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# LOBBYING THE LEGISLATURE IN THE REPUBLIC: WHY LOBBY REFORM IS UNIMPORTANT

JAMES M. DEMARCO\*

## INTRODUCTION

“Man is born free, and everywhere he is in chains.”<sup>1</sup> So begins Rousseau’s *The Social Contract*. Rousseau’s notion of the paradox of human freedom bears significance in current American political discussions. Americans live in a democracy, and yet the very meaning of the word is not being met by current political structures. Popular sentiment, as evidenced by the 1992 Perot presidential campaign is, in Ross Perot’s words, “you now have a government that comes at you and you’re supposed to have a government that comes from you.”<sup>2</sup>

Congress, in particular the House of Representatives, has a reputation for failing to be the collegial body wherein public debate would determine the will of the governed. Popular sentiment maintains that spending by lobbying groups, aimed at currying votes for favorite projects, inflates incumbent politicians’ ability to gain reelection, and that dealings between lobbyists and representatives subvert the public good.<sup>3</sup> Analyzing closely the role lobbying groups play in the American political process, however, leads inevitably to the conclusion that they increase rather than decrease the public’s role in government.<sup>4</sup> By representing a vast array of public and private interests, lobbying groups

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1. JEAN J. ROUSSEAU, *THE SOCIAL CONTRACT*, reprinted in ROUSSEAU’S POLITICAL WRITINGS at 85 (Alan Ritter & Julia Conaway Bondanella eds., 1988).

2. *The 1992 Campaign: Transcript of the 2d TV Debate Between Bush, Clinton and Perot*, N.Y. TIMES, Oct. 16, 1992, at A11.

3. *Id.* President Clinton agrees, and has lobbied hard for a lobbying reform bill:

The work of change, frankly, will never get any easier until we limit the influence of well-financed interests who profit from this current system. So I also must now call on you to finish the job both houses began last year by passing tough and meaningful campaign finance reform and lobbying reform legislation this year.

*State of the Union: Excerpts From President Clinton’s Message on the State of the Union*, N.Y. TIMES, Jan. 26, 1994, at A16.

4. In his introduction to *How to Lobby Congress*, Donald deKieffer, writing on behalf of public interest lobbying groups, stresses the increasing importance

intend to influence Congress on each major issue facing it. Lobbying groups exist for nearly every issue with which Congress deals.<sup>5</sup> A 1977 study by Malcolm Jewell and Samuel Patterson concluded that the amount of influence these groups can exert over legislation depends primarily on the popular support that each group claims to control.<sup>6</sup> A 1989 study by John W. Kingdon agrees, noting that the role of lobbyists in legislation is of only average importance.<sup>7</sup> Lobbying groups usually do not counter popular control over government; rather, they enhance such control by representing to the legislature the various majority and minority opinions on individual issues. The problem with lobbying is not lobbyists, but rather a Congressional system that creates power bases in a few select members rather than in the entire body.

While lobbying groups are not so troublesome, there are numerous problems in the legislative process today. Reelection rates in Congress are staggeringly high,<sup>8</sup> creating politicians with more job security than most businesspeople. Many bills languish in congressional committees for years before making it to a floor vote; many more die before getting to the Committee of the Whole, often despite clear public mandate.<sup>9</sup> Representatives use

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of the citizen lobbyist in the American political system. DONALD DEKIEFFER, *HOW TO LOBBY CONGRESS* at xiv (1981).

5. John B. Judis, *The Pressure Elite: Inside the Narrow World of Advocacy Group Politics*, *THE AM. PROSPECT*, Spring 1992, at 15 (1992).

6. MALCOLM JEWELL & SAMUEL PATTERSON, *THE LEGISLATIVE PROCESS IN THE UNITED STATES* (3d ed. 1977).

7.

As compared with other possible influences on congressmen's votes, interest groups are among neither the most important nor the least. Congressmen appear to consider them quite important, but they do not necessarily vote according to their wishes. This rather mixed picture leads away from global statements about group importance toward an emphasis on the conditions of group influence.

JOHN W. KINGDON, *CONGRESSMEN'S VOTING DECISIONS* 174 (3d ed. 1989).

8. In 1992, a year of "revolt" against incumbents in Congress, the reelection rate was still 88%. Charles E. Cook, *Old Timers Beware: Another Freshman Food Is on the Way*, *ROLL CALL*, Dec. 13, 1993. The 1990 reelection rate was 95%. Illustration accompanying Helen Dewar, *Stalemate of Survival: Self-Interest Defines Campaign Fund Issue*, *WASH. POST*, Aug. 6, 1992, at A28. See Charles E. Cook, *Women's Groups Hoping to Preserve 1992 Momentum*, *ROLL CALL*, Jan. 31, 1994 (reelection rates rarely fall below "85% even in the worst of years").

9. For example, the Brady Law, requiring a five day waiting period for the purchase of a handgun, took several years to pass despite its overwhelming support from the general public. Over time, Congress has developed complex procedures for passing bills. These legislative pitfalls for a bill to surpass are formidable no matter how important the bill seems to be: "When it goes from

in-committee amendments and "christmas trees" to attach locally-interested pieces of pork barrel legislation to more significant bills in the hope that the cumbersome process of resubmitting a bill will deter the President from vetoing an entire piece of legislation. Representatives lavish certain commercial interests with special treatment<sup>10</sup> and form legislative policies which clearly benefit particular constituent<sup>11</sup> interests or special interest groups despite the harm such representation can have on the public good.

The legislative quagmire Congress has established promotes rule by the few rather than by the many. A bill enters the legislative process in the House of Representatives by floor or committee proposal from a representative. Once it is proposed to the floor, the House Rules Committee attaches the bill to the legislative agenda. If the Rules Committee wishes the bill to receive special treatment, it may place it on an expedited calendar by proposing special rules of procedure. The Rules Committee can also slow a bill down by means of the agenda. Once a bill is scheduled, it is then assigned to the appropriate committee for consideration and amendment. If the committee passes the bill, it goes back to the Rules Committee, which determines whether and when the bill will reach the floor of the House for a full House vote. Assuming the bill passes the House and then the Senate without veto, it becomes law. Throughout this process, the bill is subject to examination, friendly and unfriendly amendment, and outright rejection at each step. Popular opinion believes that powerful lobbies manipulate representatives throughout the legislative process to ensure that bills match lobbyists' designs.

The Jewell and Patterson study tends to counter the popular sentiment of both 1977 and today. If Jewell, Patterson and Kingdon are correct (and public opinion wrong), then lobbying

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the clerk's desk to a committee-room it crosses a parliamentary bridge of sighs to dim dungeons of silence whence it will never return. The means and time of its death are unknown, but its friends never see it again." WOODROW WILSON, CONGRESSIONAL GOVERNMENT 69 (11th ed. 1895), *reprinted in* GRAHAM WOOTTON, INTEREST GROUPS: POLICY & POLITICS IN AMERICA 60 (1985).

10. Among many anecdotal examples is 26 U.S.C. § 3121(d)(3)(A), which excludes milk carriers from being classified as statutory agent driver employees for tax withholding purposes.

11. Note that the word constituent has both a functional and a geographic definition. For members of Congress, constituent has a geographical definition — a representative's constituents are those who live in her or his district. For lobbying groups, constituent has a functional definition — a lobbying group's constituents are those who share the group's viewpoint on a given issue.

groups actually enhance popular control over the legislature by secondarily emphasizing popular sentiment on political issues.<sup>12</sup> The committee structure of the House of Representatives enables these groups to exert influence over Congress in precisely the same way and with very similar results as more traditional influence groups.<sup>13</sup> As will be detailed below, the problem with lobbying lies not necessarily with the lobbyists themselves, but rather with a Congressional system that requires representatives to specialize and to rely on public opinion for their voting decisions. Increasing restrictions on lobbyists will prove to be an ineffectual attempt at increasing popular accountability.

Part I of this article will place the importance of lobbying groups within the historical context of the Constitution's Framers' intended republican legislature and the First Amendment right to petition. Part II will then analyze how lobbying activities fit within the Constitutional right to petition, noting their connection with the opinions of the electorate. Part III will demonstrate that legislative stagnation in Congress stems not from over-influential lobbying groups but rather from a hierarchical committee system that places more emphasis on expertise and cooperation than on judgment and debate. Part IV will analyze current attempts at lobby reform and explain their uselessness. Part V will conclude this article by offering a framework for effectual solutions to Congressional gridlock.

## I. THE HISTORICAL CONTEXT - THE FEDERALIST

To understand why lobby reform will not change anything, one must understand how Congress is supposed to work and why the House of Representatives fails to work in its intended fash-

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12. Judis, *supra* note 5, at 21. On the other hand, much influence in Congress today comes from small focus groups and corporate Political Action Committees (PACs), which represent far fewer people than most lobbying groups. It should be noted, however, that while PACs tend to represent fewer people they usually represent large economic interests that affect large numbers of people.

13. ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS AND COURTS* at x (1983). This essay deals solely with the work of the House of Representatives for two reasons. First, since the two houses of Congress operate differently, evaluating what happens in one house might mean misinterpreting the work of the other. Evaluating the way both houses operate would muddle this article's focus on the effect of lobbying groups. Second, the way in which the House of Representatives deals with legislation seems more problematic: "The norm of specialization is stronger in the House than in the Senate because the Senate is smaller and each member therefore must cover a larger portion of the institution's business." WALTER J. STONE, *REPUBLIC AT RISK: SELF-INTEREST IN AMERICAN POLITICS* 176 (1990).

ion. When it is evident that legislative procedures within the House counter the House's original design and thus prevent effective popular representation, the reader will find it clear that the policy gridlock problem is structural rather than political. Then the reader will conclude that lobby reform fails to strike at the heart of the problem. This section attempts to lay the foundation of the Framers' intentions regarding the House of Representatives.

The United States Constitution was written as a compromise. Various provisions of the document reflect settlement of divisive arguments between parties to the Constitutional Convention.<sup>14</sup> The Constitution's Framers hoped to create a bicameral legislature which would withstand the pressures of factionalism and mob rule.<sup>15</sup> To protect against the upheaval of mob rule, they established a governing body discreet from most outside influence.<sup>16</sup> The patrician government the Framers envisioned, however, was unacceptable to the Constitution's ratifiers. They ultimately required the addition of the first ten amendments to counter the aristocratic nature of the government and to protect the population's rights and voice in government.<sup>17</sup> The first Congress convened under the rules of a Constitution which hoped to balance a republican form of government with protection of citizen rights.

#### A. *Representation Starts in the House of Representatives*

To the Framers, the bicameral nature of the legislature was to be the primary source of popular sovereignty as well as the primary protection against factionalism. The House of Representatives, elected directly by the people, would be the source of all revenue and expenditure measures.<sup>18</sup> Its members would be the only elected officials selected directly by the voting popula-

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14. See, e.g., U.S. CONST. art. I, § 2 (three-fifths clause), § 3 (Senate chosen by state legislatures).

15. THE FEDERALIST NO. 10, at 53 (James Madison) (Random House 1950). *Federalist* 10 defines a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.* at 54.

16. The Constitution originally provided that the President be elected by electors, U.S. CONST. art. II, § 1, cl. 2, and that the Senate be chosen by state legislatures. Art. I, § 3, cl. 1 (amended 1913). Only the House of Representatives would be open to full voter control. Art. 1, § 2, cl. 1.

17. THOMAS A. BAILEY & DAVID M. KENNEDY, THE AMERICAN PAGEANT 135 (7th ed. 1983).

18. U.S. CONST. art. I, § 7, cl. 1

tion, and their elections were to occur the most frequently in the federal government. They were to be ones most responsible for protecting citizen rights of participation against minority factions.<sup>19</sup> At the same time, representatives had to avoid subjecting themselves to the pressures of factionalism in their constituencies and among their colleagues. The House of Representatives would be the place where popular rule and republican government would combine.

To the Framers, the most important part of popular sovereignty would be representation in the House of Representatives.<sup>20</sup> The House was to be that place where those most responsible to the people (by virtue of their selection from small groups of local constituents) would discern the consensus of the governed.<sup>21</sup> The House became an indirect way for the people to rule themselves.

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19. "As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration [the House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people." *THE FEDERALIST* No. 52, at 343 (Alexander Hamilton or James Madison) (Random House 1950).

20.

Upon the principles of a free government, inconveniences . . . must necessarily be submitted to the formation of the legislature. . . . The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority.

*The Federalist* No. 70, at 454 (Alexander Hamilton) (Random House 1950). The House was to be the place for the majority to determine the law while checked by the forcefulness of opinions from minority viewpoints.

21. "It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents. But this principle can extend no further than to those circumstances and interests to which the authority and care of the representative relate." *THE FEDERALIST* No. 56, at 365-66 (Alexander Hamilton or James Madison) (Random House 1950). It should be noted that "the governed" to which *The Federalist* refers consisted of only a fraction of the adult population. While the Bill of Rights purported to protect those excluded from the franchise, the body of the Constitution intended to serve only those considered worthy of the vote. For purposes of this article, the distinction is immaterial because the legislature's role under a republican model is to protect the rights of all citizens regardless of franchise.

### B. *Independence of Legislators Is Vital for Popular Sovereignty*

Republican democracy<sup>22</sup> has the purpose of promoting wise, although potentially unpopular, decisions in the favor of the public good. To the Framers, republican representatives would be more able to discern the will of the people than would the people collectively themselves: "[T]he public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose."<sup>23</sup> Representatives in the House would not attempt consensus for the efficiency of legislation. Rather, they would attempt to apply the will of the governed by applying their skills and judgment in debate, and by letting the majority vote arising from the debate stand as popular consensus.<sup>24</sup>

Key to this republican system was independence of legislators. Without independent viewpoints, debate would be stifled and majority rule would be subject to coalition and consensus among political factions. Accordingly, the Framers espoused the view that representative democracy at its best involves strongly independent representatives discerning what is for the collective good.

#### 1. Burke Theory Relies on Personal Judgment

This republican principle, very similar to Sir Edmund Burke's theory of political representation,<sup>25</sup> rejects the idea that

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22. As opposed to pure democracy. *Federalist* 10 designates pure democracy to mean government where all citizens voice their individual choices. THE FEDERALIST No. 10, *supra* note 15, at 59. The same description applies to legislatures where representatives choose the viewpoints of their constituents in strict proportions.

23. *Id.*

24. "When a resolution too is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable." THE FEDERALIST No. 70, *supra* note 20, at 458.

25. Burke Theory, as enumerated in his speech to the Electors at Bristol, maintains that a representative in the legislature owes his or her constituents more than simply voting as a majority thereof would vote as individuals. Election of a representative means selection of that person for his or her judgment and wisdom in dealing with political issues. A representative may vote against what is in the clear majority's opinion if that representative judges the unpopular vote to be in the best interest of his or her constituents. If constituents decide that the representative has exercised judgment of which they disapprove, they may simply vote him or her out of office at the next election. Anti-Burke theory, the competing contemporary theory of representative government, claimed that a representative owes his or her constituents a duty to vote precisely as a majority thereof would. Representation requires no thought on issues where the majority is clear. If a



representatives are nothing more than the mere voices of their constituents' collective will. Burke theory posits that a representative offers his constituents both the chance to have their voice heard and the wisdom and judgment of his representation. In his speech to the Electors at Bristol, Burke said: "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."<sup>26</sup> Thomas Cooper in 1826 noted that republican representation allowed representatives to take advantage of debate within the legislature before forming political positions:

In every deliberative assembly, it is implied and expected that no member shall make up his opinion deliberately till after he has heard the debate on it, with all the lights that the exhibition of authentic facts and documents, and the various aspects of the question brought into full view during the discussion can supply. . . . Every man called to the national legislature, is a national and not a local representative. He is sent to debate, and after debate to decide on the great interests of the nation.<sup>27</sup>

If the constituents disagreed with their representative's judgment, they could simply vote him out of office at the next election.<sup>28</sup> Presumably, a legislator's reelection would be a popular mandate of his overall wisdom and ability as a representative.

## 2. Anti-Burke Theory Disdains Personal Judgment

Anti-Burke theory disagrees strongly with the notion of popular mandate. According to this theory, representatives are merely the voice of their constituents' will: "The person chosen seems to be strictly the delegate of those by whom he is chosen, and bound by their instructions whenever they think proper to exercise the right."<sup>29</sup> Reelection would mean merely that the representative had acted as his constituents desired. Under Anti-Burke theory, popular sovereignty demands that representatives be mere mouthpieces for their constituents' desires:

If the maxim be true that all power is derived from the people . . . it seems impossible for us to withhold our assent

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representative is voted out of office, that means the majority will of the constituents has changed. See *infra* notes 26-35 and accompanying text.

26. Speech by Edmund Burke to the Electors at Bristol, in *SPEECHES AND LETTERS ON AMERICAN AFFAIRS* 73 (E. P. Dutton & Co. Inc. 1956) (1908).

27. THOMAS COOPER, *ESSAY ON THE FOUNDATION OF CIVIL GOVERNMENT* 34 (1826).

28. *Id.*

29. *Id.* at 33 (quoting Henry St. George Tucker).

from the proposition, that in a popular government the representative is bound to speak the sense of his constituents, upon every subject where he is informed of it.<sup>30</sup>

Consequently, once the Congressional representative became aware of his constituents' collective views, he would be bound to vote accordingly.

### 3. *The Federalist* Agrees with Burke Theory

*Federalist* 10 embraces republican theory as the operating principle for the national legislature. James Madison believed the House would be composed of members of many classes, representing different factional viewpoints on issues. In any representative government, conflicts would be resolved by a majority vote: "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote."<sup>31</sup> In a pure democracy, factions which make up a majority would be free to subject minority rights and the public good to the oppression of a majority vote.<sup>32</sup> *Federalist* 10 chooses to embrace a theory which protects against majority factionalism. Under *Federalist* 10, informed representatives whose goal is the public good would exercise judgment and debate to discern what is best for the governed.<sup>33</sup> In his analysis of *The Federalist*, David Epstein describes the difference between pure democracy and *The Federalist's* Burkian republic as follows: "The difference is that while enlightened statesmen were expected to adjust the clashes of the partisans in the legislature, it is now suggested that the legislative body's entire membership can be improved, replacing partisans with men of patriotism and wisdom."<sup>34</sup> Patriotic public officials would be those most likely to protect private rights while representing the people in the national House.<sup>35</sup>

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30. COOPER, *supra* note 27, at 33.

31. THE FEDERALIST NO. 10, *supra* note 15, at 57.

32. *Id.*

33.

A republic, by which I mean a government in which the [Burkian] scheme of representation takes place, [serves] . . . to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.

*Id.* at 59.

34. DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 94 (1984).

35. *Id.*

#### 4. The Constitution Has Stronger Guarantees than Burke Theory

The Constitution's ratifiers refused to accept that patriotism would protect against oppression in the legislature. Protection of private rights, while not essential to the Constitution's authors, was crucial to its ratifiers.<sup>36</sup> Fundamental to the protection of these rights was the first set of rights protected: free speech and association, and petitioning the government for a redress of grievances. The First Amendment to the Constitution states: "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."<sup>37</sup> Protection of this right to petition results in protection of minority viewpoints by allowing those in the minority to bring their cause to the legislature and to convince representatives of the public good to be served by protecting their rights.<sup>38</sup>

Protection of viewpoint means protection of rights, but it does not require espousal of that viewpoint. To the Framers, any minority viewpoint could be overruled by a majority, while the members of that majority could be voted out of office at the next election.<sup>39</sup> In the House, patriotic representatives using judgment and the honing focus of debate would determine the will of the governed and protect against mob mentalities while discerning what was best for the public good.

The Framers envisioned this republican legislature to be, within limits and subject to balancing from the other branches, the center of the federal government.<sup>40</sup> From Congress would come all laws - the executive could only reject laws, unless overruled,<sup>41</sup> and the judiciary's sole power was that of interpreting the law.<sup>42</sup> Popular sovereignty meant that the branch of govern-

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36. Note that the Bill of Rights passed immediately following the Constitution's ratification.

37. U.S. CONST. amend. I.

38. See DEKIEFFER, *supra* note 4, at 2.

39. THE FEDERALIST No. 10, *supra* note 15, at 57.

40. THE FEDERALIST No. 48, at 323 (James Madison) (Random House 1950).

41. See U.S. CONST. art. I, § 7.

42. "The judiciary . . . has no influence over either the sword or the purse. . . . It may truly be said to have neither *force nor will*, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." THE FEDERALIST No. 78, at 504 (Alexander Hamilton) (Random House 1950).

ment most responsive to the will of the governed would perform the government's primary functions.<sup>43</sup>

### C. *Lobbying Groups Were Not Important to The Federalist*

The role of lobbying groups in government appears somewhat unconsidered, in large part because the legislature itself was to be the protector of rights. The right to petition was a post-ratification addition to the Constitution. It shifted responsibility for protecting rights from the legislature to the Constitution itself (and eventually to the courts). It is possible that the early writers were silent about lobbyists because they never considered that a need would arise for them. Fifty years after the first Congress met, however, Alexis de Tocqueville wondered at the American need to form associations and the resulting protection against oppression and sedition:

In our own day freedom of association has become a necessary guarantee against the tyranny of the majority. . . . [N]o countries need associations more — to prevent either despotism of parties or the arbitrary rule of a prince — than those with a democratic social state. . . . There are factions in America, but no conspirators.<sup>44</sup>

Lobbying groups were enshrined in the First Amendment's protection of the right to petition and in the general American desire to do so.<sup>45</sup> Tocqueville's associations, the forerunners of lobbying groups, served to petition the government publicly for the interests which caused their formation. Such organizations presumably would petition to make their positions known to the Burkinian legislature, which would weigh their viewpoints in light of the public good. By preserving petition as participation in government, the First Amendment allowed for minority viewpoints while structurally avoiding the wrongs of factionalism.

The Framers of the Constitution envisioned a federal government much weaker than that which eventually developed. They saw the power of governing to be centered at the state level.<sup>46</sup> Most issues of law were to be handled by the individual

43. Indeed, the Constitution's Framers intended this interpretation so strictly as to require all bills which proposed raising revenue to originate in the House of Representatives. U.S. CONST. art. I, § 7.

44. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 192-93 (Random House, 1953).

45. DEKIEFFER, *supra* note 4, at 2.

46.

An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them would be altogether

states.<sup>47</sup> Furthermore, since states were to handle all matters internal to themselves, those issues which finally did come before the federal legislature would have national implications whose constituent viewpoints would be substantially represented by the personal experiences of individual legislators<sup>48</sup>.

Lobbyists were not a concern for the Constitution's Framers because under a republican government that espoused Burke theory they would be unnecessary. When the First Amendment established the right to petition, people lobbying the federal legislature needed no such protection. Congress, by its very structure, should have been able to protect minority rights under a realm of debate by thoughtful representatives.

## II. THE DEVELOPING ROLE OF LOBBYISTS

What the Framers envisioned and what has happened are two very different scenarios. Much has been written concerning the expanding role of the federal government in American political history. With the Industrial Revolution, the expansion of interstate commerce and rail transportation, and the need to counter post-reconstruction backlash in southern states, the federal government found its law-providing role expand. Administrative agencies performed much of this new federal work, and

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dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States.

THE FEDERALIST NO. 32, at 194 (Alexander Hamilton) (Random House 1950).  
47. *Id.*

48. *Federalist* 53 argues that the short term of members of the House serves to keep representatives informed of the interests of the people they serve:

No man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate. A part of this knowledge may be acquired by means of information which lie within the compass of men in private as well as public situations. Another part can only be attained, or at least thoroughly attained, by actual experience in the station which requires the use of it. The period of service, ought, therefore, in all such cases, to bear some proportion to the extent of practical knowledge requisite to the due performance of the service.

THE FEDERALIST NO. 53, at 349-50 (Alexander Hamilton or James Madison) (Random House 1950). Note that this argument totally rejects mandatory term limits as a means of protecting popular interests in the House. Note also that the argument might allow for lobbyists to keep representatives informed of their constituent's interests, although *The Federalist* probably never contemplated such a result.

the role the federal government had in the economy gradually shifted from that of enabler to that of manager.<sup>49</sup>

#### A. *Expanding Federal Law Has Led to Increased Lobbying*

With the rise of federal managerial control,<sup>50</sup> groups evolved to represent the industrial interests affected (i.e., chambers of commerce, labor unions, etc.). By the 1950s, organized industrial interests found themselves lobbying regularly in Washington for their respective interests.<sup>51</sup> Over time, the federal role in everyday life has grown, stemming from the vast array of federal programs established during the New Deal and continuing through the Great Society.<sup>52</sup> Traditional industrial lobbying groups have become unable to represent to Congress the opinions of national constituencies on all issues.<sup>53</sup> A vast array of new interest groups, focused on the much more specific and complex issues faced by Congress, has arisen to lobby Congress for their constituents' needs.<sup>54</sup>

Congress continues to pass increasingly generalized statutes, which have led to expanded federal law and a larger role for administrative agencies.<sup>55</sup> Today, administrative agencies enforce the legislature's intent by fleshing out the details of Congressional policy.<sup>56</sup> Because administrative agencies must follow the general guidelines of their enabling legislation, parties interested in a particular issue have an increased incentive to lobby Congress for protection of their interests at the policy-making

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49. For a history and criticism of the development of administrative agency power, see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

50. The role of administrative agencies in regulating such industrial practices as interstate commerce is virtually unquestioned. A long string of cases dating to the late nineteenth century recognizes the managerial role of administrative agencies. See, e.g., *Texas and Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 425 (1906).

51. Judis, *supra* note 5, at 15.

52. See *Id.* at 17.

53. *Id.* at 16.

54. *Id.*

55. JEWELL & PATTERSON, *supra* note 6, at 5.

56.

In the traditional division of power among the legislative, executive, and judicial branches of government, the task of lawmaking belongs to the legislature. Only in the most formal sense, however, is this a realistic way of distinguishing the work of the legislature from that of other parts of government. Administrative decisions, often formalized and published as orders and rules, constitute another part of the law.

*Id.*

level.<sup>57</sup> Thus the broadening scope of federal statutes has led to an increase in organized interest groups who lobby to affect the overall focus of legislation.<sup>58</sup> In sum, the increased complexity of federal law and the rise of administrative agencies have precipitated increased lobbying of the federal legislature.

The increase in specific programs to deal with complex needs has caused a corresponding increase in groups interested in individual issues.<sup>59</sup> Large lobbying groups work for national constituencies, but their methods are similar to those used by smaller, more narrowly focused lobbying groups.<sup>60</sup> To see how influential these groups are, and what kinds of influence they exert in the House or Representatives, one needs simply to look at their methods of operation.

## B. *Today's Lobbyists Play Multiple Roles in the Political Process*

### 1. Lobbyists Represent Constituent Groups

Contrary to popular opinion, lobbying groups generally do not trade campaign funds for votes.<sup>61</sup> Bribery and influence-peddling are much more myth than reality in the current American

57. Congress passes laws that create and empower administrative agencies to follow complex and specific policies. Agencies must look primarily to the enabling legislation for a guide on how to bring about what Congress intended. Agencies are limited further by their defined powers under the Fifth Amendment and the Administrative Procedure Act, 5 U.S.C. § 551 (1988). See *Landon v. Plasencia*, 459 U.S. 33 (1982); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). An administrative agency depends heavily on the scope and focus Congress imputes through relevant statutes. Lobbying groups whose constituents are affected by the agency's decisions have a significant interest in molding legislation beneficial to their constituent's interests. Therefore, lobbyists have an interest in affecting laws at the policy level.

58. Judis, *supra* note 5, at 17.

59. "Beginning in the late 1950s, new political movements emerged that did not fit into the structure of the old Washington pressure groups and political parties. They included on the one side the civil rights movement, the antiwar movement, the women's movement, the environmental movement, the movements for gay rights, consumer rights and abortion rights and on the other side the new conservative movement, the movements against racial desegregation and later against busing and affirmative action, the anti-abortion movement, and the right-wing evangelical movements." *Id.*

60. In the second part of *Lobbying Congress: How the System Works*, Bruce C. Wolpe performs case studies to demonstrate how both traditional lobbying groups (i.e., industrial lobbies and unions dating to the early 1900s) such as the U.S. League of Savings Institutions and modern focus groups like the Minimum Wage Coalition to Save Jobs operate very similarly (depending on the practicalities of a given situation) to influence Congressional actions. BRUCE C. WOLPE, *LOBBYING CONGRESS: HOW THE SYSTEM WORKS* 65-132 (1990).

61. See JEWELL & PATTERSON, *supra* note 6, at 291.

political scene.<sup>62</sup> Lobbying groups operate, as the numerous training manuals on how to lobby suggest, openly and under close scrutiny.<sup>63</sup>

The role of a lobbyist is to influence legislation as an active representative of constituents.<sup>64</sup> There are various specialties within the field of lobbying.<sup>65</sup> The stereotypic lobbyist, known in the industry as the contact person, maintains contact with legislators to remain a familiar face and recognized voice when a legislator considers relevant legislation.<sup>66</sup> Most of a contact person's work is done not by glad-handing but rather by telephone and letter contact.<sup>67</sup> Communications via letter and telephone are means to provide information to legislators.<sup>68</sup> Contact people maintain connections most strongly with legislators most open to influence.<sup>69</sup>

Other forms of lobbying involve organizing grass-roots support for a particular legislative program, watching the legislative calendar to keep constituents informed of important congressional activities, developing a lobbying strategy, and, importantly, making sure legislators are apprised of both relevant facts and a group's opinion on major issues.<sup>70</sup>

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62. *Id.* "Despite the myth that successful lobbying implies influence peddling, most effective lobbyists trade in facts — not influence. . . . Your long-term credibility is far more important than any temporary advantage you may gain through prevarication." DEKIEFFER, *supra* note 4, at 203-204. *But see* MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 129 (2d ed. 1989) ("None of the studies on the question of whether money buys or follows votes can be considered definitive.").

63. WOLPE, *supra* note 60, at 3.

64. JEWELL & PATTERSON, *supra* note 6, at 287.

65. *Id.*

66. Contact people do not comprise a majority of lobbyists. In fact, while PACs employ many lobbyists, only a small percentage are contact people. *Id.* at 288.

67. *Id.*

68. *Id.* at 290. Jewell and Patterson note that although lobbyists tend to believe personal relationships with legislators are their most influential tools, legislators themselves find the *information* lobbyists supply to be of the greatest influence. *Id.* *See also* DEKIEFFER, *supra* note 4, at 18 ("[P]ersonal peccadilloes do not have much affect on the Washington scene.").

69. "The contact man is likely to have his most persistent and regular contacts with friendly legislators, those who share at least a considerable proportion of the group's views. . . . [L]egislative leaders are much more likely than rank-and-file members to be objects of contact work." JEWELL & PATTERSON, *supra* note 6, at 288.

70. *Id.* at 288-90.



## 2. Lobbyists Build Coalitions

Lobbying activities mirror the coalition building of a legislature. Individual representatives find they have much better success when working with others toward a common interest. When a particular lobbying group hopes to enact or to oppose a piece of legislation, it assembles a cadre of groups with similar interests to increase their effect.<sup>71</sup> Synergy among lobbying groups increases not only the resources available for a project but also the claim of representation of popular interest.<sup>72</sup> Once popular support for (or against) a measure is organized, the lobbying system operates symbiotically with the legislative system: key players are contacted, information on the issues is shared, legislators are polled for support, administrative agencies are contacted for support, testimony is given, and the legislative process runs its course. The central role of lobbyists in this process is to enable legislators to form opinions by offering information.<sup>73</sup>

Lobbyists focus their attention on those most important to their group's success.<sup>74</sup> Because of the specialization of the House in its committee system, lobbyists need only contact a handful of representatives concerning passage of particular legislation or administrative oversight. Thus lobbyists can concentrate their efforts rather than going to the expense of contacting 435 representatives. As will be noted in Section Three of this article, the structural relationship that intimately connects lobbyists with specific representatives may lead to legislative capture.

## 3. Lobbyists Perform Grass Roots Organizing and Fund Raising

Lobbyists use press and advertising campaigns and grass-roots measures such as mass-mailing to muster support for their viewpoint.<sup>75</sup> A classic example of this method is the work on the Cable Reform Act of 1992. Groups supporting the Cable Bill, including the Association of Network Broadcasters and the Con-

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71. DEKIEFFER, *supra* note 4, at 20.

72. *Id.*

73. See generally CHARLES S. MACK, *LOBBYING AND GOVERNMENT RELATIONS: A GUIDE FOR EXECUTIVES* 83-89 (1989). See also WOLPE, *supra* note 60, at 9 ("Lobbying is the political management of information."). Of course, an effective lobbyist, like any good advocate, will characterize information to put his or her viewpoint in the best light.

74. "In general, legislators react most favorable toward lobbyists in terms of the measure of public sentiment and the information, research, and support the lobbyist can provide, rather than in terms of pressures or assertions of demands." JEWELL & PATTERSON, *supra* note 6, at 293. See also *infra* part II.B.iv.

75. DEKIEFFER, *supra* note 4, at 39.

sumer Federation of America, aired many advertisements on network television asking for mail-in campaigns in favor of the bill.<sup>76</sup> At the same time, cable regulation opponents advertised warnings (on cable channels) about the potential effects of the legislation.<sup>77</sup> Regulation supporters succeeded in generating enough popular support for the bill that it passed overwhelmingly, becoming the only bill to overcome a veto during President Bush's administration.<sup>78</sup>

The history of the Cable Reform Act illustrates another aspect of lobbying, namely, campaign spending. Conventional wisdom suggests that special interest groups and PACs spend money on political campaigns so to ensure that a legislator will favor them in the future.<sup>79</sup> In fact, the converse is true. Lobbying groups expend personal and financial resources to support legislators who have shown them support in the past. Groups use money to keep friendly voices in power, not to keep powerful voices friendly.<sup>80</sup> Money interrelates with access, not with voting.<sup>81</sup> Indeed, many works describing the methods of lobbying mention campaign contributions only briefly.<sup>82</sup>

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76. See Paul Farhi, *Foes of Cable Bill Outspend Its Supporters; Opponents Gave \$1.2 Million to Lawmakers in 10 Months, 3 1/2 Times as Much as Backers*, WASH. POST, Sept. 22, 1992, at D1.

77. *Id.*

78. *Bush Vetoes Bill to Curb Rates for Basic Cable TV*, L.A. TIMES, Oct. 4, 1992, at A1.

79. "It is quite conceivable that on a [close] vote some will suggest that money made the difference, especially for any member who switches his or her position [from a previous Senate vote]." Farhi, *supra* note 76, at D1 (quoting James C. May, National Association of Broadcasters, regarding the effect campaign spending had on the Cable Reform Act).

80. Wolpe distinguishes between legitimate (i.e., both ethical and protected within the Constitution) and illegitimate means of lobbying:

Seeking a vote, arguing for a certain position, turning up the pressure from constituents and other supporters of the legislator are all legitimate [means of influencing a legislator]. Demanding a vote as a price for continued or promised financial support is never legitimate and is a corruption of the process. . . . A lawmaker may well have a hope, if not an expectation, for political financial support at a subsequent time, and the absence of such support may mean a cooler relationship in the future. But that legislator simply cannot and will not ignore a constituent or local interest confronting a bona fide governmental issue.

WOLPE, *supra* note 60, at 46.

81. "What that less-than-charitable giving achieves in total is the subject of controversy, but the minimum is surely access, provided of course that the amount is noticeable." WOOTTON, *supra* note 9, at 200. *But see* WOLPE, *supra* note 60, at 47 (suggesting that the most effective campaign contributions are spent on those whose support a group already has).

82. See generally DEKIEFFER, *supra* note 4, at 144-48; WOLPE, *supra* note 60,

#### 4. Lobbyists Act in Symbiosis with Congress

Lobbying works not to control Congressional voting but rather to complement the work of Congress. Lobbying groups aid Congress by demonstrating the desires of the public and private organizations<sup>83</sup> whose goodwill substantially affects significant portions of the public. Lobbyists share important information with lawmakers. Lobbying groups act as secondary access points to Congress, thereby increasing the amount of public influence exerted in Washington.<sup>84</sup> The effect of lobbying should be positive, so long as lobbying activities are open and above-board.

Also contrary to popular myth, lobbying groups generally avoid using underhanded methods of influencing legislators, mainly because such methods are highly ineffective.<sup>85</sup> Because the two primary activities of a lobbying group are information-sharing and generating popular support, credibility is of primary importance for effective lobbying.<sup>86</sup> If a group loses its credibility by misstating facts or by using unethical methods of influence, legislators will mistrust that group's influence and popular support will evaporate.<sup>87</sup>

Lobbyists survive in Washington not on the power of the money they spend, nor on the connections they maintain, because individual Congressional representatives are too independent from lobbyists to allow them to hold too much

at 43-47. Both describe, in detail, the work performed by lobbying groups. Campaign contributions make up only a minor chapter in each book.

83. Examples of such organizations are professional groups, labor unions, and major industrial entities.

84. Analysts disagree, however, over whether lobbying groups offer a balance of viewpoints: "Because interest groups and their lobbyists generally play adversarial roles on particular issues, they tend to act as a rein on each other, preventing any single interest from getting too powerful for too long." MACK, *supra* note 73, at 8. Mack also argues that the relative power of lobbying groups is controlled by the amount of support each group can muster over a long period of time: "Cycles in public opinion, working through the political process . . . keep interest group alliances of either the left or the right from gaining permanent ascendancy." *Id.* But see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 125-31 (1965) (arguing that it is structurally impossible for large and small groups to have equivalent influence when lobbying).

85. RONALD J. HREBENAR & RUTH K. SCOTT, *INTEREST GROUP POLITICS IN AMERICA* 91 (2d ed. 1990). The Federal Regulation of Lobbying Act, 2 U.S.C. § 261 (1988), registers and strictly regulates all lobbying activities in a way similar to the way the Freedom of Information Act and sunshine laws open the regulatory decision-making process to the scrutiny of a skeptical public eye. DEKIEFFER, *supra* note 4, at 6.

86. WOLPE, *supra* note 60, at 9.

87. DEKIEFFER, *supra* note 4, at 203-204.

power.<sup>88</sup> Lobbyists succeed by demonstrating the importance of the viewpoints they represent and the measure of support that exists for their positions. PACs and other quasi-public groups maintain a counterbalancing view against powerful public-interest lobbies and other opposing interests, and vice versa. This multiple presentation of interests empowers Congressional representatives to make better-informed decisions. Thus, lobbying generally aids Congressional decision-making rather than hindering it. If lobbying groups ever effectively counter public demand and thereby capture Congressional policy, they succeed by taking advantage of a Congressional system that places power in the hands of only a few representatives. Lobbyists do not maintain the stranglehold that most people think they have on Congress. The hands around the Congressional neck are its own.

### III. THE ROLE OF LEGISLATORS

Popular conception portrays lobbyists as using undue influence to obtain the passage of laws favorable to their desires. The House of Representatives passes and defeats laws in a manner which allows for interest group influence, but which also places more importance on factors other than lobbying and much less conducive to popular sovereignty. The committee structure of the House, coupled with its seniority system and the inherent advantages of incumbency, forges ruts in the legislative process whereby powerful incumbents can bend laws to their designs irrespective of the popular will or the public good.<sup>89</sup>

#### A. *The Congressional Role Has Shifted from Legislation to Oversight*

Recalling the Framers' belief that the power of the central government would be weak, one recognizes that problems dealt with by the federal legislature today are much more numerous and complex than those faced by early legislatures.<sup>90</sup> In order to cope with the increasing numbers and abstractness of laws, the federal government formed an administrative process within the executive branch to manage developing issues instead of legislat-

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88. "Legislators most cherish their independence and the perception that they are independent. The ability of a lawmaker to exercise independence from outside interests is the difference between influence and control." WOLFE, *supra* note 60, at 46.

89. On the power of a committee chairperson to affect a bill, see WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* 93-97 (3d ed. 1989). See also FIORINA, *supra* note 62, at 17-29, 48-52.

90. STONE, *supra* note 13, at 175; see also *supra* text accompanying notes 49-60.

ing solutions to problems one-at-a-time.<sup>91</sup> The shift in emphasis from legislation to oversight has caused a re-focusing of power within the House to the committee chairs.<sup>92</sup> Matters which would normally be dealt with by the Committee of the Whole have been shifted to standing and special committees and subcommittees.<sup>93</sup> Increasing complexity of issues has led to an increasing diversification and decentralization of the House committee structure. All work on bills happens in committees, with the ultimate approval of the powerful House Rules Committee.<sup>94</sup>

The committee system of the House breaks down into roughly three types of committees. Authorization committees, which are responsible for implementing Congressional policy, debate most policy-oriented bills. Oversight committees supervise administrative agencies' actions pursuant to statutory authorization. Appropriations committees determine how much money agencies may spend in following their mandate.

### 1. Authorization Committees Decide on Policy

Most of the debate on how to enact Congressional policy occurs in authorization committees, which ultimately decide the fate of all policy-oriented legislation. Senior committee members have particularly strong voices, ostensibly because their specialized experience with committee matters grants them a wisdom and knowledge of relevant issues.<sup>95</sup>

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91. Chief Justice Rehnquist has traced the history of administrative law to the desire for expertise within federal administration:

The many later decisions that have upheld congressional delegations of authority to the Executive Branch have done so largely on the theory that Congress may wish to exercise its authority in a particular field, but because the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert in the area in which they choose to legislate, the most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards. . . .

Industrial Dep't, *ALF-CIO v. American Petroleum Inst.*, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring).

92. WOOTTON, *supra* note 9, at 59.

93. *Id.*

94. *Id.* at 60.

95. The chairman is deemed the most senior member of a committee's majority: "The chairman usually has had a long period of service on the committee and is likely to be better informed than most other members on the myriad of issues coming before the committee. The chairman often is privy to the leadership's plans and policies." OLESZEK, *supra* note 89, at 93. By leadership, Oleszek means the most senior members of the majority party:

When an amended bill passes the authorization committee, the Rules Committee schedules it for floor debate and ultimately a vote. By the time the bill reaches the floor, the bill is nearly assured passage by the majority because of deference to the committee's specialized opinion on the matters with which it deals.<sup>96</sup> The roles of senior House committee members are of primary importance to pending legislation. Complexity of issues lends to the efficiency of sending bills before standing and special committees for consideration before a floor decision.<sup>97</sup>

## 2. Oversight and Appropriations Committees Verify Policy

The relationship between administrative agencies and the authority granted them by enabling legislation further requires the use of oversight committees and subcommittees. While an authorization committee determines the public policy goals of the agency, the oversight committee supervises agencies to assure that they follow their mandate. Thus, if a conflict of ideology arises between authorization and oversight committee members, agencies get confusing signals as to how to apply the law. This process is further complicated by the separate existence of appropriations committees, which allocate spending according to their members' ideological goals. In a system created to maximize efficiency, this split creates confusion of Congressional policy and its application.

### B. *Complexity Has Bred Specialization*

Bills pass a committee only on an approval of the majority of the committee's members. Because bills today are so complex, committee members must develop expertise in the areas the committee covers.<sup>98</sup> Overseeing administrative agencies requires similar specialization. While it allows for more efficient channeling of bills through the House,<sup>99</sup> specialization decreases debate and position-taking by representatives on the floor by removing

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96. STONE, *supra* note 13, at 178.

97. WOOTTON, *supra* note 9, at 59.

98. "Specialization is necessary because the policy questions before Congress not only cover a wide range but are extremely complex. Members must spend a great deal of time learning the details of their specialty, much as college professors must devote their lives to mastering a relatively small portion of what is known." STONE, *supra* note 13, at 175.

99. *Id.* at 181 ("As slow as Congress can sometimes be, the committee system greatly enhances its ability to act.").

most debate to the committee room. This method of problem management is contrary to the Framers' intentions.<sup>100</sup>

By the time a bill reaches a committee vote, it has been thoroughly researched and revised by the committee, the relevant subcommittee, or both. The committee's relatively expert members reach a consensus on the bill by evaluating the research and recommendations of other experts, mainly lobbyists and affected private concerns. At this level of lawmaking lobbyists are their most influential.<sup>101</sup> The type of influence lobbyists have at this stage, as noted above, is mainly informational. Information supplied by lobbying groups, whether on the potential impact of proposed legislation or on the scope of popular support for an issue, serves mainly to supplement the committee members' expertise on issues.<sup>102</sup>

Once the committee has voted on a measure, any attempt lobbying groups might make to controvert the bill's passage will likely fail in face of floor approval of the vast majority of committee decisions.<sup>103</sup> Consequently, the influence lobbying groups might play in legislation is functionally limited to relevant committees. Within committees, lobbyist influence is subject to the discretion of the committee seniority.<sup>104</sup>

### C. *Specialization Requires Incumbency*

Since the committee structure of the House of Representatives controls the passage of laws, individual representatives find their hopes of influencing public policy tied to their committee assignments. Representatives gravitate to particular committees

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100. "Mechanisms that reduce conflict in Congress must be viewed with great suspicion from the perspective of the Republic. Conflict was to be the means by which tyranny was avoided because self-interest would frustrate self-interest. Yet the committee system isolates decision makers in a complex process. Bargains are struck among the most intensely concerned interests, without regard for the interests not included." *Id.* at 181-82. See also THE FEDERALIST No. 10, *supra* note 15, at 80.

101. See STONE, *supra* note 13, at 182; see also JEWELL & PATTERSON, *supra* note 6, at 293-99.

102. ALLAN J. CIGLER & BURDETT A. LOOMIS, INTEREST GROUP POLITICS 264 (3d ed. 1991).

103. STONE, *supra* note 13, at 178. Because of the immense workload in the House, representatives tend to rely on the committee system. They approve nearly every measure that makes it out of committees. Note that this unchecked committee power means that only a handful of representatives make individual legislative decisions. Thus committees quash popular debate.

104. Lobbyists and the media generally make committee members aware of the major viewpoints on most issues before them. Committee seniority can control the flow of public information from non-organized sources by manipulating scheduled hearings. OLESZEK, *supra* note 89, at 97-98.

mainly for two reasons: to follow individual ideological goals and to promote issues which are important to their constituencies.<sup>105</sup> Both forms of representation are incumbency-enhancing, because both enable representatives to show constituents what representatives have done to promote local interests in Congress.<sup>106</sup> By espousing ideological viewpoints pleasing to constituents, representatives develop a level of recognition with constituent desires. Representatives assure their reelection by pleasing constituents' locally-oriented desires through the use of their seats on committees to promote local interests (for example, using influence on the House Armed Services Committee to make sure Congress does not close a local military base).

Hierarchy within committees determines the amount of influence a particular legislator has over legislation.<sup>107</sup> Therefore, if a legislator wants to affect national policy on issues, he or she must stay employed long enough to obtain seniority within the committee. This goal of reelection contradicts the Framers' intended goal of serving the public good. Rather than using their judgment to vote on issues and accordingly serve the nation's good, representatives attempt to gain reelection so they can attain the seniority required to affect national policy.

If reelection were tied to thoughtful performance as a legislator, then incumbency would mean (just as the Framers intended) popular trust of a legislator's judgment. However, incumbency is more often tied to service of local interests.<sup>108</sup> The conflict of wills envisioned by the Framers of the Constitution is supplanted by a desire to stay in power long enough to control management. The Framers envisioned popular sovereignty in the model of republican representation. Under current seniority within committees, this popular sovereignty gets lost in a system keyed on expertise developed over lengthy careers on specific committees. The benefits of efficiency and expertise offered by seniority and the committee system may seem overwhelming, but it is this structure which most directly leads to a stagnation of legislation and of incumbency in the House.<sup>109</sup>

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105. STONE, *supra* note 13, at 178.

106. *Id.*

107. "[C]ommittee chairs (and to a lesser degree subcommittee chairs) wield significant influence over legislative outcomes. Their positions are coveted by other members . . . ." *Id.* at 180.

108. STONE, *supra* note 13, at 160.

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Chairmen can . . . delay, expedite, or modify legislation. A chairman who opposes a bill may simply refuse to schedule hearings on it until it is too late to finish action on the bill during the session. The same result can be achieved by allowing the hearings to drag on



Once elected, representatives find not only that reelection is important for effectuating policy, but also that achieving reelection is relatively easy.<sup>110</sup> In addition to obtaining committee assignments geared toward constituent interests, representatives develop contact with their constituents through the numerous services their offices provide. Complex Congressional staffs reply to nearly all constituent needs, and representatives use the franking privilege to maintain contact with their constituents. These privileges allow incumbents to maintain constituent satisfaction at levels sufficient virtually to assure reelection.<sup>111</sup>

The Framers of the Constitution envisioned debate among representatives who used their judgment for the popular good and who took personal responsibility for their choices. The Framers hoped this system would effect national policy which avoided exploitation of minorities and closely reflected the national will. Complexity of issues and sheer numbers have driven representation away from debate to a model of expert decision-making and conformity to opinions formed within committees.<sup>112</sup> The public good succumbs to the stale expertness and hierarchical power of committee decisions. The hierarchical structure of the committee system in the House stagnates Congressional policy.

#### IV. LIMITING LOBBYING WILL DO NOTHING

As noted above, popular opinion has it that the role lobbyists play in Congressional politics is unacceptable. At first glance, there appear to be two ways for Congress to respond to popular opinion: Congress can either enact measures to curb lobbying activities, or reform its internal structures that make lobbying overly-influential. Rather than reform itself, Congress has begun to look at changing the way in which lobbyists conduct their activities.<sup>113</sup>

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interminably. . . . And through his control of funds and the power to hire and fire most committee staffers, the chairman can effectively block action on a bill by directing the staff to disregard it. A chairman who favors a bill can give it top priority.

OLESEK, *supra* note 89, at 93-94.

110. See FIORINA, *supra* note 62, at 48-52.

111. STONE, *supra* note 13, at 164.

112. STONE, *supra* note 13, at 175.

113. While this article has until now focused solely on the House of Representatives, the analysis of lobbying reform proposals must extend to the entire Congress, because the reforms propose to affect all of Congress.

In 1993, representatives in the House proposed at least seven notable bills regarding lobbying.<sup>114</sup> The Senate saw similar legislation, and even passed a bill that would require stricter disclosure of lobbying activities.<sup>115</sup> This section of this article will unfold the different reform proposals, focusing primarily on S. 349 and H.R. 823, the Lobbying Disclosure Act of 1993.

#### A. *The Lobbying Disclosure Act of 1993*

A major obstacle to any lobbying legislation is *Buckley v. Valeo*.<sup>116</sup> In *Buckley*, the United States Supreme Court overturned the Federal Election Campaign Act of 1971, which had attempted to limit the amount of money any one person or organization could donate to an electoral campaign. The Supreme Court reasoned that such a limitation violated free speech and free association. The plurality in *Buckley* felt that any limitation on the amount of one's contribution amounts to a limitation on the amount of one's speech. Because the First Amendment protects all political speech, the plurality determined that such limitations on speech are invalid.

Under this Constitutional rubric, Senator Carl Levin (D., MI) proposed the Lobbying Disclosure Act of 1993. Because *Buckley* prohibits any limitation on the amount of political activity in which a person might engage, the best reform Senator Levin could offer is strict disclosure of all lobbying activities. The bill proposes to supersede the Federal Regulation of Lobbying Act of 1946.<sup>117</sup> It would require anyone who performs lobbying activities which incur semi-annual expenses exceeding \$1,000, or who receive \$1,000 or more in income from lobbying activities, to register with the Office of Lobbying Registration and Public Disclosure (OLRAPD).<sup>118</sup> Twice per year, each lobbyist covered by the act would have to disclose to the OLRAPD all lobbying activities and finances related thereto.<sup>119</sup> Additionally, any lobbyist who approaches a member of Congress would have to, upon request,

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114. This article will focus on the following House bills, none of which has yet passed: H.R. 211, 103d Cong., 1st Sess. (1993); H.R. 823, 103d Cong., 1st Sess. (1993); H.R. 1593, 103d Cong., 1st Sess. (1993); H.R. 2267, 103rd Cong., 1st Sess. (1993); H.R. 2834, 103rd Cong., 1st Sess. (1993); H.R. 2864, 103d Cong., 1st Sess. (1993); and H.R. 3357, 103d Cong., 1st Sess. (1993).

115. The Senate considered S. 3, 103d Cong., 1st Sess. (1993), and S. 44, 103d Cong., 1st Sess. (1993), and passed S. 349, 103d Cong., 1st Sess. (1993). H.R. 823 is the House equivalent of S. 349.

116. 424 U.S. 1 (1976).

117. 2 U.S.C. § 261 (1988). *See supra* text accompanying note 85. The bill is S. 349, 103d Cong., 1st Sess. § 14 (1993).

118. S. 349, 103d Cong., 1st Sess. § 4 (1993).

119. *Id.* at § 5.

disclose the person or group whom the lobbyist represents.<sup>120</sup> Finally, S. 349 expresses a policy choice<sup>121</sup> that limits should be placed on acceptance of gifts and perks by members of Congress.<sup>122</sup>

The changes between S. 349 and the old Federal Regulation of Lobbying Act are not substantial. The current statute already requires lobbying groups to register with the Secretary of the Senate and the Clerk of the House,<sup>123</sup> and provides penalties for noncompliance with the law's registration requirements.<sup>124</sup> The 1993 bill moves the registration office to a subdivision of the Justice Department,<sup>125</sup> with an eye toward strict enforcement, but the Senate has offered no indication that enforcement has been lax in the past. S. 349 appears to include more people within the definition of lobbyist than does the current statute, but it is unclear as to what effect this change might have on lobbying.<sup>126</sup>

On the other hand, agency disclosure is new in S. 349, although, as noted above, lobbyists already have an incentive to disclose those for whom they work.<sup>127</sup> Also, the reporting requirements in S. 349 are somewhat broader than in the current statute.<sup>128</sup> The most significant change between S. 349 and the current statute is the stated policy on limiting gifts to members of Congress.<sup>129</sup> In this regard, however, S. 349 merely states a future intention. In passing S. 349, the Senate failed to enact that intention. Thus the Lobbying Disclosure Act of 1993 offers little change from the 1946 statute.

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120. *Id.* at § 4.

121. This is for OLRAPD to enact. Note that this is precisely the delegation of authority discussed in *supra* part III.A.

122. S. 349, 103d Cong., 1st Sess. §§ 21-22 (1993).

123. 2 U.S.C. § 267 (1988).

124. *Id.* at § 269.

125. S. 349, 103d Cong., 1st Sess. §6 (1993).

126. Note that the Senate could broaden the scope of the lobbying law's coverage only by including more casual lobbyists. Those whose business it is to lobby already must register and follow all disclosure requirements. This broader coverage might discourage average citizens from petitioning the government. Indeed, S. 349 is forced to exclude from its definition those who make little or no profit at lobbying (including those who regularly write their Congressman), for fear of violating the First Amendment.

127. See *supra* part II.B.iv.

128. S. 349, 103d Cong., 1st Sess. § 5 (1993).

129. "It is the sense of the Senate that, as soon as possible during this year's session, the Senate should limit the acceptance of gifts, meals and travel by Members and staff in a manner substantially similar to the restrictions applicable to executive branch officials." S. 349, 103d Cong., 1st Sess. § 21 (1993).

### B. *Other Attempts at Lobby Reform*

Other measures the Senate considered in 1993 include S. 3, the Congressional Spending Limit and Election Reform Act. One provision of this measure would prohibit lobbyists from making contributions to the reelection campaigns of members of Congress within a year of lobbying that member. It seems highly doubtful that this measure would pass the *Buckley* test. The other important Senate measure is S. 44, proposed by Senator Strom Thurmond (R., SC). S. 44 would prohibit lobbyists from being paid on a contingent fee basis. This might serve as a disincentive for ardent lobbying, and could be an interesting reform, if it applies to anyone. S. 44 has not yet left the Senate Judiciary Committee.

The House saw a number of proposals in 1993. One proposal sought to broaden the definition of bribery under federal law to include all payments to members of Congress made by lobbyists. Other reforms proposed in the House focus on mainly two topics: limiting the perks a member of Congress may receive from lobbyists, and lengthening the period during which a former government employee is prohibited from lobbying Congress.

H.R. 211 proposes to treat as bribery any payment by a lobbyist to or on behalf of a member of Congress. This measure is incredibly broad in scope. Among other effects, it would prohibit schools that testify regularly before Congress from offering any honoraria to a member of Congress<sup>130</sup>. This measure would apply to all who qualify as lobbyists, which, under S. 349, would include virtually anyone who testifies before Congress regularly. As noted above, studies indicate that bribery is not the method of operation for lobbying groups.<sup>131</sup> Broadening the scope of bribery would only add to the definition of bribery those payments which simply are not bribery.

The reforms dealing with gifts from lobbying groups appear to have some merit. While they cannot limit the amount of campaign contributions or the number of perks offered by a lobbying group under *Buckley*, these measures can limit the number of perks received by members of Congress. The Sunshine for Lobbyists Act of 1993, H.R. 2834, would require lobbyists to make

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130. Including honoraria for speaking about, say, lobby reform. Note that only those schools which testify regularly, and thus would be considered lobbyists under S. 349, would be prohibited from offering honoraria. The University of Notre Dame would be unable to have Representative Tim Roemer (D-IN) speak on its campus, but South Bend Central High School could.

131. See *supra* part II.B.i.

semi-annual reports to the Attorney General regarding any benefits they conferred on individual members of Congress. The Information on Financial Benefits Act of 1993, H.R. 2864, is substantially the same, although it allows for disclosure in the regular semi-annual lobbying statement. S. 349 contains provisions somewhat similar to these proposals.<sup>132</sup>

H.R. 3357 renews a proposed reform which would prohibit all travel by a member of Congress at the expense of a lobbying group. Similar proposed reforms have included limitations on the dollar amount of dinners and gifts a member of Congress or Congressional staff-member may receive from lobbyists. These proposals associate gifts by lobbyists with underhanded influence-peddling. While the studies listed above, particularly the Jewell and Patterson study, dispute such an implication, these proposals might be useful for appearance's sake. Limiting the amount of gifts a member of Congress may receive might affect a marginal representative's activities. More importantly, however, these reforms would offer the public the assurance that lobbying is done completely above-board.

Note that the gift-limiting reforms focus not on lobbyists, but rather on members of Congress themselves. This article has argued that lobbying groups generally aid Congress. Where lobbying groups might offer undue influence is precisely where the Congressional system and individual members of Congress might let them. By focusing reform on those most responsible for the problems of Congressional stagnation, these reforms have some merit. It is important to note that these reforms have met stiff opposition in the House.<sup>133</sup>

Finally, H.R. 1593 and H.R. 2267 propose to eliminate the undue use of influence by former government employees. These proposed reforms follow the belief that formerly tied-in government employees can use their connections to give clients a leg up with members of Congress. H.R. 1593 would require former government employees to disclose all contacts they have with current government officials for five years after they leave the government. H.R. 2267 would prohibit all former members of Congress from engaging in lobbying activities for five years after they leave Congress. Unfortunately, these and similar proposals

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132. S. 349, 103d Cong., 1st Sess. § 5(c)(3) (1993).

133. See *Lobby Reform Slows Down As House Balks At New Limits*, CHRISTIAN SCI. MONITOR, Oct. 26, 1993, at 2. H.R. 3357 was introduced after this newspaper article was printed.

miss the fundamental premise of modern lobbying: it's not whom you know, it's what you know.<sup>134</sup>

It appears obvious that the most Congress can do to reform lobbying is adjust current law at the margins. Laws restricting the amount of lobbying activities are unconstitutional. Laws increasing the amount of disclosure a lobbying group must offer border on the superfluous. The only reform proposals that might affect the amount of influence lobbyists have in the House, while not harming the positive aspects of lobbying, are those that focus on representatives themselves. Unwilling to face such a change, Congress will probably continue to wring its hands over lobby reform. Policy stagnation in the House will not end until House structures are reformed.

#### V. CONCLUSION: REFORM MUST COME FROM WITHIN

Everyone hates lobbyists in general but loves those who advocate their views. In a similar light, everyone hates Congress, and loves their own representative. The reality of lobbying is not that special interests stagnate the work of the Congress. Rather, lobbyists represent public interests and major industrial and economic interests to representatives too unwilling to look beyond the demands of their most vocal constituents. What causes stagnation is a system which perpetuates control centers among the most senior members of the House while it attempts to cope with its burgeoning workload. Conflicts of ideology are played out not in the realm of floor debate, but rather in the forum of three separate committees for each major piece of legislation.

The Framers of the Constitution probably never envisioned a House of Representatives so given to incumbency and seniority, and to the benefits of being a Congressman. The committee structure of the House of Representatives places too much importance on seniority for efficiency in the management of legislative policy. The power of incumbents and senior members leads to a feudalistic legislature wherein many of the most important decisions concerning the public will are made by a handful of senior representatives.

Specialists gain power. To keep power, they must maintain focus on issues, even dead issues, which provide their power.

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134. A recent trilogy of New York Times articles focuses on modern lobbying tactics. The last article in the trilogy quotes Jan Schoonmaker, a recent Congressional staff-member and current lobbyist: "Information is the currency of Capitol Hill," he says, "not dollars. And not friends." Michael Wines, *A New Maxim for Lobbyists: What You Know, Not Whom*, N.Y. TIMES, Nov. 3, 1993, at A1.

Additionally, the trade of votes for incumbency and eventually power means that younger representatives have to play a reelection game (which many seem to do very well) until they have enough seniority to be among the select few who have power in the House. The solution to this problem lies to a great extent in people trusting in their representatives, and in representatives being willing to use their judgment on issues and taking responsibility for unpopular stances in lieu of relying on the most popular of different constituent interests. Popular representation requires representatives to be willing to espouse unpopular viewpoints.

If the House is to be the republican body the Framers envisioned, Congress must find a way to counter the unchecked power of committees and their hierarchy, to return debate to levels which are designed to discern the common good. The complexities of the House committee structure have undoubtedly been the subject of many doctoral theses, as have ways to reform that structure. This article will offer only points of focus that the author believes to be necessary for effectual reform.

First, and most importantly, representatives must learn to trust their own judgment. To get reelected and gain power, representatives focus too much on popular local concerns of their constituents. In so doing, they betray their judgment for expertise and seniority. They deny their constituents what the Framers considered to be the most important part of representation, namely, the best use of their individual judgment on all issues. To return to republican popular sovereignty as the Framers saw it, representatives must focus once more on deciding issues wisely rather than in a politically expedient fashion. They must run the risk of losing incumbency to preserve their integrity as wise (Madison would say patriotic) representatives.

Furthermore, if debate is to replace seniority dominance, then debate must be available to all members of Congress, not just to those involved in relevant committees. This point of focus must not be mistaken for a proposal to abandon the committee structure altogether. Abandoning committees would cause more stagnation than it would relieve; if every representative had to deal with every bill, nothing would get done. Rather, committees must become more responsive to the Committee of the Whole in a way that enables representatives to exert influence over measures that come from committees other than their own.

Finally, the Rules Committee must decrease the powers of committee chairpeople, especially the power to set agenda within the committee and the power to determine staff assignments. These powers should be shared democratically among the com-

mittee members. Shared power necessarily means losing the expedience of having one person handle seeming incidentals. Nonetheless, problems arising from this lost inconvenience would be far outweighed both by avoiding abuse of chairperson power and by letting more players determine the focus a committee will have on any given issue.

Other procedures could fine tune the process of committee and floor consideration. The problem of slow passage of non-expedited legislation may find a solution in making more uniform the procedures to be followed by every committee. Making procedures uniform would also remove some of the inherent experiential advantages of seniority within committees. Clarifying the process required for legislation rather than leaving it to the discretion of committee chairs would result in faster preparation of legislation.<sup>135</sup>

What is lost in the procedural expertise of the House seniority is adequately made up for by the decreasing importance of incumbency and the increased role junior members may play in the formation of laws and the greater emphasis on the value of wise judgment and good debate. When legislators decide that they care more about the public good than about their own reelection, the role of lobbying will become strictly informational. Only then the House can proceed, through debate and good judgment, to enact the public mandate.

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135. This would occur probably with equally-informed results, because, in general, legislators already know most of the ins and outs of opinion and expert knowledge on major legislation before it gets to the committee. See *supra* note 104. Minor legislation usually comes from committee, so it would receive committee scrutiny throughout its life.



