THE LAW AND ETHICS OF K STREET
Lobbying, the First Amendment, and the Duty to Create Just Laws

Daniel T. Ostas

Abstract: This article explores the law and ethics of lobbying. The legal discussion examines disclosure regulations, employment restrictions, bribery laws, and anti-fraud provisions as each applies to the lobbying context. The analysis demonstrates that given the social value placed on the First Amendment, federal law generally affords lobbyists wide latitude in determining who, what, when, where, and how to lobby.

The article then turns to ethics. Lobbying involves deliberate attempts to effect changes in the law. An argument is advanced that because law implicates the use of force and because law ideally reflects the values of a democratic society, seeking to slant the law to serve a client's narrow interests cannot provide an adequate ethical end for a lobbyist. On the contrary, a lobbyist has an affirmative moral duty to seek reasonably balanced and just laws. The article examines, refines, and defends this proposition in a number of settings.

Introduction

Lobbying can be defined as a deliberate attempt to effect or to resist change in the law through direct communications with public policymakers including legislators, legislative staff, and executive branch officials.[1] One can lobby on one's own behalf as a "citizen lobbyist" or as a paid agent for a client. Paid lobbying typically occurs within the context of a "public relations team."[2] In the parlance of the public relations industry, the lobbyist is the "contact person,"[3] responsible for cultivating and maintaining personal relationships of trust with relevant policy makers. Other team members include a "public-relations strategist" who coordinates team activities, a "legislative lawyer" who analyzes and drafts proposed legislation and other legal documents, a "grass-roots organizer" responsible for mass mailings and fund raising, and a "media person" who coordinates advertising efforts.[4] The team's goals are to assure that the client's perspective receives a full airing, to advance that perspective by proposing affirmative legal changes, and/or to block legal changes proposed by others.

Although it is difficult to get an exact count, there clearly are a lot of lobbyists in Washington.[5] Some of the most visible are employed with high-powered "K Street"

© 2007. *Business Ethics Quarterly,* Volume 17, Issue 1. ISSN 1052-150X. pp. 31–61

law firms.[6] These firms often employ high-profile senior partners with marquee names and represent numerous clients, each for a fee.[7] More typically, lobbyists are employed in-house, working on salary for a single client. Most of the nation's largest corporations and labor unions maintain permanent public relations offices in the District complete with in-house lobbyists.[8] Most business associations, such as the Business Roundtable, and professional associations, such as the American Medical Association, maintain headquarters in the nation's capital as well. In addition, there is no shortage of so called "public interest groups."[9] In the 1960s and 1970s, many of these groups, such as Ralph Nader's Public Citizen, tended to be associated with politically liberal causes. Today, public interest groups span the political spectrum with conservative groups having surpassed—in membership and influence—those associated with the political left.[10] Of course, public interest groups, like most major corporations and business associations, typically employ public relations staff, complete with paid lobbyists.

Although the practice of lobbying is often maligned, it is important to note that lobbying plays a growing, useful, and perhaps even necessary role in our democratic republic. The recent and quite legitimate growth in lobbying activities has been fueled, in part, by advances in communications technology. More substantively, the growth in lobbying directly links to the expanded scope of federal legislation and the complexity of the corresponding administrative regulations used to implement the legislative will.[11] Reflecting on the need for specialized knowledge and expertise in a regulatory state, President John F. Kennedy wrote:

> Lobbyists are, in many cases, expert technicians and capable of explaining complex and difficult subjects in a clear, understandable fashion. . . . They engage in personal discussions with members of Congress in which they can explain in detail the reason for positions they advocate. . . . Because our congressional representation is based on geographical boundaries, the lobbyists who speak for the various economic, commercial and other functional interests of this country serve a very useful purpose and have assumed an important role in the legislative process.[12]

Hence, as President Kennedy emphasizes, lobbying has virtues and lobbyists play an important role in a representative government.

Notwithstanding President Kennedy's optimism, today, the public is more likely to look at the practice of lobbying with a degree of suspicion. Perhaps this simply reflects a more politically cynical time. For example, in a 1964 poll, 76 percent of Americans said that they trusted government to do the right thing "just about always" or "most of the time."[13] When the same question was asked in 1994, the number dropped to 21 percent,[14] with about half of the respondents stating that the federal government was "controlled by lobbyists and special interests."[15] The public concern is not just with unsavory tactics employed by paid lobbyists on K Street, but more fundamentally with the ability of the financially well heeled to shape the law to serve their private interests rather than the public good.

Concern about lobbying is also expressed among lobbyists themselves. For example, in a recent study, fifty practicing lobbyists reflected on the ethical challenges faced by their industry.[16] Several expressed deep concerns about the corrupting influence of money and the unequal access that money buys in our political system.[17] Several others questioned the presence of unprofessional conduct including widespread instances of untruthfulness, unresolved conflicts of interests, and a general willingness among both lobbyists and clients to seek private gain at the expense of the public good.[18] Still others lamented a general public distrust of the lobbying system and noted the corrosive effect that distrust has on the functioning of democracy.[19] In short, concerns with lobbying seem to be both widespread and deep-seated, and concerns are expressed by both the public at-large and among practicing lobbyists.

A thorough examination of all the issues surrounding lobbying is beyond the scope of any single article; however, by examining one or two issues in detail, progress can be made. To this end, part I of this article surveys the major federal laws regulating lobbying activities and discusses the widespread legal freedoms enjoyed by both citizen lobbyists and paid lobbyists under current interpretations of the First Amendment. Part II then offers insights into the ethical exercise of those freedoms. In particular, it examines whether a paid lobbyist is ethically free to seek changes in the law that serve the client's interests, narrowly defined, or alternatively, whether the act of lobbying implies a social duty to cooperate with government officials in an effort to create reasonably balanced and just laws. Finding a duty to cooperate, the article examines how this duty could be implemented in differing contexts. The article begins with the legal framework.

I. Legal Framework

Several federal statutes directly address the practice of lobbying, including the Lobbying Disclosure Act of 1995[20] and the Ethics Reform Act of 1989.[21] The former seeks to reduce both corruption and the perception of corruption by shedding light on lobbying practices.[22] The latter addresses the so called "revolving door" between government service and lobbying, requiring a "cooling-off" period during which former government employees are prohibited from certain lobbying contacts.[23] Other relevant laws include rules addressing bribery and gratuities.[24] In addition, a recent Supreme Court case, *Nike, Inc., v. Kasky*, [25] provides insights into the law of fraud as it impacts on public relations activities. Of course, to the extent that any of these laws and judicial opinions restricts lobbying, the First Amendment will be at issue. The analysis begins with the Constitution and then discusses each area of lobbying law in turn. Part I closes with a summary.

A. Lobbying and the First Amendment

The act of lobbying implicates no less than three First Amendment protections: free speech, freedom of association, and the right to petition government for the

redress of grievances.[26] When people lobby, they typically associate with a group so as to speak with government officials about matters of public concern. It is not surprising, therefore, that most, if not all, governmental efforts to restrict lobbying activities must be justified on constitutional grounds.

Of the various rights implicated by lobbying, free speech clearly plays the leading role. Businesspersons, including lobbyists and their clients, enjoy First Amendment rights to free expression.[27] Under current Supreme Court interpretation, the extent of these rights depends on whether the lobbying activity is deemed to be "commercial" or "non-commercial."[28] If lobbying were deemed "commercial," then the "Central-Hudson test,"[29] a so-called middle-ground standard for constitutional review would apply.[30] Under this standard, regulations of otherwise lawful and not misleading speech must "directly advance" a "substantial government interest" and be "no more extensive that necessary" to meet that interest.[31] Restriction of non-commercial speech, by contrast, would be even more difficult to justify, with content-based regulations receiving full strict scrutiny. Under this standard, the lobbying regulation must be the "least restrictive means" to achieve a "compelling government interest."[32] Because lobbying involves communications with government officials with an eye toward affecting the law, it would almost certainly characterized as non-commercial, triggering strict scrutiny and making content-based regulations very difficult to justify.

Heightened scrutiny can also be triggered by the freedom of association. Association rights become relevant in a lobbying context whenever a disclosure statute or other lobbying regulation dissuades people from joining a group. For example, in *NAACP v. Alabama*,[33] the state sought to compel disclosure of the association's membership list. The NAACP argued that revealing the list could prove dangerous for its membership. The Supreme Court struck down the disclosure requirement reasoning that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[34]

The First Amendment right to petition government is also relevant in lobbying cases. Historically, "petitioning" referred to a particular way of asking for and receiving consideration of an issue.[35] Citizens in early America would submit petitions and Congress was constitutionally bound to respond.[36] Today the right is a bit of an anachronism. In fact, by the mid-nineteenth century, petitioning had proved impractical and the practice disappeared.[37] Yet, the right to petition retains its relevance to public relations activities as a supplement to free speech doctrine. After all, lobbyists express grievances to government, and if lobbying can be characterized as "petitioning," then lobbying takes on the qualities of political speech, rather than commercial speech, which, in turn, would trigger strict scrutiny. In fact, several U.S. Supreme Court decisions have expressly incorporated the right to petition into the doctrine of free speech.[38] Hence, the right to petition addresses lobbying, but as a supplement to speech doctrine, not as an alternative to it.

Taken collectively, the rights to speech, association, and petition suggest that most laws that regulate lobbying will trigger some form of heightened scrutiny.

As Justice Blackman directly stated in his concurring opinion in *Regan v. Taxation With Representation*,[39] "lobbying is protected by the First Amendment."[40] Of course, heightened scrutiny does not necessarily mean that a lobbying regulation is unconstitutional. Some lobbying regulations are constitutional. For instance, in *Regan* the court *upheld* a federal regulation denying tax-exempt status to organizations that do a lot of lobbying, reasoning that the government does not have to subsidize free speech.[41] Similarly, various regulations requiring public disclosure of paid lobbying activities at both the state and federal levels have typically been upheld.[42] For example, in *U.S. v. Harriss*,[43] a constitutional challenge to an early federal disclosure law, the Supreme Court expressly mixed together free press, speech, and petition rights to trigger First Amendment analysis, then relaxed the scrutiny emphasizing that disclosure does not prohibit speech but collects information.[44] The Court recognized that protecting the integrity of the political process is vital, concluded that the regulation was narrowly tailored, and then upheld the statute.[45]

In sum, the case law illustrates that lobbying is indeed protected under the First Amendment. The right to lobby, properly conceived, is a mix of rights, possibly implicating the rights of association, press, and religion, but resting primarily on the right to free speech, bolstered with references to a right to petition. Direct prohibitions on the content of political speech will almost assuredly fail constitutional scrutiny. If the lobbying activity is deemed to be commercial in nature, rather than political, or if the regulation affects only places time and place or requires disclosure, then a middle-ground constitutional test will apply. Yet, even under this test, the regulation will need to be carefully tailored to tread lightly on the First Amendment so as to survive a constitutional challenge.

B. Lobbying Disclosure Laws

Congress enacted the first comprehensive federal lobbying disclosure law about a decade ago by passing the Lobbying Disclosure Act of 1995 (LDA).[46] Section 1601 of the Act sets forth its purposes in three congressional findings:

> Congress finds that—
>
> (1) responsible representative government requires public awareness of the efforts of paid lobbyists to influence the public decision-making process in both the legislative and executive branches of the Federal Government;
>
> (2) existing lobbying disclosure statutes have been ineffective because of unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose; and
>
> (3) the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government.[47]

The first and third finding emphasize that disclosure is essential to reduce both corruption and the appearance of corruption too often associated with lobbying.

The findings reference concern with "paid lobbyists," including both lobbyists on K Street who work for a fee and lobbyists who work "in-house" on salary for a single organization. The ideas, of course, are that sunshine is the best disinfectant and that a public who suspects corruption needs information to see who is doing what with whom. The second finding emphasizes that federal disclosure laws preceding the LDA were ineffective.

Prior to 1995, there were two primary federal disclosure regulations: the Foreign Agents Registration Act of 1938 (FARA)[48] and the Federal Regulation of Lobbying Act of 1946 (Lobbying Act of 1946).[49] FARA was enacted to reduce the impact of Nazi propaganda on American foreign and domestic policy.[50] In 1966, it was amended to focus on business lobbying,[51] requiring lobbyists who represented foreign clients, including foreign corporations, to register with the U.S. Attorney General within ten days of contacting any federal official with the intent to affect government policy.[52] The Lobbying Act of 1946 was more ambitious in scope, requiring the disclosure of lobbying activities on behalf of both foreign and domestic clients. The Act, however, was poorly drafted and narrowly interpreted.[53] Ultimately it covered relatively few lobbyists. In fact, during the first three decades following enactment, there were only six prosecutions and one conviction under the Lobbying Act of 1946.[54] One commentator estimated that prior to passage of the LDA in 1995 and considering all federal disclosure laws combined less than 10 percent of federal lobbying activities were being disclosed.[55]

With enactment of the LDA, Congress sought to dramatically increase both the scope and the effectiveness of the pre-existing laws. Section 1602 of the LDA provides key definitions.[56] It defines a "lobbying contact" as a communication with a "covered official" with regard to public policy. It then defines a "lobbying activity" as an action "in support of" a lobbying contact.[57] "Covered officials" include legislators, legislative staff and executive branch officials. Lobbying contacts trigger registration requirements; lobbying activities must be disclosed.[58] In short, the scheme is fairly comprehensive and seems to be much better drafted that the legislation it replaces.

Due to the LDA, today it is much easier to estimate the money spent on federal lobbying than it was just ten years ago. As evidence, consider the recent comments of Joan Claybrook, president of Public Citizen, a public interest group that monitors governmental activities.[59] Claybrook recently commented that approximately 60 percent of registered lobbyists represent corporate interests, but that they spend well in excess of 90 percent of the money.[60] She then noted that in a recent two year span the pharmaceutical industry spent in excess of $180 million lobbying the federal government. Among the pharmaceutical industry lobbyist were "front groups" called the United Senior Association and Citizens for Better Medicare. Claybrook then emphasized that access to this information was the direct result of the LDA passed in 1995.[61] Prior to that time, the data simply was unavailable.

Of course, disclosure will not solve all of society's concerns with lobbying.[62] So long as money buys access, society must always remain concerned that the playing

field is uneven. And disclosure is not cost free; it takes time to fill out reporting documents, and someone has to collect, organize and store the records. But given the current concerns with special interests groups dominating Washington, it would seem that disclosure is unambiguously a step in the right direction. Perhaps as equally important, the Supreme Court has held that disclosure requirements do not violate First Amendment rights.[63] Hence, disclosure provides at least one constitutional tool for directing lobbying activities.[64]

C. Lobbying and the Revolving-Door of Post-Government Employment

A second area of federal law affecting lobbying involves post-government employment restrictions. It has been a common practice for government officials who leave public service to take employment as lobbyists, lobbying before the executive agencies or legislative committees on which they previously served.[65] The practice is unsightly for a number of reasons. First, it accentuates the perception that Washington is an insider's game from which ordinary citizens are excluded. Second, and perhaps more importantly, it suggests influence peddling. Government officials who know that they may soon leave government have an economic incentive to give favors to potential employers.[66] The appearance of a potential quid pro quo is particularly troublesome.

Congress addressed this so-called revolving-door problem in both the Ethics in Government Act of 1978[67] and the Ethics Reform Act of 1989.[68] Passed in the wake of Watergate, the Ethics in Government Act of 1978 was the first legislation introduced by the Carter Administration. Among other things, it provides for a one-year "cooling-off" period during which executive branch officials of GS-17 or higher are prohibited from lobbying contacts with employees of the agency for which the official worked.[69] The Ethics Reform Act of 1989 expanded the revolving-door prohibitions to include the legislative branch. It provided, among other things, for a one-year cooling-off period, during which former members must not lobby members or staff of either chamber,[70] and a one-year cooling off-period during which congressional staffers must refrain from contacting the employing member or committee for which the staffer previously worked.[71] In addition, former members, legislative staff, and certain executive branch officials are prohibited for one year from certain lobbying contacts on behalf of foreign governments.[72]

As soon as these revolving-door reforms were enacted they were attacked as inadequate.[73] It seems that the restrictions have a number of "loopholes." For example, while former members and staff are restricted from certain "lobbying contacts," the legislation permits "lobbying activities." Under the statutory scheme, permissible lobbying activities include any and all public relations tasks other than the direct contacts associated with lobbyists as "contact person." Hence, former members and staff can effectively skirt the regulatory scheme by directing lobbying strategy, promoting grass-roots campaigns or coordinating media activities, while allowing others to make the personal contacts of former colleagues, committees, and departments.[74] One study published in 1993 and critical of the practice showed that

about half of all top committee aides leaving Congress since 1988 were engaged as lobbyists.[75] Similarly, an April 1993 issue of *Congressional Daily* reported that of the 121 members leaving Congress following the 1992 election, forty were already involved in lobbying just three months later.[76] Keeping the issue before the public, the 1992 presidential debates featured discussions of lobbying reform, particularly with regard to the influence of "foreign lobbyists,"[77] and on his inauguration day, President Clinton signed an executive order applying more stringent lobbying restrictions to his top 1100 political appointees.[78]

On the first day of the 103rd Congress, Senators David Boren and John McCain introduced a bill intended to close the loopholes in the post-government employment regulations. Senate Bill 420 proposed to reform the Ethics Reform Act of 1989 by lengthening the various cooling-off periods, expanding the list of officials to whom the restrictions apply, and broadening the scope of restricted practices to include activities in support of lobbying.[79] The Bill passed the Senate in 1993 but failed in the House.[80] Thus far, the Bill has not been reintroduced.

In short, the Ethics Reform Act of 1989, complete with its "loopholes," remains the law of the land with regard to lobbying employment restrictions. In spirit, the Act recognizes the need to remove the appearances of and incentive for corruption caused by post-government employment practices. However, the letter of the Act is weak, and post-government employment lobbying remains common.

D. Other Laws Affecting Lobbying

Although registration/disclosure and post-government employment provisions provide core elements of the legal framework regulating lobbying, other laws are applicable as well. Of particular interest to lobbyists are a set of laws defining and prohibiting bribery and another set regulating the giving of honoraria, gifts, and gratuities. Also of interest are legal rules relating to truth telling, including the laws of perjury and fraud. Each of these issues, as it applies to lobbying, is discussed in turn.

1. Gifts, Honoraria, Bribery and Unlawful Gratuities

Lobbyists interact with government officials in various settings and in a number of ways.[81] Sometimes they meet over meals or at banquets and other social engagements. At times the government official may be a guest speaker. In these and other settings, gifts may be given and meals paid for. Care must taken not to run afoul of congressional rules regarding gifts and honoraria or the more generally drawn statutory prohibitions against bribery and the giving of unlawful gratuities.

First consider rules regarding gifts and honoraria. Congressional rules set monetary limits on gifts. Senate rules provide that members, officers, and employees may accept gifts valuing up to fifty dollars with a total of one hundred dollars from any one donor.[82] House rules bar gifts of any value.[83] These rules, however, have many exceptions, which some in the press have labeled "loopholes."[84]In a similar vein, the Ethics Reform Act of 1989 seeks to eliminate the appearance of impropriety associated with unsightly honorarium. One commentator writes: "We got rid of

honorarium in 1989. It used to be that a member of Congress could be asked by the Trucking Association to come down the street and give a breakfast talk for ten minutes and get paid $2000, which he puts in his pocket."[85] Again, the issues seem to be corruption and, perhaps as importantly, the appearance of corruption.

Two federal criminal statutes, one prohibiting bribery and the other unlawful gratuities, are relevant in the public relations context as well. The bribery statute prohibits giving, promising, or offering "anything of value" to a member of Congress or other public official with the "intent to influence any official act."[86] The anti-gratuity statute prohibits the giving of "anything of value" to a public official "for or because of any official act performed or to be performed" by the public official. The gratuity statute was at issue in *U.S. v. Sun-Diamond Growers of California.*[87] Sun-Diamond, which lobbied on behalf of producers of raisins, figs, and nuts, was indicted for giving the Secretary of Agriculture gifts valued at about $6000 (sports tickets, meals, and a crystal bowl). The indictment did not allege a quid pro quo (as would be required for bribery), but it did specify that at the time of the gifts, the Secretary was considering matters in which the fruit and nuts growers had an interest. The District Court jury convicted Sun-Diamond of violating the anti-gratuity law, the D.C. Circuit reversed on the basis of faulty jury instructions, and the Supreme Court upheld the reversal.[88] The case illustrates the imprecise nature of the anti-gratuity statute and the corresponding need for professional judgment to avoid the appearance of impropriety.

Navigating around bribery and anti-gratuity statutes becomes particularly tricky whenever a lobbyist is discussing campaign contributions. In their oft-cited book, *Lobbying Congress: How the System Works*, Bruce Wolpe and Bertram Levine describe the dilemma.[89] They write: "Bribery is the most serious crime that can afflict the legislative process. A lobbyist must never discuss a financial contribution in the context of legislation. Telephone conversations and meetings must be parsed into separate discussions, to keep these matters fully divorced."[90] Of course, in many situations this advice is more easily given than followed. It would seem that avoiding impropriety or the appearance of impropriety in the presence of vague and seldom enforced criminal statutes and under the corrupting influence of pecuniary self-interest would require both moral courage and seasoned professional judgment.

2. Truth-Telling

Another interesting issue surrounding lobbying involves the law and ethics of telling the truth. Lobbyists provide information to policymakers. The question arises as to the legal consequences of lying, concealing or obfuscating. Of course, if the information is given under oath, then federal perjury laws become applicable. But most information is not under oath. Perhaps a fraud standard would apply, but even here there are difficulties. For example, common law fraud can be defined as an intentional or reckless statement of material fact reasonably relied upon causing injury.[91] Under this standard, it appears uncertain that a legislator who is lied to would have standing to sue because he or she arguably would suffer no injury. In

fact, there does not appear to be any federal law that directly prohibits a lobbyist, either paid lobbyist or citizen-lobbyist, from lying to a legislator.

It is unclear as to how prevalent intentional misdirection and obfuscation is within the lobbying industry. The differing opinions of two lobbyists frame the debate.[92] One lobbyist offered a fairly optimistic view: "You can't lie; what you've basically got is your word and reputation."[93] The more pessimistic stated: "In my experience, both corporations and nonprofits can be untruthful in their lobbying efforts. And it isn't just about withholding damaging information. It's about actively presenting distorted or dishonest information. I worry that it has become appropriate in D.C. for lobbyists to flat-out lie."[94]

The issue of truth telling arose recently in the widely publicized case of *Nike, Inc., v. Kasky*.[95] Although the *Kasky* case does not involve lobbying, it highlights the potential for deliberate misrepresentations in public-relations campaigns in which lobbying may be a component. Nike's management conducted a public-relations campaign that included letters to newspapers, university presidents, and athletic directors stating that Nike did not use sweatshop labor or other unsavory labor practices.[96] Kasky, a concerned citizen, sued pursuant to a false advertising statute.[97] Nike demurred, arguing that because the communications were "non-commercial," any application of a content-based restriction, including the false advertising regulation in question, would be barred by the First Amendment.[98] In essence, Nike claimed a constitutional right to lie in public-relations campaigns. Both the trial judge and California Court of Appeals sustained Nike's demurrer.[99] The Supreme Court of California reversed and remanded in favor of Kasky.[100] The U.S. Supreme Court first granted and then declined certiorari.[101] Ultimately, the case was settled for $1.5 million, with the money donated to a Washington public interest group that monitors labor practices.[102] The sum represents less than Nike's average daily advertising budget.[103] The case was never subjected to discovery nor tried on the merits.[104]

The *Nike* case illustrates the difficulty in regulating the truthfulness of assertions made within public-relations campaigns. Ultimately, the case turned on whether Nike's speech was characterized as commercial or non-commercial; a question upon which the California Court of Appeals and California Supreme Court differed. Lobbying, by contrast, would seem to reside squarely in the *non-commercial* camp and under current law, non-commercial speech, particularly politically motivated speech, receives considerable constitutional deference. In short, if it is constitutionally difficult to regulate the truthfulness of the content of a letter to a school athletic director, then it would seem even more difficult to regulate the truthfulness of a letter to a Congressperson. In this light, the truthfulness of lobbying activities will have to depend on the lobbyist's desire to preserve his or her reputation for honesty and on personal ethics, perhaps monitored by non-governmental organizations and the press, rather than on direct legal regulation.

E. Summary

The above survey of the law demonstrates that lobbyists have been entrusted with wide latitude in determining who, what, when, where, and how to lobby. This is largely true because of the societal respect afforded to First Amendment liberties. Whether one characterizes the right to lobby as a free speech right, a right to petition the government, or as an amalgam of the two, it is clear that lobbying and lobbyists enjoy First Amendment protections. Hence, the government is constitutionally constrained in regulating lobbying.

The legal analysis also demonstrates that the various substantive areas of the law that address lobbying are more often than not conflicted, gap riddled, and/or poorly enforced. For example, revolving-door legislation provides for cooling-off periods, but currently applies only to direct lobbying contacts and not to other public-relations activities. Hence, the revolving door remains ajar, leaving both an incentive for and the appearance of inside dealing. Similarly, bribery law makes it illegal to give, offer, or promise anything of value in exchange for a public favor; yet, regulators routinely leave government to work for companies that they previously regulated. Although not technically a bribe, the economic incentives to act with favor for one's future employer would seem hard to resist. In addition, there appears to be no federal law that directly prohibits a lobbyist from lying to a legislator.

For better or worse, the primary means of regulating lobbying activities currently resides in public registration and disclosure statutes. Perhaps sunlight is indeed the best way to assure public confidence in the lobbying process. Although disclosure regulations do not directly address the issues of who, what, when, where, or how, the public information that reporting provides could have much the same effect. In the end, whether a lobbyist cooperates with the policies that underlie lobbying regulations or feels free to exploit regulatory loopholes and constitutional freedoms will largely depend on his or her personal values and ethics. It is to these questions of ethics that the discussion now turns.

II. Ethical Framework

Several attempts have been made to specify the ethical norms associated with the practice of lobbying.[105] One particularly thorough and insightful study, recently published by the Woodstock Theological Center at Georgetown University (Woodstock Study), develops and defends seven principles (Woodstock Principles) designed to give ethical guidance and advice to practicing lobbyists.[106] Although the Woodstock Study does not purport to give the final word on the subject, it offers a useful survey of ethical issues together with a framework upon which to base further analysis. The present discussion begins with a brief presentation and a general assessment of the Woodstock Principles collectively, and then uses this discussion as a base from which to focus on a single query. Is lobbying an appropriate venue for self-interested competition through which a lobbyist seeks to shape the law for private gain, or does a lobbyist owe a civic duty to cooperate with public officials

to advance the public good? Before turning to this query, the discussion begins with the Woodstock Principles generally.

A. The Woodstock Principles: A General Assessment

The Woodstock Study resulted from a three-year effort by a team of researchers sponsored by the Woodstock Theological Center, a non-profit research institute.[107] The self-described mission of the Center is "to engage in theological and ethical reflection on topics of social, economic, and political importance."[108] The Center conducts seminars and conferences, and supports research that has led to a series of articles and books examining the ethical dimensions of public policy issues. Previous works published by the Center include: *Ethical Issues in Corporate Takeovers* (1990), *Ethical Considerations in Business Aspects of Health Care* (1995), and *Ethical Issues in Managed Health Care Organizations* (1999).[109] The Woodstock Study on lobbying cites three motivations: (1) lobbying is increasingly prevalent and important, (2) public distrust of lobbyists is currently high and growing, and (3) lobbyists need standards of professional conduct parallel to those provided by the "American Medical Association and the American Bar Association."[110] Ultimately, the Woodstock Study seeks to offer ethical advice and counsel that practitioners will find useful in resolving ethical conflicts.

The Woodstock Study is organized and presented in four parts.[111] The first part is "empirical," with the authors reporting the findings of numerous interviews and focus-group discussions conducted with Washington lobbyists.[112] Part two then organizes this empirical information, asking such questions as who is doing what with whom and to what result?[113] In part three, the authors briefly discuss four ethical traditions: (1) Aristotelian "virtue ethics," (2) "rule-oriented ethics" derived from "Hebrew Scripture;" (3) a "prophetic tradition" oriented to helping the "poor and powerless;" and (4) a "democratic tradition" emphasizing individual equality.[114] The authors then use these four traditions to evaluate current lobbying practices. In part four, the authors propose "action;" in particular, they offer a set of seven principles intended to provide practical guidance to members of the lobbying industry.[115]

Each of the seven Woodstock Principles has several subparts. The principles, without the subparts, provide:

1. The pursuit of lobbying must take into account the common good, not merely a particular client's interests narrowly considered.
2. The lobbyist-client relationship must be based on candor and mutual respect.
3. A policymaker is entitled to expect candid disclosure from the lobbyist, including accurate and reliable information about the identity of the client and the nature and implications of the issues.
4. In dealing with other shapers of public opinion, the lobbyist may not conceal or misrepresent the identity of the client or other pertinent facts.
5. The lobbyist must avoid conflicts of interest.

6. Certain tactics are inappropriate in pursuing a lobbying engagement.
7. The lobbyist has an obligation to promote the integrity of the lobbying profession and the public understanding of the lobbying process.[116]

Taken collectively, the Woodstock Principles are very comprehensive. In fact, when read in conjunction with their subparts, they address virtually every contingency facing the lobbying industry. For example, Principle 6 states that "certain tactics are inappropriate." The details are found in four subparts. The second subpart condemns "attacks on a person's character" (character assassination); the third forbids the use of "phantom issues" (red herrings) to divert attention from the actual effects of legal changes.[117] Although both character assassinations and red herrings could be effective, neither is appropriate. Thus, even if the Principles seem vague, when read in conjunction with the subparts, they become both clear and comprehensive.

On first blush, the Woodstock Principles may read like bold and unsupported assertions. Note, however, that these "assertions" were produced through a self-conscious process whereby data was collected, organized, and reflected upon with open dialogue throughout. The assertive quality of the Principles derives most directly from the evaluative step of the study. In that step the authors identify and *accept* four "ethical traditions," including a "prophetic tradition" to "speak on behalf of the poor and powerless,"[118] and a "democratic tradition" that emphasizes "equality of voice in resolving disputed public questions, and concrete equality of opportunity in the pursuit of a meaningful life."[119] It would seem that once one accepts these traditions as axiomatic, all that remains are the pragmatic questions: (1) how best to resolve conflicts among traditions so as to identify proper goals, and (2) how best to achieve those goals once identified. In this light, the articulation and embrace of specific traditions, such as prophetic and democratic, and the potential for ignoring other traditions, such as utilitarian or libertarian, seemingly plays a crucial role in the advice given.

In summary, the Woodstock Study provides a very comprehensive set of principles. Of course, these principles do not carry the force of law and ultimately their persuasiveness depends on the strength of the arguments articulated in support. Simply asserting that a lobbyist should do one thing and not another will not suffice. One needs to inquire into the basis of any such assertion. To this end, the following section examines the first Woodstock Principle in some depth, exploring the source and scope of a lobbyist's duty to use lobbying as a means to advance the common good.

B. Duty to Create Reasonably Balanced and Just Laws

The present inquiry into lobbying ethics now focuses on a fundamental question with regard to a lobbyist's civic duties. *Is lobbying an appropriate venue for self-interested competition through which the lobbyist seeks to shape the law for private gain, or does a lobbyist owe a civic duty to cooperate with government officials to advance the public good?* To advance the analysis, this section fashions

a debate, beginning with an expansive view of a lobbyist's civic duties, followed by a restricted view, and concluding with an assessment and partial synthesis of the competing views.

The debate assumes throughout that a paid lobbyist has a duty of fidelity to do the client's bidding and that a lobbyist should be loyal to that duty. However, the analysis also recognizes the truism that a client, as principal, cannot ethically authorize a paid lobbyist, as agent, to take an action that the client could not ethically take. Hence, if the client owes a duty to cooperate with public officials, then so too does the paid lobbyist. This is true whether the lobbyist comes from K Street or is employed in-house. In this light, the paid lobbyist's civic duties are at least as broad as the client's civic duties if the client were to lobby on his or her own behalf and one can speak of the civic duties owed by the various types of lobbyists interchangeably. Recognizing this truism removes agency issues and focuses attention on the civic duties owed by people of influence and power regardless of their status. Although the ethical issues surrounding the agent-principal relationship can be interesting, the more fundamental question inquires into the ethical issue owed by the principal, or alternatively, by the citizen-lobbyist. The discussion begins with the expansive view of those duties.

1. The Woodstock View: Lobbyist as Public Citizen

The Woodstock Principles unambiguously support the notion that a lobbyist owes a robust civic duty to promote the "common good" of society. Principle 1 boldly asserts: "The pursuit of lobbying must take into account the common good, not merely a particular client's interests narrowly considered."[120] The authors support this assertion by explaining that a "genuine commitment to the common good . . . by clients, lobbyists, and policymakers, is essential if the integrity of American democracy is to be preserved."[121]

The Woodstock authors also recognize the natural human tendency to seek self-interest. Reflecting on the social aspirations and moral values that underlie law, the authors insist that lobbyists must cooperate with the spirit of the law and help public officials promote the common good. They write:

> In a culture that celebrates the pursuit of self-interest and individual and corporate success, the spirit of law, which properly looks to the common good, directly conflicts with the operative tendency to shape and apply existing rules in a way that favors private and partisan interests. This traditional conflict which is inseparable from politics explains why civic virtue is so important in public life. Civic virtue disposes those who make and influence public decisions to think, speak, and act on behalf of the commonweal.[122]

The above quote suggests that there is something unique about the spirit of the law that requires both cooperation with public officials and self-imposed restraints on the pursuit of self-interest.

Reflecting on the nature of law, there does seem to be something of ethical significance afoot. In the marketplace, businesspeople are expected, and typically even encouraged, to compete on such things as product quality, price, and cus-

tomer satisfaction. The buyer is encouraged to get the lowest price, the seller to seek the highest. As a matter of public policy, the focussed pursuit of self-interest in a marketplace is generally a good thing, not bad. By contrast, when lobbying for legal change, a single-minded pursuit of self-interest untempered with concern for the common good seems inappropriate. It seems inappropriate in part because law implicates the use of force, not choice, as one would find in a marketplace. It also seems inappropriate because ideally law reflects, or at least seeks to reflect, the social aspirations of a democratic society. Given these distinctive qualities of law, perhaps when lobbying for legal a change, marketplace norms of self-dealing become out of place.

First, consider the ethical implications associated with the use of force or violence. Recall that this article began by defining lobbying as a "deliberate attempt to effect or to resist changes in the law."[123] Law, of course, is backed by force. If one disobeys, a police officer may arrive at one's door armed with both billy club and cuffs.[124] Force, in turn, requires justification, and it would seem that the selfish pursuit of material self-interest is unlikely to suffice. To justify force against one's fellow man, one needs a higher principle than one's own self interest.

Legal philosophy offers various justifications for the use of legal force. Consider, for example, the justification offered by a natural law perspective. Natural law philosophy asserts that one cannot separate legal and moral inquiries.[125] Moreover, when person-made law and moral law conflict, one must reform person-made law to conform to morality. Natural law presupposes that there are moral principles of right and wrong and insists that person-made laws conform to these principles. Of course, a lobbyist who adopts a natural law perspective would not be free to use the law as a competitive weapon for personal gain. Instead, moral judgments and a corresponding concern with the common good would guide his or her lobbying efforts.

Although the natural law perspective remains a minority view, most legal philosophers admit that law has, or at least should have, some justifying referent beyond the exercise of pure power.[126] Consider, for example, legal pragmatism.[127] Pragmatists view law as an instrument of social policy, with policy goals identified through an open dialogue with all affected stakeholders.[128] Both the goals and the laws designed to achieve those goals are re-evaluated in the light of experience. If a given law fails to achieve its goal, or the goal changes, then the law is changed. [129] Law takes on an organic quality, ever evolving. The process is somewhat complicated, messy, and imprecise; but ultimately, it is rooted in creative moral reflection, open dialogue, and democratic consensus. This democratic process gives law legitimacy and justifies the use of force to exact obedience.

The Woodstock Study seems to embrace a pragmatic view of law. With regard to the regulatory process, the authors write:

> Public policy formation is a fallible but self-correcting process whereby ordinary citizens and their elected representatives seek to rise above private interests and desires to discern what is good for the country as a whole.

> This enlarged, public-spirited mentality is the hallmark of genuine political thinking. It is an essential part of civic virtue and a basic requirement for a sustainable democratic society.[130]

Reflecting legal pragmatism, the above quote offers an optimistic view of both government officials and the content of most regulatory laws. This view, consistent with the "Public Interest Theory" of regulation, casts both law and regulators in positive lights.[131] Regulators regulate in the public interest and regulations reflect the aspirations of a democratic society. In such a world, lobbyists are expected to cooperate with the regulatory process.

Although few political philosophers have directly addressed the topic of whether a citizen has a duty to help government officials *create* reasonably just laws, there is a fairly sizeable literature addressing the duty to *obey* law once it is enacted.[132] Most political philosophers support a duty to obey reasonably just laws. Most often this duty is defended with some variant of social contract reasoning.[133] John Rawls takes a different tack, grounding an obligation to obey law, not to a hypothetical social contract, but to a fundamental duty to support reasonably just institutions.[134] Of course, if a duty to support just institutions generates an obligation to *obey* laws once enacted, then this same duty would seem to support an obligation to *create* reasonably balanced laws as well. In this light, responsible businesspeople should see themselves as partners who cooperate with government officials in setting regulations. The lobbyist who accepts the norms of cooperation and partnership works with government officials with an eye on the common good.

In sum, the authors of the Woodstock Study side squarely with the proposition that lobbyists (both paid lobbyists and citizen lobbyists) have an ethical obligation to lobby in favor of reasonably balanced and socially minded laws. This obligation derives from the unique character of law. Although businesspeople typically are encouraged to seek self-interest in the marketplace, the lobbying for legal change is a not a proper venue for wholly self-serving action. This is because law implicates force, not choice, and because ideally law embodies social aspirations. Recognizing both the public interest underpinnings of regulatory law and a fundamental duty to support just institutions, lobbyists are expected to consider the public good when engaging in lobbying activities.

2. An Alternative View: Lobbyist as Advocate

Perhaps the chief alternative to the Woodstock view is to claim agnosticism and to fall back on the procedural justice of client advocacy. In this light, consider the words of Thomas Susman, a partner in the K Street law office of Ropes & Gray and former chair of the American Bar Association's Committee on Legislative Process and Lobbying. Recently asked to comment on the Woodstock Study, Susman challenged the workability of the first Woodstock Principle, and particularly the notion of a "common good." He stated:

> I have trouble with the concept that there is an immutable common good that provides a measurable guidepost for lobbying activity. I think it fair to

> propose that members of Congress remain faithful to the goal of promoting the common good, as well as the well-being of a constituency. But is it my job, as a lobbyist, to determine whether the common good is best served by cheap power provided by hydroelectric plants that can make electricity more readily available to the poor, or by maintaining pristine waterways? I think that's Congress's role, not mine.[135]

In essence, the above comments reflect an "advocacy model" of lobbying, wherein the lobbyist has little or no direct concern with the justice of the view being advocated. Apparently Susman would be equally at ease lobbying for or against the hypothetical hydroelectric plant he cites with little or no reference to what he perceived to be the common good. Other practicing lobbyists seem to share this view. For example, one lobbyist succinctly states: "My job is to advance the interests of my association or client. Period."[136] The quote fails to recognize any concern with the legitimacy of the client's interests. Again, the idea seems to be that Congress, much like a judge in a court of law, will protect the common good and the lobbyist is free to promote the client's selfish pursuits supposedly checked by an equally aggressive advocate lobbying for the opposing side.

An advocacy view of lobbying also seems to pervade the Code of Ethics promulgated by the American League of Lobbyists (ALL), a self-described "national professional association dedicated exclusively to lobbying."[137] Comparing the ALL Code with the Woodstock Principles several interesting contrasts appear. Most strikingly, whereas the Principles are permeated with civic duties and commitments to the common good, such references are completely absent in the ALL Code. Contrasts also appear in sections dealing with the client relationship. The Woodstock authors insist that clients cannot authorize agents to behave in unethical ways. Hence, they note that a lobbyist must use independent judgment and refuse "to undertake an assignment or continue with an assignment from a client [unless the lobbyist is satisfied that] the client is committed to acceptable ethical standards."[138] By contrast, the ALL Code envisions no such censoring role, stating only that "a lobbyist should vigorously and diligently advance and advocate the client's or employer's interests, and, to the extent possible, should give the client the opportunity to choose between various options and strategies."[139]

The advocacy model of lobbying, as reflected in Susman's quote and articulated more fully in the ALL Code, seems to assume that self-interested competition between competing interest groups can lead to acceptable social results. Consistent with the "Pluralist Theory" of regulation popular in the 1950s, the idea is that so long as all stakeholders are heard, no single stakeholder need be concerned with the public good because the *process* will generate a socially acceptable outcome.[140] In such a world, lobbyists are free to focus solely on how to change the law to serve their own interests, with no direct duty to seek socially balanced laws, and K-Street lobbyists are free to espouse Susman's brand of social agnosticism.

The difficulty with the pluralist view, of course, is that affected stakeholders sometimes do not take part in the lobbying process. Beginning in the 1960s, politi-

cal scientists writing under the rubric of Public Choice explained how the logic of collective action leads to the systematic over-representation of some interests groups in favor others.[141] It seems that lobbying has costs and these costs will only be worthwhile to an individual or group if the benefits of lobbying are direct and substantial to that individual or group. According to Public Choice Theory, this economic logic results in a set of regulations that systematically favors the politically well organized with narrow interests at the cost of the common good. In this light, the pluralistic view seems at least somewhat naïve.[142]

Economists offer a particularly pessimistic view of the regulatory process under the so-called Capture Theory.[143] According to the Capture Theory, businesspeople use regulatory law to secure private gain, most notably through erecting barriers to entry that secure economic rents.[144] They achieve these gains, in part, by controlling the flow of information that government officials receive through lobbying.[145] Influence is also achieved through the perverse incentives created by the so-called revolving door of regulation whereby regulators are drawn from firms whom they regulate and return to those firms upon completing their term of public service.[146] According to the Capture Theory, these perverse incentives together with the control of information provided by lobbyists result in a set of regulations (e.g., rate controls, product standards, licensing requirements) that mirror those created by economic cartels.[147]

The social science views associated with Public Choice and the Capture Theory have dominated the regulatory literature over the past thirty years or more. Reflecting on these theories one is struck by the cynical view of law that they espouse. Under either theory, much of regulatory law lacks social purpose or moral underpinning. Law is simply a command of the sovereign and backed by force. When combined with the traditional economic assumptions regarding self-serving and rational behavior, the models predict that lobbyists will use legal reforms to secure private pecuniary ends, rather than to serve the common good.

Of course, both Public Choice and the Capture Theory offer positive descriptions of how the regulatory process works, rather than normative prescriptions of how it ought to work. The models suggest that given the logic of collective action, some stakeholders are more likely to be heard than others. The difficult *normative* question for a lobbyist is what should be done if one finds oneself in a position of advantage. It seems that so long as all sides of an issue are represented, advocating one's self interest without direct reference to notions of the common good may be ethically defensible. Perhaps this is what both Susman and the authors of the ALL Code had in mind. But what if, given the logic of collective action, no one is arguing for the other side? In such situations, is one ethically free to exploit the regulatory process for private gain? Ultimately the answer to this ethical question depends on the factual nuances of the particular case and specific context in which the lobbying occurs. The discussion now turns to these issues.

3. Finding a Synthesis: The Relevance of an Adversarial Context

Comparing the Woodstock perspective with the advocacy model discussed in the previous section, perhaps one can find a degree of truth in each. Consider first the Woodstock proposition that unbridled competition is inappropriate in a lobbying context. According to this view, unbridled competition may make ethical sense in the economic realm where the seller's desire for the highest price is checked by the buyer's desire for the lowest. It may also make sense in a court of law where counsel represents both sides. But in a lobbying context, where all sides may not be heard, pursuit of unbridled self-interest may appear to be an exercise of power and privilege. From the Woodstock perspective, ethical self-restraint and commitment to the common good are not a matter of choice for lobbyists; they are indispensable to the functioning of a democratic society.

The Woodstock argument is bolstered by the notion that law encompasses an element of force. In essence the lobbyist is seeking to use the law to *force* a fellow citizen to behave in ways he or she otherwise would not. This use of force requires ethical justification. Comparing the natural law and pragmatic justifications associated with the Woodstock view with the positivistic power perspective associated with Public Choice and the Capture Theory, the former must be preferred. To legitimize political power and the use of force, one needs either moral principles or democratically determined social values. Power cannot be its own justification. In this light, the Woodstock proposition that a lobbyist "must take into account the common good" seems well supported, and perhaps even undeniable.

Yet, the practical questions remain as to how the "common good" is to be both identified and achieved. This, in turn, may depend on context. Several authors have argued that the advocacy rules contained in the *Model Code of Professional Responsibility*, adopted by the American Bar Association (ABA) in 1969, or *Model Rules of Professional Conduct*, adopted by the ABA in 1983, could be adapted to the lobbying industry. One author has suggested selective incorporation of the ABA advocacy rules designed to guide "non-adjudicative proceedings."[148] Another has proposed adapting ABA conflict-of-interest rules to the lobbying context.[149] The suggestion in each of these proposals is that the practice of law is sufficiently similar to lobbying to adapt the rules of the former to the latter. The difficulty with this comparison, however, is that law is practiced within an *adversarial context*, this may or may not be true with regard to lobbying.

The judicial system is unabashedly adversarial. The system provides for an attorney acting the part of zealous advocate on both sides of the issue at hand. The attorney is ethically remiss if he or she falters even slightly in the dogged pursuit of the client's interests. The system has been crafted to achieve a legitimate synthesis of views. All parties argue before an impartial judge and/or jury, putting forth evidence and challenging the evidence put forth by their adversaries. A record is kept and an appeal is possible. *Ex parte* communications with either judge or jury are strictly forbidden. Cumulatively, the system represents an ethical and civilized way to handle disputes and controversies. It provides a mechanism for defending the rights and interests of

all parties and typically provides reasonably just results. Given the fairness of the process, zealous advocacy of self-interest appears entirely appropriate.

The problem with analogizing the practice of law to the practice of lobbying is that lobbying is not always conducted in an adversarial setting. Often there is no advocate representing the other side of the issue. In addition, communications between lobbyist and legislative staff are not subject the rules of evidence and may be very informal and private. *Ex parte* communications are common. There is no guarantee that the public official will be unbiased, no formal record, and no formal means for appeal. All these distinctions suggest that the notion of "zealous advocacy," which may be a virtue in a court of law, may become a vice in a lobbying context.

This is not to mean that the advocacy model offered by Susman and ALL Code is wholly misapplied to the practice of lobbying; rather, it suggests that one needs to take into account the context in which specific lobbying activities are occurring, and tailor one's pursuit of self-interest accordingly. In some contexts, for example, all parties are represented and evidence is presented in open forums under the spotlight of public concern. Here, advocacy of self-interest, rather than advocacy of the common good, is probably permissible and perhaps even required. For example, consider the public nature of current lobbying efforts aimed to open (or close) Alaskan reserves for gas exploration or the current public debate over embryonic stem cell research. In such highly publicized and open debates, a lobbying model that encourages both sides to argue in opposite directions and leaves it to Congress to serve as the ultimate arbiter of the common good makes sense. In such contexts, there is no need for a lobbyist to be directly concerned with the common good, because, as in a court of law, the *system* produces reasonably balanced and just laws.

In other lobbying contexts, however, the notion of individual advocacy and the corresponding lack of concern with the common good cannot be defended. For example, suppose a legislative body is considering modifying the licensing requirements for morticians and that morticians have a trade association complete with a legislative liaison and an in-house lobbyist. The morticians find that they are the only ones lobbying the legislature. The press and public have no interest and legislative staff members addressing the licensing standards have relatively little information or expertise. The morticians quickly discover that they have an opportunity to use the licensing requirements to restrict entry into the industry and thereby generate monopoly rents. In other words, it is in the group's economic interests to set the standards at a higher level that would be dictated with sole reference to health and other public concerns. The question is whether the morticians are ethically permitted to seek the higher standard? The answer, of course, is a resounding "no." Notwithstanding Public Choice and Capture Theory predictions that they will do so, citizens do not have the ethical authority to use the public policy process to subvert the common good. Freedom of occupational choice is seen as a good, and restrictions on that freedom can only be justified with reference to another good

such as public health, not with reference to the private desire of a vested interest group to reap selfish material gains.

The above examples illustrate that the advocacy model articulated by Susman and the ALL Code carries ethical weight only in an *adversarial* setting. In adversarial settings such as a court of law or possibly in high profile lobbying settings such those involving Alaskan oil or embryonic stem cell research, the lobbyist, like the lawyer in a courtroom, is expected in argue only one side of an issue. In adversarial contexts, zealous advocacy is the norm. But absent the adversarial context, as in the mortician licensing example, arguing for only one side while ignoring the duty to create reasonably balanced and just laws becomes indefensible. In such settings, any lobbyist who claims that his or her ethical obligations are limited to the single-minded advance of a client's narrow interests engages in self-delusion or self-serving rationalization, not defensible moral reflection.

How then is the lobbyist to identify the common good? At times, perhaps a commitment to the common good may be met with sole reference to the procedural values associated with the advocacy norm – full and open dialogue with all affected stakeholders. This notion of public dialogue as a means of moving toward the common good lies at the heart of the civic republican movement popularized in the 1980s.[150] The commitment to dialogue may very well presuppose substantive values as well, such as human flourishing, peace, and goodwill that can provide the teleological goals that the dialogue seeks.[151] The procedural commitment can also be substantive in the sense that it recognizes the inherent worth of others.[152] But if there is no one with whom to dialogue, then what is the lobbyist to do? Without an opportunity for meaningful dialogue, it would seem that the lobbyist must reference a substantive vision of the common good directly and lobby for a legal change that has the best chance of achieving that vision.

Alternative visions of the common good have been debated for centuries.[153] To a classic utilitarian like Bentham or Mill the common good was best conceived as an aggregate sum of pleasure (Bentham) or happiness (Mill) of all the members of a society.[154] A liberal such as John Rawls, by contrast, would likely scoff at the teleological basis of the utilitarian conception, arguing instead that the common good refers to the conditions that promotes and supports cooperation toward privately defined and idiosyncratic pursuits.[155] A natural law thinker like John Finnis, though more sympathetic to teleological ends than the liberals, would eschew the single metric offered by utilitarianism and ground the common good in such pluralistic values as friendship, peace, and human flourishing.[156] In short, there is a variety of perspectives on how best to conceive of the notion of common good and no single vision is likely to emerge. Moreover, even if an agreement of what constitutes the common good could be achieved, how one would achieve that end in a lobbying context, or any other context for that matter, would seem equally problematic.

This epistemological difficulty of identifying the common good, together with the practical problems of deciding how best to achieve the common good once identified, suggests that the term may be of little or no practical use. Yet this overstates

the case. When compared to the alternative, an admonition to pursue self-interest, an orientation toward the common good fairs better. First, note that the term "self-interest" may be just as difficult to define as the term "common good." One's self-interest, properly understood, is not limited to seeking short-run pecuniary gain. In fact, the notion of self-interest is as multidimensional, temporal, and potentially idiosyncratic as is the term common good.[157] Second, note that one's self-interest is inextricably linked to the welfare of others. This is true in part because human beings are social animals and we need others to live a full life. It is also true because we value the welfare of others for its own sake. For example, in the opening passage of *The Theory of Moral Sentiments,* Adam Smith, surely an advocate of the judicious pursuit of self-interest, noted man's natural sympathy for others. Smith wrote: "How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortunes of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it."[158] Conversely, most, if not all, formulations of the common good admit that the term must account for the self-interest of constituent members.[159] Hence, although the notion of a common good is controversial and multifaceted, so too is the notion of one's self interest. In this light, the notion that a lobbyist should orient his or her lobbying activities toward achieving reasonably just laws is neither vacuous nor impractical. It provides a useful orientation to lobbyists, even if it fails to provide certainty and precision.

In summary, one can find value in both the Woodstock Principles and the advocacy model. Ultimately, the Woodstock assertion that lobbyists must justify their actions with reference to the common good seems irrefutable. Lobbying implicates force; the use of force requires justification. Justification can only be made with reference to the common good embedded in moral principle or with reference to democratically determined social goals. How a lobbyist promotes the common good depends on context. In adversarial settings where all stakeholders are fairly represented in an open forum complete with impartial government officials, the advocacy of self-interest is both expected and defensible. The absence of such a setting requires self-restraint and generates a social obligation to lobby in favor of reasonably balanced and just laws.

Conclusion

This article has sought to advance understanding of some of the legal and ethical issues associated with lobbying. The legal analysis demonstrates that lobbyists have been entrusted with wide latitude in determining who, what, when, where, and how to lobby. This is true, in part, because the law embraces a societal respect for the First Amendment liberties. Moreover, the analysis demonstrates that the various substantive areas of the law addressing lobbying are often vague, gap riddled, and/or poorly enforced. Revolving-door legislation purports to provide cooling-off periods during which former government employees must abstain from lobbying;

yet, gaps in the statutes permit the practice to go on largely unabated. Bribery and anti-gratuity statutes prohibit the giving of anything of value in exchange for public favors; yet, regulators routinely leave government to work for the companies that they previously regulated, creating both the perception of and the incentive for corruption. In addition, there does not appear to be any direct legal prohibition against a lobbyist intentionally lying to a public official about public policy matters and any attempts to enact such prohibitions are likely to be unconstitutional.

Given the general lack of legal restraints, the self-restraint imposed by personal ethics takes on heightened importance. To advance our understanding of the ethical dimensions of lobbying, the article discussed the Woodstock Principles in some length, explored an alternative advocacy model, and offered a synthesis of the two visions. The ethical analysis advanced and defended a proposition that lobbyists owe an ethical obligation to cooperate with public officials in the creation of reasonably balanced and just laws. The analysis also suggested that the appropriate means to achieve reasonably balanced laws depend on the context in which lobbying activities are conducted. In adversarial settings in which all stakeholders are heard in a relatively open forum, the lobbyist is free to seek private gain. However, in settings where the lobbyist enjoys sole access to the government official, direct consideration of the public good is required. These propositions were supported with reference to competing legal philosophies and alternative social science theories of regulation. Finally, the analysis demonstrates that these ethical conclusions do not depend on the status of the lobbyist, applying equally to salaried lobbyists working in-house, to K-Street lobbyists working for a fee, and to private citizens who lobby on their own behalf.

Notes

1. *See* Lobbying Disclosure Act of 1995, 2 U.S.C. §1602 (1995) (defining lobbying in a manner consistent with the text). Reportedly the use of the term "lobbyist" begins with President Ulysses S. Grant. Grant's wife, Julia, did not like his drinking, so the president often drank at the Willard Hotel not far from the White House. Those seeking an audience learned that the best place to catch him was in the hotel lobby. Grant soon complained that these "lobbyists" were interfering with his afternoon toddy! *See* Ron Smith, *Compelled Cost Disclosure of Grass Roots Lobbying Expenses: Necessary Government Voyeurism Or Chilled Political Speech?*, 6 KAN. J.L. & PUB. POL'Y 115, 119 n.34 (1996).

2. *See* Michelle Grant, *Legislative Lawyers and the Model Rules*, 14 GEO. J. LEGAL ETHICS 823, 823–24 (2001) (asserting that an effective legislative campaign requires the combined efforts of a professional, well-coordinated and specialized team).

3. *See* James M. Demarco, *Lobbying the Legislature in the Republic: Why Lobby Reform is Unimportant*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 599, 613 (1994) (noting that term "contact person" is a term of art within the lobbying industry).

4. *See* Grant, *supra* note 2, at 823–24 (identifying the roles on a public relations team as that of "strategist, lobbyist, legislative lawyer, grassroots organizer, and media person" and then focussing on the role of the legislative lawyer); Demarco, *supra* note 3, at 614–15 (discussing grass-roots organizing and fund raising).

5. The enactment of federal lobbying disclosure laws in 1995 has made it easier to count. *See generally infra* part I.B. (discussing the new regulations). As of 1996, 15,000 lobbyists had registered under the new law. *See* BRUCE C. WOLPE & BERTRAM J. LEVINE, LOBBYING CONGRESS: HOW THE SYSTEM WORKS 7 (2d ed. 1996). Under the 1995 law, only the lobbyist as "contact person," or his or her firm, must register. Registry then triggers a duty to report related "lobbying activities" performed by strategists, media professionals, grass roots organizers, and legislative lawyers. *See generally* Grant *supra* note 2 (discussing lobbying activities). Including these supporting people, Steve Forbes estimated that in 1996 Washington's lobbying industry employed 67,502 persons. Steve Forbes, *Lobbyists: Their Gain Is Our Loss*, FORBES, July 15, 1996, at 23. Forbes notes that the total calculates to 125 per Congressperson, quadruple that of the 1960s. *Id.*

6. The term "K Street" refers to a street address in Washington. The influence of K Street firms in Washington's political arena is roughly analogous to that of Wall Street firms in New York's financial district.

7. *See* WOLPE & LEVINE, *supra* note 5, at 1.

8. *See id.* at 2–4.

9. A "public interest group" has been defined as an organization that does not "benefit selectively either the membership or activists of the organization." *Id.* at 3 & n.2 (citing KAY SCHOLZMAN & JOHN TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 29 (1986)).

10. *Id.* at 3.

11. *See* Demarco, *supra* note 3, at 611–12 (noting that social legislation is often broadly stated with the details being provided through administrative rulings and orders).

12. *Issues of Democracy: Advocacy in America*, *in* 3 (no. 2) ELECTRONIC JOURNALS OF THE U.S. INFORMATION AGENCY 3 (June 1998) (quoting from 1956, prior to Kennedy's election as president).

13. *See* David L. Boren, *A Recipe for the Reform of Congress*, 21 OKLA. CITY U. L. REV. 1, 1 (1996). The poll was conducted by the Center of Political Studies at the University of Michigan. The key question was: "Do you trust government to do the right thing (a) just about always, (b) most of the time, (c) only some of the time." *Id.* at 1 n.1.

14. *Id.* at 1 n.1 (asking the same question in 1994).

15. *Id.* at 2.

16. *See* WOODSTOCK THEOLOGICAL CENTER, THE ETHICS OF LOBBYING: ORGANIZED INTERESTS, POLITICAL POWER, AND THE COMMON GOOD 2–13 (2002) [hereinafter WOODSTOCK STUDY]. The Woodstock Study is discussed in detail in part II.A *infra*.

17. The comments were gathered through a series of interviews and focus group sessions and quotes were published verbatim with the promise of anonymity. *Id.* at 1 (discussing the method used to collect the comments).

18. The quotes are given without editing; however, the authors provide headings to help organize the various comments. For example, eight quotes appear under the heading "Truth Telling," *id.* at 34, three under "Conflicts of Interests," *id.* at 6–7, and twenty-one under the heading "Professional Standards," *id.* at 5–6. Individual comments often conflict. Under the topic of Truth Telling, one practitioner stated: "You can't lie; what you've basically got is your word and reputation" *Id.* at 3. By contrast, another said: "In my experience, both corporations and nonprofits can be untruthful in their lobbying efforts. And it isn't just about withholding damaging information. It's about actively presenting distorted or dishonest information. I worry that it has become appropriate in D.C. for lobbyists to flat-out lie." *Id.* at 4.

19. *See id.* at 9–10.

20. Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (1995) (codified at 2 U.S.C. §§ 1601–12 (1995)).

21. Ethics Reform Act of 1989, Pub. L. 101-194, 103 Stat. 1760 (codified at 18 U.S.C. §§ 207–08 (1989)).

22. *See infra* part I.B.

23. *See infra* part I.C.

24. *See infra* part I.D.

25. *See infra* part I.D.

26. "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." U.S. CONST. AMEND. I.

27. Although the Supreme Court has never directly stated that there is a constitutional right to lobby, established doctrines that protect business speech, both political and commercial, have much the same effect. *See* Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL'Y 149 (1993) (arguing that there is, or at least should be, a strong First Amendment right to lobby).

28. The scholarly literature addressing the constitutional issues surrounding commercial speech is quite large. For an particularly articulate and useful introduction see Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from Greater New Orleans Broadcasting*, 37 AM. BUS. L.J. 587 (2000) (tracing a twenty-five year history of commercial speech jurisprudence and exploring current trends).

29. The reference here is to the Supreme Court precedent that originally articulated the middle-ground test for commercial speech. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980). *See generally* Langvardt, *supra* note 28, at 598–602 (discussing the Central Hudson test).

30. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc. 425 U.S. 748 (1976) (establishing a First Amendment right to commercial speech); *Cent. Hudson* at 562–63 (1980) (articulating a rubric of "intermediate scrutiny" applicable in commercial speech cases); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (reaffirming and applying the Central Hudson framework).

31. *See* Daniel G. Webber, Jr., *Proposed Revolving Door Restrictions: Limiting Lobbying by Ex-Lawmakers*, 21 OKLA. CITY U.L. REV. 29, 36–44 (1996) (discussing the appropriate standard, the necessary governmental interest, and the tailoring required to constitutionally justify a variety of lobbying restrictions).

32. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803 813 (2000); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 540 (1980); *see also* Buckley v. Valeo, 424 U.S. 1 (1976) (per curium). Although commonly cited for the proposition that fighting corruption is a compelling interest and that certain campaign contribution limits can be sufficiently tailored to address the problem, *Buckley* also reaffirms the proposition that regulations restricting business political speech receive strict scrutiny.

33. 357 U.S. 449 (1958).

34. *Id.* at 460–61. Although *NAACP v. Alabama* did not directly discuss a lobbying statute, the case illustrates that association rights can activate strict scrutiny even in the absence of a speech claim.

35. *See* Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 26–34 (1993).

36. *See* Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 142–45 (1986) (noting that the right of petition provided a means for citizens to control the legislative agenda).

37. *See id.* at 143 (attributing the demise of petitioning to a flood of abolitionist petitions and the unwillingness of an antebellum Congress to honor the petitioners' rights to a legislative response).

38. *See*, *e.g.*, McDonald v. Smith, 105 S. Ct. 2787, 2793 (1985) (petitioning right subsumed into free expression right) (Brennan J. concurring). *See generally* Annotation, *The Supreme Court and the First Amendment Right to Petition the Government for a Redress of Grievances*, 30 L. Ed. 2d 914–25 (providing a survey of case law).

39. 461 U.S. 540 (1983) (upholding a federal regulation that denied tax-exempt status to organizations that do a lot of lobbying and reasoning that the federal government does not have to subsidize free speech).

40. *Id.* at 552 (Blackman J. concurring).

41. *Id.* at 538.

42. *See* Steven A. Browne, *The Constitutionality of Lobby Reform: Implicating Associational Privacy and the Right to Petition the Government*, 4 WM. & MARY BILL RTS. J. 717, 729–37 (1995).

43. 347 U.S. 612 (1954) (addressing the constitutionality of the Federal Regulation of Lobbying Act of 1946).

44. *Id.* at 625–27.

45. *Id.*

46. Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (codified at 2 U.S.C. §§ 1601–12 (1995) [hereinafter LDA].

47. *Id.* at § 1601.

48. Foreign Agents Registration Act of 1938, 52 Stat. 631 (codified as amended at 22 U.S.C. §§ 611–21 (1990 & Supp. 1996)).

49. Federal Regulation of Lobbying Act of 1946, Pub. L. No. 79-601, 60 Stat. 839 (codified as amended at 2 U.S.C. §§ 261–70 (1994)). The senate report drafted in support of the LDA of 1995 lists two other federal disclosure statutes: the "Byrd Amendment" which requires disclosure of lobbying activities associated with federal grants and two sections of the HUD Reform Act. *See* S. Rep. No. 103-37, at 2 (1993).

50. *See* Mark B. Baker, *Updating the Foreign Agents Registration Act to Meet the Current Economic Threat to National Security*, 25 TEX. INT'L L.J. 23, 24–25 (1990) (noting that although FARA was initially focus on Nazi propaganda , it was used to monitor communist propaganda throughout the Cold War).

51. *See* Charles Lawson, *Shining the 'Spotlight of Pitiless Publicity' on Foreign Lobbyists? Evaluating the Impact of the Lobbying Disclosure Act on the Foreign Agents Registration Act*, 29 VAND. J. TRANSNAT'L L. 1151, 1162 (1996).

52. *See* S. Rep. No. 103-37, at 9 (1993).

53. *Id.* at 3–4 . The director of the Joint Committee that drafted the Lobbying Act acknowledged that it was "less than precisely-drafted legislation." *Id*. at 3 n.2. To avoid a Fourteenth Amendment vagueness challenge, the Supreme Court narrowly interpreted the Act. *Id.* at 3 (citing U.S. v. Harriss, 347 U.S. 612 (1954)). In essence, the Supreme Court interpreted lobbying to mean "direct communications with member of Congress on pending or proposed legislation." *Id.* As such, there were significant "gaps" in the disclosure requirements. *Id.*

54. *See* Smith, *supra* note 1, at 116 n.4.

55. *See* Stacie L. Fatka & Jason Miles Levien, Note, *Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution*, 35 HARV. J. ON LEGIS. 559, 570 n.58 (1998) (tracing the estimate to Senator Levin).

56. LDA, *supra* note 46, § 1602.

57. *See generally supra* notes 2–5 and accompanying text (discussing the distinction between contact activities and support activities).

58. *See* Fatka & Levien, *supra* note 55, at 571 n.63 (summarizing the LDA registration and reporting requirements).

59. Claybrook's comments were given at a forum on lobbying ethics sponsored by the Woodstock Theological Center, October 24, 2002. The comments are available on the world wide web at www.georgetown.edu/centers/woodstock/report/r.fea72.htm (accessed April 18, 2004) [hereinafter Woodstock Forum].

60. *Id.*

61. *Id.*

62. *See supra* notes 13–19 and accompanying text (discussing and documenting social concerns with lobbying).

63. *See supra* notes 42–45 and accompanying text.

64. Current registration requirements are fairly comprehensive, requiring paid lobbyists, including in-house employees as well as K Street specialists, to register, identify clients, and list government contacts. *See* Fatka and Levien, *supra* note 55, at 571 n. 63. Regulations do not require a citizen-lobbyist, such as a private individual who writes his or her Congressman, to register. This omission probably has less to do with concerns over the constitutionality of requiring registration of non-paid lobbyist than with the relative impracticality of requiring registration of such people and the relatively minimal nature of these lobbying activities as compared to those of Fortune 500 companies and other large organizations.

65. *See* Webber, *supra* note 31, at 34.

66. *See* Wendy L Gerlach, *Amendment of the Post-Government Employment Laws*, 33 ARIZ. L. REV. 401, 412 (1991).

67. The primary focus of Ethics in Government Act was financial disclosure. *Id.* at 407. Section 207 of the act addresses post-employment lobbying restrictions. *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified in 18 U.S.C. § 207 (1978)).

68. Ethics Reform Act of 1989, Pub. L. 101-94, 103 Stat. 1760 (codified at 18 U.S.C. §§ 207–08 (1989)).

69. *See* Gerlach, *supra* note 66, at 407 n.56.

70. 18 U.S.C. § 207(e)(1).

71. *Id.* § 207(e)(2).

72. *Id.* § 207(f), (c)(2)(ii).

73. *See* Webber, *supra* note 31, at 32–33 (citing several critics both inside and outside Congress).

74. *Id.* at 33.

75. *Id.* at 34.

76. *Id.* at 34 n. 26 (citing the *Congressional Daily*, Apr. 21, 1993, at 1).

77. *Id.* Adding fuel to the fire, a best-selling book published in 1990 explained how Japanese businesses influenced U.S. trade policy through the use of former U.S. government officials as lobbyists. *Id.* (referring to *Agents of Influence* by Pat Choate).

78. *Id.* The executive order specified a lifetime ban on lobbying on behalf of a foreign government and a five-year ban on lobbying before the appointee's former agency. *Id.*

79. *See* Boren, *supra* note 13, at 14–15 (discussing the proposed reforms).

80. Webber, *supra* note 31, at 30.

81. There are several "how-to" guides for lobbyists describing the daily practices of lobbying. *See, e.g.,* DONALD E. DEKIEFFER, HOW TO LOBBY CONGRESS: A GUIDE FOR THE CITIZEN LOBBYIST (1981); WOLPE & LEVINE, *supra* note 5.

82. WOODSTOCK STUDY, *supra* note 16, at 42 (citing Senate Rule 35, cl. 1(b)).

83. *Id.* (citing House Rule 51).

84. *Id.*

85. Woodstock Forum, *supra* note 59, at 9 (reprinting comments by Joan B. Claybrook, president of Public Citizen).

86. WOODSTOCK STUDY, *supra* note 16, at 42. (citing 18 U.S.C. § 201(b)(1)).

87. 526 U.S. 398 (1999).

88. *Id.*

89. WOLPE & LEVINE, *supra* note 5, at 50–51.

90. *Id.*

91. *See* JANE P. MALLOR ET AL., BUSINESS LAW: THE ETHICAL, GLOBAL, AND E-COMMERCE ENVIRONMENT 160 (12th ed. 2004).

92. The quotes come from the WOODSTOCK STUDY, *see supra* notes 16–19 and accompanying text.

93. WOODSTOCK STUDY, *supra* note 16, at 3 (also quoted in note 18 *supra*).

94. *Id.* at 4.

95. 539 U.S. 654 (2003) (per curium) (dismissing a previously granted writ of certiorari as improvidently granted). The facts are rendered more fully in the opinion offered by the Supreme Court of California. *See* Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002).

96. 45 P.3d 243, at 248.

97. *Id.* at 247 (bringing the claim pursuant to the Californian Business and Professions Code that grants private citizens standing to sue). Kasky alleged that Nike had made false and misleading statements, including claims that workers were "paid on average double the local minimum wage . . . and that their working conditions [met local] regulations governing occupational health and safety." *Id.* at 248.

98. *Id.*

99. *Id.* at 248–49.

100. *Id.* at 247.

101. 539 U.S. 654 (2003) (per curium) (declining to review on the technical grounds of standing, ripeness, and judicial efficiency).

102. *See* Adam Liptak, *Nike Move Ends Case Over Firms' Free Speech*, N.Y. TIMES, Sept. 13, 2003.

103. In 1997, Nike reported annual revenues of $9.2 billion, with advertising and marketing expenditures totaling almost $1 billion, approximately $2.7 million dollars per day. *See* 45 P.3d 243, at 247.

104. The *Nike* case garnered a lot of attention. Almost three dozen briefs (including thirty-one *amicus* briefs) were presented to the U.S. Supreme Court. Those speaking in support of Nike emphasized the chilling effect that the California Supreme Court decision could have on public discourse. One of Nike's lawyers noted that the case "genuinely frightens businesses because

even innocent mistakes made in important public debates can get you sued." *See* Liptak,, *supra* note 102 (quoting Thomas Goldstein).

105. For example, the American League of Lobbyists (ALL) maintains a web site complete with a "Lobbyists' Code of Ethics." The homepage notes that ALL was established in 1979 with a mission "to enhance the development of professionalism, competence and high ethical standards for advocates in the public policy arena, and to collectively address challenges affecting the first amendment right to 'petition the government for redress of grievances.'" *See* www.alldc.org. (last visited May 25, 2004) [hereinafter ALL].

106. *See* WOODSTOCK STUDY, *supra* note 16.

107. Woodstock Senior Fellow Edward B. Arroyo, S.J., coordinated the research team responsible for the book. Other team members were James L. Conner, S.J., theologian; Robert W. Gardner, journalist; Philip A. Lacovara, lawyer-lobbyist; and Michael H. McCarthy, philosopher-ethicist. *Id.*

108. *Id.* at vii.

109. *Id.*

110. *Id.*

111. *Id.* at viii–ix (outlining the process).

112. *Id.* at 2–13 (collecting and printing scores of anonymous quotations from practitioners).

113. *Id.* at 23–37 (discussing lobbying in a historical and social context).

114. *Id.* at 17–19.

115. *Id.* at 84–89.

116. *Id.*

117. *Id.* at 88–89 (the subparts to Principle 6 list and briefly explain four taboo tactics).

118. *Id.* at 18.

119. *Id.* at 19.

120. *Id.* at 84.

121. *Id*.

122. *Id.* at 94.

123. *See* text accompanying note 1.

124. The relevance of the police force is not limited to criminal cases, but to civil cases too, as refusals to pay civil judgments lead to contempt citations that motivate police involvement.

125. For an introduction to natural law reasoning see JEFFRIE G. MURPHY & JULES C. COLEMAN, THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 13–22 (1984). *See generally* Manual Valasqez & F. Neil Brady, *Natural Law and Business Ethics*, 7 BUS. ETHICS Q. 83 (1997) (distinguishing and discussing four natural law traditions: historicist, proportionist, right reason, and traditionalist).

126. One difficulty with natural law philosophy is its inability to demonstrate that principles of right and wrong are clearly defined and universally held. *See* Steven R. Salbu, *Law and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics*, 68 IND. L.J. 101, 110 (1992) (commenting on an "inability of natural law to convince either that there is one truth or that we can know what that truth is"). This limitation does not mean that a justifying referent cannot be found. Beyond the formal moral reasoning of natural law, justifying referents might include custom, procedural or process values, and instrumental social objectives. *See* Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 AM. BUS. L.J. 261, 264–77 (2001) (considering various justifications for law and legal force). Steven Pepper argues that a form of legal realism that denies that law has any basis other than

power dominates legal education today. *See* Steven L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1552–54 (1994–1995). Of course, the legal realism commented on by Pepper seeks to describe the law as it is, not as it should be, and the proposition in the text that most legal philosophers admit that law *should have* an external referent is no doubt correct.

127. *See generally* Symposium, *The Revival of Pragmatism*, 18 CARDOZO L. REV. 1 (1996) (collecting various distinct but complementary perspectives on legal pragmatism).

128. *See* RICHARD A. POSNER, OVERCOMING LAW 4–15 (1995) (describing a public "conversation" that encompasses both social ends and the appropriate legal means to achieve them).

129. *See* Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 444–49 (1990) (describing the pragmatic method as an "exhortation to skepticism" as to both the ends sought and the means used to achieve them).

130. WOODSTOCK STUDY, *supra* note 16, at 83–84.

131. *See* STEVEN BREYER, REGULATION AND ITS REFORM 1–11 (1982) (articulating the central tenets of the Public Interest Theory and outlining the implications of the theory for a number of regulatory settings).

132. For a collection and reprinting of fourteen oft-cited works addressing the topic see THE DUTY TO OBEY THE LAW: SELECTED PHILOSOPHICAL READINGS (William A. Edmundson ed., 1999).

133. *See* M.B.E. Smith, *Is there a Prima Facie Obligation to Obey Law?*, *in* THE DUTY TO OBEY THE LAW: SELECTED PHILOSOPHICAL READINGS 75, 77–93 (William A Edmundson ed., 1999) (noting that philosophers have analyzed the moral duty to obey law with reference to social contract theory, utilitarianism, and a "natural duty to support just institutions").

134. *See* JOHN RAWLS, A THEORY OF JUSTICE 334–37, 350–62 (1971).

135. Woodstock Forum, *supra* note 59, at 7 (reprinting comments of Thomas M. Susman).

136. WOODSTOCK STUDY, *supra* note 16, at 11.

137. *See* ALL, *supra* note 105.

138. WOODSTOCK STUDY, *supra* note 16, at 85.

139. ALL, *supra* note 105, at 3.

140. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 31–32 (1998) (discussing the "Pluralist Theory" of regulation).

141. Seminal works include MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965); and JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1965). *See generally* Croley, *supra* note 140, at 34–40 (providing citations to the recent literature).

142. Croley notes that Public Choice theorists reject Pluralist Theory. He writes: "[S]ome public choice theorists consider their main project to be exposing the naivete of pluralist political scientists and economists." Croley, *supra* note 140, at 33.

143. *See generally* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (providing the seminal work).

144. *See* Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975) (explaining how regulations can create barriers to entry and generate anti-competitive returns).

145. *See* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. L. REV. & POL. 49, 81 (1998) (arguing that lobbyists are particularly adept at controlling information when issues are complex).

146. *See supra* part I.C. (arguing that current regulations purporting to limit the practice are largely ineffective).

147. *See* Posner, *supra* note 144; *see also* Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 344 (1974).

148. *See* Grant, *supra* note 2, at 835–37.

149. *See* Kenneth R. Button, *The District of Columbia Conflict of Interest Rules and Lawyer-Lobbyists: A Troubled Marriage*, 8 GEO. J. LEGAL ETHICS 961 (1995).

150. *See* Timothy L. Fort, *The First Man and the Company Man: The Common Good, Transcendence and Mediating Institutions*, 36 AM. BUS. L.J. 391, 396–99 (1999) (discussing the central tenets of the republican movement). *See generally* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541–67 (1988) (identifying four "republican commitments" to procedural fairness that reinforce the quest for the common good); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1504–07 (1988) (arguing that common good can be arrived at by actual consensus through dialogue). *But see* Richard A. Epstein, *Modern Republicanism-Or the Flight From Substance*, 97 YALE L.J. 1633 (1988) (arguing that purely procedural guarantees of equality and commitment to dialogues are insufficient to guarantee decisions and actions that support the common good).

151. *See* Fort, *supra* note 150, at 399–400 (offering this argument as part of a critique of the civic republican movement).

152. *Id.* at 400.

153. *See generally* Kevin P. Quinn, *Sandel's Communitarianism and Public Deliberations over Health Care Policy*, 85 GEO. L.J. 2161, 2171–83 (1997) (exploring alternative conceptions of the common good); Daniel P. Sulmasy, *Four Basic Notions of the Common Good*, 75 ST. JOHN'S L. REV. 303, 303–08 (2001) (same).

154. *See* Quinn, *supra* note 153, at 2174 (noting that for Bentham, " there was no community . . . other than an aggregation" of individuals); Sulmasy, *supra* note 151, at 304 (associating Bentham and Mill with the idea of an "aggregative common good").

155. *See* Sulmasy, *supra* note 153, at 307 (offering a similar observation). *See generally* JOHN RAWLS, A THEORY OF JUSTICE 22–27 (1971) (offering comments on classic utilitarianism).

156. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 85–91 (1980) (arguing that the "basic forms of good" include "life," "play," "aesthetic experience," "friendship," and "knowledge").

157. *See generally* Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 84 GEO. L. REV. 369, 373 (1996) (discussing several distinctive ways in which the term self-interest can be used); Lawrence E. Mitchell, WASH. & LEE L. REV. 1477, 1482–83 (1993) (exploring nuances incumbent in the term self-interest).

158. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 9 (D.D. Raphael & A.L. Macfied eds., Oxford University Press 1976) (1759).

159. *See* Salmasy, *supra* note 153.