NEW YORK LAW SCHOOL | Center for New York City Law

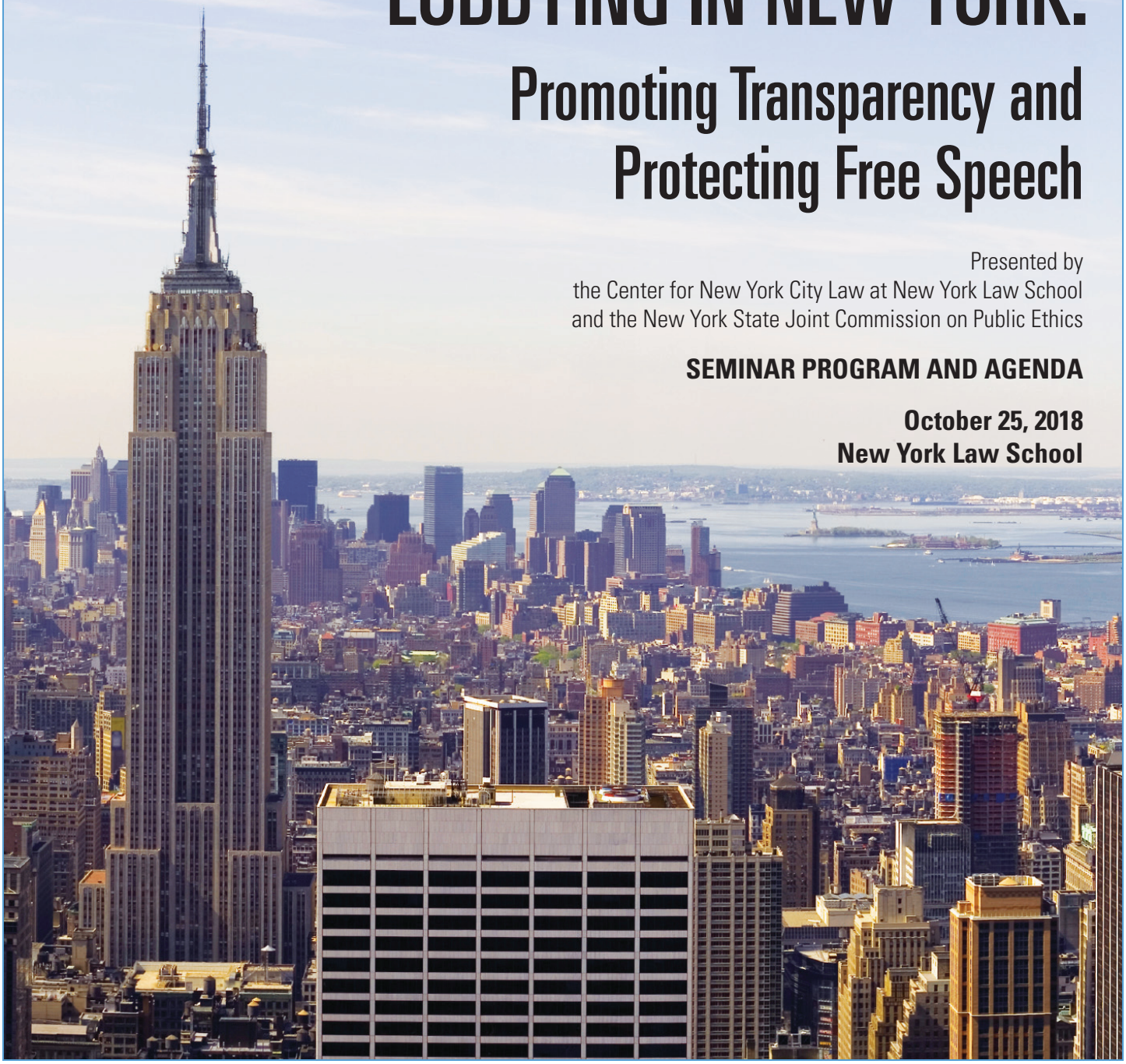
LOBBYING IN NEW YORK:

Promoting Transparency and Protecting Free Speech

Presented by
the Center for New York City Law at New York Law School
and the New York State Joint Commission on Public Ethics

SEMINAR PROGRAM AND AGENDA

October 25, 2018
New York Law School



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AGENDA

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2:00 – 2:50pm

I Plenary session (50 minutes)

Introduction by Dean Anthony W. Crowell and Professor Ross Sandler

Professor Maggie McKinley – Assistant Professor of Law, University of Pennsylvania Law School

Professor Richard Briffault – Joseph P. Chamberlain Professor of Legislation, Columbia Law School

Q&A

BREAK

2:55 – 3:45pm

II. First panel (50 minutes): The Intersection of Lobbying and the First Amendment Moderated by Seth Agata, JCOPE Executive Director

Panelists:

Jeremy Creelan, Jenner & Block

Debbie Greenberger, Emery Celli Brinckerhoff and Abady, LLP

Arthur Eisenberg, Legal Director of the New York Civil Liberties Union

Q&A

BREAK

3:55 – 4:45pm

III. Second panel (50 minutes): Key Highlights of JCOPE'S Comprehensive Lobbying Regulations and New Reporting Requirements

Panelists:

Carol Quinn, JCOPE Deputy Director of Lobbying Guidance

Q&A

PLENARY SESSION

2016

Lobbying and the Petition Clause

Maggie McKinley
University of Pennsylvania Law School

Stanford Law Review

Volume 68 May 2016

ARTICLE

Lobbying and the Petition Clause

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Abstract. Contrary to popular opinion, the Supreme Court has not yet resolved whether lobbying is constitutionally protected. Belying this fact, courts, Congress, and scholars mistakenly assume that lobbying is protected under the Petition Clause. Because scholars have shared the mistaken assumption that the Petition Clause protects the practice of "lobbying," no research to date has looked closely at the Petition Clause doctrine and the history of petitioning in relation to lobbying. In a recent opinion addressing petitioning in another context, the Supreme Court unearthed the long history behind the right to petition and argued for the importance of this history for future interpretation of the Petition Clause.

Following the Supreme Court's direction, this Article examines the implications of the history of petitioning for lobbying and, drawing from recent empirical research on lobbying, argues that the way Congress engages with the public through our current lobbying system actually violates the right to petition. At the Founding, and for much of this Nation's history, the right to petition protected a formal, transparent platform for individual—and, in particular, minority—voices to participate in the lawmaking process. Without regard to the number of signers or the political power of the petitioner, petitions received equal process and consideration. This platform allowed both the enfranchised and unenfranchised to gain access to lawmakers on equal footing. Women, African Americans, and Native Americans all engaged in petitioning activity, and Congress attended to each equally.

Moving beyond ahistorical, decontextualized interpretations of the Petition Clause, this Article posits that our current lobbying system—wherein access and procedure are

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informal, opaque, and based on political power—actually violates the right to petition, which provided access and formal procedure without respect to the political power of the petitioner. The history of petitioning teaches that affording access to the lawmaking process on the basis of an individual's political power makes as little sense as affording access to courts on such a basis.

This history suggests the need for revisiting the Petition Clause doctrine. On the one hand, it argues for a stronger petition right, especially a right to consideration and response. On the other hand, it suggests a narrowed petition right that protects only practices that correspond with the traditional practice of petitioning. Fundamentally, this Article demonstrates that a contextualized understanding of the Petition Clause, grounded in an accurate historical frame, requires comprehensive reform of our lobbying system and a formalization of the petition process in order to preserve our republican form of government.

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Introduction

Imagine that when you filed a complaint in a court, the judge first reviewed the document to count the number of signatures or to determine whether any of the signers had contributed to the judge's campaign. If the judge identified enough signatures or identified the signature of a contributor, the judge might accept your filing; otherwise, she might refuse to accept the complaint and decline to hear the case entirely. Even if she allowed the case to proceed, the judge might hold the proceedings in secret, meeting informally with parties and individuals unrelated to your action, and refuse to make public any of the filings in the action. If the judge held a close relationship with a powerful individual interested in the case, she might allow that third party to send her instructions by text message that would guide her questions and actions during trial. The judge might also afford you entirely different process than other litigants: if she thought that you were politically powerful, she might provide you comprehensive hearings and a trial. Otherwise, she might allow you a five-minute phone conference without ever reading your submissions. She might also provide you no process at all, abandoning your complaint to a wastepaper basket. There is little doubt that this scenario would offend deeply our notions of the right to due process in the context of courts because we believe that the right means equal, formal, and public process. That we accept less when we, as members of the public, engage with Congress appears more historical accident than anything grounded in reason.

Congress's engagement with the public outside of the vote inevitably presents challenging regulatory and constitutional questions. On the one hand, lawmakers have a strong need to gather information about the public to facilitate the lawmaking process, and the public is often the only source. The Constitution also protects explicitly "the right . . . to petition," or the right to engage directly with government, "for a redress of grievances."[1] On the other hand, our informal and largely unregulated lobbying system is prone to abuse, risks disruption and distortion of our lawmaking process, and has contributed to an alarming loss of public faith in Congress.[2] The minimal scholarly debate to engage with the puzzle of lobbying conflates lobbying and petitioning and

1. U.S. CONST. amend. I.

2. The low approval rating and steep decline in confidence in Congress has been well documented. *See, e.g.*, *Is Congress for Sale?*, RASMUSSEN REP. (July 9, 2015), http://www.rasmussenreports.com/public_content/archive/mood_of_america_archive/congressional_performance/is_congress_for_sale (reporting survey results that only 13% of respondents approved of Congress, with 56% responding that Congress does its job "poorly" and 59% responding that most members are willing to sell their votes); Rebecca Riffkin, *Public Faith in Congress Falls Again, Hits Historic Low*, GALLUP (June 19, 2014), http://www.gallup.com/poll/171710/public-faith-congress-falls-again-hits-historic-low.aspx (reporting survey results of only 7% of respondents having a "great deal" or "quite a lot" of confidence in Congress, down from 42% in 1973—the first year of the survey).

assumes away the question whether the First Amendment protects our current lobbying system.[3] Likely because of this assumption, few scholars have considered whether lobbying and petitioning are coextensive and, if not, how Congress ought to engage with the public in order to comport with the petition right. The literature instead focuses narrowly on whether our current lobbying system should or could be regulated[4]—or potentially even subsidized[5]—in accordance with the Constitution. Little scholarly work has been done to examine the contours of the right to petition in the context of our current lobbying system and to answer the question of how a legislature of republican design ought to engage with the public during the lawmaking process, if at all.[6] Despite presenting important questions regarding the institutional design of our legislatures, the little attention these questions have received by legal scholars and the courts has fostered only deeper confusion.

To resolve decades of confusion in a single article is a chimera. Rather, this Article aims to reshape the dialogue regarding public engagement with

3. One telling example arises from the introductory article to the *Stanford Law & Policy Review*'s special edition on lobbying. Alan B. Morrison, *Introduction: Lobbyists—Saints or Sinners?*, 19 STAN. L. & POL'Y REV. 1 (2008). Alan Morrison opens his introduction to the edition asking whether lobbyists are "saints" or "sinners." *Id.* at 1 (capitalization altered). He then quickly concludes that "the answer does not really matter . . . because, as all the authors recognize, the right to lobby is the right to petition the government for redress of grievances, which is explicitly protected by the First Amendment." *Id.* (making this statement without citation); *see also* Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying*, 13 ELECTION L.J. 160, 163 (2014); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 196 (2012); Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL'Y 149, 172 (1993). For a very recent and very rare exception, see Zephyr Teachout, *The Forgotten Law of Lobbying*, 13 ELECTION L.J. 4, 6 (2014), which notes that the scope of the lobbying right is "unclear."

4. *See, e.g.*, Hasen, *supra* note 3, at 197.

5. Heather K. Gerken & Alex Tausanovitch, *A Public Finance Model for Lobbying: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 ELECTION L.J. 75, 89-90 (2014); Heather Gerken, Keynote Address: Lobbying as the New Campaign Finance, Remarks at the Georgia State University Law Review Symposium (Nov. 12, 2010), *in* 27 GA. ST. U. L. REV. 1155, 1167-68 (2011).

6. Notably, the terms "petition" and "lobbying" are not listed in the tables of contents or indices of most First Amendment casebooks. *See, e.g.*, WILLIAM COHEN, THE FIRST AMENDMENT: CONSTITUTIONAL PROTECTION OF EXPRESSION AND CONSCIENCE (2003); JOHN H. GARVEY & FREDERICK SCHAUER, THE FIRST AMENDMENT: A READER (1992); ARTHUR D. HELLMAN ET AL., FIRST AMENDMENT LAW: FREEDOM OF EXPRESSION AND FREEDOM OF RELIGION (3d ed. 2014); RONALD J. KROTOSZYNSKI, JR. ET AL., THE FIRST AMENDMENT: CASES AND THEORY (2008); ARNOLD H. LOEWY, THE FIRST AMENDMENT: CASES AND MATERIALS (1999); STEVEN H. SHIFFRIN ET AL., THE FIRST AMENDMENT: CASES—COMMENTS—QUESTIONS (6th ed. 2015); KATHLEEN M. SULLIVAN & NOAH FELDMAN, FIRST AMENDMENT LAW (5th ed. 2013); EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS (4th ed. 2011); RUSSELL L. WEAVER ET AL., THE FIRST AMENDMENT: CASES, PROBLEMS, AND MATERIALS (2d ed. 2008).

Congress. First, this Article seeks to unsettle the presumption that the Supreme Court has resolved definitively that lobbying is protected by the First Amendment. Second, this Article aims to clarify the reach and meaning of the Petition Clause by charting the little-known history of the petition process and the history of lobbying and by addressing the Petition Clause doctrine comprehensively for the first time. Finally, the Article puts forth the heterodox argument that our current lobbying system[7] actually violates the right to petition.

Although the Supreme Court often alludes in dicta to presumed constitutional limitations on Congress's ability to regulate our current lobbying system,[8] the Court has yet to resolve the issue. The two cases generally cited for the principle that lobbying is protected under the Petition Clause[9] fail to support that claim. In the most often cited case, *United States v. Harriss*, the Court actually declined explicitly to reach the issue whether the statute's penalty of a three-year lobbying ban violated the Petition Clause.[10] The Court's first in-depth discussion of lobbying and the Petition Clause, *Noerr* of the *Noerr-Pennington* doctrine, interpreted lobbying activity as an exception

7. A definitional clarification is in order. Much of our discourse around "lobbying" fails to distinguish between the private conduct of the individuals we call "lobbyists" and the state action of Congress in providing access to the lawmaking process to those individual lobbyists and others in order to "lobby." It is the latter that is the focus of this Article. Lobbyists, as individuals, can engage in a range of activities, including running for office, contributing to electoral campaigns, and publishing op-eds, but these individuals become lobbyists only by "lobbying," or by engaging directly with government, usually Congress. Engaging directly with Congress implicates more than simply private conduct; it necessarily implies some form of reception or, at the very least, acquiescence or acknowledgement from the other side. For example, a lobbyist cannot engage in paradigmatic lobbying behavior—that is, a meeting with a member of Congress—without the member affording the lobbyist access and process. This Article takes the approach that this system of direct engagement with Congress—because it implicates state action and raises distinct constitutional and regulatory concerns—should be treated separately and refers to this system separately as our "lobbying system."

8. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 369 (2010) ("And the Court has upheld registration and disclosure requirements on lobbyists, *even though Congress has no power to ban lobbying itself*." (emphasis added)). In *United States v. Harriss*, the Court upheld disclosure requirements under an earlier version of the compelled-speech doctrine but declined explicitly to reach the question whether the statute's three-year lobbying ban penalty violated the Petition Clause. 347 U.S. 612, 625-27 (1954).

9. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961); *Harriss*, 347 U.S. at 626-27.

10. *Harriss*, 347 U.S. at 627. The Court also mentioned the Petition Clause in its survey application of the First Amendment to a mandatory disclosure requirement, but its analysis of the requirement resembled more closely its doctrine on compelled speech—the doctrine the Court applies today in the context of disclosure regimes. *See, e.g.*, Doe v. Reed, 561 U.S. 186, 194-95 (2010) (analyzing under the compelled-speech doctrine a state statute compelling public disclosure of the names and addresses of petition signers).

to the Sherman Act in order to shield it from allegations of anticompetitive conduct, citing Petition Clause concerns in part.[11] As later cases have highlighted, however, it is unclear whether the Court rested the *Noerr-Pennington* lobbying exception on the Petition Clause or on simple statutory interpretation and the legislative history of the Act.[12] The majority of case law interpreting the Petition Clause focuses not on lobbying or even legislative petitioning but on access to courts and formal agency proceedings.[13] Belying the nearly ubiquitous consensus that any and all forms of lobbying activity are coextensive to petitioning and, therefore, are protected under the Petition Clause, the constitutional protections for our current lobbying system remain a very open question.

Looking to the historical record to clarify the reach and meaning of the Petition Clause reveals that our lobbying system and the system protected by the petition right are wholly distinct. At the Founding, and for much of this Nation's history, the right protected a form of access to Congress that more closely resembled the formal process afforded in courts than the informal tool of mass politics that lobbying and petitioning have become today.[14] Individuals submitted over six hundred petitions to the first Congress—each a formal document that included a statement of grievance and a signatory list—which members of Congress read aloud on the floor, referred to a committee or another branch for consideration, and afforded a formal response.[15] Women, African Americans, and Native Americans had all engaged with colonial and

11. *Noerr*, 365 U.S. at 137-38.

12. Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2502-03 (2011) (Scalia, J., concurring in part and dissenting in part).

13. *See infra* Part II.B.

14. The most well-known contemporary example is the Obama Administration's "We the People" website that allows the public to "petition" the executive. WE THE PEOPLE, https://petitions.whitehouse.gov (last visited May 5, 2016). The Obama Administration describes the "We the People" petition website as a supplement to, not a displacement of, the "current official methods of communication" with the executive. *Terms of Participation*, WE THE PEOPLE, https://petitions.whitehouse.gov/how-why/terms-participation (last visited May 5, 2016). As of January 2013, the Obama Administration promises that petitions are made available to the public in a searchable database if the petition garners 150 signatures in thirty days and promises an official response to petitions that garner more than 100,000 signatures in thirty days. *Id.* The website initially required only 5000 signatures in thirty days, but increasing use of the website motivated the Obama Administration to increase the threshold for response to 25,000 signatures and then 100,000. Macon Phillips, *Why We're Raising the Signature Threshold for We the People*, WHITE HOUSE (Jan. 15, 2013, 6:00 PM ET), https://www.whitehouse.gov/blog/2013/01/15/why-we-re-raising-signature-threshold-we-people. An examination of the historical petition right could call into question the constitutionality of this novel model of petitioning the executive. *See infra* Part III.A.

15. *See infra* Part I.A.

state governments through the petition process as a matter of course,[16] and these unenfranchised and politically powerless communities transitioned smoothly to petitioning Congress after the Founding.[17] Members did not afford more process or consideration to petitions with more signatures and did not require a minimum level of electoral power, or signature count, in order to provide formal process to a petition.[18] Much like a complaint filed with a court, Congress treated each petition on equal footing—no matter the petition's source and without regard to the political power of the petitioner[19]—and consideration was a public, transparent process.[20]

By contrast, the lobbying market functioned (and still functions) as the antithesis of the formal petition process. Historically, the lobbying market auctioned informal access to lawmakers—access acquired through bribes, personal connections, threats, and electoral pressure.[21] Lobbyists cultivated relationships with members of Congress in order to offer their clients more access and more comprehensive process than those individuals who engaged in the formal petition process.[22] Professional lobbyists might themselves engage in petitioning, and petitioners might, on occasion, employ lobbyists to represent them in the formal petition process.[23] The lobbying industry, however, was largely distinct from the formal petition process and inspired incredible public resentment at the fact that lobbyists circumvented and undermined the legitimate system of public engagement—namely, petitioning.[24] State governments criminalized lobbying, and courts were quick to void contracts for lobbying services as violative of public policy because they saw the sale of one's own personal, informal access as a corruption of petitioning.[25] In most cases, the courts were clear that engaging in the formal petition process or hiring a representative to engage in the formal petition

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See, e.g.*, Jeffrey L. Pasley, *Private Access and Public Power: Gentility and Lobbying in the Early Congress*, *in* THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT 57, 57-99 (Kenneth R. Bowling & Donald R. Kennon eds., 2002) [hereinafter HOUSE AND SENATE] (surveying petitions submitted to Congress during the 1790s and noting the advantages gentility afforded to individuals seeking to influence the early Congress).

22. *Id.* at 58-62.

23. *Id.* at 60-65.

24. *Id.* at 60-61.

25. Teachout, *supra* note 3, at 7.

process on your behalf would not raise the same concerns;[26] such contracts might even obtain constitutional protection.[27] It was only in contracting for "lobbying" services—specifically, the sale of a lobbyist's ability to circumvent the formal petition process—that public policy was offended.[28]

The historical process of petitioning bears little resemblance to the way that Congress engages with the public today. Today, Congress affords individuals access to lawmakers and the lawmaking process only on an informal basis and provides preferential access, consideration, and procedure to the politically powerful.[29] Gone is the public process whereby petitions were read into the congressional record, and in its place is a process closed to public scrutiny,[30] with little to no public record outside of the compelled self-disclosure reports mandated by the Lobbying Disclosure Act.[31] In essence, our legitimate petitioning right has been supplanted by the illegitimate lobbying system that was seen as undermining the right to petition. We have increasingly taken this substitution for granted.[32] But the history of

26. *See, e.g.*, Trist v. Child, 88 U.S. (21 Wall.) 441, 449-50 (1874) (voiding a lobbying contingency fee contract as against public policy and distinguishing the lobbying contract from a contract for "purely professional services" such as "drafting [a] petition . . . attending to the taking of testimony, collecting facts, [and] preparing arguments . . . to a committee or other proper authority").

27. *See, e.g.*, Marshall v. Balt. & Ohio R.R. Co., 57 U.S. (16 How.) 314, 334-36 (1853) (holding contracts "to use personal or any secret or sinister influence on legislators" or contingency fee contracts as void against public policy but noting that all affected have an "undoubted right" to urge their claims before legislative committees so long as it is done honestly, openly, and candidly).

28. *Trist*, 88 U.S. (21 Wall.) at 448-50.

29. *See infra* Part IV.A.

30. *Id.*

31. 2 U.S.C. § 1604 (2014). The disclosure regime of the Lobbying Disclosure Act has also been widely criticized as ineffective and out of date. *See, e.g.*, TASK FORCE ON FED. LOBBYING LAWS, AM. BAR ASS'N, LOBBYING LAW IN THE SPOTLIGHT: CHALLENGES AND PROPOSED IMPROVEMENTS, at vii (2011).

32. A recent example occurred in a challenge to the Obama Administration's policy of banning lobbyists from serving on certain advisory commissions. *See* Autor v. Pritzker, 740 F.3d 176, 177-78 (D.C. Cir. 2014). The administration had campaigned on an antilobbyist platform and, after taking office, implemented a number of restrictions on lobbyist engagement with the executive, including the advisory commission ban. Bob Bauer, Assessing Lobbying Reform in the Obama Administration, Presentation to the American University Conference on Lobbying Reform in the U.S. and the E.U. (Mar. 17, 2014), https://www.american.edu/spa/ccps/upload/Bauer-remarks.pdf. A cohort of lobbyists challenged the ban as an unconstitutional condition on their petition rights. *Autor*, 740 F.3d at 177-78. During the litigation, the Obama Administration *conceded* that lobbying was protected by the Petition Clause, despite the fact that the Supreme Court has yet to wholly resolve the issue. *Id.* at 182 ("[T]he government acknowledges, as it must, that registered lobbyists are protected by the First Amendment right to petition."); *see also infra* Part III.B. The administration subsequently declined to appeal the adverse ruling and instead withdrew the ban.

petitioning teaches that our procedural rights to engage with legislatures and our procedural due process rights in courts should not be so distinct.

What little effort Congress has undertaken to regulate lobbying and the little doctrine that has developed around the Petition Clause have yet to recognize this history. Instead our regulatory frameworks and doctrine simply assume that lobbying and petitioning are coextensive and reflect the struggle to define the petition right against a background of changed circumstances. In the absence of any context to provide meaning to the Petition Clause, in 1985 the Court eventually conflated the right to petition with the Free Speech Clause in *McDonald v. Smith*.[33] However, the Supreme Court has recently indicated that it could be receptive to the history of petitioning when reinvigorating the Petition Clause. Following *McDonald*, scholars rushed to unearth the history of petitioning in order to criticize the Court's conflation of the Petition and Free Speech Clauses and to argue for a distinctive Petition Clause doctrine grounded in that history.[34] In 2011, the Supreme Court, citing the long-established importance of history in interpreting the First Amendment,[35] relied on this newly unearthed history in the context of judicial and executive "petitioning" to establish a Petition Clause doctrine distinct from free speech.[36]

Part I follows the Court's lead in *Guarnieri* and provides a thick description[37] of the Petition Clause in order to clarify our Petition Clause

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33. 472 U.S. 479, 480 (1985).

34. *See, e.g.*, Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998) (excavating the history of petitioning and arguing for a distinctive Petition Clause doctrine); Eric Schnapper, *"Libelous" Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303 (1989) (same); Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153 (1986) (same); 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) (same); Stephen A. Higginson, Note, *A Short History of the Right to Petition the Government for Redress of Grievances*, 96 YALE L.J. 142 (1986) (same). The burgeoning discourse of historical scholarship around the Petition Clause even fostered dissent. *See, e.g.*, Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 740-41 (1999).

35. Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2498 (2011) ("Some effort must be made to identify the historic and fundamental principles that led to the enumeration of the right to petition in the First Amendment, among other rights fundamental to liberty.").

36. *Id.* at 2495 ("Courts should not presume there is always an essential equivalence in the two Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause claims. Interpretation of the Petition Clause must be guided by the objectives and aspirations that underlie the right. A petition conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns." (citations omitted)).

37. Modeling the Supreme Court's method of interpretation in *Guarnieri*, this Article draws upon historical sources as a means to contextualize or provide a "thick

doctrine with respect to legislative petitioning. In particular, Part I aims to contextualize the Petition Clause within the history of the text's drafting, the history of petitioning, and the history of the distinct practice of lobbying.[38]

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description" in order to understand the meaning ascribed to these terms. This method relies heavily on the work of semiotician and anthropologist Clifford Geertz, who advocated a "thick description" or contextualization of a focus of inquiry in order to understand its meaning. Clifford Geertz, *Thick Description: Toward an Interpretative Theory of Culture*, *in* THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 3, 14 (1973). Legal historian Saul Cornell has commented that an historical application of Gricean pragmatics would resemble a Geertzian thick description and has remarked upon Geertz's recent contribution to historical methodology. Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 302 n.25 (2011).

38. We have, in our constitutional culture, become tribal. To point to text and history, at least for some, is to join ranks with the tribe of originalists and the ideology that imbues that tribe. Although I am quite supportive of tribalism in other contexts, I find this simplification of methodology problematic. Clearing the theoretical thicket around the differences between the use of text and history and the methodology called "originalism" is beyond the scope of this Article. I reserve this question for later work, where I might clear the thicket more precisely. But a point of clarification is in order here to avoid any distraction prompted by this methodological tribalism.

    Praising fidelity to constitutional text within historical context is an acceptable means of constitutional interpretation within a range of methodologies, including Dworkin's moral reading. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1251-52 (1997). In reaching a "moral reading," Dworkin claims that we must first look to constitutional text to resolve the "best sense of the Framers speaking as they did in the context in which they spoke." *Id.* at 1253. In particular, we must look to the meaning of the text at the time of the Framing in order to resolve whether the text involves a set meaning or an abstract principle. *Id.* It is only the latter that involves a moral reading. *Id.* (contrasting the abstract terms of "cruel" within the Eighth Amendment and "equal" within the Fourteenth Amendment against the constitutional requirement that the President meet or exceed the age of thirty-five). Constitutional text with a fixed meaning, according to Dworkin, is subject to a form of textualism even when applying the moral reading methodology. *Id.* at 1251-52. In describing his form of textualism, a method that he claimed to share with Justice Scalia and Laurence Tribe, Dworkin provides an example apropos of the Petition Clause. *Id.* at 1256-62.

    In describing his moral reading methodology, Dworkin points to history to resolve ambiguities in meaning for these nonabstract constitutional terms and, to illustrate, he describes a passage from Shakespeare's *Hamlet* where Hamlet "said to his sometime friends, 'I know a hawk from a handsaw.'" *Id.* at 1251 (quoting WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2). But the question arises "whether Hamlet was using the word 'hawk' that designates a kind of a bird, or the different word that designates a Renaissance tool." *Id.* at 1251. To resolve this question, "[w]e must begin, in my view, by asking what—on the best evidence available—the authors of the text in question intended to say" and "[i]f we apply that standard to Hamlet, it's plain that we must read his claim as referring not to a bird, which would make the claim an extremely silly one, but to a renaissance tool." *Id.* at 1252. So it would appear that, in calling for textual fidelity to the term "petition" in the Petition Clause, I would likely have the spirits of both Dworkin *and* Scalia on my side.

This Part focuses on the little-known history of petitioning, a formal practice that once constituted a vital mechanism of the legislative process.

In Part II, I present the regulatory and doctrinal muddle around lobbying and the Petition Clause doctrine as a prime case study in the problems that arise from textualist interpretive methods that fail to take account of context[39]—in this case, an early and highly criticized version of textualism developed by Hugo Black that interpreted the Petition Clause without reference to the history that would have provided a clarified and stable meaning to the text.[40] In particular, Part II advances the argument that interpreting constitutional text, in the absence of a contextualized understanding of petitioning and lobbying, resulted in an overbroad and inconsistent application of the Clause.

Part III relies on the thick description of petitioning to argue for a partial revisitation of the Petition Clause doctrine. Part III first argues that the Court should narrow the right to petition and disambiguate "petitioning" from "lobbying." Specifically, it posits that the petition right protects only direct engagement with government and that the right would not protect other forms of "lobbying," including informal engagement with government or public-directed advocacy. Part III then argues that the Court should strengthen the right to petition to guarantee equal and open access to the legislature through a formal, public process and to guarantee consideration and response. Lastly, Part III provides two examples of implications for the Petition Clause doctrine.

Part IV describes findings from recent political science studies that show that our current lobbying system does not afford equal, formal access to lawmakers. Rather, the data show that Congress affords access to the lawmaking process both on an informal basis and sorted by the political power

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39. Although statutory and constitutional interpretation scholarship has taken a definitive pragmatic or contextualized turn in the last few decades, what constitutes "context" is an underdeveloped question in legal scholarship. *See* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 1-13 (Andrei Marmor & Scott Soames eds., 2011); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951-55 (1995); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392-93 (2003); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 165; Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1614-16 (2014); Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1124-39 (2015). In an effort to begin to remedy this theoretical hole in interpretive scholarship, this Article draws from the fields of neo-Gricean sociolinguistics and linguistic anthropology which have, with the support of empirical study, systematically begun to model context in everyday language use. *See, e.g.*, STEPHEN LEVINSON, PRAGMATICS 22-23 (1983); Allessandro Duranti & Charles Goodwin, *Rethinking Context: An Introduction*, *in* RETHINKING CONTEXT: LANGUAGE AS AN INTERACTIVE PHENOMENON 1, 1-32 (Allessandro Duranti & Charles Goodwin eds., 1992); Elinor Ochs, *Introduction: What Child Language Can Contribute to Pragmatics*, *in* DEVELOPMENTAL PRAGMATICS 1, 1-17 (Elinor Ochs & Bambi B. Schieffelin eds., 1979).

40. *See infra* Part II.B.

of the petitioner. Based on these findings, Part IV explores the implications of a contextualized right to petition for our current lobbying system, concluding that our current lobbying system actually violates the right to petition. In particular, this Part argues that a contextualized understanding of petitioning, and the republican values it preserved, could move the debate around lobbying reform away from a fixation on registration and disclosure regimes that simply force transparency within the current taken-for-granted system and toward an affirmative vision of how Congress ought to engage with the public during the lawmaking process.

I. Contextualizing the Petition Clause

A. Contextualizing Petitioning

In a strange sense, the year 2015 marked the eight hundredth anniversary of the American right to petition.[41] Magna Charta,[42] a document signed under duress by a reviled English king, might seem at first blush an odd document on which to build our history of American petitioning.[43] But, for the colonists, the document formed a fundamental illustration of the rights and liberties they felt were foundational in their struggle against the British Crown.[44] Benjamin Franklin noted the anniversary of Magna Charta for readers of his *Poor Richard's Almanack* in 1749, to mark the day in remembrance of the document.[45] During the Revolutionary era, Magna Charta took on new life as a model for the demands of independence as it had, by Thomas Paine's estimation, demanded liberties for all men and had been "formed, not in the senate, but in the field; and insisted on by the people, not granted by the crown."[46] His revolutionary advocacy in *Common Sense* urged the colonists to draft a document of independent government that would "answer[] to what is called the Magna Charta of England."[47]

The colonists, an unenfranchised and politically powerless minority, justified the Revolution with and rooted an independent American sovereignty in the failure of the British Crown to comply with its procedural obligations within the petition process and to respond to the colonists'

41. WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 466-67 (1914).

42. As is customary among early Americanist historians, I adopt the eighteenth- and nineteenth-century spelling of the document common at the Founding.

43. MCKECHNIE, *supra* note 41, at 466-67.

44. *See id.*

45. BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK (1749).

46. THOMAS PAINE, *The Forester's Letter III* (1776), *reprinted in* THOMAS PAINE: COLLECTED WRITINGS 74, 81 (1955).

47. THOMAS PAINE, COMMON SENSE 31-32 (1776).

petitions.[48] The Revolutionary era's Continental Congress petitioned[49] King George III twice in an effort to avoid full independence from Britain and the war that would necessarily precede it.[50] The first petition was "huddled" into Parliament "amongst a bundle of American papers, and there neglected."[51] Despite the failure of the first attempt, the Continental Congress adopted the second petition, termed the "Olive Branch Petition," on July 8, 1775 and enlisted Richard Penn, former governor of Pennsylvania, to deliver it to the King.[52] But the King refused to receive the colonists' olive branch, and they were told that because he would not formally receive the petition at his throne, he would provide no response.[53] Following its list of grievances, the Declaration of Independence[54] grounded the right to sovereignty and ultimately to war in the failure of the King to respond:

> In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.[55]

Hardly mentioned at all during the Constitutional Convention, the document constituted an icon of American Revolutionary independence and an historical and moral authority in support of American protest.

Paine was correct that the original document was an act of political protest. In May of 1215, around forty English barons overtook London in an act of rebellion against King John.[56] The following month, the King sued for

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48. PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 133 (1997).

49. According to Pauline Maier, under English law, a petition was a form of "address" that asked something of the King. Petitions of right

> had a particularly important place in English practice. They gave subjects a way of seeking redress of wrongs done under the authority of the King, whom they could not sue in the regular courts. Petitions of right asked for the recognition of undoubted rights, not mercy, and were directed at the King as the font of justice.

Id. at 94.

50. *Id.* at 55.

51. *Id.* (quoting THE DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS para. 6 (U.S. 1775)).

52. *Id.* at 57.

53. *Id.* at 58.

54. Declarations, according to Maier, occupied a different function under English law than petitions. "A declaration was a particularly emphatic pronouncement or proclamation that was often explanatory: from the fourteenth century 'declaration' implied 'making clear' or 'telling.' . . . But the word 'declaration' also referred to a legal instrument, a written statement of claims served on the defendant at the commencement of a civil action." *Id.* at 94.

55. THE DECLARATION OF INDEPENDENCE para. 4 (U.S. 1776).

56. MCKECHNIE, *supra* note 41, at 35.

peace and agreed to give audience to the barons and their demands and to provide a formal response.[57] The document of demands presented by the barons and grudgingly signed by the King later became known as the Magna Charta, Latin for "the Great Charter."[58] But Paine's description of the document as securing broad rights was historical fiction. In grudgingly fixing his seal to the charter, the King granted his barons—hardly the common man envisioned by Paine—future audience before the Crown to present petitions.[59] Petitioners would present petitions, along with a statement of grievances, and would often offer to finance the government in exchange for granting the petition.[60] Not surprisingly, as the financial needs of the Crown increased, so did the volume of petitions afforded an audience before the King.[61] Some have speculated that exponential increase in petitioning led eventually to the institutionalization of Parliament, a term used during the period to denote a discussion and, especially, a formal discussion between the King and those given audience in his court.[62]

In Parliament, petitioning often drove the legislative agenda, which included petitions for public and private matters without any mechanism to distinguish them.[63] Gregory Mark has argued that it was because of the quasi-judicial nature of petitions and the quasi-judicial role of Parliament that Parliament developed an obligation to consider all petitions equally and the public fostered a growing sense of the right to formal consideration of and a response to their petitions.[64] The petitions also allowed Parliament to expand its power vis-à-vis the King.[65] The King was dependent on Parliament and, as the barons had earlier done, Parliament conditioned the granting of money on the King first redressing the petitions submitted to him from Parliament.[66] Petitioning became an intrinsic part of English political life by the seventeenth century, the words "petition" and "bill" were used interchangeably in legislatures, and the petition process was regarded as part of the constitutional framework.[67] Notably, petitioning also served as the primary means of political engagement for the unenfranchised and for collective political

57. *Id.* at 38.

58. *Id.*

59. *See* Mark, *supra* note 34, at 2165-66.

60. Spanbauer, *supra* note 34, at 22-23.

61. *Id.* at 23.

62. *Id.*

63. *See* Mark, *supra* note 34, at 2166.

64. *Id.* at 2166-67.

65. *Id.* at 2167.

66. *Id.*

67. K. Smellie, *Right of Petition*, *in* 11 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 98, 98 (Edwin R.A. Seligman ed., 1933).

activity, as petitioners formed associations and petitioned on behalf of the collectivity.[68]

English colonists of North America brought with them the English practice of petitioning and began to expand and extend the practice to fit within their new political context.[69] Colonial charters reaffirmed the colonists' right to petition in over fifty provisions, and many colonial assemblies reaffirmed the right.[70] When the Massachusetts General Court established the Body of Liberties in 1641, the first legal code developed by English settlers, it codified the right to petition and articulated its contours in very inclusive terms:

> Every man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councell, or Towne meeting, and either by speech or writing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner.[71]

Colonists exercising these broad petition rights petitioned on a broad range of matters, spanning from matters of general applicability in the "public interest" to very individual grievances, including many disputes that did not fit in neatly to an existing judicial cause of action.[72] The petition process also began to manifest some of the dynamics of modern day interest group politics.[73] Petitions often addressed the economic needs of different associations, and colonial governments used the petition process, including the review of counterpetitions from competing groups, to negotiate between competing economic interests within their developing economies.[74]

In addition to associational activity, the petition process also catered to the needs of individuals and political minorities.[75] Like the Massachusetts Body of Liberties, many colonial governments either explicitly or implicitly opened the petition process to the unenfranchised and disenfranchised, and these

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68. *See, e.g.*, Mark, *supra* note 34, at 2169-70.

69. *See* JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788, at 25 (1986).

70. *See* Mark, *supra* note 34, at 2175 n.90.

71. *A Coppie of the Liberties of the Massachusetts Collonie in New England*, *in* 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS: THE ANGLO-AMERICAN TRADITION 122, 124 (Zechariah Chafee, Jr. ed., 1963).

72. *See* Higginson, *supra* note 34, at 145.

73. *See id.* at 150-51.

74. *Id.*

75. *See, e.g.*, RAYMOND C. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 44 (1979).

groups took full advantage of the process.[76] Prisoners petitioned in quasi-habeas terms to alter judgments, but they also petitioned to alter sentences and for broader criminal justice reform.[77] Women petitioned to redress private grievances and joined men in petitioning on matters of broader public concern.[78] While less common, colonial governments also saw petitions from slaves and free African Americans.

In one poignant example, the Virginia legislature heard, considered, and granted a petition by "[a] group of mulattoes and free blacks" to exempt their wives and daughters from a tax imposed on black women and not white women.[79] In 1769, the Colony of Virginia collected a "head tax," or a flat tax, from all residents.[80] The tax applied to all men, both white and black.[81] But the tax applied only to black women, meaning that white women did not have to pay the tax.[82] A group of mixed-race and free blacks took issue with the tax on black women and decided to exercise their right to petition.[83] As surprising as it may sound to our modern ears, the Virginia Assembly treated the petition as it did all others.[84] The document became part of the formal record of the legislature.[85] Following formal consideration and review, "both houses of the assembly and the governor agreed that the request was reasonable" and they passed a law exempting black women from the tax.[86] Native Americans petitioned also, often including explicit reference to their tribal identity, most commonly to redress concerns over tribal land claims.[87]

That the Articles of Confederation mentioned petitioning only in the context of the rights of states should come as little surprise given the limited jurisdiction and structure of the federal government under the Articles.[88] The newly formed state constitutions, however, were quick to include the right.[89] Pennsylvania, with its long history of participatory politics, and Vermont

76. Smith, *supra* note 34, at 1170-72.

77. Mark, *supra* note 34, at 2181-82.

78. BAILEY, *supra* note 75, at 44.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 45.

85. *Id.* at 44.

86. *Id.*

87. *See, e.g.*, Daniel Carpenter, Indigenous Representation by Petition: Transformations in Iroquois Complaint and Request, 1680-1760, at 14-15 (Feb. 2015) (unpublished manuscript) (on file with author).

88. ARTICLES OF CONFEDERATION OF 1781, art. IX, paras. 2-3.

89. Mark, *supra* note 34, at 2199-2203.

bestowed a broad right to petition on all "people" within the state.[90] As they did in Parliament, petitions drove the legislative agenda of the colonial and state governments.[91] Volunteer farmers and other part-time support staffed these nascent governing bodies, and the petitions offered a steady stream of welcome information.[92] Given the ubiquity of the practice in eighteenth-century America, it was taken for granted that the U.S. Constitution would include the right to petition in its later-added Bill of Rights.

B. Contextualizing the Text

Unlike other rights delineated by the Bill of Rights, the Petition Clause generated very little debate during drafting and ratification. Some have ascribed this omission to the petition process's being so ubiquitous and so mundane in the colonies by the time of the Founding that capturing the right required little discussion—most state constitutions had included the right as a matter of course, and the petition process and the purpose that it served were largely taken for granted. The most substantive discussion of the right to petition came in response to an effort to amend what would become the First Amendment to include a more restrictive right—the right to instruct representatives. It was through the rejection of this more restrictive right that the Framers left us with a record of their interpretation of the right to petition.

The process of "instructing" representatives was what many at the Founding, but especially the Federalists, viewed as an anachronistic mechanism afforded the state governments in the Confederation Congress. Unlike petitions, instructions emanated from majorities and official institutions only. In the Confederation Congress, instruction allowed state governments, constituted by a majority, to bind a lawmaker to a particular course of action.[93] If a lawmaker failed to abide by the instructions that directed him, he risked recall back to his state and loss of salary.[94] The mechanism of instruction in the Confederation Congress was itself a carryover from the colonial governments and had been used increasingly in the colonies as the primary means of political

90. *Id.* at 2201-02.

91. *See* Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1463 (1998); Alison G. Olson, *Eighteenth-Century Legislatures and Their Constituents*, 79 J. AM. HIST. 543, 556-57 (1992); Alan Tully, *Constituent-Representative Relationships in Early America: The Case of Pre-Revolutionary Pennsylvania*, 11 CAN. J. HIST. 139, 143-45 (1976).

92. Higginson, *supra* note 34, at 153.

93. *See* John P. Kaminski, *From Impotence to Omnipotence: The Debate over Structuring Congress Under the New Federal Constitution of 1787*, *in* HOUSE AND SENATE, *supra* note 21, at 1, 25-26.

94. *Id.*

engagement.[95] Instructions embodied a rejection of the British conception of "virtual representation"—the notion that each member of Parliament represented the whole people and not the particular locality that elected him.[96]

It was via virtual representation, Britain argued, that the colonies were represented in the House of Commons despite not possessing the franchise.[97] The colonies rejected virtual representation for what they termed "actual representation" by colonial governments and moved from petitioning to instructing their assemblies to declare independence from Britain.[98] As Gordon Wood described it,

> [T]he petitioning and the instructing of representatives were rapidly becoming symbols of two quite different attitudes toward representation . . . . Petitioning implied that the representative was a superior so completely possessed of the full authority of all the people that he must be solicited, never commanded, by his particular electors . . . . Instructing, on the other hand, implied that the delegate represented no one but the people who elected him and that he was simply a mistrusted agent of his electors, bound to follow their directions.[99]

Modern legislation scholarship refers to these two models of representation by the roughly analogous contemporary theories of trustee and agency, respectively.[100]

Despite early enthusiasm for actual representation around the time of the Revolution, support of instructing as the ideal means of engaging with government outside of the vote would soon wane.[101] Relying heavily on instructions had its costs, and governance in the colonies grew more decentralized and more fractured.[102] Localities leaned heavily on instructions in binding general governments to the needs of their constituencies and, given the inevitable blurring between local and general issues, instructions contributed to converting the public into an "infinite number of jarring, disunited factions."[103] As Wood observed, the era preceding the Founding saw a similar decline in the version of republicanism reliant on virtue and on

95. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 189-90 (1969).

96. *Id.*

97. *Id.* at 176.

98. *Id.* at 189.

99. *Id.*

100. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 123-24 (1995).

101. WOOD, *supra* note 95, at 195-96; *see also id.* at 606-15 (describing the transition in American's conception of politics from an expectation of virtuous homogeneity to an acknowledgement of diverse pluralism).

102. *Id.* at 192-93.

103. *Id.* at 192.

transcendence of self-interest in the domain of lawmaking.[104] With the factions wrought by actual representation, instructions, and other structures of direct democracy, the Founding generation witnessed first-hand the realities of human nature on which they had to construct the American republic.

Madison framed this paradigm shift from American homogeneity and virtuous republican exceptionalism to the realities of pluralist politics in poetic terms in *The Federalist No. 10*: "Liberty is to faction, what air is to fire, an aliment without which it instantly expires."[105] Rather than force human nature into the Aristotelian virtue ethics required by antiquated republican forms of government, the constitutional experiment of 1787 would recognize the intrinsic nature of factions and the expansive range of the public good in order to design around these democratic "defects."[106] As Madison theorized in *The Federalist No. 10*, America could not plausibly vanquish liberty, nor could it enforce or expect a homogeneous vision of the good, and it was under these conditions that factions flourish.[107] The aim of government was not to control the causes of faction; in Madison's view, the aim of government was instead to control the effects of faction and to construct mechanisms to prevent competing visions of the good from debilitating the newly formed national government. The Framing generation would realize this goal through what Madison termed the "republican principle," or the scheme of representative government.[108] Through representative democracy, rather than a "pure" or direct democracy, government would control faction by passing public views "through the medium of a chosen body of citizens."[109] By passing the public will through the filter of republican government, in Madison's vision, "it may well happen that the public voice pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves."[110] So it was that the Framing generation reflected on the failures of actual representation and, in rejecting the latter, embraced a new form of republicanism that rejected instructions.

The debate over whether representation in the new Congress should subscribe to the theory of representation aligned with instructions or one aligned with petitioning surfaced in the House of Representatives debates around drafting what would become the First Amendment. On Saturday, August 15, 1789, following debate over other proposed amendments, the House considered the text of the nascent Petition Clause: "The freedom of speech and

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104. *See id.* at 195.

105. THE FEDERALIST NO. 10, at 44 (James Madison) (Clinton Rossiter ed., 1961).

106. *See id.* at 44-46.

107. *Id.* at 44-45.

108. *Id.* at 45, 47-48.

109. *Id.* at 46-47.

110. *Id.* at 47.

of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed."[111] Theodore Sedgwick of Massachusetts spoke first and, finding the right to assemble—the necessary predicate to speaking in an era of low-tech communications—redundant to the right of speech, moved to strike the phrase "assemble and."[112] If the Constitution was to include such an obvious and duplicative right, Sedgwick declared, it must also declare "that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper."[113]

Striking out "assemble and" concerned Thomas Tudor Tucker of South Carolina because the phrase had been recommended by the states of Virginia and North Carolina.[114] The recommendations of these particular southern states, Tucker lamented, had been largely neglected. He noted that the proposed amendment omitted Virginia and North Carolina's most "material" proposal: the right to instruct their representatives.[115] In light of the fact that Virginia and North Carolina might soon lose ground on the right to assemble, Tucker stated his intention to move to include the right of instruction following resolution of the motion to strike the right to assemble.[116]

As the text of the Constitution reveals, the right to assemble survived the motion. The House then refocused its institutional attention on Tucker's amendment, which would prove far more contentious than omission of the mere "surplusage" that was the right to assemble. At the very moment Tucker moved to insert the words "to instruct their Representatives," Thomas Hartley of Pennsylvania exclaimed aloud that he "wished the motion had not been made."[117] Hartley's concern was that the proposal had reinvigorated the longstanding debate over actual and virtual representation embodied in the distinct recognition of petitioning rather than instructions.[118] Representation in Congress, according to Hartley, required that the people have trust in their representatives to govern independently. The principle of representation was "distinct from an agency, which may require written instructions."[119]

A majority of the House shared Hartley's concerns with instructions as a "dangerous doctrine, subversive of the great end for which the United States have confederated," which could prove "utterly destructive of all ideas of an

111. 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1089 (Bernard Schwartz ed., 1971).

112. *Id.* at 1089-90.

113. *Id.* at 1090.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1091.

118. *Id.* at 1091-92.

119. *Id.* at 1092.

independent and deliberative body."[120] By allowing the right to instruct, "the Government would be altered from a representative one to a democracy, wherein all laws are made immediately by the voice of the people."[121] Such a right might leave the legislature open to capture by the "passions" of people, echoing Madison's term for faction.[122] The new legislature was expected to do more than simply reflect the public will. The Constitution would instead include a variety of checks on representation elsewhere—bicameralism for example—that would foster structured deliberation and an ordered lawmaking process in Congress.[123] In order to prevent disruption of these mechanisms, the "right of the people to consult for the common good can go no further than to petition the Legislature, or apply for a redress of grievances."[124]

Elbridge Gerry of Massachusetts espoused the minority view that the right to instruct was a necessary additional check on the inevitable maladministration of government.[125] Gerry interjected that instruction would no more foster faction in the House than would deliberation.[126] Moreover, the right to instruct was a fundamental component of sovereignty, according to Gerry, and to fail to recognize the right to instruct would cause the people to relinquish the sovereignty vested in them elsewhere in the Constitution.[127] But Gerry couched his support for instructions on the theory that the instructions would serve to advise only and would not bind representatives to the will of constituent majorities.[128] He also balked at the criticism of the majority that instructions would serve to convert the new national government into a democracy.[129] Holding himself as among the Anti-Federalists, Gerry wholly expected the new government to be a democracy, just not a direct democracy.[130] John Page of Virginia shared this view as well, seeing representative democracy as a necessary evil to resolve problems of scale and geography—were it possible for all to cast a vote, in Page's view the government must allow it.[131]

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120. *Id.* at 1093, 1105.

121. *Id.* at 1097.

122. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison), *supra* note 105, at 43-44.

123. 2 THE BILL OF RIGHTS, *supra* note 111, at 1094.

124. *Id.*

125. *Id.* at 1094-96.

126. *Id.* at 1095.

127. *Id.*

128. *Id.*

129. *See id.* at 1095-96.

130. *See id.*

131. *Id.* at 1101-02.

The majority view prevailed, declining the proposed amendment and rejecting the right to instruction by a vote of forty-one to ten.[132] In the majority view, it was petitioning that ought to form the limiting principle on how the public could engage in the lawmaking process outside of the vote, in order to maintain republican principles and those mechanisms of representation carefully designed and detailed elsewhere in the Constitution. To provide the right to instruct was to require members to be bound by those instructions, thereby disrupting the deliberative and independent lawmaking process envisioned by Article I. The right to petition, by contrast, very clearly did not bind, yet it afforded the public a formal and transparent channel by which the public could "declare their sentiment . . . to the whole body."[133]

While the legislative history might convey the Founders' personal views in framing the Petition Clause, there is little better evidence of the public's understanding of the Petition Clause than the Framing generation's exercise of the right before and after ratification—it wasted no time in doing so. Amidst the debates in the House and Senate over the proposed amendments, including the Petition Clause, Congress was affording equal, formal, and public process to petitioners. Historians have documented over six hundred petitions to the First Congress.[134] Notably, petitioners of the First Congress did not limit themselves to matters of private concern. To provide a few examples, petitions conveyed grievances pertaining to a range of matters, including regulation of commerce, the need for public credit, the institution of slavery, requests for intellectual property protection, disposition of public lands, public employment and elections, the location of postal offices and federal courts, and the settlement of war debts and pensions.[135] Congress most often referred these petitions to the executive or to a congressional committee for review and routinely provided each a formal response.[136] Not infrequently, petitions included argument, charts, maps, and proposed statutory language.[137]

The unenfranchised, including one Mary Katherine Goddard of Maryland, also petitioned the First Congress on their own behalf.[138] Goddard had recently

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132. *Id.* at 1105.

133. *Id.* at 1096.

134. William C. diGiacomantonio, *Petitioners and Their Grievances: A View from the First Federal Congress*, *in* HOUSE AND SENATE, *supra* note 21, at 29, 31.

135. *Id.* at 31-56.

136. *See* STAMM OF H. COMM. ON ENERGY & COMMERCE, 99TH CONG., PETITIONS, MEMORIALS AND OTHER DOCUMENTS SUBMITTED FOR THE CONSIDERATION OF CONGRESS, MARCH 7, 1789 TO DECEMBER 14, 1795, at 361 (Comm. Print 1986).

137. diGiacomantonio, *supra* note 134, at 46; *see also* Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 30-31 (2011).

138. 8 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789-3 MARCH 1791, at 232-33 (Kenneth R. Bowling et al. eds., 1998) [hereinafter DOCUMENTARY HISTORY].

been dismissed as postmistress for the city of Baltimore after serving in the position for over fourteen years and petitioned Congress to challenge the dismissal.[139] Goddard argued that at the time, the Washington Administration mandated that only "manifest misconduct" would establish a basis for dismissal from public office.[140] It was unclear whether Goddard's dismissal was due to gender—her replacement appointee was male—or her close association with the Anti-Federalists through her brother, William.[141] In addition to contacting President Washington directly, Goddard submitted Washington's executive order, along with her petition signed by two hundred Baltimore businessmen, to the Senate for consideration.[142] The Senate read her petition but declined to act in her favor.[143] Again, it was unclear whether the refusal was driven by discrimination or politics, but the petition was accepted like all others.[144] The petitions of the unenfranchised also included the petition of Jehoiakim McToksin, citizen of the Stockbridge, or Moheconnuck, Nation, who petitioned for compensation due to him for serving as an interpreter for the United States in the war for independence.[145] Presented by the representative for Massachusetts, who also collected affidavits on McToksin's behalf, the petition was successful, and Congress granted McToksin his unpaid salary and forgave his missing documentation.[146]

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139. Richard R. John & Christopher J. Young, *Rites of Passage: Postal Petitioning as a Tool of Governance in the Age of Federalism*, *in* HOUSE AND SENATE, *supra* note 21, at 100, 109-10.

140. *Id.* at 110.

141. *Id.* at 111.

142. 8 DOCUMENTARY HISTORY, *supra* note 138, at 231-33.

143. John & Young, *supra* note 139, at 114.

144. *Id.*

145. diGiacomantonio, *supra* note 134, at 52; *see also* H.R. JOURNAL, 1st. Cong., 1st Sess. 804 (1789) (noting a resolution "directing the payment of $120" to McToksin).

146. diGiacomantonio, *supra* note 134, at 52. Absent from this history of petitioning is discussion of the so-called "gag rules," a series of resolutions passed by the House during the 1830s and 1840s to limit consideration of petitions on the subject of slavery. *See* Higginson, *supra* note 34, at 158-65. Omission of this later history of petitioning is not inadvertent. Rather, it is pragmatic. The secondary sources describing nineteenth-century petitioning lend primacy to assorted debates around the gag rules largely based on the false premise that the gag rules caused the end of petitioning in Congress. *Id.* at 143 ("Although sheer volume of business eventually might have severed the duty of assembly consideration from First Amendment petitioning, this result was guaranteed when petitioning became enmeshed in the slavery controversy." (footnote omitted)); Lawson & Seidman, *supra* note 34, at 751 ("The so-called gag rule, which prohibited receipt of petitions concerning slavery, brought this era of petitioning to an end."). More recent scholarship has discredited this earlier theory, most notably a thorough treatment of the question by legal historian Tabatha Abu El-Haj in her pathbreaking work on nineteenth-century state and local political participation outside of the vote. *See* Abu El-Haj, *supra* note 137, at 28-35. A comprehensive treatment of nineteenth and twentieth-century congressional petitioning has yet to be written, however. I aim to address this notable absence in future projects.

C. Contextualizing Lobbying

A comprehensive history of lobbying, charting its course across the development of the American republic, has yet to be written. To the extent that the historiography of American politics references lobbying at all, historians have largely cabined their study to particular eras, interest groups, and legislative vehicles.[147] Aside from the descriptive work of public choice theory, lobbying has been largely absent from political theory and political ethics. Political scientists have created out of whole cloth the assumption that "[l]obbying is probably as old as government," with little development of the basis for that assumption.[148] Even the origin of the term "lobbying" remains in dispute.[149] It is as if the amorphous nature of lobbying has seeped into the very scholarship that surrounds it.

Despite the invisibility of what some refer to as the "fourth branch" of government, the few Early Americanists to focus on lobbying describe the practice as wholly distinct from petitioning.[150] Political historian Jeffrey Pasley describes lobbying as "the personal buttonholing of lawmakers by paid agents of special interests," and earlier historical work of the period found little evidence of our modern lobbying system in the First Congress.[151] Much of the pressure from interested groups during this period took the form of petitions, private letters, and engagement with the press.[152] While pressure groups engaged in all of these tactics, the petition process constituted the primary means by which individuals and loose associations engaged in the lawmaking process.[153] Pasley speculates that the absence of the comprehensive lobbying scheme we have today was due, at least in part, to the efficient functioning of petitioning.[154] But, in contrast to earlier inquiry, Pasley's review of the historical documents of the First Congress revealed "abundant evidence" of a different kind of lobbying, one of subtler and more limited form.[155]

147. *See* Pasley, *supra* note 21, at 57-58.

148. LESTER W. MILBRATH, THE WASHINGTON LOBBYISTS 12 (1963).

149. *Compare* Pasley, *supra* note 21, at 72 (tracing the term back to before 1808 as a way to describe "upper-crust" citizens congregating in the antechambers of Congress), *with* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 149-50 (2014) (tracing the term back to "the beginning of the nineteenth century as paid influencers started to hang around the lobbies of legislative buildings and hotels").

150. Pasley, *supra* note 21, at 58-59.

151. *Id.* at 59.

152. *See id.* at 58.

153. *See id.* at 60.

154. *Id.*

155. *Id.* at 61.

Pasley describes this subtle and limited form of early lobbying as an outgrowth of petitioning.[156] It was common practice at the Founding to hire lawyers to draft and deliver petitions on behalf of petitioners.[157] The petition process included a range of formalities, and attorneys could prove helpful in navigating those formalities by drafting and presenting the documents.[158] Lawyers largely stayed away from broader policy petitions, however, mainly focusing their representation on petitions with individualized grievances.[159] Convinced that it might increase their chances of favorable consideration, some petitioners began to hire agents not only to draft and present their petitions but also to contact members personally and monitor the consideration process.[160] While most petitioners or their agents delivered the petition and then left the capital, many began to stay and to put up extended residence around the seat of national government.[161] Less politically connected and distinguished agents frequented the hallways of Congress, as well as local taverns, in the hopes of catching a member for casual conversation.[162] Pasley traces an early usage of the term "lobby" to describe loiterers in the antechambers of Congress, where interested parties would congregate in hopes that they might catch a moment with a member.[163] While there was extensive evidence of loitering in lobbies and bars,[164] there is little evidence that such loitering was ever actually successful.

One of the first comprehensive lobbying campaigns was waged by the Quakers, a community that still prides itself today on its vigorous legislative advocacy.[165] The Quakers coupled their attempts to petition the First Congress to abolish slavery with an impressive lobbying campaign that included "looming" over the galleys, loitering in the lobbies to approach members as they left formal proceedings, visiting members' temporary capital lodgings, and inviting members of Congress to discuss the issue over meals.[166] Not surprisingly, the Quakers' aggressive methods cultivated an incredible hostility by members against any and all forms of lobbying.[167] The Quakers' conduct

156. *Id.* at 61-62.

157. *Id.* at 62.

158. *See id.*

159. *Id.*

160. *See id.* at 64-65.

161. *Id.*

162. *See id.* at 63-64.

163. *Id.* at 72.

164. *Id.* at 64, 77.

165. *See, e.g.*, *History of FCNL*, FRIENDS COMM. ON NAT'L LEGIS. (Oct. 21, 2010), http://fcnl.org/about/history/chronology.

166. Pasley, *supra* note 21, at 64-65.

167. *See id.* at 65.

was unprecedented. Very few organized interests existed in the capital at that time, and none circumvented the petition process in ways similar to the Quakers.[168] Following the campaign, "Congress took steps to prevent a repeat of the episode."[169]

The rise of our modern, ubiquitous lobbying culture did not occur until the mid- to late-nineteenth century.[170] Some ascribe its development to growing dysfunction within the petition process and petitioning's slow decline.[171] Consideration of petitions became less formalized and Congress implemented a series of rules that provided petitions less prominence on the legislative agenda.[172] While Congress undermined the petition process by a thousand procedural cuts, lobbying flourished, as did the reality that the ability to have a voice during the lawmaking process required hiring a lobbyist to speak on your behalf.[173] With the rise of lobbying came the use of ever more creative practices of influencing the lawmaking process, including bribery and other more nefarious means.[174] Public proclamations of hatred for the profession soon followed.[175] Eventually, likely some time during the Progressive Era, lobbying wholly supplanted petitioning as the primary means of public engagement with the lawmaking process outside of the vote.[176]

II. The "Decontextualized" Petition Clause

A. Our Lobbying Regulatory Framework

There are few today who would defend our current lobbying system on consequentialist grounds.[177] Many, if not most, Americans hold lobbyists in

168. *Id.* at 65-66.

169. *Id.* at 66 (quoting 8 DOCUMENTARY HISTORY, *supra* note 138, at 314).

170. *Id.* at 60-61.

171. *See id.*

172. *See* Higginson, *supra* note 34, at 159-65 (describing the gag rule debates in depth); Benjamin Schneer, Representation Replaced: How Congressional Petitions Substitute for Direct Elections 13 (Sept. 12, 2014) (unpublished manuscript), https://www.dropbox.com/s/ox9rwuo0cy7h3w6/ben_schneer_jmp.pdf?dl=0. *But see* Abu El-Haj, *supra* note 137, at 32-35 (describing the impact of the gag rule as "overstate[d]").

173. Pasley, *supra* note 21, at 61.

174. *Id.*

175. *Id.*

176. *See* Schneer, *supra* note 172, at 13-14. Because scholars are just beginning to speculate as to these questions, the exact timing and causes of the formal petitioning process's demise in Congress are as of yet unknown. My future work in this area will begin to address these questions.

177. Although few would defend our current lobbying system on consequentialist grounds, one stalwart body of scholarship suggesting such a defense remains. According to some public choice theorists, our lobbying system and preferential treatment of the

incredibly low regard,[178] lobbying is often referred to as "legalized bribery,"[179] and the overwhelming majority of Americans believe that lobbyists routinely

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politically powerful could result in efficient policy outcomes. Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 373 (1983); *cf.* KEVIN M. ESTERLING, THE POLITICAL ECONOMY OF EXPERTISE: INFORMATION AND EFFICIENCY IN AMERICAN NATIONAL POLITICS 1-2 (2004) ("[S]ociety should prefer to be governed by expert-informed rather than ill-informed policies because the former are often more effective and efficient in reaching social goals. . . . Unlike policy experts, ordinary citizens often have at best a rudimentary or incomplete understanding . . . [of the information] underlying an expert policy idea or proposal."). Becker's model responded to a growing disapproval among public choice scholars over the preferential treatment of politically powerful special interest groups and a concern that preferential treatment of these groups would result in an inefficient expression of majority preference. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 34 (1991); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 31-32, 52 (1965) (modeling group behavior and concluding that "small groups will further their common interests better than large groups").

The answer to Becker's empirical claim that our current lobbying system results in an efficient expression of majority preference is that it is irrelevant here, where the petition right protects the procedural rights of minorities regardless of legislative outcomes. As Einer Elhauge argued persuasively, public choice theory necessarily rests on an exogenous "normative baseline," and most public choice scholarship assumes, without support, that the correct normative baseline is majoritarianism. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 49-50 (1991); s*ee also* LARS UDEHN, THE LIMITS OF PUBLIC CHOICE: A SOCIOLOGICAL CRITIQUE OF THE ECONOMIC THEORY OF POLITICS 10 (1996) (offering a sociological critique of the economic theory of politics and describing the distinctions between positive and normative public choice theory).

A contextualized understanding of the petition right offers an alternative normative baseline for evaluating the lawmaking process—the equality of access and procedure baseline supported by the right to petition—and provides grounds to reject the majoritarian baseline assumed by public choice theory. Through the petition process, Congress attended to and passed laws in favor of minorities and individuals, even, at times, in contravention of the will of the majority. The requests of "specific interest" groups were not only encouraged, they were officially sanctioned, regardless of their comportment with majority preference. *See* Elhauge, *supra*, at 50.

178. In the first year that Gallup included lobbyists on its "honesty and ethics list," lobbyists debuted at the very bottom, immediately below automobile salesmen. Jeffrey M. Jones, *Lobbyists Debut at Bottom of Honesty and Ethics List*, GALLUP (Dec. 10, 2007), http://www.gallup.com/poll/103123/lobbyists-debut-bottom-honesty-ethics-list.aspx. In a different poll, respondents reported overwhelmingly, at 71%, that lobbyists held too much power. Lydia Saad, *Americans Decry Power of Lobbyists, Corporations, Banks, Feds*, GALLUP (Apr. 11, 2011), http://www.gallup.com/poll/147026/americans-decry-power-lobbyists-corporations-banks-feds.aspx. A 2006 poll, around the time of the Abramoff scandal, had 77% of respondents agreeing that lobbyists bribing members of Congress is just "[t]he way things work in Congress." CBS News & N.Y. Times, Congress, the Abramoff Scandals, and the Alito Nomination 1 (2006), http://www.cbsnews.com/htdocs/CBSNews_polls/JANB-CON.PDF.

179. Jeffrey Birnbaum, *The End of Legal Bribery*, WASH. MONTHLY (June 2006), http://www.washingtonmonthly.com/features/2006/0606.birnbaum.html.

bribe members of Congress.[180] Many decry lobbying as rent seeking and a corruption of the democratic process.[181] Despite near-unanimous consensus that more must be done to regulate lobbying, Congress has enacted only minimal and ineffective regulation in the face of lobbying scandals and growing public concern. Some scholars, offering a more charitable interpretation, have speculated that the discordant views of lobbying as both criminal and constitutionally protected have evolved over time, resulting in a jumbled patchwork of lobbying laws.[182] Other scholars, more cynical of the political process, see the corrupt handiwork of lobbyists themselves in failures to regulate lobbying.[183] Although public opinion seems quite settled about the problem, Congress continues to raise concerns that any solution would violate the Petition Clause. A close examination of the legislative histories of these attempted reforms reveals that our inability to regulate lobbying is based, it seems, on constitutional and not consequentialist or nefarious grounds.

Our often-criticized modern lobbying regulatory framework—namely light-touch registration and disclosure regimes—has its origins in our ongoing inability to reconcile lobbying with the Petition Clause. The legislative history of this scheme provides an illustrative example of the underlying tensions inherent in our efforts to regulate lobbying.

On April 4, 1935, then-Senator Hugo Lafayette Black of Alabama introduced Bill 2512, titled "[t]o define lobbyists, to require registration of lobbyists, and provide regulation thereof," into the Senate.[184] The main content of that bill will feel familiar to anyone versed in our modern lobbying regulation: it offered a registration requirement, a periodic disclosure regime, and penalties for noncompliance. Black's bill defined lobbying broadly, regulating not only *direct* contact with legislatures but also *indirect* efforts to influence legislation with advocacy campaigns aimed at the public. It defined "lobbying" as an effort to influence any political branch, legislative and executive, by any means possible—including direct means, like petitioning and appearing before committees, as well as indirect means, like publishing books or magazines.[185] Next, the bill outlined a registration and disclosure scheme that would require all who engaged in "lobbying" for compensation to register with the Clerk of the House of Representatives and the Secretary of the Senate

180. *Americans Taking Abramoff, Alito, and Domestic Spying in Stride*, PEW RES. CTR. (Jan. 11, 2006), http://pewrsr.ch/X0KeSB (finding that 81% of Americans believed that lobbyists bribing members of Congress was "common behavior").

181. *See, e.g.*, Hasen, *supra* note 3, at 197-98.

182. *See* Briffault, *supra* note 3, at 193.

183. *See* William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, *in* THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE 5, 8 (William V. Luneburg et al. eds., 4th ed. 2009).

184. S. 2512, 74th Cong. (1935).

185. *Id.* § 1.

before engaging in any lobbying activity.[186] The bill then required the registrant to file monthly disclosure reports thereafter that included all income received, names of individuals lobbied, and names of all publications authored by the lobbyist.[187] Failure to comply with the registration and disclosure regimes carried a penalty of $5000, criminal sanctions of not more than twelve months in prison, or both.[188]

By the time that Senator Black drafted his bill, the formal petition process had fallen into disuse and the primary means of engagement with Congress was through informal mass mobilization tactics.[189] The structure of the bill captured Senator Black's view that petitioning encompassed the broad and informal practice of public-directed advocacy and mass mobilization of his day, including not only direct engagement with legislators but also the act of advocating for or against legislation in the public sphere. According to Black, this broad right to petition was sacrosanct, and regulation aimed at "lobbying" was an effort to expose abuse of the petition process in order to preserve the right to petition. Senator Black did not believe that the Constitution protected the right to "lobby," a term that to Black encompassed only "bad lobbying" or abuse of the petition process. When it came to lobbying, the Senator did not mince words:

> There is no constitutional right to lobby. There is no right on the part of any greedy or predatory interest to use money taken from the pockets of the citizen to mislead him and thus enlist his aid in enabling the same greedy and predatory interest to take still more money out of the pocket of the same unsuspecting citizen. There is no constitutional right on the part of any sordid and powerful group to present its views behind a mask concealing the identity of the group. These money-maddened men behind the mask have no right to send their hired men out into the streets, into the places of business, into the homes and into the churches, to persuade or frighten citizens into giving blanket authority to have their names signed to telegrams and letters, to be later manufactured by high-powered, high-priced publicity agents, and sent at company expense to the citizens' representatives in Washington, in such way and manner as to deliberately deceive those representatives.[190]

At the time Senator Black introduced his bill, no regulatory scheme governed lobbyists at the federal level. After the first thorough congressional investigation of lobbying activities in 1913 and a few scandals that followed, members began introducing a variety of bills, only to have them die in

186. *Id.* § 4.

187. *Id.* § 5.

188. *Id.* § 7.

189. *See* Abu El-Haj, *supra* note 137, at 34-35; Eskridge, *supra* note 183, at 8; Schneer, *supra* note 172, at 13.

190. Senator Hugo L. Black, Lobby Investigation, Address on NBC (Aug. 8, 1935), *in* 1 VITAL SPEECHES OF THE DAY 762, 762 (1935).

committee.[191] Black's bill was similarly responsive to scandal: in 1935, the year that Black introduced his bill, Congress was fighting to pass the Public Utility Holding Company Act, commonly known as the Wheeler-Rayburn Bill.[192] The Wheeler-Rayburn bill was typical of the "trust-busting" legislation common to the New Deal era, and it proposed bringing private utilities under government oversight for the first time.[193] The utility companies were not going to take the new restrictions lying down and mounted one of the fiercest antilegislation campaigns that Congress had seen.[194] Most notably, the utility companies flooded Congress with over 250,000 telegrams opposing the bill, all of them paid for by the utilities and most with signatures forged by utility employees.[195] Controversy surrounding the campaign fueled both a new Senate investigatory committee, focused on "lobbying," chaired by Senator Black and also a bill that he authored.[196]

Like all of the earlier reform efforts, Black's bill also stalled. Following an amendment to expand the disclosure period to three months and to broaden the definition of lobbyist to anyone who, for pay, attempted "to influence legislation, or to prevent legislation," the Black bill quickly passed the Senate.[197] However, it faced strong opposition in the House. William Eskridge, subscribing to the cynical view, has speculated that the bill's failure was a result of a Senate bill dying in a lobbyist-controlled House.[198] But the legislative history reveals a more nuanced story, grounded in a fundamental disagreement over the right to petition and the relationship between petitioning and lobbying.

The legislative history reveals that the House Judiciary Committee stalled Black's bill in order to make way for a draft of its own.[199] Like Black, the House Committee believed that the right to petition was sacrosanct and encompassed the mass mobilization politics of the day. But the House Committee saw no daylight between Black's distinction of petitioning and lobbying, because the actual regulated conduct of "influencing or preventing legislation" looked identical. By that time, there were no longer clear rules to govern petitioning

191. Eskridge, *supra* note 183, at 8.

192. *Id.*; *see also* Public Utility Holding Company Act of 1935, ch. 687, 49 Stat. 803 (repealed 2005).

193. Eskridge, *supra* note 183, at 8.

194. *See id.*

195. *Id.*

196. *Registration and Regulation of Lobbyists: Hearing on S. 2512 Before a Subcomm. of the S. Comm. on the Judiciary*, 74th Cong. 1-2 (1935).

197. 79 CONG. REC. 8305-06 (1935).

198. Eskridge, *supra* note 183, at 8.

199. *See* H.R. REP. NO. 74-2214, at 1-3 (1936) (introducing the House Judiciary Committee's own bill in 1936 to encourage "a reasonable and proper regulation of lobbying activities").

and therefore abuse of that process, what Black called "lobbying," was impossible to identify. Therefore, the House saw any forced registration or disclosure regime focused on legislative advocacy efforts, good or bad, as necessarily an infringement of that sacrosanct petitioning right.[200] The House Committee would allow some infringement of the right to petition because of the need to balance that right against the informational interest of lawmakers. But that infringement must be narrowly tailored.[201]

The bill was then referred to conference in order to reconcile the House and Senate drafts.[202] The conference committee reported out a broad bill, expanding the registration regime to include lobbyists who target the executive and expanding the disclosure regime to require monthly disclosure reports. The broad conference bill met its expected fate in the House and was defeated in a floor vote by a three-to-one margin. In the debates that preceded the defeat, House members expressed concern that the broad bill regulated beyond the recent "bad lobbyists," the utility companies, and would burden "good" groups who petitioned, such as "all farm organizations, all patriotic organizations, all women's clubs, all peace societies."[203] These floor debates reveal that Black had argued convincingly for a normative distinction between "good" petitioning and "bad" lobbying and that bad lobbyists, like the utilities, had no petition rights to infringe. But House members struggled with the fact that the conduct that constituted "petitioning" and "lobbying" looked identical. Aside from penalizing those "bad lobbyists" directly, House members were not convinced that there existed a way to regulate unprotected bad lobbying without also regulating petitioning.[204]

It wasn't until ten years later, after Black's appointment to the Supreme Court, that the text of the Black bill was revived, dusted off, and finally muscled through both chambers on the coattails of comprehensive legislative reform. Following World War II, the concern over associational lobbying intensified, and in March of 1946, Congress established yet another special committee—the Special Joint Committee on the Organization of Congress—to investigate "any or all groups which have or are engaged in the present propaganda campaign or lobby to defeat legislative measures for the relief of the acute housing shortage . . . to abolish or weaken price control; [and] all

200. *See id.*

201. *See id.* at 1-2 (describing lobbying as protected by the right to petition and then balancing that right against the informational interests of lawmakers, resulting in a narrowed bill).

202. 80 CONG. REC. 9430 (1936).

203. *Id.* at 9747.

204. *Cf.* H.R. REP. NO. 74-2925, at 1, 5-6 (1936) (documenting disagreements between the House and the Senate about who should be regulated).

groups which have or are engaged in the power lobby."[205] Five hurried months later, President Truman signed into law the Legislative Reorganization Act, Title III of which included the Federal Regulation of Lobbying Act.[206] The scheme closely tracked the language of the 1936 conference committee bill and then-Senator Black's bill, which had provided a basis for the committee bill.[207] The legislative history reveals little attention to lobbying and confusion in the floor debates over the effect of the legislation and its relationship with the right to petition.[208] Despite the confusion and lack of deliberation, the momentum of the larger legislative reform bill would push the Lobbying Act through. Although widely criticized as toothless and ineffective,[209] Black's regime of registration and disclosure has served as the basis for all lobbying regulation since 1946, replaced only by statutes that have adopted the same registration and disclosure framework while strengthening requirements around the edges.

B. Our Muddled Petition Clause Doctrine

A similar definitional muddle pervades our Petition Clause jurisprudence. The First Amendment provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[210] Huddled at the end of this famous amendment is the nearly forgotten Petition Clause. By comparison to other First Amendment protections, the Supreme Court has only rarely turned its attention to this particular piece of text. On those rare occasions where it has, the Court has adopted a form of simple textualism uncommon to its First Amendment jurisprudence[211] and has abstained, perhaps out of necessity, from relying on the historical context that so often provides an interpretive frame for its First

205. 92 CONG. REC. 2338 (1946) (introducing House Resolution 557, a resolution to establish the special committee in the House); *see also* S. REP. NO. 1011, at 27 (1946).

206. Pub. L. No. 79-601, tit. III, 60 Stat. 812, 839 (1946) (repealed 1995).

207. *Compare id.*, *with* 80 CONG. REC. 9430-31 (1936), *and* S. 2512, 74th Cong. (1935).

208. 92 CONG. REC. 6552 (1946).

209. *See, e.g.*, TASK FORCE ON FED. LOBBYING LAWS, *supra* note 31, at 6 n.53; Moshe Cohen-Eliya & Yoav Hammer, *Nontransparent Lobbying as a Democratic Failure*, 2 WM. & MARY POL'Y REV. 265, 286 (2011); Craig Holman, *Disclosure Is Fine, but Genuine Lobbying Reform Must Focus on Behavior*, ADMIN. & REG. L. NEWS, Summer 2006, at 5, 5.

210. U.S. CONST. amend. I.

211. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982) (noting that First Amendment analysis necessarily draws on contextual history of First Amendment text and has "long eschewed any 'narrow, literal conception' of the Amendment's terms" (quoting NAACP v. Button, 371 U.S. 415, 430 (1963))).

Amendment jurisprudence.[212] A review of the legislative history and doctrine reveals that much of this simple textualism derives from the heavy involvement of a single individual: famed textualist and First Amendment absolutist Hugo Lafayette Black.

Justice Hugo Black is often referred to as the "patron saint" of modern textualism.[213] But among his lesser-known accomplishments is his role as the patron saint of modern lobbying law. Black drafted the first comprehensive scheme to regulate lobbying, a bill that provided the foundation for our current lobbying regime,[214] while serving as Senator for Alabama and drafted the pillars of our Petition Clause doctrine[215] after his appointment to the Court.[216] To each, Black applied his self-described "literalist"[217] interpretative method.

Following his appointment to the Supreme Court, Justice Black drafted *Noerr*, the first case to address the right to petition in any depth, and a number of other key cases in the Petition Clause constellation.[218] In each, Black brought his normative distinction between petitioning and lobbying and his "literalist" interpretive method to bear on the Clause. Although Black described his methodology as friendly to the incorporation of context and history in the interpretation of text,[219] at that time the history of petitioning was not before the Court.[220] Without an understanding of the history of the petition right,

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212. We the People Found., Inc. v. United States, 485 F.3d 140, 145 (D.C. Cir. 2007) (Rogers, J., concurring) (describing the Court's regular reliance on history and rejection of a "literalism" approach in interpreting the First Amendment and collecting cases).

213. *See, e.g.*, Pamela S. Karlan, *Bullets, Ballots, and Battles on the Roberts Court*, 35 OHIO N.U. L. REV. 445, 449 (2009).

214. *See* Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601-14 (2014).

215. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961).

216. *See infra* Part II.B.1.

217. Although Black and others have described Black's early textualist method as "literalist," the term is a bit of a misnomer. The more accurate term would be "semantic-ist," denoting a narrow focus on the semantic meaning of text. Stephen C. Levinson, PRAGMATICS 17-18 (2009) (describing the distinction as one between Grice's speaker-meaning and sentence-meaning, but also noting that the distinction is not always clear). As contemporary legislation scholars, including John Manning, have identified, the "literalist" textualists of the Progressive Era suffered from the inaccuracies of interpreting text in the absence of context. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108-09 (2001). Modern textualists have remedied these earlier interpretive missteps by incorporating an understanding of context as defined by the field of pragmatics. *Id.*

218. *See infra* Part II.B.2.

219. HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 10 (1968).

220. *See, e.g.*, Brief for the Petitioners at 25-28, 28 n.21, *Noerr*, 365 U.S. 127 (No. 50) 1960 WL 98829; *see also* We the People Found., Inc. v. United States, 485 F.3d 140, 148-49 (D.C. Cir. 2007) (Rogers, J., concurring) (noting that the Court had not yet tussled with the historical argument in relation to the Petition Clause and speculating that the change

Black turned to the text of the Petition Clause devoid of context and against a background of changed circumstances. As is common for decontextualized interpretations,[221] the Court's "literalist" interpretation of the Petition Clause resulted first in an overinclusivity—for example, merely containing the term "petition" or "grievance" brought practices within the purview of the doctrine, and the Court expanded the petition right to include filing "petitions" in courts and administrative agencies, the filing of "grievances" by public employees, and any form of legislative advocacy.[222]

In the absence of this context, the Court has struggled to provide clear and fixed meanings to the Petition Clause, often conflating practices historically distinct but termed similarly in modern parlance. Eventually succumbing to the lack of structure behind its Petition Clause analysis, thirty years ago the Court effectively subsumed the right to petition under the more developed doctrine of the Free Speech Clause.[223] It was not until 2011, when faced with this history, that the Court began to contextualize and clarify its Petition Clause analysis in order to establish a distinct Petition Clause doctrine.[224]

Scholars have been quick to criticize this doctrinal muddle,[225] but the development of the doctrine in disparate substantive fields of law, from labor to civil rights, has prevented the criticism from forming a chorus loud enough to be heard. More importantly, the lack of intensive regulation and litigation in the field of lobbying law and the development of the Petition Clause doctrine between camps of legal scholarship has deterred a comprehensive

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in doctrine would prove drastic given the Court's preference for reliance on history in interpretation of the First Amendment).

221. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 419-20 (1989). Although interpretive theory in this area is still ripe for future development, Sunstein also begins to describe the interaction between literalism and changed circumstances. *Id.* at 422-23.

222. *See infra* Part II.B.2. This process is referred to in linguistics as "word-sense disambiguation," or the ability of humans to discern from context the particular sense of the meaning of the word used. Mark Stevenson & Yorick Wilks, *Word-Sense Disambiguation*, *in* THE OXFORD HANDBOOK OF COMPUTATIONAL LINGUISTICS 249, 249 (Ruslan Mitkov ed., 2003). As Stevenson and Wilks describe, the term light could denote weight, as in "not heavy," or "illumination." *Id.* at 249.

223. McDonald v. Smith, 472 U.S. 479, 482, 485 (1985).

224. Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2495 (2011).

225. *See, e.g.*, RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 10 (2012); Carol Rice Andrews, *After* BE & K*: The "Difficult Constitutional Question" of Defining the First Amendment Right to Petition Courts*, 39 HOUS. L. REV. 1299, 1302 (2003); John T. Delacourt, *The FTC's* Noerr-Pennington *Task Force: Restoring Rationality to Petitioning Immunity*, ANTITRUST, Summer 2003, at 36, 36-37; Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CALIF. L. REV. 1177, 1177-79 (1992); William A. Herbert, *The Chill of a Wintry Light?:* Borough of Duryea v. Guarnieri *and the Right to Petition in Public Employment*, 43 U. TOL. L. REV. 583, 617-22 (2012); Smith, *supra* note 34, at 1153.

review of the Petition Clause doctrine. What follows is the beginning of a broader review of the doctrine and an effort to highlight the incoherence wrought on the right to petition through the lack of a contextualized interpretation.

1. Origins

Although the Supreme Court referenced the right to petition in dicta in two nineteenth-century opinions—once as a predicate to the right to associate[226] and another as a predicate to the right to interstate travel[227]—the Court's first opportunity for substantive analysis of the right to petition came in 1954. In an era of increasing political ferment, 1954 began the term that the Court decided *Brown v. Board of Education*[228] and that the world's leaders convened in Geneva in efforts to bring peace in Vietnam. Also in that same year, in *United States v. Harriss*, the Court reviewed a First Amendment challenge to the statute born of Senator Black's early handiwork and the first statute to provide comprehensive regulation of lobbyists: the Federal Regulation of Lobbying Act of 1946.[229]

The sections of the Lobbying Act at issue in *Harriss*, sections 305, 307, and 308, mandated registration requirements for all individuals and groups who accepted money to influence "directly or indirectly" legislation in Congress and required quarterly reporting of all moneys received and expended, as well as the name of the legislation lobbied for or against.[230] Application of the Lobbying Act was broad and the statute purported to regulate

> any person . . . who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:
>
> (a) The passage or defeat of any legislation by the Congress of the United States.
>
> (b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.[231]

The Lobbying Act also built on Black's framework by adding the additional penalty of a three-year lobbying ban for any violations of the registration and disclosure requirements.[232]

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226. United States v. Cruikshank, 92 U.S. 542, 552-53 (1876).

227. Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 43-44 (1868).

228. 349 U.S. 294 (1955).

229. United States v. Harriss, 347 U.S. 612, 617 (1954); *see also* Pub. L. No. 79-601, tit. III, 60 Stat. 812, 839 (repealed 1995).

230. *Id.* at 614 n.1, 618-19.

231. *Id.* at 618-19 (quoting 2 U.S.C. § 266).

Despite the victory celebrated by reformers following passage of the Lobbying Act, the scheme suffered from serious flaws, not the least of which was hurried, compromised drafting throughout the Act.[233] In addition to clumsy drafting errors, the Act was also structurally unsound and lacked an enforcement mechanism outside of criminal penalties, which were presumably enforceable by the Department of Justice.[234] The Act's disclosure requirements were also unclear and treated contributions *by* lobbyists and contributions *to* lobbyists as functionally identical expenditures.[235] Not surprisingly, given the questionable enforcement measures, very few prosecutions were brought pursuant to the Lobbying Act, and it took eight years for a constitutional challenge to come before the Court.[236]

On direct appeal to the Supreme Court under the Criminal Appeals Act,[237] the United States challenged the United States District Court for the District of Columbia's dismissal of an information against a number of associational and individual defendants.[238] Relying on *National Ass'n of Manufacturers v. McGrath*,[239] the lower court had held the statute unconstitutional and dismissed the ten-count information,[240] which charged multiple violations of the Lobbying Act.[241] The government appealed.

In *Harriss*, Chief Justice Warren, writing for the Court, reversed the district court's dismissal and upheld the Lobbying Act as constitutional. In reaching this decision, the Court reviewed the constitutionality of four provisions of the Lobbying Act on vagueness and First Amendment grounds.[242] Because *Harriss* is so uniformly presumed as the case where the

232. *Id.* at 626-27.

233. *See id.* at 631 (Douglas, J., dissenting) (noting that the majority was "rewrit[ing] the Act" by providing a limit on the definition of "lobbying" because the language used in the Act was expansive and lacked any real limit).

234. *See id.* at 633-34 (Jackson, J., dissenting).

235. *See id.* at 633 ("The Act passed by Congress would appear to apply to all persons who . . . (2) receive and expend funds for the purpose of lobbying, or (3) merely expend funds for the purpose of lobbying."); *see also* Federal Regulation of Lobbying Act of 1946, Pub. L. No. 79-601, tit. III, 60 Stat. 812, 839 (repealed 1995).

236. Eskridge, *supra* note 183, at 12.

237. Act of March 2, 1907, .ch. 2564, 34 Stat. 1246.

238. *Harriss*, 347 U.S. at 613-17.

239. In *National Ass'n of Manufacturers*, 103 F. Supp. 510 (D.D.C. 1952), a three-judge panel struck down sections 303 through 307 of the Lobbying Act as unconstitutionally vague in contravention of the Due Process Clause of the Fifth Amendment and held section 310(b), the lobbying ban penalty, unconstitutional under the Free Speech and Petition Clauses of the First Amendment. *Id.* at 514.

240. United States v. Harris, 109 F. Supp. 641, 641-42 (D.D.C. 1953), *rev'd*, 347 U.S. 612.

241. Brief for the United States, *Harriss*, 347 U.S. 612 (No. 32), 1953 WL 79232, at *3, *22-23.

242. *Harriss*, 347 U.S. at 617 ("The 'invalidity' of the Lobbying Act is asserted on three grounds: (1) that §§ 305, 307, and 308 are too vague and indefinite to meet the

Supreme Court held definitively that Congress violates the Petition Clause by banning or heavily regulating lobbying, including a notable recent misreading by the Supreme Court in *Citizens United v. FEC*,[243] it is worthwhile to explore the case in depth to dispel this presumption.

The Court began in *Harriss* with a vagueness challenge. With respect to the disclosure requirement, the Court avoided any accusations of vagueness by interpreting the requirements to apply to paid lobbyists only.[244] In analyzing section 307, the definition of lobbying, the Court drew on *United States v. Rumely*, a case that interpreted similar statutory language and legislative history, to clarify that the Act applied to "lobbying in its commonly accepted sense" only,[245] that is, "to direct communication with members of Congress on pending or proposed federal legislation."[246] Following this clarification of section 307, the Court held that its narrowed construction rendered the disclosure requirement sufficiently definite to survive constitutional scrutiny.[247]

Turning next to the First Amendment, the Court addressed all clauses en masse and held in a summary fashion that the disclosure and registration requirements of the Lobbying Act, as construed, "d[id] not violate the freedoms guaranteed by the First Amendment—freedom to speak, publish, and petition the Government."[248] Its analysis was similarly general and held that the state interest in providing lawmakers and the public information on who was pressuring Congress and in "maintain[ing] the integrity of a basic governmental process" outweighed any potential chilling effect on the exercise of "First Amendment rights."[249] Although the Court did not specify the

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requirements of due process; (2) that §§ 305 and 308 violate the First Amendment guarantees of freedom of speech, freedom of press, and the right to petition the Government; (3) that the penalty provision of § 310 (b) violates the right of the people under the First Amendment to petition the Government.").

243. 558 U.S. 310 (2010).

244. *Id.* at 618-19.

245. *Id.* at 620 (quoting United States v. Rumely, 345 U.S. 41, 47 (1953)).

246. *Id.*

247. *Id.* at 622-24.

248. *Id.* at 625.

249. *Id.* at 625-26. Although the Court approached its First Amendment analysis without specifying a particular clause, the balancing test applied by the Court bore a similarity to a line of cases later termed the compelled-speech doctrine and, given the fact that the Lobbying Act was a disclosure regime, the similarity should come as no surprise. Originating in 1943 with *West Virginia State Board of Education v. Barnette*, the compelled-speech doctrine held that the Free Speech Clause "includes both the right to speak freely and the right to refrain from speaking at all." 319 U.S. 624, 645 (1943) (Murphy, J., concurring). Similar to the reasoning in *Harriss*, the Court initially identified the right as one generic to the "First Amendment," without specifying a particular clause. *Id.* at 642 (majority opinion). It was not until 1977 in *Wooley v. Maynard* that the Court stated explicitly that the compelled-speech doctrine sourced

particular clause on which its determination rested, its analysis resembled its later compelled-speech doctrine developed to analyze similar disclosure regimes.[250]

Finally, the Court addressed the challenge to section 310(b), the three-year lobbying ban as a penalty for failing to comply with the registration and disclosure requirements, as violative of the Petition Clause.[251] The challenge to section 310(b) on Petition Clause grounds presented the only clear right to petition challenge against the only clear prohibition on petitioning and lobbying activity in *Harriss*. The Court expressly *declined* to reach this issue. Explaining that section 310(b) was a penalty and, therefore, had not yet been applied to the defendants and might not ever apply if they were found innocent, the Court found it "unnecessary to pass on [the] contention" whether the lobbying ban in section 310(b) violated the Petition Clause.[252] Contrary to broad misconception, in reviewing the first comprehensive scheme regulating lobbying and the last lobbying regulatory scheme to come before it, the Court declined to address whether the Petition Clause prohibited Congress from regulating lobbying.[253]

2. Applying the clause to "lobbying"

To the extent that a law of public engagement with the lawmaking process exists, Hugo Black had an influential hand in crafting it. Seven years after *Harriss*, Justice Black spurred the development of what would become our modern Petition Clause doctrine. This early doctrine also bore Black's broad conception of the right and his "literalist" interpretation of the Petition Clause. In drafting *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[254] Justice Black addressed the meaning of the Petition Clause for the first time in depth, introducing into the doctrine his literalist interpretation of the right to petition as encompassing any form of advocacy aimed at influencing

from the Free Speech Clause. *See* 430 U.S. 705, 714 (1977). Later cases have followed suit and have consistently analyzed disclosure regimes as affronts to the right of free speech. *See* Doe v. Reed, 561 U.S. 186, 196 (2010) (noting a series of cases analyzing First Amendment challenges to disclosure requirements); Citizens United v. FEC, 558 U.S. 310, 366-67 (2010) (analyzing disclosure and disclaimer provisions under the compelled-speech doctrine).

250. *Compare Harriss*, 347 U.S. at 625-26 (upholding a disclosure regime on the grounds that it provided information necessary for well-informed legislators and noting that the regime did not prohibit speech), *with Citizens United*, 558 U.S. at 366-67 (upholding a disclosure regime on the grounds that it provided information necessary for a well-informed electorate and noting that the regime did not prohibit speech).

251. *Harriss*, 347 U.S. at 626-27.

252. *Id.* at 627.

253. *Id.*

254. 365 U.S. 127 (1961).

government action, no matter the audience and no matter the form. Black's broad literalism, omitting all reference to the historical context that defined the scope of the right, would set the stage for a series of cases that articulate the petition right as it stands today.

In *Noerr*, the Court reviewed a gaggle of antitrust claims under the Sherman and Clayton Acts that railroad and trucking operators had aimed at one another in the midst of a freight war.[255] The association for the trucking industry had initiated the suit, alleging that the association for the railroad industry had engaged in anticompetitive conduct with its publicity campaign against the truckers.[256] In particular, the truckers alleged that the railroads had conducted a public directed-advocacy campaign, using the "third-party technique,"[257] whereby the railroad's public relations firm would foster fake "so-called 'independent' citizens groups" that would "circulate false and malicious propaganda" that aimed to stop the passage of legislation favorable to the truckers.[258] While a few allegations alluded to contact with government officials, the truckers' complaint largely focused on anticompetitive conduct directed at the public.[259] Rather than anything analogous with the historical petition right, the truckers' complaint fell quite squarely into the domain of the Free Speech Clause.

In fact, the railroads in *Noerr* argued the case under the anonymous speech doctrine[260] and attempted to distinguish *United States v. Harriss* and others like it.[261] These earlier cases had balanced protections for anonymous speech with lawmakers' strong informational interest in knowing the identity of the speaker.[262] Distinguishing these cases on the ground that they dealt with direct participation in the lawmaking process, the railroads argued that this case was aimed at influencing *public discourse* and, thus, attempts to speak anonymously through "third-party" campaigns should incur heightened speech protections.[263] The Court was persuaded that the case raised First Amendment concerns, but rather than relying on the Free Speech Clause and the anonymous speech doctrine, the Court *sua sponte* analogized the railroads' conduct to petitioning.[264]

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255. *See id.* at 129-30.

256. Noerr Motor Freight, Inc. v. E. R.R. Presidents Conference, 113 F. Supp. 737, 741 (E.D. Pa. 1953).

257. Brief for the Petitioners, *supra* note 220, at 27.

258. *Noerr*, 113 F. Supp. at 741.

259. *See id.* at 741-42.

260. Brief for the Petitioners, *supra* note 220, at 27.

261. *Id.* at *29-30.

262. *See id.* (citing United States v. Harriss, 347 U.S. 612, 625 (1954)).

263. *See id.* at 23, 29-30.

264. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961).

Writing for the Court, Justice Black again invoked his understanding of petitioning as a practice that spanned broadly to encompass any form of legislative advocacy and communication, no matter the audience.[265] As Justice Black had known all too well from his days as a senator, "[i]n a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[266] To Black, who had served in the Senate after the formal process of petitioning had fallen into disuse, any form of communication directed at the public or otherwise regarding a legislative matter fell into the category of petitioning.[267] Accordingly, any interpretation of the Sherman Act that might impede this fundamental mechanism of representation could not accurately depict the intent behind the Act, Justice Black wrote, and had no basis in its legislative history.[268] It was only in the alternative that the Court relied on the Petition Clause, citing potential constitutional questions with any restriction the Act placed on "mere solicitation of governmental action with respect to the passage and enforcement of laws."[269]

3. Expanding the clause to courts and the executive

Over the next twenty years, applying the same literalist interpretation of the petition right established in *Noerr* and in the absence of context around the history and meaning of the right to petition, the Court expanded the petition right to protect anything termed a "petition" filed in formal proceedings in the judicial and executive branches.[270] The Court began by bringing "petitions" filed in courts under the protection of the Petition Clause. Then, relying on

265. *See id.* at 137-39.

266. *Id.* at 137.

267. Four years later, in *United Mine Workers v. Pennington*, the Court revisited *Noerr*'s exception to the Sherman Act for legislative advocacy and squarely applied the exception to conduct that more closely resembled petitioning—namely, direct engagement with the Secretary of Labor. 381 U.S. 657, 669-70 (1965).

268. *Noerr*, 365 U.S. at 138-39.

269. *Id.* at 138. Some have called into question the extent to which *Noerr* rested its analysis on Justice Black's Petition Clause reasoning, rather than on a simple interpretation of the Sherman Act. *See, e.g.*, Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2502-03 (2011) (Scalia, J., concurring).

270. A quick point of theoretical clarification: I am critical only of the grounds for the Court's expansion of the petition right to courts and the executive. A contextualized reading of the Petition Clause could very likely support such an expansion, as the petition process historically included an incredible amount of interbranch efforts at petition resolution. The criticism of the doctrine in this Subpart focuses on the reasoning on which the expansion is grounded and the "literalist" method employed, which ignored the history and the nuances that history would bring to the doctrine.

this doctrine, the Court further expanded the reach of *Noerr-Pennington* antitrust immunity to judicial and executive "petitioning."

Two years after *Brown v. Board of Education* and for the first time in almost a hundred years, the state of Virginia amended certain professional ethics rules governing client solicitation by lawyers.[271] The amendment prohibited solicitation of legal business by any "individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability."[272] As part of their efforts at integration, the NAACP solicited the parents of Virginia school children to become clients and then provided those parents with an attorney.[273] Not coincidentally, this amendment brought the litigation strategy implemented by the NAACP to integrate southern schools squarely within the prohibitions of the ethics rules.[274] The NAACP challenged the rules in state court primarily on Fourteenth Amendment due process and equal protection grounds, but the Virginia courts upheld the laws.[275] The NAACP then petitioned for certiorari, and the Supreme Court reversed.[276]

In what was likely a surprising move, the Court declined to adopt the NAACP's primary argument: that the rules offended notions of due process and equal protection and, therefore, violated the Fourteenth Amendment.[277] Justice Brennan, writing for the Court, relied instead on the NAACP's alternative grounds and struck down the ethics rules as violative of the First Amendment.[278] Echoing the approach taken in *Harriss*, the Court addressed the First Amendment en masse, conflating the rights to speak, associate, and petition under a conjoined right that the Court referred to as a right to "vigorous advocacy."[279] The First Amendment, the Court held, protected "vigorous advocacy" against government regulation because it constituted a form of political expression.[280] The Court reasoned that political expression in the form of filing petitions in court was essential for minorities who would "find themselves unable to achieve their objectives through the ballot" and where "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of

271. NAACP v. Button, 371 U.S. 415, 423 (1963).

272. *Id.*

273. *Id.* at 421.

274. *Id.* at 423-26.

275. *Id.* at 424-26, 428 n.10.

276. *Id.* at 417-18, 428.

277. *Id.* at 428.

278. *Id.* at 428-29.

279. *See id.* at 429.

280. *Id.*

grievances."[281] Among other purely associational rights, the Court also relied on *Noerr* for the principle that disruption of organized legislative advocacy could raise important "First Amendment" questions.[282] Later opinions, drafted by Justice Black, made clear that the right of access to courts rested firmly within the specific protections of the Petition Clause.[283]

A few years after *NAACP v. Button*, the Court expanded the scope of the Petition Clause again to include the "petitions" filed by prisoners pursuant to the writ of habeas corpus.[284] Justice Fortas wrote for the Court in *Johnson v. Avery* and struck down a Tennessee statute prohibiting prisoners from assisting other prisoners with habeas corpus petitions.[285] The state of Tennessee, finding the quality of habeas petitions falling rapidly in the hands of untrained "jailhouse lawyers"—prisoners turned professional petition writers—had decided to ban the practice.[286] In striking down the law, the Court held that the ban, in the absence of the prison offering any alternative, effectively barred uneducated and illiterate prisoners from exercising the "right to apply to a federal court for a writ of habeas corpus"[287]—a right the Court later clarified derived from the Petition Clause.

Finally, just a few months after Justice Black retired from the bench, the Court took what it saw as the next natural step under *Johnson* and expanded the *Noerr-Pennington* "lobbying" exception to reach advocacy directed at the courts and the executive.[288] "Certainly," Justice Douglas wrote in reliance on *Johnson*, "the right to petition extends to all departments of Government. The right of access to the courts is indeed but one aspect of the right to petition."[289] Belying this expansive interpretation, the facts of *California Motor Transport Co.* challenged the Court's earlier absolute petition right. Rather than a simple antitrust claim involving allegations of judicial and administrative actions, the association in *California Motor Transport Co.* alleged that a competitor had initiated a flood of judicial and administrative actions as a means to crowd out

281. *Id.* at 429-30.

282. *Id.* at 430.

283. United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 221-22 (1967) (holding that the right to petition protects unions' ability to provide staff counsel to represent membership in workers' compensation claims and that the petition need not be solely for political purposes); Bhd. of R.R. Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1, 7 (1964) (holding that the union members' ability to recommend lawyers to one another for litigation is protected by the Petition Clause because the right to petition the courts cannot be so handicapped).

284. Johnson v. Avery, 393 U.S. 483, 490 (1969).

285. *Id.* at 484, 490.

286. *See id.* at 484-88.

287. *Id.* at 486-87 (quoting *Ex parte* Hull, 312 U.S. 546, 549 (1941)).

288. *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

289. *Id.*

and undermine the associations' own pending actions.[290] The competitor was functionally engaging with the courts and agencies as an advocate, but the alleged purpose of the actions was to blockade the court and agencies from the advocacy of others.[291]

Black's literalist right to petition from *Noerr* that promised unfettered access to formal government institutions began to call out for a limiting principle.[292] Unlike the marketplace of ideas for speech, access to these institutions was a finite resource, and the right to petition could not mean absolute access that disrupted the functioning of government and foreclosed the access of others.[293] That the conduct was unethical, however, would not provide the limit. *Noerr* had confronted a large-scale public relations campaign where the railroad industry had organized fake advocacy associations and engaged in "third party technique" campaigns under the identities of well-known and well-compensated experts, but the Court had still shielded the conduct from the antitrust laws.[294] Later cases further emphasized that the exception in *Noerr* applied to any "concerted effort to influence public officials *regardless of intent or purpose.*"[295]

Maneuvering carefully around these earlier exceptions, the Court seized on some spare language in *Noerr*[296] and crafted what is known as the sham exception to the *Noerr-Pennington* doctrine.[297] Under this exception, the Court declined to shield the association's executive and judicial actions on the ground that the actions were mere "shams"—i.e., not a "concerted effort to influence public officials" but conduct aimed at blocking a competitor's access to government.[298] The Court analogized the sham exception to abuse of government process in many other contexts—for example, obtaining a patent through fraud to block a competitor or bribing a government official.[299] Contrary to *Noerr*'s broad right to petition that shielded advocacy through formal process, the sham exception allowed liability for advocacy that had a

290. *Id.* at 509, 511.

291. *Id.* at 512.

292. *See id.*

293. *See id.* at 515.

294. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 140 (1961).

295. United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965) (emphasis added).

296. *Noerr*, 365 U.S. at 144 ("There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.").

297. *Cal. Motor Transp. Co.*, 404 U.S. at 511.

298. *Id.* at 515-16.

299. *Id.* at 512-13.

tendency to "corrupt the administrative or judicial processes."[300] The sham exception has failed to provide much of a limit. Most notably and with some irony, lower courts have declined to apply the sham exception to the context from which it derived in *Noerr*—that is, legislative petitioning—because abandonment of the formal petition process has left the courts without a baseline against which to gauge improper advocacy.[301] To the Court, our lobbying system of today in Congress is seen as "no holds barred."

4. Conflating the clause into speech

Engagement with government outside of the formal processes offered by litigation and administrative actions presented the Court with an even greater challenge. Black himself struggled to draw this fine distinction. As a former legislator who had served during a period where formal petitioning had receded from view, Black's decontextualized understanding of petitioning defined petitioning so broadly as to include any form of advocacy that addressed legislation. Also, as an absolutist, Black eschewed a First Amendment doctrine that balanced the limitation of a First Amendment right against any government interest, including the continued functioning of government.[302] These two views presented particular challenges in the context of petitioning. In contrast to speech directed at an open marketplace, petitioning addressed direct engagement with government, which could require affirmative government action and had the potential to wholly disrupt government functioning. There are meaningful differences between limiting government interference with a political speech in a park and requiring the government by constitutional fiat to allow the same speech on the floor of Congress or inside a prison, but the Petition Clause doctrine failed to provide the Court the tools to manage these differences.

The Court had begun to establish some limits on the petition right with respect to formal litigation and agency actions, but outside of those formal processes and without the history to guide it, there was little to assist the Court in limiting the right. Had the Court looked to the history, as the Court had with its speech doctrine, it might have provided some formal limits to the petition right. But the history was not before the Court. Given the overlap between the broad petition right and free speech, the Court began to look for

300. *Id.* at 513.

301. *See, e.g.*, Manistee Town Ctr. v. City of Glendale, 227 F.3d 1090, 1094 (9th Cir. 2000) ("The sham exception is more easily applied to litigation, however, than it is to lobbying before executive or legislative bodies."); *see also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 204, at 262 (2015).

302. HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 188-89 (1996); NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 143 (2010); JAMES J. MAGEE, MR. JUSTICE BLACK: ABSOLUTIST ON THE COURT 5 (1980).

limits within the fully developed speech doctrine, eventually conflating the two clauses.[303]

The doctrine of protest was an area in which the Court, including in opinions drafted by Black, began to conflate petitioning and speech early on and so it bears particular mention. In the early 1960s, at the height of the civil rights movement, law enforcement officers arrested over 150 African-American students for entering and protesting on the South Carolina state legislature's grounds in alleged breach of the peace.[304] The students met at a nearby church and walked together to the grounds in order to protest. The purpose of this protest, as described by the students, was

> to submit a protest to the citizens of South Carolina, along with the Legislative Bodies of South Carolina, our feelings and dissatisfaction with the present condition of discriminatory actions against Negroes, in general, and to let them know that we were dissatisfied and that we would like for the laws which prohibited Negro privileges in this State to be removed.[305]

The students challenged their convictions on First Amendment grounds and, in *Edwards v. South Carolina*, the Court held that the students had exercised their First Amendment rights "in their most pristine and classic form."[306] Although the Court did not specify explicitly that it rested its decision on the Petition Clause, it described the protest as a peaceable assembly whereby the students "expressed their grievances 'to the citizens of South Carolina, along with the Legislative Bodies of South Carolina.'"[307] In striking down the convictions as violative of the students' "First Amendment freedoms," the Court noted especially that the legislature was located on the grounds of the protest and was in session on that day.[308]

Later cases struggled, however, to maintain the distinct doctrine of protest as petition, rather than speech. Just a few years after the Court's ruling in *Edwards*, the Court faced a nearly identical set of facts in *Adderley v. Florida*.[309] On an afternoon in Florida, approximately 200 students walked from their nearby school to the local jail in order to protest the jail's discriminatory policy of segregation and the recent arrest of their classmates following another protest.[310] When a number of students declined to leave the jail premises upon

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303. The Court has heard a number of cases that could have been petition cases but were treated as speech. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972); Beauharnais v. Illinois, 343 U.S. 250, 267 (1952) (Black, J., dissenting).

304. Edwards v. South Carolina, 372 U.S. 229, 230 (1963).

305. *Id.* at 230.

306. *Id.* at 235.

307. *Id.*

308. *Id.* at 235 & n.10.

309. 385 U.S. 39, 40 (1966).

310. *Id.* at 44-45.

request by custodians of the jail, the police arrested the students for trespass.[311] Justice Black, writing for the Court, unexpectedly upheld the convictions. Without mention of his expansive petition right, Black distinguished *Edwards* and upheld the law on speech principles, invoking reasoning that sounded in the public forum doctrine familiar to free speech.[312] Unlike the capitol grounds, Black reasoned, the jail had not been traditionally open to the public.[313] Moreover, the students had entered the jail through a driveway not open to public traffic and "without warning to or permission from the sheriff."[314]

The dissent took issue with Black's framing of the case as dealing simply with speech.[315] As an outgrowth of the executive, the jail, the dissent argued, was as much a branch of government as the courts and legislatures, and the Court had defined a broad petition right under *NAACP v. Button* that spanned across all three branches.[316] Given the Court's earlier holdings, whether the jail had been open to the public was immaterial in the dissent's view to analysis of the case under the Petition Clause and was even less important in cases addressing the rights of minorities where the "[c]onventional methods of petitioning may be, and often have been, shut off to large groups of our citizens."[317] The dissent argued vigorously that the students had not disrupted the jail, nor had the students obstructed the entrances to the jail, and they had moved upon request.[318] But a limitless petition right that allowed groups to enter government property, even prisons, at any time and without notice was too much for the Court—and even Justice Black—to bear. Out of necessity, the Court began to back away from its Petition Clause doctrine.

The Court's steady project of conflating the Free Speech and Petition Clauses finally came to a conclusion in a pair of cases brought before the Court in the mid-1980s.[319] In the first, *Minnesota State Board for Community Colleges v. Knight*, the Court reviewed a challenge brought by community college instructors against a Minnesota statute that assigned the instructors a representative with whom the state college would "meet and confer" over college administrative matters and employment terms for the faculty.[320] The

311. *Id.* at 40.

312. *Id.* at 41.

313. *Id.*

314. *Id.*

315. *Id.* at 48-50 (Douglas, J., dissenting).

316. *Id.* at 49-51.

317. *Id.* at 50.

318. *Id.* at 51-52.

319. For an additional case that ignored the speech-petition distinction, see Regan v. Taxation with Representation, 461 U.S. 540 (1983).

320. 465 U.S. 271, 273-75 (1984).

instructors took issue with the statute because it prevented anyone aside from the assigned representative from attending and participating in the meet-and-confer sessions. That the college refused to "meet and confer" with them over college administrative policy and employment terms, the instructors alleged, violated their First Amendment rights. Justice O'Connor, writing for the Court, upheld the law and, without citation to any earlier cases developing the broad petition right, stated in sweeping terms that "[n]othing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues."[321] The Court framed the instructors' argument as one radically more broad than a simple request for access to a public forum. Rather, the Court saw in the instructors' case an effort to create a constitutional right out of whole cloth that would afford individuals a "right to participate directly in government" and would require all branches of government "to afford every interested member of the public an opportunity to present testimony before any policy is adopted."[322]

Such a right, the Court reasoned, "would work a revolution in existing government practices," raise concerns of federalism and separation of powers, and transform our republican form of government into a direct democracy.[323] Nowhere in the opinion does the Court reference the history of the petition process, and later courts have noted that the history was not before the Court at that time.[324] Confronted with a request for an expansive petition right devoid of any limiting principle that the history of the Petition Clause could provide, the Court was unable to envision a more limited form of formal public engagement with the lawmaking process. Consequently, the Court may have stripped the petition right of one of its core distinctive characteristics—that is, the right to formal consideration and response—and conflated implicitly the right to petition and the speech right.

The Court issued the opinion generally recognized as conflating explicitly the Free Speech and Petition Clauses a few months later.[325] In *McDonald v. Smith*, the Court again reviewed a narrow question: whether immunity from libel extended to letters sent to the President.[326] The letters' aim was to disrupt the appointment process for a potential U.S. Attorney whom the letter accused

321. *Id.* at 285.

322. *Id.* at 284.

323. *Id.*

324. We the People Found., Inc. v. United States, 485 F.3d 140, 145 (D.C. Cir. 2007) (Rogers, J., concurring).

325. KROTOSZYNSKI, *supra* note 225, at 157; *see also* Wayte v. United States, 470 U.S. 598, 610 n.11 (1985) ("Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis.").

326. 472 U.S. 479, 480 (1985).

of fraud and other ethical violations.[327] The letters had their intended effect, and the thwarted candidate commenced a libel action.[328] The Court's holding was narrow: even assuming the letters were petitions, they were subject to the libel laws.[329] Despite this seemingly narrow holding, many read the Court's sweeping language in the opinion as the death knell for a distinctive Petition Clause doctrine.[330] In particular, the Court described the right to petition as "cut from the same cloth as the other guarantees of [the First] Amendment," and it held the right "inseparable" from the "freedoms to speak, publish, and assemble."[331] In light of this inseparability, the Court held, "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions."[332]

The Court's conflation of petitioning and speech inspired a flurry of scholarly commentary and criticism.[333] In just a few years following the Court's ruling in *McDonald*, a number of scholars began to unearth the history of petitioning in order to challenge the Court's decontextualized view of the Petition Clause.[334] Two historical pieces, published just months after the Court issued its decision in *McDonald*, provided a detailed history of petitioning at the Founding and stretching back to medieval England and criticized the Court for its failure to recognize the distinctive concerns at issue with the Petition Clause.[335] Many others soon followed, calling for a strengthened and distinctive petition right rooted in an historical understanding of the Clause.[336]

5. An historic revival

In 2011, the Court confronted the historical literature crafted post-*McDonald* for the first time in the context of a contentious employment dispute between a chief of police and his small-town employer in Pennsylvania. In *Borough of Duryea v. Guarnieri*, Charles Guarnieri brought suit against his city employer for retaliation, alleging violations of his Petition Clause rights.[337] Guarnieri had initially brought a public employee grievance pursuant to his

327. *Id.* at 481.

328. *Id.*

329. *Id.* at 483.

330. Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 717 n.431 (2002) (reviewing the literature).

331. *McDonald*, 472 U.S. at 482, 485.

332. *Id.* at 485.

333. *See supra* notes 34-36 and accompanying text.

334. *Id.*

335. *See* Smith, *supra* note 34, at 1153; Higginson, *supra* note 34.

336. *See supra* note 34 and accompanying text.

337. 131 S. Ct. 2488, 2492 (2011).

collective bargaining agreement, challenging his termination as chief of police.[338] In adjudicating the grievance, the arbitrator held that the city had committed procedural errors in processing Guarnieri's termination and ordered Guarnieri reinstated.[339] In processing the reinstatement, the city issued Guarnieri a series of additional job requirements and restrictions, which Guarnieri challenged as retaliatory in a subsequent employee grievance and a § 1983 action.[340]

The lower courts had recently split over whether the content of the grievance must address a matter of public concern in order to obtain protection under the Petition Clause.[341] Following the Court's conflation of the Petition and Free Speech Clauses in *McDonald*, many courts of appeals had begun to import the "public concern" doctrine from the Free Speech Clause, which prohibited retaliation claims against public employers unless the speech was a matter of public concern, into the Petition Clause doctrine of public employee grievances.[342] The Third Circuit in *Guarnieri* split the circuits by declining to apply the public concern doctrine.[343] The Supreme Court granted certiorari.

Writing for the Court, Justice Kennedy recounted the long history of petitioning from Magna Charta to the modern day and emphasized the importance of history in interpreting the Petition Clause as wholly distinct from the right to free speech.[344] Kennedy clarified that, contrary to broad misconception, the Court had not conflated the Free Speech and Petition Clauses in *McDonald* and that the rights aimed at distinct democratic functions: "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs."[345] Belying these distinctions, however, Kennedy went on to apply the public concern doctrine to Guarnieri's grievance.[346] The Court's reasons were pragmatic: to raise every employment dispute to a matter of constitutional significance would result in an inadministrable standard.[347] The same concerns that motivated the public concern doctrine in the context of speech were equally

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at 2493.

342. *Id.*

343. *Id.*

344. *Id.* at 2499.

345. *Id.* at 2495.

346. *Id.* at 2501.

347. *Id.*

presented by employee grievances—namely, that the government needs a limiting principle to allow for less disruption to government operations by employee disputes—and allowing a different standard in the context of grievances could allow easy circumvention of the speech rule.[348] If every public employee grievance was a petition protected by the Petition Clause, as the Court assumed it had earlier held, this left the Court with no limiting principle in order to protect the efficient functioning of government from the flood of potential litigation.[349] The Court acknowledged the history and established a distinct Petition Clause doctrine, but it saw the public concern doctrine as a necessary limiting principle.

Justice Thomas and Justice Scalia were quick to criticize the Court's inconsistent application of the history.[350] Justice Scalia rightly observed that one of the primary functions of petitioning was the resolution of private concerns.[351] As his concurrence described, the "overwhelming majority of First Congress petitions presented private claims."[352] Not only did the protections of the Petition and Free Speech Clauses reside in separate texts in the Constitution, the clauses also served wholly different values.[353] Justice Scalia agreed that the Court would require a limiting principle, but he disagreed that transplanting the public-private distinction at the core of the First Amendment's marketplace-of-ideas values made any sense in the context of other constitutional protections.[354] It would likewise make little sense to say that the exercise of religion in public ought to be a matter of greater constitutional concern than practicing privately or to value due process concerns for public interest litigation over cases adjudicating private matters.[355] Because the rights themselves are wholly different, the public concern at the core of the Free Speech Clause simply has no place in the context of the Petition Clause.[356]

Drawing heavily on the history, Justice Scalia offered instead two other possible limiting principles, each of which bears particular mention here. First, he questioned the Court's presumption that it had earlier held public employee grievances and lawsuits to be petitions subject to protection under the Petition

348. *Id.*

349. *See id.*

350. *Id.* at 2501 (Thomas, J., concurring in the judgment); *id.* at 2503 (Scalia, J., concurring in the judgment in part and dissenting in part).

351. *Id.* at 2505 (Scalia, J., concurring in the judgment in part and dissenting in part).

352. *Id.* at 2504 (quoting 8 DOCUMENTARY HISTORY, *supra* note 138, at xviii).

353. *Id.* at 2504-05.

354. *Id.* at 2506.

355. *Id.* at 2505.

356. *Id.*

Clause.[357] The Court's doctrine establishing lawsuits as "petitions" rested on as shaky ground as the lobbying doctrine; much of it was dicta or ambiguous statutory interpretation with related Petition Clause concerns.[358] Moreover, looking to the history, Justice Scalia found little direct evidence that the petition process ever engaged with courts.[359] If neither Guarnieri's grievance nor his lawsuit obtained Petition Clause protection, Justice Scalia reasoned, then there could be no corresponding suit for retaliation and the suit was clearly limited.[360] Alternatively, assuming that the Petition Clause protected lawsuits and grievances, Justice Scalia offered a second alternative limiting principle: the Petition Clause would protect only petitions brought against the government as a *sovereign* by citizens, rather than filings brought against the government as an *employer*.[361] As Justice Scalia admitted, such a rule would undoubtedly involve some level of ambiguity in application; but it would, at the very least, provide a limiting principle with greater relevance to the underlying right than the Free Speech Clause's public-private speech distinction.[362]

So in *Guarnieri*, the Court began the difficult process of exhuming distinct Petition and Free Speech Clauses from the Constitution and wrestling with the implications of that history for the petition right in the context of executive and judicial petitioning. The Court was receptive to the history and relied on it to clarify its doctrine, but pragmatic concerns brought about by earlier decisions and the parties' own concessions—the parties had litigated the case on the assumption that the grievance and lawsuit were petitions[363]—dampened the Court's reformist spirit.

The Court has yet to address this history in the context of legislative petitioning or lobbying, and courts have begun to speculate that the history could have important effects on the doctrine.[364] Because access to legislatures was of particular concern to the right to petition and because the doctrine around legislative petitioning is less developed, legislative petitioning and lobbying could provide a ripe area for a future Court to develop an independent Petition Clause doctrine. The following sections explore the implications of this contextualized interpretation for the petition right as applied to legislative advocacy and lobbying.

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357. *Id.* at 2502-03.

358. *Id.*

359. *Id.* at 2503-04.

360. *Id.* at 2505-06.

361. *Id.* at 2506-07.

362. *Id.* at 2506.

363. *Id.* at 2492, 2494 (majority opinion).

364. *See, e.g.*, We the People Found., Inc. v. United States, 485 F.3d 140, 145 (Rogers, J., concurring).

III. Implications for the Doctrine

A. Contours of a Contextualized Right to Petition

The contours of the right to petition might appear less anomalous if one recalls that the right predated the invention of American elections by hundreds of years. Unlike the Free Speech Clause, a text often described as having electoral concerns at its core,[365] the Petition Clause protected a form of engagement with government wholly distinct from the majoritarian mechanism of the vote. Although lost to our understanding of constitutional law today,[366] the historical distinction between civil rights and political rights provides a helpful frame to begin to establish the right to petition as more than mere extension of the franchise. Courts in nineteenth-century America recognized a distinction between "civil rights"—or the rights afforded all inhabitants of the United States, regardless of station or demographic—and "political rights," or the rights afforded elites in society to allow for participation in the political process.[367] The latter category included the rights to vote, to hold public office, and to serve on juries, while the former included a broad range of rights and freedoms, including the freedom of speech, freedom to worship, the right to contract, the right to hold property, and the right to sue and be sued.[368] The distinction between civil and political rights was used as a means to justify and explain the extension of these rights to some classes of individuals and not others.[369] To nineteenth-century Americans, it was not the case that white male landholders held all of the rights and that others held none but rather that different classes of individuals held different sets of rights.[370] Although women, free African Americans, Native Americans, and the foreign born suffered extensive injustice and subjugation during this period and beyond, these groups were in some instances at least nominally extended the same civil rights as others. These demographics did exercise property and

365. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948); *see also* Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1823 (1999).

366. *See* Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1208-10 (1992); *see also* G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RES. L. REV. 755, 758 (2014).

367. Tushnet, *supra* note 366, at 1208.

368. *Id.* at 1208-09, 1210 n.17, 1217.

369. *See id.* at 1208-11 (describing civil rights as attached to all people qua people and political rights as reserved to those people designated by a structured political system).

370. *See id.* at 1208-10; *see also* Ahkil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1164 (1991).

contract rights, as well as bring suits in court.[371] White male landholders, on the other hand, enjoyed civil rights as well as the political power of the franchise.[372]

Historically, the right to petition afforded not a political right but a "civil" right and was open to all inhabitants equally.[373] Exercise of the right was not limited to the elite but was afforded to the politically powerful and powerless alike.[374] Jury service, voting, and holding elected office all involved majoritarian decisionmaking and hewed closely to the structure and function of the political process. By contrast, petitioning constituted more than a mere extension of these political rights. Like other civil rights, the right to petition afforded individuals the ability to engage with government even in the absence of the franchise and without the consideration of political power generally at issue in the electoral process.

In addition to functioning as a civil right, the right to petition was also an individual right. Some scholars, including Akhil Amar, have argued that the text and structure of the Petition Clause reveal a particularly majoritarian core.[375] By contrast, the Court has recently taken the position that the right to petition is an individual right and not a "collective" or majoritarian right.[376] This divergence between the Court and the scholarly literature is likely due to the Court's conclusion that the Petition Clause is wholly distinct from the Assembly Clause that precedes it.[377] Other readings of the First Amendment, Amar's included, lean heavily on the collective language of the Assembly Clause in articulating the collective and majoritarian nature of the right to petition.[378] In addition to conjoining assembly and petition, Amar reads "the people" of the First Amendment as an invocation of popular sovereignty and an echo of the Founding-era calls for convention. Although the text and structure of the Petition Clause might support Amar's interpretation, the historical record largely supports the minority and individual view. While the petition process served as a vehicle for social organization and mobilization of many marginalized groups,[379] the petition right was in the main a tool for

371. Amar, *supra* note 370, at 1164.

372. *See id.*

373. AHKIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 30 (1998) (describing earlier formulations of the right to petition as a civil right and not a political right).

374. *See supra* Part I.A.

375. AMAR, *supra* note 373, at 30-32.

376. District of Columbia v. Heller, 554 U.S. 570, 579 (2008).

377. *See id.* at 579 n.5.

378. AMAR, *supra* note 373, at 30.

379. *See generally* Daniel Carpenter & Colin D. Moore, *When Canvassers Became Activists: Antislavery Petitioning and the Political Mobilization of American Women*, 108 AM. POL. SCI. REV. 479, 479-81 (2014) (describing petitioning as crucial in the development of

individuals and minorities.[380] The phrase "the people" in what became the First Amendment largely echoed the broad language of state constitutions, which provided the right broadly to all "people." Moreover, as Amar has recognized elsewhere, the drafters of the First Amendment rejected the right of instruction, or the ability to bind lawmakers to majority will, describing petitioning as a process distinct from instruction.[381] Rather, the right contained a strong quasi-adjudicative component and often served as a stopgap measure to remedy injuries for which no clear cause of action existed.[382] Legislatures were able to resolve by statute what courts did not have the ability to resolve through existing law, and litigants often converted complaints into petitions in order to receive redress.[383] In this way, as well as others, the historical petition right served as a platform for minority voice in the lawmaking process.

What the history of petitioning reveals is that the right to petition has more in common with the right to procedural due process than it does with free speech.[384] The historical right to petition also provided a much more comprehensive and robust petition right than is recognized today. Similar to the due process right that governs judicial conduct, the petition right governed congressional procedure. The right was limited, however, to procedural protections only; nowhere did it guarantee a favorable policy outcome or secure substantive rights. The petition right preserved only the procedures of

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women's political participation in advocacy campaigns against slavery and later for suffrage).

380. *See supra* Part I.A.

381. Amar, *supra* note 370, at 1154-56.

382. *See supra* Part I.A.

383. Higginson, *supra* note 34, at 145.

384. Jerry Mashaw's dignitary due process theory in the context of administrative adjudication provides a helpful overview of the general values implicated by procedural due process, including the "appearance of fairness"; "equality"; and "predictability, transparency and rationality." *See* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 482-91 (1986) (reviewing Mashaw's dignitary due process theory as a framework for noninstrumental values underlying the due process right). Recent work has drawn these values into the political realm to argue for proceduralism as a normative defense of democracy writ large. *See, e.g.*, Maria Paula Saffon & Nadia Urbinati, *Procedural Democracy, the Bulwark of Equal Liberty*, 41 POL. THEORY 441, 443-45 (2013). Maria Paula Saffon and Nadia Urbinati, building on early twentieth-century theorists Hans Kelsen and Norberto Bobbio, propose democracy as the best protection for equality and liberty in a pluralist society because it provides the means for collective decisionmaking without substantive demands on outcomes. *Id.* Most importantly, a proceduralist view of democracy would require not simply rights-based limitations on majority lawmaking but also mechanisms of participation for the minority in the lawmaking process. *Id.* at 459-60. Petitioning would provide one such mechanism.

acceptance, consideration, and response[385] for each petition without respect to the political power of the petitioner.[386] The petition right also shared the principles of transparency that underlie the due process right. In compliance with Article I's Journal Clause,[387] the process of consideration for each petition was by default a public process, and members read each petition aloud on the floor; included actions on petitions in the congressional record; and provided petitioners with formal, written responses.[388] The right was also guaranteed. If Congress had jurisdiction to act on a petition and the petition was properly filed, then it afforded that petition formal process.[389] The process afforded each petition was provided according to the merits of each petition and not according to the political power of the petitioner. Also, as directed by the Rules Clause of Article I,[390] Congress established formal rules that governed the consideration of petitions and published those rules in the formal procedural manuals for each house.[391]

However, the historical right to petition protected a substantially narrower right than that recognized by the Court today. In particular, the historical right concerned direct engagement with government only. The right to petition, unlike the right of free speech, concerned legislative advocacy directed toward government and solely through specific, formal channels. Any broader advocacy, even advocacy directed ultimately at legislative reform through electoral action or otherwise, that utilized channels outside those

385. Stephen Higginson has argued persuasively that the colonists' outrage over the British Crown's failure to respond to their petitions lends strong support to the theory that the Petition Clause required a response. Higginson, *supra* note 34, at 155; *see also* AMAR, *supra* note 373, at 31 ("[T]he right to petition implied a corresponding congressional duty to respond, at least with some kind of hearing."). Hundreds of years of past practice lend support also, wherein colonial, state, and federal legislatures expended valuable resources reading petitions into the record, providing the petitions with a fair hearing, and deciding to grant or deny the petition. *See supra* Part I.A. Given the extensive support for such a theory, it comes as some surprise that Higginson identifies the gag rule debates of the 1830s and 1840s, enacting a blanket ban on all antislavery petitions, as the "abrupt" end of the right to petition. *See* Higginson, *supra* note 34, at 165. Not only does this presumption generalize the contours of a constitutional right from a few highly controversial debates in Congress, it ignores two contrary points: First, it was hardly the death of the petition right; Congress upheld its obligation to respond to petitions for over one hundred years following the gag rule debates. *See* Schneer, *supra* note 172, at 18. Second, like the Revolution, the failure of the petition process over the issue of slavery was followed by war about twenty years later when the South attacked Fort Sumter in Spring of 1861.

386. *See supra* Part I.A.

387. U.S. CONST. art. I, § 5, cl. 3.

388. *See supra* Part I.A.

389. *See id.*

390. U.S. CONST. art. I, § 5, cl. 2.

391. *See supra* Part I.A.

established by government—including speech directed at the public marketplace, newspaper articles, pamphlets, and even protest—would likely fall outside of the Petition Clause's protections. This is not to say that such action would fail to obtain any constitutional protections whatsoever. As core political speech, these actions would likely implicate the Free Speech Clause, and it is entirely likely that the Free Speech Clause would have provided a more appropriate framework to analyze earlier Petition Clause challenges. However, the relationship between the speech and petition rights, especially when the two come into conflict, is in need of future scholarly attention. Much of the Petition Clause doctrine to date has assumed these rights to be coextensive, largely because the Court has often referred to them interchangeably, without any real analysis of how the two rights can and should interact.[392]

B. Implications for the Doctrine

The historical petition right could begin to provide a strengthened, but narrowed, framework to structure future Petition Clause analysis. The impact that a contextualized right to petition could have on our Petition Clause doctrine is twofold: unsettling[393] and unbundling.

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392. *See, e.g.*, Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2491-92 (2011). Once the Court begins to address this question head on, it could have drastic implications for the doctrine. The relationship between free speech rights and other equivalent rights, like due process for court proceedings, is complicated, and free speech rights are often seen as wholly curtailed by the demands of competing rights. *See, e.g.*, Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884, 889-90 (2009) (developing a distinctive doctrine for campaign finance in the context of judicial elections because of the procedural due process concerns at issue in courts); Gentile v. State Bar of Nev., 501 U.S. 1030, 1070-71 (1991) (noting that attorneys' free speech rights inside and outside of court are properly circumscribed by ethical restrictions that preserve the integrity of judicial functions); *see also* Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2350 (2011); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 569 (1998).

393. Unsettling, as I use the term here, is not equivalent to "unsettlement theory" as developed by Louis Seidman to describe the Court's role in "unsettl[ing]" wins and losses during the political process. *See* LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2001). There have been no real wins or losses through the political process here because taken-for-granted assumptions have likely preempted the question. Rather, unsettling here refers to an attempt to suspend and interrogate the doxa, "the world of tradition experienced as a 'natural world' and taken for granted." PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 164 (Richard Nice trans., Cambridge Univ. Press 1977) (1972). Unsettling here means the constitution of a "field of opinion" or a "critique which brings the undiscussed into discussion, the unformulated into formulation." *Id.* at 168. Unsettling is important because "[t]he political function of classifications is never more likely to pass unnoticed than in the case of relatively undifferentiated social formations, in which the prevailing classificatory system encounters no rival or antagonistic principle." *Id.* at 164.

An important contribution of a clarified petition right would be to unsettle the presumption that the Supreme Court has held definitively that the Petition Clause protects all forms of lobbying. This presumption has led to confusion in the doctrine and a lack of reflection in application of the First Amendment and has frustrated efforts to regulate lobbying.[394] Many courts now simply assume without analysis that petitioning and lobbying are synonymous.[395] In a fairly recent example, the D.C. Circuit struck down a Department of Commerce regulation, promulgated in response to an Obama Administration presidential memorandum, banning registered lobbyists from serving on certain advisory commissions on the ground that it was an unconstitutional condition on the lobbyists' Petition Clause rights.[396] In support of the court's presumption that lobbying was protected under the Petition Clause, Judge Tatel, writing for the court, cited to a single 1968 D.C. Circuit opinion that implicated the Petition Clause only tangentially.[397] Rather, the 1968 opinion addressed whether the freedom of speech protected the right of a newspaper to publish documents stolen from a lobbying firm by one of the firm's employees.[398] The two-page opinion referenced the Petition Clause only once, when discussing whether the stolen documents would implicate the public interest.[399] In dicta, the opinion presumed, without analysis or support, that any lobbyist attempting to persuade Congress, presumably by any means, exercises her right to petition and, therefore, the exercise of that right must also fall into the public interest.[400] In drafting *Autor*, the D.C. Circuit relied on dicta from that single 1968 opinion, strengthened no doubt by the Obama Administration's *concession* that lobbying is protected by the Petition Clause, to strike down the ban. Given the nearly ubiquitous presumption that lobbying must be protected under the Petition Clause,[401] the decision prompted little outcry. The Obama Administration declined to petition for certiorari and, instead, quickly amended its policies on lobbyist public service. Contrary to the government's concession in *Autor*, the Supreme Court has yet to resolve the issue of whether the Petition Clause protects lobbying. Both a closer examination of the current doctrine and recognition of the history could begin to highlight the lack of foundation to this assumption.

Second, a contextualized petition right would force an unbundling of the activities we currently conflate into the term "lobbying." A close interrogation

394. *See supra* Part II.B.

395. *See* Autor v. Pritzker, 740 F.3d 176, 182 (D.C. Cir. 2014).

396. *Id.* at 177-78.

397. *See id.* at 182.

398. Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 490 (D.C. Cir. 1968).

399. *Id.* at 491.

400. *See id.*

401. *See supra* text accompanying note 33.

reveals that lobbying is not one single practice but an amalgam of a broad range of advocacy practices, some triggering more constitutional concern than others.[402] The conflation of these advocacy practices into a single term has led some scholars to suggest that "lobbying" ought to obtain strengthened First Amendment protection or, at the very least, protection under a First Amendment "penumbra" because a "bundle" of practices necessarily implicates a "bundle" of First Amendment protections. Unbundling "lobbying" into a clear articulation of what advocacy practice is at issue in a particular case could bring much-needed clarity to our scholarship and doctrine.

In particular, unbundling could begin to clarify important distinctions between speech, petitioning, and lobbying. Cases like *Noerr*, which addressed the constitutional protections of a lobbying campaign directed at the public through speeches and the press,[403] would fall under the Free Speech Clause, rather than the Petition Clause. Given that the Court has already conflated the speech and petition doctrines in these areas, the substantive impact of converting these to free speech cases, including the *Noerr-Pennington* doctrine, would be negligible. Clarity in the doctrine could, however, allow the Court to develop an independent framework specific to the particular needs and functions of the petition right. Second, a contextualized petition right could provide enough structure to support an independent Petition Clause doctrine. As in *Guarnieri*, the Court has often reflected on history in developing its First Amendment jurisprudence and the broader concerns structuring its free speech analysis often source from this historical reflection.[404] A contextualized petition right could provide structure and a limiting principle to the doctrine and, most importantly, prevent the Court from again conflating petitioning with speech. Moreover, as noted, a distinct Petition Clause doctrine would provide the analytic space to articulate the relationship between the Petition and Free Speech Clauses, no longer assuming they are coextensive simply because of prior doctrinal conflation.

Although complete analysis of the implications of a contextualized petition right for our current doctrine is beyond the scope of this Article, the balance of this Subpart will provide a few examples as illustrations of how the right could impact past and future issues in our lobbying and petitioning doctrine. Part III.B.1 looks backward to explain a longstanding puzzle at the

402. To provide some examples: "lobbying" that consists of public-directed advocacy during an election, even aimed at influencing legislative outcomes, would fall into the heart of the Free Speech Clause; "lobbying" consisting of direct engagement with government through the formal petition process would fall under Petition Clause protections; "lobbying" consisting of campaign contributions would fall under the Free Speech Clause and the *Buckley* doctrine; whereas "lobbying" consisting of threats and bribes would obtain no protections whatsoever.

403. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 129, 138 (1961).

404. *See* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2499 (2011).

heart of lobbying law that the historical petition right might resolve. Part III.B.2 describes issues looming on the horizon for our lobbying doctrine, identified in recent election law scholarship, which a contextualized petition right could avoid. The following Part, Part IV below, looks beyond the current doctrine to analyze the constitutionality of our current lobbying system under a contextualized petition right.

1. Making sense of contingency fee contracts

The core of lobbying law has long held a puzzle that a contextualized petition right could resolve. For the past seventy years, the Court has raised the possibility of First Amendment concerns when faced with the slightest restriction on lobbying activity. Belying these constitutional considerations, for much of this nation's history, legislatures and courts have criminalized lobbying and voided lobbying contracts as against public policy without mention of the First Amendment. Zephyr Teachout recently crafted a careful and thoughtful review of this history, concluding that the distinction between earlier cases treating lobbying as a criminal act and later cases invoking First Amendment protections was rooted in a shift in both contract and constitutional law from the nineteenth to twentieth centuries.[405] As Teachout describes, the turn of the twentieth century brought a shift in the courts' usage of contract enforcement as a means to legislate in preservation of public policy.[406] In the early 1900s, criminal law, specifically bribery charges, became the primary tool for courts to confront the corruption concerns raised by lobbying contingency fee contracts.[407] It was this shift in doctrine, Teachout argues, that explains the difference in treatment of lobbying from the earlier contract cases to the Petition Clause cases like *Harriss*.[408]

The history of petitioning provides an alternative, simplified solution to the apparent tension in the lobbying doctrine. The right to petition, as it was exercised in *Harriss*, protects formal engagement with government. The right does not protect, however, efforts to circumvent and undermine that formal process by engagement with Congress through informal means.[409] Contracts struck down by the courts include services such as "procuring legislative action . . .by personal solicitation," the sale of "personal influence to obtain the passage of a private law," and an agreement that a lobbyist would "use his influence to ensure the passage of a law."[410] A court would just as likely void a

405. Teachout, *supra* note 3, at 6.

406. *Id.* at 17-19.

407. *Id.* at 17.

408. *Id.* at 17-19.

409. *Id.* at 19.

410. *Id.* at 7, 8, 10.

contract between a lawyer and a client for litigation services that included intentionally violating the established rules of civil procedure and using personal relationships to secure additional access to the judge to discuss the case, as it would void a contract for similar services in the context of Congress. In striking down contracts for lobbying services, the courts were explicit, however, that contracts for services in circumvention of the formal petition process by engaging with Congress through informal means were voidable, while contracts for representation during the formal petition and legislative process were not.[411] The courts made clear that the latter contracts would not be against public policy and might even obtain constitutional protection.[412]

While Teachout's explanation for the tension in the doctrine could hold true, the contextualized petition right provides a simpler explanation: the Petition Clause protects only that conduct in comportment with the formal process and not efforts to engage informally with Congress. Contracts for services that circumvent the petition process would not obtain constitutional protection.

2. Lobbying is not the new campaign finance

Finally, an increasing number of scholars, primarily from the election law community, have begun to speculate that the Court's steady dismantling of the campaign finance regulatory framework under the Free Speech Clause doctrine of *Buckley v. Valeo*[413] and especially its progeny, *Citizens United v. FEC*,[414] raises strong concerns about the constitutionality of any lobbying regulation, including our current disclosure regimes.

Elizabeth Garrett, Ronald Levin, and Theodore Ruger first raised the issue in their chapter in the lobbying bible, *The Lobbying Manual*.[415] As they describe it, the foundational regulatory scheme governing lobbyists, the Lobbying Disclosure Act, "is primarily justified on the ground that it combats political corruption," and, therefore, the disclosure provisions that compelled lobbyists to share data on quarterly expenditures could run afoul of the *Buckley* doctrine if not narrowly tailored enough to address quid pro quo corruption.[416] In particular, Garrett, Levin, and Ruger took issue with the fact that the lobbying expenditure disclosure requirements did not require disclosure of *enough* information, including more detailed information tying expenditures to

411. *See id.* at 9.

412. *See id.* at 19.

413. 424 U.S. 1 (1976) (per curiam).

414. 558 U.S. 310 (2010).

415. Elizabeth Garrett et al., *Constitutional Issues Raised by the Lobbying Disclosure Act*, *in* THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE, *supra* note 183, at 197, 199.

416. *Id.* at 201.

specific lawmaker targets, which they argue would more closely target disclosure of a quid pro quo relationship.[417] The absence of a clear tie between the disclosure requirements and the ability to discern a quid pro quo relationship left the regime on a shaky foundation under the *Buckley* doctrine, assuming a corruption-based state interest.[418]

Following the *Citizens United* decision in 2010 and its constriction of the corruption state interest, Rick Hasen published a comprehensive treatment of lobbying law, declaring all future lobbying regulation under fire and offering a new state interest in "promoting national economic welfare" as a motivation for future regulation.[419] If lobbying regulation had been on shaky footing before the Court issued *Citizens United*, Hasen declared that the lower courts would use the "[Supreme] Court's new deregulatory campaign finance jurisprudence" to steadily dismantle all forms of lobbying regulation.[420]

In support, Hasen provided two examples: First, the Second Circuit in *Green Party of Connecticut v. Garfield* applied *Citizens United* to strike down a Connecticut law that banned campaign contributions from lobbyists, the lobbyists' spouses, and the lobbyists' dependent children to candidates for state office and banned lobbyists from soliciting contributions, or fundraising, on behalf of a candidate.[421] Second, the Southern District of Ohio in *Brinkman v. Budish* applied *Citizens United* to strike down an Ohio revolving door ban that prohibited former state lawmakers and their staff from appearing before the state legislature as lobbyists for a year after leaving public service.[422] To Hasen, these decisions marked the rising tide of challenges that lobbying regulation faced after *Citizens United*.[423]

Hasen's article also followed on the heels of a number of election law scholars, most prominently Richard Briffault and Heather Gerken, who declared lobbying to be the "new campaign finance" and called for increased attention to the topic in the burgeoning field of election law.[424] This declaration was not simply the reformer's spirit looking for a more fruitful avenue of reform. Gerken described the two as inseparable, both factually and theoretically:

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417. *Id.* at 201-02.

418. *Id.*

419. Hasen, *supra* note 3, at 197.

420. *Id.* at 195.

421. *Id.* at 195-96; *see also* Green Party of Conn. v. Garfield, 616 F.3d 189, 192-93 (2d Cir. 2010).

422. Hasen, *supra* note 3, at 196; *see also* Brinkman v. Budish, 692 F. Supp. 2d 855, 858 (S.D. Ohio 2010).

423. Hasen, *supra* note 3, at 195.

424. *See* Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL'Y REV. 105, 105 (2008); Gerken, *supra* note 5, at 1155.

> Money is just a visible symptom of the hydraulics of political influence. If we think about campaign finance in these terms, it is hard to imagine why anyone would neglect lobbying. It is the other natural means of seeking political influence. As long as lobbying and campaign finance work in tandem with one another, we should not study one without studying the other. Both are simply different means to achieve the same set of political ends. They are not isolated systems that are separate from one another.[425]

Briffault shared Gerken's perspective that lobbying and campaign finance were largely similar in that they are both "vital to representative democracy," involve information and communication, raise common concerns about unequal wealth and unequal influence in the political process, and inspire concerns over improper influence or corruption.[426] Briffault, however, went on to develop some of the distinctions between lobbying and campaign finance, including noting some important differences in the role of political equality between the two practices:

> Political equality plays a far smaller role in lobbying regulation. . . . Operationally, it is difficult to imagine a set of rules that could give each adult resident citizen an equal say on every issue subject to lobbying without choking off lobbying itself. Capping the amounts an individual or group could spend either on hiring a lobbyist or on lobbying personally would cut directly into the amount of lobbying the individual or group could undertake.[427]

Rather than claiming that egalitarianism held no place in the context of lobbying, Briffault called for a form of equality theory that comports with the specific concerns of the petition process.[428] Unlike the *equality of influence* generally espoused by election law scholars in the context of elections and the value of "one person, one vote," however, Briffault recognized that engaging with the lawmaking process demanded a different kind of equality—namely, a *procedural equality*, akin to equality of access to courts:

> All citizens have a formal equal right to seek to lobby their legislature, and all individuals, organizations, or interest groups affected by a legislative proposal should have an equal opportunity to present their case to the legislature. . . . This, however, is not a matter of the political equality of individuals per se, but of structuring fair competition among contending interest groups.[429]

Given the dearth of scholarship focused on lobbying and petitioning, the growing attention by the election law community to the issue of lobbying and lobbying regulation is most welcome. But as earlier parts describe, it is unclear whether the election law frames of the electoral process and the Free Speech

425. Gerken, *supra* note 5, at 1162.

426. Briffault, *supra* note 424, at 107-08.

427. *Id.* at 113.

428. *Id.* at 113-14.

429. *Id.* at 114.

Clause, as well as the community's ongoing debates over political equality[430] and political corruption,[431] are appropriate for the particularities of the law of lobbying. Our current lobbying system is no doubt entrenched deeply in our system of campaign finance. As Briffault recognized, however, the important questions and concerns in the context of petitioning during the lawmaking process are different from and often in tension with the concerns of elections and campaign finance.[432] Most notably, the electoral process serves as a mechanism of representation that aims to capture the will of the majority, while the petition process provides a counterpoint mechanism of representation for minorities and individuals to engage in the lawmaking process.

The history of petitioning and the specific text of the Petition Clause counsel against conflation of the electoral and the legislative processes. These two contexts present wholly different dynamics. Elections rely on a majoritarian decision rule to select the composition of Congress, a rule necessarily dependent upon equality of influence, and involve political speech that falls into the core of the Free Speech Clause and its "marketplace of ideas" model. By contrast, the mechanism of petitioning rejected a majoritarian decision rule and instead established a platform for engagement during the lawmaking process, like that of a court, to give voice to individual and minority grievances. Unlike speech in the context of elections, petitioning is not directed at influencing public discourse, electoral outcomes, or the

430. *Id.* at 113-14.

431. *Id.* at 108. One potential exception is the theory of institutional corruption developed by Lawrence Lessig. LAWRENCE LESSIG, REPUBLIC, LOST: THE CORRUPTION OF EQUALITY AND THE STEPS TO END IT 238 (rev. ed. 2015). Unlike other theories of political corruption, Lessig's institutional corruption focuses on systemic corruption, or ways in which intended mechanisms of representation are undermined or "corrupted" by competing mechanisms. *Id.* at 18. His paradigmatic example is that of the "green primary," or a private market for campaign fundraising that decides which candidates are able to run in an election based on how much the campaigns can raise from the wealthy. *Id.* at 11-16. Citizens can still technically vote for the candidates selected by the green primary, but the structure of our electoral system is "corrupted" by this earlier process that makes our votes less functional. *Id.* Scholars of the First Amendment might recognize strong parallels between this instance of institutional corruption and that of Robert Post's "electoral integrity." *See* ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 60 (2014); *see also* Doe v. Reed, 561 U.S. 186, 198 (2010) (recognizing the state interest of "electoral integrity" in the context of ballot initiatives). However, Lessig's theory of institutional corruption sweeps more broadly than elections and could capture some of the dynamics of our lobbying system as well. Similar to the green primary that corrupts our intended electoral system, lobbying is an institutional corruption of the petition process envisioned by the Petition Clause.

432. Briffault, *supra* note 424, at 109-10.

marketplace of ideas.[433] Given these differences, conflation of the mechanism of the vote and the mechanism of petitioning makes little sense and could undermine efforts to design and enact a system of public engagement with the lawmaking process that satisfies the particular countermajoritarian function that petitioning was intended to serve.

This conflation also does not bode well for clarity in the doctrine. Without much reasoning or support, the lower courts have begun to assume that the *Buckley* doctrine applies to all lobbying regulation. Such an approach overlooks critical constitutional distinctions between regulation of the electoral process and regulation of the lawmaking process. Hasen highlights one poignant example in *Brinkman v. Budish*,[434] where the Southern District of Ohio applied *Citizens United* to strike down an Ohio revolving door ban—a law that prevented former state lawmakers and their staff from petitioning the lawmaking process for one year after public service.[435] Without reflection on the important distinctions between *Brinkman* and *Green Party of Connecticut*, Hasen relies on these two cases to declare a new era for all attempts to regulate lobbying post-*Citizens United*.[436] While Hasen's concern over judicial deregulation might ring true in the context of lobbyist participation in the campaign finance system—the area of regulation challenged in *Green Party of Connecticut*—the ban on petitioning challenged in *Brinkman* presents an entirely different question.

Buckley and its progeny have developed as a doctrine specific to speech and, in particular, speech and the financing of speech in the context of electoral campaigns.[437] This doctrine has clear application to a First Amendment challenge to the Connecticut campaign finance laws challenged in *Green Party of Connecticut v. Garfield*.[438] By contrast, the ban on petitioning challenged in *Brinkman* holds no clear relationship to campaign finance or the electoral process whatsoever.[439] While *Citizens United* included some loose language

433. *See* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2495 (2011) ("The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs.").

434. Hasen, *supra* note 3, at 196; *see also* Brinkman v. Budish, 692 F. Supp. 2d 855, 858 (S.D. Ohio 2010).

435. Hasen, *supra* note 3, at 196.

436. *Id.* at 195-96.

437. Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam) (holding that provisions limiting the amount which any individual could spend independent of a particular candidate impermissibly abridged freedom of speech); Citizens United v. FEC, 558 U.S. 310, 319 (2010) (holding that the government may not, under the First Amendment, suppress political speech on the basis of the speaker's corporate identity).

438. 616 F.3d 213, 245 (2d Cir. 2010).

439. Brinkman v. Budish, 692 F. Supp. 2d 855, 863 (S.D. Ohio 2010).

regarding lobbying law,[440] nothing in that case dealt with lobbying regulation, petitioning, or the Petition Clause. Rather than ushering in a new era for all lobbying regulation, it is likely that *Brinkman* was simply an outlier case that wrongly applied a free speech doctrine to a Petition Clause case.

The application of *Buckley* and its progeny to regulation of the petition process is likely a mistake of the ligation process. As Garrett, Levin, and Ruger observed, as campaign finance and lobbying have become all the more entwined, most governments describe their lobbying regulations as motivated by an interest in preventing corruption. When asked by the Southern District of Ohio in *Brinkman* why it had passed its lobbying ban, the Ohio government proffered that it had passed the law to prevent corruption and the appearance of corruption. Among other corruption concerns, Ohio wanted to prevent the corruption that would occur from former legislators "using their close relationships with former colleagues and special knowledge of the legislative process to gain access as lobbyists in ways that provide them unequal access to public officials [in comparison] to that of others petitioning the government."[441] In interpreting whether Ohio had met the proper standard to prove the corruption state interest, the court turned to the *Buckley* doctrine—specifically *Citizens United*—the only doctrine that defines the corruption state interest.[442] In determining whether unequal access to lawmakers during the lawmaking process would constitute corruption, the court responded that under *Citizens United*, a case that noted explicitly that unequal access was not corruption, it would not.[443] Not only does conflation of campaign finance and lobbying in the election law scholarship risk missing the theoretical nuances specific to petitioning, it risks a similar dismantling of lobbying regulation under the Free Speech Clause as that fated to campaign finance reform.

IV. Contextualizing Our Current Lobbying System

A. Our Current Lobbying System

Although lobbying and money in politics are increasingly vilified for "corrupting" our political process, little empirical evidence exists to support

440. *Citizens United*, 558 U.S. at 369.

441. *Brinkman*, 692 F. Supp. 2d at 863 (alteration in original).

442. *Id.*

443. *Id.* It also bears noting that, even if a litigant should raise a challenge to regulation of the petition process under *Buckley*, the Court could always hold the doctrine inapposite on other grounds. Specifically, regulation of the petition process is better suited to the campaign finance doctrine developed for the judiciary, in the context of due process rights, and distinguished explicitly from *Buckley* in *Citizens United*. *See Citizens United*, 588 U.S. at 360.

the conclusion that undue influence causes lawmakers to shift their votes.[444] Despite the best efforts of generations of political scientists, empirical studies of Congress have found only indeterminate evidence that campaign contributions and political power lead to more favorable policy outcomes. The few studies that have focused on lobbying exclusively have reached similar conclusions, finding little correlation between positive substantive outcomes and lobbying expenditures.[445] The steady influx of millions of dollars in campaign contributions and billions of dollars expended on lobbying reminds empiricists, however, that rational political donors continue to find a reason to invest in lobbying and campaign contributions. As a consequence, despite years of dissatisfying findings, political scientists continue to try to find an empirical connection between resources and influence on outcomes. This struggle has only intensified in the years following *Buckley v. Valeo* and the Court's use of the doctrine to steadily dismantle Congress's ability to regulate the political process and to narrow "undue influence" to quid pro quo transactions.

By contrast, it has been settled for decades that Congress affords greater consideration and access to the lawmaking process to those who have provided campaign contributions and to the politically powerful. Political theorists have long speculated that contributions and political power bought access in Congress.[446] But starting in the 1980s, empiricists dissatisfied with the inability to find a correlation between political money and roll call votes turned their methods to study other measures of influence on the lawmaking process.[447] Using survey data that charted time usage by a random sample of members of the House from the ninety-fifth Congress combined with FEC data on campaign contributions, Laura Langbein found that PAC contributions significantly increased the likelihood that an interest group would gain access to a lawmaker with the "cost" of lawmaker time ranging from $6400 for less than twenty-five minutes to $72,300 for an hour with a lawmaker.[448] A few years later, Richard Hall and Frank Wayman used interviews and markup records to study the relationship between PAC contributions and the allocation

444. *See, e.g.*, Stephen Ansolabehere et al., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 116 (2003).

445. *See, e.g.*, FRANK R. BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 25 (2009).

446. J. David Gopoian, *What Makes PACs Tick?: An Analysis of the Allocation Patterns of Economic Interest Groups*, 28 AM. J. POL. SCI. 259, 262 (1984); James F. Herndon, *Access, Record, and Competition as Influences on Interest Group Contributions to Congressional Campaigns*, 44 J. POL. 996, 997 (1982); Alexander Heard, Money and Politics 14-15 (Public Affairs Pamphlet No. 242, 1956).

447. Laura I. Langbein, *Money and Access: Some Empirical Evidence*, 48 J. POL. 1052, 1053 (1986).

448. *Id.* at 1059-61.

of access and attention to an issue in three congressional committees.[449] Hall and Wayman found a strong correlation between campaign contributions to members already ideologically aligned with an issue and increased access to those members and increased attention by those members to the donor's issue.[450]

More recent studies have confirmed earlier results. A randomized field experiment of 191 congressional offices revealed that senior policymakers made themselves available for a meeting three-to-four times more often if the person trying to schedule the meeting was an identified campaign contributor.[451] The presumption that access to lawmakers is contingent on a relationship with that member, built through campaign contributions and other forms of electoral power, has become profoundly uncontroversial. Taking the correlation between access and political power as given, political scientists have now started to focus on analyzing stratification within politically powerful groups. They are finding even further entrenchment of who gains access to lawmakers as the costs of building relationships with members increase over time.[452] Unlike campaign contributions affecting policy outcomes, the fact that Congress affords access and process unequally and based on political power has become settled doctrine in political science.

It is perhaps even less controversial to claim that those who are able to muster the political capital to secure access to lawmakers are afforded wholly arbitrary, informal, and unequal process. As Langbein's findings demonstrate, the amount of time spent with a lawmaker correlates closely with the political power of the individual securing the meeting, so the less politically powerful can expect far less time and, by inference, less process devoted to their issues as a result.[453] The little process that petitioners can expect, if any, is incredibly informal, and no standards exist to provide minimum requirements or ethical guidelines.[454]

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449. Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 798 (1990).

450. *Id.* at 798-99.

451. Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, AM. J. POL. SCI. (forthcoming), http://onlinelibrary.wiley.com/doi/10.1111/ajps.12180/epdf.

452. *See, e.g.*, Thomas Groll & Maggie McKinley, *Modern Lobbying: A Relationship Market*, CESIFO DICE REP., Autumn 2015, at 15; Thomas Groll & Christopher J. Ellis, *Dynamic Commercial Lobbying* (Ctr. for Econ. Studies & Ifo Inst., Working Paper No. 4114, 2013) (on file with author); Lee Drutman et al., The Interest Group Top Tier: More Groups, Concentrated Clout (Aug. 21, 2014) (unpublished manuscript), http://ssrn.com/abstract=2453733.

453. Langbein, *supra* note 447, at 1057-60.

454. *See, e.g.*, Deanna R. Gelak, *Communicating with Congress*, *in* THE LOBBYING MANUAL, *supra* note 183, 605, 605-18 (describing the lobbying process); Thomas Ross, *Ethics Law and the Lawyer/Lobbyist*, *in* THE LOBBYING MANUAL, *supra* note 183, at 689, 691-94

By contrast to our historical petition process, which was governed by formal rules, public process, and nonarbitrary consideration, our current lobbying system consists entirely of informal and opaque norms, customs, and practices. An individual who wants to engage with the lawmaking process in Congress could obtain a meeting with a member or her staff at which the individual could deliver her "one-pager," a customary lobbying document that outlines the policy issue, and her "ask," a request for specific legislative action.[455] But she could also receive no response to her request to meet—instead she might have to meet with a member at a fundraiser for the member's campaign and deliver her "one-pager" and her "ask" along with her contribution of $1000 for individuals or $2500 for a PAC.

When it comes to our lobbying system of today, no procedure is guaranteed and there are no clear rules. Contrary to historical congressional practice, neither chamber drafts parliamentary rules outlining the procedures of our current lobbying system. Unlike court process, the default expectation is that contact with the legislature will be shielded from public view, and no public record exists to provide the due process protections that public scrutiny affords. The informality and opacity of the lobbying system has essentially closed the process to nonprofessionals and noninsiders.[456] No government websites document the process by which individuals may lobby Congress or describe the formalities of lobbying consideration. The few texts to describe the process are confined to manuals for professional lobbyists and describe an entirely informal system of customs and norms.[457] Unlike the rules of civil procedure and other due process requirements, few laws govern the means by which the public engages with Congress, and those that do tend to articulate only the boundaries of the process through ethics rules, lobbying restrictions, and criminal bribery laws.[458] No formal structure exists to ensure that our current lobbying system comports with the petition right.

B. Implications of the Petition Right for Our Lobbying System

As empirical work in political science demonstrates, Congress has developed through our current lobbying system an informal petitioning

(describing the process by which lobbyists who are lawyers may opt out of professional ethics rules for lawyers).

455. Gelak, *supra* note 454, at 612-13.

456. Drutman et al., *supra* note 452, at 1-3.

457. *See* GARY J. ANDRES, LOBBYING RECONSIDERED: POLITICS UNDER THE INFLUENCE (2009); BERTRAM J. LEVINE, THE ART OF LOBBYING: BUILDING TRUST AND SELLING POLICY (2009); PAT LIBBY & ASSOCS., THE LOBBYING STRATEGY HANDBOOK: 10 STEPS TO ADVANCING ANY CAUSE EFFECTIVELY (2012); ERNEST WITTENBERG & ELISABETH WITTENBERG, HOW TO WIN IN WASHINGTON: VERY PRACTICAL ADVICE ABOUT LOBBYING, THE GRASSROOTS, AND THE MEDIA (2d ed. 1994); Gelak, *supra* note 454, at 605-22.

458. *See* TASK FORCE ON FED. LOBBYING LAWS, *supra* note 31, at 4-5.

mechanism that is opaque and unorthodox and that provides preferential access to the lawmaking process to the politically powerful. Our current lobbying system has become mundane and routinized inside Congress as members engage daily with constituents, lobbyists, and other interested parties to gather information and hear grievances. Although Congress has not passed a statute that limits the right to petition, it has developed an extensive system of informal procedures that does just that. These informal procedures constitute what Francis Lieber termed the "common law" of Congress and what I term, borrowing from recent work by Victoria Nourse, "legislative common law."[459] Similar to the means by which the rules of civil procedure and laws of evidence constitute due process in courts, it is through the enactment of this legislative common law that Congress constitutes the petition process.

By affording access to the lawmaking process unequally, conditioned on the political power of the petitioner, and on an arbitrary, informal, and opaque basis, Congress is violating the Petition Clause. Rather than establishing a mechanism for petitioning that comports with the right, Congress has essentially conflated the functions and principles of the electoral process into the lawmaking process. The electoral process, and the core principles of the speech right that protect it, functions to foster a free and competitive marketplace of ideas where the most popular ideas rise above the din, shape electoral conduct, and are then resolved through a majoritarian decision rule. Petitioning, by contrast, provided a mechanism for individuals and minorities to have a voice in the lawmaking process that more closely resembled the procedural due process right afforded litigants in court. The right was individual and protected certain procedural guarantees, including consideration and response. In conflating these two distinct mechanisms of representation, Congress has carried forward the majoritarian decision rule intended to resolve public decisionmaking during the electoral process into the distinctive process of petitioning. Put simply, our current lobbying system violates the right to petition.

1. Remedies

To resolve Congress's current violation of the right to petition, I propose that Congress at minimum formalize the petition process and establish procedures whereby it would afford public and equal access to the lawmaking process. In many ways, such a system would resemble an Administrative Procedure Act[460] for Congress. Establishing such a system would require more than our current lobbying registration and disclosure regime. In place of our

459. Victoria F. Nourse, *The Constitution and Legislative History*, 17 U. PA. J. CONST. L. 313, 362 (2014) (citing FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 188-89 (3d ed. 1877)).

460. 5 U.S.C. §§ 552-59 (2014).

current Lobbying Disclosure Act,[461] Congress should enact, either through rules or by statute, formal guidelines to make transparent and predictable the consideration it will afford. This proposed solution would not require any prohibitions or lobbying bans. Rather, Congress could regulate both the petition process and efforts to circumvent that process through "lobbying" by preempting the field and establishing comprehensive regulation that governs affirmatively when and how the public may engage with Congress.

Ideally, this comprehensive system would resemble the petition process that served our legislatures well for over a hundred years and that the Framers protected with the Petition Clause. As described, this quasi-adjudicative process considered grievances submitted by petitioners as formal filings, which contained a statement of grievance, arguments in support of the grievance, signatures in support of the petition, and occasionally supplemental materials like proposed legislative language or other supportive evidence. By contrast to contemporary legislative practice, members would always know of the source of proposed statutory language and other materials introduced through the petition process. Members would read these petitions aloud on the floor of Congress and then refer the petition to the appropriate committee, executive agency, or adjudicative body.[462] Whatever the substantive outcome, Congress would afford petitioners formal consideration of their petitions, and action on the petition would become part of the congressional record.[463] As lobbying drives the congressional agenda today,[464] Congress could allow petitions to drive the legislative agenda in place of our current lobbying system. In response to voluminous numbers of similar petitions, Congress could resolve the issue as it has historically by either consolidating the petitions or by creating new government institutions to process the petitions. In fact, Congress dealt with problems of volume historically by creating much of the administrative state and specialized courts, including the Patent and Trademark Office and the Court of Claims, for example. Congress could resolve frivolous petitions through summary dismissal.

By establishing the petition process affirmatively, Congress could also clarify what constitutes improper procedure and access. Congress could then regulate engagement with Congress and lawmakers outside of the formalized petition process through disclosure and ethics rules, including recusal rules similar to those that govern judges. This is not to say that lawmakers could no longer engage with the public. A conversation at a town hall to clarify a

461. Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601-14 (2014).

462. *See supra* Part I.B.

463. *See id.*

464. Frank R. Baumgartner et al., *Money, Priorities, and Stalemate: How Lobbying Affects Public Policy*, 13 ELECTION L.J. 194, 201-02 (2014) (finding a significant correlation between the agenda of lobbyists and the agenda of Congress and almost no correlation with the agenda identified by the public).

lawmaker's policy position before an upcoming election could be ethical, and lawmakers could still reach out to the public for hearings and other formal processes. By contrast, listening to an individual grievance and accepting draft statutory language to resolve that grievance at a fundraiser could be subject to disclosure requirements, ethics restrictions, and recusal requirements. Lawmakers would be required to disclose those all-too-common text messages from powerful lobbyists that direct questions during hearings. To the extent that Congress found these and other circumventions too disruptive of the lawmaking process, Congress could begin to limit these circumventions. A formal petition process could also allow professionalization of the representatives who represent the public in the formal petition process. As we now regulate lawyers who represent their clients before formal government proceedings in courts and otherwise, we could begin to establish professional standards and ethics restrictions for those highly trained policy experts now employed as lobbyists. Not only would professionalization benefit the petition process and the client, but professional lobbyists might also welcome the heightened stature and improved public understanding of their now vilified profession.

2. Objections

First, adopting this proposed solution would inevitably face problems of scale. Some historians speculate that the formal petition process died out in Congress because lawmakers struggled to manage the sheer volume of petition submissions as the country grew.[465] This theory suffers from some yet unexplored flaws, but the fact remains that today's Congress represents a polity of over 320 million individuals and tackles a host of modern regulatory issues far more complex than in earlier centuries. Federal jurisdiction has also expanded and with it the range of possible matters on which petitioners might express grievances. These criticisms do not consider, however, that while formal petitioning in Congress may have fallen by the wayside, public engagement with Congress has not. In response to an industry that some speculate may exceed $8 billion in expenditures per year, Congress is necessarily spending resources and affording informal process to the public. Congress has established a de facto petition process and is attempting to address

465. Pasley, *supra* note 21, at 60. There are some fundamental flaws in this theory that current scholarship is beginning to explore, including the fact that Congress resolved problems of scale in the petition process historically by constructing much of the administrative state. The early congressional origins of the administrative state and the nuanced Founding-era view of separation of powers and lawmaking have been recently and masterfully documented. *See* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1297 (2006). The connection between this early American institutional development and the petition process has yet to be explored.

scalability and complexity problems by establishing an informal, grey market system that affords preferential access and process to the politically powerful.

There is no doubt that concerns over feasibility should inspire caution and further discussion on questions of institutional design, but problems of scale should not preclude reform of our lobbying system for two reasons. First, our government has confronted and resolved problems of scale in a number of other areas. For example, our extensive system of lower federal courts did not exist at the Founding but has scaled appropriately in response to increased federal jurisdiction and volume of litigants.[466] Congress could summarily dispose of frivolous motions and could consolidate duplicative motions. In addition to simple expansion, the courts have also developed an extensive system of procedural rules to routinize and streamline the litigation process.[467] Our heavy reliance, for better or worse, on pretrial motion practice and the settlement process to dispose of actions has been a functional solution to problems of scale.[468] Along similar lines, our administrative agencies have developed complex and large-scale means of public engagement through the formal notice-and-comment process. There is little that would prevent Congress from adopting these and other similar measures to respond to issues of scalability. Moreover, advances in technology in the twenty-first century offer additional solutions to problems of scale not available historically.[469] Second, and most importantly, issues of scale should not preclude future reforms because our current lobbying system is constitutionally inadequate. Preserving the status quo is simply not an option if Congress aims to comply with its obligations under the Petition Clause.

A second objection is that this proposed solution could create tension between the Petition Clause and other First Amendment rights, most notably speech and association. On further reflection, however, this tension could actually prove beneficial. The upside to a fully articulated petition process is

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466. RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 3-39 (First Harvard Univ. Press paperback ed., 1999).

467. *Id.*; *see also* Edson R. Sunderland, *The Machinery of Procedural Reform*, 22 MICH. L. REV. 293, 294 (1924) (making the case for the later-implemented federal rules).

468. *See, e.g.*, Stanley Sporkin, *Reforming the Federal Judiciary*, 46 SMU L. REV. 751, 751-54 (1992) (prescribing a number of reforms to streamline efficiency in the federal courts in the face of rising demands on both civil and criminal dockets).

469. *See, e.g.*, STEPHEN GOLDSMITH & SUSAN CRAWFORD, THE RESPONSIVE CITY: ENGAGING COMMUNITIES THROUGH DATA-SMART GOVERNANCE 1 (2014). Project Madison, a platform for legislative engagement born from a hack-a-thon held within the House of Representatives and used to allow for the first "crowdsourced" markup of a bill on the House, provides an early example of the possibilities for technological solutions. *See* Richa Mishra, *Frontiers of Democracy Research: A Fresh Perspective on Lobbying and Political Access*, ASH CTR. FOR DEMOCRATIC GOVERNANCE: CHALLENGES TO DEMOCRACY (Aug. 5, 2014, 8:25 AM), http://www.challengestodemocracy.us/home/frontiers-of-democracy-research-a-fresh-perspective-on-lobbying-and-political-access.

that it would force the courts to begin to clarify the relationship between the Petition Clause and the Free Speech and Association Clauses, as it has done in other contexts. In confronting this tension elsewhere, the Supreme Court has routinely held that limitations on speech and associational rights do not violate the Constitution if those limitations protect government processes. To provide three poignant examples: The Court, per Justice Scalia, upheld a law which restricted the right to speak on the floor of a state legislature as a reasonable protection of the lawmaking process.[470] Similarly, the Court has held that a restriction on ballot information was a reasonable regulation of the electoral process and did not violate a challenger's speech and associational rights.[471] Kathleen Sullivan has meticulously documented the myriad restrictions on the ability of lawyers to speak in violation of court rules upheld as reasonable protections of the judicial process.[472] If these other contexts are any indication, any Free Speech Clause protections for lobbying will give way to the right to petition when lobbying undermines the petition process.

Finally, some might argue that a petition right analogous to a procedural due process right has no place in the majoritarian institution of Congress and that, as a so-called "political branch," Congress should be more "democratic" than the courts. Under a simple model of democracy, the need to be responsive to majoritarian pressures throughout the lawmaking process could justify affording more access and consideration to those with political power. This presupposition, however, relies on two misconceptions. First, it ignores the key distinction that exists between the electoral process, governed by a majoritarian-decision rule,[473] and the lawmaking process, which was designed

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470. Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347, 2351 (2011) ("Legislative sessions would become massive town-hall meetings if those who had a right to speak were not limited to [lawmakers] who had a right to vote. . . . This Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message."); *see also* Chula Vista Citizens for Jobs & Fair Competition v. Norris, 782 F.3d 520, 531 (9th Cir. 2015) (en banc) (delineating the distinctions between First Amendment rights in the electoral context and those in the lawmaking context).

471. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 362-63 (1997) ("We are unpersuaded, however, by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression.").

472. Kathleen M. Sullivan, *supra* note 392, at 569 ("Lawyers' freedom of speech is constrained in many ways that no one would challenge seriously under the First Amendment. Rules of evidence and procedure, bans on revealing grand jury testimony, page limits in briefs, and sanctions for frivolous pleadings, to name a few, are examples of speech limitations that are widely accepted as functional necessities in the administration of justice, much like rules of order in a town meeting.").

473. This distinction tracks that drawn by Adrian Vermeule between majoritarianism writ large, or decisions made by an electoral mass to select partisan representatives "like bundles of issue-preferences," and majoritarianism writ small, or "voting in a series of single-issue referendums." Adrian Vermeule, *The Force of Majority Rule*, *in* MAJORITY

to be more complex than a simple majoritarian system.[474] Conflation of the electoral and lawmaking processes ignores the long history of legislatures, including Congress, that provided formal, equal access to the lawmaking process for individuals and minorities through the petition process[475] and the protection of that right through ratification of the Petition Clause.[476] As discussed, the drafters of the Petition Clause considered and explicitly rejected the right to instruct representatives, whereby a majority could bind a lawmaker to its will.[477] Debates around the Petition Clause described the right as one that was inherently individual and the petition process as a platform for individual voices in the lawmaking process.[478] Second, we need to evaluate critically the foundations of our assumptions that legislatures are strictly majoritarian institutions and that the absence of majoritarian legislative outcomes undermines our Congress. A critical gaze might reveal the lack of any foundation at all to these assumptions. Rather, our Constitution established a republican form of government,[479] and although that term is itself ambiguous, it is well settled that a republican form of government is not a direct democracy.[480]

DECISIONS: PRINCIPLES AND PRACTICES 134-35 (Stephanie Novak & Jon Elster eds., 2014). One is a manner of selecting representatives only, without necessarily driving substantive outcomes and the procedures by which those substantive outcomes are reached. There is of course some relation between the two, but the relation has been highly disputed to date as a matter of political and moral theory. *See also* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 1-13 (Univ. of Cal. Press paperback ed., 1972).

474. *See, e.g.*, ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 85-114 (2007) (listing "submajority" voting rules across a range of institutions, including Congress, and describing these mechanisms as a stable means of allowing minorities to "force a kind of public accountability upon the majorities who would otherwise prefer to sweep minority views and desires under the rug"). This Article frames petitioning as an additional structural right, akin to procedural due process, and a mechanism of minority protection. In so doing, it joins the growing body of scholarly discourse challenging the majoritarian-protecting structure and minority-protecting rights distinction. *See, e.g.*, Heather K. Gerken, Windsor*'s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 594-95 (2015).

475. *See supra* Part I.B.

476. *See supra* Part II.B.

477. *See supra* Part I.B.

478. *See supra* Part III.A.

479. *See supra* Part I.B.

480. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison), *supra* note 105, at 46-47 (distinguishing a "pure" or direct democracy from the proposed republican or representative national government outlined in the Constitution).

Conclusion

On one level, this is an article about lobbying and about the need for a paradigm shift in how we are approaching reform. This Article's main focus of inquiry, however, is not simply lobbying but rather Congress, an institution much reviled by the public and largely ignored by the legal academy. Congress has, in some senses, fallen into an intellectual jurisdictional hole. On the one hand, political scientists find the lawmaking process too "legal" to involve their discipline and, on the other hand, legal scholars recoil at an institution they envision as devoid of law and driven by politics all the way down. Our neglect has likely contributed to the institution's current dysfunction. It is time that we begin to see the lawmaking process as again the domain of lawyers and open a discussion as to the theory and law that should structure that process.

In illuminating the history and theory behind the petition process and the Petition Clause, this Article takes an early step toward developing an affirmative vision of how Congress should function within our constitutional framework. In particular, this Article begins the work of articulating a concrete vision of how Congress should engage with the public outside of the vote. Historically, Congress engaged with the public through a formal, nonarbitrary, transparent, and equal process called petitioning. Because the petition process was designed to protect individuals and minorities, the process was not contingent on the political power of the petitioner. The unenfranchised engaged in petitioning, and lawmakers did not require a minimum signature count to obtain review and response. We often assume that legislatures and the lawmaking process are as majoritarian as the vote; history provides a more nuanced view. The Framers codified the right to petition in the First Amendment. To date, we have presupposed, often without support or reasoning, that the current way that Congress engages with the public—that is, our current lobbying system—is constitutionally protected by the right to petition. But a closer look reveals that our current lobbying system, which is informal, arbitrary, and opaque and which provides preferential treatment to the politically powerful, provides none of the values protected by the petition right. In failing to satisfy even the basic requirements of the petition right, Congress is violating our right to petition.

At best, clarity in the right to petition and Congress's obligation to the public under that right could motivate Congress toward reform. The legislative histories of earlier efforts at reform appear to turn on confusion over the scope of the Petition Clause. The more cynical among us, however, can at least hope that clarity in the petition right might stimulate the external pressure necessary, either by the public or the courts, to bring about much-needed reform.

Election Law Journal: Rules, Politics, and Policy, Vol. 13, No. 1 | Perspectives

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The Anxiety of Influence: The Evolving Regulation of Lobbying

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Published Online: 18 Mar 2014 | https://doi.org/10.1089/elj.2014.0245

Abstract

Our legal system has long been of two minds about lobbying. As far back as the Jacksonian Era, courts anxiously viewed the use of paid agents to influence government decision-making as a source of corruption. Yet courts have also long recognized a legitimate interest in having professional assistance when trying to affect government. Moreover, since the mid-twentieth century the Supreme Court has emphasized that lobbying is protected by the First Amendment. The law of lobbying grows out of these conflicting views of lobbying as both corrupting and legitimate, constitutionally protected yet requiring regulation.

Lobbying regulation today reflects four goals: protecting the right to lobby; preventing improper influence; restricting some unfair opportunities for influence; and promoting transparency of lobbyists' activities. Although the constitutional core of lobbying, that is, the presentation of facts and arguments to officials is protected from limitation, rules may restrict the material benefits (gifts, honoraria, free travel) lobbyists can give officials; limit lobbying by former government officials; and require lobbyists to disclose their income and expenditures.

Recently, attention has focused on the campaign finance role of lobbyists, with some jurisdictions restricting their ability to give or raise campaign funds or requiring greater disclosure of these activities. The law in this area is still developing, but some special regulation of the interplay of lobbying and campaign finance is likely to be sustained in light of the longstanding concern that lobbying poses special corruption dangers.

I. The Regulation of Lobbying

A. Two views of lobbying

In 1843, the Pennsylvania Supreme Court warned that "already has a class of persons arisen, at the seat of the general government and elsewhere, who make it a business to…procure the passage of an Act of the Legislature."[1] "The arts and misrepresentations of these designing men" threatened to

"mislead" members of the legislature "from the paths of duty."[2] The court acknowledged there was no evidence that anyone retained to persuade the state legislature had actually engaged in any misconduct, but the practice had a "tendency… in the hands of designing and corrupt men to improper tampering with members, and the use of extraneous, secret influence over an important branch of government."[3] The "designing and corrupt men" that so troubled the Pennsylvania court in *Clippinger v. Hepbaugh* were lobbyists, and the court's concern that lobbying—that is, the use of paid agents to influence government action—necessarily raises the prospect of "improper tampering" and the "use of extraneous, secret influence" to shape public policy remains a driving force shaping the legal treatment of lobbying.

Yet, courts have also long recognized that lobbying has a legitimate place in our system of representative government. As New York's highest court observed in 1893, "[i]t must be the right of every citizen who is interested in any proposed legislation to employ an agent, for compensation payable to him, to draft his bill and explain it to any committee, or the legislature, fairly and openly, and ask to have it introduced."[4] To be sure, the New York court emphasized that merely drafting and explaining bills to legislators and requesting their introduction did not involve asking members of the legislature actually to vote for those bills, so that such activity did not involve the "lobby services," which the court "condemned as against public policy." According to the court, the plaintiff was "not a lobbyist" because "he had no acquaintance or influence with any member of the legislature, and it does not appear that he had any peculiar facilities for procuring legislation."[5] Today, however, we would certainly view the efforts of a hired agent to draft a bill, explain it to legislators, and seek the bill's introduction as lobbying.

The law of lobbying grows out of the tension between these two views of lobbying—what might be called the "good" lobbying, that is, the preparation and explanation of legislation, regulation, or policy proposals to advance the interests of members of the public; and the "bad" lobbying, such as the use of "extraneous, secret influence," "peculiar facilities," and "tampering" with legislators. In the public's mind, the "bad" vision of lobbying clearly dominates the "good" one. Lobbyists like the notorious Jack Abramoff[6] have featured prominently in scandals involving members of Congress, and candidates and elected officials compete to denounce lobbyists and to decry lobbyists' influence on government. Lobbying has become a "very dirty word,"[7] a virtual synonym for corruption. Indeed, the term is so toxic that the American League of Lobbyists—the lobbyists' trade association—dropped "lobbyist" from its name and is now the "Association of Government Relations Professionals."[8] But legal doctrine also reflects a recognition of the "good" lobbying—the right of individuals, groups, organizations, businesses, nonprofit associations, state and local governments,[9] unions and other groups on their own or through paid representatives to seek to influence government action. Like campaign finance, lobbying is an essential part of modern democracy that simultaneously triggers deep-seated concerns about the impact of private wealth and special interests on public policy. Again like campaign finance, lobbying regulation strives to hold together the differing and sometimes conflicting goals of protecting constitutional rights of speech, association, and petition; controlling undue influence and improper efforts to shape government decision making; and promoting the transparency of the political process. Indeed, lobbying and campaign finance regulation are increasingly linked, as reformers, lawmakers, and academics have begun to give greater attention to the lobbying-campaign finance nexus.

Lobbying is a big business. At the federal level, lobbyists reported spending approximately $3.5 billion a year during the 2009–12 period.[10] There is also extensive lobbying at the state and local level. Lobbying expenditures with respect to the New York state government, for example, are running at more than $200 million per year.[11] These numbers almost certainly understate actual lobbying expenditures. At the federal level, a significant fraction—perhaps as much as half—of "people currently employed as policy advocates" in Washington do not register as lobbyists[12] but instead, like former House Speaker Newt Gingrich, claim only to be giving "historical advice,"[13] or, more commonly, like former Senate Majority Leader Tom Daschle, claim to be "strategic advisers" who shape lobbying strategy behind the scenes, but do not engage in the direct contact with policymakers that triggers the statutory definition of lobbying.[14] Moreover, at least at the federal level, even registered lobbyists do not have to report media expenditures or social media activities intended to influence the broader political and policy environment, even though such "campaign-style advocacy" is central to contemporary lobbying.[15]

Lobbying is a heavily regulated activity, with both the extent and pace of regulation increasing. Congress,[16] all fifty states,[17] and many local governments[18] have enacted laws regulating lobbying. Many of these measures have recently been revised and updated, and new proposals for lobbying regulation, as part of government ethics or political reform packages, are frequently advanced in Congress and many state and local legislatures.[19] Lobbying is also directly affected by such other measures as the Internal Revenue Code, the Foreign Agents Registration Act (FARA),[20] procurement laws, executive orders and internal legislative rules.

This article examines the legal framework for the regulation of lobbying. The remainder of this Part lays out the values shaping lobbying regulation and the regulatory techniques that follow from those values. Part II considers how courts, particularly the United States Supreme Court, have treated lobbying. Parts III through V then address the principal issues that are attracting the attention of legislators, are contested in litigation, or are on various reform agendas, including the campaign finance activities of lobbyists; lobbying by former government officials (the "revolving door" problem); and the scope and contents of lobbyist disclosure requirements. Part VI briefly concludes.

B. Values driving lobbying regulation

The regulation of lobbying has been shaped by four principal concerns:

(1) protection of the opportunity for individuals, groups, and organizations to lobby, that is, to present facts, arguments, and views to legislative and executive branch officials;

(2) prevention of improper influence on government action;

(3) promotion of a level playing field by restricting unfair or unequal opportunities to influence government action; and

(4) provision for the transparency of lobbyist-government official interactions.

The first concern is aimed at preventing regulations that would interfere with the ability of people to lobby or use lobbyists to inform and influence government action. Lobbying is an aspect of the

freedoms of speech, press, association, and petition protected by the constitution. Lobbying can advise government officials about conditions in particular industries, geographic areas, government subunits, or socio-economic groups; the costs and benefits of proposed laws and regulations; the consequences of government actions under consideration; and the views of those affected by potential government decisions. It is a means of political expression, a form of popular participation in government, and a tool for educating government decision making.

But if the first value of lobbying regulation is to assure that the core right to communicate with government is not abridged, the second goal reflects the concern that lobbying can be, and often has been, accompanied by inappropriate techniques inconsistent with public-regarding decision making. Lobbying should inform and thereby improve government action, not distort it by appeals to the private self-interest of decision makers. The principal concern here is not with the communicative aspect of lobbying per se, but with activities ancillary to communication that may improperly influence government action. To be sure there is no widely agreed-upon definition of the *proper* influences on government action—such as whether and to what extent an elected official should consider the needs or preferences of her local constituency versus the state or nation as a whole; the implications of a vote or decision for her reelection; or the views of the leaders of her political party or her supporters in the last election. But it is generally recognized that it is improper for a public official to take an official action in exchange for, in response to, or in order to obtain a private or personal material benefit. The widespread criminal prohibitions of bribery and illegal gratuities reflect the belief that it is improper to provide officials with material benefits to influence their official actions. Criminal laws are focused on situations in which the private benefit is closely linked a specific official act, but the concern about improper private influence on government goes beyond relatively clear cut quid pro quos. Improper influence may occur when private benefits—such as free meals, entertainment, travel, or investment opportunities—are not linked to specific official acts, but are intended merely to facilitate access, provide opportunities for quasi-social interaction, smooth relations, or promote good will towards the lobbyists and the interests they represent. Even though not tied to specific official actions, such benefits can still distract government decision makers from the public interest or skew the formation of public policy. As a result, they constitute a form of *improper* influence that may be subject to regulation.

A third goal is preventing some lobbyists from obtaining unfair or unequal influence relative to others. The concerns about improper and unfair influence overlap. If one lobbyist provides an official with a material benefit and others do not, this may constitute both improper and unfair influence. But the concern about unfair influence focuses in particular on lobbyists who, based on their past or present relationships with government officials, may have opportunities for special access to officials that are not available to other people attempting to communicate with these officials. This has been an impetus for the rules intended to limit the ability of former government officials to lobby agencies or branches of government where they recently worked, that is, so-called “cooling off” or “revolving door” restrictions.[21] The concern about unequal influence can also be seen underlying the laws governing the tax treatment of lobbying. Under the Internal Revenue Code, businesses may not treat lobbying expenditures as deductible ordinary and necessary business expenses,[22] while a charitable organization entitled to receive tax-deductible contributions under section 501(c)(3) will forfeit that favorable tax treatment if “attempting, to influence legislation” constitutes a “substantial part” of its activities.[23] Both of these tax

provisions reflect the view that deductibility is a form of government subsidy inconsistent with a level playing field for lobbying. Similarly, the Byrd Amendment,[24] which bars the use of funds appropriated by Congress to lobby for federal contracts, grants, loans, and cooperative agreements, reflects Congress's concern not to subsidize some lobbying activity. To be sure, the impact of the value of preventing unequal influence is quite limited. Lobbying involves the expenditure of private funds, and different individuals, firms, groups, and organizations have widely different amounts of resources available to them. They are, thus, capable of spending widely different amounts on lobbying. In theory, equalization could be advanced by capping the spending of those with great resources or subsidizing the lobbying of those without resources. However, limits on lobbying expenditures, like limits on campaign expenditures, would run straight into the First Amendment. There is no constitutional objection to offering subsidies for lobbying, but with thousands upon thousands of bills, amendments, appropriations, regulations and other measures subject to lobbying each year, it is difficult to see how lobbying with respect to any specific measure or issue area could be equalized, although it would certainly be possible to provide subsidies or tax breaks to organizations that lobby on behalf of politically weak or underrepresented groups. Instead of addressing lobbying inequality generally, the level-playing-field goal tends to focus more narrowly on inequalities that flow from government action, such as the provision of government funds and tax benefits to some but not other lobbyists, or the benefits some lobbyists may obtain from prior government service.

The fourth goal—transparency—is central to contemporary lobbying regulation. Indeed, with the proliferation of open meetings laws, freedom of information laws, public access to records laws, public official financial disclosure laws and other “government in the sunshine” measures, transparency has become a central focus of the regulation of government operations. Transparency can promote public understanding of how government works, enable the people to better assess government performance, seek change, and hold government accountable for its actions. Measures promoting transparency do not of their own force actually prohibit any lobbying or activities ancillary to lobbying, but they may discourage practices that are, or are likely to be perceived as, improper or unfair. As Justice Brandeis famously observed nearly a century ago, “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”[25]

It is sometimes asserted that transparency promotes public confidence in government. It is not clear if this is really the case. Greater public attention to the nitty-gritty of government operations, to the battling of party and group interests, the pulling and hauling and the wheeling and dealing inherent in legislative decision making could be demoralizing rather than confidence-building. The dictum often (perhaps mistakenly) attributed to Bismarck that “laws, like sausages, cease to inspire respect in proportion as we know how they are made”[26] may be more accurate. Nevertheless, the public is surely likely to be anxious when interactions between lawmakers and lobbyists are hidden behind closed doors. As a result, transparency may be valuable in ameliorating public suspicions about lobbyist-government misconduct even if it does not produce confidence in the results of the disclosed interactions. Certainly, transparency facilitates public oversight and pressure for the adoption of reforms to address forms of improper or unfair influence that transparency may reveal.

C. Techniques of lobbying regulation

Lobbying regulatory techniques follow from the values driving regulation. Commitment to the petitioning, associational, and communicative activity at the core of lobbying means that lobbying per se—that is, the fact and substantive content of the advocacy of legislation, administrative action, or policy proposals—cannot be prohibited or limited in amount. As a result, one technique is, in a sense, no-regulation. Unlike, say, in campaign finance, where federal and many state laws restrict contributions to candidates or political parties, there is no restriction on the use of private funds to hire lobbyists and pay for lobbying expenditures. Indeed, even regulatory fees imposed on lobbyists as part of registration and reporting requirements have been subject to constitutional oversight; when found to be greater than necessary to cover the costs of enforcing those requirements, fees may be struck down as an unconstitutional tax on lobbying.[27]

Although lobbying per se is constitutionally protected, some of the ancillary activities of lobbyists, such as the provision of private benefits to public officials, can be restricted. Gifts, free meals and entertainment, honoraria, and other private benefits to government officials may be barred outright, subject to dollar limitations, restricted under some circumstances, or required to be reported.[28] Recently, concern about improper influence has begun to focus on the role of lobbyists in financing election campaigns. Although campaign contributions and fundraising do not provide elected officials with personal pecuniary benefits, as the funds so provided must be used for electioneering activity, they can certainly be at least as effective in garnering the attention and gratitude of officials who have to stand for reelection or want to seek higher office as free dinners or complementary Super Bowl tickets. In addition, to reduce any temptation lobbyists may feel to engage in improper activity, many jurisdictions regulate contingent fees, primarily through prohibition but also through disclosure requirements.

The principal regulatory technique for addressing unfair or unequal influence is the cooling-off period or revolving door law. These rules vary considerably with respect to the determination of who ought to be regulated and the length and scope of the cooling-off requirement, but the central idea is that for some period of time a former government employee should be barred from lobbying the office where she used to work in order to prevent her from taking advantage of the inside information and personal contacts she acquired at that office. At the national level, the Obama administration adopted a number of regulatory measures, reflecting both the anti-improper influence and level-playing-field goals of barring lobbyists from certain government positions—a “reverse revolving door” rule. Again, the underlying concern appears to be that the official will be affected by personal connections to the lobbyists with whom she used to work or the clients she used to represent, or by a psychological predisposition to be sympathetic to the positions advocated by former colleagues or clients. This might give them an unfair advantage over other firms or interest groups with a stake in the official's government decisions.

The value of transparency is widely advanced by federal, state, and local lobbying disclosure laws. Lobbyists are required to register with a designated regulator and then file periodic reports concerning their activities. The reports tend to focus on the money trail, that is, the funds paid by clients or principals to lobbyists, and the funds spent by lobbyists in the course of their representational

activities. Recent regulatory measures and proposed reforms have sought to widen the scope of these reports to include, inter alia: the disclosure of so-called indirect spending intended to advance the lobbying agenda by persuading members of the public to contact government decision makers; greater disclosure of the individuals and groups that fund the organization that is a lobbyist's nominal client; and more information concerning the particular officials contacted by lobbyists and the matters discussed with them.

II. Lobbying and The Constitution

The Supreme Court's treatment of lobbying originally focused on the problem of lobbyist contingency fees. In a series of cases running from the mid-nineteenth through the early twentieth centuries involving lobbyist for the Court demonstrated a very low regard for lobbying. In the 1950s, however, the Court shifted focus and determined that lobbying is protected by the First Amendment. However, even after reframing lobbying as a constitutionally protected activity, the Court has been willing to uphold some regulation of lobbying, particularly disclosure.

A. In the beginning: The courts and lobbying in the nineteenth and early twentieth centuries

In November 1847, Alexander Marshall, an experienced “lobby member” before the Virginia legislature, wrote to the officials of the Baltimore & Ohio Railroad proposing that they retain him to help persuade the legislature to grant the railroad a certain right of way it wanted. Marshall's proposal stressed the need for “an active, interested, well-organized influence” in the legislature. Marshall urged that the railroad

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inspire your agents with an earnest, nay, an anxious wish for success. You must give them nothing if they fail, endow them richly if they succeed…. My plan would aim to place the “right-of-way” members on an equality with their adversaries [a competing railroad], by sending down a corps of agents, stimulated to an active partisanship by the strong lure of profit…Under this plan you pay nothing unless a law be passed which your company will accept…. I have surveyed the difficulties of this undertaking, and think they may be surmounted. The cash outlay for my own expenses, and those of the subagents, would be heavy. I know the effective service of such agents as I would employ cannot be had except on a heavy contingent.… I should not like to undertake the business on such terms, unless provided with a contingent fund of at least $50,000 [or about $1.2 million in 2013 dollars], secured to my order on the passage of a law, and its acceptance by your company.[29]

”

Marshall's proposal stressed that he “contemplate[d] the use of no improper means or appliances in the attainment of your purpose. My scheme is to surround the legislature with respectable and influential agents, whose persuasive arguments may influence the members to do you a naked act of justice.”[30] Marshall did, however, emphasize the need to keep the arrangement secret “from motives of policy alone, because an open agency would furnish ground of suspicion and unmerited invective, and might

weaken the impression we seek to make."[31] Subsequently, Marshall, claiming both that the arrangement had been agreed to by the railroad and that he had won the railroad what it wanted from the Virginia legislature, sued the railroad over its failure to pay his fee.

The dispute ultimately came before the United States Supreme Court, which dismissed Marshall's claim, finding the contract void for public policy. Although the Court determined that "[a]ll persons whose interests may in any way be affected by any public or private act of the legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees,"[32] Marshall's concealment of his role as the railroad's agent was troubling: "A hired advocate or agent, assuming to act in a different character, is practicing deceit on the legislature."[33] And the Court expressed concern that the contingency arrangement would inevitably lead to improper influence and outright corruption:

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Bribes in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are 'proper means'; and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or 'careless' members in favor of his bill. The use of such means and agents will have the effect to subject the State governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector.[34]

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The Court concluded that "contracts for a contingent compensation for obtaining legislation, or to use any personal or any secret influence or any secret or sinister influence on legislators, is void by policy of the law."[35]

Marshall foreshadowed some of the principal themes of lobbying regulation today: recognition of the right to present "claims and arguments" to the legislature and to hire representatives to assist in doing so; hostility to secrecy and a preference for the transparency of lobbying arrangements; and anxiety that lobbyists will employ improper means or exercise undue influence in pursuit of their goals. *Marshall* focused on the potential for improper influence inherent in secrecy and the use of contingency fees, but in other cases the Court treated lobbying *per se* as troublesome. A decade after *Marshall*, the Supreme Court decided *Providence Tool Company v. Norris*,[36] which involved a contingent fee agreement pursuant to which a lobbyist had secured Providence Tool a contract to provide muskets to the Union Army at the outset of the Civil War. Justice Field declared that "all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution."[37] Inherent in lobbying is the "tendency…to introduce personal solicitation and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds."[38] Lobbying contracts were invalid

"whether [or not] improper influences were contemplated or used, but upon the corrupting tendency of the agreements," and contingency agreements were particularly problematic because of the incentive to "the use of sinister and corrupt means for the accomplishment of the end desired."[39]

In *Trist v. Child*,[40] decided a decade after *Provident Tool,* the Court clarified that some contracts for "purely professional services" in presenting legislation to Congress would be valid and enforceable.

"

[D]rafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority. But such services are separated by a broad line of demarcation from personal solicitation.[41]

"

The Court provided as an example of objectionable activity a letter from the lobbyist to his client urging him:

"

Please write to your friends to write to any member of Congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know to work. Even if he knows a page, for a page often gets a vote.

"

The Court strongly condemned such paid personal-solicitation lobbying:

"

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy.[42]

"

To be sure, the contingent compensation aggravated the abuse. "[W]here the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased."[43] But the reliance on "personal solicitation" to influence legislative action was itself a problem.

At the start of the twentieth century, the Court remained anxious about the payment of compensation for lobbying. In *Hazelton v. Sheckels*,[44] Justice Holmes determined that where part of the consideration for a contract consisted of "services in procuring legislation upon a matter of public interest" the contract could not be enforced.[45] Similarly, in *Earle v. Myers*[46] in 1907, the Court noted that "services…of the kind known as lobbying services" involving the use of "personal influence and personal solicitation with members of Congress" were "illicit" and claims for compensation for such services were

unenforceable.[47] On the other hand, in the 1927 decision in *Steele v. Drummond*,[48] the Court found that a contract which required, in part, that the plaintiff seek the enactment of local ordinances approving the construction of a proposed railroad line in a particular location, was valid in the absence of a showing that the contract "require[ed] or contemplate[ed]…action as a matter of favor by means of personal influence, solicitation and the like, or by other improper or corrupt means." Without evidence "that tends to indicate that in the promotion or passage of [the ordinances] there was any departure from the best standards of duty to the public," the plaintiff's claim would be enforced.[49]

These Supreme Court decisions are representative of a number of federal and state cases from the nineteenth and twentieth centuries that grappled with lobbying. Most dealt with the propriety of paying for lobbyists' services, whether under a contingent fee agreement or in suits against corporate boards of directors or public bodies for authorizing the hiring of lobbyists.[50] Some of the early cases were particularly hostile to paid lobbyists. A New York court damned the "swarms of hired retainers of the claimants upon public bounty or justice" as a threat to "free, honorable, and correct" legislative deliberation,[51] and a Tennessee court asserted that "[t]he practice of lobbying is in its very nature demoralizing and corrupting."[52] Others recognized that "the use of money to influence legislation is not always wrong. It depends upon the manner of its use."[53] As the Kansas Supreme Court explained in 1871:

"

If it be used to pay for the publication of circulars or pamphlets, or otherwise, or the collection or distribution of information openly and publicly among the members of the legislature, there is nothing objectionable or improper. But if it be used directly in bribing, or indirectly in working up a personal influence upon individual members, conciliating them by suppers, presents, or any of the machinery so well known to lobbyists, which aims to secure a member's vote without reference to his judgment, then it is not only illegal but one of the grossest infractions of social duty of which an individual can, under the circumstances of the present day, be guilty.…For it is the way of death to republican institutions.[54]

"

Perhaps the most striking feature of these early cases, particularly those that struggled to distinguish between proper and improper means of seeking legislative action, is their view that "personal influence," "importunities to members of the legislature," "seducing or influencing them by any other arguments, persuasions, or inducements than such as directly and legitimately bear upon the merits of the pending application"[55] were improper actions akin to bribery and corruption. Personal influence was often linked to lack of transparency, with courts referring to "dishonest, secret, or unfair means;"[56] "secret and insidious overtures,"[57] or "the use of personal, or any secret or sinister, influence upon legislators."[58] Even in the absence of a showing of bribery, secrecy, "hang[ing] around legislators for the purpose of influencing such legislators whereby legislative action is to be procured,"[59] and the personal solicitation of legislative votes were tantamount to corruption. Efforts of influence disconnected from substantive information or public-regarding arguments about the merits of a measure—even without criminal misconduct—tended to corrupt the legislative process. By contrast, more public efforts—testimony in public hearings before legislative committees,[60] "the collecting of facts, and presenting them to the proper officers, making arguments thereon"[61]—and the use of "special

knowledge and training" derived from "years of study and experience" concerning the issue in dispute—were legitimate means of seeking legislative action.[62]

Although lobbying in this period was often treated as a shady, indeed, illicit activity—the California constitution actually made lobbying a felony[63]—legal condemnation did not extend to all paid efforts to influence the legislature, but only to those involving "bribery, promise of reward, intimidation, or any other dishonest means."[64] The difference between this period and our own was the widespread determination that lobbyists' use of personal influence, including personal solicitation of legislative votes, fell on the corruption side of the corruption/legitimate advocacy divide. The particular problem with the contingency fee agreements that triggered much of this litigation was that they were seen as providing an incentive to the use of improper means of seeking legislative action, even when the actual use of improper means had not been proven.[65] But the deeper point was the courts' tendency to conclude that legislative advocacy involving private meetings, personal solicitations, and the use of personal influence—a term never precisely defined but used as a contrast to influence based on facts, "fair argument and legitimate evidence"[66] relating to the merits of a legislative proposal—went beyond the scope of legitimate representation.

Although some courts in this period noted the value of professional advocacy in obtaining laws that could advance the public interest,[67] there was little discussion of constitutional law and, in particular, no reference to the First Amendment. These were all common law contracts cases, although often inflected by concerns about the needs of our republican form of government.[68] After World War II, however, issues involving the regulation of lobbying were constitutionalized as the Supreme Court determined that lobbying implicates First Amendment rights. That development is the focus of the next section.

B. Lobbying and the First Amendment

In the 1950s, the Supreme Court reframed its analysis of lobbying from a focus on the potential for improper influence latent in lobbyists' efforts at personal persuasion of legislators to the First Amendment's protection of the communication about political and policy matters which lies at the core of lobbying. The Court's new approach, however, recognized that even though protected by the First Amendment, lobbying may be regulated to protect the integrity of the legislative process.

In *United States v. Rumely*,[69] the Court considered the scope of the investigative authority of the House of Representatives' Select Committee on Lobbying Activities, which had been created by the House in 1949 to examine how well the Federal Regulation of Lobbying Act of 1946 (FRLA) was working. The Committee was authorized *inter alia* to "conduct a study and investigation of…all lobbying activities intended to influence, encourage, promote or retard legislation." As part of its investigation it sought to obtain from Rumely, the secretary of an organization known as the Committee for Constitutional Government, records concerning the organization's sale "of books of a particular political tendentiousness," particularly the names of those who had made bulk purchases of those books for subsequent distribution. When Rumely refused to provide the information, the House sought to hold him in contempt.

Writing for the Court, Justice Frankfurter expressed the concern that permitting the Committee to inquire into "all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment."[70] But the Court stopped short of holding the investigation unconstitutional. Instead, Justice Frankfurter noted that Congress had not defined "lobbying activities" in the resolution authorizing the investigation. He concluded that in order to "avoid a serious constitutional doubt" about whether Congress could investigate the sale of political books to the public the phrase "lobbying activities" would be read to mean "lobbying in its commonly accepted sense, that is representations made directly to Congress, its members, or its committees."[71] Using this narrower definition of lobbying, Justice Frankfurter determined that Congress had not granted the Committee the authority to investigate Rumely's organization's activities.[72]

The Court returned to the meaning of "lobbying activities," the scope of congressional authority to regulate lobbying, and the role of the First Amendment the following year in *United States v. Harriss,*[73] which involved a prosecution brought against the National Farm Committee and several individuals for violations of the reporting requirements of the FRLA. Specifically, the Committee was charged with failing to report the solicitation and receipt of contributions to influence the passage of legislation, and the individuals were charged with failing to report expenditures for the same purpose. The expenditures included "payment of compensation to others to communicate face-to-face with members of Congress, at public functions and committee hearings concerning legislation" and payments "related to the costs of a campaign to induce various interested groups and individuals to communicate by letter with members of Congress on such legislation." The defendants contended the statute violated the First Amendment and that its "vague and indefinite" language violated the Due Process Clause. The Court rejected both arguments.

Relying on *Rumely*, the Court interpreted the FRLA to apply only to "'lobbying in its commonly accepted sense'—to direct communication with members of Congress on pending or proposed federal legislation. The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign."[74] As such it satisfied the due process requirement of definiteness without violating the freedoms guaranteed by the First Amendment—freedom to speak, publish, and petition the Government. Chief Justice Warren explained that the measure was justified by Congress's legitimate interest in knowing who is behind efforts to influence legislative action:

"

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.…Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much.… Under these circumstances, we believe that Congress, at least within the

bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection. And here Congress has used that power in a manner restricted to its appropriate end.[75]

”

Harriss is significant in three respects. First, without expressly saying so, the Court clearly indicated that lobbying is protected by the First Amendment. Although the Court acknowledged that lobbying involves placing pressures on members of Congress—which greatly troubled the Court in the older contingency fee cases—*Harriss* emphasized in upholding the FRLA that “Congress has not sought to prohibit these pressures.”[76] The limited scope of Congress's regulation was critical to the statute's constitutionality.

In later cases, the Court confirmed the First Amendment's protection of lobbying. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[77] for example, the Court held that the contention that a group of businesses conspired to seek passage of legislation beneficial to them and harmful to their competitors did not state a claim of an antitrust violation: “[S]uch a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.”[78]

Second, the Court upheld disclosure because of Congress's interest in understanding who is behind efforts to influence it. This carried forward *Marshall*'s view more than a century earlier that a lobbyist's failure to disclose the principal on whose behalf he acts is a form of deceit. Strikingly, given our current sense that the purpose of disclosure is to educate the public, inform the voters, and, thus, ultimately, advance the goal of government accountability to the people, *Harriss*, like *Marshall*, stressed the importance of lobbying disclosure to those who are lobbied—in this case, members of Congress—to enable them to better understand the forces behind the lobbyists seeking to influence them. The Court also analogized lobbyist disclosure to the Federal Corrupt Practices Act, an early federal campaign finance law, which had imposed contribution and expenditure reporting requirements on elected officials. In adopting the FRLA, Congress “acted in the same spirit and for a similar purpose as it did in passing the Federal Corrupt Practices Act”—to maintain the integrity of a basic governmental process.[79] The Court's support for disclosure of the identities of those behind lobbying activities was confirmed more recently in *Citizens United v. Federal Election Commission,*[80] in which the Court cited and quoted from *Harriss* in rejecting Citizens United's challenge to federal campaign finance disclosure requirements, even as it sustained the organization's attack on campaign spending limitations:

“

And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. United States v. Harriss, 347 U.S. 612, 625, 74 S.Ct. 808, 98 L.Ed 989 (1954) (Congress has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose).[81]

”

Third, the Court sent mixed signals about the constitutionality of applying disclosure requirements to money spent on efforts to persuade the public to communicate with legislators as part of efforts to pass or block legislation—what has come to be referred to as "grassroots lobbying." On the one hand, one of the charges against the *Harriss* defendants involved their failure to report grassroots expenditures. In its reference to the legislative history of the FRLA, the Court grouped grassroots activity with direct communications to members of Congress when it explained that "at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings *or through an artificially stimulated letter writing campaign*."[82] And in a footnote the Court quoted at length from the Senate and House reports accompanying the title of the bill that became the FRLA, which laid out the three distinct classes of lobbyists who would be subject to disclosure requirements. The first group mentioned was

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[t]hose who do not visit the Capitol but initiate propaganda from all over the country, in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts. This class of persons and organizations will be required under the title, not to cease or curtail their activities in any respect, but merely to disclose the sources of their collections and the methods in which they are disbursed.[83]

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On the other hand, the Court construed the Act to refer only to "'lobbying in its commonly accepted sense'—to direct communications with members of Congress on pending or proposed federal legislation."[84] That would appear to exclude communications from interest groups to the public to stimulate public communications to Congress. In so reading the Act, the Court quoted from and invoked *Rumely*, with its suggestion that such a narrower reading was necessary to avoid a constitutional question.

The Court has not directly addressed the constitutionality of the regulation of lobbying per se since *Harriss*. However, other cases have carried forward *Harriss*'s main themes that lobbying falls within the First Amendment's protection of speech, press, and petition, but that some regulation of lobbying is constitutional and, indeed, appropriate to maintain the integrity of the governmental process. Lower courts have relied on *Harriss* in striking down state laws that impose excessive registration fees on lobbyists and, thus, are tantamount to a tax on political communication, but have also cited *Harriss* in upholding federal and state laws requiring lobbyists to register and file periodic reports concerning their finances and activities.

Five years after *Harriss*, in *Cammarano v. United States*,[85] the Court considered and rejected the claim that a Treasury regulation denying a deduction for "ordinary and necessary" business expenses for money spent for lobbying purposes violated the First Amendment. The Court denied that the regulation discriminated against or burdened speech: "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, as everyone else engaging in such activities is required to do."[86] Moreover, the regulation was justified by the legitimate congressional goal of promoting a level

playing field for lobbying activity: "[I]t appears to us to express a determination by Congress 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."[87]

Twenty-five years after *Cammarano*, in *Regan v. Taxation with Representation of Washington*,[88] the Court also upheld against a First Amendment challenge the provision of the Internal Revenue Code conditioning the availability of a tax deduction for contributions to 501(c)(3) charities on the requirement that "no substantial part of the activities" of the charity "is carrying on propaganda or otherwise attempting to influence legislation." As in *Cammarano*, the Court concluded this restriction did "not infringe[] any First Amendment rights or regulate any First Amendment activity." Rather, it simply reflected Congress's decision "not to pay for" lobbying.[89]

In an important concurring opinion, Justice Blackmun, joined by Justices Brennan and Marshall, wrote that although the First Amendment does not require a tax subsidy for lobbying, conditioning the tax subsidy on a complete prohibition of lobbying by the benefitted organization would be unconstitutional as it would "den[y] a significant benefit to organizations choosing to exercise their constitutional rights." However, because the tax code permits a 501(c)(3) charity to establish a 501(c)(4) affiliate—a (c)(4) is exempt from tax on its income, but contributions to the (c)(4) are not tax-deductible to the donors—which could engage in lobbying, the limitation on lobbying by the 501(c)(3) is constitutional. In the view of the concurring justices, the tax code could prevent an organization from using tax-deductible contributions for lobbying but could limit the use for lobbying of *only* the tax-deductible contributions, not other funds. For them, the First Amendment barred conditioning the tax benefit on a prohibition of all lobbying, including lobbying financed from unsubsidized donations.[90]

The tax cases, thus, confirm *Rumely* and *Harriss* in finding that although laws affecting lobbying will be viewed through the prism of the First Amendment, regulatory measures may be sustained where they promote traditional goals like transparency and the prevention of unfairness and do not unduly burden the core lobbying activity of legislative advocacy.[91]

III. Lobbying and Campaign Participation

A. Background

A central focus of efforts to restrict the exercise of improper influence by lobbyists has been to limit the ability of lobbyists to provide government officials with gifts or comparable material benefits such as honoraria for speeches or complementary travel, meals, or entertainment. The scope of these restrictions varies considerably and states and local governments continue to revise and extend these rules.[92] But elected officials may be at least as grateful for donations to or other forms of active support for their election campaigns as for tickets to the Super Bowl or golfing trips. As Professor Luneburg has observed, "lobbyist assistance in political fundraising is a matter of intense interest today."[93] Thomas Susman has pointed out that lobbyists are actively involved in electoral campaigns through "writing checks, hosting or attending fundraisers, delivering bundled checks, or acting as treasurer of a reelection committee." As a result, "lobbyists [are] a principal source of fundraising for

candidates."[94] This carries the potential (some would say danger) of triggering reciprocal favors by the officeholder. Although Dean Nicholas Allard has suggested that the role of campaign contributions in lobbying has been overstated, he also agrees that it would be "unrealistic to dismiss the role of campaign contributions on the lobbying process." Moreover, he notes that as laws and regulations restrict or prohibit lobbyists from giving gifts to legislators or paying for their meals or entertainment, the salience of campaign contributions and other forms of campaign participation as a means for lobbyists to influence officials has grown:

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By prohibiting and restricting a wide array of activities and contacts involving lobbyists that are, in most cases, still permitted if related to fundraising activities, the new rules enhance the already too important impact of fundraising on the political process, thus increasing the risk of the perception, if not the reality, of impropriety. For example, under the [new federal] rules, a lobbyist may not buy a Congressman a meal at a restaurant unless he and perhaps other guests also hand over checks as campaign contributions.[95]

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Indeed, as the *New York Times* recently found, the campaign finance "loophole allows lawmakers to reel in trips and donations" through "destination fund-raisers, where business interests blend with pleasure in exclusive vacation venues."[96] Public interest organizations have also given extensive attention to the campaign finance practices of lobbyists as donors, bundlers, and fundraisers. The 2011 report of the American Bar Association's (ABA's) Task Force on Federal Lobbying Laws made several recommendations for the "separation of lobbying and campaign participation."[97]

The Honest Leadership and Open Government Act of 2007 (HLOGA)[98]—the most recent major revision of federal lobbying law—addressed the campaign finance practices of lobbyists. HLOGA requires federal candidate campaign committees, political party committees, and leadership political action committees (PACs) to disclose the bundled contributions received from federally registered lobbyists that are in excess of $15,000 in a six-month period.[99] Bundled contribution are those that have been collected by an individual and forwarded—"in a bundle"—to a political committee of campaign in such a way that the person collecting and forwarding the funds is credited by the recipient with raising the money.[100]

Many states go much further than disclosure and impose substantive limitations on lobbyists' campaign finance activities. Nearly a dozen states prohibit lobbyists from making—and legislators, state elected officials, and candidates for state office from accepting—campaign contributions while the legislature is in session.[101] Another five states flatly ban contributions by lobbyists to some categories of elected officials or candidates for elective office, such as those holding or seeking offices the lobbyist has registered to lobby.[102] Some impose a lower donation limit on lobbyists' contributions to candidates or political committees than would apply to other donors.[103] North Carolina not only bans lobbyists from contributing to legislators and other public officials, but also bars lobbyists from engaging in bundling;[104] Maryland prohibits regulated lobbyists from fundraising for candidates, including soliciting or transmitting contributions, sitting on a fundraising committee, or serving as a campaign treasurer.[105] Other state laws have been more modest, requiring only that lobbyists disclose

their campaign contributions or their bundled contributions in their lobbying reports.[106] Unsurprisingly, many of these restrictions have drawn constitutional challenges.

B. The evolving case law

The most common state provision aimed at lobbyists' campaign finance participation, and the one most frequently challenged, is the ban on lobbyist contributions while the legislature is in session. These have drawn a mixed judicial reaction, with such bans struck down by state or federal district courts in Alaska,[107] Arkansas,[108] Florida,[109] and Missouri.[110] In addition, a federal district court in Tennessee invalidated the application of that state's ban on lobbyist contributions during the legislative session to non-incumbent candidates for office, albeit without addressing whether the ban could constitutionally be applied to incumbents.[111] On the other hand, two courts—the Vermont Supreme Court[112] and the United States Court of Appeals for the Fourth Circuit[113]—upheld session contribution bans.

The courts invalidating the bans found them to be overinclusive in barring even small contributions; in applying to contributions to elected statewide officials who were not part of the legislative process; or in applying to contributions to nonincumbents.[114] Some bans have also been found to be underinclusive because they target contributions only during the legislative session or shortly thereafter, thus failing "to recognize that corruption can occur anytime, even outside the banned time period."[115] By taking a potentially large chunk of the year out of the fundraising process, the bans were said to help incumbents, as challengers would have less time to overcome the built-in advantages incumbents enjoy.[116] Moreover, given the possibility of "unusually long" or extra legislative sessions, a session fundraising ban can be a significant burden on fundraising activity.[117]

The Fourth Circuit in *North Carolina Right to Life, Inc. v. Bartlett* undertook the most substantial treatment of the constitutional question posed by a session contribution ban. Chief Judge Wilkinson applied strict judicial scrutiny to the contribution restriction but still found it justified by the compelling state interest in preventing corruption and the appearance of corruption:

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With respect to actual corruption, lobbyists are paid to effectuate particular political outcomes. The pressure on them mounts as legislation winds its way through the system. If lobbyists are free to contribute to legislators while pet projects sit before them, the temptation to exchange "dollars for political favors" can be powerful.…While lobbyists do much to inform the legislative process, and their participation is in the main both constructive and honest, there remain powerful hydraulic pressures at play which can cause both legislators and lobbyists to cross the line. State governments need not await the onset of scandal before taking action.

The appearance of corruption resulting from…lobbyist contributions during the legislative session can also be corrosive. Even if lobbyists have no intention of directly "purchasing" favorable treatment, appearances may be otherwise. The First Amendment does not prevent states such as North Carolina from recognizing these dangers and taking reasonable steps to ensure that the appearance of corruption does not undermine public confidence in the integrity of representative democracy.[118]

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Chief Judge Wilkinson also found the restriction to be narrowly tailored, as the legislative session typically, although not invariably, runs just a few months in an election year and is also the period “during which the risk of an actual quid pro quo or the appearance of one runs highest.”[119]

Broader bans on lobbyists' campaign contributions have also drawn constitutional challenges, with similarly mixed results.[120] In 1979, the California Supreme Court struck down a complete prohibition on lobbyists' campaign contributions, adopted by voter initiative in 1974. The court found the ban to be fatally overbroad because it applied to donations “to any and all candidates even though the lobbyist may never have occasion to lobby the candidate.” The court also noted that by applying to small as well as large contributions the ban was not “narrowly directed to the aspects of political association where potential corruption might be identified.”[121] Two decades later a federal district court upheld a more tightly focused ban, adopted by California voters in 2001, which prohibits lobbyists from making contributions only to those candidates running for the offices the lobbyist has registered to lobby.[122] The Alaska Supreme Court sustained a somewhat broader ban on contributions by lobbyists to candidates in legislative districts outside the district in which the lobbyist is eligible to vote.[123]

Both the Alaska and more recent California court decisions emphasized the dangers posed by lobbyists' contributions while minimizing the burden the restrictions placed on lobbyists' constitutional rights. The Alaska court found that lobbyist contributions “create special risks of actual or apparent corruption because of the lobbyist's special role in the legislative system.”[124] The lobbyist's incentive to make contributions to large numbers of legislators who are “in position to introduce or thwart legislation and to vote in committees or on the floor on matters of professional interest to the lobbyist… creates a very real perception of interest-buying.”[125] In language echoing the nineteenth and early twentieth century contingent fee cases, the California court emphasized that lobbyists' contributions present a special danger of corruption because their “continued employment depends on their success in influencing legislative action.”[126] These courts found that the restrictions were narrowly tailored to focus on the danger of undue influence without burdening lobbyists' rights because they did not limit the ability of lobbyists to undertake independent expenditures, contribute to political parties, or volunteer on behalf of legislative campaigns.[127]

In 2010 and 2011, two federal appeals courts divided over the constitutionality of state laws banning campaign contributions by lobbyists. In *Green Party of Connecticut v. Garfield*,[128] the United States Court of Appeals for the Second Circuit invalidated a Connecticut law prohibiting lobbyists and their family members from contributing to any statewide or state legislative candidate, a legislative caucus or leadership committee, or a party committee, and from soliciting contributions for such candidates or committees. The court emphasized that a complete ban, as opposed to a tight limit on, campaign contributions imposed a serious burden on First Amendment rights. Writing for the court, Judge Cabranes acknowledged the contention that lobbyists receive special attention from elected officials, but denied there was anything improper about that: “Influence and access, moreover, are not sinister in nature. Some influence, such as wise counsel from a trusted advisor—even a lobbyist—can enhance the effectiveness of our representative government.”[129] Earlier in the same opinion, the court had upheld Connecticut's flat prohibition on campaign contributions by government contractors, finding the

contractor ban justified because recent Connecticut scandals involving corrupt dealings between contractors and government officials created an appearance of corruption with respect to all exchanges of money between state contractors and candidates for state office.[130] But "the recent corruption scandals had nothing to do with lobbyists"[131] so a comparable blanket ban on contributions by lobbyists could not be justified. The court also found that the solicitation ban was not narrowly tailored to preventing the kind of improper influence that might result from the bundling of contributions; however, the court suggested that "a less restrictive alternative" focused on large-scale bundling might pass constitutional muster.[132] The following year, a different Second Circuit panel in *Ognibene v. Parkes*[133] upheld a New York City law sharply lowering the permissible limits on contributions by lobbyists and persons and firms doing business with the City to candidates for municipal office. *Ognibene* relied on *Green Party*'s differentiation between a ban and a limit to distinguish the earlier case.

In contrast to the Second Circuit's *Green Party* decision, the Fourth Circuit in *Preston v. Leake*[134] in 2011 upheld North Carolina's total ban on lobbyist contributions against both a facial attack and an as-applied claim by the plaintiff lobbyist that her stated desire to make only $25 contributions to her favorite candidates did not raise any danger of corruption. Writing for the court, Judge Niemeyer reached the conclusion, directly opposed to that of Judge Cabranes and the Second Circuit panel, that "experience has taught" that "lobbyists are especially susceptible to political corruption."

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The role of a lobbyist is both legitimate and important to legislation and government decision-making, but by its very nature, it is prone to corruption and therefore especially susceptible to public suspicion of corruption. Any payment made by a lobbyist to a public official, whether a campaign contribution or simply a gift, calls into the question the propriety of the relationship, and therefore North Carolina could rationally adjudge that it should ban all payments.[135]

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Preston emphasized the limited scope of the ban, which applied only to lobbyists' contributions to candidates, and did not preclude lobbyists from canvassing for or donating time to a candidate.[136] Moreover, unlike the situation in Connecticut, lobbyists had been part of the political corruption scandals which had led North Carolina to enact the campaign contributions prohibition in 2006[137] so the "legislature thus made the rational judgment that a complete ban was necessary as a prophylactic to prevent not only actual corruption, but also the appearance of corruption in future state political campaigns."[138]

Courts have also addressed a handful of other restrictions on the campaign finance practices of lobbyists. A federal district court in Wisconsin held that the portion of the state law prohibiting lobbyists from furnishing to any agency official, legislative employee of the state, or any candidate for state elective office "any…thing of pecuniary value" was unconstitutional to the extent that, as interpreted by the state ethics board, the regulation prohibited lobbyists from volunteering personal services to political campaigns. The court recognized that Wisconsin's lobby law reflects the legislature's judgment that, as a class, lobbyists have greater potential to corrupt the political process than do ordinary

citizens, but the court found that the ethics board had failed to show any basis "for finding that volunteering by lobbyists threatens the integrity of the political process any more than volunteering by other citizens, such as environmental activists, insurance executives, or lawyers, whose volunteering is altogether unregulated."[139] On the other hand, a federal district court in Maryland upheld the provisions of that state's law prohibiting a lobbyist from serving as a campaign treasurer for a candidate or elected official, serving on a candidate's fundraising committee, or organizing or establishing a political committee for the purpose of soliciting or transmitting contributions. The court sustained these provisions with little discussion, noting simply that those relationships posed a danger of corruption and that the Maryland legislature had acted after "an actual influence peddling scandal" involving a lobbyist.[140]

C. Regulating the campaign finance-lobbying relationship

The increased interpenetration of lobbying law and campaign finance regulation is hardly surprising. Like the gifts, honoraria, and entertainment that lobbyists have long sought to provide to public officials, campaign financial support provides valuable private benefits that build social relationships, cement good will, and may create a predisposition on the part of the elected beneficiaries to reciprocate by giving special access, or even taking official actions helpful, to their lobbyist benefactors.[141] Given the premium elected officials place on staying in office or reaching for higher office, campaign finance support may be an even more successful means for lobbyists to ingratiate themselves with officeholders than free meals and entertainment.

But restrictions on lobbyists' campaign finance activities raise constitutional questions not posed by prohibitions on tickets to the Super Bowl or plane tickets for golfing in Scotland. Gifts and free meals are not forms of political speech and association, they do not help finance political speech, and they play no positive role in the electoral system. They are tools for influence peddling and nothing more. By contrast, campaign contributions, the solicitation of donations, and other forms of campaign participation are constitutionally protected. In the absence of full public funding for candidates and political parties, private campaign contributions are essential to the functioning of our electoral system. Candidates, political parties, and other political groups are dependent on donations to pay for their ability to bring facts, arguments, and policy ideas to the voters. Campaign contributions are also a form of political expression and association by donors. To be sure, campaign contributions can be limited in amount, and donations from certain sources may be restricted. But the constitutional protection accorded giving and soliciting campaign funds means that special restrictions on lobbyists' campaign contributions present questions not raised by comparable restrictions on gifts, honoraria, and free meals and entertainment.

The least intrusive form of lobbying regulation, and the one most likely to pass constitutional muster, is disclosure. The Supreme Court has upheld disclosure requirements in both the campaign finance[142] and lobbying contexts. With lobbyists already subject to registration and reporting requirements, it would not be a much greater burden to also require them to detail their campaign finance activities—contributions over a dollar threshold, bundling over a dollar threshold, fundraising, or service as a campaign treasurer or fundraiser—in their periodic reports. Although some of this might overlap with reports filed by candidates concerning contributions or staff, it would still be useful for public

transparency and voter information to combine lobbying and campaign contribution information in a single place in a form which is filed electronically, downloadable, and searchable.

Beyond disclosure, the enactment of special restrictions on lobbyists' campaign contributions, whether by subjecting them to tighter limits than those that apply to other donors or barring them from making contributions altogether, presents a more difficult question: Are lobbyists' contributions particularly likely to be sources of the corruption and the appearance of corruption that the Supreme Court has determined are the only constitutionally permissible bases for limiting campaign finance activity? Some courts have been willing to defer to legislative judgments that contributions from lobbyists pose a special risk of improperly influencing government because of lobbyists' regular and extended engagement with the legislative process, their ongoing close contacts with government officials, their inside knowledge, and the financial rewards they obtain from their relationships with officials and other government decision makers. Other courts, however, have indicated that they do not see lobbyists as necessarily posing any greater dangers than anyone else making campaign contributions, so that tighter restrictions would require more specific evidence of lobbyists' involvement in corrupt activities. The disagreement between the Second and Fourth Circuits on this question brings to mind the older judicial debate over whether lobbying is inherently corrupting or whether there has to be some specific showing of misconduct before a lobbying contingency fee could be declared unenforceable.

This issue is intertwined with the question of what ought to be considered improper or undue influence. In *McConnell v. FEC*, the Supreme Court upheld restrictions on soft money contributions to the political parties because Congress had demonstrated that such contributions were given in order to win their donors preferential access, which the court treated as a species of corruption. In language suggestive of the nineteenth and early twentieth century courts' concern about the threat to self-government posed by “personal influence” and private solicitations, *McConnell* observed:

“

Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such influence.…Many of the deeply disturbing examples of such corruption cited by this Court in Buckley…to justify FECA's contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials.… Even if that access did not secure actual influence, it certainly gave the appearance of such influence.[143]

”

By contrast, *Citizens United* was sharply critical of the use of “generic favoritism or influence theory” to determine what constitutes improper influence. The Court narrowed the definition of what constitutes corruption, declaring “ingratiation and access, in any event, are not corruption” and urging that the “influence over and access to elected officials” that may follow from the use of campaign money does not mean those officials have been corrupted.[144] To be sure, *Citizens United* involved spending limits, not contributions, but the decision compounds the uncertainty as to just what must be shown about the impact of lobbyist contributions or fundraising to justify their special restriction.

Arguably, special rules for lobbyist donations are misdirected or underinclusive. Lobbyists are advocates for the legislative or regulatory goals of clients. While lobbyists may have special knowledge of the state of legislative developments and special incentives to get contributions to strategically significant legislators at specific times in order to advance a particular measure, it is a client's interest they are advancing. As such, it is not clear why lobbyists' contributions present a greater risk of corruption than the contributions from the firms, organizations, associations, or individuals they represent. Some jurisdictions have recognized that lobbyists, or lobbyists alone, do not present special dangers of corruption by imposing special restrictions more broadly. Sixteen states ban all contributions during the legislative session, not just those from lobbyists.[145] Many states have adopted so-called “pay-to-play” laws limiting or barring donations by government contractors,[146] or limiting or restricting donations by businesses in certain highly regulated fields, like gambling[147] or the sale of alcohol.[148] Federal law has long imposed a complete ban on campaign contributions by federal contractors in connection with federal elections.[149] New York City may have adopted the most comprehensive approach, imposing very low donation limits on both lobbyists and a broad category of firms and individuals defined as “doing business” with the City, as well as making donations from those groups ineligible for public matching funds under the City's public funding program.[150] These restrictions were upheld by the Second Circuit in *Ognibene v. Parkes.*

On the other hand, many experts with first-hand experience of the role of campaign contributions are convinced that there is something particularly toxic about the interaction of lobbying and campaign finance. If successful interest-group representation turns on building relationships with officials in order to get access, and lobbyists are in the business of building those relationships, then lobbyists—or at least the most successful lobbyists—may be particularly adept at using campaign contributions to advance legislative ends. “At the very least, fundraisers are also an opportunity to check in, to get face time, and to build relationships.”[151] Recent political science work indicates that for contract lobbyists—that is, lobbyists hired by a variety of clients, rather than in-house lobbyists who work for a specific employer—campaign contributions are a significant means of sustaining relationships with legislators and a marker of professional success.[152] A relatively small fraction of lobbyists account for most of lobbyists' contributions. A survey by Public Citizen found that from 1998 through 2005 only one-quarter of federally registered lobbyists actually made campaign contributions in excess of $200 to a single congressional candidate or PAC, but that 6% of all lobbyists accounted for 83% of all lobbyists' campaign contributions, and that these superdonors were also major bundlers.[153] Moreover, while it might make sense to apply the notion of special influence beyond lobbyists to include contractors or others doing business with government, it ought not be fatally underinclusive for a government to take the more limited step of focusing on the corruption and appearance of corruption concerns posed by the campaign activity of those whose business it is to influence government action.

Even if lobbyists are not necessarily a group more likely to convert campaign support into undue influence, recent evidence of government corruption involving lobbyists in a specific jurisdiction, as in North Carolina, can provide support for tighter restrictions on lobbyists in that jurisdiction. On the other hand, as the Connecticut example suggests, the absence of recent local scandals involving lobbyists may be a reason for finding that more stringent laws impose an unjustified burden on First Amendment rights.

The specific restriction in question also matters. As *Ognibene*'s distinguishing of *Green Party* demonstrates, lower contribution limits pose less constitutional difficulty than sweeping contribution bans. Concerns about improper and unfair influence would also be particularly well-served by restrictions that focus on the nature of the relationship a campaign finance activity establishes between the lobbyist and the candidate, and the likelihood that the campaign support will be reciprocated through influence on official action. An individual campaign contribution—which in most jurisdictions is subject to a dollar limit—is unlikely to have a major effect on an officeholder. People active in the legislative process regularly make contributions not because they particularly support the candidates to whom they are donating but because it has become a part of lobbying practice. Making a campaign contribution is often considered a cost of doing legislative business, and it is not uncommon for a donor to give to both parties and competing candidates in the same election.[154] Such a campaign contribution may have a positive impact on a relationship with an elected official—as well as avoid a negative implication from not having made a contribution—but the impact may not be great. On the other hand, direct involvement in a candidate's campaign—such as by serving as a treasurer or on the finance committee—suggests real personal support which may be more likely to be recognized and honored by an officeholder. Campaign activities which involve a distinct personal role for the lobbyist may tend to forge a link between the lobbyist and the candidate which subsequently gives the lobbyist extra influence. As a result, restrictions on such a campaign role may be justified. Bundling arguably falls between these extremes. Although bundling or other forms of fundraising may be less of a commitment than service as a campaign treasurer or other officer, bundling or fundraising over a threshold level can represent a more significant level of support for a candidate than merely making a personal contribution. There might, thus, be a good case to prohibit lobbyists from bundling for candidates running for an office the lobbyist lobbies or limiting how much a lobbyist may bundle.

IV. Substantive Regulation on Lobbying: Contingent Fees and The Revolving Door

A. Contingent Fees[155]

General federal lobbying regulations do not restrict the use of contingent fees in the compensation of lobbyists,[156] but forty-three states prohibit the practice and a forty-fourth restricts it.[157] As noted in Part II, courts have long treated contingent fee arrangements for lobbyists as void for public policy on the theory that they create an incentive for lobbyists to use improper means to influence government action. Some modern court decisions continue to support restrictions on contingent fees. Within the last two dozen years, the United States Court of Appeals for the Eleventh Circuit and the Supreme Court of Kentucky rejected facial challenges to state laws banning the payment of contingent fees to lobbyists; a Florida state court found a lobbyist contingent fee arrangement to be void for public policy; and Maryland's highest court permitted an enforcement action by the state ethics board to go forward against a lobbyist who inserted a contingent fee provision in his contract, although the court split over a procedural question in the case.[158] On the other hand, in a case decided in the 1980s, the Montana Supreme Court concluded that a "blanket prohibition against contingent compensation of lobbyists" is unconstitutionally overbroad and "infringes the rights of those who, while contemplating neither illegal

nor unethical conduct, need or desire to employ a lobbyist on a contingent fee basis in order to advance their interests before a public official."[159]

Modern First Amendment doctrine poses difficulties for a ban on contingent fee lobbying. In *Meyer v. Grant*[160] the Supreme Court invalidated under the First Amendment a Colorado law banning payments to people who circulated the petitions used to gather signatures to place an initiative question on the ballot. Barring the use of paid circulators reduced the number of people willing to carry petitions and the number of people they could reach with their message, thereby making it more difficult to qualify initiatives for the ballot. The Court held that the restriction could not be justified by the state's interest in assuring that an initiative has sufficient grass roots support to be placed on the ballot or—more pertinent to the contingent fee for lobbying question—its interest in protecting the integrity of the initiative process. The former interest was held to be adequately protected by the signature requirement itself, while the latter was held to be adequately addressed by laws criminalizing the forging of petition signatures, making false or misleading statements to obtain a signature, or paying someone to sign a petition.[161] Similarly, in a series of cases involving charitable solicitations, the Court struck down state laws limiting the percentage of charitable donations collected that could be used to defray solicitation costs or pay professional fundraisers.[162] Limiting the expenditure of funds used to solicit funding was treated as a limitation on the speech involved in solicitation. The principal justification offered by the states in these cases was the prevention of fraud, but the Court emphasized that the anti-fraud goal could be attained by laws targeting fraud itself or requiring charities to file financial disclosure reports, so that the limits on compensation were not narrowly tailored to the fraud-prevention interest.

To the extent that a prohibition on contingent fee compensation makes it more difficult for some individuals or groups to hire a lobbyist or reduces communications made by lobbyists to government officials on their behalf, a prohibition on contingent fees infringes on First Amendment rights. The principal justification traditionally given for the restriction is that by tying compensation to success contingent fees create an incentive for a lobbyist to use improper or corrupt means, but the comparable anti-fraud argument has not fared well in the petition circulation and charitable solicitation contexts, where the Court's response has been that limits on compensation are overbroad and anti-fraud laws can do the job. To be sure, the Court in the campaign finance cases has held that Congress and the states can use campaign contribution restrictions to address concerns about corruption and the appearance of corruption that fall short of outright bribery or the payment of illegal gratuities, but contribution restrictions (and gift restrictions) apply directly to interactions with elected officials, whereas contingent fee prohibitions apply only to private contracts (although they reflect a concern about the ultimate impact of such fee arrangements on public actions). The contingent fees themselves, thus, do not literally involve the corruption of government officials. The claim, rather, is the more attenuated one that they create an incentive to lobbyists to take actions that improperly influence the officials they lobby. Still, given the extensive body of older Supreme Court case law invalidating lobbyist contingent fees, lower courts have been reluctant to strike down prohibitions on contingent fees in the absence of a modern Supreme Court case applying the First Amendment to such contingency fee arrangements.[163]

Even apart from the constitutional question, the case for regulating lobbying contingent fees is uncertain. Contingent fees are regularly used in the hiring of counsel and have proven to be a means of enabling the less affluent to obtain representation for their interests. As the ABA Task Force Report noted "[t]he opportunity to resort to a contingency fee contract may enable some private persons to obtain representation that they could not otherwise afford.…In this regard, contingency fee arrangements may promote norms of equal access to justice."[164] It is not clear if any empirical work has been done concerning whether contingent fees are either useful in obtaining lobbying representation or tend to fuel misconduct.

Permitting contingency fees, but requiring disclosure[165] of such arrangements—as provided by a handful of states—would surely pass constitutional muster. Adding such a requirement to existing disclosure laws would place little new burden on those required to register and report, and would be unlikely to curtail the availability of representation. Disclosure would also provide useful information concerning how widespread contingent fee arrangements are; how large the payments are; what types of clients use them; whether this arrangement actually makes representation more available to less affluent interests and organizations; and whether there is any correlation between contingent fees and misconduct.

B. Revolving door restrictions[166]

As one scholar has put it, "[p]erhaps no problem in government ethics is easier to understand or more difficult to address effectively, than that posed by revolving-door employment,"[167] that is, the hiring as lobbyists of former government officials upon their leaving public office. "Lobbying and other advocacy groups seek out former members [of Congress] in order to gain an advantage over the opposition."[168] "The risk is obvious that a client represented by a public-servant-turned-lobbyist will have, or will appear to have, an unfair advantage in petitioning the government."[169]

This unfair advantage can take many forms. "A former lawmaker may know about a Senator's family or a House member's parochial concerns, insights that help advocates make quick personal connections while pressing a policy position. They also have better prospects for getting a private meeting with their former Senate or House colleagues."[170] As former Solicitor General and Watergate Special Prosecutor Archibald Cox put it, "the ex-official lobbyist comes as a friend, an insider."[171] Sometimes, the ex-official may literally have better physical access, if, for example, a legislature continues to give former members special access to legislative facilities. So, too, as Cox explained, "the ex-official will often be able to trade upon habits of deferring to his advice and wishes engendered during the days when he was senior to, or at least a more influential official than those with whom he now deals in a different capacity." Sometimes the ex-official will have special knowledge or inside information about the matter subject to potential government action which will give her an edge over other lobbyists. Beyond the possibility of unfairness to other interests seeking government action, the potential for post-public-service employment as a lobbyist may affect the decisions of government officials while in office, who may be "tempted to curry favor with prospective employers or clients."[172]

As a result, Congress, many state legislatures, and a number of cities have adopted "revolving door" rules or "cooling off" periods limiting for a time the ability of former government officials to lobby the

government offices where they were once employed.[173] The Senate's revolving door rule played a role in the scandal that led to the 2011 resignation of Senator John Ensign (R-NV). Ensign was having an affair with the wife of his administrative assistant, Doug Hampton. When Hampton found out, Ensign helped Hampton establish himself as a lobbyist by finding him clients. Hampton then contacted Ensign's office on behalf of those clients in violation of the anti-revolving door rule, and was eventually indicted for violating the revolving door prohibition.[174]

The content of these restrictions vary significantly with respect to who is restricted; which offices, agencies, or branches of government they are restricted from lobbying; and how long and with respect to what matters the restriction applies. The most consistently accepted principles are (1) that former members of government should not be allowed to lobby with respect to matters with which they were personally and substantially involved as government employees, and (2) that former government officers should not be able to lobby the particular offices or agencies where they were employed for a specific, limited period of time, typically one or two years. At the federal level, revolving door restrictions were initially aimed at members of the executive branch under the 1978 Ethics in Government Act, and the rules governing former executive branch officials vary considerably according to the level of the former official's employment, the subject matter of his or her public service, and the nature of the representation in question. Congress began to regulate lobbying by former members of Congress and their staffs in the Ethics Reform Act of 1989, which also strengthened the limits on former members of the executive branch. HLOGA adopted or extended a number of revolving door restrictions so that former senators are now barred from lobbying Congress for two years after leaving office and former members of the House of Representatives are barred from lobbying Congress for one year after leaving office. Higher-paid congressional staffers, including staff to members of Congress, committees, leadership, and legislative offices are subject to a one-year restriction on lobbying the offices or committees where they had been employed.[175]

Revolving door restrictions have been questioned as both too restrictive and not restrictive enough. On the one hand, they constrain the employment opportunities of former government officials and limit the ability of private individuals and groups to retain as lobbyists individuals who may be uniquely well-informed about their issues and well-qualified to represent them. This could discourage some capable people from government service, particularly legislative staff members who do not enjoy civil service protections and whose jobs are subject to unpredictable political changes. The exclusion of former legislators and staffers knowledgeable about both the policy content of and legislative process for important issues is also a cost. On the other hand, many existing revolving door restrictions are weak. The typical one-year rule may not be long enough to curb unfair influence. Moreover, former members of Congress can escape revolving door restrictions by avoiding the direct contacts with the legislature necessary to fall within the statutory definition of lobbying and instead providing “strategic consulting” services to clients. Former Senator Christopher Dodd demonstrated this when he became chairman and chief executive for the Motion Picture Association of America—in other words, Hollywood's top lobbyist—less than three months after leaving office, despite the Senate's two-year revolving door rule. As Senator Dodd explained, he saw his job “as an architect of legislative strategy.” “There are other people here who do that,” he said of direct lobbying efforts.[176]

There is relatively little case law dealing with revolving door restrictions, perhaps because they have generally been considered constitutionally unproblematic. An early Seventh Circuit decision rejected a due process challenge to the federal criminal law provision barring a former government official from representing a client before the government with respect to a matter in which the former official had been substantially involved while in government, finding that the "statute proscribes as precisely as possible an unethical practice that can manifest itself in infinite forms."[177] Similarly, an Ohio court upheld that state's one-year revolving door rule, at that time aimed only at executive branch personnel, finding the "state has a substantial and compelling interest to restrict unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government."[178] A more recent federal district court decision in Ohio treated revolving door laws as creating a more serious constitutional issue. *Brinkman v. Budish*[179] enjoined the enforcement of Ohio's revolving door law, which had been expanded to bar former members of the state legislature and former legislative employees from representing any person on any matter before the legislature or legislative committees for a period of one year after the conclusion of the member or employee's legislative service. *Brinkman* involved a former legislator who was also a member of an anti-tax advocacy organization and sought to represent that organization, on an uncompensated basis, before the legislature within the statutory one-year period. Finding that the revolving door rule burdened the organization's right to retain a representative of its choosing, the court subjected the law to strict judicial scrutiny. The court agreed that the goals of preventing unethical practices of public employees and public officials, and promoting, maintaining, and bolstering the public's confidence in the integrity of state government are compelling government interests, but held, without explanation, that they are not compelling with respect to *uncompensated* lobbying.[180] A third interest advanced by the government—"to prevent unequal access to the General Assembly by outside organizations by virtue of any significant relationships with current and former public officials who may be in a position to influence government policy"—was held not to be a compelling interest at all.[181] The court reasoned that *Citizens United*'s rejection of the idea "that political corruption necessarily follows from the fact that a speaker may be favored or have special access to elected officials" eliminates the prevention-of-unfair-access justification for revolving door laws.[182]

Brinkman's assertion that *Citizens United* precludes the unequal special access justification for revolving door laws is unpersuasive. Revolving door laws are much more tightly limited than the spending ban at issue on *Citizens United*. The "cooling off" period requirement targets only communications by former government officials to current government officials for a limited time or with respect to a limited set of matters. The former official is free to speak about government matters to the public, or, when not seeking to influence legislative action, during the revolving door period and is entirely free thereafter. So, too, the burden on the individuals and organizations that would retain ex-officials as advocates is light. They are free to hire anyone other than a recent ex-official to represent them to the legislature, and to hire anyone they want to communicate their views to the public about matters before the legislature. The burden on political expression is, thus, quite modest—probably less than that posed by contingent fee restrictions, which may make counsel entirely unavailable to less affluent clients. The prevention of unequal access based on prior government service is an appropriate regulatory goal consistent with the longstanding purposes of lobbying laws to promote public-regarding

government decisions and public confidence in government. Indeed, the essence of the nineteenth and early twentieth century anti-lobbying decisions—the reliance on personal importunities, private solicitation, and the use of inside knowledge—is at the heart of the rationale for the revolving door ban, and would apply even to uncompensated lobbying.

Despite its result, *Brinkman* recognizes that revolving door laws are justified by traditional concerns about government ethics and public confidence in government. Certainly, the narrower rules prohibiting representations with respect to specific matters in which the official was involved are grounded in traditional conflict of interest principles barring representatives from switching sides in the same case. *Brinkman* is a useful reminder that lobbying restrictions implicate First Amendment concerns and that there may be a First Amendment outer limit to revolving door restrictions but the court erred in its unjustified extrapolation from *Citizens United* and its unduly narrow definition of the public interests that can justify lobbying regulation.

A recent development in this area has been the emergence of "reverse revolving door" rules limiting the hiring of lobbyists into government positions. At the start of his administration, President Obama issued an executive order barring—subject to waivers—the hiring of a lobbyist for a position in an agency the lobbyist had lobbied in the preceding two years and requiring any former lobbyist to recuse himself for two years from participating in any matters or policy areas in which the lobbyist had participated in the two years prior to the executive branch appointment.[183] Thereafter the White House issued a memorandum directing the heads of executive departments and agencies not to appoint federally registered lobbyists to serve on advisory boards and committees.[184]

It is difficult to see the case for a blanket ban on the reverse revolving door appointment of lobbyists to full-time positions. Presumably, the appointee's prior service as a lobbyist would be known to both those making the appointment and to the Senate if the position requires Senate confirmation. If the knowledge, experience, and perspective the person brings to the position is attractive, it is hard to see why prior service as a lobbyist should be disqualifying per se, although closeness to a particular organization, industry, or special interest group might be a factor taken into account in the decision to appoint or confirm.[185] If the concern is that the appointee would subsequently exploit the position when he or she leaves the government that could be addressed by the traditional revolving door rule.

On the other hand, requiring former lobbyists to recuse themselves from specific matters on which they had lobbied is completely appropriate as the prospect of a conflict of interest in that situation is very real. So, too, restrictions on the appointment of lobbyists to part-time positions makes some sense as there could be a legitimate concern that a lobbyist who simultaneously holds high government office might have an unfair advantage in seeking to influence government action. On the other hand, some advisory bodies are structured to permit representation of industries, organizations, or interest groups affected by the recommendations or decisions of those bodies. Moreover, as with the question of special limits on campaign contributions it is debatable whether the problem of improper special interest influence is more acute for lobbyists than for other individuals whose private sector positions give them a stake in government actions. The United States Court of Appeals for the District of Columbia Circuit noted these issues when it reversed a lower court's dismissal of a challenge by federally registered lobbyists who were interested in being appointed to the Industry Trade Advisory

Committees (ITACs) authorized by the Trade Act of 1974 to President Obama's executive order barring registered lobbyists from serving on a wide range of advisory boards and commissions, including the ITACs. Emphasizing that "registered lobbyists are protected by the First Amendment right to petition," the court found the plaintiffs "plausibly alleged that the ban pressures them to limit their constitutional right" and so "pled a viable First Amendment unconstitutional conditions claim."[186] As the court explained, the ITACs were created "for the very purpose of reflecting the viewpoints of private industry."[187] Remanding without passing expressly on the merits of the claim, the court noted the government's argument that the ban was intended to change the "culture of special-interest access," but observed skeptically that ITAC members are intended to "serve in a *representative* capacity," and then directed the district court on remand to "ask the parties to focus on the justification for distinguishing…between corporate employees (who may represent their employers on ITACs) and the registered lobbyists those same corporations retain (who may not)."[188]

V. Disclosure

Disclosure laws generally require lobbyists to register with some oversight body and then submit periodic reports concerning the identities of their clients, the funds they receive and spend, and the subjects with respect to which they lobby. Disclosure—indeed, any regulation of lobbying—requires a definition of what constitutes the "lobbying" subject to regulation. The most significant unresolved issue in the definition of lobbying is whether "indirect" lobbying or so-called "grassroots activities"—that is, communications aimed not directly at public officials but at the public in order to get people to contact lawmakers with respect to pending or proposed government actions—should be treated as "lobbying" subject to disclosure. Other current disclosure issues include whether lobbyists should be required to report more information concerning the specific officials they lobby and concerning the sources of the funds used to pay for their activities.

A. Grassroots lobbying

As Dean Allard has explained, effective lobbying includes "efforts to inform and leverage public opinion on an issue in order to shape political outcomes. Indirect advocacy involves research institutions, education and public relations campaigns, mobilization and strategic communication efforts, and coalition building, all of which take place outside of the legislative chamber, but with obvious indirect effects."[189] The use of television and digital and social media campaigns to "build support among voters and key elites" to influence legislative activity is increasingly integral to modern lobbying.[190] Thomas Susman has pointed out that "[g]rassroots organizing and public relations campaigns also accompany rulemaking proceedings" in addition to legislative lobbying, and that with the rise of Internet organizing, websites, blogs, banners, and more, grassroots lobbying has become more technologically sophisticated and widespread.[191] Professor William Luneburg observes that "exhortations to the public at large or various sectors thereof to contact Congress or the federal bureaucracy on an issue or particular legislation or regulation is omnipresent today, particularly given the ease of Internet access to persons who may react favorably to the exhortations and, with a few mouse clicks and not much more effort, send the requested message or an edited version through cyberspace to the requested target." In his view, lobbying disclosure that omits grassroots activity is "seriously incomplete assuming, as most

commentators do, that it can contribute significantly to the success of lobbying campaigns."[192] On the other hand, some activists and scholars have opposed regulation of grassroots lobbying. Jay Alan Sekulow and Erik Zimmerman of the American Center for Law and Justice have emphasized that "[g] rassroots issue advocacy increases citizen participation in the democratic process by encouraging Americans to exercise their right to inform their elected representatives about their positions on important issues." In their view, any regulation of grassroots lobbying, by imposing administrative requirements with the attendant costs of compliance and penalties for noncompliance, would significantly hamper ordinary citizens' political activity, in violation of the First Amendment.[193]

Federal lobbying law does not apply to grassroots lobbying,[194] but most state lobbying disclosure laws do cover some grassroots lobbying activity. One 2009 study concluded that all but thirteen states require reporting concerning some indirect lobbying expenditures.[195] Unsurprisingly, a number of these laws have been challenged in court, but courts have nearly always upheld these requirements.

In *Young Americans for Freedom, Inc. v. Gorton*, the Washington Supreme Court in 1974 rejected a challenge to the Washington State law enacted two years earlier that required disclosure of grassroots lobbying campaigns involving the expenditure of more than $500 within three months or $200 in one month "in presenting a program addressed to the public, a substantial portion of which is designed or calculated primarily to influence legislation." The court found the requirement advanced the informational function generally justifying lobbying disclosure. Indeed, it concluded that striking down the law "would leave a loophole for indirect lobbying without allowing or providing the public with information and knowledge re the sponsorship of the lobbying and its financial magnitude."[196] Two years later, the Michigan Supreme Court in an advisory opinion that addressed a host of challenges to a proposed campaign finance, government ethics, and lobbying measure found it would be permissible to treat as lobbying subject to disclosure "soliciting others to communicate with an official in the legislative branch or an official in the executive branch for the purpose of influencing legislative or administrative action" above the statutory dollar threshold, provided that the definition was "interpreted to mean express and direct requests to so communicate."[197]

The federal courts of appeals for the Eighth and Eleventh Circuits, addressing challenges to the lobbying disclosure laws of Minnesota and Florida, respectively, rejected claims that regulating grassroots lobbying is unconstitutional. The Minnesota law defined lobbying to include "attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials." The National Rifle Association asserted it would be unconstitutional to require it to report concerning letters and mailgrams the organization sent to its Minnesota members urging them to contact their state legislators with respect to certain legislative items. The Eighth Circuit, however, rejected the claim, finding that "when persons engage in an extensive letter writing campaign for the purpose of influencing specific legislation, the State's interest is the same whether or not those persons are members of an association."[198]

The Eleventh Circuit has twice upheld Florida's grassroots lobbying disclosure requirements. In *Florida League of Professional Lobbyists, Inc. v. Meggs*,[199] in 1996, the court observed that the governmental interest in disclosure of indirect lobbying efforts including media campaigns may in some ways be stronger than the case for disclosure of direct lobbying because "when the pressures are indirect…they

are harder to identify without the aid of disclosure requirements."[200] In 2008, the court rejected a challenge to Florida's requirement that lobbyists report indirect communications, which the court noted might include opinion articles, issue advertisements and letter writing campaigns from lobbyists on behalf of their clients to the press and public at large for the purpose of influencing legislation or policy. The court concluded that the requirement was justified by the compelling interest in voters being able to appraise "the integrity and performance of officeholders and candidates."[201]

The only court decision going the other way is *Montana Automobile Assn. v. Greely*,[202] in which the Montana Supreme Court struck down the provision of Montana's law that defined as a "principal" not only someone who spends more than $1,000 a year to engage a lobbyist but also a person "other than an individual" who spends above that threshold amount "to solicit, directly or indirectly or by an advertising campaign, the lobbying efforts of another person." The court found that this could include the efforts of various organizations to ask their members to contact public officials with respect to legislation, and concluded there was no compelling state interest that would justify the burden on First Amendment rights such a provision would impose.[203]

The argument that applying disclosure requirements to grassroots lobbying is unconstitutional relies primarily on the sentence in *Harriss* construing the Federal Regulation of Lobbying Act of 1946 (FRLA) "to refer only to lobbying in its commonly accepted sense; to direct communication with members of Congress on pending or proposed federal legislation"[204] and the comparable reading of the FRLA by *Rumely*[205] on which *Harriss* relied and which it quoted. But *Harriss* and Rumely are actually consistent with mandatory disclosure of at least some grassroots lobbying campaigns.

First, *Harriss* does not say that requiring the disclosure of grassroots activity would be unconstitutional, only that it could raise a more substantial constitutional question than disclosure with respect to direct contacts with legislators and legislative staff. Invocation of the constitutional avoidance canon reserves the constitutional question; it does not resolve it.

Second, and more importantly, *Harriss* actually treats at least some grassroots lobbying as part of "lobbying in its commonly accepted sense." The very next sentence after the one just quoted states: "The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings *or through an artificially stimulated letter campaign.*"[206] At that point, the opinion's footnote 10 cites to and quotes from the legislative history of the Act which indicates that the first of the "three distinct classes of so-called lobbyists" to which the FRLA was intended to apply consists of "[t]hose who do not visit the Capitol but initiate propaganda from all over the country, in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts"[207]—in other words, grassroots lobbying. *Harriss* on its own terms, thus, appears to permit the application of disclosure requirements to at least some grassroots lobbying.

Third, the informational interest served by the regulation of direct lobbying is equally applicable to indirect lobbying. As *Harriss* found, there is an important government interest in enabling members of Congress to find out from those attempting to influence them "who is being hired, who is putting up the money, and how much."[208] With grassroots lobbying often a component of efforts to influence

legislative and regulatory processes, disclosure of the source and scope of grassroots lobbying activities can provide valuable information both to government officials and to the general public. Indeed, as the Eleventh Circuit observed, disclosure may be more valuable here than for direct lobbying because the sponsors and extent of grassroots lobbying efforts may be much less apparent than the interests behind face-to-face lobbying.[209]

Finally, in the half-century since *Harriss* the Supreme Court has repeatedly upheld federal campaign finance laws that require the reporting and disclosure of political expenditures aimed at the general public. Indeed, the Court has invoked the important public interest in informing voters about the interests behind electoral communications to uphold disclosure requirements even as it has struck down associated substantive limits on electoral expenditures. In *Buckley v. Valeo*,[210] the Court invalidated the provision of the Federal Election Campaign Act (FECA) that would have limited how much individuals or committees could spend independently (e.g., not in contributions to candidates, parties, or political action committees) to support or oppose candidates for office, but it upheld the requirement that such expenditures above a threshold amount be reported. More recently, in *Citizens United* the Court upheld the application of the requirements of the Bipartisan Campaign Reform Act (BCRA) for the reporting of independent electioneering communications above a dollar threshold to corporations even as it struck down all limits on corporate campaign spending. The Court reaffirmed its prior position that disclosure of the identity of the person, group, or organization paying for an electioneering communication advances the important public interest in voter information. Although campaign finance is not on all-fours with lobbying, the two forms of political engagement are similar and have been treated by the Court as triggering similar constitutional concerns. As a result, the Court's determination that disclosure of the financing of electoral communications aimed at the public does not violate the First Amendment would support a determination that at least some disclosure of grassroots lobbying would be constitutional as well.

Nor is judicial support for disclosure limited to candidate elections. The Supreme Court has clearly indicated, albeit without expressly deciding, that disclosure requirements can be applied to organizations seeking to influence the public in ballot proposition elections.[211] The courts of appeals have regularly upheld the constitutionality of state laws requiring financial disclosures by committees active in ballot proposition campaigns.[212] Ballot committee campaigns to influence voter decisions whether to enact or defeat proposed state laws or constitutional amendments closely resemble grassroots lobbying to influence legislative or executive branch actions.

Applying disclosure requirements to grassroots activity raises at least two further questions. First, should such a requirement apply only to those whose direct lobbying activities have already triggered the duty to register as a lobbyist and file periodic reports, or may grassroots activity alone, without any direct contacts with legislative or executive branch officials, trigger a duty to register and report? Second, what kinds of communications aimed at the public should be treated as “lobbying,” as opposed to a more general discussion or advocacy concerning public issues?

On the first question, limiting the disclosure requirement to lobbyists already required to register because of their direct lobbying contacts with public officials is certainly less burdensome. Mandating the inclusion of grassroots expenditures in a quarterly or semi-annual report would be a merely

incremental change to a pre-existing reporting requirement rather than the addition of an entirely new regulatory obligation. By contrast, for an individual or organization not engaged in lobbying in the traditional sense, imposition of a registration and reporting requirement for the dissemination of communications aimed at the general public or the organization's members could come as a surprise and impinge on the ability to engage in political activity. However, from the perspective of providing government decision makers or the public with information about lobbying campaigns, it does not make a difference if an organization engaged in grassroots activity is also involved in more traditional face-to-face lobbying. Limiting a registration and reporting requirement to grassroots expenditures above a fairly high dollar threshold, however, would mitigate the burden by focusing the obligation on individuals or organizations engaged in a significant level of activity.[213] These are also the lobbying programs for which the public information value of disclosure is greatest.

The second question resembles the issue central to campaign finance regulation over how to distinguish between electioneering communications which may be subject to disclosure requirements and general political speech about issues—including communications that may mention candidates—that is not considered to be electioneering and therefore not subject to disclosure. In the lobbying context, disclosure could be limited to (1) communications that refer to a specific bill or a clearly identified pending or proposed executive or legislative action, or (2) messages that expressly call on listeners, viewers, or readers to contact a government official. The first approach has the benefit of limiting regulation to communications addressing relatively determinate government actions. Much as an election is a particularly focused form of political activity, limiting the definition of lobbying to communications that refer to a particular bill or other proposed official action would also limit regulation to communications that aim at a particular government decision rather than discuss public policy generally. Thus, when the Washington Supreme Court upheld that state's grassroots disclosure requirement, the court noted that under state law "reporting would not be required when the subject campaign does not have as its object the support or rejection of specific legislation."[214] The difficulty with this approach, however, would be defining a particular legislative proposal and distinguishing it from a broader legislative subject, especially as particular proposals change during the legislative process. Would a message dealing with health insurance reform be sufficiently focused to be treated as lobbying, or would it have to refer to "Obamacare," "Medicaid expansion," individual mandate, or a specific bill number to trigger an obligation to report spending?

The second approach of limiting "lobbying" to messages that expressly call on the recipient to contact government officials to urge them to take a particular action provides a clearer standard. It is more consistent with the traditional definition of lobbying as involving contacts with government officials and with the Court's express advocacy standard in campaign finance disclosure, which focuses on communications that call on the recipient to take the action of voting for or against the candidate mentioned in the message. Thus, the Michigan Supreme Court interpreted that state's proposal for the disclosure of indirect lobbying to apply only to "express and direct requests to [others to] communicate" with officials for the purpose of influencing legislative or administrative action.[215] This approach is also more consistent with *Rumely.* As the Court explained, the activity of Rumely's organization that attracted the attention of the House Select Committee on Lobbying Activities was "the sale of books of a particular political tendentiousness."[216] There was no claim that the books called on readers to

contact government officials. Rather, Committee Chairman Buchanan's concern was with "attempts 'to saturate the thinking of the community.'"[217] The *Rumely* Court was troubled by a congressional investigation into efforts to influence public thinking generally rather than the legislative process more specifically. Such more general efforts to affect public opinion would be exempt from regulation under a definition of grassroots lobbying that limits coverage to messages to the public which use language calling on message recipients to contact government officials.

A grassroots lobbying disclosure requirement that survives a facial constitutional attack could still be subject to an as-applied challenge. In upholding FECA's campaign finance disclosure provision, *Buckley* observed there could be cases where an organization could show that disclosure of its activities would likely result in harassment or threats of reprisal to contributors or members. If so, the organization could obtain an exemption from even a valid disclosure law. Similar reasoning would presumably apply in the grassroots lobbying disclosure context, although given that such disclosure would likely be focused on organizational expenditures rather contributors, members, or the identities of the recipients of the organization's messages, the need for an as-applied exception would not be likely to arise.

B. Other disclosure issues

1. Contact disclosure

Disclosure ought to require lobbyists to identify the government officials lobbied. For all their attention to the money spent on lobbying, relatively few disclosure laws require the reporting of the specific contacts a lobbyist makes with a legislator, staff member, or executive branch officer in the course of lobbying. Instead, disclosure laws, such as the federal Lobbying Disclosure Act,[218] tend to focus on the reporting of how much was spent on lobbying during the reporting period and on identifying the clients. A registered federal lobbyist must report on the "general issue area in which the registrant engaged in lobbying activities, specific issues upon which a lobbyist employed by the registrant engaged in lobbying activities, including, to the maximum extent practicable, a list of bill numbers and references to specific executive branches;" and "a statement of the Houses of Congress and the Federal agencies contacted by lobbyists employed by the registrant on behalf of the client."[219] But the lobbyist need not report the specific actions requested of the officials lobbied, or identify the officials lobbied or even the specific congressional committee or subcommittee, or the specific agency bureau, unit, or division, contacted.

Contact disclosure would require lobbyists to disclose the specific officials, or at least the specific congressional offices, congressional committees, or federal agency offices, contacted and to provide more information about the content of that contact than the number of the bill and a reference to executive branch actions. If the purpose of lobbying transparency is to serve the public interest in understanding "the efforts of paid lobbyists to influence the public decision-making process,"[220] contact disclosure would be at least as valuable as disclosure of the amount of money spent on lobbying. Indeed, only contact disclosure can actually demonstrate the links between particular lobbyists and particular elected officials or senior agency appointees. When combined with the reporting of campaign contributions and other forms of financial assistance to the same elected officials, contact disclosure could give a fuller picture of the interactions between interest groups and government. The ABA Task

Force Report called for a version of contact disclosure focused on congressional offices and committees, rather than specific individuals,[221] and the Sunlight Foundation has developed a model Lobbying Transparency Act which would require reporting the names of the officials contacted.[222] The city of San Francisco amended its Lobbying Ordinance in 2010 to require monthly reports by registered lobbyists that include the name of each city officer with whom the lobbyist made a contact during the reporting period, the date of the contact, and the "local legislative or administrative action that the lobbyist sought to influence, including, if any, the title and file number of any resolution, motion, appeal, application, petition, nomination, ordinance, amendment, approval, referral, permit, license, entitlement, or contract, and the outcome sought by the client."[223]

An alternative approach would be to require the officials lobbied to publicly report on their contacts with lobbyists. Professor Anita Krishnakumar proposed this in her 2007 article,[224] and President Obama in his 2011 State of the Union Message called on Congress "to do what the White House has already done" and put online information about "when your elected officials are meeting with lobbyists"[225]—although his proposal was rejected by congressional leaders out of hand.[226] As the goal of transparency is to get a better public understanding of the interest group pressures on public officials, disclosure by officials of lobbyist contacts makes some sense. But focusing contact disclosure efforts on the lobbyists rather than the officials is likely to be more successful. Public officials may not always know whether the people with whom they are meeting are lobbyists. Indeed, in some cases, whether an individual is to be treated as a regulated lobbyist may vary across, or within, reporting periods depending on the extent of the individual's lobbying activity. Public officials need not ordinarily maintain detailed logs of all their meetings. And enforcement of reporting requirements against public officials, including compliance with reporting time deadlines, is likely to be difficult. Registered lobbyists, by contrast, know who they are; likely already keep time logs in order to bill their clients; and already have to file periodic reports. Lobbying regulators are likely to be more vigorous in enforcing requirements against private lobbyists than public officials. Moreover, resistance to adopting contact disclosure is likely to be far greater if the disclosure has to be made by the lawmakers themselves instead of the lobbyists. The ABA Task Force Report recommends that registered lobbyists be required to report "all congressional offices, congressional committees, and federal agencies and offices contacted."[227] As the Report observes, such disclosure would directly serve the social interest in tracing the impact of lobbying on public decision making.[228]

2. Coalition lobbying

Some significant lobbying campaigns are undertaken by trade associations, coalitions, or umbrella organizations that act on behalf of a collection of businesses or interest groups with a stake in an issue. Traditional disclosure laws might require the organization formally undertaking the lobbying or hiring the lobbyist—or organized for the sole purpose of lobbying—to disclose its actions, but would provide little information concerning the identity of the businesses, ideological groups, individuals, or other interests directing or financing the lobbying. The problem of obtaining adequate information about the groups actually responsible for lobbying is analogous to the increasingly salient campaign finance issue of spending by 501(c)(4) non-profit social welfare organizations and 501(c)(6) trade associations, which are required to disclose the fact and amount of their spending but not the identities

of the individuals or firms supplying their funds. For both lobbying and campaign finance, the growing role of organizations with anodyne names that are specially created for electoral or legislative advocacy and do not disclose the sources of their funding or the amounts given to them undermines the goal of political transparency. HLOGA addresses this problem partially by requiring the disclosure of the identity of any organization that contributes more than $5,000 to a registered lobbyist or client in a quarterly period and also actively participates in the planning, supervision, or control of the registrant's lobbying activities. The United States Court of Appeals for the District of Columbia Circuit in *National Association of Manufacturers v. Taylor*[229] sustained this enhanced disclosure requirement in the fact of a host of First Amendment objections.

Coalition lobbying may also involve grassroots campaigns. In New York, which has experienced extensive grassroots lobbying by coalitions of organizations intending to influence state budget decisions, the legislature in 2012 enacted a bill proposed by Governor Andrew Cuomo requiring any organization that spends at least $50,000 and three percent of its total expenditures on lobbying in a year to report the identity of any donor that contributes at least $5,000 to the lobbying effort.[230] One consequence of the law was that the Committee to Save New York, a business-backed coalition which was the highest spending lobbying group in New York in 2011 and 2012[231] and spent more than $13 million to promote Governor Cuomo's agenda, “went dormant as soon as the state began requiring disclosure of donors.”[232] By going beyond the disclosure of major donors actively involved in organizational lobbying decisions and seeking to reach all major donors, whether involved in an organization's lobbying efforts or not, the New York law may be pushing the edge of the constitutional envelope. But the law and the political context in which it emerged underscore the need for enhanced disclosure of the sources behind coalition lobbying.

VI. Conclusion

Although lobbying is often treated as a relatively recent phenomenon, its place in our representative system has been intensely debated by courts for nearly two centuries. For much of that time, the efforts of paid advocates to influence the legislative process were treated as tending to corrupt the republican form of government, yet even then many judges recognized that individuals, firms, and groups have legitimate interests in government action and that paid advocates can be appropriate intermediaries for seeking government decisions to advance those actions. Since the mid-twentieth century, the debate over the regulation of lobbying has been constitutionalized, with the Supreme Court grounding lobbying activity in the First Amendment's protections of speech, association, and petition. But even then, the courts have recognized that the dangers of hidden and unfair improper influence justify many regulations of lobbying particularly disclosure. Indeed, the concerns central to the nineteenth century critique of lobbying—secret contacts, provision of private pecuniary benefits, misuse of personal influence, special access—remain salient to contemporary lobbying laws and the constitutional issues they implicate.

Changes in lobbying practice raise new challenges for lobbying law. The increasing interpenetration of lobbying with candidate election finance on the one hand, and with public relations campaigns on the other, have led for new calls (and some laws) that regulate beyond what the Supreme Court in the 1950s called “lobbying in its commonly accepted sense” and reach lobbyists' involvement in campaign

fundraising lawmakers and "grassroots" public advocacy communications. These and other current lobbying law disputes—such as the Obama administration's reverse revolving door rules—require consideration of whether lobbying poses a special danger of corruption or its appearance, what role special interests may legitimately play in the political process, and when is it appropriate to regulate, if only through disclosure, non-electoral political advocacy. The legal and regulatory balancing act of holding together First Amendment rights, controls on improper, and promoting government transparency may be more difficult than ever.

After nearly two centuries, anxiety over the influence of lobbyists continues and the debate over whether and when lobbying is a corruptive form of special interest influence or an appropriate—indeed, constitutionally protected—means of seeking to educate and influence government decision making remains unresolved. This conflict over the place of lobbying in our system is likely to persist for some time to come.

[1] *Clippinger v. Hepbaugh*, 5 Watts & Serg. 315, 320–21 (Pa. 1843).

[2] *Id* at 320.

[3] *Id*.

[4] *Chesebrough v. Conover*, 140 N.Y. 382, 387 (1893).

[5] *Id*.

[6] Jack Abramoff was a politically powerful Washington lobbyist from the mid-1990s until his activities came under federal scrutiny starting in 2004. As the United States Court of Appeals for the District of Columbia Circuit observed, the Department of Justice investigation into his activities "unearthed evidence of corruption so extensive that it ultimately implicated more than twenty public officials, staffers and lobbyists." United States v. Ring, 706 F.3d 460, 463 (D.C. Cir. 2013). *See also* United States v. Safavian, 649 F.3d 688 (D.C. Cir. 2011) (affirming conviction of General Services Administration chief of staff who accepted a golf trip to Scotland from Abramoff).

[7] Dan Eggen, "In Midterm Elections, Washington Lobbying Becomes a Line of Attack for Both Parties," Washington Post, Oct. 6, 2010.

[8] *See* Megan R, Wilson, "K Street Group Strikes 'Lobbist' from Name," The Hill, Nov. 18, 2013, <http://thehill.com/business-a-lobbying/business-a-lobbying/190639-k-street-group-strikes-lobbyist-from-name>.

[9] *See, e.g.*, Andrew Doughman, "Local Governments Spend $3 Million to Lobby Legislature—for Tax Increases," Las Vegas Sun, July 24, 2013, <http://www.lasvegassun.com/news/2013/jul/24/local-governments-spend-3-million-lobby-legislatur/>; "Local Governments Lobby Minnesota Legislature with $7.8 Million in 2012," Sctimes.com, July 17, 2013, <http://www.sctimes.com/viewart/20130717/NEWS01/307170049/Local-governments-lobby-Minnesota-Legislature-7-8-million-2012>; Brian M. Rosenthal, "Local Governments Spend Big to Lobby

Legislature," Seattle Times, June 18, 2013 (government entities—cities, counties, ports, Native American tribes, public utility districts and school districts—were the biggest category of lobbying spenders in Washington state), <http://seattletimes.com/html/localnews/2021218481_governmentlobbyingxml.html>.

[10] *See* OpenSecrets.org, "Lobbying Database," <http://www.opensecrets.org/lobby>. Total reported federal lobbying spending was $3.50 billion in 2009, $3.55 billion in 2010, $3.33 billion in 2011, and $3.30 billion in 2012. *Id*.

[11] *See* New York State Joint Commission on Public Ethics, 2012 Annual Report (2013) at 33 (reported lobbying spending was $213 million in 2010, $220 million in 2011, and $205 million in 2012). Lobbying expenses with respect to the New Jersey government were a record $65.6 million in 2010, up from $57.6 million in 2009, see "Lobbying Up," Philadelphia Inquirer, Mar. 9, 2011, <http://www.philly.com/philly/multimedia/Lobbying_in_New_Jersey.html?view=graphic>.

[12] *See* Timothy M. LaPira and Herschel F. Thomas III, "Just How Many Newt Gingrich's Are There on K Street? Estimating the True Size and Shape of Washington's Revolving Door," Apr. 2, 2013, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241671>.

[13] During one of the debates during the 2011–12 contest for the Republican presidential nomination, former Speaker Gingrich responded to the request that he explain what he had done to earn a payment of $300,000 from mortgage giant Freddie Mac by stating that he had not lobbied but had offered "historical advice" relevant to the mortgage crisis. *See, e.g.,* "Republican Debate: 7 Attacks on Newt Gingrich to Watch," Politico, Dec. 15, 2011, <http://www.politico.com/news/stories/1211/70230_Page2.html>.

[14] *See, e.g.,* Chris Frates, "Lobbyists Call Bluff on 'Daschle Exemption'" Politico, July 26, 2010; Kate Ackley, "Lobbying Without a Trace," Roll Call, March 20, 2013. *See also* Thomas Edsall, "The Shadow Lobbyist," N.Y. Times, Apr. 25, 2013, <http://opinionator.blogs.nytimes.com/2013/04/25/the-shadow-lobbyist/?_r=0>.

[15] *See, e.g.,* Gary Andres, "Campaign-Style Advocacy: A Broader View of Lobbying," 11 The Forum 3 (2013); accord, Thomas B. Edsall, "The Unlobbyists," N.Y. Times, Dec. 31, 2013, <http://www.nytimes.com/2014/01/01/opinion/edsall-the-unlobbyists.html?_r=0>.

[16] *See, e.g.,* 2 U.S.C. § 1601 et seq. (disclosure of lobbying activities).

[17] *See, e.g.,* National Conference of State Legislatures (NCSL), "Lobbyist Activity Report Requirements," (updated Jan. 2013) <http://www.ncsl.org/legislatures-elections/ethicshome/50-state-chart-lobbyist-report-requirements.aspx>.

[18] *See, e.g.,* N.Y.C. Admin Code, §§ 3-211 et seq., <http://www.cityclerk.nyc.gov/html/lobbying/law_admin.shtml>; City of Chicago, Governmental Ethics Ordinance, §§2-156-210 et seq., Municipal Code of Chicago, <http://www.cityofchicago.org/content/dam/city/depts/ethics/general/Ordinances/GEO-Jan-

2013.pdf>; Municipal Lobbying Ordinance, Los Angeles Municipal Code, §§ 48.01 et seq., <http://ethics.lacity.org/PDF/laws/law_mlo.pdf>.

[19] For only a handful of recent examples, *see* Nicholas Kuznets, "IMPACT: Georgia Governor Signs Bills Limiting Gifts from Lobbyists," Center for Public Integrity, May 7, 2013, <http://www.publicintegrity.org/2013/05/07/12622/impact-georgia-governor-signs-bills-limiting-gifts-lobbyists>; Nathan Shaker, "Mayor Signs Revision to Philadelphia Lobbying Law," Lobby Comply Blog, Nov.1, 2011, <http://67.39.100.124/wordpress/?p=6291>; Cy Ryan, "Bill on Lobbyist Spending on Legislators Introduced," Las Vegas Sun, Mar. 1, 2011; Chris Joyner, "Commission Expands Definition of Lobbyist," Atlanta Journal-Constitution, Mar. 7, 2011; Sarita Chourey, "SC Lobbyists Face Tighter Restrictions," Augusta Chronicle, Mar. 31, 2011; Beveridge & Diamond, "Expansion of the Massachusetts' Lobbying Law May Catch Many Unaware," 2010, <http://www.bdlaw.com/news-797.html>.

[20] 22 U.S.C. § 611 et seq.

[21] *See, e.g.*, 18 U.S.C. § 207. For federal revolving door restrictions, *see generally* Jack Maskell, "Post-Employment, 'Revolving Door,' Laws for Federal Personnel," Congressional Research Service Report for Congress, 7-5700 (Sept. 13, 2012).

[22] Section 162(e) of the Internal Revenue Code, as amended by the Omnibus Budget Reconciliation Act of 1993, provides that expenses incurred in attempting to influence federal or state legislation, administrative action or referenda may not be deducted as business expenses.

[23] 26 U.S.C. § 501(c)(3).

[24] 13 U.S.C. § 1352.

[25] Brandeis, "What Publicity Can Do," Harper's Weekly, Dec. 20, 1913, at 10.

[26] According to Professor Fred Shapiro the quip so frequently associated with Bismarck was really first uttered by "lawyer-poet John Godfrey Saxe" in 1869, and was not generally attributed to Bismarck until the 1930s. *See* Fred R. Shapiro, "Quote…Misquote," N.Y. Times, July 21, 2008, <http://www.nytimes.com/2008/07/21/magazine/27wwwl-guestsafire-t.html?_r=0>.

[27] *See, e.g.*, Moffett v. Killian, 360 F. Supp. 228 (D. Conn. 1973); Fidanque v. Oregon Standards and Practices Comm., 969 P.2d 376 (Ore. 1998); ACLU of Illinois v. White, 692 F. Supp.2d 896 (N.D. Ill. 2010).

[28] *See, e.g.*, Chip Nielsen, Jason D. Kaune, and Jennie Unger Skelton, "State Lobby and Gift Laws," Practising Law Institute, 2010, 1837 PLI/Corp 597; National Conference of State Legislatures, "Ethics: Legislator Gift Restrictions Overview," Updated Mar. 2013, <http://www.ncsl.org/legislatures-elections/ethicshome/50-state-table-gift-laws.aspx>.

[29] Marshall v. Baltimore & Ohio RR Co., 57 U.S. 314, 317–19 (1854).

[30] *Id*. at 318.

[31] *Id*.

[32] *Id*. at 334–35.

[33] *Id*. at 335.

[34] *Id*.

[35] *Id*. at 336.

[36] 59 U.S. 45 (1864).

[37] *Id*. at 56.

[38] *Id*. at 54–56.

[39] *Id*. at 54–55.

[40] 88 U.S. 441 (1874).

[41] *Id*. at 450.

[42] *Id*. at 451.

[43] *Id*. at 452.

[44] 202 U.S. 71 (1906).

[45] *Id*. at 78.

[46] 207 U.S. 244 (1907).

[47] *Id*. at 248.

[48] 275 U.S. 199 (1927).

[49] *Id*. at 206.

[50] *See, e.g.,* Shea v. Mabry, 69 Tenn. 319 (1878) (claim of misuse of corporate funds in hiring a lobbyist); Crawford v. Imperial Irr. Dist., 253 P. 726 (Cal. 1927) (taxpayer suit against district board of directors for hiring a lobbyist).

[51] Harris v. Roof's Executors, 10 Barb. 489, 494–95 (Sup Ct. N.Y. Co., N.Y. 1851).

[52] Shea v. Mabry, 69 Tenn. at 341–42.

[53] Kansas Pac. Ry. Co. v. McCoy, 8 Kan. 538, 543 (1871).

[54] *Id*. at 543–44.

[55] Brown v. Brown, 34 Barb. 533, 537 (Sup Ct., General Term, N.Y. 1861).

[56] Foltz v. Cogswell, 25 P. 60, 62 (Cal. 1890).

[57] Houlton v. Dunn, 61 N.W. 898, 899 (Minn. 1895).

[58] Crawford v. Imperial Irr. Dist., 253 P. at 728.

[59] Burke v. Wood, 162 F. 533, 541 (S.D. Ala. 1908).

[60] Crawford v. Imperial Irr. Dist, 253 P. at 728–29.

[61] Houlton v. Nichol, 67 N.W. 715, 718 (Wis. 1896).

[62] *Id*.

[63] *See* Foltz, 25 P. at 62 (quoting Article 4, section 35 of the California constitution).

[64] *Id*.

[65] *See, e.g.,* Note, Contingent Fee Contract to Procure Legislation, 45 Yale L.J. 731, 733 (1936).

[66] Houlton v. Dunn, 61 N.W. at 901.

[67] *See, e.g., id*. at 900 (noting that "frequently our educational, charitable, and humane laws are thus procured").

[68] *See, e.g., id.* at 901 (noting that the "present iniquitous system of lobbying with members of our legislative bodies and public officials is fast becoming a menace to our capacity for self-government").

[69] 345 U.S. 41 (1953).

[70] *Id*. at 46.

[71] *Id*. at 47.

[72] *Id*. at 44–49. Justices Black and Douglas concurred in the result but would have held the investigative resolution unconstitutional.

[73] 347 U.S. 612 (1954).

[74] *Id*. at 620.

[75] *Id*. at 625–26. Justice Douglas, joined by Justice Black, and Justice Jackson in a separate opinion dissented. The dissenters found the statute to be vague and overbroad and thus a burden on First Amendment rights. Justice Douglas left open the possibility that with a properly drawn statute Congress might have "power to require disclosure of the real principals behind those who come to Congress (or get others to do so) and speak as though they represent the public interest, when in fact they are undisclosed agents of special groups." *Id*. at 632. Similarly, Justice Jackson noted that he did not disagree with the Court's assumption that "Congress has power to regulate lobbying for hire as a business or profession and to require such agents to disclose their principals, their activities, and their receipts." *Id*. at 636.

[76] *Id*. at 625.

[77] 365 U.S. 127 (1961).

[78] *Id*. at 138.

[79] 347 U.S. at 625.

[80] 558 U.S. 310, 130 S.Ct. 876 (2010).

[81] 130 S.Ct. at 915.

[82] *Harriss*, 347 U.S. at 620 (emphasis supplied).

[83] *Id*. at 621, n.10.

[84] *Id*. at 620.

[85] 358 U.S. 498 (1959).

[86] *Id*. at 513.

[87] *Id*.

[88] 461 U.S. 540 (1983).

[89] *Id*. at 546. The Supreme Court recently reaffirmed *Regan*'s central holding that the denial of a tax deduction for lobbying expenses is a permissible congressional decision not to provide a subsidy for efforts attempting to influence legislation and is not an unconstitutional burden on protected First Amendment activity. *See* Agency for Int'l Devel. v. Alliance for Open Society Int'l, 133 S.Ct. 2321, 2328 –29 (2013).

[90] *Id*. at 551–54.

[91] *Cf*. Autor v. Pritzker, __ F.3d __ (D.C. Cir. Jan. 17, 2014) (holding that lawsuit by lobbyists challenging presidential executive order making registered lobbyists ineligible to serve on federal Industry Trade

Advisory Committees states a "viable First Amendment unconstitutional conditions claim" because the "ban pressures them to limit their constitutional right to petition").

[92] *See, e.g.,* Walter Moskop, "Missouri Politicians Took More than $750K in Lobbyist Gifts During Session," St. Louis Post-Dispatch, July 2, 2013, <http://www.stltoday.com/news/local/govt-and-politics/political-fix/missouri-politicians-took-more-than-k-in-lobbyist-gifts-during/html_d0e4e4e0-68cb-5a0f-8d86-6847e0aa902c.html>; Chris Joyner, "Loopholes Abound in Some Lobbyist Gift Bans," Atlanta Journal-Constitution, Oct. 14, 2012, <http://www.ajc.com/news/news/loopholes-abound-in-some-lobbyist-gift-bans/nScjt/>; Andy Johns, "Georgia Lawmakers Defend Lobbyist Dollars," Times Free Press, July 5, 2011, <http://www.timesfreepress.com/news/2011/jul/05/georgia-lawmakers-defend-lobbyist-dollars/>; Phillip Rawls, "Gambling Trial Highlights Fees Paid to Legislators," June 26, 2011, <http://www.vcstar.com/news/2011/jun/26/gambling-trial-highlights-fees-paid-to/>. A particularly interesting question arises when an elected official donates to an official's favorite charity (such as an academic center named in honor of the official or a foundation run by a member of the official's family). *See, e.g.,* Eric Lipton, "Wife's Charity Offers Corporate Tie to a Governor," N.Y. Times, Mar. 2, 2011, <http://www.nytimes.com/2011/03/03/us/politics/03jindal.html?pagewanted=all>.

[93] William V. Luneburg, "The Evolution of Federal Lobbying Regulation," 41 McGeorge L. Rev. 85, 114 (2009).

[94] Thomas Susman, "Lobbying in the 21st Century—Reciprocity and the Need for Reform," 58 Admin. L. Rev. 737, 744–45 (2006).

[95] Nicholas W. Allard, "Lobbying is an Honorable Profession: The Right to Petition and the Competition to be Right," 19 Stan. L. & Pol. Rev. 23, 60 (2008).

[96] Eric Lipton, "A Loophole Allows Lawmakers to Reel in Trips and Donations," N.Y. Times, Jan. 19, 2014, <http://www.nytimes.com/2014/01/20/us/politics/a-loophole-allows-lawmakers-to-reel-in-trips-and-donations.html?ref=todayspaper>.

[97] "Lobbying Law in the Spotlight: Challenges and Improvements," Report of the Task Force on Federal Lobbying Laws, Section of Administrative Law and Regulatory Practice, American Bar Ass'n, (hereinafter "ABA Task Force Report"), Jan. 3, 2011, at 19.

[98] P.L. 110-81, 121 Stat. 735 (110th Cong., 1st Sess.).

[99] 2 U.S.C. § 434 (i).

[100] 2 U.S.C. § 434(i)(8)(A).

[101] According to the National Conference of State Legislatures (NCSL), eleven states ban lobbyist contributions while the legislature is in session. *See* NCSL, Limits on Campaign Contributions During the Legislative Session (Dec. 6, 2011), <http://www.ncsl.org/legislatures-elections/elections/limits-on-contributions-during-session.aspx>. *See also* Kevin O'Hanlon, "Senators Want to Stop Lobbyist Contributions During Session," Lincoln Journal Star, Feb. 19, 2013,

<http://journalstar.com/legislature/senators-want-to-stop-lobbyist-contributions-during-session/article_65813aa2-6708-57e7-b1da-15488a66b4b7.html>.

[102] NCSL, "Prohibited Donors," Dec. 6, 2011 (five states—Alaska, California, Kentucky, South Carolina, and Tennessee—prohibit lobbyists from making campaign contributions to candidates for some elected offices), <http://www.ncsl.org/legislatures-elections/elections/prohibited-donors.aspx>.

[103] *Id*. (Massachusetts). *See also* N.Y.C. Admin Code § 3-703 (imposing substantially lower contribution limits on donations to candidates for New York City office by lobbyists and other individuals and entities that have business dealings with the City).

[104] N.C. Stat. § 163-278.13C.

[105] Md. Code, State Gov't, § 15-714.

[106] *See, e.g.,* Conn. Gen. Stat. 9-610(g); R.I. Gen. Laws § 22-10-9; Wash. Rev. Code § 42.17.170.

[107] State v. Alaska Civil Liberties Union, 978 P.2d 597, 630-31 (Alaska. 1999).

[108] Ark. Right to Life State PAC v. Butler, 29 F.Supp.2d 540, 550–53 (W.D. Ark. 1998).

[109] State v. Dodd, 561 So.2d 263 (Fla. 1990).

[110] Shrink Missouri Gov't PAC v. Maupin, 922 F. Supp. 1413 (E.D. Mo. 1996).

[111] Emison v. Catalano, 951 F. Supp. 714 (E.D. Tenn. 1996).

[112] Kimbell v. Hooper, 655 A.2d 44 (Vt. 1995).

[113] North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999), cert. den. 528 U.S. 1153 (2000).

[114] *See, e.g.,* Butler, 29 F.Supp.2d at 552; Dodd, 561 So.2d at 265; Alaska CLU, 978 P.2d at 631.

[115] *See, e.g.,* Maupin, 922 F.Supp. at 1422; Butler, 29 F.Supp.2d at 552; Dodd, 561 So.2d at 265–66.

[116] Emison, 951 F.Supp. at 723; Dodd, 561 So.2d at 565–66.

[117] Dodd, 561 So.2d at 564.

[118] 168 F.3d at 715–16.

[119] *Id*. at 716.

[120] *See generally* Fair Political Practices Comm. v. Superior Court, 599 F.2d 46 (Cal. 1979); Institute of Government Advocates v. Fair Political Practices Comm., 164 F. Supp.2d 1183 (E.D. Cal. 2001); State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999); Associated Indus. of Kentucky v. Comm., 912

S.W.2d 947 (Ky. 1995); Green Party of Connecticut v. Garfield, 616 F.3d 189 (2nd Cir. 2010); Preston v. Leake, 660 F.3d 726 (4th Cir. 2011).

[121] Fair Political Practices Comm. v. Super. Ct., 599 P.2d at 52, 53.

[122] Institute of Government Advocates, 164 F. Supp.2d at 1190.

[123] Alaska CLU, 978 P.2d at 617–20.

[124] *Id*. at 619.

[125] *Id*.

[126] Institute of Government Advocates, 164 F.Supp.2d at 1193–94.

[127] *Id*. at 1192–93; Alaska CLU, 978 P.2d at 619.

[128] 616 F.3d 189 (2d Cir. 2010).

[129] *Id*. at 207.

[130] *Id*. at 199–205.

[131] *Id*. at 206.

[132] *Id*.

[133] 671 F.3d 174 (2d Cir. 2011), cert. den., 133 S.Ct. 28 (2012).

[134] Preston v. Leake, 660 F.3d 726 (4th Cir. 2011).

[135] *Id*. at 737 (emphasis in original).

[136] *Id*. at 740.

[137] *Id*. at 729–30.

[138] *Id*. at 736.

[139] Barker v. State of Wisconsin Ethics Board, 841 F. Supp. 255 (W.D. Wis. 1993).

[140] Maryland Right to Life State Political Action Comm. v. Weathersbee, 975 F. Supp. 791 (D. Md. 1997).

[141] *See, e.g.,* Lipton, Loophole Allows Lawmakers to Reel in Trips, *supra* note 96 ("'An informal setting is an effective way to build a better relationship,' said a health care lobbyist who attended the fund-raising weekend in Vail this month.").

[142] Citizens United, 130 S.Ct. at 915–16.

[143] 540 U.S. 93, 150 (2003).

[144] 130 S.Ct. at 910.

[145] *See* NCSL, "Limits on Campaign Contributions During the Legislative Session," *supra* note 101.

[146] *See, e.g.,* Perkins Coie, "Overview of State Pay-to-Play Statutes," May 5, 2010, <http://www.perkinscoie.com/overview-of-state-pay-to-play-statutes/>.

[147] *See, e.g.,* Casino Ass'n of Louisiana v. State, 820 So.2d 494 (La. 2002).

[148] *See, e.g.,* Schiller Park Colonial Inn, Inc. v. Berz, 349 N.E.2d 61 (Ill. 1976).

[149] *See* 2 U.S.C. § 441c. That ban was recently upheld in *Wagner v. FEC*, 901 F.Supp.2d 101 (D.D.C. 2012). Connecticut's similar ban was upheld in *Green Party of Connecticut v. Garfield*, 616 F.3d at 194 –205.

[150] The business dealings that trigger the "doing business" rule include holding contracts with the City worth $100,000 or more; applications for approval of transactions involving office space, land use, or zoning changes; certain high value concessions and franchises; grants above a dollar threshold; the acquisition or disposition of real property; economic development agreements; contracts for the investment of pension funds; and transactions with lobbyists. *See* N.Y.C. Admin Code § 3-702(18).

[151] Dorie Apollonio, Bruce Cain, and Lee Drutman, "Access and Lobbying: Beyond the Corruption Paradigm," 36 Hastings Const. L.Q. 13, 37 (2008).

[152] Marianne Bertrand, Matilde Bombardini, Francesco Trebbi, "Is It Whom You Know or What You Know? An Empirical Assessment of the Lobbying Process," ERLINK, <http://ssrn.com/abstract=1748024> (Jan. 2011 draft).

[153] Public Citizen, "The Bankrollers: Lobbyists' Payments to the Lawmakers they Court, 1998 –2006" (2006), <http://www.citizen.org/documents/BankrollersFinal.pdf>.

[154] Shrewd lobbyists may limit the size of their initial donations in an election cycle below the maximum allowable amount so that the elected official "has to call again to ask for another contribution. It creates another opportunity to talk." Kent Cooper, "Lobbyists Keep Freshmen Coming Back for More Checks," Roll Call, Political MoneyLine Blog, May 6, 2013.

[155] On the regulation of lobbyists' contingent fees, *see generally* Stacie L. Fatka and Jason Miles Levien, Note, "Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution," 35 Harv. J. Legis. 559 (1998); Meredith A. Capps, "Gouging the Government: Why a Federal Contingent Fee Lobbying Prohibition is Consistent with First Amendment Freedoms," 58 Vand. L. Rev. 1885 (2005); Thomas M. Susman and Margaret Martin, "Contingent Fee Lobbying: Inflaming Avarice or Facilitating Constitutional Rights?," 31 Seton Hall Legis. J. 311 (2006); NCSL, "Ethics: Contingency Fees for Lobbyists," <http://www.ncsl.org/default.aspx?tabid=15351> (June 2010).

[156] However, federal procurement contracts other than those awarded by sealed bids are required to contain a "Covenant against Contingent Fees," in which government contractors warrant that contingent fees were not used to secure the contract. *See* ABA Task Force Report, *supra* note 97, at 27.

[157] *See* NCSL, "Ethics: Contingency Fees for Lobbyists" (updated Mar. 2013).

[158] *See* Florida League of Professional Lobbyists, Inc. v. Meggs, 87 F.3d 457, 462 (11th Cir. 1996); City of Hialeah Gardens v. John L. Adams & Co. 599 So.2d 1322 (Fla. Ct. App. 1992); Assoc'd Indus. of Kentucky v. Comm., 912 S.W.2d 947, 951 (Ky. 1995); Bereano v. State Ethics Comm., 944 A.2d 538 (Md. 2008).

[159] Montana Automobile Assn. v. Greely, 632 P.2d 378, 392–94 (Mont. 1981).

[160] 486 U.S. 414 (1988).

[161] *Id*. at 425–27.

[162] *See* Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984); Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988).

[163] *See, e.g.,* Capital Keys, LLC v. Ciber, Inc., 875 F.Supp.2d 59, 63–65 (D.D.C. 2012); Florida League of Professional Lobbyists, 87 F.3d at 462.

[164] ABA Task Force Report, *supra* note 97, at 28. The Report proposed a limited federal ban on contingent fees "where the object of the lobbying is to obtain an earmark, tax relief, or similar authorization of a targeted loan, grant, contract, or guarantee." *Id*. at 27. According to the Report, "[w]here the lobbyist is seeking a narrow financial benefit for the client, the temptations for unethical behavior are probably at their greatest. The appearance of unseemliness, driven by public apprehensions about a possible corrupt exchange, is likely to be particularly strong in that setting also, as taxpayer dollars are directly involved." *Id*. However, it is not clear why the incentive for misconduct *by the lobbyist* would be greater when the benefit is narrowly targeted to certain individuals or interests. One would think that the incentive for misconduct would be greater when the fee is greater, which might occur when the legal, regulatory, or tax change benefits an entire industry or economic sector rather than an individual firm.

[165] This is the law in Montana, *see* NCSL, Contingency Fees for Lobbyists. The ABA Task Force Report also recommends the adoption of a contingency fee reporting requirement for federal lobbyists. *See* ABA Task Force Report, *supra* note 97, at 28.

[166] The literature on the lobbyist revolving door issue is enormous. *See, e.g.,* Robert G. Vaughn. "Post-Employment Restrictions and the Regulation of Lobbying by Former Employees," chapter 24 of William V. Luneburg and Thomas M. Susman, *The Lobbying Manual: A Complete Guide to Federal Law Governing Lawyers and Lobbyists* (3d ed. 2005); Note, "Post-Employment Lobbying Restrictions on the Legislative Branch of Government: A Minimalist Approach to Regulating Ethics in Government," 65 Wash. L. Rev.

883 (1990); Michael H. Chang, "Protecting the Appearance of Propriety: The Policies Underlying the One-Year Ban on Post-Congressional Lobbying Employment," 5 Kan. J. L. & Pub. Pol. 121 (1995); Daniel G. Webber, Jr., "Proposed Revolving Door Restrictions: Limiting Lobbying by Ex-Lawmakers," 21 Okla. City U.L. Rev. 29 (1996); Jeni L. Lassell, "The Revolving Door: Should Oregon Restrict Former Legislators From Becoming Lobbyists?" 82 Ore. L. Rev. 979 (2003).

[167] Vincent Johnson, "Regulating Lobbyists: Ethics, Law and Public Policy," 16 Cornell J. L. & Pub. Pol. 1, 32 (2006).

[168] Jonathan D. Salant, "Congress Members Sprint for Money to Lobby After Election," <www.bloomberg.com>, May 8, 2013.

[169] Johnson, *supra* note 167.

[170] Salant, *supra* note 168.

[171] Quoted in Chang, *supra* note 166.

[172] *Id*.

[173] *See, e.g.,* Jack Maskell, "Post-Employment, 'Revolving Door,' Laws for Federal Personnel," Congressional Research Service Report for Congress, 7-5700 (Sept. 13, 2012); NCSL, "'Revolving Door' Prohibitions Against Legislators Lobbying State Government After They Leave Office," updated Dec. 2012.

[174] *See* Jennifer Yachnin and Kate Ackley, "Hampton Case a Reminder of Revolving Door Crimes," Roll Call, Mar. 28, 2011.

[175] *See* Maskell, *supra* note 173, at 10–13.

[176] Brooks Barnes and Michael Cieply, "Motion Picture Industry Group Names Ex-Senator Dodd as Its New Chief," N.Y. Times, Mar. 1, 2011. To be sure, Senator Dodd's case is not unusual and top in-house lobbyists are often not lobbyists within the meaning of lobbying laws even when revolving door restrictions are not at issue. *See, e.g.,* Edward Wyatt, "AT&T Lobbyist Faces Beltway Test in T-Mobile Deal," N.Y. Times, Mar. 26, 2011 (AT&T's senior vice present for external and legislative affairs—the company's chief lobbyist—is technically not a lobbyist). *See also* Juliet Eilperin and Tom Hamburger, "For Obama's Ex-aides, It's Time to Cash In on Experience," Washington Post, May 30, 2013 (noting that many ex-officials take positions as consultants and media advisers not subject to the revolving door rules applicable to lobbying).

[177] United States v. Nasser, 476 F.2d 1111, 1115 (7th Cir. 1973).

[178] State v. Nipps, 419 N.E.2d 1128, 1132 (Ohio App. 1979).

[179] 692 F.Supp.2d 855 (S.D. Ohio 2010).

[180] *Id*. at 863.

[181] *Id*. at 864.

[182] *Id*.

[183] Executive Order 13490 (Jan. 21, 2009).

[184] *See* U.S. General Services Administration, Registered Lobbyists Serving on Advisory Committees, June 24, 2010.

[185] *See, e.g.,* Timothy B. Lee, "Lobbyists Becoming Public Officials Isn't as Bad as the Other Way Around," Washington Post, June 20, 2013.

[186] Autor v. Pritzker, ___ F.3d ___ (D.C. Cir., Jan. 17, 2014), slip op. at 10–12.

[187] *Id*. at 3.

[188] *Id*. at 13–14.

[189] Allard, *supra* note 95, at 48–49.

[190] *See* Edsall, The Shadow Lobbyist, *supra* note 14.

[191] Susman, *supra* note 94, at 742, 744–45.

[192] William V. Luneburg, "Anonymity and its Dubious Relevance to the Constitutionality of Lobbying Disclosure Regulation," 19 Stan. L. & Pol. Rev. 69, 102 (2008).

[193] Jay Alan Sekulow and Erik M. Zimmerman, "Weeding Them Out By the Roots: The Unconstitutionality of Regulating Grassroots Issue Advocacy," 19 Stan L. & Pol. Rev. 164, 165 (2008). *Cf.* Lloyd Hitoshi Mayer, "What is This 'Lobbying' That We Are All So Worried About?" 26 Yale L. & Pol. Rev. 485, 558–60 (2007) (discussing the benefits of grassroots lobbying in informing the public about pending legislative and regulatory issues).

[194] However, the prohibition on section 501(c)(3) organizations engaging in lobbying includes grassroots lobbying.

[195] Chip Nielsen, Jason D. Kaune, Jennie Unger Eddy, "State Lobby and Gift Laws," Practicing Law Institute, Corporate Law and Practice Course Handbook Series, 1760 PLI/Corp 677 (2009).

[196] Young Americans for Freedom, Inc. v. Gorton, 522 P.2d 189, 192 (Wash. 1974).

[197] Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2–10), 242 N.W.2d 3, 23 (Mich. 1976).

[198] Minnesota State Ethical Practices Board v. National Rifle Ass'n, 761 F.2d 509. 512–13 (8th Cir. 1985).

[199] 87 F.3d 457 (11th Cir. 1996).

[200] *Id*. at 461.

[201] Florida Assn. of Professional Lobbyists, Inc. v. Division of Leg. Information Services, 525 F.3d 1073, 1080 (11th Cir. 2008).

[202] 632 P.2d 300 (Mont. 1981).

[203] *Id*. at 306–08.

[204] *Harriss*, 347 U.S. at 620.

[205] *Rumely*, 345 U.S. at 47.

[206] 347 U.S. at 620 (emphasis supplied).

[207] *Id*. at 620–21 (quoting from S. Rep. No. 1400, 79th Cong., 2d Sess., p. 27; Committee Print, July 26, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., pp. 32–33).

[208] *Id*. at 625.

[209] Florida League of Professional Lobbyists, Inc, 87 F.3d at 461.

[210] 424 U.S. 1 (1976).

[211] *See, e.g.,* First National Bank of Boston v. Bellotti, 435 U.S. 765, 792, n. 32 (1978); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 298 (1981) (striking down limit on contribution to ballot proposition committee but noting that voter information goal could be advanced by disclosure requirement).

[212] *See, e.g.,* National Org. for Marriage v. McKee, 649 F.3d 34 (1st Cir. 2011); Human Life of Washington, Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010).

[213] The ABA Task Force Report endorsed a version of the more limited approach to grassroots lobbying disclosure by proposing that only the client of a firm that is required to register under the LDA should be required to disclose grassroots lobbying expenditures. *See* Report, *supra* note 97, at 13–16.

[214] YAF v. Gorton, 522 P.2d at 191.

[215] Advisory Op'n, 242 N.W.2d at 23.

[216] 345 U.S. at 42.

[217] *Id*. at 47.

[218] 2 U.S.C. § 1601 et seq.

[219] 2 U.S.C. § 1604(b)(2).

[220] 2 U.S.C. § 1601(3).

[221] ABA Task Force Report, *supra* note 97, at 13–15.

[222] Sunlight Foundation, Real Time Online Lobbying Transparency Act, <http://publicmarkup.org/bill/real-time-online-lobbying-transparency-act/print/>.

[223] San Francisco Lobbying Ordinance (2010) at sec. 2.110(c)(4), <http://www.sfethics.org/ethics/2009/12/lobbyist-ordinance-2010.html>.

[224] Anita S. Krishnakumar, "Towards a Madisonian, Interest-Group Based Approach to Lobbying Regulation," 58 Ala. L. Rev. 513 (2007).

[225] Remarks by the President in State of the Union Address, <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>, Jan. 25, 2011.

[226] Russell Berman and Kevin Bogardus, "Obama's Call for Disclosure of Lobbying Visits Falls Flat," The Hill, Jan. 26, 2011. Rep Darrell Issa (R-CA), who chairs the House Committee in charge of government oversight contended that the president was being hypocritical, noting reports that White House officials met with lobbyists at nearby coffee shops to avoid their own disclosure rules. *Id*.

[227] ABA Task Force Report, *supra* note 97, at 13.

[228] *Id*. at 14. The ABA Task Force considered but declined to recommend that disclosure be extended to require the identification of specific individuals contacted during a lobbying campaign on the grounds that "[t]he obligation to keep track of conversations with multiple staff members in a given office would be burdensome." *Id*.

[229] 582 F.3d 1 (D.C. Cir. 2009).

[230] N.Y. Legislative Law, § 1-h(c)(4). The law provides an exemption from donor disclosure for lobbying by all 501(c)(3) organizations and by a 501(c)(4) organization "whose primary activities concern any area of public concern determined by the commission to create a substantial likelihood that application of this disclosure requirement would lead to harm, threats, harassment, or reprisals to a source of funding." *Id*. The exemption provision became controversial in the summer of 2013 when the Joint Committee on Public Ethics (JCOPE), the agency charged with administering the law, granted an exemption from financial source disclosure to Naral Pro-Choice New York, a prominent anti-abortion group, but not to other groups focused on the abortion issue and on same-sex marriage or the NYCLU. *See* Thomas Kaplan, "Nonprofits are Balking at Law on Disclosing Political Donors," N.Y. Times, Aug. 20, 2013, <http://www.nytimes.com/2013/08/21/nyregion/citing-safety-nonprofits-balk-at-law-on-

disclosing-donors.html?pagewanted=all>. *See also* Jessica Alaimo, "JCOPE Delays Action on Request to Shield Donors," Capital New York, Oct. 29, 2013, <http://www.capitalnewyork.com/article/politics/2013/10/8535224/jcope-delays-action-requests-shield-donors>.

[231] See Thomas Kaplan, Pro-Cuomo Group Repeats as Top Spender on Lobbying, N.Y. Times, Mar. 28, 2103, <http://www.nytimes.com/2013/03/29/nyregion/committee-to-save-new-york-tops-2012-list-of-lobbying-spenders.html>.

[232] Kaplan, Nonprofits are Balking, *supra* note 230.

PANEL ONE

The Intersection of Lobbying and the First Amendment

N.Y. Civil Liberties Union v. Grandeau

United States Court of Appeals for the Second Circuit

March 7, 2008, Argued; June 6, 2008, Decided

Docket No. 06-4895-cv

Reporter
528 F.3d 122 *; 2008 U.S. App. LEXIS 12083 **

NEW YORK CIVIL LIBERTIES UNION, Plaintiff-Appellant, -v.- DAVID GRANDEAU, Executive Director of the New York State Temporary State Commission on Lobbying, Defendant-Appellee.

Prior History: **[**1]** Plaintiff-appellant the New York Civil Liberties Union ("NYCLU") appeals from a September 28, 2006 judgment of the United States District Court for the Southern District of New York (Preska, J.), dismissing as moot its complaint against defendant-appellee David Grandeau, in his capacity as Executive Director of the New York Temporary State Commission on Lobbying. Unlike the district court, we do not conclude that this case was moot, but we nevertheless uphold the district court's grant of summary judgment in favor of the defendant and dismissal of the complaint because the NYCLU's *First Amendment* challenge is not, as a prudential matter, ripe for judicial review. Accordingly, we AFFIRM the district court's judgment.

N.Y. Civ. Liberties Union v. Grandeau, 453 F. Supp. 2d 800, 2006 U.S. Dist. LEXIS 70482 (S.D.N.Y., 2006)

Counsel: CHRISTOPHER DUNN (Arthur Eisenberg, on the brief), New York Civil Liberties Union Foundation, New York, New York, for plaintiff-appellant.

SASHA SAMBERG-CHAMPION, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Michelle Aronowitz, Deputy Solicitor General, on the brief), for Andrew M. Cuomo, Attorney General of the State of New York, New York, New York, for defendant-appellee.

Judges: Before: SOTOMAYOR and RAGGI, Circuit Judges, GLEESON, District Judge. *

Opinion by: SOTOMAYOR

Opinion

[*125] SOTOMAYOR, *Circuit Judge*:

Plaintiff-appellant the New York Civil Liberties Union ("NYCLU") appeals from a September 28, 2006 judgment of the United States District Court for the Southern District of New York (Preska, J.), dismissing as moot its complaint against defendant-appellee David Grandeau, in his capacity as Executive Director of the New York Temporary State Commission on Lobbying ("Grandeau" and the "Commission"). *See* *N.Y. Civil Liberties Union v. Grandeau, 453 F. Supp. 2d 800 (S.D.N.Y. 2006)*. This case arises out of the Commission's inquiry into whether the NYCLU incurred reportable lobbying expenses in connection with a billboard promoting awareness of free speech issues in private shopping malls erected near the Crossgates Mall in Albany, New York. After receiving the Commission's request for additional information on its billboard expenses, the NYCLU filed a complaint alleging that the Commission's demand for reporting on expenses for non-lobbying advocacy activity violates the *First Amendment*. Although the Commission ultimately abandoned its **[**3]** demand for additional reporting by the NYCLU on the billboard, we cannot agree with the district court's finding that this case moot because the NYCLU's complaint challenged an alleged Commission policy beyond the specific billboard controversy. Nevertheless, we conclude as a prudential matter that the NYCLU's policy challenge is not ripe for judicial review. We therefore AFFIRM the district court's grant of summary judgment in favor of the defendant and dismissal of the complaint.

BACKGROUND

In 1981, the New York State Assembly enacted the Lobbying Act (the "Act"), designed "to preserve and maintain the integrity of the governmental decision-making process in the state" by requiring disclosure of the "identity, expenditures, and activities" of people or organizations involved in influencing state decision-making processes in certain ways.

* The **[**2]** Honorable John Gleeson of the United States District Court for the Eastern District of New York, sitting by designation.

N.Y. Legis. Law § 1-a. [1] The Act contains a series of restrictions and reporting requirements for individuals and entities that engage in lobbying activities. "Lobbying activities" are defined as "any attempt to influence" governmental decision-making in a variety of forms, including, *inter alia*, "the passage or defeat of any legislation by either **[**4]** house of the state legislature or approval or disapproval of any legislation by the governor." § 1-c(c). The Act requires every lobbyist to register with the Commission and file regular reports containing detailed information on its lobbying activities. *See, e.g.*, § 1-h(b)(3) (requiring a description of the subject matter and legislative bill numbers associated with lobbying activities). These reports must also list "any expenses expended, received or incurred by the lobbyist for the purposes of lobbying," § 1-h(b)(5)(i), and, except for expenses under seventy-five dollars, detail those expenses "as to **[*126]** amount, to whom paid, and for what purpose," § 1-h(b)(5)(ii).

The NYCLU is a not-for-profit membership organization that engages in "a full range **[**5]** of advocacy, including lobbying, litigation, and public education." Compl. P 10. It routinely files reports with the Commission about its lobbying activities. According to the NYCLU, "[o]n many issues about which it lobbies, the NYCLU also engages in a range of advocacy that is not lobbying: that is, does not involve communications with lawmakers or other relevant public officials. That advocacy includes, but is not limited to, public rallies, reports, newsletters, communications through media outlets, op-ed pieces, websites, reports, films, and flyers." Appellant's Br. 8.

One such advocacy initiative was the Crossgates Mall billboard. In March 2003, Stephen Downs was arrested at the Crossgates Mall for wearing a t-shirt bearing the words "Give Peace a Chance," in reference to the impending war in Iraq, and for refusing to take it off when told to do so by mall security. Compl. P 14. His arrest triggered a wave of media attention, and the NYCLU became involved in challenging what it deemed to be an abridgement of Mr. Downs' free speech rights. [2] According to the NYCLU, a third party approached it seeking to collaborate on a billboard, to be placed near the Crossgates Mall, promoting **[**6]** free-speech rights at shopping malls. Compl. P 19. Independently and subsequent to that solicitation, a New York State Assembly Member prepared a bill proposing to entitle New Yorkers to exercise certain free-speech rights in shopping malls in the state. "Consistent with its position on this issue and with its longtime participation in legislative advocacy, the NYCLU extensively communicated with the Assembly Member about development of this proposal and publicly endorsed the proposal at a news conference" in March 2003. Compl. P 21. At the same time the NYCLU endorsed the legislative proposal, it announced the unveiling of the billboard near Crossgates Mall. The billboard featured an image of a person who was gagged and included the following text: "Welcome to the mall. You have the right to remain silent. Value free speech. www.nyclu.org." The billboard did not mention any legislative proposal or call upon anyone to take action with respect to the proposal. It remained up for one month. Compl. P 22.

In its semi-annual report on lobbying activities in July 2003, the NYCLU reported "all lobbying work done in conjunction with the New York State Assembly bill, including its appearance at the [March] press conference." Compl. P 25. It did not, however, include information about the billboard or any of NYCLU's "nonlobbying work concerning free speech rights in shopping malls." *Id.*

On October 28, 2003, the NYCLU received a letter from a program analyst at the Commission stating, in pertinent part, "reportable lobbying expenses include the funding of parties, receptions, and all events which are hosted by the client with a special interest in pending legislation. . . . The Commission is aware of an expense for advertising on a billboard. It appears that certain costs of this event are reportable lobbying expenses and, therefore, must be reported as such." Five **[*127]** days later, the NYCLU filed its complaint. The complaint was assigned to Judge Preska as a case related to another **[**8]** matter pending on her docket, *Hip-Hop Summit Action Network v. N.Y. Temp. State Comm'n on Lobbying, No. 03-civ-5553, 2003 U.S. Dist. LEXIS 21229, 2003 WL 22832569 (S.D.N.Y. Nov. 25, 2003)*, which principally involved a *First Amendment* challenge to the Commission's investigation of certain individuals alleged to be lobbyists but who failed to register with the Commission. [3] *Id.* The

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[1] The Act was recently amended by the Public Employee Ethics Reform Act, effective April 25, 2007. 2007 N.Y. Sess. Laws ch. 14, A. 3736-A (McKinney). None of the substantive provisions at issue in this case were amended, although the New York State Temporary Commission on Lobbying was abolished and its duties have been replaced by the Commission on Public Integrity. *See id.* § 2. For the sake of consistency, we refer simply to "the Commission."

[2] The NYCLU wrote to the private management company that owned the mall, and the NYCLU's Legal Director spoke out publicly against the arrest. In addition, shortly after the criminal charges **[**7]** against Mr. Downs were withdrawn, he retained the NYCLU to represent him in possible civil proceedings associated with the arrest. At the time the NYCLU filed its complaint, it still represented Mr. Downs. Compl. PP 16-18.

[3] The plaintiffs in *Hip-Hop Summit* were the subject of an

NYCLU's complaint in the instant action alleged that the Commission violated the *First Amendment* by insisting that it "report as lobbying advocacy that makes no mention of pending legislation nor exhorts any action with respect to pending legislation, *including but not limited to its erection of the billboard outside the Crossgates Mall.*" Compl. P 41 (emphasis added). The NYCLU sought a declaratory judgment along with a preliminary and permanent injunction to prevent the Commission from forcing the NYCLU to report such alleged non-lobbying advocacy activities.

Two days after the NYCLU filed its complaint, on November 5, 2003, Grandeau sent a letter to the NYCLU stating that it did not need to respond to the Commission's request for reporting on the billboard because "[i]t has been determined that the billboard in question was not paid for by NYCLU; and as such it should not be included as a reportable lobbying expense on your . . . Semi-Annual Report." The next day, the NYCLU sent a letter to Assistant Attorney General James Henly explaining that withdrawal of the Commission's request "does not resolve the controversy that led us to file our federal challenge earlier this week" because **[**10]** resolution "cannot and should not be based on the incorrect conclusion that the NYCLU did not incur expenses with respect to the billboard." The NYCLU stated that it had incurred expenses on the billboard [4] and therefore "any resolution of this dispute must be based on an acknowledgment that the NYCLU's free speech billboard is not lobbying activity subject to reporting." The Attorney General's office responded with a two-sentence letter reiterating that the Commission did not seek reporting related to the billboard, and that the office considered the case moot. The NYCLU followed with another letter stating its belief that the case was not moot because the Commission continued to assert the billboard was part of a lobbying effort.

On December 4, 2003, Commission counsel Ralph Miccio sent the NYCLU a letter stating that the Commission's position "has never been that the billboard in and of itself constitutes lobbying, but rather, its use as part of a lobbying campaign would make the cost of the billboard a reportable lobbying expense *if paid for by a registered lobbyist.*" Miccio stated that the **[*128]** Commission's investigation revealed that the NYCLU had not paid for the billboard.

On December 15, 2003, the Commission moved to dismiss the action on *Younger* abstention grounds because a proceeding before the Commission was ongoing. In a reply memorandum on December 19, 2003, the Commission then "took the contradictory position that its inquiry into the [b]illboard was closed and that the action should be dismissed as moot." *See* *N.Y. Civil Liberties Union v. Grandeau, 453 F. Supp. 2d 800, 803 (S.D.N.Y. 2006)* ("*Grandeau II*"). The district court denied the Commission's motion to dismiss the case as moot, citing four factors:

> (1) the contradictory positions taken by the Commission in this matter; (2) the disputed basis on which the Commission has withdrawn its request/demand for filing regarding the Billboard; (3) the appearance that the Commission's withdrawals have been in response to litigation brought by the NYCLU; and (4) the narrowly drawn "present intention" declaration provided by the Commission in support of the present motion. **[**12]**

N.Y. Civil Liberties Union v. Grandeau, 305 F. Supp. 2d 327, 330-31 (S.D.N.Y. 2004) ("*Grandeau I*").

Following this decision, the Commission passed a resolution affirming that it did not seek, and would not seek, additional information from the NYCLU regarding the Crossgates Mall billboard. The case also moved forward in the district court with depositions and limited discovery, after which both parties moved for summary judgment. The district court granted the defendant's motion for summary judgment, concluding that the case was moot for two reasons. First, the district court reasoned that the Commission's resolution indicated that it had closed the billboard inquiry "complete[ly] and irrevocabl[y], obviating the concern that it will recur." *Grandeau II, 453 F. Supp. 2d at 806*. Second, in response to the NYCLU's claim that the Commission's alleged policy of seeking information on non-lobbying activity was likely to recur, the court found that "the alleged Commission policy . . . is not presented on the facts of this case." *Id.* The court therefore concluded that "there is, therefore, no substantial, real, and immediate controversy between the parties," and "[a]ny decision construing **[**13]** the reach of the Commission's policy would amount to an advisory opinion." *Id.*

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investigation by the Commission, allegedly prompted by their role in organizing a rally at City Hall in Manhattan that was intended to raise public awareness of the Rockefeller Drug Laws. *See* *Hip-Hop Summit, 2003 U.S. Dist. LEXIS 21229, 2003 WL 22832569, at *1*. **[**9]** The plaintiffs, two individuals who co-founded Hip-Hop Summit Action Network, alleged that "the Commission's investigation of [their] activities and threat of subpoenas, civil fines, additional investigations and the prospect of being required to register as lobbyists penalize [them] for exercising their ***First Amendment*** rights and have a chilling effect on their exercise of those rights." *Id.* Judge Preska dismissed the case on abstention grounds under *Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*, and therefore did not reach the merits of their challenge. *2003 U.S. Dist. LEXIS 21229, [WL] at *6*.

[4] It is **[**11]** unclear whether the NYCLU maintains that it *paid for* the billboard or merely incurred expenses in connection with its collaboration with whoever actually paid for the billboard. Resolution of this issue is not relevant to this appeal.

The NYCLU appeals, urging us to reverse the district court's mootness determination and to decide the merits of its *First Amendment* challenge.

DISCUSSION

We review a district court's grant of summary judgment *de novo*, construing the evidence in the light most favorable to the non-moving party and drawing all permissible inferences in its favor. *Niagra Mohawk Power Corp. v. Jones Chem., Inc., 315 F.3d 171, 175 (2d Cir. 2003)*. Whether a case is moot presents a legal issue that we also review *de novo*. *White River Amusement Pub, Inc. v. Town of Hartford, 481 F.3d 163, 167 (2d Cir. 2007)*.

I. Mootness

The NYCLU is not appealing the district court's determination that its challenge to the Commission's billboard inquiry is moot. [5] Our mootness review **[*129]** therefore encompasses only whether, in the absence of a dispute about the Crossgates Mall billboard, the NYCLU's entire case is moot.

The district court's mootness determination appears to rest on a premature assumption that certain facts were not in dispute. The court stated that "[b]oth sides are in agreement that expenses incurred as part of the NYCLU's non-lobbying activities, including placement of the Billboard at issue in this case, are not reportable as lobbying expenses unless they are part of a lobbying effort." *Grandeau II, 453 F. Supp. 2d at 806*. The court then stated that "[t]he undisputed facts at the summary judgment stage show that the NYCLU's Billboard effort was separate and apart from [its] lobbying activity." *Id.* **[**15]** In fact, the parties did not agree on whether the billboard could be deemed part of a lobbying effort. The NYCLU maintained that any expenses incurred in erecting the billboard were not reportable because the billboard was non-lobbying advocacy. The Commission, however, never agreed that the billboard expenses, if incurred by NYCLU, were not reportable; its retreat was based on a determination that the NYCLU had not paid for the billboard. Indeed, the Commission assiduously maintained that billboard expenses were reportable if paid for by a registered lobbyist and part of a lobbying effort. In short, the parties were (and, as best we can tell on the current record, continue to be) in disagreement about what activities are reportable, either because they were lobbying or because they were in support of a lobbying effort.

This ongoing disagreement about what activities are reportable is reflected in the complaint as a challenge to the Commission's alleged policy of targeting non-lobbying advocacy work for reporting and investigation and supports the NYCLU's argument that this case is not moot. For example, the complaint alleges, *inter alia*, that the Commission's "effort to extend the **[**16]** . . . lobbying reporting and disclosure regime to advocacy that makes no mention of any pending legislation and that calls for no action on any such legislation substantially and unnecessarily burdens the *First Amendment* rights of advocacy organizations." Compl. P 4. The NYCLU sought an injunction to prevent the Commission from "further inquiry . . . into [its] non-lobbying advocacy work," *id.*, as well as a preliminary and a permanent injunction "enjoining the defendant from forcing the NYCLU to report as lobbying advocacy that makes no mention of pending legislation nor exhorts any action with respect to pending legislation, including *but not limited to* its erection of the billboard outside the Crossgates Mall." [6] Compl. P 41 (emphasis added). In addition, the complaint describes the Commission's investigation of Hip-Hop Summit Action Network's advocacy activities, Compl. PP 34-35, and expresses concern about the potential chilling effects of allowing the Commission to target non-lobbying advocacy **[*130]** work in the future, Compl. PP 30, 36, 37. The NYCLU also asserted in its statement of allegedly undisputed facts, submitted pursuant to *Rule 56.1 of the Local Civil Rules* of the United States **[**17]** District Courts for the Southern and Eastern Districts of New York ("*Rule 56.1*"), that the Commission construes the lobbying law to "require[] reporting about all forms of nonlobbying advocacy . . . by an organization also engaged in lobbying if that advocacy addresses a topic about which the organization is engaged in

[5] The NYCLU does not, however, concede mootness of the billboard dispute. Rather, it suggests that the Commission may not have met its "formidable burden" under the "stringent" standard for determining whether "a case has been mooted by the **[**14]** defendant's voluntary conduct." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189-90, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)*; *see also Lamar Adver. of Penn, LLC v. Town of Orchard Park, 356 F.3d 365, 375 (2d Cir. 2004)* (stating that "voluntary cessation of allegedly illegal conduct usually will render a case moot if the defendant can demonstrate that (1) there is no reasonable expectation that the alleged violation will recur *and* (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation" (emphasis added) (internal quotation marks omitted)).

[6] The NYCLU also sought a declaratory judgment that the Commission "violated the ***First Amendment*** by demanding that the NYCLU report as lobbying advocacy that makes no mention of pending legislation nor exhorts any action with respect to pending legislation." Compl. P 41.

lobbying and the organization believes the nonlobbying advocacy will have some beneficial effect on its lobbying."

These allegations, read in the light most favorable to the NYCLU, plainly challenge conduct beyond the Commission's request for reporting with respect to the Crossgates Mall billboard. [7] They demonstrate the existence of a live controversy between the parties regarding what constitutes reportable activity "in support of a lobbying effort," and how broadly the Commission may interpret that phrase without running afoul of the *First Amendment*. We therefore conclude that the district court erred **[**18]** in finding that this case was moot.

II. Ripeness

Grandeau argues that even if we read the complaint to challenge a policy of targeting non-lobbying advocacy efforts for reporting and investigation, the alleged policy "has not been adopted by the Commission, let alone enforced against the NYCLU or anyone else." Invoking the ripeness doctrine, Grandeau contends that this challenge is unfit for judicial review because "a court cannot coherently rule on a policy's constitutionality where, as here, it is at best unclear to what extent an agency has actually adopted a policy or how stringently the agency will enforce it." [8] We agree.

"The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003)* (internal quotation marks omitted). A central purpose of this doctrine "is to prevent the courts, through **[*131]** avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Abbott Labs. v. Gardner, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)*, *overruled on other grounds by Califano v. Sanders, 430 U.S. 99, 105, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977)*. There are "two overlapping threshold criteria for the exercise of a federal court's jurisdiction" that fall under the term "ripeness." *Simmonds v. INS, 326 F.3d 351, 356-57 (2d Cir. 2003)*.

> Both [criteria] are concerned with whether a case has been brought prematurely, but they protect against prematureness in different ways and for different reasons. The first of these ripeness requirements has as its source the Case or Controversy Clause of Article III of the Constitution, and hence goes, in a fundamental way, to the existence of jurisdiction. The second is a more **[**21]** flexible doctrine of judicial prudence, and constitutes an important exception to the usual rule that where jurisdiction exists a federal court must exercise it.
>
> These two forms of ripeness are not coextensive in purpose. Constitutional ripeness is a doctrine that, like standing, is a limitation on the power of the judiciary. It prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it. But when a court declares that a case is not prudentially ripe, it means that the case will be *better* decided later and that the parties will not have constitutional rights undermined by the delay. It does not mean that the case is not a real or concrete dispute affecting cognizable current concerns of the parties within the meaning of Article III. . . . Prudential ripeness is, then, a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial.

Id. at 357 (internal citations **[**22]** omitted); *see also Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 733 n.7, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997)* (noting that ripeness

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[7] Grandeau has provided no support for the assertion that pleading a facial challenge requires the allegations or request for relief to take a particular form, and we find his argument that the NYCLU's complaint is somehow deficient in this regard unavailing. As discussed above, it is enough here that the complaint challenges an alleged Commission policy, rather than simply the application of that policy to the billboard incident.

[8] Grandeau further argues that the NYCLU lacks standing "[f]or essentially the same reasons already described" with respect to ripeness--because **[**19]** the NYCLU has "not shown that any Commission policy has harmed it or threatens imminent harm." Standing and ripeness are closely related doctrines that overlap "most notably in the shared requirement that the [plaintiff's] injury be imminent rather than conjectural or hypothetical." *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp., 462 F.3d 219, 225 (2d Cir. 2006)*; *see also United States v. Fell, 360 F.3d 135, 139 (2d Cir. 2004)* ("At the core of the ripeness doctrine is the necessity of ensur[ing] that a dispute has generated injury significant enough to satisfy the case or controversy requirement of Article III of the U.S. Constitution . . . ." (internal quotation marks omitted; brackets in original)). Because Grandeau focuses his argument on ripeness, we consider standing within the constitutional ripeness challenge. *See Brooklyn Legal Servs., 462 F.3d at 225-26* (considering ripeness within standing inquiry); *see also Bronx Household of Faith v. Bd. of Educ., 492 F.3d 89, 111 (2d Cir. 2007)* (Leval, J., concurring) (noting the overlap in ripeness and standing doctrines and focusing discussion "on those decisions which concern the ripeness of the dispute, regardless of whether they **[**20]** speak in terms of 'ripeness' or of 'standing'").

derives "both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction" (internal quotation marks omitted)).

Despite Grandeau's arguments to the contrary, there can be little dispute that the NYCLU has demonstrated the existence of a "case or controversy" over the Commission's alleged reporting requirements sufficient to establish standing and constitutional ripeness. At the time of the complaint, the NYCLU was charged with providing additional information on the expenses incurred in connection with the Crossgates Mall billboard. It argued that to allow the Commission to demand reporting on non-lobbying advocacy, including but not limited to the billboard controversy, would greatly increase its administrative burden and would infringe its *First Amendment* rights. These facts demonstrate a "concrete dispute affecting cognizable current concerns of the parties" sufficient to satisfy standing and constitutional ripeness. *Ehrenfeld v. Mahfouz, 489 F.3d 542, 546 (2d Cir. 2007)* (internal quotation marks omitted).

The real issue **[**23]** is one of prudential ripeness: whether the alleged policy at this stage is sufficiently definite and clear to permit sound review by this Court of the NYCLU's *First Amendment* challenge. To determine whether a challenge to administrative action is ripe for judicial review, we proceed with a two-step inquiry, **[*132]** "requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs., 387 U.S. at 149*. [9]

A. *Fitness for Judicial Review*

"[T]he 'fitness' analysis is concerned with whether the issues sought to be adjudicated are contingent on future events or may never occur." *Simmonds, 326 F.3d at 359* (internal quotation marks omitted). For example, in *Isaacs v. Bowen, 865 F.2d 468 (2d Cir. 1989)*, this Court deemed unripe a challenge to a proposed policy change in Medicare administration. We explained that plaintiffs' challenge was "directed at possibilities and proposals only, not at a concrete plan which has been formally promulgated and brought into operation." *Id. at 477*. We thus **[**24]** drew a distinction between pre-enforcement judicial review of "specific regulations" promulgated by the agency and judicial review of a nonfinal proposed policy. *Id. at 478*.

Similarly, in *American Savings Bank, FSB v. UBS Financial Services, Inc., 347 F.3d 436 (2d Cir. 2003)* (per curiam), we dismissed a company's motion to enforce subpoenas served on a broker's former employees under the prudential ripeness doctrine. We held that the case was "ill-suited for judicial resolution" principally because (1) the plaintiff had not exhausted its administrative remedies; (2) judicial review would "only benefit by awaiting [the agency]'s views" of how best to interpret its own regulations, *id. at 440*; and (3) it would be unwise to "prematurely address[] the novel issues of first impression," *id.* In contrast, "issues have been deemed ripe when they would not benefit from any further factual development and when the court would be in no better position to adjudicate the issues in the future than it is now." *Simmonds, 326 F.3d at 359*.

The Commission policy in this case is vague at best. Other than the billboard controversy, the NYCLU purports to demonstrate the existence of a policy principally from: **[**25]** (1) paragraph 49 of its unopposed *Rule 56.1* statement in support of summary judgment, crafted largely from statements Grandeau made in a deposition after the NYCLU filed this case; [10] (2) the Commission's investigation of nonlobbying advocacy activities relating to the Hip-Hop Summit Action Network; and (3) certain statements in the Commission's Guidelines on the Lobbying Law. None of these sources suffices to establish the existence of a Commission policy that is fit for judicial review.

First, an opposing party's failure to controvert a fact in a *Rule 56.1* statement "does not absolve the party seeking summary judgment **[**26]** of the burden of showing that it is entitled to judgment as a matter of law, and a *Rule 56.1* statement is not itself a vehicle for making factual assertions that are otherwise unsupported in the record." *Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 74 (2d Cir. 2001)*. In this **[*133]** case, the summary judgment record itself must support the existence of the Commission policy the NYCLU alleges. Grandeau's deposition responses to hypothetical questions about whether certain expenses would be reportable, which form the basis of the NYCLU's assertion in its *Rule 56.1* statement, adopt a view of the Commission's reach that is troublingly broad, but those deposition statements do not amount to an established Commission policy. *Cf. Marchi v. Bd. of Coop. Educ. Servs., 173 F.3d 469, 479 (2d Cir. 1999)* (refusing to rely on deposition statements to establish

[9] The two-step inquiry is relevant for both constitutional and prudential ripeness analysis. *See Simmonds, 326 F.3d at 359*.

[10] Paragraph 49 reads in full: "As construed by the Lobbying Commission, the lobbying law requires reporting about all forms of nonlobbying advocacy--including radio spots, public rallies, op-ed pieces, websites, organizational newsletters, letters to the editor, books, and even flyers handed out on street corners--by an organization also engaged in lobbying if that advocacy addresses a topic about which the organization is engaged in lobbying and the organization believes the nonlobbying advocacy will have some beneficial effect on its lobbying." (citations omitted).

"credible fear of enforcement" of an allegedly unconstitutional policy when statements were described as "personal opinion"). [11]

Second, the Commission's investigation of the co-founders of Hip-Hop Summit Action Network principally concerned who must register and report to the Commission as a lobbyist. The plaintiffs' *First Amendment* claim in that case emphasized the chilling effect of the Commission's threats to subpoena, levy fines, and bring criminal charges against entities who were suspected lobbyists because of their public activities, but who had not registered as such. Here, the NYCLU's challenge concerns the extent to which non-lobbying activities may constitute a reportable expense for *registered lobbyists* when those activities are in support of a lobbying effort. While these two issues overlap to some extent, the NYCLU cannot establish the existence of a policy regarding when a lobbyist's non-lobbying activities are reportable based on the Commission's investigation into whether certain parties were lobbyists.

The NYCLU's best effort to demonstrate the alleged policy is the Commission's Guidelines, posted on its website, which state that "reportable expenses" include:

> any expenditure incurred by or reimbursed to the lobbyist for the purpose of lobbying[.] Reportable **[**28]** expenses include, but are not limited to the following:
> advertising, telephone, electronic advocacy, food, beverages, tickets, entertainment, parties, receptions or similar events, advocacy rallies, consultant services, expenses for non-lobbying support staff, and courier services when said expenses are part of a lobbying effort.

New York State Commission on Public Integrity, Guidelines to New York State Lobbying Act, http://www.nyintegrity.org/law/lob/guidelines.html (last visited June 5, 2008). We recognize that this reference to electronic advocacy, advocacy rallies, receptions, and advertising creates a basis for concern that the Commission will require the NYCLU and other organizations to report non-lobbying advocacy that is only loosely related to lobbying. But the potential breadth of "reportable expenses" depends on how the Commission determines what is "part of a lobbying effort," and the Guidelines offer no indication of a Commission policy on this point. Nor was the NYCLU able to point this Court to any evidence, other than in Grandeau's deposition, of how the Commission interprets this principle.

In short, judicial review of the NYCLU's *First Amendment* challenge would certainly **[**29]** benefit from additional factual development and is in many ways contingent on future events, such as an inquiry by the Commission into activity that the NYCLU deems non-lobbying advocacy. *See* Simmonds, 326 F.3d at 359; *see also* Marchi, 173 F.3d at 478 (finding *First Amendment* **[*134]** claim unripe when the court "would be forced to guess at how [the defendant] might apply the [challenged] directive and to pronounce on the validity of numerous possible applications of the directive, all highly fact-specific and, as of yet, hypothetical"); Bronx Household of Faith, 492 F.3d at 114 (Leval, J., concurring) ("The ripeness principles elaborated in the foregoing cases bear heightened importance when, as in the present case, the potentially unripe question presented for review is a constitutional question.").

B. *Hardship to Plaintiff of Withholding Judicial Review*

The second step in our ripeness analysis is "whether and to what extent the parties will endure hardship if decision is withheld." Simmonds, 326 F.3d at 359. In assessing this possibility of hardship, "we ask whether the challenged action creates a direct and immediate dilemma for the parties." Marchi, 173 F.3d at 478. "The mere possibility **[**30]** of future injury, unless it is the cause of some present detriment, does not constitute hardship." Simmonds, 326 F.3d at 360. The hardship standard is relaxed somewhat in the *First Amendment* context "to avoid the chilling of protected speech," but "some credible fear of enforcement must exist." Marchi, 173 F.3d at 479.

This Court recently found unripe a claim by a consortium of national banks that enforcement of the Fair Housing Act against its members was preempted by the National Bank Act because the New York Attorney General had threatened but not filed an FHA action. *See* Clearing House Ass'n L.L.C. v. Cuomo, 510 F.3d 105, 124 (2d Cir. 2007). The panel held that "[b]ecause Clearing House challenges the Attorney General's right to enforce the FHA against its members, but does not contest the validity of the federal statute itself or its applicability to national banks, there is no risk that the threat of enforcement would chill conduct in which the banks could otherwise legally engage." *Id.* Moreover, the banks would not be required to violate an allegedly unconstitutional state regulation in order to challenge the FHA enforcement action nor "incur immediate expenses, make changes **[**31]** in their daily activity, or otherwise . . . affect their primary conduct." *Id.* (internal quotation marks omitted).

For similar reasons, the NYCLU has not demonstrated that it

[11] Indeed, although Grandeau's position as executive director made him the "chief administrative officer of the commission," N.Y. Legis. § 1-d(b) (McKinney 2004), nothing in the Lobbying Act gives the executive director **[**27]** the authority to set Commission policy.

will suffer hardship by our withholding judicial review. Although the NYCLU must grapple with some ambiguity in preparing its regular reports, it has not shown that this lack of clarity is the cause of "present detriment," rather than a "mere possibility of future injury" if the Commission initiates another inquiry or enforcement action. *See* *Simmonds, 326 F.3d at 360*. In the meantime, the NYCLU may seek an advisory opinion regarding whether a particular activity is reportable. *See* *N.Y. Legis. Law § 1-d(f)* (stating that the Commission has the power to "issue advisory opinions to those under its jurisdiction" and that such opinions are binding "with respect to the person to whom such opinion is rendered"). Moreover, even though the NYCLU faces the contingent possibility of an inquiry into its reporting decisions, the Lobbying Act provides penalties for statements only if they are found to be "knowingly and wilfully" false, *N.Y. Legis. Law § 1-o*, after investigation and a hearing at which the parties are entitled **[**32]** to present evidence addressing "the basis for and the amount of an assessment," *Chavis v. N.Y. Temporary State Comm'n on Lobbying, 16 A.D.3d 886, 791 N.Y.S. 2d 707, 709 (3d Dep't 2005)*. Finally, the NYCLU has not alleged that our withholding of judicial review will deter it from its usual advocacy efforts, *see* *Clearing House, 510 F.3d at* ***[*135]*** *124*, thereby threatening to chill activity protected by the *First Amendment*. Under these circumstances, we conclude that the NYCLU will not suffer significant hardship from delay in adjudication of the issue it presents.

Because the NYCLU's policy challenge is not fit for judicial review at this time, and because the NYCLU has not demonstrated that withholding judicial review will subject it to hardship, we hold that its *First Amendment* claim is not ripe for adjudication.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of the defendants and dismissal of the complaint under our prudential ripeness doctrine.

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United States v. Harriss

Supreme Court of the United States

October 19, 1953, Argued ; June 7, 1954, Decided

No. 32

Reporter
347 U.S. 612 *; 74 S. Ct. 808 **; 98 L. Ed. 989 ***; 1954 U.S. LEXIS 2657 ****

UNITED STATES v. HARRISS ET AL.

Prior History: [**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Disposition: *109 F.Supp. 641*, reversed.

Syllabus

1. As here construed, §§ 305, 307 and 308 of the Federal Regulation of Lobbying Act are not too vague and indefinite to meet the requirements of due process. Pp. 617-624.

(a) If the general class of offenses to which a statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. P. 618.

(b) If this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, the Court is under a duty to give the statute that construction. P. 618.

(c) Section 307 limits the coverage of the Act to those "persons" (except specified political committees) who solicit, collect, or receive contributions of money or other thing of value, and then only if one of the main purposes of either the persons or the contributions is to aid in the accomplishment of the aims set forth in § 307 (a) and (b). Pp. 618-620, 621-623.

(d) The purposes set forth in § 307 (a) and (b) are here construed to **[****2]** refer only to "lobbying in its commonly accepted sense" -- to direct communication with members of Congress on pending or proposed legislation. Pp. 620-621.

(e) The "principal purpose" requirement was adopted merely to exclude from the scope of § 307 those contributions and persons having only an "incidental" purpose of influencing legislation. It does not exclude a contribution which in substantial part is to be used to influence legislation through direct communication with Congress or a person whose activities in substantial part are directed to influencing legislation through direct communication with Congress. Pp. 621-623.

(f) There are three prerequisites to coverage under §§ 307, 305 and 308: (1) the "person" must have solicited, collected or received contributions; (2) one of the main purposes of such "person," or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress; and (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress. P. 623.

2. As thus construed, §§ 305 and 308 do not violate the freedoms guaranteed by the *First Amendment* **[****3]** -- freedom to speak, publish and petition the Government. Pp. 625-626.

3. In this case, it is unnecessary for the Court to pass on the contention that the penalty provision in § 310 (b) violates the *First Amendment*. Pp. 626-627.

(a) Section 310 (b) has not yet been applied to appellees, and it will never be so applied if appellees are found innocent of the charges against them. P. 627.

(b) The elimination of § 310 (b) would still leave a statute defining specific duties and providing a specific penalty for violation of any such duty, and the separability provision of the Act can be given effect if § 310 (b) should ultimately be found invalid. P. 627.

Counsel: Oscar H. Davis argued the cause for the United States. With him on the brief were Robert L. Stern, then Acting Solicitor General, Assistant Attorney General Olney, Beatrice Rosenberg and John R. Wilkins. Walter J. Cummings, Jr., then Solicitor General, filed the Statement as to Jurisdiction.

Burton K. Wheeler argued the cause for Harriss, appellee. With him on the brief was Edward K. Wheeler.

Hugh Howell argued the cause for Linder, Commissioner of Agriculture of Georgia, appellee. With him on the brief was Victor **[****4]** Davidson.

Ralph W. Moore, appellee, submitted on brief pro se.

Judges: Warren, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton

Opinion by: WARREN

Opinion

[*613] **[**810]** **[***994]** MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The appellees were charged by information with violation of the Federal Regulation of Lobbying Act, 60 Stat. 812, 839, *2 U. S. C. §§ 261-270*. Relying on its previous **[*614]** decision in *National Association of Manufacturers v. McGrath, 103 F.Supp. 510*, vacated as moot, *344 U.S. 804*, the District Court dismissed the information on the ground that the Act is unconstitutional. *109 F.Supp. 641*. The case is here on direct appeal under the Criminal Appeals Act, *18 U. S. C. § 3731*.

Seven counts of the information are laid under § 305, which requires designated reports to Congress from every person "receiving any contributions or expending any money" for the purpose of influencing the passage or defeat of any legislation by Congress. [1] One such count charges the National Farm Committee, a **[***995]** Texas corporation, **[*615]** with failure to report the solicitation and receipt of contributions to influence **[****5]** the passage of legislation which would cause a rise in the price of agricultural commodities and commodity futures and the defeat of legislation which would cause a decline in those prices. The remaining six counts under § 305 charge defendants Moore and Harriss with failure to report expenditures having the same single purpose. Some of the alleged expenditures consist of the payment of compensation to others to communicate face-to-face with members of Congress, at public functions and committee hearings, concerning legislation affecting agricultural **[**811]** prices; the other alleged expenditures relate largely to the costs of a campaign to induce various interested groups and individuals to communicate by letter with members of Congress on such legislation.

[**6]** The other two counts in the information are laid under § 308, which requires any person "who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation" to register with Congress and to make specified disclosures. [2] **[****7]** These two counts allege **[***996]** in

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[1] Section 305 provides:

"(a) Every person receiving any contributions or expending any money for the purposes designated in subparagraph (a) or (b) of section 307 shall file with the Clerk between the first and tenth day of each calendar quarter, a statement containing complete as of the day next preceding the date of filing --

"(1) the name and address of each person who has made a contribution of $ 500 or more not mentioned in the preceding report; except that the first report filed pursuant to this title shall contain the name and address of each person who has made any contribution of $ 500 or more to such person since the effective date of this title;

"(2) the total sum of the contributions made to or for such person during the calendar year and not stated under paragraph (1);

"(3) the total sum of all contributions made to or for such person during the calendar year;

"(4) the name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar year, of $ 10 or more has been made by or on behalf of such person, and the amount, date, and purpose of such expenditure;

"(5) the total sum of all expenditures made by or on behalf of such person during the calendar year and not stated under paragraph (4);

"(6) the total sum of expenditures made by or on behalf of such person during the calendar year.

"(b) The statements required to be filed by subsection (a) shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous statement only the amount need be carried forward."

The following are "the purposes designated in subparagraph (a) or (b) of section 307":

"(a) The passage or defeat of any legislation by the Congress of the United States.

"(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."

[2] Section 308 provides:

"(a) Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included. Each such person so registering shall, between the first and tenth day of each calendar quarter, so long as his activity continues, file with the Clerk and Secretary a detailed report under oath of all money received and expended by him during the preceding calendar quarter in carrying on his work; to whom paid; for what purposes; and the names of any papers, periodicals, magazines, or other publications in which he has

considerable **[*616]** detail that defendants Moore and Linder were hired to express certain views to Congress as to agricultural prices or to cause others to do so, for the purpose of attempting to influence the passage of legislation which would cause a rise in the price of agricultural commodities and commodity futures and a defeat of legislation which would cause a decline in such prices; and that pursuant to this undertaking, without having registered as required by **[*617]** § 308, they arranged to have members of Congress contacted on behalf of these views, either directly by their own emissaries or through an artificially stimulated letter campaign. [3]

[1]We are not concerned here with the sufficiency of the information as a criminal pleading. Our review under the Criminal Appeals Act is limited to a decision on the alleged "invalidity" of the statute on which the information is based. [4] In making this decision, we judge the statute on its face. See *United* ***[**812]*** *States v. Petrillo, 332 U.S. 1, 6, 12*. The "invalidity" of the Lobbying Act is asserted on three grounds: (1) that §§ 305, 307, and 308 are too vague and indefinite to meet the requirements of due process; (2) that §§ 305 and 308 violate the *First Amendment* guarantees of freedom of speech, freedom of the press, and the right to petition the Government; (3) that the penalty provision of § 310 (b) violates the right of the people under the *First Amendment* to petition the Government.

[**8]** I.

[2]The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. [5]

[*618] [3][4]On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. **[****9]** *United States v. Petrillo, 332 U.S. 1, 7*.Cf. *Jordan v. De George, 341 U.S. 223, 231*. And if this general class of offenses can be made constitutionally definite by a reasonable **[***997]** construction of the statute, this Court is under a duty to give the statute that construction. This was the course adopted in *Screws v. United States, 325 U.S. 91*, upholding the definiteness of the Civil Rights Act. [6]

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caused to be published any articles or editorials; and the proposed legislation he is employed to support or oppose. The provisions of this section shall not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation; nor to any public official acting in his official capacity; nor in the case of any newspaper or other regularly published periodical (including any individual who owns, publishes, or is employed by any such newspaper or periodical) which in the ordinary course of business publishes news items, editorials, or other comments, or paid advertisements, which directly or indirectly urge the passage or defeat of legislation, if such newspaper, periodical, or individual, engages in no further or other activities in connection with the passage or defeat of such legislation, other than to appear before a committee of the Congress of the United States in support of or in opposition to such legislation.

"(b) All information required to be filed under the provisions of this section with the Clerk of the House of Representatives and the Secretary of the Senate shall be compiled by said Clerk and Secretary, acting jointly, as soon as practicable after the close of the calendar quarter with respect to which such information is filed and shall be printed in the Congressional Record."

[3] A third count under § 308 was abated on the death of the defendant against whom the charge was made.

[4] *18 U. S. C. § 3731*. See *United States v. Petrillo, 332 U.S. 1, 5*. For "The Government's appeal does not open the whole case." *United States v. Borden Co., 308 U.S. 188, 193*.

[5] See *Jordan v. De George, 341 U.S. 223, 230-232*; Quarles, Some Statutory Construction Problems and Approaches in Criminal Law, 3 Vand. L. Rev. 531, 539-543; Note, 62 Harv. L. Rev. 77.

[6] Cf. *Fox v. Washington, 236 U.S. 273*; *Musser v. Utah, 333 U.S. 95*; *Winters v. New York, 333 U.S. 507, 510*.

This rule as to statutes charged with vagueness is but one aspect of the broader principle that this Court, if fairly possible, must construe congressional enactments so as to avoid a danger of unconstitutionality. *United States v. Delaware & Hudson Co., 213 U.S. 366, 407-408*; *United States v. Congress of Industrial Organizations, 335 U.S. 106, 120-121*; *United States v. Rumely, 345 U.S. 41, 47*. Thus, in the *C. I. O.* case, *supra*, this Court held that expenditures by a labor organization for the publication of a weekly periodical urging support for a certain candidate in a forthcoming congressional election were not forbidden by the Federal Corrupt Practices Act, which makes it unlawful for ". . . any labor organization to make a contribution or expenditure in connection with any [congressional] election . . . ." Similarly, in the *Rumely* case, *supra*, this Court construed a House Resolution authorizing investigation of "all lobbying activities intended to influence, encourage, promote, or retard legislation" to cover only "'lobbying in its commonly accepted sense,' that is, 'representations made directly to the Congress, its members, or its committees.'"

[5]

[**10]** The same course is appropriate here. The key section of the Lobbying Act is § 307, entitled "Persons to Whom Applicable." Section 307 provides:

> "The provisions of this title shall apply to any person (except a political committee as defined in **[*619]** the Federal Corrupt Practices Act, and duly organized State or local committees of a political party), who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:
>
> "(a) The passage or defeat of any **[**813]** legislation by the Congress of the United States.
> "(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."

[6]This section modifies the substantive provisions of the Act, including § 305 and § 308. In other words, unless a "person" falls within the category established by § 307, the disclosure requirements of § 305 **[****11]** and § 308 are inapplicable. [7] Thus coverage under the Act is limited to those persons (except for the specified political committees) who solicit, collect, or receive contributions of money or other thing of value, and then only if "the principal purpose" of either the persons or the contributions is to aid in the accomplishment of the aims set forth in § 307 (a) and (b). In any event, the solicitation, collection, or receipt of money or other thing of value is a prerequisite to coverage under the Act.

The Government urges a much broader construction -- namely, that under § 305 a person must report his expenditures to influence legislation even though he does not solicit, collect, or receive contributions as provided in **[*620]** § 307. [8] Such a construction, we believe, would do violence to the title and language of § 307 as **[***998]** **[****12]** well as its legislative history. [9] If the construction urged by the Government is to become law, that is for Congress to accomplish by further legislation.

[**13]** We now turn to the alleged vagueness of the purposes set forth in § 307 (a) and (b). As in *United States v. Rumely, 345 U.S. 41, 47*, which involved the interpretation of similar language, we believe this language should be construed to refer only to "lobbying in its commonly accepted sense" -- to direct communication with members of Congress on pending or proposed federal legislation. The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign. [10] **[****14]** It is likewise clear that Congress would have **[*621]** intended the Act **[**814]** to operate on this narrower basis, even if a broader application to organizations seeking to propagandize the general public were not permissible. [11]

[7]There remains for our consideration the meaning of "the principal purpose" and "to be used principally to **[*622]** aid." The legislative history of the Act indicates that the term "principal" was adopted merely to exclude from the scope of § 307 those contributions and persons having only an

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[7] Section 302 (c) defines the term "person" as including "an individual, partnership, committee, association, corporation, and any other organization or group of persons."

[8] The Government's view is based on a variance between the language of § 307 and the language of § 305. Section 307 refers to any person who "solicits, collects, or receives" contributions; § 305, however, refers not only to "receiving any contributions" but also to "expending any money." It is apparently the Government's contention that § 307 -- since it makes no reference to expenditures - is inapplicable to the expenditure provisions of § 305. Section 307, however, limits the application of § 305 as a whole, not merely a part of it.

[9] Both the Senate and House reports on the bill state that "This section [§ 307] defines the application of the title . . . ." S. Rep. No. 1400, 79th Cong., 2d Sess., p. 28; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., p. 34. See also the remarks of Representative Dirksen in presenting the bill to the House: "The gist of the antilobbying provision is contained in section 307." 92 Cong. Rec. 10088.

[10] The Lobbying Act was enacted as Title III of the Legislative Reorganization Act of 1946, which was reported to Congress by the Joint Committee on the Organization of Congress. The Senate and House reports accompanying the bill were identical with respect to Title III. Both declared that the Lobbying Act applies "chiefly to three distinct classes of so-called lobbyists:

"First. Those who do not visit the Capitol but initiate propaganda from all over the country in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts. This class of persons and organizations will be required under the title, not to cease or curtail their activities in any respect, but merely to disclose the sources of their collections and the methods in which they are disbursed.

"Second. The second class of lobbyists are those who are employed

"incidental" purpose of influencing legislation. [12] **[****16]** Conversely, **[***999]** the "principal purpose" requirement does not exclude a contribution which in substantial part is to be used to influence legislation through direct communication with Congress or a person whose activities in substantial part are directed to influencing legislation through direct communication with Congress. [13] If it **[**815]** were otherwise -- if an organization, for example, were exempted **[*623]** because lobbying was only one of its main activities **[****15]** -- the Act would in large measure be reduced to a mere exhortation against abuse of the legislative process. In construing the Act narrowly to avoid constitutional doubts, we must also avoid a construction that would seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate.

[8][9] **[****17]** To summarize, therefore, there are three prerequisites to coverage under § 307: (1) the "person" must have solicited, collected, or received contributions; (2) one of the main purposes of such "person," or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress; (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress. And since § 307 modifies the substantive provisions of the Act, our construction of § 307 will of necessity also narrow the scope of § 305 and § 308, the substantive provisions underlying the information in this case. Thus § 305 is limited to those persons who are covered by § 307; and when so covered, they must report all contributions and expenditures having the purpose of attempting to influence legislation through direct communication with Congress. Similarly, § 308 is limited to those persons (with the stated exceptions [14]) who are covered by § 307 and who, in addition, engage themselves **[*624]** for pay or for any other valuable consideration for the purpose of attempting to influence legislation **[***1000]** through **[****18]** direct communication with Congress. Construed in this way, the Lobbying Act meets the constitutional requirement of definiteness. [15]

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to come to the Capitol under the false impression that they exert some powerful influence over Members of Congress. These individuals spend their time in Washington presumably exerting some mysterious influence with respect to the legislation in which their employers are interested, but carefully conceal from Members of Congress whom they happen to contact the purpose of their presence. The title in no wise prohibits or curtails their activities. It merely requires that they shall register and disclose the sources and purposes of their employment and the amount of their compensation.

"Third. There is a third class of entirely honest and respectable representatives of business, professional, and philanthropic organizations who come to Washington openly and frankly to express their views for or against legislation, many of whom serve a useful and perfectly legitimate purpose in expressing the views and interpretations of their employers with respect to legislation which concerns them. They will likewise be required to register and state their compensation and the sources of their employment."

S. Rep. No. 1400, 79th Cong., 2d Sess., p. 27; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., pp. 32-33. See also the statement in the Senate by Senator La Follette, who was Chairman of the Joint Committee, at 92 Cong. Rec. 6367-6368.

[11] See the Act's separability clause, note 18, *infra*, providing that the invalidity of any application of the Act should not affect the validity of its application "to other persons and circumstances."

[12] Both the Senate and House reports accompanying the bill state that the Act ". . . does not apply to organizations formed for other purposes whose efforts to influence legislation are merely incidental to the purposes for which formed." S. Rep. No. 1400, 79th Cong., 2d Sess., p. 27; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., p. 32. In the Senate discussion preceding enactment, Senator Hawkes asked Senator La Follette, Chairman of the Joint Committee in charge of the bill, for an explanation of the "principal purpose" requirement. In particular, Senator Hawkes sought assurance that multi-purposed organizations like the United States Chamber of Commerce would not be subject to the Act. Senator La Follette refused to give such assurance, stating: "So far as any organizations or individuals are concerned, I will say to the Senator from New Jersey, it will depend on the type and character of activity which they undertake. . . . I cannot tell the Senator whether they will come under the act. It will depend on the type of activity in which they engage, so far as legislation is concerned. . . . *It* [the Act] *affects all individuals and organizations alike if they engage in a covered activity*." (Italics added.) 92 Cong. Rec. 10151-10152. See also Representative Dirksen's remarks in the House, 92 Cong. Rec. 10088.

[13] Such a criterion is not novel in federal law. See Int. Rev. Code, § 23 (o)(2) (income tax), § 812 (d) (estate tax), and § 1004 (a)(2)(B) (gift tax), providing tax exemption for contributions to charitable and educational organizations "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." For illustrative cases applying this criterion, see *Sharpe's Estate v. Commissioner, 148 F.2d 179* (C. A. 3d Cir.); *Marshall v. Commissioner, 147 F.2d 75* (C. A. 2d Cir.); *Faulkner v. Commissioner, 112 F.2d 987* (C. A. 1st Cir.); *Huntington National Bank v. Commissioner, 13 T. C. 760, 769*. Cf. *Girard Trust Co.* v. *Commissioner, 122 F.2d 108* (C. A. 3d Cir.); *Leubuscher v. Commissioner, 54 F.2d 998* (C. A. 2d Cir.); *Weyl v. Commissioner, 48 F.2d 811* (C. A. 2d Cir.); *Slee v. Commissioner, 42 F.2d 184* (C. A. 2d Cir.). See also Annotation, 138 A. L. R. 456.

[14] For the three exceptions, see note 2, *supra*.

[15] Under this construction, the Act is at least as definite as many

[**19]** **[*625]** II.

[10]Thus construed, §§ 305 and 308 also do not violate the freedoms guaranteed **[**816]** by the *First Amendment* -- freedom to speak, publish, and petition the Government.

[11]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. [16]

[**20]** Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. It acted in the same spirit and for a similar purpose in passing the Federal Corrupt Practices Act -- **[***1001]** to maintain the integrity of a basic governmental process. See *Burroughs and Cannon v. United States, 290 U.S. 534, 545*.

Under these circumstances, we believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection. **[*626]** And here Congress has used that power in a manner restricted to its appropriate end. We conclude that §§ 305 and 308, as applied to persons defined in § 307, do not offend the *First Amendment*.

[12]It is suggested, however, that the Lobbying Act, with respect to persons **[****21]** other than those defined in § 307, may as a practical matter act as a deterrent to their exercise of *First Amendment* rights. Hypothetical borderline situations are conjured up in which such persons choose to remain silent because of fear of possible prosecution for failure to comply with the Act. Our narrow construction of the Act, precluding

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other criminal statutes which this Court has upheld against a charge of vagueness. *E. g.*, *Boyce Motor Lines v. United States, 342 U.S. 337* (regulation providing that drivers of motor vehicles carrying explosives "shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings"); *Dennis v. United States, 341 U.S. 494* (Smith Act making it unlawful for any person to conspire "to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence . . . ."); *United States v. Petrillo, 332 U.S. 1* (statute forbidding coercion of radio stations to employ persons "in excess of the number of employees needed . . . to perform actual services"); *Screws v. United States, 325 U.S. 91*, and *Williams v. United States, 341 U.S. 97* (statute forbidding acts which would deprive a person of "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States"); *United States v. Wurzbach, 280 U.S. 396* (statute forbidding any candidate for Congress or any officer or employee of the United States to solicit or receive a "contribution for any political purpose whatever" from any other such officer or employee); *Omaechevarria v. Idaho, 246 U.S. 343* (statute forbidding pasturing of sheep "on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower"); *Fox v. Washington, 236 U.S. 273* (state statute imposing criminal sanctions on "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice . . . ."); *Nash v. United States, 229 U.S. 373* (Sherman Act forbidding "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"). Cf. *Jordan v. De George, 341 U.S. 223* (statute providing for deportation of persons who have committed crimes involving "moral turpitude").

[16] Similar legislation has been enacted in over twenty states. See Notes, 56 Yale L. J. 304, 313-316, and 47 Col. L. Rev. 98, 99-103.

as it does reasonable fears, is calculated to avoid such restraint. But, even assuming some such deterrent effect, the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from criminal libel laws. [17] The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest.

[**22]** **[**817]** III.

The appellees further attack the statute on the ground that the penalty provided in § 310 (b) is unconstitutional. That section provides:

> "(b) In addition to the penalties provided for in subsection (a), any person convicted of the misdemeanor specified therein is prohibited, for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from **[*627]** appearing before a committee of the Congress in support of or opposition to proposed legislation; and any person who violates any provision of this subsection shall, upon conviction thereof, be guilty of a felony, and shall be punished by a fine of not more than $ 10,000, or imprisonment for not more than five years, or by both such fine and imprisonment."

This section, the appellees argue, is a patent violation of the *First Amendment* guarantees of freedom of speech and the right to petition the Government.

[13]We find it unnecessary to pass on this contention. Unlike §§ 305, 307, and 308 which we have judged on their face, **[****23]** § 310 (b) has not yet been applied to the appellees, and it will never be so applied if the appellees are found innocent of the charges against them. See *United States v. Wurzbach, 280 U.S. 396, 399*;*United States v. Petrillo, 332 U.S. 1, 9-12*.

[14]Moreover, the Act provides for the separability of any provision found invalid. [18] If § 310 (b) should ultimately be declared unconstitutional, its elimination would still leave a statute defining specific **[***1002]** duties and providing a specific penalty for violation of any such duty. The prohibition of § 310 (b) is expressly stated to be "In addition to the penalties provided for in subsection (a) . . ."; subsection (a) makes a violation of § 305 or § 308 a misdemeanor, punishable by fine or imprisonment or both. Consequently, there would seem to be no obstacle to giving effect to the separability clause as to § 310 (b), if this should ever prove necessary. Compare *Electric Bond & Share Co.* v. *Securities & Exchange Commission, 303 U.S. 419, 433-437*.

[**24]** **[*628]** The judgment below is reversed and the cause is remanded to the District Court for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

Dissent by: DOUGLAS; JACKSON

Dissent

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I am in sympathy with the effort of the Court to save this statute from the charge that it is so vague and indefinite as to be unconstitutional. My inclinations were that way at the end of the oral argument. But further study changed my mind. I am now convinced that the formula adopted to save this Act is too dangerous for use. It can easily ensnare people who have done no more than exercise their constitutional rights of speech, assembly, and press.

[15]We deal here with the validity of a criminal statute. To use the test of *Connally v. General Construction Co., 269 U.S. 385, 391*, the question is whether this statute "either forbids or requires the doing of an act in terms so vague that **[**818]** men of common intelligence must necessarily guess at its **[****25]** meaning and differ as to its application." If it is so vague, as I think this one is, then it fails to meet the standards required by due process of law. See *United States v. Petrillo, 332 U.S. 1*.In determining that question we consider the statute on its face. As stated in *Lanzetta v. New*

[17] Similarly, the Hatch Act probably deters some federal employees from political activity permitted by that statute, but yet was sustained because of the national interest in a nonpolitical civil service. *United Public Workers v. Mitchell, 330 U.S. 75*.

[18] 60 Stat. 812, 814:

"If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby."

Jersey, 306 U.S. 451, 453:

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation **[*629]** under it, that prescribes the rule to govern conduct and warns against transgression. . . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

And see *Winters v. New York, 333 U.S. 507, 515*.

The question therefore is not what the information charges nor what the proof might be. It is whether the statute itself is sufficiently narrow and precise as to give fair warning.

It is contended that the Act plainly applies

> -- to persons who pay others to present views **[****26]** to Congress either in committee hearings or by letters or other communications to Congress or Congressmen and
> -- to persons who spend money to induce others to communicate with Congress.

The Court adopts that view, with one minor limitation which the Court places on the Act -- that only persons who solicit, collect, or receive money are included.

The difficulty is that the Act has to be rewritten and words actually added and subtracted to produce that result.

[*1003]** Section 307 makes the Act applicable to anyone who "directly or indirectly" solicits, collects, or receives contributions "to be used principally to aid, or the principal purpose of which person is to aid" in either

> -- the "passage or defeat of any legislation" by Congress, or
> -- "To influence, directly or indirectly, the passage or defeat of any legislation" by Congress.

We start with an all-inclusive definition of "legislation" contained in § 302 (e). It means "bills, resolutions, amendments, nominations, and other matters **[*630]** pending or proposed in either House of Congress, and includes any other matter which may be the subject of action by either House." What is the **[****27]** scope of "any other matter which may be the subject of action" by Congress? It would seem to include not only pending or proposed legislation but any matter within the legitimate domain of Congress.

What contributions might be used "principally to aid" in influencing "directly or indirectly, the passage or defeat" of any such measure by Congress? When is one retained for the purpose of influencing the "passage or defeat of any legislation"?

(1) One who addresses a trade union for repeal of a labor law certainly hopes to influence legislation.

(2) So does a manufacturers' association which runs ads in newspapers for a sales tax.

(3) So does a farm group which undertakes to raise money for an educational program to be conducted in newspapers, magazines, and on radio and television, showing the need for revision of our attitude on world trade.

(4) So does a group of oil companies which puts agents in the Nation's capital **[**819]** to sound the alarm at hostile legislation, to exert influence on Congressmen to defeat it, to work on the Hill for the passage of laws favorable to the oil interests.

(5) So does a business, labor, farm, religious, social, racial, or other group which **[****28]** raises money to contact people with the request that they write their Congressman to get a law repealed or modified, to get a proposed law passed, or themselves to propose a law.

Are all of these activities covered by the Act? If one is included why are not the others? The Court apparently excludes the kind of activities listed in categories (1), (2), and (3) and includes part of the activities in (4) and (5) -- those which entail contacts with the Congress.

[*631] There is, however, difficulty in that course, a difficulty which seems to me to be insuperable. I find no warrant in the Act for drawing the line, as the Court does, between "direct communication with Congress" and other pressures on Congress. The Act is as much concerned with one as with the other.

The words "direct communication with Congress" are not in the Act. Congress was concerned with the raising of money to aid in the passage or defeat of legislation, whatever tactics were used. But the Court not only strikes out one whole group of activities -- to influence "indirectly" -- but substitutes a new concept for the remaining group -- to influence "directly." To influence "directly" the passage or defeat **[****29]** of legislation includes any number of methods -- for example, nationwide radio, television or advertising programs promoting a particular measure, as well as the "buttonholing" of Congressmen. To include the latter while excluding the former is to rewrite the Act.

This is not a case where one or more distinct types of "lobbying" are specifically proscribed and another and

different group defined in such loose, broad terms as to make its definition vague and uncertain. Here if we give the words of the Act their ordinary meaning, we do not know what the terminal points are. Judging from the words Congress used, one type of activity which I have enumerated is as much proscribed as another.

[*1004]** The importance of the problem is emphasized by reason of the fact that this legislation is in the domain of the *First Amendment*. That Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances."

Can Congress require one to register before he writes an article, makes a speech, files an advertisement, appears **[*632]** on radio or television, or **[****30]** writes a letter seeking to influence existing, pending, or proposed legislation? That would pose a considerable question under the *First Amendment*, as *Thomas v. Collins, 323 U.S. 516*, indicates. I do not mean to intimate that Congress is without power to require disclosure of the real principals behind those who come to Congress (or get others to do so) and speak as though they represent the public interest, when in fact they are undisclosed agents of special groups. I mention the *First Amendment* to emphasize why statutes touching this field should be "narrowly drawn to prevent the supposed evil" (see *Cantwell v. Connecticut, 310 U.S. 296, 307)* and not be cast in such vague and indefinite terms as to cast a cloud on the exercise of constitutional rights. Cf. *Stromberg v. California, 283 U.S. 359, 369*; *Thornhill v. Alabama, 310 U.S. 88, 97-98*; *Winters v. New York, 333 U.S. 507, 509*; *Joseph Burstyn, Inc.* v. *Wilson, 343 U.S. 495, 504-505*.

[820]** If that rule were relaxed, if Congress could impose registration requirements on the exercise of *First Amendment* rights, saving to the courts the salvage of the good from the bad, **[****31]** and meanwhile causing all who might possibly be covered to act at their peril, the law would in practical effect be a deterrent to the exercise of *First Amendment* rights. The Court seeks to avoid that consequence by construing the law narrowly as applying only to those who are paid to "buttonhole" Congressmen or who collect and expend moneys to get others to do so. It may be appropriate in some cases to read a statute with the gloss a court has placed on it in order to save it from the charge of vagueness. See *Fox v. Washington, 236 U.S. 273, 277*. But I do not think that course is appropriate here.

The language of the Act is so broad that one who writes a letter or makes a speech or publishes an article **[*633]** or distributes literature or does many of the other things with which appellees are charged has no fair notice when he is close to the prohibited line. No construction we give it today will make clear retroactively the vague standards that confronted appellees when they did the acts now charged against them as criminal. Cf. *Pierce v. United States, 314 U.S. 306, 311*. Since the Act touches on the exercise of *First Amendment* rights, and is not narrowly **[****32]** drawn to meet precise evils, its vagueness has some of the evils of a continuous and effective restraint.

MR. JUSTICE JACKSON, dissenting.

Several reasons lead me to withhold my assent from this decision.

The clearest feature of this case is that it begins with an Act so mischievously vague that the Government charged with its enforcement does not understand it, for some of its important assumptions are rejected by the Court's interpretation. The clearest feature of the Court's decision is that it leaves the country under an Act which is not much like any Act passed by Congress. Of course, when such a question is before us, it is easy to differ as to whether it is more appropriate to strike out or to strike down. But **[***1005]** I recall few cases in which the Court has gone so far in rewriting an Act.

The Act passed by Congress would appear to apply to all persons who (1) solicit or receive funds for the purpose of lobbying, (2) receive and expend funds for the purpose of lobbying, or (3) merely expend funds for the purpose of lobbying. The Court at least eliminates this last category from coverage of the Act, though I should suppose that more serious evils affecting the **[****33]** public interest are to be found in the way lobbyists spend their money than in the ways they obtain it. In the present indictments, six counts relate exclusively to failures to **[*634]** report expenditures while only one appears to rest exclusively on failure to report receipts.

Also, Congress enacted a statute to reach the raising and spending of funds for the purpose of influencing congressional action *directly or indirectly*. The Court entirely deletes "indirectly" and narrows "directly" to mean "direct communication with members of Congress." These two constructions leave the Act touching only a part of the practices Congress deemed sinister.

Finally, as if to compensate for its deletions from the Act, the Court expands the phrase "the principal purpose" so that it now refers to any contribution which "in substantial part" is used to influence legislation.

I agree, of course, that we should make liberal interpretations to save legislative Acts, including penal statutes which punish conduct traditionally recognized as morally "wrong."

Whoever kidnaps, steals, kills, or commits similar **[**821]** acts of violence upon another is bound to know that he is inviting retribution **[****34]** by society, and many of the statutes which define these long-established crimes are traditionally and perhaps necessarily vague. But we are dealing with a novel offense that has no established bounds and no such moral basis. The criminality of the conduct dealt with here depends entirely upon a purpose to influence legislation. Though there may be many abuses in pursuit of this purpose, this Act does not deal with corruption. These defendants, for example, are indicted for failing to report their activities in raising and spending money to influence legislation in support of farm prices, with no charge of corruption, bribery, deception, or other improper action. This may be a selfish business and against the best interests of the nation as a whole, but it is in an area where legal penalties should be applied only by formulae as precise and clear as our language will permit.

[*635] The *First Amendment* forbids Congress to abridge the right of the people "to petition the Government for a redress of grievances." If this right is to have an interpretation consistent with that given to other *First Amendment* rights, it confers a large immunity upon activities of persons, organizations, **[****35]** groups and classes to obtain what they think is due them from government. Of course, their conflicting claims and propaganda are confusing, annoying and at times, no doubt, deceiving and corrupting. But we may not forget that our constitutional system is to allow the greatest freedom of access to Congress, so that the people may press for their selfish interests, with Congress acting as arbiter of their demands and conflicts.

In matters of this nature, it does not seem wise to leave the scope of a criminal Act, close to impinging on the right of petition, dependent upon judicial construction for its limitations. Judicial construction, constitutional or statutory, always is subject to hazards of judicial reconstruction. One may rely on today's narrow interpretation only at his peril, for some later Court may expand the Act to include, in accordance with its terms, what today the Court excludes. This recently happened with the antitrust laws, which the Court cites as being **[***1006]** similarly vague. This Court, in a criminal case, sustained an indictment by admittedly changing repeated and long-established constitutional and statutory interpretations. *United States v. **[****36]** South-Eastern Underwriters Assn., 322 U.S. 533*. The *ex post facto* provision of our Constitution has not been held to protect the citizen against a retroactive change in decisional law, but it does against such a prejudicial change in legislation. As long as this statute stands on the books, its vagueness will be a contingent threat to activities which the Court today rules out, the contingency being a change of views by the Court as hereafter constituted.

[*636] The Court's opinion presupposes, and I do not disagree, that Congress has power to regulate lobbying for hire as a business or profession and to require such agents to disclose their principals, their activities, and their receipts. However, to reach the real evils of lobbying without cutting into the constitutional right of petition is a difficult and delicate task for which the Court's action today gives little guidance. I am in doubt whether the Act as construed does not permit applications which would abridge the right of petition, for which clear, safe and workable channels must be maintained. I think we should point out the defects and limitations which condemn this Act so clearly that the Court cannot **[****37]** sustain it as written, and leave its rewriting to Congress. After all, it is Congress that should know from experience both the good in the right of petition and the evils of professional lobbying.

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STATE OF NEW YORK
JOINT COMMISSION ON PUBLIC ETHICS

Advisory Opinion No. 16-01: **Reporting obligations under the Lobbying Act for a party who is compensated for consulting services in connection with lobbying activity**

Introduction

Consultants offer a number of services that abut lobbying, but may not necessarily cross the line into lobbying. For example, consultants may offer services that may include communications and media relations, community organizing, coalition building, strategic planning, social media relations, grassroots advocacy, advertising, and electoral campaigns. However, despite the terms used to describe the services, some of this activity could constitute reportable lobbying under Legislative Law Article 1-A (the "Lobbying Act").

Principally, this analysis will address actions taken and roles played by consultants in two typical lobbying scenarios – as "facilitators" for direct lobbying to or before a public official, and as architects of grassroots lobbying campaigns to the public.

The State Temporary Commission on Lobbying (the "Lobbying Commission"), a predecessor agency of the New York State Joint Commission on Public Ethics ("JCOPE"), previously defined the activities under the Lobbying Act that may constitute grassroots lobbying through a series of Advisory Opinions discussed below. Since that time, however, the Lobbying Act has been amended more than once and the Lobbying Commission has been disbanded and ultimately replaced by JCOPE.

The Commission issues this Advisory Opinion in order to articulate when the Lobbying Act covers the services of consultants, and to clarify the test used to determine when grassroots advocacy constitutes reportable lobbying activity.

Issues

I. When a consultant (or other paid representative) contacts a public official on behalf of a client, for the purpose of enabling or otherwise facilitating lobbying activity, is that initial contact, *i.e.*, the "door opening", reportable under the Lobbying Act?

II. When a consultant attends a meeting between a client (with or without a lobbyist) and a public official, is the consultant engaging in lobbying?

III. Must consultants who create and implement grassroots lobbying campaigns on behalf of clients themselves register as lobbyists?

Conclusions

Pursuant to its authority under Lobbying Act § 1-d(f), the Commission renders its opinion that:

I. Reportable lobbying[1] includes preliminary contact made with public officials to enable or facilitate the ultimate advocacy.

II. Any direct interaction with a public official in connection with an advocacy campaign, including preliminary communications to facilitate or enable the eventual substantive advocacy, constitutes lobbying.

Direct interaction includes, but is not limited to: (i) verbal or written communications, including communications made for the purpose of facilitating access to a public official; (ii) attendance at a meeting with a public official; and (iii) presence on a phone call with a public official.

III. A grassroots communication constitutes lobbying if it:

1. References, suggests, or otherwise implicates an activity covered by Lobbying Act Section 1-c(c).
2. Takes a clear position on the issue in question; and
3. Is an attempt to influence a public official through a call to action, *i.e.*, solicits or exhorts the public, or a segment of the public, to contact (a) public official(s);

A consultant's activity on a grassroots campaign can be considered reportable lobbying if the consultant controlled the delivery and had input into the content of the message.

Control of the *delivery* of a grassroots communication involves participation in the actual delivery of the message.

Input on the *content* of a grassroots message means participation in the formation of the message.

Discussion

History and Precedent

Lobbying was first regulated in New York state in 1977 with the enactment of the "Regulation of Lobbying Act"(L. 1977, Ch. 937). The statute defined "lobbying" or "lobbying activity" as:

> [A]ttempts to influence the passage or defeat of any legislation by either house of the legislature or the approval or disapproval of any legislation by the governor, or the adoption or rejection of any rule or regulation having the force and effect of law or the

[1] *See* Lobbying Act § 1-c(c)(i)-(x)

outcome of any rate making proceeding by a state agency. *Section 3(b) of Ch. 937, L. 1977.*

This legislation also created the first iteration of the State's lobbying regulatory body, with the creation of the Temporary Commission on the Regulation of Lobbying. This Commission was subsequently reconstituted in 1981 as the similarly-named Temporary Commission on Lobbying, which would remain in place until 2007.[2]

These commissions are charged in their respective enabling statutes with the interpretation of the laws governing lobbying, through the issuance of advisory opinions.[3]

The definition of lobbying provides what kind of activity can be lobbying ("attempts to influence"), as well as the contexts in which it can occur (*i.e.*, legislation, rulemakings, and rate makings).

However, it was not until the Lobbying Commission's Opinion No. 21 (79-1) in 1979 that a New York state regulator addressed what specific conduct constituted an "attempt to influence" under the Act. In that opinion, a committee of the state bar association both: (1) challenged the "attempts to influence" language of the statute as vague and unqualified; and (2) asked whether this language included interactions other than "direct contact with legislators, the Governor, or regulatory agency decision makers".

On both questions the Lobbying Commission turned to the U.S. Supreme Court's seminal 1953 lobbying-related decision, United States v. Harriss (347 U.S. 612). *Harriss* upheld a constitutional challenge to the Federal Lobbying Act, the Court held that the definition of lobbying captured "direct pressures exerted by lobbyists themselves…or through an artificially stimulated letter campaign." *Harriss* at 620. Justifying the potential infringement of protected speech, the Court noted that "[Congress] has … merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much…". TCOL Op. No. 21 (79-1), quoting *U.S. v. Harriss*.

The Lobbying Commission stated that it was acting to "conform with Federal case law", *i.e.*, *Harriss* and, as a result, "lobbying activity" under the New York state statute is through direct verbal, written, or printed communications with legislators, including "contacts with those staff members of the decision maker to whom authority to decide had been delegated and to those staff members upon whom the decision maker relies for informed recommendations on matters under consideration." Lobbying Commission Op. No. 21 (1979).

In the months immediately following the publication of this opinion, the Lobbying Commission notified the Commission on Independent Colleges and Universities ("CICU") of potential reporting obligations under the law, should [CICU] exceed the $1,000 lobbying spending

[2] The Lobbying Commission was merged with the State Ethics Commission in 2007, into the Commission of Public Integrity ("COPI"), as part of the Public Employee Ethics Reform Act, Ch. 14, L. 2007. COPI was subsequently replaced by the Joint Commission on Public Ethics in 2011's Public Integrity Reform Act, Ch. 399, L. 2011. All prior opinions referenced in this document were issued by the Lobbying Commission, unless otherwise noted.
[3] See § 4(c)(6), Ch. 937, L. 1977; § 4(c)(6), Ch. 1040, L. 1981; Legislative Law Article 1-A, § 1-d(f).

threshold then in effect. CICU subsequently registered as a lobbying organization and sought a declaratory judgment in the District Court that the lobbying statute was "in its entirety, null and void, unconstitutional and of no force and effect".[4] The constitutional challenge argued that the law was an overbroad constraint on the rights to speech, petition the government, and association, because it attempted to regulate "any action which could conceivably impact upon government action, no matter how remote".[5] The Court dismissed the plaintiffs' arguments, noting that the Supreme Court had limited the definition of lobbying in *Harriss* and pointed to the Lobbying Commission's decision to apply *Harriss* to its own activities.[6]

In applying *Harriss* to the New York lobbying laws, the *CICU* court ratified the boundaries that the Lobbying Commission had imposed on itself (in Op. No. 21). Further, an ensuing progeny of decisions by the Lobbying Commission created a series of general rules about what constituted lobbying activity under *Harriss* and state law, and applied the rules in the context of "grassroots" lobbying.

After CICU, the Commission issued the first opinion applying criteria to grassroots lobbying. The Commission found in Op. No. 36 (82-2) that **lobbying included not only the direct contacts with a public official, but also exhortations to the public to contact the public official, *i.e.*, a call to action**, with regard to specific pending legislation.

The Commission was later presented with the question whether a consultant that carries out the *mailing* function of a grassroots campaign (assuming the requisite "call to action" is present) is required to register as a lobbyist. The Commission found that **lobbying occurs when a consultant controls message delivery, and that control results in direct contact with a public official** ("A lobbyist cannot be allowed to avoid registering with the Commission simply by changing how contact with legislators is made. Any attempt by a lobbyist to influence the passage or defeat of any legislation…is lobbying irrespective of how contact is made.")[7] However, the Commission clarified that the consultant's activity must include participation in both the content and delivery of a grassroots lobbying campaign to trigger the disclosure requirements. In that case, the delivery of pamphlets – without input, editing, reviewing, or other connection to the content of the message – was not lobbying activity.

The Lobbying Commission further clarified that an advertisement that includes a public "call to action" need not necessarily identify a bill number for the advertisement to constitute lobbying. In evaluating radio advertisements encouraging the public to contact the Governor regarding proposed Indian casino gaming issues, the Commission wrote, "[t]he company's reliance on the omission of a bill number to avoid the requirement of disclosure is misplaced; it is the clear attempt to stimulate a grassroots lobbying effort in regard to pending legislation that controls the question." (Opinion No. 44 (00-3)). The Commission also articulates a three-part test for all lobbying – direct or grassroots: "**Lobbying, under New York law, occurs when the activity in**

[4] Commission on Independent Colleges and Universities v. New York Temporary State Commission on Regulation of Lobbying, 534 F. Supp. 489, 491, (N.D.N.Y 1982).
[5] *Id*. at 496.
[6] *Id*. at 497, citing Lobbying Commission Op. No. 39 (97-1).
[7] Lobbying Commission Op. No. 39 (97-1) (1997).

question relates to pending legislation, a position is stated, and the activity is an attempt to influence decision makers…Direct contact is not required."[8] (emphasis added)

Finally, and as discussed below, the definition of "lobbying" or "lobbying activities" has expanded from the initial 1977 version[9]: in 1999, the legislature added certain actions by municipalities to the contexts in which lobbying can occur; in 2005, the definition was expanded to cover attempts to influence governmental procurements and tribal-state compacts (or Class III gaming actions);[10] and most recently, in 2011, PIRA further amended the definition (to its current state) to specify that an attempt to influence passage or defeat of legislation included the introduction or intended introduction of such legislation.[11]

Issue Analysis

I. *When a consultant (or other paid representative) contacts a public official on behalf of a client, for the purpose of enabling or otherwise facilitating lobbying activity, is that initial contact, i.e., the "door opening", reportable under the Lobbying Act?*

JCOPE is cognizant and respectful of the fact that the scope of the Lobbying Act is limited to those circumstances enunciated in Section 1-c(c) of the Lobbying Act. However, advocacy has evolved, requiring JCOPE to address activities that are clearly within the ambit of the Lobbying Act, but not been previously considered.

JCOPE finds that **reportable lobbying[12] includes preliminary contact** made with public officials to enable or facilitate the ultimate advocacy. This initial contact does not have to involve the substantive concerns of the client, but can simply be to schedule a future meeting for the client with the public official. It can also include a consultant introducing his client to a public official prior to a meeting.

While one may call himself a consultant, when that individual communicates with a public official (or her staff) on behalf of a client – for the purpose of enabling the client to explicitly advocate before the public official – the lobbying has begun. *But for the access* to the public official, the ensuing advocacy could not take place.

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[8] *Id.*

[9] The original definition of lobbying covered "attempts to influence the passage or defeat of any legislation by either house of the legislature or the approval or disapproval of any legislation by the governor, or the adoption or rejection of any rule or regulation having the force and effect of law or the outcome of any rate making proceeding by a state agency".

[10] Ch. 15, L. 2005.

[11] Part D, Ch. 399, L. 2011.

[12] As discussed above, the Lobbying Act defines "lobbying" or "lobbying activities" as any attempt to influence the enumerated activities in Section 1-c(c)(i)-(x). However, lobbying requires reporting only if the potential lobbyist or client expends, incurs, or receives more than $5,000 in annual compensation and expenses for lobbying (hereinafter, "reportable lobbying"). For purposes of this opinion, all references to and discussions of the applicability of the Lobbying Act presume that the $5,000 monetary threshold has been met.

JCOPE is not attempting to regulate personal social conversation among those who happen to also work in and around government – but rather to ensure that those who are compensated for their political connections are exposed to the requisite sunlight.

To hold otherwise allows a class of individuals to operate in the same sphere as lobbyists, yet be exempted from specific statutes designed to promote transparency about attempts to influence public officials. For example, JCOPE holds that just as it is presumptively impermissible for a lobbyist to give a gift to a public official,[13] a consultant who "opens doors" should be subject to the same restrictions. Similarly, the prohibition on a lobbyist receiving a fee contingent on the success of the lobbying[14] should apply to a consultant as well.[15]

For these reasons, JCOPE finds that anyone who makes contact with a public official, including preliminary communications to facilitate or enable the eventual substantive advocacy, is engaging in lobbying.

A consultant must report these activities if he *knows or has reason to know* that lobbying will occur before the public official. The consultant cannot employ a "willful blindness" strategy in order to create plausible deniability as to any lobbying that follows.

II. *When a consultant attends a meeting between a client (with or without a registered lobbyist) and a public official, is the consultant engaging in lobbying?*

As noted above, reportable lobbying begins on first contact with the public official, even if that contact is only an introduction or securing a future meeting for a client. However, the question remains whether a consultant's attendance at a lobbying meeting (or participation on a call), even if only to make initial introductions or observe, constitutes reportable lobbying activity. Based on the new rules above, it follows that an individual who subsequently has *direct interaction* with a public official in connection with reportable lobbying may also be required to register as a lobbyist.[16]

> *For purposes of this opinion,* direct interaction *includes, but is not limited to (i) verbal or written communications, including communications made for the purpose of facilitating access to a public official; (ii) attendance at a meeting with a public official; and (iii) presence on a phone call with a public official.*

Just as JCOPE determined, *supra*, that using a consultant's *access* to facilitate advocacy is part of lobbying, **it is also the case that a consultant's *presence* can be part of lobbying.** These situations are all part and parcel of trading on relationships and influence. To be clear,

[13] Lobbying Act Section 1-m
[14] Lobbying Act Section 1-k
[15] Regardless of whether the registration requirements – and thus these prohibitions – apply, consulting services procured as part of a lobbying campaign will be disclosed as reportable expenses in the filings submitted by another lobbyist or client.
[16] This should not be interpreted to require clerical or administrative staff who make scheduling calls for consultants to be listed as additional lobbyists. The activity is attributed to the consultant – the actions of clerical staff are a reportable non-lobbying salary expense (which can be reported in the aggregate).

consultants should not be barred from these practices – the Legislature clearly found lobbying to be part of a fundamental exercise of rights under the Constitution[17]; but, at the same time, these transactions should merit that "modicum of information from those who for hire attempt to influence legislation" that the Supreme Court called for in *Harriss*. **To that end, a consultant who has direct interaction (as defined above) with a public official at any point in the reportable lobbying effort is subject to the Lobbying Act.**

There may be individuals who attend meetings with public officials, *e.g.*, architects, scientists, or engineers, to address technical questions. They have no role in the strategy, planning, messaging, or other substantive aspect of a meeting. Since these attendees are not trading on access, influence, or relationships, they are not subject to the attendant lobbying reporting rules.

III. *Must consultants who create and implement grassroots lobbying campaigns on behalf of clients themselves register as lobbyists?*

Grassroots Lobbying

As noted above, the Lobbying Commission's adoption of *Harriss* (via Lobbying Commission Opinion No. 21) first determined that lobbying activity can occur via direct contact with public officials, or through what the *Harriss* court called "artificially stimulated letter campaigns".

However, the Lobbying Commission continued to refine its position on these indirect methods of lobbying. For example, the Lobbying Commission stated that a communication that addresses specific pending legislation, takes a position on the issue, and solicits the public to contact a public official, *i.e.*, includes a call to action, constitutes lobbying activity.[18]

Further, it stated that a communication that included the following attributes would constitute lobbying activity, specifically that the communication:

(1) related to pending legislation;

(2) took a position; and

(3) was an attempt to influence decision makers. [19]

Finally, the Lobbying Commission found that an individual or organization that participates in the formation of the content and delivery of such a communication may be lobbying ("Lobbying activity requires some participation in both message content and delivery. A company that has complete control over mailing in furtherance of a grassroots lobbying effort would be a lobbyist

[17] Section 1 of Ch. 937, Laws of 1977 ("…the operation of responsible democratic government requires that the fullest opportunity be afforded to the people to petition their government for the redress of grievances and to express freely to appropriate officials their opinions on legislation and government operations").
[18] Lobbying Commission Op. No. 36 (82-2).
[19] Lobbying Commission Op. No. 44 (00-3).

only if that company participated in the formation of the message itself or was given some control over reviewing or editing the client's message.")[20]

Since these opinions were published, however, the statutory reach of the Lobbying Act has increased. In PIRA, the Lobbying Act was expanded to cover not only attempts to influence the passage, defeat, enactment, or veto of legislation, but also the "introduction or intended introduction of legislation".

This opinion attempts to account for this expanded scope by forming a new grassroots lobbying test, as well as a determination of the applicability of the Lobbying Act to consultants who participate in these grassroots lobbying campaigns.

The existing requirements for a communication to: (1) include call to action; (2) take a position on an issue; and (3) attempt to influence decision makers are still applicable regardless of the breadth of covered activities under Section 1-c(c) However, given the expansions to the statutory definition of "lobbying", the "current pending legislation" element must be redefined.

JCOPE finds that the communication need only *relate to a Section 1-c(c) activity*. It need not reference a bill number, but a bill (or its defeat) must be the intended byproduct of the lobbying. Similarly, it need not identify an executive order or regulation, but it must be clear that an executive order or regulation is the subject of the lobbying. In sum, a grassroots communication constitutes lobbying if it:

1. **References, suggests, or otherwise implicates an activity covered by Lobbying Act Section 1-c(c).**
2. **Takes a clear position on the issue in question; and**
3. **Is an attempt to influence a public official through a call to action, *i.e.*, solicits or exhorts the public, or a segment of the public, to contact (a) public official(s);**

Application to Consultants

With the above grassroots criteria in mind, JCOPE **affirms while clarifying the position of its predecessor from Op. No. 39**, and finds that a consultant's activity on a grassroots campaign can be considered reportable lobbying if the consultant **controlled the delivery of the message and had input into its content**.

Control of the delivery of a grassroots communication requires participation in the *actual* delivery of the message to the audience, whether verbally or in writing. The delivery can be either to a targeted audience, or to the public in general, *e.g.*, as a spokesperson.

The speaker/author should be identifiable as a person/entity distinct from their client, who is speaking for the client's benefit. A public relations consultant who speaks to a group to advance the client's lobbying message would be participating in actual delivery of a message. Further, a public relations consultant who contacts a media outlet in an attempt to get it to advance the client's message in an editorial would also be delivering a message. That said, this is in no way

[20] Lobbying Commission Op. No. 39 (97-1).

intended to restrict a reporter's ability to gather information or to seek comment from representatives of advocacy groups as part of reporting the news. Rather, this is intended to generate transparency in the activities of paid media consultants who are hired to proactively advance their client's interests through the media. Any attempt by a consultant to induce a third-party – whether the public or the press – to deliver the client's lobbying message to a public official would constitute lobbying under these rules.

Input into the content of a grassroots communication means participation in forming the message. The determining factor is shaping the content of the communication. It involves more than mere proofreading, but at the same time does not require full decision-making authority, *i.e.*, a client having the "final say" in a work product does not exempt the role played by the consultant in creating the message.

If a consultant's participation in a grassroots campaign constitutes control over delivery and input into content, the activity becomes reportable lobbying for the consultant and may require registration and reporting.

Exceptions

In reiterating that the conduct must involve participation in both the content and delivery, JCOPE notes that each of the following activities or roles would not alone be lobbying under this test:

1. Billboard or sign owners;
2. Copy editing;
3. Advertisement writers;
4. Storyboard artists;
5. Film crews;
6. Photographers;
7. Video editors;
8. Website managers, hosts, or internet service providers;
9. Media outlets or broadcasters; [21]
10. Media buyers or placement agents;
11. Secretaries, clerical, and ministerial staff.

Additionally, existing exceptions and limitations in the Lobbying Act would also apply, ensuring that attorneys who draft opinions, research, or memos[22]; non-lobbying staff; or others are not unnecessarily captured by the law.

Conclusion

JCOPE has identified a class of participants in lobbying efforts who, while potentially engaging in lobbying activities, have called themselves something other than lobbyists. Through this opinion, JCOPE has means to clarify the criteria when those activities require registration and

[21] See also Lobbying Act Section 1-c(c)(B).
[22] Lobbying Act Section 1-c(c)(A).

reporting under the Lobbying Act, and when those activities need only be disclosed as expenses incurred by another lobbyist.

Concur:

Daniel J. Horwitz, Chair	Gary J. Lavine
David Arroyo	David A. Renzi
Hon. Joseph Covello	Michael A. Romeo, Sr.
Seymour Knox, IV	Michael K. Rozen
Hon. Eileen Koretz	George H. Weissman

Opposed:

Marvin E. Jacob	Dawn L. Smalls
Hon. Renee R. Roth	

Absent:

Hon. Mary Lou Rath

Dated: January 26, 2016

PANEL TWO

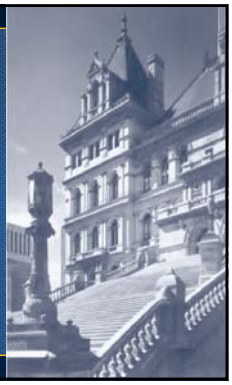
Key Highlights of JCOPE'S Comprehensive Lobby Regulations and New Reporting Requirements

KEY DIFFERENCES – EXISTING PRACTICE VS. NEW REGULATIONS

EXISTING PRACTICE	REGULATIONS
1. A registration may disclose a Client and, *when applicable*, a Third Party Beneficiary	1. Every registration and lobbying report must include a Contractual Client and a Beneficial Client (even if the same)
2. Lobbying reports could identify vague targets of lobbying, i.e., "legislative branch"	2. Greater specificity on Lobbying Targets: Every lobbying report must disclose actual individual targets of lobbying
3. Direct Lobbying only covered the advocacy meeting (pre 16-01)	3. Direct lobbying includes contacts made for "door opening"
4. Limited guidance on: a. Grassroots Lobbying b. Lobby Days c. Coalitions	4. a. **Grassroots Lobbying** is defined and reportable, including social media activities **b. Lobby Days** are defined and include instructions on associated reportable expenses and individuals **c. Coalitions** are defined and filing options and associated filing requirements are provided. Certain Coalition members become Beneficial Clients
5. Organizations with in-house lobbying had to file both Lobbyist and Client reports	5. Only Lobbyist reports are required unless the organization also retains external Lobbyists

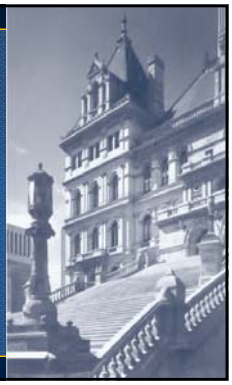
WHO ARE YOU AND HOW DO YOU FILE?

- Clients – Contractual and Beneficial
- Lobbyists – Employed, Retained and Designated
- Multi-Party Relationships – Sub and Co-Lobbyists
- Coalitions



CLIENTS

Contractual and Beneficial Client



CONTRACTUAL AND BENEFICIAL CLIENTS

THE CONCEPT

- Lobbyists and Clients must identify both the Contractual Client and Beneficial Client on all lobbying filings.
- Contractual Client and Beneficial Client can be the same.
- Designed to close loopholes in Source of Funding disclosure and promote transparency by requiring Lobbyists and Clients to identify the **"true"** Client on all lobbying reports.

I am a **CONTRACTUAL CLIENT**...

CONTRACTUAL CLIENT

An individual or organization that retains the services of a Lobbyist for the benefit of itself or another.

- Responsible for filing the CSA, except for the Source of Funding Disclosure section of the CSA
- Responsible Party of the Contractual Client signs Lobbying Agreements or Authorizations
- Party that compensates the Lobbyist (internal or external)
- Listed by Lobbyist and Client on all lobbying filings

I am a **BENEFICIAL CLIENT**...

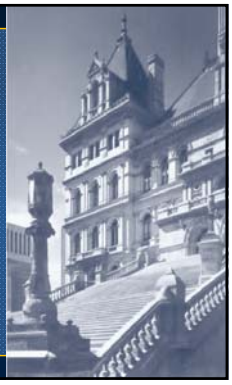
BENEFICIAL CLIENT

The specific individual or organization on whose behalf and at whose request or behest lobbying activity is conducted. The "true" client.

- Listed by Lobbyist and Client on all lobbying filings
- Coalition Members (of Coalitions filing lobbying reports) exceeding $5,000 in cumulative annual lobbying compensation and expenses
- An individual or organization that lobbies on its own behalf (in which case they are the Lobbyist, BC and CC)
- Responsible for Source of Funding Disclosure requirements

LOBBYISTS

Employed, Designated and Retained
Prime, Co and Sub-Lobbyists



I am an **EMPLOYED LOBBYIST**...

In this case, the Advocacy Center is <u>both</u> its own Lobbyist and Client

EMPLOYED LOBBYISTS

INDEPENDENT CONTRACTORS

How does an in-house independent contractor have to file?

QUESTIONS TO CONSIDER

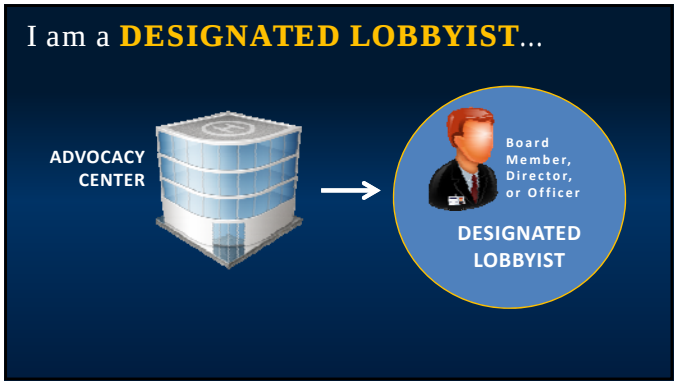
- Are they considered a Retained Lobbyist?
- Are they considered an Employed Lobbyist as part of the in-house lobbying team?

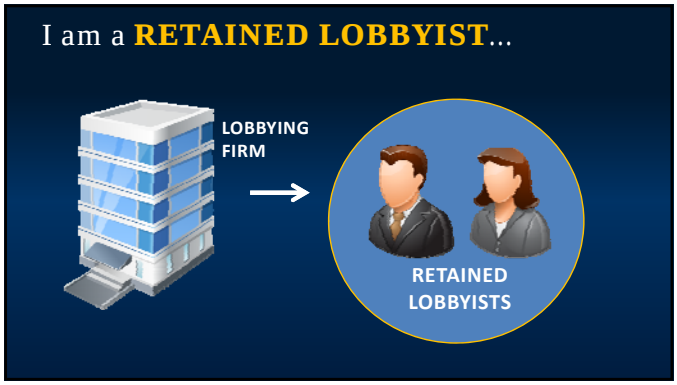
EMPLOYED LOBBYISTS

INDEPENDENT CONTRACTORS

The person may be considered an **<u>Employed Lobbyist (In-house)</u>** and listed on the organization's lobbying reports if such person meets the following criteria:

- The only source of lobbying compensation is the lobbying organization;
- Their lobbying activities are supervised by the lobbying organization; and
- The person is not otherwise identified as an Individual Lobbyist on any other Statement of Registration.


I am a DESIGNATED LOBBYIST...
ADVOCACY CENTER
Board Member, Director, or Officer
DESIGNATED LOBBYIST


I am a RETAINED LOBBYIST...
LOBBYING FIRM
RETAINED LOBBYISTS


MULTI-PARTY RELATIONSHIPS
Prime Lobbyists
Sub-Lobbyists
Co-Lobbyists

REPORTING OBLIGATIONS FOR **ALL PARTIES** TO A LOBBYING ACTIVITY

LOBBYIST
- STATEMENT OF REGISTRATION
- BI-MONTHLY REPORTS
- DISBURSEMENT OF PUBLIC MONIES (If applicable)

CONTRACTUAL CLIENT
- CLIENT SEMI-ANNUAL REPORT

BENEFICIAL CLIENT
- SOURCE OF FUNDING

PRIME OR **SUB LOBBYIST**?

CLIENT

Retains Lobby Firm A

(Contractual and Beneficial)

LOBBY FIRM A
(Prime Lobbyist)

Lobby Firm A retains Lobby Firm B to do a portion of the work

(Contractual Client of Sub)

LOBBY FIRM B
(Sub-Lobbyist)

The Sub-Lobbyist may or may not have interaction with the Client

MULTI-PARTY – **CLIENT** REQUIRED FILINGS

CLIENT
(BOTH CONTRACTUAL AND BENEFICIAL)

CLIENT
SEMI - ANNUAL REPORT

Lists Prime Lobbyist as the Lobbyist and discloses lobbying activity by Prime Lobbyist on their behalf

MULTI-PARTY – **PRIME LOBBYIST** REQUIRED FILINGS

PRIME LOBBYIST

STATEMENT OF REGISTRATION AND BI-MONTHLY REPORTS

Disclose Client and all Sub-Lobbyists

Describes own lobbying activity

AND

A CONTRACTUAL CLIENT (OF SUB-LOBBYIST)

CLIENT SEMI-ANNUAL REPORT

Describes contractual Client/Lobbyist relationship between Prime (as the Contractual Client on behalf of the Beneficial Client) and Sub-Lobbyist

MULTI-PARTY – **SUB-LOBBYIST** REQUIRED FILINGS

SUB-LOBBYIST

STATEMENT OF REGISTRATION AND BI-MONTHLY REPORTS

DISCLOSES THE CONTRACTUAL CLIENT (= PRIME LOBBYIST) AND BENEFICIAL CLIENT (=ORIGINAL CLIENT/"TRUE" CLIENT)

DESCRIBES THEIR OWN LOBBYING ACTIVITY

CO-LOBBYISTS

- EACH CO-LOBBYIST MUST FILE OWN REGISTRATION STATEMENT
- MUST IDENTIFY CO-LOBBYIST
- BUT ONLY LIST ITS <u>OWN</u> COMPENSATION AND EXPENSES

CLIENT

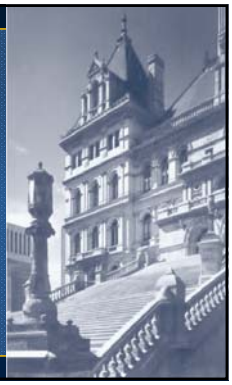
SINGLE CONTRACT

LOBBY FIRM A
(Co-Lobbyist)

LOBBY FIRM B
(Co- Lobbyist)

MULTI-PARTY RELATIONSHIPS – COALITIONS

Striking a balance between improved transparency surrounding who is behind Coalitions without discouraging their formation



WHAT IS A COALITION?

A group of otherwise-**unaffiliated** entities or members who pool funds for the primary purpose of engaging in lobbying activities on behalf of the members of the Coalition.

\+ **Lobbying Activities and Pooled Funds**

= **COALITION**

FILING REQUIREMENTS FOR COALITIONS THAT EXCEED THE $5,000 THRESHOLD

FILE A LOBBYING REPORT AS A LOBBYIST OR CLIENT

- Name a Responsible Party for the filings
- Maintain up-to-date record of all members who exceed $5,000 in cumulative annual Lobbying Compensation and Expenses (Beneficial Clients)

OR

Each member who is required to file a Lobbying report (either through the Coalition activity and/or other Lobbying Activity engaged in by the member) must disclose in such report their own contribution to such Coalition, including the amount and the name of the Coalition to which it contributed

WHEN THE COALITION FILES ON ITS OWN BEHALF

If the Coalition identifies itself as a LOBBYIST and/or a CLIENT, then:

1. The Coalition must **FILE** a lobbying report on behalf of the Coalition and identify a Responsible Party for the filings.
2. The report must **DISCLOSE** all members who **EXCEED $5,000** in annual lobbying compensation or expenses. Such members are considered **Beneficial Clients**.

WHEN THE COALITION FILES ITS OWN REPORT

MEMBER CONTRIBUTIONS TO COALITION

ARE NOT CONSIDERED	ARE CONSIDERED
• Lobbying expenditures to determine if each member has met $5k threshold	• Lobbying expenditures to determine if each member has met the $15k/3% Source of Funding threshold

WHEN THE COALITION DOES NOT FILE ITS OWN REPORT

MEMBER CONTRIBUTIONS TO COALITION

ARE CONSIDERED

LOBBYING EXPENDITURES TO DETERMINE IF EACH MEMBER:

- Has met $5k threshold
- Has met the $15k / 3% Source of Funding Threshold

WHEN THE COALITION **DOES NOT FILE** A LOBBYING REPORT ON ITS OWN BEHALF

If the Coalition DOES NOT file as a LOBBYIST and/or a CLIENT, then:

Each member who is required to file a lobbying report (either through the Coalition activity and/or other lobbying activity engaged in by the member) must disclose in the report **their own member contribution** to such Coalition, including the **contribution amount and name of the Coalition to which it contributed.**

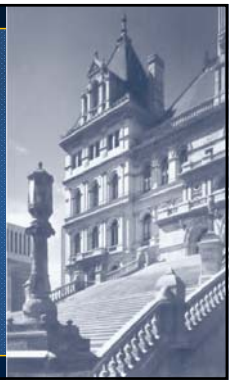
I AM A **COALITION MEMBER** (OF A NON-FILING COALITION) AND I **EXCEED THE $5,000 THRESHOLD**

How and where do I report my contribution to the Coalition?

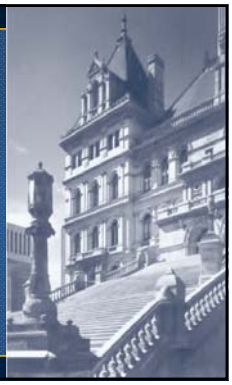
If *only* Lobbying Activity involves member's Contribution to Coalition	If member already files a CSA	If member is already a registered Lobbyist and submits Bi-Monthly Reports
Register and file lobbying reports as a Lobbyist lobbying on its own behalf, identify the named Coalition, and list contribution as an expense	In CSA list the contribution as an expense to the named Coalition.	In Bi-Monthly Report list the contribution as an expense to the named Coalition.

WHAT'S NEW?... WHAT KIND OF LOBBYING?

Direct and Grassroots Lobbying and the New Regulations



DIRECT LOBBYING



CONTACT IS MADE BY: DIRECT LOBBYING

Direct lobbying involves direct contact between a Lobbyist and the individual you are attempting to influence, including but not limited to:

- face-to-face **meetings**
- telephone **calls**
- distribution of **written materials**
- **e-mails**
- **social media** interactions

Direct Lobbying: DIRECT CONTACT and PRELIMINARY CONTACT

Direct Contact	Preliminary Contact
Any communication or interaction directed to a Public Official, including: • Verbal or written communications • Electronic, social media and internet communications • Attendance at a meeting with Public Official • Presence on phone call if Public Official is aware of such presence	When the Lobbyist knows or has reason to know that the Client will Attempt to Influence a Public Official • Scheduling a meeting or phone call with a Public Official and a Client • Introducing a Client to a Public Official • Any other contact with the Public Official on behalf of a Client

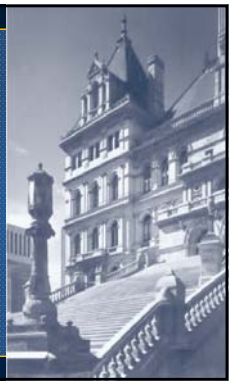
DIRECT LOBBYING DOES **NOT** INCLUDE

ATTENDING A MEETING WITH A PUBLIC OFFICIAL ONLY TO:

- provide **technical** information or address technical questions
- provide **clerical or administrative** assistance (including audio/visual, translation or interpretation, and sign language)
- to **observe** for educational purposes
  - When the person plays no role in the strategy, planning, messaging or other substantive aspect of the overall lobbying effort

When a person schedules a meeting or places a call in a purely administrative capacity (even if lobbying is expected to occur at such meeting – such activity is attributable to the person who directed that the call be made or the meeting set up)

DIRECT LOBBYING: LOBBY DAYS



DIRECT LOBBYING
LOBBY DAYS: **REPORTABLE ACTIVITY**

An employee or Designated Lobbyist of an organization coordinating a Lobby Day is engaged in Direct Lobbying via the Lobby Day and must be identified as an **Individual Lobbyist on its filings** only if the employee or Designated Lobbyist:

- **makes Direct Contact** with a Public Official

and

- **speaks on behalf of the organization** at the Lobby Day.

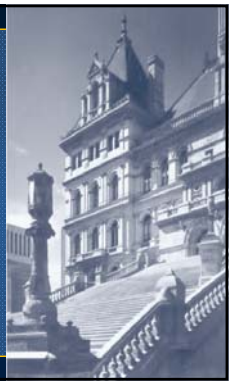
DIRECT LOBBYING

LOBBY DAYS - REPORTING EXPENSES

Reportable expenses for a Lobby Day may include, but are not limited to:

- compensated staff time for **attendance**
- staff time spent **planning**
- expenses for advocacy **paraphernalia**
- expenses related to **transportation**

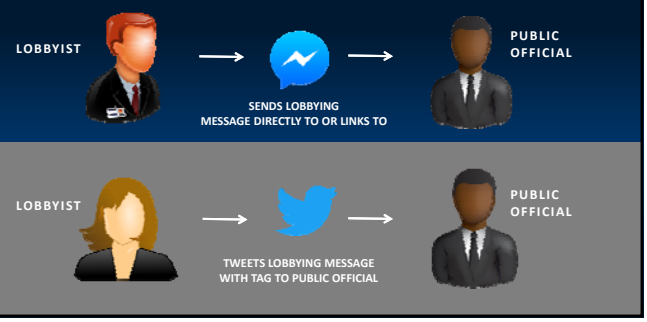
DIRECT LOBBYING: SOCIAL MEDIA



SOCIAL MEDIA COMMUNICATION = DIRECT LOBBYING IF:

1. It is **directly sent** to a social media account known to be owned or controlled by a Public Official; or
2. Creates a direct electronic link to any social media account known to be owned or controlled by a Public Official; or
3. It is targeted to a Public Official's staff with knowledge that the person is a member of the Public Official's staff.

EXAMPLES: SOCIAL MEDIA – DIRECT LOBBYING



When must an organization identify its employee as an INDIVIDUAL LOBBYIST based on the employee's social media communication?

IDENTIFIED AS AN INDIVIDUAL LOBBYIST ONLY IF:

- **Direct contact via social media was made in the course of person's employment**

and

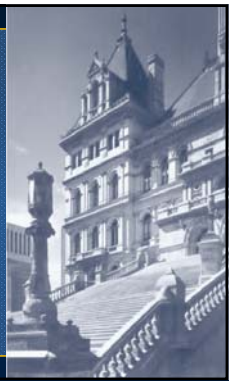
- **Such contact was not part of a coordinated, mass social media campaign conducted by the organization**

SOCIAL MEDIA – LOBBYING EXPENSES

The personal social media activities of an individual are attributable to a lobbying organization ***only*** when those activities are conducted in the course of such person's employment.

Reportable expenses attributable to an organization's social media activities that constitute direct lobbying may include, but are not limited to: consulting services, staff time allocated to planning and posting, search engine optimization and sponsoring, and advertising.

GRASSROOTS LOBBYING



CONTACT IS MADE BY: GRASSROOTS LOBBYING

A Grassroots Lobbyist is a person or organization who solicits another to deliver a message to a Public Official.

The audience or recipients of grassroots communications who voluntarily (and without compensation) subsequently deliver the message to the Public Official are not Grassroots Lobbyists.

WHAT IS A GRASSROOTS COMMUNICATION?

TAKES A CLEAR POSITION ON THAT LOBBYING ACTIVITY

COMMUNICATION REFERENCES A LOBBYING ACTIVITY

INCLUDES A CALL TO ACTION

WHAT IS A **CALL TO ACTION**?

SOLICITATION TO THE PUBLIC/PERSON

1. **To directly contact Public Official**

OR

2. **Have them solicit others to directly contact Public Official**

Other examples of a Call to Action may include:

- Inclusion of Public Official contact info without specific solicitation to the public to make contact = call to action
- Inclusion of paper/electronic petition, text message, social media communication, or similar material for the recipient to use to communicate with Public Official even without specific solicitation to the public to use the material.

GRASSROOTS LOBBYING EXAMPLES INCLUDE:

GRASSROOTS LOBBYING - BY THE ORGANIZATION

An organization engages in Grassroots Lobbying on its own behalf **when a Grassroots Lobbying Communication is issued by the organization**, including when an employee delivers a Grassroots Lobbying Communication at the direction of the organization.

Every Grassroots Lobbying Communication is attributable to a Lobbyist (which may be the organization as a whole) but not necessarily require the identification of any Individual Lobbyists.

WHEN DOES ORGANIZATION HAVE TO IDENTIFY **EMPLOYEES AS INDIVIDUAL LOBBYISTS** IN FILINGS?

1) Delivers a Grassroots Lobbying Communication;
2) Can be identified as the speaker; and:
3) Participates in shaping the message expressed in the communication in the course of such employee's employment.

WHEN DOES AN ORGANIZATION HAVE TO IDENTIFY A **RETAINED** LOBBYIST'S ACTIVITIES?

A retained individual or organization's activities on behalf of a Client constitute Grassroots Lobbying if the individual or organization delivers a Grassroots Lobbying Communication and can be identified as speaking for, representing, or endorsing the position of the Client.

THESE FUNCTIONS OR ROLES ALONE **ARE NOT** GRASSROOTS LOBBYING

- Owners of billboards or signs
- Copy editing
- Advertisement writers
- Storyboard artists
- Film crews
- Photographers
- Video editors
- Website managers, hosts, or internet service providers
- Media outlets or broadcasters
- Media buyers or placement agents
- Delivery services
- Secretaries, clerical, and ministerial staff

GRASSROOTS LOBBYING AND SOCIAL MEDIA EXPENSES

Personal social media communications are only attributable to the Organization when the activities are done **in the course of such person's employment**.

Reportable Expenses attributable to the Organization's Grassroots Lobbying may include:

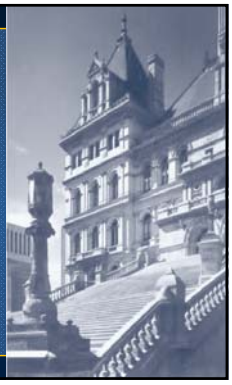
- consulting services
- sponsoring posts
- staff time allocated to planning and posting
- search engine optimization
- advertising

REVIEW OF TRAINING

- Who are you and how do you file lobbying reports?
- If Lobbying effort involves multi-party relationships, what role do you play and who is responsible for disclosing what activities?
- What kind of lobbying are you engaged in **(Direct or Grassroots)** and what requirements attach to each type?

WHAT'S NEW RELATING TO REPORTING REQUIREMENTS?

- **New Late Fee Schedule**
- **Streamlined Reporting**
- **Greater Specificity Required**



NEW REPORTING REQUIREMENTS

Statement of Registration – Bi-Monthly Reports – Client Semi-Annual Reports

- Identify all parties to the Lobbying (as described in 943.9(h)) including all Lobbyists, Clients, and Coalitions
- Greater specificity regarding "Subjects Lobbied" (this replaces old "Business Nature" categories)
- Disclosure of bill, rule, rate, Procurement, and Executive Order **numbers** lobbied or expected to be lobbied on, if available, or description of activity related to the intended introduction/issuance of legislation or lobbying related to tribal-state contacts
- Disclosure of the intended (in Registration) or actual (in Bi-Monthlies and CSAs) targets of the Lobbying, including the name of the person, organization, agency, municipality, office and/or specific legislative body lobbied.
- Indicate whether it is Direct Lobbying, Grassroots Lobbying, or both.

BIENNIAL STATEMENT OF REGISTRATION

NEW REQUIREMENTS

- Option to either include a copy of a Lobbying agreement or authorization OR, instead, a **Lobbying Agreement form** as provided by JCOPE
- Lobbyists and Clients will no longer be required to notify JCOPE of a **Termination** if the agreement/authorization terminates on the date specified in the agreement/authorization. Likewise, no need to notify JCOPE if it terminates at the end of a biennial registration cycle.

BI-MONTHLY AND CLIENT SEMI-ANNUAL REPORTS

NEW REQUIREMENTS

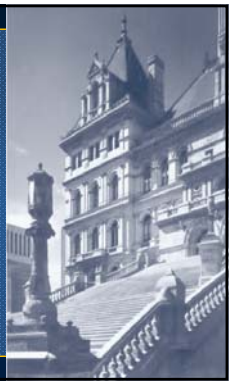
If a Lobbyist files Bi-Monthly Reports, only lobbies on its own behalf and does not retain outside Lobbyists, then it will not be required to also submit Client Semi-Annual Reports covering the same reporting period, other than Source of Funding disclosures prescribed by Part 938.

NEW LATE FEE SCHEDULE

- Statement of Registration/Amendment
- Bi-Monthly Reports
- Client Semi-Annual Reports
- Disbursement of Public Monies Reports
- Reportable Business Relationships
- Source of Funding

DAYS LATE	ACTION	
	First Time Filers	All Other Filers
1 – 7 days	Grace Period/No Late Fee	
8 – 14 days	$75 flat late fee	$150 flat late fee
15 – 30 days	$150 flat late fee	$300 flat late fee
31 – 90 days	$300 flat late fee	$500 flat late fee
91 – 180 days	$500 flat late fee	$1,000 flat late fee
181 days and more	$1,000 flat late fee	$2,000 flat late fee

OTHER TOPICS



ONLINE ETHICS TRAINING FOR LOBBYISTS

Section 1-d(h) of the Lobbying Act

ALL REGISTERED LOBBYISTS MUST COMPLETE AN ONLINE ETHICS TRAINING:

- Complete the training within 60 days of initial Registration
- Complete the training again within three years of the date the Lobbyist first or subsequently completed the training, if such Lobbyist is still registered to lobby as such time;

and/or

- If there is a lapse in a Lobbyist's Registration, complete the training again within 60 days of re-registration to lobby or three years from the date such Lobbyist last completed the training, whichever is later.

NEW LOBBYING APPLICATION

Beginning in the 2019-2020 biennial period, all new and existing filers required to register and file lobbying reports with JCOPE will file their online reports in the new JCOPE Lobbying Application ("LA").

- Better interface
- User-friendly
- Streamlined
- Greatly improved Search Functions (Spring of 2019)

PREPARING FOR THE NEW LOBBYING APPLICATION

FIRST STEPS WILL BE TO:

- Create an NY.gov account to access the system
- Create User Profiles

JCOPE will provide FAQs, "how-to" videos and instructions to guide you through every step of the process:

- Check your email inbox and the JCOPE website (www.jcope.ny.gov) regularly for information and official announcements, including when filers may access the new Lobbying Application to create their User Profiles.

We anticipate having the **Profiles** available early **November 2018** and allowing 2019-2020 **Statement of Registrations** to start being filed on **December 3, 2018**.

JCOPE CONTACT INFORMATION

FOR GENERAL INQUIRIES
Call: 800-87-ETHICS or (518) 408-3976

FOR LEGAL GUIDANCE, contact the attorney of the day by phone at 1-800-87-ETHICS and press "2" or email them at: legal@jcope.ny.gov

FOR QUESTIONS ON TRAINING
Email us at: education@jcope.ny.gov

ACCESSING THE NEW JCOPE LOBBYING APPLICATION: *What You Need to Know*

JCOPE is launching a new online Lobbying Application ("LA") to coincide with the 2019-2020 biennial registration period and new lobbying regulations (19 NYCRR Part 943), which take effect January 1, 2019. Anyone required to register and file lobbying reports with JCOPE, whether existing or new filers, will submit their 2019 online reports in the new application. (**Note**: Lobbying reports covering 2018 lobbying activity must be filed utilizing the current online lobbying system).

To access the new lobbying application, filers must have a NY.gov ID account. If you don't have one, you can create an account at https://my.ny.gov. Once a filer has a NY.gov ID and has accessed the new LA, they must set up a **User Profile** in the application; more on that below.

Here are some frequently asked questions ("FAQs") to assist you during the rollout of the new LA. Following the FAQs is a list of next steps and things to consider ahead of accessing the new system, which will be available for creating profiles in early November.

NY.gov ID FAQs

1. **What is a NY.gov ID account?**
   A NY.gov ID account is a secure online service that allows users to create one username and password to access multiple government online services.

2. **Why do I need a NY.gov ID account?**
   Agencies across New York State utilize NY.gov ID accounts to provide citizens with access to government services without having to create multiple usernames and passwords for each unique online State government application. Individuals without a NY.gov ID **will not** be able to file lobbying reports in the new LA.

3. **What type of NY.gov ID accounts are available for me?**
   Anyone requesting access to the new LA will be required to create a "personal" account. To create an account, go to: https://my.ny.gov/.

4. **What if I already have a personal account?**
   If you already have a "personal" NY.gov ID account, you will be able to use your existing credentials, e.g., for tax or DMV services. JCOPE will provide an enrollment link that will allow you to verify your

account and give you access to the new LA. We anticipate the enrollment link will be available on the JCOPE website during the first week of November.

5. **What information do I need to provide to create a new NY.gov ID account?**
   You will need a valid e-mail address which is *unique to you*. Please do not use a general email address that is accessed by multiple people. Basic identifying information such as your first and last name is also required. In creating your NY.gov ID account, you will be required to create a unique username, and select and answer three security questions to verify your identity if you forget your username or password.

6. **Are there any fees associated with requesting or using a NY.gov ID account?**
   No.

7. **Who do I contact if I have issues with a NY.gov ID account?**
   Call the NY.gov ID Customer Care Center at 1-800-697-1323.

8. **What happens if I forget my password?**
   Passwords can be reset, but **cannot** be recovered. If you forget your password, you can use the "**Forgot Your Password**" link on the my.ny.gov homepage to reset it.

9. **What should I do if I forget my NY.gov user ID and password?**
   If you cannot remember your user ID or password, contact the NY.gov ID Customer Care Center at 1-800-697-1323. Do **NOT** contact the JCOPE Helpdesk, as JCOPE staff cannot assist you with any issues related to a NY.gov ID account.

10. **What if I do not remember which e-mail address I used to create a NY.gov ID account when I took my Ethics for Lobbyists training?**
    JCOPE staff may be able to assist you. Email JCOPE's Education Unit at education@jcope.ny.gov.

11. **When should I create a NY.gov ID account and do I need to notify JCOPE once I do?**
    JCOPE staff recommends creating a NY.gov ID account in early November so you have plenty of time to troubleshoot any potential issues that may arise. You **do not** need to notify JCOPE that you have created an account. Please remember to write down your username and password since the JCOPE Helpdesk will **not** be able to help you to recover a username or password.

LA User Profile FAQs

1. **What is the difference between NY.gov ID enrollment and creating a User Profile in the new LA?**
   Creating a NY.gov ID username and password is the **first step** required to access the new JCOPE system. Once you have created your NY.gov ID and verified your account through the JCOPE enrollment link (to be provided), then you can go on to create a User Profile in the new LA.

   My.ny.gov and the new LA are two **different** online applications. A NY.gov ID can be used by any State government entity to grant public access to an online service. JCOPE's new LA is owned and operated by JCOPE.

2. **What types of profiles are available?**
   There are two types of profiles in the new system:
   1. User Profiles
   2. Organization Profiles

   User Profiles are "owned" by the individual; an Organization Profile is "owned" by the Responsible Party (generally a Chief Administrative Officer, or CAO).

3. **Who needs to create a User Profile, and what role(s) do these individuals play for the organization that is required to file lobbying reports?**

   The following individuals are required to create a User Profile:

   - **The CAO (Responsible Party) of a Lobbyist or Client Organization –** The Responsible Party is generally the CAO. The CAO is ultimately responsible for all lobbying filings submitted to JCOPE.

   - **Delegated Administrators –** Delegated Administrators can submit filings or assign Preparer(s) to do so. The CAO can act as the Delegated Administrator or assign a designee. An Organization Profile can have **two** Delegated Administrators assigned to it.

   - **Preparers –** A Preparer is an individual hired to prepare and submit filings on behalf of Individuals or Organizations who are required to submit lobbying filings to JCOPE. A Preparer can work for any number of Individuals or Organizations. Organizations can assign multiple Preparers to their Organization Profile. **Note**: If an Organization elects to use a Preparer, **it** must assign the Preparer; Preparers **cannot** assign themselves to an Organization.

   - **Individual Lobbyists –** User profiles are automatically created by the Lobbying application for Individual Lobbyists (formerly known as "Additional Lobbyists") once a Lobbyist/Client Organization begins a filing. Individual Lobbyists are **not** required to verify a User Profile if their only role is as an Individual Lobbyist.

4. **Who can make changes to a filing or an Organization Profile?**

   Authorized Persons can submit and make changes to a filing and/or an Organization Profile. Authorized Persons include the CAO (Responsible Party), Delegated Administrators, and Preparers.

5. **What permissions are attached to the different roles played by individuals filing in LA?**

   - **CAO (Responsible Party)** – As the owner of the Organization Profile, the CAO (Responsible Party) can modify every field in that profile. They can submit filings and assign Delegated Administrators and Preparers. It is the responsibility of the CAO or Delegated Administrator to remove either a Delegated Administrator or Preparer(s) from an Organization Profile.

   - **Delegated Administrator** – Can modify any field in the Organization Profile. A Delegated Administrator can submit filings. A Delegated Administrator can remove the alternate Delegated Administrator, if applicable.

   - **Preparer** – Can only be assigned by Individuals or Organizations for whom they are retained. Once assigned, Preparers can modify any field on an Organization Profile or filing **except** the name of the CAO and the names of Delegated Administrators. **Please note:** A Preparer **cannot** assign themselves to an Organization Profile or assign other Preparers to an Organization.

   - **Individual Lobbyist** – If an Individual Lobbyist is also designated as a Preparer or Delegated Administrator, they are granted permissions applicable to those roles.

6. **When will I be able to create my User Profile in the new LA?**

   JCOPE will send e-blasts and post reminders when the new LA is ready for User and Organization Profile creation. Please check your email and the JCOPE website regularly. We anticipate having this available in early November.

7. **I am an existing filer in the current JCOPE online Lobbying Filing System. Will I still have access to my old filings?**

   Yes. All previous filings submitted in JCOPE's current online Lobbying system will remain accessible until they are eventually transferred to the new LA. JCOPE will provide sufficient notice to filers before this occurs.

8. **I am an existing filer and will need to submit my 2018 November/December Bi-Monthly Report and/or my 2018 July-December Client Semi-Annual Report. Where do I file these reports?**

   All filings covering 2018 lobbying activity must be filed in the **current JCOPE Online Lobbying Filing System**. This also includes the 2018 November/December Disbursement of Public Monies Report.

9. **When will I be able to submit a 2019-2020 Lobbyist Statement of Registration?**

   We anticipate both existing and new filers will be able to prepare and submit their 2019-2020 Statements of Registration the first week of December in the new LA.

10. **Will JCOPE provide technical instructions for creating a NY.gov ID account and a User Profile in the new LA?**

    Yes. Detailed instructions will be sent via e-mail to all e-mail addresses provided in the current system, as well as posted in multiple easy-to-find locations on the JCOPE website (https://jcope.ny.gov)

11. **If I need help creating my User Profile in JCOPE's new LA, who do I contact?**

    You may contact the JCOPE Helpdesk at 800-87-ETHICS (873-8442). When prompted, press '1' to speak to a Lobbying Filings Specialist.

Next Steps: Things to consider and prepare for prior to the profile launch in early November

For Client and Lobbying Organizations (including those who lobby on their own behalf)

Applicable to both existing and new filers:

1) **Create** your personal NY.gov ID account.

2) **Review the roles and permissions** available in JCOPE's new LA and decide who within your Organization should be assigned to each role. Each individual assigned to a role will need their own unique NY.gov ID. Each Organization Profile has the following roles available:
   - One CAO (Responsible Party) **(required)**
   - One Delegated Administrator **(required, can be the CAO)**
   - A second Delegated Administrator **(optional)**
   - Preparer(s) **(optional)**

3) **Contact your Preparers**. It is the responsibility of the CAO and/or Delegated Administrator(s) to assign or accept a Preparer(s). This guarantees that only the people **you** select will have access to your Organization's information and filings. **Note:** A Preparer **cannot** assign themselves to your Organization.

4) **Check your email** and the JCOPE website (https://jcope.ny.gov) regularly for the official announcement that User Profiles may be created; we anticipate that happening in early November.

5) **Create your User/Organization Profile** in the new LA once JCOPE has notified you that this function is available**.**

Special considerations for existing filers:

Once the new LA is available for filers to create their Profiles, the CAO (Responsible Party) will need to "claim" their Organization Profile and review and update any information contained in it. Once an Organization Profile is "claimed" by an individual, it **cannot** be claimed by anyone else. To avoid any issues, please ensure the CAO (Responsible Party) is the **only** person to "claim" the Organization Profile. JCOPE's Helpdesk will be able to assist you if someone has "claimed" an Organization Profile accidentally. We will provide more information on this in the coming weeks.

Special considerations for Preparers:

When the new online filing system is available:

1) **Create** your **NY.gov ID account** (if you haven't already done so).
2) **Create** your **User Profile**.
3) **Do not** "claim" an **Organization Profile**.
4) **Contact each** Organization you are authorized to prepare and submit filings on behalf of, and let them know they can now assign you to their Organization Profile. You will **not** be able to prepare or submit filings until you are assigned to the Organization Profile.

SPEAKER BIOGRAPHIES

SPEAKERS AND WORKSHOP PRESENTERS

Seth H. Agata

Seth H. Agata was appointed Executive Director of the Joint Commission on Public Ethics in March 2016. He previously served as Chairperson of the New York State Public Employment Relations Board and Counsel to the Governor and as well as First Assistant Counsel and Ethics Officer to the Executive Chamber.

Before joining the Governor's staff, he was Assistant Secretary for Program and Policy (with oversight of the Assembly Codes, Correction, Election Law, and Judiciary Committees) and Senior Associate Counsel in the Office of Counsel to the Majority for the New York State Assembly. He served as Counsel for Investigations in the Office of State Comptroller, Assistant District Attorney for Columbia County, and a trial examiner in the New York City Office of Collective Bargaining and was in private law practice in New York City and Columbia County.

He co-authored *The History of the New York Court of Appeals, 1932-2003* (Columbia U. Press, 2006) and has written on other topics. Mr. Agata is a graduate of the New York State School of Industrial and Labor Relations at Cornell University and the Cornell Law School. He is a member of the New York State Bar Association and the American Bar Association.

Richard Briffault

Richard Briffault is the Joseph P. Chamberlain Professor of Legislation at Columbia Law School. His work focuses on state and local government law, the law of the political process, and government ethics. He is Chair of the New York City Conflicts of Interest Board; was a member of New York's Moreland Act Commission to Investigate Public Corruption; and is the Reporter for the American Law Institute's project on Principles of Government Ethics. He was a member of or consultant to several New York City and State commissions, including the State Commission on Local Government Efficiency & Competitiveness, the Temporary Commission on Constitutional Revision, the Real Property Tax Reform Commission, and the New York City Charter Revision Commission. He is co-author of the textbook *State and Local Government Law,* and author of *Balancing Acts: The Reality Behind State Balanced Budget Requirements* as well as more than seventy-five law review articles.

Jeremy M. Creelan

Mr. Creelan is a partner in the firm's Litigation Department and a member of the Complex Commercial Litigation and Government Controversies and Public Policy Litigation Practices. He has broad experience in class action consumer fraud defense and investigations; complex insurance and reinsurance disputes; federal and state election law matters; and intellectual property matters related to technology, including IT outsourcing disputes. He has represented

clients in trials, domestic and international arbitrations, and appeals, including in the United States Supreme Court.

Mr. Creelan joined Jenner & Block in 2006, after serving as Deputy Director of the Democracy Program at the Brennan Center for Justice at New York University School of Law. At the Brennan Center, he developed and prosecuted numerous high-profile election law cases to protect voters' rights. He also co-authored a landmark, comprehensive study of New York State's legislative process and, as an adjunct professor at the NYU School of Law from 2005 to 2007, Mr. Creelan taught an election law seminar. Most recently, in 2014, Mr. Creelan was appointed by Governor Cuomo as Co-Chair of the Commission on Youth, Public Safety & Justice. In that role, he was tasked with developing recommendations and plans to raise the age of criminal responsibility in New York State and implementing additional reforms to the juvenile justice system.

Arthur Eisenberg

Arthur Eisenberg is the Legal Director of the New York Civil Liberties Union. Over a career at the NYCLU that has spanned more than 40 years, he has litigated extensively around issues of free speech, voting rights, race discrimination and education. He has been involved in more than 20 cases that were presented to the United States Supreme Court, representing either direct litigants or *amici curiae*. The cases included those involving the questions of whether Wisconsin engaged in unconstitutional, political gerrymandering when it drew its legislative district lines. (*Gill v. Whitford* (2017)); whether the Defense of Marriage Act was constitutional (*United States v. Windsor* (2013)); whether a state violated the fundamental right to vote when it denied voters the right to cast write-in ballots (*Burdick v. Takushi* (1992)); whether a school board violated the First Amendment in removing ten books from its high school library (*Island Trees Union Free School District v. Pico* (1982)).

Eisenberg is the co-author, with Burt Neuborne, of the *Rights of Candidates and Voters* (2nd ed. 1980). He published an essay on issues of faith and conscience, in the book, *Engaging Cultural Differences* (2002), on military tribunals in *It's a Free Country* (2002); on school reform and the State Constitution in *A Quality Education for Every Child* (2009); and on free speech and Occupy Wall Street in *Beyond Zuccotti Park* (2012). He has also published law review articles on a range of topics including essays on Lani Guinier (*Review Essay: The Millian Thoughts of Lani Guinier,* New York University Review of Law and Social Change (1995)); on Robert Bork (*Repaid In The Coin Of A Controversialist: The Bork Nomination Process,* University of Cincinnati Law Review (1990)); on campaign finance reform (*Civic Discourse, Campaign Finance Reform, and the Virtues of Moderation,* Cardozo Studies in Law and Literature (2000)); and on censorship of the arts (*The Brooklyn Museum Controversy and the Issue of Government-Funded Expression*, Brooklyn Law Review (2000)).

Eisenberg earned his BA degree from The Johns Hopkins University and his J.D. from Cornell Law School. He has taught courses in Constitutional Litigation, Civil Rights Law and Constitutional Law at Cardozo Law School and the University of Minnesota Law School and is currently teaching at Cardozo Law School.

Debra L. Greenberger

Debra L. Greenberger is an experienced litigator who represents clients in commercial and civil rights matters. She has extensive class action experience, including representing classes of defrauded consumers, underpaid workers, and inmates who suffered from excessive force while incarcerated at Rikers Island. She also represents individual clients who suffer employment or housing discrimination, who are falsely arrested or abused by police officers, or who are abused by correctional officers. She also brought a constitutional challenge on behalf of women forced to submit to gynecological exams.

Ms. Greenberger's commercial practice includes contract and tort disputes, as well as constitutional challenges to government regulations, at both the trial and appellate level. She has represented a broad range of companies, institutions, and individuals, from start-ups, to real estate developers, to the taxi industry, to the New York City Council, to merchant groups objecting to interchange fees, among others.

She also advises executives, employees, and management on employment matters and advises students and their families on academic discipline issues.

Ms. Greenberger was selected by "Super Lawyers" in 2014 and 2015 as a "New York Metro Rising Star."

Prior to joining the firm in 2007, Ms. Greenberger clerked for the Honorable Robert A. Katzmann of the Second Circuit Court of Appeals and for the Honorable Edward R. Korman of the Eastern District of New York. While attending the New York University School of Law, she served as an Articles Editor for *the N.Y.U. Law Review* and represented clients in the Immigrant Rights Clinic.

Maggie McKinley

Maggie McKinley (Fond du Lac Band of Lake Superior Ojibwe) is an Assistant Professor of Law at the University of Pennsylvania Law School. McKinley teaches in the areas of constitutional law, federal Indian law, and legislation. Her research combines empirical, theoretical, and historical methods to examine the structural representation and empowerment of minorities. Most recently, her research has focused on the history and law of lobbying and petitioning. Her work has been published or is forthcoming in the *Harvard Law Review*, *Yale Law Journal*, *Stanford Law Review*, and *Cambridge University Press*. Prior to joining the faculty at Penn, McKinley practiced union-side labor law at Bredhoff & Kaiser in Washington, D.C. She also clerked for the Honorable Susan P. Graber for the United States Court of Appeals for the Ninth Circuit and the Honorable Chief Judge James Ware of the Northern District of California. McKinley earned a J.D. from Stanford Law School and a B.A. in linguistic anthropology from UCLA. Prior to entering law school, McKinley worked for a number of years as a social science researcher on large-scale interdisciplinary projects. In addition to her faculty appointment, McKinley also serves as a Senior

Constitutional Advisor to the President of the Minnesota Chippewa Tribe and as President Elect for the AALS Section on Legislation & Law of the Political Process.

Carol Quinn

Carol Quinn is the Deputy Director of Lobbying Guidance at the New York State Joint Commission on Public Ethics (JCOPE). In this position, she has led JCOPE's effort to propose and adopt its Comprehensive Lobbying Regulations and launch a new online Lobbying Application, both of which are set to take effect on January 1, 2019. Prior to her current position, Ms. Quinn served as an Associate Counsel in JCOPE's Ethics and Lobbying Guidance unit. At JCOPE, she educates and advises public officials, state employees, as well as lobbyists and their clients to ensure compliance with New York State's Public Officers Law and the Lobbying Act. Ms. Quinn came to JCOPE with a background in regulatory and education reform work. She began her career as an Assistant Counsel for the Governor's Office of Regulatory Reform where she facilitated the development and enactment of regulatory reforms with an eye toward making it easier to do business in New York State. Thereafter, Ms. Quinn served as a consultant to various organizations regarding education reform and charter school operations.

Center for New York City Law

The Center for New York City Law is one of the most active and prominent Centers of New York Law School. Ross Sandler, formerly New York City Commissioner of Transportation and a special advisor to Mayor Edward I. Koch, was and remains Founding Director. The Center for New York City Law has two missions: to create an open window on New York City's government, and to serve the Law School's students.

Programs & Publications:

1. ***CityLaw***: a 24-page bi-monthly printed journal, provides news of City's administrative, legislative, and judicial decisions. *CityLaw* began publication in 1995.

2. ***CityLand:*** a free, online publication, comprehensively reports New York City land use decisions. Covered are City Planning Commission, Board of Standards and Appeals, Landmarks Preservation Commission, Buildings, and City Council. Visit us at www.citylandnyc.org.

3. ***CityRegs:*** a bi-weekly e-mail news service since 1999 summarizes every current proposed or adopted New York City rule and regulation. *CityRegs* provides notice of hearings, agency contacts and telephone numbers.

4. ***CityAdmin:*** a free research Internet library of New York City administrative decisions, provides access to more than 135,000 decisions from 32 City agencies. Visit us at www.cityadmin.org.

5. **Continuing Legal Education Programs:** sponsored in partnerships with New York City agencies, provide seminars on specialized City legal issues: City conflicts of interest, City real property tax, City contracts, City tort claims, and City land use laws.

6. **Academic Symposia:** in partnership with the *New York Law School Law Review*, focused on major New York City topics: the City's repetitive budget gaps (1994); the Mollen Commission's Report on Police Corruption (1995); the 100th anniversary of the consolidation of the Greater City of New York (1998); the New York City Corporation Counsel (2008); and the New York City Charter since 1989 (2012).

7. **CityLaw Breakfasts:** for twenty-four years, have provided a networking and informational exchange on city policies.

8. **Undergraduate law courses:** introduced by the Center, expose students to specialized classroom instruction and clinical experience.

The Center draws heavily on New York Law School's faculty, staff, and students, and on an Advisory Council of governmental and civic leaders. The Center's funding comes from fees, foundation and government grants, program sponsorships, and individual contributions.

New York Law School has been certified by the New York State Board of Continuing Legal Education as an Accredited Provider of Continuing Legal Education in the State of New York.
This program is approved for newly admitted and experienced attorneys.