View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by bepress Legal Repository

Abstract

Recent lobbying scandals involving Jack Abramoff and Representative Tom DeLay have created a much-needed impetus for legislative reform of the lobbying process. But the question cries out: Will Congress actually enact any of the multitude of reform proposals currently on the table and, even if it does, will any of those reforms make a difference in how the lobbying process operates? History suggests that the answer is "No."

This paper examines the reasons for Congress' persistent failure to enact effective lobbying reform, and posits that the primary cause is an underlying disjunct between legislators' versus the public's views about the value of lobbying. I argue that before effective lobbying reform can be achieved, a fundamental shift in the philosophy underlying lobbying regulation must take place. The basic problem with existing lobbying regulations ─ and with all of the reforms currently under consideration by Congress ─ is that they focus on disclosure by lobbyists alone, leaving the elected officials whom lobbyists target, and the interest groups behind the lobbyists, essentially unregulated. I advocate that lobbying regulations instead (1) should require disclosures by elected officials about official-lobbyist contacts; and (2) should seek to capitalize on interest group competition for access to legislators as a means of disseminating lobbying disclosures to the voting public, and of generating more even-handed political contact by elected officials with interests on different sides of an issue.

In this manner, lobbying regulations both would produce more substantively informative disclosures and would ensure that the voting public pays some attention to such disclosures, while also creating an incentive for elected officials to increase their own exposure to differing viewpoints before rendering policy decisions. As a result, voter competence at the ballot box, as well as the quality of legislative outcomes, should improve.

Towards An Interest-Group-Based Approach To Lobbying Regulation

Anita S. Krishnakumar

Introduction

Lobbying long has been a dirty word in the eyes of the American public. The images it conjures are many, from well-dressed political types casually peddling their clients' cases before elected officials over fancy four-course meals, to brackish political hacks cornering members of Congress in House and Senate lobbies, to hired guns offering campaign contributions and other financial incentives in exchange for unspoken future allegiance from elected officials. Public distrust of lobbying is as old as the profession itself, and efforts to regulate or reform the lobbying process, not coincidentally, have been a perennial agenda item in Congress.

In fact, in the twentieth century alone, lobbying reform has been the subject of over fifteen congressional investigations and has resulted in at least as many hearings and legislative markups.[1] Such congressional efforts typically have followed on the heels of highly publicized

[1] *See, e.g.*, *Hearings Before a Subcomm. of the Comm. on the Judiciary United States Senate on S. Res. 92, A Resolution Instructing the Committee on the Judiciary to Investigate the Charge That a Lobby Is Maintained to Influence Legislation Pending in the Senate*, 63d Cong., 1st Sess. (1913) (special investigation of tariff lobbying); *Hearings Before the Select Comm. of the House of Representatives Appointed Under H.R. 198*, 63d Cong., 1st Sess. (1913) (investigation of alleged unscrupulous lobbying by the National Association of Manufacturers); H.R. 15,466, 63d Cong., 2d Sess. (1914) (bill introduced after NAM investigation); S. REP. NO. 43, 71st Cong, 1st Sess. (1929-1930) (investigation into lobbying improprieties involving Manufacturers Association of Connecticut); *Hearings Before a Subcomm. Of the Comm. on Naval Affairs*, 71st Cong., 1st Sess. (1929-1930) (investigations into lobbyist efforts to sink the Geneva Naval Limitation Conference); *Hearings Before a Special Comm. to Investigate Lobbying Activities*, 74th Cong., 1st & 2d Sess. (1935-1936) (investigation into lobbying activities of the utility industry); *Registration and Regulation of Lobbyists: Hearings Before a Subcomm. of the Senate Judiciary Comm.*, 74th Cong., 1st Sess. 12 (1935) (investigations on lobbying improprieties generally); H.R. REP. NO. 2214, 74th Cong., 2d Sess. (1936) (drafted in response to investigation of public utilities lobbying); *Hearings Before the House Select Comm.. on Lobbying Activities*, 81st Cong., 2d Sess. (1950) (general lobbying reform investigation); H. R. REP. NO. 3137, 81st Cong., 2d Sess. (1950), *Expenditures by Corporations to Influence Legislation*; H.R. REP. NO. 3238, 81st Cong., 2d Sess. (1951), *Expenditures by Farm and Labor Organizations to Influence Legislation*; H.R. REP. NO. 3239, 81st Cong., 2d Sess. (1951), *Report and Recommendations on Federal Lobbying Act*; *Congress and Pressure Groups*, S. Print 161, 99th Cong., 2d Sess. at 48 (1986) [hereinafter *Congress and Pressure Groups*] (hearings instituted by Senator Case after receiving bribe offer for his vote on natural gas bill); *The Special Committee to Investigate Political Activities, Lobbying, and Campaign Contributions*, S. REP. NO. 395, 85th Cong., 1st Sess. (1957) (special committee investigation of alleged lobbying improprieties involving the Natural Gas Act, the Federal Highway Act, and sugar legislation); *Regulation of Lobbying, Hearings Before the Committee on Standards of Official Conduct*, H. Res. 1031, 91st Cong., 2d Sess. (1970) (investigation driven by scandals involving, inter alia, Lyndon Johnson aide Bobby Baker); *Hearings Before the Subcomm. on Administrative Law and Governmental Relations, House Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) (explaining that there were 34 bills introduced in the House regarding lobbying and disclosure in one year); *Hearings Before the Comm. on Gov't Operations*, 94th Cong., 1st Sess. 8 (1975); *Lobbying Disclosure Act of 1979: Hearings Before the House comm.. on Governmental Affairs*, 96th Cong., 1st Sess. (1979); *Federal Lobbying Disclosure Laws: Hearing Before the Subcomm. on*

lobbying scandals. Recent efforts to reform the lobbying process, including the Special Interest Lobbying and Ethics Accountability Act ("SILEAA"),[2] introduced by Representatives Meehan and Emmanuel, and the Lobbying Transparency and Accountability Act of 2005 ("LTAA"),[3] introduced by Senator John McCain, are no exception — predictably having followed in the wake of well-publicized scandals involving lobbyist Jack Abramoff[4] and Representative Tom DeLay.[5] But if past experience is any indication, any lobbying reforms enacted as a result of these scandals — if, indeed, any reforms are enacted at all — are unlikely to effect substantial change in the way thatlobbying is regulated, let alone practiced.

This paper examines the reasons for Congress' persistent failure to enact effective lobbying reform, and argues that a fundamental shift in the philosophy underlying lobbying regulation is in order. Currently, lobbying is regulated under the Lobbying Disclosure Act of 1995[6] ("the LDA") and related House and Senate rules restricting gift-giving by lobbyists to members of Congress.[7] All pending proposals to reform the lobbying process, including the SILEAA and LTAA, are styled as amendments to the LDA, ostensibly designed to expand the reach and efficacy of disclosure,[8] revolving door,[9] and gift reporting[10] requirements already

---

Oversight of Gov't Management, Comm. on Governmental Affairs, U.S. Senate, 102d Cong., 1st Sess. (June 20, July 16, and Sept. 25, 1991).

[2] *See* H.R. 2412, 109th Cong., 1st Sess. (May 17, 2005).

[3] *See* S. 2128, 109th Cong., 1st Sess. (Dec. 16, 2005). *See also* Lobbying and Ethics Reform Act of 2005, S. 1398, 109th Cong., 1st Sess. (July 14, 2005); Stealth Lobbyist Disclosure Act of 2005, H.R. 1302 and H.R. 1304, 109th Cong., 1st Sess. (Apr. 4, 2005 & Mar. 15, 2005); Lobby Gift Ban Act of 2005, H.R. 3177, 109th Cong., 1st Sess. (June 30, 2005); Terrorist Lobby Disclosure Act of 2005, S. 1972, 109th Cong., 1st Sess. (Nov. 7, 2005); H.R. 3623, 109th Cong., 1st Sess. (July 29, 2005) (a bill to increase to 5 years the period during which former Members of Congress may not engage in certain lobbying activities); H. Res. 81, 109th Cong., 1st Sess. (Feb. 9, 2005) (directing the House Clerk to post on official House website all lobbying registrations and reports filed with the Clerk under the LDA).

[4] *See, e.g.*, Neil A. Lewis, *Official Tipped Abramoff on Client's Case, Filing Says*, NEW YORK TIMES, Jan. 29, 2006, at 120; Carl Hulse, *Abramoff Conviction Gives New Impetus to Moves in Congress to Toughen Curbs on Lobbying*, NEW YORK TIMES, Jan. 1, 2006, at A18.

[5] *See, e.g.*, Anne E. Kornblut and Glenn Justice, *Inquiry Focusing on Second Firm with Connections to DeLay*, NEW YORK TIMES, January 8, 2006, at 11; Marie Cocco, *DeLay's Worst: A Dirty Drama of Bondage*, NEWSDAY, May 9, 2005, at A34 (describing public outrage over reports that lobbyists paid for a Scottish golf junket taken by DeLay, his wife, and aides).

[6] Pub. L. 104-65, §2, 109 Stat. 691 (1995) (codified at 2 U.S.C. §1601-1612 (1997) and other scattered sections).

[7] *See* S. Res. 158, 104th Cong., 1st Sess. (1995); H. Res. 250, 104th Cong., 1st Sess. (1995). The bans were adopted separately by each chamber in the form of resolutions and, *inter alia*, limit the value of gifts — e.g., meals and entertainment — that members of Congress may accept from lobbyists (no individual gift may exceed $50 in value and no more than $100 in cumulative gifts may given by any one source), as well as prohibit senators and representatives from accepting free travel to substantially recreational events such as charity trips where congressmen and lobbyists golf and ski together to raise money for charities.

[8] Title I of the LTAA, labeled "Enhanced Lobbying Disclosure," for example, amends the LDA to provide for, *inter alia*, quarterly filings of lobbying disclosure reports, electronic filing of such reports, creation of a public database for accessing such reports, application of the LDA's disclosure requirements

imposed by the Act and House and Senate gift rules. Not surprisingly given their common starting point, existing lobbying regulations and their proposed reforms all suffer from the same flaw: They are classic cases of "symbolic legislation,"[11] designed to appease the public superficially without effecting any real change in how elected officials conduct business with lobbyists, or the interest groups whom they represent. Moreover, the LDA, internal rules, and pending reform proposals all make lobbyists — rather than the legislators whom they target or the interest groups whom they represent — the focal point of lobbying regulation. Worse, they cast Congress as a victim, or at least a passive actor, in the lobbying process,[12] essentially ignoring the public's underlying concerns about the influence that lobbyists exercise over legislators.

I argue that the key to effective lobbying reform is to abandon this misguided approach to lobbying regulation, with its focus on lobbyists as the main actors, and disclosures about who hires lobbyists as magical cure-alls that somehow will increase "public confidence in the integrity of government."[13] If lobbying reform is to be meaningful, it should regulate not only lobbyists, but also those actors with whom the public is most concerned — i.e., the elected officials whom lobbyists seek to influence. Further, if lobbying reform is to be both meaningful and successful, it should take into account a third, currently overlooked, set of actors in the lobbying process — the interest groups who hire lobbyists to represent their positions. In other words, lobbying reform should become less concerned with disclosure for the sake of disclosure and more concerned with the dynamics created by disclosure — i.e., with how disclosures will be used and who they can benefit in the legislative process.

The conventional wisdom behind congressional lobbying regulation thus far has been that requiring lobbyists to disclose their clients' names and lobbying expenditureswill cause the clients (i.e., interests) and lobbyists to behave in a more open and honest manner. But the more likely real world consequence of disclosure requirements is that they will enable those actors with the greatest capacity to capitalize on information in the lobbying game — interest groups — better to police each other's activities, contacts, and expenditures on a given issue. Although the

---

to grassroots lobbying, and increased penalties for violations of the LDA's disclosure requirements. *See* S. 2128, §§ 101-103, 105, 107, 109th Cong., 1st Sess. (Dec. 16, 2005). SILEAA provides for these same expansions, in virtually identical language. *See* H.R. 2412, §§ 101-103, 106, 402, 109th Cong., 1st Sess. (May 17, 2005).

[9] *See* S. 2128, §§ 201-203, 109th Cong., 1st Sess. (Dec. 16, 2005) ("Title II – Slowing the Revolving Door"); H.R. 2412, §§ 201-203, 109th Cong., 1st Sess. (May 17, 2005) ("Title II – Slowing the Revolving Door").

[10] *See* S. 2128, §§ 301-304, 109th Cong., 1st Sess. (Dec. 16, 2005) ("Title III – Curbing Excesses In Privately Funded Travel and Lobbyist Gifts"); H.R. 2412, §§ 301-304, 109th Cong., 1st Sess. (May 17, 2005) ("Title III – Curbing Excesses In Privately Funded Travel") (providing travel and gift restrictions only slightly different from those in the Senate bill).

[11] For detailed discussions of symbolic legislation, see MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS (1964); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233 (1990).

[12] *See* discussion *infra* Section II.C.2__.

[13] 16 U.S.C. §1601(1) (1995).

public may not realize it, this is not necessarily a bad thing. In fact, greater transparency and increased monitoring across interest groups could lead to more balanced political participation by interests on both sides of an issue, as opposing groups seek to match or "check" each other's efforts in true Madisonian fashion.[14] Thus, the key to more effective lobbying regulation may be to embrace the fact that interest groups are the entities with the greatest incentive to take advantage of lobbying disclosures and, accordingly, to structure lobbying regulations in a manner that encourages organized interests, in maximizing their own positions, also to further public goals.

Part I of this paper highlights the symbolic nature of the LDA, illustrating that the statute was designed to enable legislators publicly to claim credit for imposing restrictions on the lobbying process, while in practice permitting lobbyists to conduct business as usual. It also explores how the LDA fails the public, analyzing the public's concerns about lobbying and positing that there is a disjunct between public versus congressional perceptions of the role played by lobbyists in the legislative process. Part II discusses the goals that a public-regarding, rather than symbolic, approach to lobbying regulation might seek to achieve — including improved voter competence and more informed legislating. Part III argues that the key to accomplishing such public-regarding reform of the LDA is to focus not on lobbyists, as Congress has done for the past two centuries, but on the two entities between which lobbyists mediate: elected officials and interest groups. First, the Act's disclosure requirements should be expanded to require information from elected officials, in the both the legislative and executive branches, as well as from lobbyists. Second, reforms to the LDA should be designed to take advantage of interest groups' natural incentives to use disclosed information to increase their access to elected officials and to make disclosed information accessible to the public. Part III ends by outlining specific reforms to the LDA suggested by an interest-group-based approach to lobbying regulation, and compares and contrasts these suggested reforms with proposals contained in pending reform bills. Part IV discusses the political conditions that must exist in order for Congress to enact the suggested reforms, and possible strategies for creating such conditions.

I. THE LOBBYING DISCLOSURE ACT OF 1995: SYMBOLIC REFORM

A. How and Why the LDA is A "Symbolic" Statute

Unlike most lobbying reform efforts, the LDA was not drafted in response to any particular lobbying scandal. Rather, it represented the effectuation of a series of campaign promises — by Ross Perot and Bill Clinton in 1992 and by Republican congressional candidates in 1994 — to change the way that lobbying was practiced in Washington, D.C., and to curb the

[14] *See* THE FEDERALIST NO. 10, at 56 (Madison) (J. Cooke, ed. 1961). *See also* discussion *infra* Section III.A, pp. __.

influence wielded by special interests in the lawmaking process.[15] Thus,the Act's preamble emphasizes the public's right to be informed about behind-the-scenesactivities that impact the formation of public policy. In fact, the preamble lists three congressional findings that form the basis for the Act's provisions: (1) that responsible representative government requires public awareness of the efforts of paid lobbyists to influence the public decision-making process of the federal government; (2) that existing lobbying disclosure statutes have been ineffective because of unclear statutory language and weak administrative and enforcement provisions; and (3) that effective public disclosure of the identity and extent of paid lobbyists' efforts to influence federal officials would increase public confidence in the integrity of government.[16] The disclosure provisions that follow the preamble, however, borrow wholesale from lobbying reform bills drafted in prior years. Thus, the LDA, like all previous congressional lobbying proposals,[17] focuses almost exclusively on regulating lobbyists — rather than the federal officials whom they contact — and operates on the fundamental premise that simple disclosure of the names of lobbyists' clients, issue areas, and the amounts expended on lobbying will revolutionize the way

[15] *See, e.g.*, Warren P. Strobel, *Clinton Says Lobby-Reform Bill Will 'Pull Back The Curtains', Measure Reflects Bipartisan Consensus, Has Major Curbs*, WASH. POST, Dec. 20, 1995, at A8 (Clinton called for lobbying reform in his State of the Union Address; lobbying reform was a plank in House Republicans' "Contract With America"); Nancy Watzman, *Indecent Disclosure, Public Citizen's Congress Watch Report* (Mar. 1993) in *Lobbying Disclosure Legislation: Hearing Before the House Subcomm. on the Constitution*, 104th Cong., 1st Sess., at 90 (1995) (attachment to statement of Joan Claybrook, President, Public Citizen) (noting that "theme" of 1992 elections was public disgust over "business as usual" in Washington and that voters responded eagerly when candidates such as Ross Perot and Bill Clinton decried special interest influence; commenting that President Clinton drew continued attention to special interest lobbying after taking office, by calling for reform of disclosure laws in his State of the Union address); Jonathan D. Salant, *Members Urge Action on Lobbying Issue*, 1995 CONG. Q. 2857 (Sept. 23, 1995) (reporting that the LDA was being pushed through in part by Republican freshmen seeking to live up to their campaign pledges); *Bill Targets Lobbying Loopholes*, 1995 CONG. Q. 3477 (Nov. 11, 1995) (same).

[16] *See* 2 U.S.C. §1601(1).

[17] *See, e.g.*, H.R. 15,466, 63d Cong., 2d Sess. (1914) (bill introduced in response to 1913 lobbying scandal involving the National Manufacturer's Association, which would have imposed registration and disclosure requirements on all lobbyists); S. 1095, 70th Cong., 1st Sess. (1928) (lobbyist registration and reporting measure, called the Caraway resolution, contemplated in the wake of a lobbying scandal involving the Connecticut Manufacturer's Association); Foreign Agents Registration Act of 1938, 22 U.S.C. §611, et. seq. (1938) (provision requiring all persons who are agents of foreign principals to file informational statements with the State Department); Merchant Marine Act of 1936, 46 U.S.C. §1225 (1936) (provision requiring registration by those who presented, advocated or opposed matters within the scope of the Merchant Marine Act and related shipping legislation before Congress, the Federal Maritime Board, or the Secretary of Commerce); Federal Regulation of Lobbying Act, 2 U.S.C. §§261-270 (1988) (requiring disclosures, by lobbyists, of contacts with members of Congress).

that lobbying is practiced. The result is symbolic legislation[18] that promises sweeping change but delivers lobbying as usual.

For beyond elected officials' surface rhetoric,[19] the LDA discernibly is more concerned with appearances than with substantive reform. The statute nowhere even purports to require or promote any change in how lobbyists behave; in fact, the Act's preamble makes clear that it seeks only to ensure that all lobbyists make publicly available information about their clients, funding, and the issue areas with respect to which they lobby.[20] Likewise, Congress, in enacting the LDA, made no claims that its regulations would require lobbyists to alter their business practices. Rather, the congressional pitch was that if the LDA forced lobbyists to disclose their client's names, lobbying expenditures, and the issues on which they advocate to the public, then the principles of representative government would be served and "public confidence in the

[18] Scholars have coined the term "symbolic legislation" to describe a law whose primary purpose is to appease public demand for action while in practice effecting little of what it promises. *See, e.g.*, EDELMAN, *supra* note 11, at 22-29; Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. Contemp. Legal Issues 717, 733-34 (2005). As Beth Garrett has explained, symbolic legislation is "an attempt to defuse an issue that has roused a normally quiescent and inattentive public while leaving the underlying process of lawmaking, bargaining, and interest group interaction largely unchanged." *Id.* at 733-34.

[19] Congress, for example, widely touted the LDA, and the gift ban resolutions that followed, as breakthroughs in lobbying regulation that would "chang[e] the political culture in Washington." Jonathan D. Salant & Richard Sammon, *Senate Bans Lavish Gifts From Interest Groups*, 1995 CONG. Q., July 29, 1995, at 2237 (quoting Senator Paul Wellstone comments about the gift ban). *See also id.* at 2237 (quoting Senator William Cohen's remarks that "[t]here has been a major step forward. . . [o]verall, we can claim we moved the institution toward reform); 141 CONG. REC. S10845, S10857 (July 28, 1995) (statement of Sen. Hatfield) (commenting that LDA and Senate gift rule reforms "take significant steps" to improve the lobbying process); 140 CONG. REC. H10283, H10285 (Sept. 29, 1994) (statement of Rep. Cantwell commenting that the 1993 bill upon which the 1995 LDA was based includes the "broadcast [sic] and strictest lobbying disclosure requirements ever enacted" and "permanently limits the influence of the lobbyists and special interests on Capitol Hill"); Lobbying Disclosure Act, 140 CONG. REC. H1966, H1987 (Mar. 24, 1994) (comments to same effect by Representative Hoyer). President Clinton similarly promised that the LDA would help "give ordinary Americans a greater stake in our government" by "pull[ing] back the curtains from the world of Washington lobbying" and ensuring that "the days of secret lobbying are over." President William J. Clinton, Remarks By the President at Signing Ceremony for the Lobbying Dislosure Act of 1995 (Dec. 19, 1995), *available at* http://www.clintonfoundation.org/legacy/121995-speech-by-president-at-lobbying-reform-bill-signing.htm (last checked June 30, 2005).

[20] *See* 2 U.S.C. §1601(1).

integrity of government" (automatically) would increase.[21] In other words, Congress designed the LDA not to repair improprieties in the lobbying system, but to shed light on the lobbying industry in the hopes that if it educated the public about the true operation of the lobbying process, it could "erase the *appearance* of impropriety" popularly associated with lobbyists' activities.[22]

There also was some suggestion by those drafting the LDA that the Act's disclosure requirements might lead to better lobbying practices on the part of lobbyists and their clients by revealing links between lobbying expenditures and success in the legislative process.[23] But the suggestion was little more than rhetoric, given that the LDA's provisions do not require detailed disclosures about specific issues, proposals, votes, or pieces of legislation concerning which a lobbyist is hired to advocate or about specific officials whom a lobbyist might contact,[24] or provide for any disclosure whatsoever about the success or failure of lobbyists' activities on behalf of a client.[25] Thus, even if Lobbyist X were to disclose that he lobbied the House of Representatives on behalf of Client A regarding Issue Q, and even if a watchful public citizen knew that the House reported out a bill dealing with Issue Q, it would be difficult for the citizen to gauge Lobbyist X's success without knowing client A's preferences regarding specific

---

[21] *See* discussion *supra* Section I.A & n.16 and accompanying text, p. __ (quoting congressional findings in 2 U.S.C. §1601(1)). *See also Overhauling the Lobbying Disclosure Laws: Hearing on the Lobbying Disclosure Act of 1995, Before the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995), *available at* 1995 WL 527076 (statement of Sen. Levin) ("Lobbying disclosure will enhance public confidence in government by ensuring that the public is aware of the efforts that are made by paid lobbyists to influence public policy.") [hereinafter *Hearing: Overhauling the Lobbying Disclosure Laws*]; Phil Kuntz, *New Lobbying Reform Bill Has Watchdog's OK Passage Predicted, But Groups Agree It Still Leaves Some Loopholes*, S.F. EXAMINER, Jan. 30, 1994, at A4 (noting, with respect to 1993 bill on which the LDA is based, that "[s]upporters envision a sunshine-filled world of computerized and cross-indexed data that will illuminate how power is leveraged in Washington – thus producing a better-informed public and a more perfect democracy").

[22] *Reform of Laws Governing Lobbying: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess., at 2 (1995) (statement of committee chairman, Rep. Canaday) (expressing hope that through the LDA Congress "can work to bring the relationship between lobbyists and government officials into the light and erase the *appearance* of impropriety from their dealings") (emphasis added).

[23] *See, e.g.*, *Hearing: Overhauling the Lobbying Disclosure Laws*, *supra* note __, (statement of SenLevin) ("In some cases, such disclosure will perhaps encourage lobbyists and their clients to be sensitive to even the appearance of improper influence.").

[24] *See* 2 U.S.C. §1603(b) (listing information that lobbyists are required to include in their registration reports).

[25] *See* 2 U.S.C. §1603(b)(5)(A) & (B) (requiring lobbyists to identify the "general issue areas" regarding which they expect to lobby for the named client and leaving it in lobbyists' discretion to disclose "to the extent practicable" specific issue "areas" — not specific bill provisions, preferences, or stances — on which they already have lobbied).

components of Issue Q and how those preferences were reflected in, or rejected by, the bill passed by the House.[26]

Second, the disclosures required by the Act are minimal, and are made in a format that is neither easily accessible nor decipherable by average citizens. Currently, lobbyists comply with the Act by filling out forms created by the Clerk of the House and the Secretary of the Senate and return these forms to the Clerk's and Secretary's offices, where the forms are reviewed and then made available to the public — in hard copy at the Legislative Resource Center and at the Senate Office of Public Records in Washington, D.C. and, to a more limited extent, online through the Senate's official website.[27] In keeping with the Act's requirements, the form consists primarily of lines asking lobbying firms to list the name, address, and principal place of business of: (1) the registering lobbying firm; (2) the client on whose behalf the firm has or will engage in lobbying; (3) any affiliated organization that has contributed more than $10,000 towards the registering firm's lobbying activities; and (4) any foreign entities that hold at least 20% ownership in the client or any of its affiliated organizations.[28] A very small section asks lobbyists to list a three-letter code describing their "general lobbying issue areas" and then to describe their "specific lobbying issues (current and anticipated)".[29] Such disclosures do not go very far towards enlightening the public. For although the names of lobbying firms, individual lobbyists, and even clients may have currency for members of Congress who deal with these entities on a regular basis, they are of little use or relevance to average members of the public.

Further, the LDA requires lobbyists to reveal little information regarding the governmental officials whom they contact. In fact, lobbyists need only state generally that they contacted the House of Representatives or the Senate or a particular federal agency such as the Department of Energy at large, rather than specify individual legislators, committees, or federal

---

[26] A lobbying client's preferences on an issue usually are more complicated and multi-faceted than a simple "yes" or "no" position on a bill, and lobbyist "success" on a particular issue is rarely complete. *See* Diana M. Evans, *Lobbying the Committee: Interest Groups and the House Public Works and Transportation Committee*, *in* ALLAN J. CIGLER & BURDETT A. LOOMIS, INTEREST GROUP POLITICS 257, 257 (3d Ed., 1991). Most members of the public do not have access to lobbying clients' preference breakdowns and, in any event, are not willing to do the research necessary to piece together various pieces of disclosed information; thus, it is highly unlikely that the disclosure requirements imposed by the LDA would frighten lobbyists or their clients into changing their lobbying practices in any substantial manner.

[27] *See* Office of the Clerk of the House of Representatives Website, *available at* http://clerk.house.gov/pd/; Lobbying Disclosure Page of Senate Website, *available at* http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm (last reviewed July 1, 2005).

[28] *See, e.g.*, United States Lobby Report Images, 2005 Mid-Year Termination Lobbying Report of Paul Marcone & Assocs., LLC, on behalf of client MercyHurst College, *available at* http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2005/01/000/212/000212190|2; 2005 Year-End Lobbying Report of Parents as Teachers Center on behalf of itself, *available at* http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2005/01/000/012/000012626|4 (through link in United States Senate Office of Public Records website).

[29] *See, e.g.*, *id.*

employees with whom they corresponded.[30] It is difficult to see how the American public is to derive from such vague, general disclosures a better understanding of the manner in which the lobbying process operates, let alone gain renewed faith in its elected officials or in the integrity of its government.

Finally, the fact that the LDA is a primarily symbolic law is evident from its weak enforcement provisions. The sole penalty for violation of the Act's registration provisions is a judicially-imposed civil fine of up to $50,000.[31] For lobbying firms that earn anywhere from hundreds of thousands to millions of dollars in revenues each year,[32] this is barely a slap on the wrist. Further, only the United States District Attorney for the District of Columbia has authority to prosecute violations of the Act,[33] and the Act leaves unclear how that office is to gain evidence of such violations.

B. Behind the Symbolism: Why Current Lobbying Regulations Fail the Public

Perhaps more important than understanding that there is a disconnect between what the LDA promises and what it delivers is understanding why that disconnect exists. Subsection 1 below analyzes the public's concerns about lobbying and special interests, arguing that the public cares primarily about lobbyists' (and their clients') ability, both through money and through insider access, to exert undue influence over elected officials. Yet the LDA paradoxically ignores the role of elected officials in the lobbying process and pays almost no attention to the importance of lobbyist access, as distinct from monetary contributions, to elected officials. Subsection 2 examines why Congress responded to the public's concerns with the symbolic LDA. In addition to being externally constrained by the First Amendment, I argue that Congress structured the LDA as it did because it: (1) believes that the public misunderstands and is unduly critical of lobbyists' role in the legislative process, (2) wishes to continue its existing financial and informational relationships with lobbyists, and (3) prefers to avoid subjecting itself to the burden of complying with lobbying disclosure regulations.

1. *The Public's Concerns About Lobbying*

The public perceives two main categories of problems with the lobbying process: *quid pro quos* and unequal access. First, the public fears that through campaign contributions, personal gifts, and perhaps even outright bribery, lobbyists make elected officials beholden to

---

[30] *See* 2 U.S.C. §1604(b)(2)B).

[31] *See* 2 U.S.C. §1606. Section 12(b) of the LDA, which amends 18 U.S.C. §219(a) to make it illegal for public officials to act as lobbyists in connection with the representation of a foreign entity, is the only part of the LDA that creates any criminal sanctions. *See also* 18 U.S.C. §219(a) (Supp. 1997).

[32] *See, e.g.*, Andy Metzger and Anna Palmer, *In '04 Returns, A Landslide for Lobbyists*, Broward Dly. Bus. Rev. at 9 (Mar. 24, 2005) (reporting that top 50 Washington lobbying firms earned more than $840 million in fees in 2004, and cataloguing individual firms' revenues as follows: Patton Boggs ($65.8 million), Akin Gump Strauss Hauer & Feld ($64.2 million), Hogan & Hartson ($51 million), DLA Piper Rudnick Gray Cary ($42.4 million), and Preston Gates Ellis & Rouvelas Meeds ($21.4 million)).

[33] *See* 2 U.S.C. §1605(8).

them.[34] As a result, it believes, lobbyists are able to exert undue influence on the policymaking process by pressuring elected officials to vote in their clients' interests on threat of otherwise losing the lobbyists' financial support.[35] Such beliefs are fueled by scandals such as Senator Francis Case's revelation in 1956 that he was offered a $2500 campaign contribution to influence his vote on a pending natural gas bill[36] and President Clinton's 2001 pardon of fugitive commodities trader Marc Rich amidst disclosures that Rich's wife, who lobbied for the pardon, had contributed heavily to Clinton's library foundation.[37] For the most part, Congress has sought to address these types of *quid pro quo* concerns through laws other than the LDA. For example, the Federal Election Campaign Act of 1971[38] ("FECA") and its successor, the Bipartisan Campaign Reform Act of 2002[39] ("BCRA"), seek both to prevent the actual purchasing of elected officials by special interests, and to dispel the appearance that elected officials can be purchased, by setting limits on campaign contributions and requiring such contributions to be disclosed.[40] In addition, a federal anti-bribery statute outlaws the giving and receiving of *quid pro quos* in general,[41] and the House and Senate gift ban resolutions implemented in 1995 aim to

---

[34] *See, e.g.*, *Hearings on Lobby Reform Legislation, Senate Comm. on Government Operations*, 94th Cong., 1st Sess., at p. (15? 18?) (Apr.-Nov. 1975) (*quoted in Congress and Pressure Groups*, *supra* note 1, at 59) (describing wide-spread public view that government is the "puppet of wealthy citizens and powerful interest groups").

[35] Common Cause representative Fred Wertheimer's comments before Congress are illustrative:

> The single most important factor . . . in undermining public confidence in the integrity of Congress and its ability to make decisions on the merits, is the role being played by PAC contributions . . . PACs are generally tied to groups that regularly conduct organized lobbying efforts, and campaign contributions are an integral part of these efforts . . . . PACs, through campaign contributions, are creating a higher obligation for our representatives, an obligation to serve PAC interests, first and foremost.

Congress and Pressure Groups, *supra* note 1, at 22 (quoting 1983 Lobby Hearings at 39 (statement of Common Cause representative Fred Wertheimer)).

[36] *See Congress and Pressure Groups*, *supra* note 1, at 47.

[37] Denise Rich reportedly gave at least $450,000 to President Clinton's library foundation. *See, e.g.*, Marc Lacey, *Political Memo; Resurrecting Ghosts of Pardons Past*, N.Y. TIMES, Mar. 4, 2001, at 126 (discussing, *inter alia*, the "appearance of a quid pro quo"); Don Van Natta & David Johnston, *Clinton Library Will Yield Details on Big Donations*, N.Y. TIMES, Mar. 3, 2001, at A9. The incident drew sharp criticism from Congress as well. *See, e.g.*, 148 CONG. REC. S3154-56 (daily ed. Mar. 29, 2001) (statement by Sen. Arlen Specter) (noting that Clinton's last minute pardons had sparked public outrage and commenting that this was "rightly so").

[38] Pub. L. No. 92-225, 86 Stat. 3 (Feb. 7, 1972) (codified as amended in 2 U.S.C. §§431-455 (2000)).

[39] Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.A. (West 2005)).

[40] *See* John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 SO. CAL. L. REV. 591, 593 (2005).

[41] *See* 18 U.S.C. §201.

eliminate the appearance of undue influence by prohibiting lobbyists from wining and dining elected officials.[42] The LDA itself addresses the public's concerns about *quid pro quo* corruption only minimally, through the requirement that lobbyists disclose the amounts that their clients have paid for their lobbying activities.[43]

Second, and perhaps more troubling to the public than the fear of outright bribery, is the special access, or inside edge, that lobbyists maintain in communicating with elected officials. Whether because of the "revolving door"[44] or because of other close personal connections,[45] the

[42] The bans limit, *inter alia*, the value of gifts — e.g., meals and entertainment — that members of Congress may accept from lobbyists (no individual gift may exceed $50 in value and no more than $100 in cumulative gifts may given by any one source), as well as prohibit senators and representatives from accepting free travel to substantially recreational events such as charity trips where congressmen and lobbyists golf and ski together to raise money for charities. *See* S. Res. 158, 104th Cong., 1st Sess. (1995); H. Res. 250, 104th Cong., 1st Sess. (1995)..

[43] *See* 2 U.S.C. §1604(b)(3) (requiring lobbying firms to include in their registration reports "a good faith estimate of the total amount of all income from the client (including any payments to the registrant by any other person for lobbying activities on behalf of the client)"); *id.* §1604(b)(4) (requiring that registrants engaged in lobbying activities on their own behalves include "a good faith estimate of the total expenses that the registrant and its employees incurred in connection with lobbying activities").

[44] "Revolving door" is a term used to describe the common phenomenon whereby congressional and executive staffers, and even some members of Congress and higher-level executive officials themselves, become lobbyists upon leaving public office. *See, e.g.*, Michael Wines, *Powerful Persuaders: A Look at Lobbying Tactics – For New Lobbyists, It's Now What They Know*, N.Y. TIMES, Nov. 3, 1993, at B14 (reporting that of the 121 lawmakers who left Capitol Hill after the November 1992 election, 48 had become lobbyists within one year, as had at least 50 of their top aides and more than 30 senior officials of the outgoing Bush I Administration).

[45] Notably, some of the nation's top lobbyists are the relatives of current and former elected officials. For example, Linda Hall Daschle, the wife of the former Senate Minority Leader and herself a former top official at the Federal Aviation Administration, lobbied on aviation issues while her husband was in office, *see* Jill Abramson, *The Influence Industry: The Business of Persuasion Thrives in Nation's Capitol*, N.Y. TIMES, Sept. 29, 1998, at A1; Randy DeLay, brother of former House Majority Leader Tom DeLay, once was as a lobbyist, *id.*; the son of former Louisiana Senator J. Bennett Johnston is one of Washington's most successful lobbyists, and Johnston and one of his top aides joined his son in the business following Johnston's retirement from Congress, *id.*; Michael Brown, the son of late Commerce Secretary Ron Brown, is a lobbyist with one of D.C.'s best known lobbying firms, Patton Boggs, *see* Deirdre Shesgreen, *Old, New Guard Court Williams*, THE LEGAL TIMES, Dec. 7, 1998, at 4; and renowned Washington lobbyist Tommy Boggs is the son of the late Representative Hale Boggs, *see* Frank N. Winer, *The Money Game*, TRAFFIC WORLD, Oct. 26, 1998, at 21.

public perceives that lobbyists receive special face time with elected officials.[46] Whether that face time occurs in scheduled meetings, on a train ride,[47] over a game of poker,[48] or on the golf course,[49] it creates opportunities for lobbyists to present and persuade elected officials of their clients' positions — opportunities that ordinary citizens do not have.[50] In other words, the public's concern is not just that elected officials will engage in blatant vote-selling to lobbyists, but, more subtly, that they will be susceptible or partial to the causes of lobbyists' clients because they spend a lot of time in lobbyists' company. Public concern with the lobbying process thus reflects an underlying view that lobbyists have the ability — through some combination of monetary and personal clout — to make elected officials forego their independent judgment and take actions that are in the lobbyists' clients' best interests, as distinct from the interests of the

---

[46] *See, e.g.*, Martin Tolchin, *The Outlook for Lobbying: Critical Capitol is Pondering the Deaver Effect*, N.Y. TIMES, Apr. 30, 1986, at 134 (quoting Senator David L. Boren's reports of public concern over the fact that some former officials earned as much as 20 times their former salaries by becoming lobbyists within a short time of leaving government, and that Oklahoma farmers attributed their problems in exporting farm products to the efforts of former officials who left government to become high-priced lobbyists); Michael Wines, *Powerful Persuaders: A Look at Lobbying Tactics – For New Lobbyists, It's Now What They Know*, N.Y. TIMES, Nov. 3, 1993, at B14 (referencing a Public Citizen report labeling the revolving-door phenomenon "government service for sale").

[47] On the way to the 1992 Democratic convention in New York, for example, lobbyists paying several thousand dollars apiece were given the opportunity to ride for three hours on a train from Washington to New York with members of Congress. *See* Charles Lewis, *The Rainmaker's in Bill's Parade: Outing the Insiders*, THE NATION, vol. 255, Dec. 7, 1992, at 693.

[48] Newspaper reports in 1995 outed Senator Alfonse D'Amato's long-standing tradition of hosting Thursday night poker games in his office for "a small group of influential lobbyists and other Washington insiders", including many who represent banks, securities firms, credit unions, and other financial institutions with business before D'Amato's Banking Committee. *See, e.g.*, Douglas Frantz & Jane Fritsch, *High-Stakes Poker Put Lobbyists Close to D'Amato's Ear*, N.Y. TIMES, Oct. 26, 1995, at 1. Needless to say, the games "were an extraordinary opportunity to reach a Senator whose actions are crucial to their clients." *Id.*

[49] *DeLay Foundation Exploits New Rules*, ROLL CALL, Jan. 20, 2003, *available at* 2003 WLNR 3035720 (describing charity event in which lobbyists, business executives, and elected officials golfed together to raise money for abused children).

[50] In the words of Representative Frank R. Lautenberg, "[t]he meal involves time, and time means access. Ordinary citizens do not have that access." Jonathan D. Salant & Richard Sammon, *Senate Bans Lavish Gifts From Interest Groups*, 1995 Cong. Q. 2237, 2238 (July 29, 1995). Public Citizen Director Pamela Gilbert similarly testified during hearings on the 1993 LDA that, "the vast, vast majority of American citizens never hire anybody to be able to wine and dine a Member of Congress, so you have a tremendous disadvantage. It is not a level playing field." *See Lobbying Disclosure Act of 1993, Hearing on H.R. 823 Before the Subcomm. on Administrative Law and Gov't Relations of the House. Comm. on the Judiciary*, [hereinafter *1993 LDA Hearing*] 103d Cong., 1st Sess. at 202 (Mar. 31, 1993).

general public.[51]

2. *The Gap Between the LDA and the Public's Concerns*

Viewed from the above perspective, the LDA fails even to attempt to address the public's concerns in several important respects. First, although the public's misgivings about the lobbying process focus on lobbyists' ability to command the attention of and exert influence over elected officials, the LDA essentially leaves elected officials out of the scope of its regulations. The Act requires disclosures only from lobbyists, not elected officials, and the information it demands of lobbyists is general and vague, telling the public nothing about the lobbyists' contacts with any elected official.[52] Because of disclosure requirements in the FECA and the BCRA, lobbyists must disclose their campaign contributions to elected officials elsewhere, but tying such disclosures to lobbyists' activities on behalf of a particular client requires substantial cross-referencing and, in any event, reveals nothing about the amount or kind of face time that individual lobbyists obtain vis-à-vis elected officials to discuss issues of importance to their client(s).

This focus on disclosures by and about lobbyists is, from the public's standpoint, a little upside-down. After all, the social contract upon which our government is based is not between lobbyists and the public; it is between the public and its elected officials. It is elected officials,[53] not lobbyists, who are agents of the public, and who hold their positions and make policy at the public's behest. If the public has an interest or right to know who is exerting influence in the legislative game, that interest must stem from its political contract with the officials it elects and its desire to know how those officials are executing their political charge — i.e., the public is interested in lobbyists (and their clients) only to the extent that they interact with and influence elected officials and public policy, not in lobbyists or their clients themselves. Particular lobbyists are not the starting point of the public's concern; rather, citizens are interested in who their state representatives or the members of a particular congressional committee are meeting with, listening to, and otherwise consulting about policy decisions. Thus, it would make far more sense for the LDA to require some disclosure about lobbyists' contacts with individual elected officials, broken down by official, than it does for the Act to require that lobbyists disclose their clients and fees, and list the legislative chamber or executive department contacted on behalf of a client, broken down by lobbyist and/or client name. Indeed, the LDA differs in this respect from its close cousins, the FECA and BCRA, which require candidates for elective

---

[51] The United States Supreme Court has recognized the validity of such concerns in the related context of campaign finance regulation. *See* FEC v. Colorado Republican Federal Campaign Comm., 533 U.S. 431, 441 (2001) (acknowledging that corruption of the political process extends beyond explicit cash-for-votes agreements and includes "undue influence on an officeholder's judgment"). In *McConnell v. FEC*, 540 U.S. 93 (2003), concerning the constitutionality of the BCRA, the Court specifically discussed corporate interests' use of donations to "gain access to high-level government officials" and noted the "appearance" of undue influence created by such access. 540 U.S. at 150.

[52] *See supra* notes 27-30 and accompanying text.

[53] This includes, by extension, the staff, appointees, and others whom elected officials allow to have input into their legislative policy decisions.

office to make detailed disclosures about the sources of contributions to their political campaigns.[54]

Second, and related to the first, the LDA fails to address the public's concerns about the purchasing of *access to legislators*, as distinct from the outright purchasing of votes. Further, it ignores the perceived disparity between the access that elected officials afford to well-connected lobbyists and the wealthy interests who are able to hire them, versus to ordinary members of the publicand to less wealthy interests. That is, the Act in no way attempts to level the playing field between moneyed and not-so-moneyed interests in the lobbying game. In fact, if anything, the LDA seems to promote inequalities between such groups; one of its provisions, for instance, effectively prohibits certain non-profit organizations, known as 501(c)(4)s, from lobbying or hiring lobbyists by denying them federal funds if they engage in lobbying activities.[55]

The LDA does minimally address the revolving door problem, by placing a one-year ban on lobbying by former members, officers, or employees of Congress and their staff.[56] But it does not preclude would-be revolving-door lobbyists from advising clients on lobbying strategy, or from letting their names be used by clients who want to gain access to a friendly bureaucratic ear during this one-year cooling off period. Further, even the restrictions that the Act does impose last only for one year, and once that year has passed, elected officials (and their former staff members) can lobby the very committees and offices for which they formerly served, no matter how high a post they (or their former employers) once held.[57] While there may be legitimate reasons for allowing, or even desiring, such insiders to serve as lobbyists on policy matters in their areas of expertise,[58] the practice as currently condoned feeds the public's visions of a small cadre of hired-gun lobbyists controlling public policy, on their clients' terms, without regard for anyone else's interests.

Gift ban resolutions similarly address only the *quid pro quo* problem, but not the purchasing of access to elected officials: Although they bar lobbyists from paying for officials' meals or travel expenses, the resolutions cannot and do not ban elected officials from socializing with lobbyists — e.g., at charity golf or skiing events organized by lobbyists to benefit causes

---

[54] *See* Bipartisan Campaign Reform Act, 2 U.S.C. §434(b)(2) & (3) (disclosure requirements for individual candidates' political committees); *id.* at §434(d),(f) & (g) (requiring disclosure by individuals and entities under certain circumstances). The FECA also initially required individuals making contributions or expenditures exceeding $100 to file a statement with the Federal Election Commission. *See* 2 U.S.C. §432 (Supp. II 1973).

[55] *See* 2 U.S.C. §1611 (referencing 26 U.S.C. §501(c)(4)). Specifically, the Act provides that any civic league or non-profit organized for the promotion of social welfare will lose all federal grants, loans, or other awards if it engages in lobbying activities.

[56] *See* 18 U.S.C. § 207(e).

[57] Former Senate Energy Committee Chairman J. Bennett Johnston became a lobbyist in 1996, as did one of his top aides; their client roster "brims with energy interests." Abramson, *supra* note 45, at A1. Ann M. Eppard, once a top aide to former House Transportation Committee chairman, Bud Shuster, similarly left her job in 1994 to become a transportation lobbyist. *See id.*

[58] *See* discussion *infra* section II.C, pp. __.

supported by elected officials. Nor do the gift ban resolutions forbid lobbyists from inviting elected officials to speak at events that they host.[59] Thus, the resolutions do not eliminate moneyed interests' special access to legislators; they only limit such interests' ability to shower small treats and favors upon legislators.

Finally, the LDA's weak enforcement provisions thwart the public's underlying desire to hold elected officials and, perhaps to a lesser extent lobbyists and their clients, accountable for lobbying improprieties. As discussed earlier, the sanctions created by the LDA apply only to lobbyists,[60] not to the elected officials who are the focal point of the public's concerns, or to the interests whom the lobbyists represent. In addition, prosecutions under the Act are so few and far between[61] that there is little incentive for lobbyists to make adequate disclosures even of the little information they are required to report.[62] Further, there is no way for the public to know about underreporting or other violations of the Act unless the House Clerk or Secretary of the Senate decides to divulge this information.[63] The House and Senate gift ban resolutions suffer from similar flaws because although the resolutions do require disclosures from elected officials themselves, they too are subject to lax enforcement and widespread noncompliance, as proved by

---

[59] *See* S. Res. 158.104th Cong., 1st Sess. (1995) (amending Senate Rule XXXV; *see* Rule XXXV(1)(c)(23)(A)).

[60] *See* 2 U.S.C. §§1605(8), 1606.

[61] *See, e.g.*, Kenneth P. Doyle, *Senate Passed 2,000 Possible LDA Violations To DOJ, Dodd Reports; DOJ Pursued 13 Cases*, BNA MONEY & POLITICS REP. (Feb. 14, 2006) (recounting DOJ report that it has pursued possible enforcement action in only 13 lobbying-reporting-violation cases since 2003); Kate Ackley, *LDA Enforcement: Is It Strong Enough?*, ROLL CALL (June 27, 2005) *available at* 2005 WLNR 10116594 (quoting comment by a spokesman for the U.S. Attorney's Office that there have been "few" prosecutions related to the LDA); Carl Weiser, *Enforcement of Law Almost Non-Existent*, U.S.A. TODAY, Nov. 16, 1999, at 11A (reporting that between January 1, 1996, when the LDA took effect, and the date of the article in November 1999, not a single lobbyist had been prosecuted or referred for prosecution under the Act, and commenting that "no one knows whether lobbyists are complying with the law").

[62] *See, e.g.*, *Editorial*, CHRISTIAN SCIENCE MONITOR, *High Fives in the Skybox*, Jan. 18, 2005, at 8 (noting that "[e]ven lobbyists on Washington's K street corridor have said they view the act as 'voluntary'"). A recent study of lobbying disclosure forms conducted by the Center for Public Integrity found that 20% of such forms were filed at least three months after the deadline; in fact, 3,000 forms were filed six months late and 1,700 disclosure forms were at least one year overdue. Eliza Newlin Carney, *Lobbyists in the Crossfire*, CONG. DAILY (May 16, 2005) *available at* 2005 WLNR 7653948.

[63] For most of the LDA's life, the Senate Office of Public Records ("SOPR"), which oversees LDA enforcement on the Senate side, has refused to make public the number of its LDA-related referrals to the U.S. Attorney's Office, much less to provide any details about individual cases. *See* Kate Ackley, *LDA Enforcement: Is It Strong Enough?*, ROLL CALL, June 27, 2005, *available at* 2005 WLNR 10116594; Doyle, *supra* note 61, at __. In a Senate Rules and Administration Committee meeting held on February 7, 2006, in the wake of the Abramoff and DeLay scandals, the SOPR for the first time reported that, between 2003 and early 2006, it referred over 2,000 cases of possible LDA violations to the Justice Department; the Justice Department responded that it has received only about 200 such referrals. Doyle, *supra* note 61, at __.

recent events.[64]

C. Why Congress Opted For Symbolic Reform

Why do the regulations imposed by the LDA fall so short of addressing the public's concerns? Is Congress unaware of the public's views, or has it simply chosen to ignore them? This Section argues that Congress' failure to enact lobbying regulations that more closely satisfy the public's concerns is the result of a confluence of factors: congressional sensitivity to constitutional constraints involving the First Amendment, substantial differences in congressional versus public perceptions of lobbying, and self-interested legislator behavior.

1. First Amendment Concerns

First Amendment concerns are the reason that Congress itself typically gives in explaining why the LDA is structured as a disclosure statute, rather than a conduct-regulating statute, and why it lacks strong enforcement mechanisms.[65] Irrespective of what the public might want, Congress understands — and to some extent hides behind — the fact that it cannot prohibit, or even substantially restrict, substantive lobbying practices without violating citizens'

---

[64] *See, e.g.*, Mary Curtius & Chuck Neubauer, *DeLay Reports He Made Five Trips Within U.S. in 2004*, L.A. TIMES (Bus. Sec.), June 16, 2005 (reporting that in the wake of the DeLay scandal, other House members and staff members began filing a flurry of reports about trips they previously had failed to disclose); *Lobby Control*, ROLL CALL, June 8, 2005, *available at* 2005 WLNR 9072447 (reporting that to date, members of Congress "have ignored [the LDA's] report-filing requirements and, under scrutiny, are now scrambling to fulfill their obligations" and noting that Republicans' response to criticism of DeLay's travel practices was in effect, that "everybody does it").

[65] *See, e.g.*, 141 Cong. Rec. H1703, 1704 (Sept. 6, 1995) (extension of Remarks by Rep. Lee H. Hamilton) ("Lobbying reform is needed, but it must be balanced. We must not reach too far and try to restrict legitimate lobbying activities and public contact with Members of Congress. Almost any attempt by the government to limit private and nongovernmental entities from using their own private funds to lobby will be difficult due to the First Amendment."); *1993 LDA Hearing*, *supra* note 50, at 1 (Opening Statement of Committee Chairman John Bryant, commenting that the 1993 LDA "is designed to provide for the effective disclosure of the efforts of paid lobbyists to influence Federal, legislative, or executive branch officials in the conduct of government actions so that the public can see what influences these important actions affecting their lives while continuing to afford the fullest opportunity to the people to exercise their right to petition their Government for a redress of grievances and to express their opinions freely and provide information to the Government"). *See also* Robert L. Koenig, *Senator Offers Legislation to Close Lobbying Loopholes*, ST. LOUIS POST- DISPATCH, Feb28, 1992, at 16A (reporting comments by Senator Carl Levin that lobbying is protected by the First Amendment and that "[t]he way to protect the public interest is through disclosure").

First Amendment rights of petition, speech, and association.[66] First Amendment concerns are, for example, behind the Act's failure to place caps on the dollar amounts that a group may spend for lobbying activities[67] or to restrict campaign contributions by those who engage in lobbying activities.[68] They also explain the weakness of the penalties imposed for non-compliance with the LDA's disclosure requirements: The previous lobbying regulation statute, the 1946 Federal Regulation of Lobbying Act ("FRLA"), had imposed criminal penalties and prohibited future lobbying by those found to have violated its provisions, and these penalties widely had been

[66] First Amendment issues raised by lobbying regulations are discussed more fully *infra* Section III.C.2. In brief, the concern is that "the First Amendment protects [the] right not only to advocate [one's] cause, but also to select what [one] believe[s] to be the most effective means of doing so," including hiring a lobbyist. Meyer v. Grant, 486 U.S. 414, 424 (1988); *see also* Lehnert, et. al. v. Ferris Faculty Ass'n, 500 U.S. 507, 522 (199 1) (First Amendment freedom of expression protects the decision whether to engage in or hire someone to engage in political lobbying). Legislative restrictions on political advocacy or advocacy of the passage or defeat of legislation thus violate the First Amendment, whether those restrictions are placed directly on those who seek to benefit from the passage or defeat of legislation or on those who are hired to advocate on others' behalves. *Cf.* Buckley v. Valeo, 424 U.S. 1, 48 (1976). Even disclosure requirements can run afoul of the First Amendment if their effect is to chill citizens' exercise of their right to advocate or of their right to associate for fear that public exposure of their affiliation with a particular position or interest group might result in adverse economic or private consequences. *See, e.g.*, Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); Baird v. State Bar of Arizona, 401 U.S. 1 (1971). For detailed treatments of how lobbying is protected under the First Amendment see David E. Landau, *Public Disclosure of Lobbying: Congress and Associational Privacy After* Buckley v. Valeo, 22 HOW. L. J.27 (1979); Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J. L. & PUB. POL'Y 149 (1993); Steven A. Browne, Note, *The Constitutionality of Lobby Reform: Implicating Associational Privacy and the Right to Petition the Government*, 4 WM. & MARY BILL RTS. J. 717 (1995).

[67] [Cite].

[68] The Senate in 1992 considered enacting a law that would have prohibited lobbyists from making political contributions to any candidate or elected official whom they had lobbied within the past year, but the bill died amidst serious concern that it would violate the First Amendment. *See, e.g.*, 139 CONG. REC. S6655, S6657 (May 27, 1993) (Statement of Senator Paul Wellstone questioning constitutionality of the proposed law).

criticized as constitutionally suspect.[69] In addition, First Amendment arguments formed the focal point of interest group opposition to proposed LDA provisions that would have required disclosure of grassroots lobbying activities.[70]

But First Amendment concerns do not explain why the LDA leaves Congress out of the lobbying equation, focusing all of its disclosure requirements exclusively on lobbyists. Nor do they explain the Act's failure to address the public's concerns about lobbyist access to elected officials. To understand these, it is necessary to consider the dynamics of the legislative process, and the role of lobbying therein.

---

[69] The 1946 Act contained a provision that made violations of the Act a misdemeanor, punishable by a fine of $5,000 or imprisonment of up to 12 months, and that prohibited persons who were convicted of violating the Act from engaging in lobbying activities for a subsequent period of three years. *See* 2 U.S.C. §269(a) & (b). The District Court for the District of Columbia found this provision to be "obviously unconstitutional" on the ground that a person convicted of a crime cannot for that reason be stripped of his constitutional privileges, including the right to petition the government. *See* Nat'l Ass'n of Mfrs. v. McGrath, 103 F. Supp. 510, 514 (D.D.C. 1952), vacated by McGrath v. National Ass'n of Mfrs of U S, 344 U.S. 804 (1952). Although the Supreme Court later vacated this ruling and found the 1946 FRLA constitutionally valid, it left for another day the question of whether the Act's penalty provisions were constitutional. *See* United States v. Harriss, 347 U.S. 612, 627 (1954). Most scholars and commentators continue to view such sanctions as unconstitutional. *See, e.g.*, Elizabeth Garrett, Ronald M. Levin & Theodore Ruger, *Constitutional Issues Raised by the 1995 Lobbying Disclosure Act*, *in* THE LOBBYING MANUAL: A COMPLIANCE GUIDE FOR LAWYERS AND LOBBYISTS (William V. Luneburg & Thomas M. Susman, eds. 2005) at 149 (calling the sanction "highly questionable" and applauding Congress for abandoning its use in the 1995 LDA).

[70] *See, e.g.*, 140 CONG. REC. S14207, S14208 (Oct. 5, 1994) (statements of Sen. Dole) (discussing request by certain members of Congress to remove grassroots regulations from conference report for 1993 LDA because of "wide" and "diverse" interest group concern that the Act's grassroots lobbying provisions "will seriously impair our ability to exercise our rights guaranteed under the First Amendment"); 140 CONG. REC. H10283, 10291 (Sept. 29, 1994) (statements of Representative Doolittle criticizing grassroots lobbying provisions as a "gag rule" that "will have a chilling effect on free expression" and citing diverse list of grassroots groups opposed to the legislation, including the ACLU, U.S. Chamber of Commerce, Defenders of Property Rights, and the Christian Coalition). The concerns expressed were that regulation of grassroots lobbying would result in the disclosure of interest groups' membership lists and possibly chill the political participation of religious organizations. *See, e.g.*, 141 CONG. REC. S10654, S10654 (July 25, 1995) (statement of Senator Smith discussing concern that prior version of bill containing grassroots lobbying provision threatened to "make grassroots lobbyists divulge their entire mailing lists"); Jonathan D. Salant, House Postpones Vote On Tougher Rules, 1995 Cong. Q. 3589 (Nov. 25, 1995) (noting that Republicans had opposed the LDA in the prior year because they believed it "could limit the political participation of religious organizations by forcing them to disclose their grass-roots lobbying efforts"). Because of the vociferous opposition to such regulation, the final version of the LDA passed in 1995 contains no regulation of grassroots lobbying. *See* 141 CONG. REC. H13099, H13103 (Nov. 16, 1995) (statement of Representative John Bryant) (presenting 1995 LDA for consideration and noting that prior year's "controversial" grassroots lobbying provision was not in current bill); 141 CONG. REC. S15513, S15514 (Oct. 24, 1995) (statement of bill sponsor Sen. Levin explaining that "[w]e struck any reference to grassroots lobbying from the lobbying reform bill this year in order to make progress").

2. *Differences in Congressional v. Public Perceptions About Lobbying*

One overlooked, but key, reason for the disjunct between public concerns about lobbying and the LDA's actual provisions is that Congress' conception of lobbyists and their role in the legislative process differs vastly from the public's. Whereas the public views lobbyists as soul-less mercenaries, skilled at arm-twisting and bribing legislators into appeasing their clients' interests at the expense of the public good,[71] Congress (generally) views lobbyists as invaluable policy experts who provide elected officials with useful information about the underlying subjects of proposed legislation.[72] Broadly speaking, the public seems to have adopted a "pluralist"[73] view of the lobbying process, in which interest groups — through their hired lobbyists — barter in the political marketplace to obtain the best possible package of goods and services for themselves, with little thought for the broader public interest.[74] Congress, by contrast, seems to subscribe to a "deliberative" model of the legislative process[75] in which lobbyists, motivated by their clients' best interests, present specialized information to elected officials, who take that information into account when debating various policy proposals and

---

[71] *See, e.g.*, Adam Clymer, *Lobbyist Disclosure Is Backed in Senate: Gift Issue Is Put Off*, N.Y. TIMES, July 25, 1995, at 1 (quoting comment by Senator Cohen indicating that a perception had developed "that just a few key people are being paid very high dollars in order to shape and influence and alter public policy in ways that are very damaging to the overall good of the country").

[72] *See, e.g.*, *1993 LDA Hearing*, *supra* note 50, at 127 (statement by Representative Frank) (commenting that he finds lobbyists to be "very useful sources of information"); Clymer, *supra* note 71, at 1 (reporting that Senator Cohen defended lobbyists as providing an important democratic service); David E. Shribman, *Lobbying: Business by Nuance, Feint and Gamble*, N.Y. TIMES, Nov. 21, 1981, at 111 (quoting comment by Rep. LaFalce, D-NY, that legislators "almost by definition, have to be generalists, but we also have to deal with very technical issues requiring the skills of specialists" and that lobbyists providing useful such specialized information); David E. Shribman, Lobbyists *Proliferate - So Do the Headaches*, N.Y. TIMES, July 25, 1982, at 45 (reporting that members of Congress admit they depend upon lobbyists to brief them on issues, and that with the work of Congress reaching into increasingly technical areas, individual members often feel they are unable to sort out issues without lobbyists).

[73] *See, e.g.*, Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32-33 (1985) (explaining that under the pluralist view of politics, the legislative process consists of competition between various self-interested groups for scarce social resources).

[74] *See, e.g.*, Adam Clymer, *Lobbyist Disclosure Is Backed in Senate: Gift Issue Is Put Off, N.Y. Times*, July 25, 1995, at 1 (quoting comment by Senator Levin that public opinion polls show that "a majority of Americans feel that lobbyists are the real power in Washington, only 22 percent believe it's Congress, and only 7 percent the President"); David E. Rosenbaum, *Senate Refuses to Weaken Bill to Limit Gifts from Lobbyists*, N.Y. TIMES, May 6, 1994, at A1 (referencing a 1992 New York Times/CBS News poll finding that 75 percent of American adults believed the government was run by a few big interests, while only 19 percent thought it was run for the benefit of all the people).

[75] *See id.* at 41 (describing civic republicanism, or deliberative, concept of representative government as one in which elected officials engage in a careful process of information-gathering, discussion, and debate, from which a common good ultimately emerges).

then come to their own conclusions about how best to serve the public good.[76]

Congress is aware of the public's opinions and concerns about the lobbying process, but it considers these opinions to be uninformed and misguided.[77] Elected officials, for instance, firmly (and sometimes vexedly) reject the popular notion that lobbyists direct or control their policy decisions.[78] Similarly, the revolving door that is so reviled by the public does not seem such a bad thing to members of Congress, because it means that elected officials and government employees who have developed expertise in a particular policy area can continue to share their

---

[76] *See, e.g.*, *Lobbyists Praised by Bono for Their Efforts to Educate Congress*, COMMUNICATIONS DAILY, Feb. 22, 1996, *available at* 1996 WLNR 3292400 [hereinafter Lobbyists *Praised*] (quoting Rep. Bono's observations that "'education by lobbyists' is very valuable to Congress and after lobbyists have done their work, 'ethics take over' when members decide how to vote on issues"); Shribman, *supra* note 72, at 111 (quoting comment by Rep. Henry A. Waxman that "[l]obbyists help us see the full impact of legislation we might adopt" but indicating that he knows to be "sensitive to the fact that they often think their self-interest and the public interest are the same thing"); *id.* (quoting explanation by Rep. LaFalce that "[w]e often have to turn to lobbyists for information" but that he knows how to "use lobbyists rather than have the lobbyists use [him]" and how to "get the perspective of lobbyists who differ with each other"); Shribman, *supra* note 72, at 45 (reporting, based on interviews with members of Congress, that legislators "listen to lobbyists representing more than one side of an issue and proceed to make their decisions").

[77] *See, e.g.*, *1993 LDA Hearing*, *supra* note 50, at 126-27 (statement by Rep. Frank) ("People who think that adopting the most stringent forms of regulation and disclosure will materially change the public policy of this country are wrong. I think there is a misperception that public policy is shifted more by this than, in fact, is the case."); Rosenbaum, *supra* note 74, at A1 (reporting that senators had said they "knew they were honorable public servants and that they should stop beating up on themselves to vanquish a misguided public perception" that their votes could be bought). *See also* Michael Wines, *House Hardens Rule on Lobbyists; Bans Accepting Gifts From Them*, N.Y. TIMES, Mar. 25, 1994, at A1 (reporting legislator comments on the House floor indicating that they had been wounded "by the mistaken perception that they can be swayed by free skiing vacations, tickets to National Football League games and dinners in four-star restaurants").

[78] *See, e.g.*, *Lobbyists Praised*, *supra* note 76 (quoting Rep. Bono's comment that although lobbyists help educate members of Congress, members make their own independent decisions about how to vote on legislation); *1993 LDA Hearing*, *supra* note 50 at 196 (statements of Rep. John Bryant) ("What I am concerned about, though, is the impression that is constantly given is that members are induced to make different decisions after the have been elected and come here simply because somebody is taking the to dinner or spending funds on them. . . . "I really thing it is wrong of you and wrong of anyone to suggest that this place changes its mind because of things like that"); LESTER MILBRATH, THE WASHINGTON LOBBYISTS 352 (Rand McNally & Co., 1962) (congressional respondents in a study reported that other factors are more important in shaping policy outcomes than is lobbying); S. REP. NO. 1400, 79th Cong., 2d Sess. 26 (1946) (Senate Judiciary Committee report disdainfully referencing those who come to Washington "under the false impression that they exert some mysterious influence over Members of Congress").

knowledge with Congress even after they have left government service.[79] In fact, members of Congress have been known to rely on lobbyists, revolving-door and otherwise, for help in writing speeches and even drafting parts of legislation.[80] Thus, in enacting the LDA, Congress neither wanted nor saw a need to change many aspects of the lobbying process that troubled the public and, accordingly, tended to focus on superficially appeasing, rather than substantively addressing, the public's concerns when constructing lobbying regulations. That is, Congress wanted to enact lobbying regulation in order to repair its image with the, in its view, misinformed public — but it wanted to do so without substantially changing the way that lobbying is practiced. This explains why, for example, Congress drafted the LDA to impose a one-year ban on revolving-door lobbying, rather than banning such lobbying outright, as the public might have preferred,[81] and why legislators, in drafting the House and Senate gift ban resolutions, themselves commented that these reforms were designed to address the public's misconceptions but were unlikely to effect real change in the lobbying process.[82]

Congress does have its own concerns about the lobbying process, but its concerns differ substantially from those expressed by the public. Unsurprisingly, the primary congressional concern is with protecting members of Congress from harassment by lobbyists. As then-Senator John F. Kennedy once wrote, "the problem is pressure on the legislative branch of the Government."[83] In Congress' view, although some lobbyists can be valuable information sources, the sheer number and ubiquity of lobbyists can make interacting with them exacting and

---

[79] *See, e.g.*, Martin Tolchin, Senators *at Hearing Support a Bill to Tighten Lobbyist Restrictions*, N.Y. TIMES, April 30, 1986, at A32 (quoting comment by David H. Martin, director of the Office of Government Ethics, that "We do not want to prevent a person from using his expertise and his knowledge when he leaves the government").

[80] *See Congress and Pressure Groups*, *supra* note 1, at 18 (quoting lobbyist Charles Walker's descriptions of last-minute phone calls from legislators asking for speech-writing help); Wines, *supra* note 77, at B14 (noting that revolving-door lobbyist Jan Schoonmaker has twice helped House appropriators write legislative language).

[81] Similarly, nothing in the LDA prevents former members of Congress from lobbying executive-branch agencies that they once supervised as committee members. The same is true of former executive-branch officials, who can lobby Congress unbridled.

[82] *See, e.g.*, Rosenbaum, *supra* note 74, at A1 (quoting Senator Johnston's comment that "[t]he assumption is that if we pass this bill, somehow it will satisfy the American public who has unjustly believed that we can be bought for a sack of fruit"); Wines, *supra* note 77, at A1 (noting that Representative John Bryant "and many other lawmakers" said their behavior would not change because they do not socialize with lobbyists nearly as much as the public believes). *See also* Adam Clymer, *G.O.P. Filibuster Deals a Setback to Lobbying Bill*, N.Y. TIMES, Oct. 7, 1994, at A1 (quoting comment by then-Senate Minority Leader Bob Dole that, "We're prepared to correct all the abuses, real or *perceived*, that have tarnished the credibility of Congress") (emphasis added); Wines, *supra* note 77, at A1 (quoting comment by lobbyist Allen Klein that "[The House gift resolution]'s going to have a positive effect on the public perception, but it's going to have a very limited effect on the way business is done here").

[83] John F. Kennedy, *Congressional Lobbies: A Chronic Problem Re-Examined*, 45 GEORGETOWN L. J.535, 556 (1957).

confusing for elected officials. Thus, the aim of lobbying regulation, from Congress' perspective, is to help level the playing field between lobbyists, who hold all of the information, and elected officials, who hold none — by, for example, forcing lobbyists to identify the interests on whose behalf they are advocating so that elected officials will know who is behind the data (and pressure) thatthey are receiving.[84]

House and Senate reports studying the lobbying process also reveal a congressional concern about the unequal access obtained by big business versus less affluent interests. A House Select Committee Report on Lobbying published in 1950, for example, acknowledged that "the advantage in lobbying would always lie with those interests which [are] best organized, best financed, and had the easiest access to mass media of communication" and that, for this reason, "[o]rganized business has always gained the most from lobbying."[85] The problem with this disparity is that it skews the spectrum of information presented to legislators and, therefore, the shape of public policy. As Congress has recognized, "[f]acts are seldom presented for their own sake, or without having been carefully selected for maximum impact" and it is only "where a full hearing is available for all interested groups" that Congress can "rely on competitive watchfulness and public scrutiny as partial safeguards against misrepresentation of the facts by any one group."[86] But, concluding that it had no feasible way to remedy this situation, Congress essentially abandoned this concern when contemplating the shape of lobbying regulation and focused instead on obtaining more information from lobbyists.[87]

Thus, whereas the public views lobbyists as dangerous influence peddlers who create deleterious effects in the policymaking process, Congress views them as useful, if sometimes annoying, political actors without whom the political system could not function.[88] Given these divergent underlying assumptions, the goals that Congress seeks to accomplish through lobbying regulations differ substantially from the public's ideal. Factor in Congress' dismissiveness of the public's "misinformed" views, tempered by its electoral obligation to address the public's concerns, and symbolic legislation is the unsurprising result.

---

[84] *See id.* at 566; HOUSE REP. NO. 3138, *General Interim Report, House Select Comm. on Lobbying Activities*, 81st Cong., 2d Sess. at 30 (1950) [hereinafter *1950 House Report*] ("The all-pervading purpose and intent of the Lobbying Act was to bring into the open activities intended to influence legislation, directly and indirectly, and to provide full public disclosure of the financing and expenditures involved in these activities."); [Preamble to 1946 Act, and perhaps other proposed bills?].

[85] *1950 House Report*, supra note 84, at 63.

[86] *Id.* at 27.

[87] *Id.* at 66 (rejecting proposals for leveling playing field between wealthy and less wealthy interests and stating that "We need more information on lobbying and lobbyists. This, at the moment, is the most feasible approach. Every group has the right to present its case, but at the same time Congress and the public have a right to know who they are, what they are doing, how much they are spending, and where the money is coming from. . . . What is needed is that this act be equipped to fulfill more effectively the purposes for which it was designed.").

[88] *See, e.g.*, Kennedy, *supra* note 83, at 566 (calling lobbyists the "third chamber" and praising the "real contribution they make to the legislative process").

3. *Legislator Self-Interest*

Beyond philosophical differences in congressional versus public perceptions of lobbying, legislator self-interestedness also seems to have played a significant role in shaping the symbolic LDA. Basic game theory tells us that legislators can be expected to maximize their own self-interest when enacting lobbying regulations, and this is precisely what seems to have occurred with the LDA. First, despite their central role in the lobbying process, legislators distanced themselves from the LDA's regulatory burdens, instead placing the entire onus of the Act's disclosure requirements on lobbyists. Second, despite the public's deep distrust of lobbying practices, legislators constructed the LDA in a manner that leaves lobbyist contacts with elected officials both unregulated and undisclosed, thereby protecting their own ability to obtain the benefit of lobbyists' expertise, information, and assistance in drafting speeches and legislation — without the public's knowledge. Further, legislators imposed only the most minimal of revolving-door restrictions upon themselves, requiring former members of Congress and their committee staff to wait only one year before lobbying (and providing information and legislative assistance to) members of the committees on which they once served.

II. BEYOND SYMBOLISM: THE PROMISE OF MORE RESPONSIVE LOBBYING REFORM

A. Is Symbolism Enough?

Given legislators' incentives, one might wonder whether symbolism might not be the most that we can expect from Congress in the context of lobbying regulation. Indeed, symbolism has much to recommend it: Congress certainly is correct in its view that the public lacks an accurate understanding of the beneficial role lobbyists can play in the legislative process, and symbolism allows Congress to satisfy the public's concerns superficially, as well as to correct its own informational disadvantages vis-à-vis lobbyists, without disrupting those aspects of the lobbying process that it believes work well. Moreover, disclosure — an inherently symbolic form of regulation — may be the only method of lobbying regulation permitted by the First Amendment.

But while there is nothing wrong with symbolism per se, the LDA's approach to lobbying regulation — an approach that has been accepted without question by those who seek to reform the lobbying process — leaves something to be desired. First, the Act's approach discounts the public's concern with lobbyist access to elected officials, focusing almost exclusively on the financial aspects of lobbyists' activities.[89] As a result, the disclosures that current regulations produce are incomplete and provide no information with which to gauge any correlation between lobbyists' and interest groups' monetary contributions and their legislative access. In this respect, the LDA falls far short of achieving its own symbolic goals of increasing public

[89] Significantly, lobbyists themselves confirm the public's concerns, stating that their objective is to ensure access to policy makers and that they make contributions to help them gain access, not to buy the votes of elected officials. *See, e.g.*, Evans, *supra* note 26, at 267. While this statement should, of course, be taken with a grain of salt given its self-serving nature, it undoubtedly describes at least some lobbyists' behavior.

awareness about the lobbying process and of improving public confidence in the integrity of government.

Second, the LDA's lax enforcement provisions leave substantial room for lobbyists to circumvent its disclosure requirements through incomplete, intentionally vague, and even egregiously late filings. Further, they enable lobbyists and interest groups, working together, to avoid full disclosure, by registering an affiliate or coalition name rather than a recognizable interest group name under the "client" category — with little fear of detection, let alone sanction.[90]

Third, even if the LDA's disclosure requirements had been sufficient to satisfy the public's needs when enacted, Congress' passage of the BCRA in 2002 at least arguably made more aggressive lobbying disclosure necessary. In restricting interest groups' ability to make campaign contributions, BCRA closed off one prominent tactic used by interest groups to obtain political access to elected officials.[91] Because money is fungible, cutting off its use in one political arena inevitably will lead to increased expenditures in another;[92] thus, if the law limits how much interests can spend on campaigns, interests presumably will begin to spend more on other political activities, including lobbying.[93] This, in turn, means that the political stakes associated with lobbying will increase and that lobbying likely will play an increasingly significant role in the legislative process.

Ultimately, the problem with the LDA's approach is not merely that it is symbolic, but that it offers only a narrow, static solution to a dynamic problem. The Act's approach assumes that requiring minimal disclosures about lobbyists' clients, fees, and issue areas automatically will result in greater public respect for the lobbying system, and ignores the manner in which different political players interact with each other in the lobbying process, as well as the manner

---

[90] This problem is discussed in greater detail *infra* Section IV.B.2.

[91] Before BCRA, interest groups could circumvent legal caps on contributions to political candidates by donating unlimited amounts to political parties, who in turn passed this money on to their candidates. *See, e.g.*, Note, *Soft Money: The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323 (1998). BCRA makes such "soft money" – i.e., money not subject to a contribution cap – contributions unavailable to political parties and, thereby, political candidates, by subjecting all political party expenditures to contribution limits. *See* 2 U.S.C. §434; *see also* de Figueiredo & Garrett, *supra* note 40, at 598-99.

[92] For an excellent discussion of this hydraulics principle, see Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1714, 1709 (1999) (noting, for example, that "campaign money is inevitably seeking the path of least resistance").

[93] *Cf.* Jeffrey Milyo, *Bribes and Fruit Baskets: What Does the Link Between PAC Contributions and Lobbying Mean?*, 4 BUS. & POLITICS 157, 158-59 (2002) (noting that expenditures on lobbying and PAC contributions tend to move in tandem and arguing that there is strong empirical support indicating that PAC contributions, like lobbying, are used to gain access to elected officials) (citing Steven Ansolabehere, James M. Snyder, and Micky Tripathi, *Are PAC Contributions and Lobbying Linked? New Evidence from the 1995 Lobbying Disclosure Act*, 4 BUS. & POLITICS 135-55 (2002)).

in which the public obtains and processes political information. In order to achieve more effective lobbying reform, we need a disclosure system that appreciates the incentives that motivate different political entities — legislators, interest groups, lobbyists, the media, and the public— and thataccounts for how these entities interact with each other. We need a system that produces disclosures relevant to the public, ensures the accuracy of these disclosures, and channels such disclosures to the public in an accessible way so that voters can make more informed electoral decisions and hold their elected officials accountable for their legislative and lobbying behavior. Such a dynamic system of lobbying regulation could benefit the public *and* the legislative process in a number of ways, beginning with increased voter competence and more informed (balanced) legislating.

B. Voter Competence

Voter competence is a crucial component of any democratic government that claims to be run based on the consent of the governed. Voting is, of course, the only form of control that most citizens can exercise over those who make public policy decisions with often far reaching private consequences. It stands to reason that if voting is conducted based on inadequate or inaccurate information, then voters will not get the government they expect (or will not expect the government that they get), and thatpublic confidence in the political p rocess accordingly will disintegrate. Hence, disclosure statutes are justified in part on the theory that they provide useful information to citizens and legitimize the political process, as illustrated by the preamble to the LDA[94] and the Supreme Court's jurisprudence in the campaign finance context.[95] But if this is their purpose, then the information elicited by disclosure statutes should be that which is most helpful to citizens in deciding how to vote.[96]

As Elizabeth Garrett and Daniel Smith have noted in the context of campaign finance regulation, political scientists define voters as competent "if they cast the same votes they would have cast had they possessed all available knowledge about the policy consequences of their

---

[94] *See* 2 U.S.C. §1601 (listing congressional findings that "(1) responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decisionmaking process" 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").

[95] *See* McConnell v. FEC, 540 U.S. 93, 196 (2003) (citing, *inter alia*, state interest in "providing the electorate with information" as justification for BCRA's application of disclosure requirements to all "electioneering communications"); Buckley v. Valeo, 424 U.S. 1, 66-67 (1976) (citing governmental interests "in providing the electorate with information as to where political campaign money comes from and how it is spent by the candidate" and "in deterring actual corruption and avoiding the appearance of corruption by exposing large contributions and expenditures to the light of publicity" as sufficient to justify intrusion on First Amendment rights by FECA's disclosure requirements).

[96] *See* Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors: The Real Threat to Campaign Disclosure Statutes* (USC-Caltech Ctr. for the Study of Law and Politics, Working Paper No. 13, 2002), *available at* http:// lawweb.usc.edu/cslp/papers/cslp-wp-013.pdf.

decision."[97] That is, if knowledge of Candidate X's position on 100 political issues would render a voter competent in an election, then if Citizen A does not know these facts, and cannot access other facts that allow her to make the same choice at the ballot box, she cannot vote competently.[98] But, on the other hand, if there exists another, related, set of facts that leads her to make the same choice she would have made with knowledge of Candidate X's position on 100 political issues — e.g., the related fact that Candidate X is endorsed by the NRA — then knowledge of the full set of facts is not necessary to cast a competent vote.[99] In other words, voters need not possess all available information about a candidate in order to vote competently; they can instead rely on "particular pieces of information, connected non-accidentally to accurate conclusions about the consequences of [their] vote[s]," and still make competent electoral decisions.[100] Smaller, digestible, "particular pieces of information" thus serve as cues, or heuristics, that enable citizens to vote competently with limited information.[101]

As the use of the NRA in the above example suggests, an incumbent's or challenger's (if the challenger has held prior elective office) connection to a particular interest group can serve as one important heuristic for voters.[102] In fact, the Supreme Court has acknowledged as much when discussing the value of campaign finance rules requiring disclosure of the names of those who have contributed to a candidate's campaign:

[D]isclosure provides the electorate with information as to 'where political

---

[97] *Id.* at __ (quoting Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections*, *in* CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS 147, 149 (S.L. Elkin & K.E. Soltan eds., 1999)).

[98] *Id.* at __ (quoting Arthur Lupia & Richard Johnston, *Are Voters to Blame? Voter Competence and Elite Maneuvers in Referendums*, *in* REFERENDUM DEMOCRACY: CITIZENS, ELITES, AND DELIBERATION IN REFERENDUM CAMPAIGNS 191, 194-95 (M. Mendelsohn & A. Parkin Eds., 2001)).

[99] *Id.* (employing this example with the Sierra Club in place of the NRA).

[100] *Id.* at __.

[101] *See id.* at __; Michael Kang, *Democratizing Democracy: Restoring Voter Competence in Direct Democracy: Heuristic Cues and "Disclosure Plus,"* 50 U.C.L.A L. REV. 1141 (2003) (arguing that strengthening heuristic cues in direct democracy is the best means for rehabilitating voter competence).

[102] *Cf.* Arthur Lupia, *Dumber than Chimps? An Assessment of Direct Democracy Voters*, *in* DANGEROUS DEMOCRACY: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 66, 69 (L.J. Sabato, H.R. Ernst & B. A. Larson eds., 2001) (listing "interest-group endorsements", along with personal reputations and political ideologies, as an example of an informational shortcut that voters may use to help themselves make electoral decisions in ballot initiative context); Kang, *supra* note 101, at 1157 (citing ELISABETH R. GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION 18 (1999) (for the proposition that the political orientation of many interest groups is well-known)); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 71 (1994) (finding that voters who were ignorant about the substantive content of insurance-related ballot initiatives, but knew the interest group positions, voted almost exactly like substantively knowledgeable voters).

> campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also *alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office*.[103]

In other words, knowledge of which interest groups an elected official is most likely to pay attention to once in office can be a crucial factor in increasing voter competence. The most reliable predictor of such future behavior, of course, is a catalogue of those interests to which the candidate has responded in the past — i.e., a list of his or her lobbying contacts while in office thus far.

Meaningful, dynamic, lobbying regulation thus must require some disclosure of elected officials' (and their staffs') [104] lobbying contacts with particular interest groups, so that the public can use this information to predict, reward, or punish its elected representatives' behavior. In order to prove useful to the public, moreover, lobbying regulations must ensure that the information disclosed (1) is accurate; and (2) is presented in a form that is both easily accessible to the public and likely to garner the public's attention. The accuracy of information about lobbying contacts obviously is crucial, as incorrect or incomplete cues about the interests to which an elected official responds could lead the public to draw erroneous conclusions about how to vote. As discussed earlier,[105] current lobbying regulations do nothing to ensure the accuracy or thoroughness of lobbyist disclosures, giving the Secretary of the Senate and the Clerk of the House no authority to investigate whether the information reported by lobbyists is

[103] Buckley v. Valeo, 424 U.S. 1, 66-67 (1976) (emphasis added).

[104] In order to obtain an accurate picture of lobbyists' access and opportunities to influence elected officials, it is imperative that contacts with members of an elected official's staff be covered by disclosure requirements. *See, e.g.*, Evans, *supra* note 26, at 266 (explaining that the majority of the lobbyists interviewed in her study of the House Public Works and Transportation Committee "considered lobbying staff a key part of their strategy" and opining that such meetings were at least as fundamental to an interest group's success as were meetings with the chairmen and ranking members of the House committee and subcommittee themselves); E-mail from Bill Dauster, Democratic General Counsel, United States Senate Finance Committee (Aug. 23, 2005, 07:54 EST) (on file with the author) [Also cite conversation with W.M., lobbyist?].

[105] *See* discussion *supra* Section II.B, pp. 29-30 and accompanying notes.

true or to catch entities who engage in lobbying activities but fail to register.[106] This structure actually encourages incomplete and inaccurate reporting by lobbyists.[107] Lobbying reforms that strengthen the LDA's enforcement mechanisms and give real investigative authority to those charged with enforcing the Act can change this unfortunate dynamic,[108] increasing lobbyists' incentives to provide thorough and reliable information, and thus helping to improve the accuracy of voting cues. Reforms that enable enforcers and the public to cross-reference information disclosed under the Act — by, for example, comparing lobbyists' disclosures about their contacts with elected officials (and officials' staff) against disclosures made by elected officials and staff members themselves[109] — also would enhance the reliability of the information provided to the voting public.

In addition, the format of information disclosed under the LDA is integral to its usefulness as a voting heuristic. Most voters are disengaged from politics and have little time or attention to devote to digesting information disclosed by lobbyists; thus it is imperative that lobbying regulations be designed to provide voters with "the information most crucial to improving their ability to vote consistently with their preferences,"[110] and to do so in a format that readily translates into a voting cue. Current lobbying regulations provide information in a decidedly non-voter-friendly manner: The disclosures required by the LDA offer no connection between lobbyists' activities and the officials whom voters have elected, and the registration forms available online are searchable only by lobbyist name, client name, year filed, or federal agency / congressional committee contacted (though, as indicated above, lobbyists rarely list the names of the committees they have contacted). Lobbying reforms could ameliorate this problem in a number of ways. First, they could require disclosure of lobbyist contacts with elected officials and their staffs on behalf of specific interests, thereby givingvoters inf ormation that enhances their capacity to evaluate elected officials' conduct in office and increasing their ability to vote consistently with their preferences. Second, reforms to the LDA could require maintenance of online databases with better search and indexing capabilities, to ensure that voters have easier access to the information that concerns them most.

---

[106] The LDA does give the Secretary of the Senate and the Clerk of the House authority to "review, and, where necessary, verify and inquire to ensure the accuracy, completeness, and timeliness of registration and reports," *see* 2 U.S.C. §1605(2), but that authority is different from, and falls short of, conferring power to audit or investigate the information that lobbyists submit. *See, e.g.*, Weiser, *supra* note __, at 11A (quoting comments by Pam Gavin, superintendent of the Senate office that collects lobbying forms indicating that "We do not have the authority to investigate. . . . We only have the authority to inquire" and noting that while House and Senate officials have power to write to lobbyists asking for more information and to notify the U.S. Attorney's office if a lobbyists is not complying, they would "never know" if someone is lobbying but not reporting).

[107] *See supra* note 62 and accompanying text.

[108] *See* proposal discussed *infra* Section III.B., pp.__.

[109] *See* proposal *infra* Section III.B.1, advocating that elected officials be required to file disclosure statements estimating the amount of time spent meeting with specific lobbyists on behalf of specific interests.

[110] Garrett & Smith, *supra* note 96, at __.

Interestingly, reforms requiring disclosure of the lobbyists and interest groups who receive access to specific elected officials may even increase voter respect for some elected officials by demonstrating that these officials do, in fact, exercise independent judgment in making policy decisions. Such might be the case if, for example, lobbying disclosures reveal that an official or his aides metwith a particular group often butthe official nevertheless voted against that group's legislative interests, or by revealing that an official or his aides met with groups on both sides of an issue before deciding how to vote.[111]

C. More Informed Legislating

As members of Congress have acknowledged,[112] lobbyists and the interests they represent play an important role in informing and educating elected officials about the need for, and the effects of, specific policy decisions. But the information that officials receive is only as good as its source. No one doubts that lobbyists and their clients present facts in the light most favorable to their policy interests;[113] thus, the political, economic, or other agendas of those interest groups whose lobbyists succeed in securing the ear of elected officials and their aides inevitably affect the shape of the public policy that is enacted.[114] Accordingly, the identity and views of the lobbyists and interests with whom elected officials and their staff consult are highly consequential features of the legislative process.

Relatedly, the relative ideological diversity of the lobbyists and groups with which individual officials and their aides meet can be a crucial determinant of where along the political spectrum each official's policy preferences on particular issues will fall.[115] Legal scholarship on

---

[111] Elected officials certainly behave in this manner in the campaign finance context, taking money from interest groups on both sides of an issue and/or taking money from a group but voting against that group's interests on legislation. *See, e.g.*, Neil A. Lewis, *Medical Industry Showers Congress With Money*, N.Y. TIMES, Dec. 13, 1993, at A1 (discussing, for example, contributions made to Rep. Peter Stark).

[112] *See supra* notes 72, 76, and accompanying text.

[113] *See, e.g.*, *1950 House Report*, *supra* note __, at 27 (noting that in lobbyist communications with members of Congress, "[f]acts are seldom presented for their own sake, or without having been carefully selected for maximum impact").

[114] *See, e.g.*, John R. Wright, *Contributions, Lobbying, and Committee Voting in the U.S. House of Representatives*, 84 AMER. POL. SCI. REV. 417 (1990) (reporting results of an empirical study demonstrating that representatives' voting decisions in committee, particularly in the Ways and Means Committee, bear a strong correlation to the number of lobbying contacts they received from groups on either side of an issue).

[115] *See, e.g.*, Evans, *supra* note 26, at 257-59 (concluding, based on a study of the House Public Works and Transportation Committee's behavior during consideration of a highway reauthorization bill, that interest groups are most effective at getting the majority of their policy preferences accepted when they face no competition for elected officials' attention from opposing interests).

the subject of group polarization[116] suggests that if an elected official consults with a homogenous set of interest groups representing only one side of an issue — whether because those interests contributed to his campaign or because those interests share the official's political ideology — then the public policy generated by that official will become polarized, or skewed in an extreme direction, because the official is hearing from a "limited argument pool" whose ideas tend to feed off each other and push the official to an extreme position.[117] Lobbying by coalitions of like-minded interest groups, a growing phenomenon,[118] likely only makes this problem worse. Sunstein posits that such polarization creates "deliberative trouble" because "widespread error and social fragmentation are likely to result when like-minded people, insulated from others, move in extreme directions simply because of limited argument pools and parochial influences."[119] Thus, to the extent possible, it is important to ensure that elected officials hear from interests on both sides of a policy issue.[120] When elected officials, or the staff who assist in making policy recommendations to such officials, receive information from and hear the concerns of interests on both sides of an issue, then rather than become polarized, their policy positions are likely to become tempered, balanced, and more informed. Indeed, Sunstein speculates that polarization will end or reverse when the argument pool is expanded and new members add new arguments.[121]

Current lobbying regulations provide no mechanism or incentive for such diversity of access, because they reveal nothing about how individual officials allocate access across different lobbyists and their interest group clients. Lobbying reforms that require elected officials to disclose their contacts with particular lobbyists on behalf of particular interests, however, would shed some light on whether a particular elected official takes all of her cues from interests of a particular stripe or whether she gives audience to interests on all sides of an issue. The threat of such exposure, moreover, could encourage (or force) elected officials, or at least their staffs, to split their dance-cards more evenly between opposing interests, for fear of how it will look to the electorate, and other interest groups, if lobbying disclosures reveal them to

---

[116] Group polarization is a theory positing that members of a deliberating group move predictably toward a more extreme point in the direction of group members' pre-deliberation tendencies. Like "polarized molecules," group members become even more aligned in the direction in which they already were tending. *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74-75 (2000) (quoting JOHN C. TURNER ET AL., REDISCOVERING THE SOCIAL GROUP 142 (1987)); Mark Seidenfeld, Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking, 87 Cornell L. Rev. 486, 535-36 (2002) (citing Amiram Vinokur & Eugene Burnstein, *Effects of Partially Shared Persuasive Arguments on Group-Induced Shifts: A Group-Problem-Solving Approach*, 29 J. PERSONALITY & SOC. PSYCHOL. 305, 306-07 (1974)).

[117] *See id.* at 104-05.

[118] [Cite].

[119] Sunstein, *supra* note 116, at 105.

[120] *See, e.g.*, *Congress and Pressure Groups*, *supra* note 1, at 13 (quoting statement by ACLU that" [w]hen groups push on both sides of an issue, officials can more freely exercise their judgment than when the groups push on only one side").

[121] *See* Sunstein, *supra* note 116, at 95-96.

be unduly partial to one set of interests. Such a shaming mechanism may be the most effective institutional method available to ensure that deliberating legislators do not isolate themselves from competing views.

III. HOW TO FIX THE LDA: INTEREST GROUPS, THE OVER-LOOKED FACTOR

Lobbying regulations traditionally have paid little attention to interest groups; in fact, the only portion of the LDA directed towards such groups is the requirement that lobbyists disclose the names of their clients. This is because in focusing on lobbying regulation as a means of (1) combating *quid pro quo* corruption, and the appearance thereof, and (2) protecting elected officials from lobbyist harassment, Congress has ignored the public's underlying concern with the preferential access and disproportionate ability to influence legislative agendas that the lobbying process affords to certain interests. Moreover, Congress has ignored the fact that interest groups are the driving force behind the lobbying process and that, without them, lobbyists would have no one to advocate for and no need to seek access to elected officials. This Part suggests that the LDA's ignorance of interest group's role in the lobbying process is almost as glaring an omission as the Act's failure to impose any regulations on elected officials. Indeed, given Congress' distorted incentives, a focus on interest groups may well be the key to effecting meaningful lobbying regulation.

A. The Potential Impact of Greater Transparency on Interest Group Dynamics

In crafting lobbying reform, it is important to consider not only what current regulations fail to achieve, but also what incentives and consequences they succeed in producing. One oft-overlooked consequence of current disclosure requirements is that they create a system through which opposing interests can obtain information about their competitors' lobbying activities.[122] Interest groups, unlike ordinary citizens, tend to be familiar with the names of other interest groups; thus the LDA, in permitting the public to look up lobbyist registration statements by client name, enables interest groups to discover which lobbyists their competitors have hired, how much their competitors have spent on lobbying, the general issues on which their competitors' lobbying activities have focused, and even, to some extent, the federal departments or congressional committees that have been lobbied on their competitors' behalves. In so doing, the LDA provides organized interests with information they can use to step-up their own lobbying efforts to match those of their competitors. Herein lies the great promise of lobbying regulation: Instead of shuddering in horror at this realization, reformers should embrace it. That is, reformers should approach lobbying reform with the view that since organized interest groups are the political actors with the greatest incentive to take advantage of disclosures in the lobbying game, it is most efficient to structure lobbying regulations in a way that makes it likely that, as these interests act to maximize their own best interests, they also will further public goals. In other words, lobbying regulations should be designed to ensure that opposing interests get the

[122] *See, e.g.*, Gil Klein, *2 Push Congress to Get Cracking on Lobbying Bill Lawmakers Cite Campaign Promises*, RICHMOND TIMES DISPATCH, Mar. 6, 1994, at A20 (noting that some lobbyists liked the then-draft LDA because "[b]y requiring all lobbyists to disclose details of their business, competitors can check up on each other").

kind of information that will help them to counterbalance each other as well as encourage them to bring their competitors' disclosures to the public's attention; i.e., lobbying regulations should produce information not only about which lobbyists competing interests hire, or how much those lobbyists are paid, but also about the amount of access thatthose lobbyists obtain vis-à-vis specific elected officials. This, of course, dovetails naturally with the public's interest in learning how much access its elected officials provide to particular lobbyists and their interest group clients.

The aim should be to create a system through which interests groups carefully can monitor their competitors' lobbying registration statements and can use the detailed disclosures therein (1) to inform the public of any disparities between the lobbying access granted to their competitors versus to interests on their side; and (2) to increase their own substantive lobbying efforts to counterbalance the information provided by their competitors. In this way, disclosures made under the LDA actively could be brought to the public's attention and, at the same time, targeted efforts could be made by interests themselves to force elected officials to listen to arguments on both sides of an issue before making policy decisions. As a result, legislators should be better informed and public policy should become more balanced.

What I am advocating, in other words, is that lobbying regulations embrace the familiar Madisonian concept of allowing factions to check factions in service of the public good.[123] The idea is to shift vigilance over lobbying activities away from members of the public, who current regulations disingenuously assume will pay attention to lobbying disclosures of their own initiative, and towards interest groups. Instead of relying on reactions from the all-too-often disengaged public, lobbying regulations should rely on the normal workings of the political process —i.e., on competing interests' natural incentives to bring elected officials' contacts with lobbyists and interest groups to the public's notice and to press officials to listen to groups on both sides of an issue. This potential vigilance from within the political process is what Madison heralded as the saving grace of a large republic composed of numerous and varied interests.[124]

But the suggestion that would-be reformers use interest groups' natural incentives to promote more balanced legislating is not purely utilitarian; I do not advocate it because I believe it to be the only type of reform that will work given the irremediable reality of interest group (faction) behavior. Rather, I believe that using competing interests to broaden elected officials' views is a normatively good idea. As Sunstein has acknowledged in the context of group polarization, the ideal solution to one-sided interest group interactions with elected officials is not necessarily to eliminate private group deliberation and ensure that all policymaking occurs within a large and heterogeneous public sphere — for such a solution would produce the countervailing problem of drowning out minority viewpoints.[125] Some private, "enclave deliberation" should continue to occur in order to "increase the diversity of society's aggregate 'argument pool'" and protect minority interests.[126] A system of lobbying regulation that employs

[123] *See* THE FEDERALIST, NO. 10 (James Madison).
[124] *See* THE FEDERALIST, NO. 10, at 64-65 (James Madison) (Jacob E. Cooke ed., 1961).
[125] Sunstein, *supra* note 116, at 105.
[126] *Id.*

competing interests to ensure that legislators hear from both sides of an issue incorporates the best of both kinds of group deliberation: Majority concerns and a variety of viewpoints can be brought to light on the House and Senate floors and in conference committees, while "enclave deliberation" by like-minded people with intense preferences on either side of an issue can occur within interest groups themselves and in private meetings between elected officials and interest groups.

In addition to promoting equal access and more balanced legislating, competing interests can and should be encouraged to use lobbying disclosures to increase voter competence. Voters are, for the most part, "civic slackers," disengaged from politics and disinclined to spend their free time learning about candidates for elective office, let alone combing lobbying disclosure statements to uncover candidates' relationships with lobbyists.[127] Thus, they need "information entrepreneurs"[128] to bring information to them, in an accessible and useful form. Interests groups are ideal information entrepreneurs because they have inherent incentives to examine lobbying disclosures thoroughly and to present information gleaned therefrom to voters in terms that voters can understand and that relate directly to electoral issues. For example, a disfavored interest group might, in furtherance of its own self-interest, seek to alert voters that "*Congressman A met with representatives of the gun lobby X times for a total of Y hours last year, but never [or only once, or only for Z hours] with groups favoring tougher handgun regulation.*" Groups that enjoy the greatest power and access conversely might use the disclosed information to boast to their members about how much access they receive, noting for example that, "*Our gun lobbyists spent 20 hours with Congressman B last year and the other side spent only 15 minutes with him. Look what great access we're getting. Keep those checks coming!*" Both such uses of lobbying disclosure would result in greater public awareness of specific elected officials' contacts with lobbyists for specific interests, and would provide the public with useful heuristic cues about how specific elected officials are likely to approach various policy issues if (re)elected. Of course, lobbying reforms designed to encourage interest groups to publicize lobbying disclosures in furtherance of their own narrow political interests may result in soundbite-type dissemination of information about elected officials' lobbying contacts, rather than in an impartial presentation of the facts, but at least such reforms would provide voters with *some* information about lobbyists' access to elected officials — which is famore than can be said of current lobbying regulations.

B. A + B = C: Interest Group Incentives + Public Goals = New LDA Reforms

The preceding section describes the potential promise of using interest group incentives to implement lobbying reforms that will achieve the public goals of voter competence, equal access, and more balanced legislating. But how precisely should reformers go about harnessing interest group incentives? This section discusses some possibilities, pausing to compare and contrast reforms suggested by an interest-group-based approach to lobbying regulation with those currently under consideration by Congress.

---

[127] *See* Issacharoff & Karlan, *supra* note __, at 1727 (quoting Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 901-02 (1998)).

[128] *See, e.g.*, Garrett & Smith, *supra* note 96, at __(6).

1. Who and What Must Be Disclosed

a. Disclosure by Public Officials

First, lobbying regulations must require disclosure of the information that is most useful to competing interests and the public. If, as I have suggested, interest groups care about the relative political access they receive to elected officials, compared to that received by their competitors, then lobbying reforms cannot be effective unless they compel lobbyists to reveal the extent of their lobbying contacts with individual elected officials. This means that lobbying regulations must require disclosure not only of the particular elected officials or members of congressional or executive staffs whom a lobbyist has contacted, but also of the approximate amount of time the lobbyist has spent with the official or staff member(s). Further, in order to address the public's concerns and enable interest groups to gauge the relative responsiveness of specific officials, elected officials, in addition to lobbyists, should be required to file lobbying disclosure statements listing the lobbyists (and their interest group clients) with which the officials and their staff members have met and approximating the aggregate amount of time spent with each lobbyist or interest group, and describing the general context of such meetings (e.g., in-office, fundraiser, lunch, travel, golf course). Specifically, elected officials could be required to make an "office disclosure" listing the approximate aggregate amount of a time spent by the official and/or members of his staff in meeting with a particular lobbyist on behalf of a particular client, as well as breaking down that larger number into time spent with the official and time spent with staff. To avoid constitutional problems, these disclosures need not reveal the specifics of what was discussed between lobbyists and elected officials, but need only describe the issue or bill concerning which the lobbying contact was made. In addition, time spent by officials or their staff in reviewing informational reports or memoranda provided by a lobbyist should be listed on the disclosure form, so as to avoid circumvention problems.[129]

Mandatory disclosures of elected officials' contacts with lobbyists would provide interest groups with a method of evaluating their success, vis-à-vis opposing interests, in gaining access to specific elected officials. Indeed, disclosures of this kind would enable interests to discover patterns in an elected official's lobbying contacts and/or identify particular officials whom they may have overlooked and whom they may wish to focus additional resources educating, in the future, in order to counterbalance their competitors' efforts. In addition, such disclosures would enable other interested parties, including candidates for elective office and the press, to act as information entrepreneurs and bring data about an incumbent's lobbying contacts to the public's attention, at least in election years. Perhaps of less immediate interest to the public, disclosures about the access that lobbyists receive vis-à-vis elected officials would help academics, think tanks, and public interest groups conduct research studies — comparing, for example, the relative effectiveness of campaign contributions versus lobbying in influencing elected officials, or evaluating how effective campaign contributions are as a means of securing access to elected

[129] It seems unnecessary to require disclosure of other written communications — e.g., letters — because such writings do not encapsulize the special access with which the public seems to be concerned, but rather, constitute communications of the type that even ordinary citizens can and do engage in.

officials[130] — which then can be shared with society at large and used to inform future regulatory reform efforts.

Some of the reform proposals currently under consideration by Congress take a step in the right direction by advocating that lobbyists disclose their contacts with specific elected officials.[131] But pending proposals do not go far enough, because they (1) require no estimation of the amount of time — i.e., the amount of access — a group has received with a particular official, and (2) fail to require any disclosures whatsoever by elected officials. In so doing, pending proposals ignore the public's official-centric and access-related concerns about the lobbying process, as well as the substantial dynamic benefits to be gained from disclosure by both officials and lobbyists about the amount of access granted to various interests. Lobbying regulations that require disclosure of lobbyist-official contacts from both lobbyists and elected officials are likely to engender more accurate reporting from both sets of actors than are regulations that require disclosures from only one side. This is because the ability to cross-reference lobbyists' reports of elected-official access with elected officials' own reports increases either side's incentives to make thorough reports, lest they be accused of underreporting based on inconsistencies between the two sets of reports Further , requiring disclosure by elected officials might give such officials greater incentive to pay attention to the interest groups behind the lobbyists with whom they are meeting, since lobbying regulations would require officials to disclose not only the names of the lobbyists they have consulted but also the interests on whose behalf those lobbyists were acting. Elected officials, of course, have an interest in knowing who is lobbying them — indeed, that is a significant part of the rationale behind the current disclosure-based system of lobbying regulation[132] — but to the extent that current disclosures do not provide enough information about the real interests a lobbyist represents or that certain officials may be less than fully diligent in ascertaining such interests,[133] regulations requiring disclosures by officials themselves should force officials more seriously to contemplate the source of the information provided by lobbyists. Finally, disclosure by elected

---

[130] *See, e.g.*, de Figueiredo & Garrett, *supra* note 40, at 609-10 (speculating about such issues in the absence of substantial empirical work); Wright, *supra* note __, at 418 (similarly hypothesizing about such issues).

[131] *See* Special Interest Lobbying and Ethics Accountability Act of 2005, H.R. 2412, 109th Cong., 1st Sess., §104 (2005); Lobbying and Ethics Reform Act of 2005, S. 1398, 109th Cong., 1st Sess., §104 (2005).

[132] *See* sources cited *supra* notes 83 & 84 and accompanying text; United States v. Harriss, 347 U.S. 612, 625 (1954) (noting that "[p]resent-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures").

[133] Insiders indicate that public officials meet many people without knowing whether they are lobbyists or not, let alone what interests they represent, particularly in contexts such as receptions or fundraisers. "The Senator is approached by someone that he does not know, who gives his or her name and then starts to harangue the Senator about a public policy issue. The petitioner may be a lobbyist or not. The Senator does not know." E-mail from Bill Dauster, Democratic General Counsel, United States Senate Finance Committee (Aug. 23, 2005, 07:54 EST) (on file with the author). [Cite conversation with Andrea Cohen?].

officials could be used to help level the playing field between moneyed and non-moneyed interests. There has been some concern that the costs of filing disclosure reports may, at the margin, discourage non-profits and other less wealthy interests from lobbying;[134] if elected officials were required to disclose their contacts with such interests, then regulators would have some latitude to ease reporting burdens on non-profits and to rely on official's reports to provide information about non-profits' lobbying activityshould they deem this to be an equitably necessary solution.

Requiring elected officials to make disclosures about their lobbying contactsin this fashion is not an entirely unprecedented or fanciful idea. The importance of having disclosure statutes require information both from elected officials and from those who seek to influence them long has been accepted in the related context of campaign finance regulations, which require candidates to report the names of those who contribute to their political campaigns. And at least a few observers and academics had suggested, even before the recent spate of reform proposals, that lobbying regulations should require lobbyists to disclose the specific members of Congress or executive branch officials whom they contact [135] Further, the recent scandals involving Jack Abramoff and Representative DeLay prompted former Speaker of the House Newt Gingrich, on at least one occasion, to call for weekly Internet disclosures of all contacts between lobbyists and elected or appointed officials.[136]

b. Grassroots Lobbying

If lobbying reforms are to help interests on either side of an issue counterbalance each other's lobbying activities effectively, then they must provide opposing interests with information about the full extent of their competitors' lobbying activities, including grassroots lobbying efforts. "Grassroots lobbying" refers to efforts by lobbyists or interest groups to

---

[134] *See also* FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 254-55 (1986) (expressing concern, in the related context of election-related political activity, that "[d]etailed record-keeping and disclosure obligations. . . impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage. . . Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, . . . it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it"); *1993 LDA Hearing*, *supra* note 50, at 207-213 (statement of Nan Aron, Executive Director of Alliance for Justice) ("[W]e are nevertheless deeply concerned that the principal effect of the bill will not be to increase the amount of information available to the public, but will be to decrease the amount of advocacy undertaken by public interest and other citizen organizations.").

[135] *See, e.g.*, Letter from the Professional Lobbying & Consulting Center to House Judiciary Committee Chairman, *printed in 1993 LDA Hearing*, *supra* note 50, at 284-85; Garrett, Levin, & Ruger, *supra* note __, at 147; Prepared Statement of Wright H. Andrews, Jr., Subcomm. on Admin. Law and Gov't Relations of the House Judiciary Comm. (Mar. 31, 1993), *reprinted in 1993 LDA Hearings*, *supra* note 50, at 303, 305.

[136] *See, e.g.*, Todd S. Purdum, *The Nation: Go Ahead, Try to Stop K Street*, NEW YORK TIMES, Jan. 8, 2006, at 41. *See also Newt as Diogenes in a Dark Capitol*, NEW YORK TIMES, Jan. 7, 2006, at A10 (quoting Mr. Gingrich as warning Republicans that "You can't have a corrupt lobbyist without a corrupt member or a corrupt staffer on the other end").

contact constituents — either through media and mail advertising or through direct contacts — in order to convince them of the group's position (if they are not already disposed to favor it),[137] and to encourage them to participate in letter or telephone campaigns expressing their views, en masse, to elected officials in the hope that this will change the official's policy position.[138] Grassroots lobbying is a fast-growing and important lobbying tactic in today's world;[139] absent mandatory disclosure of this lobbying tactic, interest groups cannot obtain a complete picture of their competitors' efforts to influence elected officials or particular policy outcomes. Indeed, disclosure of grassroots lobbying efforts may in some ways be *more* important than disclosure of other lobbying activities: Because votes are the ultimate currency in politics, and because officials must win reelection in order to continue in their jobs, lobbyists' and interest groups' ability to demonstrate (or generate the appearance of) public support for their positions may be the most critical element in convincing elected officials to support their policy preferences.[140] Moreover, if grassroots lobbying is left unregulated by LDA reforms, it will only become more prevalent, as lobbyists and interest groups gain a substantial incentive to shift their resources to this tactic in an effort to avoid full disclosure of their lobbying activities.[141] In addition, failure to include grassroots lobbying regulation in the LDA would exacerbate the unequal access problem by disproportionately shielding from disclosure the lobbying activities of those interest groups that have substantial resources to spend on advertising campaigns and other means of reaching constituents, and which are well-organized enough to orchestrate letter or telephone campaigns.

In terms of specifics, grassroots lobbying regulations need not require disclosure of the names of individuals who belong to or are contacted by particular interest group organizations or their lobbyists; they need only mandate disclosure of the fact that a group or its lobbyist has spent $X for, e.g., "television advertisements in the State of Kansas educating residents about proposed revisions to emissions standards in the Clean Air Act" or "grassroots lobbying, contacting residents of Denver, Colorado to encourage them to let their Congressmen know that they support our position on the minimum wage." The SILEAA and LERA reform proposals currently under consideration in Congress contain a well-worded disclosure provision that would capture this kind of information about grassroots lobbying communications, while explicitly exempting communications from an interest group to its own members.[142] As discussed *infra*

---

[137] Grassroots lobbying campaigns typically are targeted towards those who already are members of the interest group running the campaign or who otherwise are inclined to support the group's public policy goals. *See, e.g.*, Ron Faucheux, *The Grassroots Explosion*, 16 CAMPAIGNS & ELECTIONS 20, 22 (December/January 1995) (Grassroots Lobbying Glossary Box).

[138] *See id.*

[139] *See, e.g.*, *id.* at 20; Peggy Schmidt, *The New Tax Bill; Legislative Mills Stir Up Lobbying*, N.Y. TIMES, Oct. 12, 1986, at 16.

[140] *See* Issacharoff & Karlan, *supra* note __, at 1723 ("[V]oters ultimately control politicians' access to representational opportunities through the vote, and money thus is useful solely in influencing voters' choices.").

[141] *Cf.* de Figueiredo and Garrett, *supra* note 40, at 623-24 (describing how political actors, in the analogous campaign finance context, responded to each successive campaign finance reform effort by directing their money to those avenues of spending that had been left unregulated).

[142] The section defines grassroots lobbying as "an attempt to influence legislation or executive

Section III.C.2, such disclosures should not violate the First Amendment because they do not require revelation of interest groups' members' identities.

c. Aggressive Client Disclosure

Experience in the analogous field of campaign finance and direct democracy (referenda) teaches that many interests will seek to avoid full disclosure of their lobbying activities by creating separate organizations, subsidiaries, or coalitions with unrelated names which then can be used as the vehicles for making campaign contributions or hiring lobbyists; in this way, only the name of the separate organization, subsidiary, or coalition — rather than the recognizable name of the parent organization or interest group — need appear on campaign finance or lobbying disclosure forms.[143] Such "veiled political actors"[144] can subvert the entire purpose of disclosure statutes by effectively shielding their lobbying activities from public view and causing voters and competing interests to draw inaccurate conclusions about the true nature of the groups to whom elected officials have granted political access, and by whom such officials may have been influenced, on a particular issue. This problem is exacerbated by the fact that at least some interests intentionally seek to mislead voters through the use of patriotic or populist sounding names, which in some instances make them appear to represent neutral policy positions or even positions directly opposite to their true ones.[145]

The LDA already requires disclosure of "the name, address, and principal place of business of any organization" that "contributes more than $10,000 toward the lobbying activities" of the registered lobbyist.[146] Some pending reform proposals would go one step further, providing that individual members of lobbying coalitions or associations be treated as lobbyist "clients" and mandating disclosure of such members' names.[147] These proposals are a good start, but in order effectively to combat the inevitable veiled actor problem, lobbying

---

action through the use of mass communications directed to the general public and designed to encourage recipients to take specific action with respect to legislation or executive action, except that such term does not include any communications by an entity directed to its members." H.R. 2412, 109th Cong., §106 (2005); Lobbying and Ethics Reform Act of 2005, S. 1398, 109th Cong., 1st Sess., §106 (2005). Perhaps less well-worded, but also sufficient, is the definition contained in the LTAA, which characterizes as grassroots lobbying "any attempt to influence the general public, or segments thereof, to engage in lobbying contacts whether or not those contacts were made on behalf of a client" but excepting "any attempt . . . by a person or entity directed to its members, employees, officers, or shareholders, unless such attempt is financed with funds directly or indirectly received from or arranged by a retained registrant." LTAA, S. 2128, 109th Cong., §105(a)(2).

[143] *See* Garrett & Smith, *supra* note 96.

[144] *See id.*

[145] *See id.* at (22, 35) (describing, for example, creation of organization with neutral-sounding name "U.S. Term Limits" by Republican oil executives who wished to hide their party affiliation); id. at (40 & n.117) (describing conservative foundations' use of nonprofit organizations named the "American Civil Rights Coalition" and "American Civil Rights Institute" to promote anti-affirmative action initiatives).

[146] 2 U.S.C. §1603(b)(3)(A).

[147] *See* Special Interest Lobbying and Ethics Accountability Act of 2005, H.R. 2412, 109th Cong., 1st Sess., §107 (2005); Lobbying and Ethics Reform Act of 2005, S. 1398, 109th Cong., 1st Sess., §107.

reforms also should require elected officials and lobbyists to identify the names of organizations who own more than a threshold percentage of the named client organization or of any organization thatcontributes more than $10,000 to the lobbying activities of the named *client* organization. In other words, lobbying regulations should ensure the exposure of all major entities that may be involved in a layered organizational structure underlying the named lobbying entity or lobbying *client*. For the sake of consistency, the wording of such a provision can track that currently used by the LDA to ensure disclosure of any layered organizational structures involving foreign entities, and can adopt the 20% ownership threshold employed in that section.[148] All such disclosure requirements should apply equally to nonprofit organizations which, as shown by Garrett and Smith in the direct democracy context, otherwise are likely to be used by corporate entities or wealthy political activists to circumvent other lobbying disclosure rules.[149]

2. Technical Reforms

a. Quarterly Filings

If competing interests are to be expected to counterbalance each other effectively and to bring information about elected officials' lobbying contacts to voters' attention in time for popular elections, then they must themselves receive such information in a timely fashion. Disclosed information is, of course, most useful if disseminated while it is current and still accurately describes the lobbying practices of those involved; as the lag between the lobbying activity or access described and the date of disclosure increases, the value of the disclosed information will become proportionately less and less useful. Yet the LDA currently requires that lobbying disclosures be made only once every six months, by which time the information revealed will have become quite stale. Worse, as discussed earlier, even this six-month disclosure period has been treated in an exceedingly casual and flexible manner, with 20% of lobbying disclosure forms filed more than three months late and thousands filed more than six months late.[150] Thus, in order to ensure the usefulness of lobbying disclosures, LDA reforms must require more frequent and more stringent reporting deadlines. In this respect, current reform proposals are on the correct track, with provisions requiring that lobbying disclosures be

---

[148] *See* 2 U.S.C. §1603(b)(4):

"Each registration under this section shall contain—

. . . .

(4) the name, address, principal place of business, amount of any contribution of more than $10,000 to the lobbying activities of the registrant, and approximate percentage of equitable ownership in the client (if any) of any foreign entity that--

(A) holds at least 20 percent equitable ownership in the client or any organization identified under paragraph (3);

(B) directly or indirectly, in whole or in major part, plans, supervises, controls, directs, finances, or subsidizes the activities of the client or any organization identified under paragraph (3); or

(C) is an affiliate of the client or any organization identified under paragraph (3) and has a direct interest in the outcome of the lobbying activity."

[149] Garrett & Smith, *supra* note 96, at (30, 35).

[150] *See* sources cited *supra* note 62.

filed on a quarterly, rather than a semi-annual, basis[151] and that such disclosures be filed electronically in order to ensure timely public access.[152] Quarterly filings, which were the norm under the 1946 FRLA,[153] would provide reasonably up-to-date information without overly burdening lobbyists or interest groups, while the enforcement reforms suggested *infra* subsection II.C.3.b should ameliorate the late filing problem.

b. Accessibility of Disclosed Information

In order to be most useful to competing interests and the public, lobbying disclosure forms also should be easily accessible, searchable, cross-referenceable, and user-friendly. Immediate online availability of disclosure forms, as occurs with campaign finance disclosures, is a must for widespread accessibility. Current reform proposals recognize this, and accordingly require mandatory electronic filing of all lobbying reports.[154] In addition, lobbying disclosure forms should be downloadable, so that interest groups can make use of and disseminate information from such forms quickly and simply. Disclosure forms also should be easily searchable, by interest group name, bill number or general issue area, elected official contacted, lobbyist name, and filing date, so that competing interests, members of the public, the press, campaign officials, academics, and other interested parties can discover any information they seek efficiently and accurately. Recent reform proposals appear to address the need for such electronic manipulability, requiring that a public database of lobbying disclosure information be made available over the internet, at no charge, "in a searchable, sortable, and downloadable manner" that links directly to information disclosed under certain sections of the FECA.[155]

3. Restrictions and Penalties

a. Eliminate Restrictions on Lobbying by 501(c)(4)s

As mentioned earlier, the current LDA contains one particularly troubling provision that renders certain nonprofit organizations, as defined in Section 501(c)(4) of the Internal Revenue Code, ineligible to receive federal awards, grants, contracts, and loans if they engage in lobbying activities.[156] This provision appears to have arisen in response to the general anti-lobbying mood of the 1992-1995 period and the related notion that public funds should not be used to subsidize an activity that is hated by the public, on behalf of organizations with whose positions not all taxpayers agree.[157] But the practical impact of such a provision is to create unequal access

---

[151] *See* Special Interest Lobbying and Ethics Accountability Act of 2005, H.R. 2412, 109th Cong., 1st Sess., §101 (2005); LTAA, S. 2128, 109th Cong., 1st Sess., §101 (2005); Lobbying and Ethics Reform Act of 2005, S. 1398, 109th Cong., 1st Sess., §101 (2005).

[152] SILEAA, §102; LTAA §102; LERA, §102.

[153] *See* 2 U.S.C. §264 (repealed 1995).

[154] H.R. 2412, 109th Cong., §102 (2005); S. 2128, 109th Cong., §102 (2005); S. 1398, 109th Cong., §102 (2005).

[155] *See* H.R. 2412, 109th Cong., §103(a)(9) (2005); S. 2128, 109th Cong., §103(a)(9) (2005); S. 1398, 109th Cong., §103(a)(9) (2005).

[156] 2 U.S.C. §1611; *see supra* note 100 and accompanying text.

[157] *See, e.g.*, 141 CONG. REC. S10538, S10540 (Remarks by Sen. Alan Simpson, sponsor of the 501(c)(4) provision); *Lobbying By Groups Receiving Federal Funds, Hearing Before the House Comm.*

between different types of interest groups. Its effect, in essence, is to preclude or substantially restrict the ability of certain interests — i.e., those thatrely on federal funds to operate, and that have particular types of missions, as defined in the tax code — to compete in the information-providing-influence-seeking lobbying game, thus tipping the legislative balance in favor of those interests that have more money.[158] Nonprofit organizations should not have to muster the support of the entire citizenry — an impossible standard given the variety of viewpoints held by citizens throughout the country on a broad spectrum of issues — in order to be allowed to share their members' views with elected officials or to educate elected officials on the effects of certain policy decisions, without foregoing their entitlement to federal assistance.

The LDA's restrictions on lobbying by 501(c)(4)s undermine the goal of relying on interest group competition to produce a balanced presentation of information to elected officials and, thereby, more balanced legislating. There cannot be balanced legislating if certain interests effectively are shut out of the access/influence game. Thus, it is imperative that proposals for reform of the LDA include the elimination of restrictions on 501(c)(4) organizations. Unfortunately, all of the lobbying reform proposals pending in Congress at this time are completely silent on the subject of such restrictions.

Current law also limits the amount that nonprofits organized under 501(c)(3) of the Internal Revenue Code may spend on lobbying activities without paying taxes, providing that once a qualifying organization exceeds the limit, it will have to pay taxes on 25% of its excess lobbying expenditures.[159] This provision is admirably tailored to promote equitable treatment of nonprofit versus for-profit interests. However, as LDA reforms become effective, and more information becomes available regarding the relative lobbying expenditures and access obtained by nonprofits versus their competitors, Congress may wish to tinker with the lobbying limits and/or tax rate figures currently in effect.

b. LDA Enforcement

A system of lobbying regulation that depends on transparency, and political actors' responses to disclosed information, will be only as effective as its disclosures are accurate. As discussed earlier, meaningful enforcement is crucial to ensuring the accuracy and usefulness of information disclosed under the LDA.[160] The Act's current enforcement mechanisms are truly symbolic: They provide for no investigations, audits, or other checks on the validity of information disclosed by lobbyists, and for little punishment even if a disclosure violation miraculously is found. In order to remedy this situation, lobbying reforms must give substantial investigative and enforcement authority over the LDA to an executive agency which can,

---

On Gov't Reform (testimony of Terrence Scanlon, President of the Capital Research Center) (June 29, 1995), *available at* 1995 WL 407997.

[158] Organizations can get around this restriction to some extent by, for example, splitting into two qualifying Section 501(c)(4) organizations, one of which lobbies and the other of which does not, but this causes unnecessary administrative hassle and expenses that are likely to interfere with the organizations' ability to lobby effectively.

[159] *See* 26 U.S.C. §4911.

[160] *See* discussion *supra* notes 61-64, pp. __, and accompanying text.

through cross-referencing and other investigative techniques, identify inaccuracies in the information reported on lobbying disclosure forms. Separation of powers concerns dictate that this enforcement authority be located in the executive branch, rather than left with the Clerk of the House or the Secretary of the Senate, because, among other concerns, placing such authority in the hands of agents of Congress impermissibly would encroach upon the executive branch's constitutional duty to "take Care that the Laws be faithfully executed."[161] Indeed, the Department of Justice has expressed concern that even the current LDA, which expressly provides that its provisions should not be "construed to grant general audit or investigative authority to the Secretary of the Senate or the Clerk of the House,"[162] may infringe on the executive branch's authority.[163] Moreover, conferring such enforcement authority upon the Clerk of the House and the Secretary of the Senate would be ineffective. The House Clerk and Senate Secretary are too close to the lobbying process and daily congressional affairs to be entirely impartial or vigilant in uncovering and punishing lobbyists who violate the Act's disclosure requirements. Indeed, some lobbyists are former members of Congress, with whom the Clerk and Secretary once may have worked closely.

For a number of reasons, the Federal Election Commission ("FEC"), which oversees enforcement of campaign finance regulations, seems an ideal agency in which to situate enforcement authority for the LDA. First, there are obvious synergies between the disclosures made under campaign finance laws and those made under the LDA, including the fact that both statutes call for disclosure of lobbyist contributions to candidate campaigns. Thus, the agency charged with oversight of the LDA will have to engage in at least some cross-referencing with the FEC in order to check the accuracy of lobbying disclosures. Further, because lobbying and campaign contributions tend to be complementary activities, often conducted in tandem,[164] many of the providers of lobbying disclosure information are likely to be the same entities who provide information about campaign contributions; likewise, many of the consumers of lobbying information — i.e., the reporters, public interest groups, and academics who wish to track lobbying — also will be the consumers of campaign finance information. Thus, much of the FEC's experience dealing in the realm of campaign finance can translate directly to the lobbying context. Second, and related to the first, expenses and administrative hassles can be kept to a minimum if the LDA confers authority for its enforcement in an existing agency rather than creates a new agency, with new offices, personnel, etc. for this purpose. While the FEC's budget would have to be increased and other enhancements made to enable it to absorb the new duties associated with lobbying oversight, such enhancements would prove lessburdensome than would creating an entire new agency.

---

[161] U.S. CONST., art. II, §3.

[162] 2 U.S.C. §1607(c).

[163] *See* Letter from Andrew Fois, Assistant Attorney General, to the Honorable Henry Hyde, Chairman, House Committee on the Judiciary (Nov. 7, 1995), *contained* in H.R. REP. 104-339, at 27 (1995).

[164] *See* Wright, *supra* note __, at 418 (citing LARRY J. SABATO, PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES (1984)); Stephen Ansolabehere, James M. Snyder, Jr. & Micky Tripathi, *Are PAC Contributions and Lobbying Linked? New Evidence from the 1995 Lobbying Disclosure Act*, 4 BUS. & POL. 131, 151-52 (2002).

In addition, the penalties for inaccurate reporting or noncompliance with lobbying regulations must be enhanced in order to give lobbyists and interest groups greater incentives to be diligent and forthright in their reporting. Specifically, fines for inaccurate reporting should be changed from the current flat sum of $50,000 to something like 20% of the lobbyist's fees or the interest group's lobbying expenditures; this would make penalties more equitable across lobbyists/interest groups and more painful to the bank accounts of wealthy lobbyists and interests. Moreover, the FEC or other oversight agency should be directed to distribute to major news outlets a list of all lobbyists and interest groups that have been fined for making inaccurate lobbying disclosures.[165] Fear of public reprisal resulting from the revelation of such information should encourage lobbyists and interest groups to engage in more accurate reporting. Finally, in order to ensure that the FEC's newly-conferred investigative powers have teeth, and that they are not used in a targeted partisan manner to harass particular officials or lobbyists, lobbying regulations could mandate random auditing of lobbyist and official disclosure reports on a periodic basis.

4. How and Where Pending Lobbying Reform Proposals Falls Short

The numerous reforms proposed by Congress in 2005 address and, in some instances even match, the proposals suggested above. But they do not go nearly far enough in bridging the gap between the public's and Congress' concerns. In fact, the proffered reforms are almost entirely superficial, calling for improvements such as quarterly reporting and mandatory online accessibility to disclosure forms, without substantively addressing the public's concerns about the access that lobbyists obtain to elected officials. The SILEAA's and LERA's requirement that lobbyists disclose the names of specific elected officials with whom they have met pays only lip service to the public's concerns, because it provides no information whatsoever about the relative amount of access thatdifferent lobbyists obtainto elected officials , and places no responsibility on public officials themselves to account to the voters who elected them.

Some of the pending reforms would expand application of lobbying regulations to cover grassroots lobbying — an important substantive step — but, as with other disclosures required under the LDA, it will be difficult to ensure the accuracy of the grassroots lobbying information that interest groups choose to report absent stronger enforcement mechanisms. Unfortunately, despite the substantial weaknesses that have been identified in the LDA's enforcement mechanisms, current reform proposals offer only minimal, symbolic, enforcement reforms. The SILEAA, LTAA, and LERA, for example, would leave all enforcement authority as it is — in the hands of the House and Senate clerks, with power in the U.S. Attorney's office to prosecute offenders — but would require the Government Accounting Office (GAO) to investigate and report to *Congress* semi-annually regarding how well the House and Senate clerks are

[165] Something similar has been suggested in the context of federal campaign finance reform, and has been implemented on a city-wide level against delinquent taxpayers. *See* Todd Lochner, *Overdeterrence, Underdeterrence, and a (Half-Hearted) Call for a Scarlet-Letter Approach to Deterring Campaign Finance Violations*, 2 ELECTION L. J. 23, 24, 32 & n.58 (2003).

performing their duties.[166] The SILEAA proposal then would require the House Administration Committee and Judiciary Committee to hold hearings to consider the implications of any recommendations made by the GAO's reports.[167] Thus, all enforcement authority essentially would remain with the legislative branch, no entity would be charged with investigating the accuracy of lobbying disclosures, and no other checks or balances would exist to ensure accurate reporting. Moreover, the SILEAA, LTAA, and LERA reform proposals offer only minimal changes in the civil penalties applicable for violations of the Act, increasing the potential fine for failing to file lobbying reports — not for making inaccurate disclosures — from $50,000 to $100,000.[168] Such a penalty remains a purely symbolic one, amounting to merely a drop in the bucket for many lobbyists and interest groups, and is likely to be far less effective than are fines based on a percentage of lobbying income or lobbying expenditures, or the threat of media publicization of the names of entities who make inaccurate disclosures.

Pending lobbying legislation proposals also offer a number of reforms not dictated by an interest-group-based approach to lobbying regulation, including extension of the ban on revolving door lobbying by former members of Congress to two or more years;[169] creation of an internal ethics task force;[170] and stricter disclosure requirements/bans on lobbyist-sponsored travel by elected officials.[171] These reforms are little more than direct, symbolic, responses to the scandal-of-the-day — i.e., lobbyist Jack Abramoff's payment of travel expenses for numerous elected officials, including Representative Tom DeLay, and their aides. And while they may prove useful in inspiring Congress to ratchet up internal oversight of its own members, reforms of this kind fail to address the public's primary underlying concern about who elected officials consult with and listen to when making policy decisions, and about how much access respective interest groups and lobbyists receive to particular elected officials. Extension of the ban on lobbying by former members of Congress, for example, sounds good but accomplishes little, as it merely delays the onset of a practice that the public considers suspect. It thus is a classic symbolic solution that allows Congress to appease the public superficially while continuing as usual a lobbying practice that Congress finds useful. Likewise, creation of an ethics task force and the institution of stricter travel rules enable Congress to appear as though it is being tough on its members, but will do little to change the way thatlobbying is practiced or to provide the public with more information about lobbyist interactions with (as opposed to monetary expenditures for) members of Congress.

---

[166] *See* H.R. 2412, 109th Cong. §401 (2005); S. 2128, 109th Cong. §401 (2005); S. 1398, 109th Cong. §401 (2005).

[167] *Id.* §403.

[168] H.R. 2412, 109th Cong. §402 (2005); S. 2128, 109th Cong. §107 (2005); S. 1398, 109th Cong. §108 (2005).

[169] H.R. 2412, 109th Cong. §201 (2005); S. 2128, 109th Cong. §201 (2005); S. 1398, 109th Cong. §201 (2005); H.R. 3623, 109th Cong. (2005) (recommending a 5-year cooling-off period before allowing revolving door lobbying).

[170] H.R. 2412, 109th Cong. §404 (2005).

[171] H.R. 2412, 109th Cong. §§301-304 (2005); S. 2128, 109th Cong. §§301-304 (2005); S. 1398, 109th Cong. §§301-307 (2005).

* * * ** * * *

It should be noted that the reforms suggested in this Section remain centered on disclosure, and thus continue the LDA's primarily symbolic approach to lobbying regulation. But while the suggested reforms will not in and of themselves change the way that the lobbying process works, the hope is that by taking a dynamic approach — byheeding the incentives that motivate various political actors, and by requiring substantive rather than minimal disclosures, these reforms will prompt political actors to change their lobbying-related behavior, instead of merely waiting for the public to come around, on its own, to a more favorable view of lobbying — as preceding reforms have done.

C. Possible Objections and Concerns Regarding The Proposed Reforms

1. *Practical Concerns*

The primary criticism likely to be leveled against the proposed reforms is that they will be unduly burdensome, requiring lobbyists and elected officials to spend an excessive amount of time tracking their contacts with each other. But while reforms requiring lobbyists and elected officials to disclose the approximate amount of time they have spent together undoubtedly will increase the administrative paperwork required of both entities, neither lobbyists nor elected officials will have to reinvent the wheel from scratch in order to comply with the new disclosure requirements. Many lobbyists already keep time logs, for client purposes, of their contacts with congressional and executive branch officials on behalf of specific clients. Similarly, elected officials and their staffs already keep calendars listing their appointments, lunches, speaking engagements, etc., with particular lobbyists and interest groups. Such records could be used as at least a starting point for disclosure of lobbying contacts between elected officials and lobbyists. Further, the disclosure requirement itself can be crafted with some sensitivity to this concern by, for example, including a *de minimis* provision exempting communications with a lobbyist that total less than half an hour in a three month period from disclosure, and allowing elected officials to approximate the amount of time spent with a lobbyist, rather than requiring strict, law-firm-style billing specificity.

A second potentialproblem with reforms that require greater disclosure of lobbyist interactions with elected officials is that they might lead the already misinformed public to draw inaccurate and unfair conclusions about lobbyists' influence. Faced, for example, with the knowledge that Congresswoman A spent 20 hours meeting with interest group X, and that she voted in favor of Legislation Q, which was supported by interest group X, the public might assume that Congresswoman A voted the way she did because of pressure from interest group X — although, in fact, Congresswoman A always may have supported Legislation Q and may have met with interest group X in order to strategize with its members about how to convince others to vote in favor of the law. [172] But while fears that the public will misinterpret disclosed

[172] A substantial body of political science literature suggests that this kind of interaction between lobbyists and legislators is common – that lobbying efforts do not persuade legislators, but merely reinforce or encourage those who already agree with them. *See, e.g.*, Wright, *supra* note __, at 419; MILBRATH, *supra* note __; RAYMOND A. BAUER, ITHIEL DE SOLA POOL, & LEWIS ANTHONY DEXTER, AMERICAN BUSINESS AND PUBLIC POLICY 353 (1963); DONALD T. MATTHEWS, U.S. SENATORS AND

information are not unrealistic, neither are they a problemthat should prove fatal to the proposed reforms. The most effective way for Congresswoman A to combat misinterpretations of this kind is to spend equal or near-equal amounts of time meeting with interest group X *and* its competitors, so that she may be in a position to explain to the public that it was not pressure from either group, but her own convictions after considering information presented by either side, that formed the basis for her vote. As Sunstein's polarization work suggests, reforms that inspire or force Congresswoman A to provide equal time to interest group X's competitors in this manner, even if she does so purely for the sake of public appearances, are likely to result in some tempering of Congresswoman A's views and, accordingly, in a less extreme final version of Legislation Q.

Relatedly, the proposed reforms might be criticized on the grounds that they will produce more, rather than less, lobbying — a result that could anger the lobbying-hating public and undermine the goal of increasing public confidence in the political process. In other words, the public may view disclosures detailing the time elected officials spend with lobbyists and interest groups as evidence that special interests, rather than public concerns, control government policy. This, again, is a realistic danger, but not one that augurs against adopting the proposed reforms. More lobbying, as explained above, is not necessarily a bad thing — particularly if it results in a more balanced presentation of viewpoints and data to elected officials. Indeed, more evenhanded lobbying by interests on either side of an issue may do a great deal of good for the legislative process. The problem, then, is not with lobbying per se, but with the public's one-dimensional view of alllobbying as unequivocally malevolent. The democratically correct solution cannot be to avoid reforms that are good for the legislative process out of fear that the public will misinterpret the consequences; rather, it should be to educate the public about the value that lobbyists add to the political process. Specifically, elected officials, perhaps aided by public interest groups, should emphasize the informational expertise that lobbyists provide, both when campaigning for passage of reforms to the LDA and when making disclosures thereunder. For example, when enacting LDA reforms, elected officials should explain to the public that policymakers depend on lobbyists to educate them about the impact of certain policy proposals, and that the purpose of lobbying reforms is (a) to enable the public to see the type of help and influence that lobbyists provide; and (b) to encourage public officials to consult with and obtain information from groups on both sides of an issue, to the extent that they are not already doing so. Similarly, when making disclosures under the Act, elected officials should be specific about the informational assistance provided by lobbyists — explaining, for example, that they or their staff "*Met with interest group X for approximately 20 hours, during which time the group's lobbyist provided me with data including Regulation No. 1234's long-term impact on the quality of drinking water*." In this manner, disclosures revealing that elected officials have met with interests on both sides of an issue may help to undermine the notion that officials are controlled, rather than assisted, by interest groups. While efforts such as these may not solve the public perception problem entirely, they ought at least to improve the public's views about the lobbying process. Of course, some of the public's perceptions about lobbying may be unalterable, but to the extent that this is the case, there is little short of outlawing lobbying entirely that LDA reforms can do to satisfy the public.

THEIR WORLD 191 (1963).

A third possible concern that may be raised against the proposed reforms is that they could disadvantage incumbents. After all, at election time, voters will have information about the lobbying contacts only of those who already have held office — leaving challengers for elective office with substantial ammunition to use against incumbents, but providing incumbents with no comparable weapon. Again, this is a realistic concern, but not one that should be considered debilitating. Many challengers for elective office will be prior officeholders themselves, as elected officials often are career public servants and are likely to have served in other federal positions or in state government before seeking higher or federal office. In such cases, information about a challengers' prior lobbying and interest group contacts also should be available in some capacity, particularly if reforms requiring elected officials to disclose their lobbying contacts are adopted by state governments. Even if no lobbying contact information is available for a challenger, it hardly is unfair to force incumbents to defend the choices they have made, including the people to whom they have chosen to listen, while serving at the people's pleasure. Indeed, it is appropriate for an incumbent's prior record to come under greater scrutiny than his challenger's; the incumbent already has been serving in the position for which he is seeking reelection, and should be held accountable to his constituents for the manner in which he has performed. In fact, to the extent that the proposed disclosure requirements act to disadvantage incumbents, this may even be a beneficial development that helps to balance out the incumbency advantage — name recognition, franking privilege, etc. — currently enjoyed by those running for reelection.

Fourth, the proposed reforms might be criticized on the ground that disclosure of elected officials' lobbying contacts could generate voter backlash against officials who associate with particular interest groups. Elected officials may worry, for example, that conservative, pro-life voters will react negatively to the revelation that an official has met with a lobbyist representing a pro-choice group, or conversely, that liberal voters will be upset upon learning that an official has met with a lobbyist for the NRA. In other words, to the extent that voters themselves are polarized, they might prefer for officials to provide limited, politically-skewed, access to lobbyists and interest groups, rather than for officials to meet with groups on all sides of an issue; further, such polarized voters might punish an official who seeks to be more broadly inclusive. As a result, elected officials who currently provide balanced access to groups on either side of an issue might be forced to cease meeting with interests with whom a majority of their constituents disagree. Such concerns about a potential backlash against particular interests are completely hypothetical at this stage, and the likelihood that the above scenario would be played out cannot be assessed accurately at this time. Because elected officials currently do not make any disclosures about the access that they provide to interest groups, it is impossible to tell whether there are officials from exceedingly conservative districts who meet with Planned Parenthood or the ACLU, or whether such officials, if they exist, would find it necessary to cease meeting with liberal groups if the proposed disclosure requirements were enacted. Further, it is impossible to tell how the number of elected officials in this position compares to the number of officials who currently meet with interests on only one side of an issue and who would, if the proposed reforms were enacted, be driven to provide more balanced access to interests on either side of an issue. I suspect that the number of officials in the latter category far surpasses the number of

officials in the former category, because only in extremely homogenous districts can voters be expected to fall on one side of the spectrum to the exclusion of other interests, and in such districts elected officials themselves are likely to be quite polarized and disinclined to meet, of their own volition, with groups whose policy preferences differ vastly from the officials' own. To the extent that this is not the case, officials should be able to pitch their meetings with interests on both sides of an issue as an act of simple fair play — e.g., "*I met with groups on both sides of an issue not because I agree wholeheartedly with either side, but because I wanted to take into account all viewpoints before making a final decision*" — and to make a forceful case to the public thatthe diversity of the groups with whom they have met in fact demonstrates that political access does not equate to arm-twisting or a pledge of ideological allegiance.

In the rare case where an official or lobbyist is reluctant to disclose access given to or received on behalf of an unpopular, perhaps ostracized, minority interest — the classic examples being the NAACP in the 1960s or the Communist Party in the 1950s — for fear of retribution against that organization, the reforms can include a provision allowing lobbyists or elected officials to apply to the FEC for a ruling authorizing nondisclosure of that particular interest's information, upon a showing thatthe interest has been treated as a pariah group and/or that there is likely to be retaliation against the interest, lobbyist, or official if lobbying contacts with the interest are disclosed.

2. *Constitutional Concerns*

Any proposal to reform the LDA must, of course, be sensitive to the fact that lobbying is an activity protected by the First Amendment rights "to petition Government for a redress of grievances,"[173] and to freedom of speech,[174] and that regulations which burden or chill the exercise of these rights may be constitutionally suspect. The reforms suggested in this paper should survive constitutional scrutiny for a number of reasons.

First, although lobbying is a protected First Amendment activity, the protection it enjoys is not absolute. As with other First Amendment rights, Congress may impose disclosure requirements that burden the rights of petition and speech if it can "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest,"[175] and if the disclosure requirements are narrowly tailored to achieve the state's interests.[176] In fact, lobbying disclosure requirements have received the Supreme Court's express stamp of approval when their purpose is "to maintain the integrity of a basic governmental process."[177] The disclosure requirements proposed above clearly fit this description, as they are designed to restore the public's faith in the "integrity of [the] governmental process" by providing information that directly relates to the public's concerns

[173] U.S. CONST., amend. I.

[174] As the Supreme Court has recognized, this right includes freedom of political expression and protects the free discussion of governmental affairs. *See* Buckley v. Valeo, 424 U.S. 1, 14 (1976).

[175] Gibson v. Florida Legislative Investigation Commission, 372 U.S. 539, 546 (1963).

[176] United States v. Harriss, 347 U.S. 612, 632 (1954).

[177] *Harriss*, 347 U.S. at 625.

about lobbyist access: The underlying premise behind the proposed reforms is that the public cares about lobbyists' ability to interact with and influence elected officials, and that the best way to satisfy the public and to ensure its belief in the integrity of government thus is to require elected officials and lobbyists to disclose their contacts with each other.

Further, Supreme Court decisions in the campaign finance context suggest that the proposed reforms would be found to intrude only minimally upon the freedom of speech and that the specific purposes that the reforms are designed to achieve would be held to justify such intrusions. In *Buckley v. Valeo*,[178] for instance, the Courtruled that the governmental interests in (1) providing the electorate with meaningful information about candidates and the interests to which they are likely to be responsive; and (2) deterring actual corruption and the appearance of corruption, justified campaign finance regulations that limited individual contributions and required identification of individuals who contribute to a campaign. Like the campaign finance regulations in *Buckley*, the disclosure requirements proposed in this paper are designed to provide the electorate with meaningful information about candidates — i.e., the relative amount of access that such candidates have provided to particular lobbyists, on behalf of particular interest groups, in the course of making policy decisions while in office thus far. In so doing, the proposed reforms also are meant (1) to combat the appearance of corruption by demonstrating to the public that political access does not always translate into legislative success, while (2) encouraging officials to be listen to groups on both sides of an issue. Moreover, theproposed reforms require only the minimum intrusion necessary to address the public's concerns about lobbyist access — i.e., disclosure of elected officials' contacts with lobbyists; they do not prohibit any type of lobbying conduct or require disclosure of ordinary citizens' contacts with officials. In this respect, the proposed reforms are far less burdensome of First Amendment rights than FECA's spending caps, which prohibit conduct, or its requirement that individual campaign contributors be identified — both of which were upheld in *Buckley*.[179]

Similarly, in *McConnell v. FEC*,[180] the Courtrule that the important governmental interest in combating the appearance of "undue influence on an officeholder's judgment" justified even greater restrictions on campaign spending in the form of soft money donations.[181] The *McConnell* Court noted that if it were to deny Congress the ability to regulate the appearance of undue influence, then "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."[182] This governmental concern applies equally in the lobbying context, where the risk of "undue influence" over an officeholder's judgment is at least as great as it is in the campaign contribution context — since an attempt to influence officials' judgment is precisely the point of lobbying interactions, and a failure to regulate lobbying is just as likely to result in a cynical assumption that well-connected lobbyists, rather than voters, control elected officials' policy

[178] *See* 424 U.S. 1, 66-68 (1976).
[179] *Id.*
[180] 540 U.S. 93 (2003).
[181] *Id*. at 143 (2003) (quoting FEC v. Colorado Republican Federal Campaign, 533 U.S. 431, 441 (2001)).
[182] 540 U.S. at 144.

decisions. In fact, the Court in *McConnell* implicitly acknowledged as much, observing that the purpose of large campaign contributions, whose regulation it upheld as necessary to combat the appearance of undue influence, is to gain political *access* to elected officials;[183] thus, it is difficult to imagine that the Court would now turn around and rule that reforms requiring disclosures about such political access itself are unconstitutional.

Despite these compelling governmental interests, however, opponents may argue that the proposed reforms violate the First Amendment because they (1) force lobbyists and interest groups to reveal their lobbying strategies, and thus might have a chilling effect on certain interest group or lobbyist behavior; (2) require disclosure of grassroots lobbying communications with members of Congress; and (3) violate associational rights by mandating identification of the members of lobbying coalitions and major contributors to interest groups that engage in lobbying. These arguments are misguided. As Bill Eskridge has noted in testimony concerning the 1993 LDA, any useful disclosure requirement necessarily will reveal some interest group strategy and probably also will deter groups from making certain calculated moves.[184] But this fact does not *ipso facto* render the requirement unconstitutional. Interest groups, like all citizens, have a right to petition their government and to engage in political discussions with elected officials; they do not have a right to hide the fact that they have exercised their rights of petition and political discussion, or the manner in which they have exercised these rights, from the rest of the citizenry — particularly where exposure of interest group strategy is itself likely to serve the public interest. More specifically, the chilling effect argument against disclosure of elected officials' lobbying contacts is unpersuasive for two reasons. First, while an interest group understandably may prefer that its lobbying contacts remain secret, the prospect of disclosure generally should not destroy the value of the contact or cause the interest to abandon a particular strategy unless there was something dishonest or manipulative about the strategy in the first place. "If you're afraid to disclose what committee or agency you're contacting, you might be up to no good."[185] It is not for nothing that Justice Brandeis observed that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."[186] Indeed, arguing

---

[183] *See, e.g.*, 540 U.S. at 147 n.46, 148-50 ("[T]hose checks open the doors to the offices of individual and important Members of Congress and the Administration . . . Labor and business leaders believe – based on experience and with good reason – that such access gives them an opportunity to shape and affect governmental decisions.") ("The majority of those who contribute to political parties do so for business reasons, to gain access to influential members of Congress" (quoting Hickmott Declaration cited in lower court opinion)).

[184] *See 1993 LDA Hearing*, *supra* note 50, at 234, 249 (testimony of William N. Eskridge, Jr.).

[185] *Id.* at 249-50. Eskridge illustrates the point with a hypothetical involving a lobbyist, acting on behalf of Jane Doe Ministries, who makes an *ex parte* contact with the FCC and also contacts a staff member of the relevant House oversight committee. Such disclosures would reveal the client's strategy of working the FCC from within the agency as well as through congressional pressure. Disclosure requirements that force the lobbyist to report the contacts with both the FCC and the committee may deter the lobbyist from engaging in this strategy, because the FCC might then discount any phone calls that it gets from the committee, given the revelation that the committee is acting at the lobbyist's behest rather than based on its own conviction. But if this is in fact what happens, Professor Eskridge observes, it may well be in the public's best interest. *See id.* at 249

[186] LOUIS BRANDEIS, OTHER PEOPLE'S MONEY 62 (1933 edition), *quoted in* Buckley v. Valeo,

against, or invalidating disclosure of lobbying contacts on this ground would be akin to invalidating source disclosure requirements in the campaign finance context because some interests might be dissuaded from running campaign advertisements on the theory that their message would be less effective if taken in light of its source. Second, a similar chilling effect argument already has been rejected by the Supreme Court in *Harriss*, which held thatany First Amendment restraint resulting from interest group reluctance to engage in lobbying activities for fear of disclosure consequences "is at most an indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from criminal libel laws."[187] Again, to the extent that there are legitimate, retaliatory concerns that may result in the chilling of a pariah group's lobbying activity, provision can be made in the disclosure requirements allowing lobbyists and elected officials to seek an FEC ruling excusing them from disclosing that particular interest's information.

The argument that mandatory disclosure of grassroots lobbying violates the First Amendment is similarly unconvincing. The reforms proposed in this paper, and in the SILEAA and LERA, would not require disclosure of communications from constituents — the "grassroots" — to Members of Congress. Nor would they require revelation of interest groups' membership lists or communications with their members.[188] The proposed reforms would require disclosure only of communications made to the "grassroots" from lobbying organizations in an effort to drum up support for a particular position. In other words, the disclosure sought in these reforms is of expenditures made to generate grassroots, or "astroturf",[189] activity. There is no constitutional right to secrecy regarding the fact that a hired lobbyist has tried to persuade citizens of a particular viewpoint.[190] On the other hand, there is a strong governmental interest in such disclosure because grassroots lobbying is a common lobbying tactic in the modern era, omission of which would leave the public with an incomplete picture of the lobbying process.[191] Further, as is the case with disclosures of lobbyists' contacts with elected officials, if the mere prospect of disclosure deters lobbyists from engaging in grassroots lobbying, then this suggests that the grassroots tactic owes its effectiveness in part to misrepresentation, not thatthe regulation of grassroots lobbying is unconstitutional.

---

424 U.S. 1, 67 (1976).

[187] *See* United States v. Harriss, 347 U.S. 612, 626 (1954).

[188] Indeed, such communications explicitly are excepted from disclosure by the SILEAA. *See* H.R. 2412, 109th Cong., §107 (2005).

[189] The term "astroturf" lobbying was coined to describe lobbyist efforts to orchestrate a fake, or less than completely accurate, showing of citizen support for a particular policy position, at the grassroots level, by advertising lobbying clients' positions to the public and encouraging individual citizens to call or write their representatives expressing support for those positions.

[190] The analysis would be different if the party seeking secrecy were an individual citizen, expressing his or her own political views, who might be dissuaded from speaking without the benefit of anonymity. *See* McIntyre v. Ohio Elections Comm., 514 U.S. 334, 356 n.20 (1995) (overturning conviction of a private citizen who had circulated an unsigned leaflet opposing a local ballot measure on the ground that state law prohibiting distribution of anonymous campaign literature unconstitutionally abridged citizens' right of free speech, but specifically disassociating this ruling from lobbying context).

[191] *See, e.g.*, Faucheux, *supra* note 137, at 20.

Finally, while regulations requiring disclosure of major contributors to a lobbying client and of the members of interest group coalitions do intrude on contributors' and coalition members' First Amendment rights, such reforms should survive constitutional scrutiny so long as they are tailored to serve the governmental interest in guarding against circumvention of disclosure requirements. In fact, in the analogous campaign finance context, the Supreme Court specifically has recognized the validity of regulations designed to prevent the circumvention of other, first-order, regulations which themselves aim to combat the appearance of corruption.[192] The Court similarly has suggested, in the context of direct democracy referenda, that regulations requiring disclosure of the identity of the proponents of a ballot question and the total amount of money spent for a petition campaign would be appropriately tailored to serve the state's substantial interest in controlling special interests'domination of the initiative process. [193] The government's interest in preventing circumvention of lobbying disclosure laws should be considered as strong as its interest in preventing circumvention of campaign contribution limits or silent domination of the referendum process by interest groups: Interest group circumvention of lobbying disclosure requirements both would give voters an incomplete picture of how particular lobbyists and groups interact with elected officials and would skew individual interests' ability to compete effectively with their issue opponents; thus, the government cannot achieve its interest in "providing meaningful information" to the electorate unless it is permitted to require disclosure of interest group coalition members and major financial contributors to lobbyists' clients. Further, the lobbying reforms proposed herein are narrowly tailored to serve the government's interests without unduly infringing upon First Amendment rights, in that they would require identification of the major players behind a lobbying client, while permitting de minimis contributors of less than $10,000 to remain unnamed.[194]

IV. GETTING LDA REFORMS ENACTED

It is, of course, easy for academics to sit back, survey the scene, and suggest grand proposals to reform ailing regulatory regimes. Far more difficult is to propose reforms that have some chance of successful implementation. This Part discusses the conditions necessary for reform of the LDA and contemplates the political developments that would need to take place in order for the proposed reforms to become enacted.

A. Keys to Convincing Congress

1. *Lessons From the Campaign Finance Context*

An important starting point for anyone seeking to evaluate the likelihood that Congress will enact lobbying reforms requiring disclosures from elected officials, rather than merely from lobbyists, is to understand why Congress was willing, in the related campaign finance context, to enact regulations that require disclosures from candidates for elective office. Put slightly

---

[192] *See* McConnell v. FEC, 540 U.S. 93, 143-44 (2003) (governmental interest in combating the appearance of corruption is sufficient to justify not only regulations imposing limits on campaign contributions, but laws preventing the circumvention of such limits by political actors) (citing cases).

[193] *See* Buckley v. American Constitutional Law Found., Inc., 525 U.S. 182, 202-03 (1999).

[194] *See* discussion *supra* Section III.B.1.c, pp. __.

differently, why did Congress impose disclosure requirements on public officials in the campaign finance context, but not do so in the lobbying context? The answer, I believe, is twofold. The first fold lies in differences between the manner and frequency with which campaign finance issues, versus lobbying process issues, are brought to the public's attention. Campaign finance issues become part of the public consciousness, on some level, at least every two years — i.e., every time a national election takes place. The public may pay more attention to campaign finance issues in certain election years than in others, but candidates' fundraising efforts are a topic always in the news, at least in the background, during an election year. Concerns about the lobbying process, by contrast, rise to the level of news only in the wake of a scandal. Further, when scandals in either sphere grab headlines, the press tends to frame campaign finance abuses differently than it does lobbying abuses: Campaign finance abuses tend to be tied to the particular candidates or political parties who solicited and received the questionable contributions, whereas lobbying abuses tend to be tied more to the interest groups or lobbyists responsible for the questionable tactic. Think, for example, of the Clinton Administration's infamous sale of stays in the Lincoln Bedroom, versus the Keating savings and loan scandal in the late 1980s, which tellingly was named for the corrupt Lincoln Savings and Loan chairman, Charles Keating, rather than the elected officials involved.[195] The recent scandal involving Representative DeLay is unusual in lobbying history for its focus on a particular elected official — and, not coincidentally, has prompted one of the only serious reform proposals calling for disclosure of the specific elected officials whom lobbyists contact — but even this scandal has focused at least as much on the activities of lobbyist Jack Abramoff as it has on Representative DeLay.[196] As a result of this media and congressional portrayal, lobbying abuses generally are viewed as the work of specific lobbyists, on behalf of specific interests, directed towards Congress as a whole, whereas campaign finance abuses are seen as stemming from the soliciting candidate's campaigns. Thus, elected officials are viewed as passive acceptors of lobbyist gifts, whose transgressions lie in taking advantage of lavish perks and allowing such gifts to influence them; while candidates campaigning for office are viewed as responsible for, if not the architects of, questionable contribution schemes.

The second reason for Congress' willingness to impose disclosure requirements on its own members in the campaign finance context is more practical: The majority of actors on the other side of campaign finance contributions are individual citizens, and Congress would have

---

[195] Indeed, the five senators involved in the Keating scandal escaped virtually unscathed. On of them, Senator John McCain, has gone on to become a champion of ethics reform in Congress.

[196] *See, e.g.*, Philip Shenon, *Lobbying Probe Spurs Request*, ALBANY TIMES UNION, July 6, 2005, at A7 (discussing expansion of congressional investigation into wrongdoing by Abramoff, who worked closely with DeLay and paid for DeLay's airfare on a trip to England as Scotland, as well as for an expensive skybox used by DeLay to entertain donors); Associated Press, *House Breakthrough Could Lead to DeLay Probe*, CHARLESTON GAZETTE, July 1, 2005, at 5D (noting that news organizations had uncovered documents showing connections between payments to DeLay and lobbyist Jack Abramoff); *Coushatta Tribe Was Told to Reroute DeLay Money*, FORT-WORTH STAR TELEGRAM, June 22, 2005, at A6 (discussing failure by DeLay political groups to disclose checks from Indian tribe connected to lobbyist Jack Abramoff); Les Blumenthal, *Group Wants Hastings Off Panel*, THE NEWS TRIBUNE, June 10, 2005, at B02 (describing Abramoff as "the lobbyist at the center of DeLay's problems").

come under serious political fire if it had sought to place the burden of disclosure on such citizens rather than on candidates running for elective office. When the entity on the other side of a campaign contribution is not a citizen, but a PAC, campaign finance regulations do require disclosure from that entity in addition to candidate disclosure. Further, even prior to enactment of campaign finance laws, candidates' reelection committees kept track of contributions made to candidates' campaigns; thus, candidate-side disclosure of campaign finance contributions did not require reinventing any wheels but could instead build upon existing internal records.

In sum, differences in public perception and presentation, combined with practical recordkeeping considerations, left Congress with no choice but to put candidates for elective office at the forefront of campaign finance disclosure rules; whereas in the lobbying context, legislators were free to place the entire burden of disclosure on lobbyists alone.

2. *Engendering Public Support*

Not surprisingly, then, one key ingredient for successful reform of the LDA is public perception and publicsupport for specific reforms . In order for elected officials to be persuaded to enact specific reforms — e.g., disclosure of lobbyist contacts with specific officials, disclosure by officials, disclosure of grassroots lobbying, stronger penalties and enforcement mechanisms — the public first must agitate against failures in the current lobbying regulation system that correspond to these reforms. Instead of vague dissatisfaction with the lobbying system and criticism of the influence that interest groups exert over elected officials, the public would need to express concern or even ire about grassroots lobbying, inadequate oversight of compliance with lobbying disclosure rules, and the fact that lobbying regulations fail to require any information about lobbyist access to elected officials, let alone any disclosures by elected officials themselves.

Experience teaches that such specific public pressure is likely to occur only if one of two developments (or some combination thereof) takes place: (1) the public receives news of a large scandal involving grassroots lobbying, or particular officials' contacts with lobbyists, or widespread noncompliance with lobbying regulations; (2) political elites — whether candidates for elective office, party heads, or heads of public interest organizations such as Ralph Nader — orchestrate a national campaign highlighting deficiencies in the current LDA and calling for reforms akin to those proposed in this paper. The power of a public scandal to prompt reforms tailored (sometimes myopically) to prevent recurrences of similar scandals in the future is historically obvious and needs little exposition. The power of political elites to shape public opinion is perhaps less well understood, except by political scientists. In brief, political theory holds that public opinions overwhelmingly are developed through heuristic cue-taking from political elites.[197] The public pays little attention to political facts on its own; it becomes interested only when political actors, often in political speeches, make such facts symbolically threatening or reassuring — and even then the public responds to the cues from the political

[197] *See, e.g.*, Kang, *supra* note 101, at 1162 (citing JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION 40-52 (1992)).

elites' speeches, not to direct knowledge of the facts.[198] Thus, efforts by political candidates, parties, or prominent political figures — e.g., Ralph Nader or Ross Perot — to connect public dissatisfaction with the lobbying process to a particular cause and to generate public support for specific reforms aimed at eradicating that cause — i.e., to make lobbying facts symbolically meaningful — could be the key to successful LDA reform. This is precisely what happened in 1992 when presidential candidate Ross Perot made revolving-door lobbying a campaign issue[199] and roused public sentiment to such an extent thatBill Clinton also took on the cause and, upon winning the election, issued an executive order restricting revolving-door lobbying by executive branch officials.[200]

The first condition for reform, public scandal, undoubtedlywas satisfied this past summer (2005) by revelations of Representative Tom DeLay's ethics violations concerning lobbyist-paid travel and other gifts. Predictably, this scandal has inspired several reform proposals, including the SILEAA and LERA, which take the unusual step of calling for disclosures of lobbyist contacts with specific public officials. But the second condition, support from political elites, also must exist if lobbying reform is to get past the proposal stage and become law. Indeed, history teaches that championing by political elites actually is more important than the existence of a public scandal in effecting successful lobbying reform: Despite numerous previous attempts at reform in the wake of lobbying scandals, Congress ultimately enacted the FRLA and the LDA, not in response to a public scandal, but as the result of internalpressure to reorganize the way Congress operated (1946),[201] and public pressure, generated by political elites, to "change the way business is done in Washington" (1992 and 1994),[202] respectively.

The requisite support from political elites does not, unfortunately, appear to exist at present. Various Senators and Representatives, including Meehan, Emmanuel, McCain, and Feingold, may have started the ball rolling, to some extent, with respect to proposals for grassroots lobbying, coalition identification, and disclosure by lobbyists of the specific officials with whom they meet. But more championing from political elites is necessary if such reforms

---

[198] *See* EDELMAN, *supra* note 11, at 172.

[199] *See, e.g.*, Adam J. Rombel, *Interest Group Politics in the Northeastern States* (Book Review), SPECTRUM: J. OF STATE GOV'T, Sept. 22, 1994, at 46 (Vol. 67) (observing that "Ross Perot's 1992 presidential campaign focused attention on the problem of lobbyists" by, *inter alia*, specifically criticizing the revolving door practice of government officials turning into lobbyists upon leaving government); Jane Bussey, *U.S. Officials Who Quit To Lobby For Mexico Are Brought Under Fire*, MIAMI HERALD, Oct. 11, 1992, at 3K (describing Perot campaign commercial criticizing former government officials who walked through the "revolving door" to become lobbyists after leaving office).

[200] *See, e.g.*, David Corn*, Beltway Bandits (Reversing the Reagan/Bush years)*, THE NATION, Nov. 23, 1992, at 620 (reporting that during the campaign Clinton, "stealing Ross Perot's tune," had "decried the revolving door through which government officials pass into positions as lobbyists" and was now making good on this promise by instituting an executive order forcing executive appointees to pledge not to lobby their agencies for five years after leaving their government posts).

[201] The FRLA was enacted as a last-minute add-on to the Legislative Reorganization Act of 1946 and was "in effect carried through on the coattails of the other congressional reforms regarded as most important by Congress." *See* Kennedy, *supra* note 83, at 548.

[202] *See* sources cited *supra* note 15 and accompanying text.

are to be successful. The Democratic Party (insofar as it seeks to capitalize on the DeLay scandal) or public interest groups could be ideal candidates for pushing forth the other reforms, particularly those relating to stronger penalties and transfer of enforcement authority to the FEC. Given legislators' self-interested behavior, however, it is unlikely that any current member of Congress will take up the mantle in favor of disclosure by elected officials; thus, this reform likely would have to be brought to the fore by an outsider, akin to a Ross Perot in 1992, in order to succeed. Newt Gingrich may perhaps be able to fulfill this role, if he is so inclined, given his name recognition and his penchant for no-nonsense comments such as, "You can't have a corrupt lobbyist without a corrupt member or a corrupt staffer on the other end."[203]

3. *Political Reality*

Because of legislator self-interest, Congress is certain to be reluctant to enact regulations that require its own members and staff to disclose their lobbying contacts. Further, it is unlikely to be pleased at the prospect of a system that encourages additional interests to approach its members seeking face time equal or proportionate to that received by their competitors. But if outside-the-beltway political elites akin to Ross Perot or Ralph Nader are willing and able to focus the public's attention on the inequity and inadequacy of forcing lobbyists, but not elected officials, to make disclosures about their lobbying interactions, Congress nevertheless could find itselfforced into imposing lobbying disclosure requirements o n its own members and other elected officials. Absent the generation by political elites of such public clamoring for elected official disclosures, the closest, second-best solution that we are likely to see is enactment of regulations requiring lobbyists to list the specific public officials with whom they meet, perhaps along with some estimate of the amount of time spent with those officials. As discussed *supra* Section III.B.1.a, such a disclosure requirement would not provide all of the benefits of disclosures by elected officials, but it would improve competing interests' ability to monitor and match each others' efforts, and thus would be a step in the right direction.

A. Interest Group Support

Madisonian ideals aside, we live in a Mancur Olson[204] world, where wealthy, powerful, organized interests tend to exert disproportionate influence over the legislative process. While Congress has proved capable of enacting lobbying reforms without the support of organized interests,[205] the reforms proposed in this paper, particularly those calling for disclosure of

---

[203] *Newt as Diogenes in a Dark Capitol*, NEW YORK TIMES, Jan. 7, 2006, at A10.

[204] Olson was a public choice theorist who famously argued that small interest groups with intensely held preferences, not necessarily in the public or majority interest, are the most likely to organize and, therefore, to wield disproportionate influence over legislative policy. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (Harvard, 1965).

[205] In 1993, for example, Congress successfully eliminated tax deductibility of lobbying expenses, despite lobbyist and interest group opposition; but this was an unusual case, in which elected officials and the public overwhelmingly supported the reform. *See, e.g.*, Michael Wines, *Special Pleaders -- A Periodic Look at Lobbying: Lobbyists Scrambling to Kill A Clause That's About Them*, N.Y. TIMES, Aug. 27, 1993, at A1; Joel Brinkley, *Special Pleaders -- A Periodic Look at Lobbying: Lobbyists Appear Inept When They're the Issue*, N.Y. TIMES, July 30, 1993, at A12.

lobbyist contacts with specific elected officials on behalf of specific interests, would face an exceedingly uphill battle if opposed by those interests that currently hold the most power and access to legislators. Thus, interest group reaction is an important factor to consider in evaluating the likelihood that the reforms proposed herein might successfully be enacted. For the reasons outlined below, I believe that interest groups should be inclined to support the proposed reforms.

First, special interests, and particularly those "Mancur-Olson" interests that are best organized and thatcurrently receive the most access to elected officials, may gain from having an official system that tracks access to lawmakers. As discussed earlier, such a system would help organized interests legitimate their claims to group members that they have been successful in making their case to elected officials and in achieving desired group objectives.[206]

Second, it is likely that competing interests, like competitors in any business industry, always will want more rather than less information about their competitors, even if it means having to give up information about themselves. Indeed, in the economic marketplace, we have antitrust laws designed to restrict the sharing of competitive information precisely because we fear that if businesses have such information, they may collude or allocate their resources in too-effective ways. In the political marketplace, powerful, wealthy interest groups have similar incentives. Such groups tend to have wide lobbying interests, and may obtain substantial congressional deference in some contexts, but very little in others. As a result, they may be willing to tolerate more transparency for their lobbying activities in sectors where they are winning in exchange for more transparency regarding their lobbying activities in sectors where they are losing. To be sure, this would cause such interests to lose some effectiveness in areas where they currently are the only side being represented, but it also would enable them to gain effectiveness in other areas where they are underrepresented; this is a trade-off that at least some, if not most, interests may be willing to make. It is only interests who constantly are winning all of their battles who might oppose reforms aimed at increasing transparency, and even such interests may believe that the time lag between their lobbying activities and disclosure thereof will be sufficient that they need not worry about reforms requiring greater disclosure.

Third, greater transparency may assist interests with coalition-building by revealing additional groups with like interests or groups who have demonstrated access to a key influential legislator or committee. The magnitude of this benefit may be limited to the extent that groups in an industry already are familiar with each other, but the proposed disclosures may at least help at the margins. Fourth, interest groups should support the proposal that contacts between lobbyists and specific elected officials be disclosed because such disclosures will save interests some of the time and energy currently spent monitoring, tracking, and assessing the activities of government officials and will provide more accurate and thorough information about these activities.[207]

---

[206] *See* discussion *supra* Section III.A, pp. 32-33.

[207] *See* Robert H. Salisbury, *Putting Interests Back Into Interest Groups*, *in* CIGLER & LOOMIS, *supra* note 26, at 382.

Even the proposal requiring disclosure of grassroots lobbying activities should not garner the interest group opposition that it did in 1995, so long as it exempts from disclosure communications between interest groups and their own members and otherwise protects membership lists from exposure. A grassroots disclosure requirement along the lines of that proposed in the SILEAA and the LERA should satisfy such First Amendment concerns while still providing the information needed by competing interests.

Conclusion

Interest group attempts to match each other's efforts always will be a guessing game; lobbying disclosures by necessity will be retrospective, and thus will not enable interests to discover what lobbying contacts their opponents are engaging in at present, but only will reveal what access a group received in the last reporting period. Further, interest groups always will be one step ahead of lobbying reforms and regulations, seeking new ways to avoid disclosing certain information; the hydraulics principle that as one hole is plugged, another will open, certainly applies here. Thus, lobbying reform may produce many unintended consequences; we may, for example, next see an increase in elected officials lobbying each other — e.g., Congress lobbying executive agencies, executive officials lobbying Congress — and/or a shift to lobbying of political parties rather than individual elected officials, in an effort to circumvent disclosure requirements. Accordingly, lobbying reforms should be enacted with the expectation that they will need to be reevaluated and revised in the not-too-distant future.

Thus, the reforms proposed in this paper are not offered as a panacea, or even as a permanent partial fix, for all that ails the lobbying process. Rather, they are intended as a step in the right direction, towards dynamic regulation of the lobbying process, in a manner that realistically accounts for and utilizes different political actors' internal incentives to inspire more balanced legislating and, ideally, enhanced voter competence.