Distorting Access to Government: How Lobbying Disclosure Laws Breach a Core Value of the Petition Clause

Abstract 328
I. Introduction 328
II. Problems and Prospects in the Judicial Assessment of Lobbying Disclosure 332
A. *Tracing the Roots: Disclosure and the First Amendment Before the LDA* 333
B. *Bird's Eye View: A Brief Synopsis of the LDA's Disclosure Framework* 335
C. *A Ship with No Compass: The Failure of First Amendment Claims Against the LDA* 338
D. *Shifting the Paradigm: Why the Contemporary Standard Must be Reassessed* 341
III. The Historical Rationale Against Lobbying Regulation 342
A. *Steeped in Tradition: Agent-Based Petitioning in England and the American Colonies* 343
B. *Of Revolutionary Spirit: Views on Petitioning in the Formative Years of the Republic* 345
C. *At the Heart of Democracy: The First Congress and its Engagement with Lobbyists* 346
IV. The Consistency Rationale Against Lobbying Regulation 347
A. *Burning the House to Roast the Pig?: Preserving a Right to Distribute Offensive Speech* 348
B. *First Person Plural: Promoting a Right to Speak on Behalf of Group Members* 350
V. Contours and Implications of the "Access Distortion" Problem 352
A. *A Concrete Injury: Defining the Nature of "Access Distortion" by Way of Analogy* 353
B. *The Injury at Work: Elements of Proof and Necessary Changes to Strict Scrutiny* 356
C. *Anticipating the Skeptics: Why the Test for Access Distortion Is Not Flawed* 359
Conclusion 362

ABSTRACT

Lobbying occupies a unique and indispensable role in our democracy. History and doctrine indicate that it is a form of political expression which should enjoy expansive First Amendment protection. However, lobbying has long been the target of federal regulation. This Note argues that the Lobbying Disclosure Act of 1995 (LDA), as amended in 2007, violates the Petition Clause of the First Amendment by distorting a lobbying client's right to access the government. The distortion occurs when a lobbyist foregoes effective (and otherwise legal) petitioning strategies simply because they might spark public controversy when disclosed. The client is then forced to accept a distorted form of advocacy, which inhibits his petition from being properly heard. Because that outcome cuts closely against the value of public access to government, this Note proposes that "access distortion" is a provable and redressable constitutional injury under the Petition Clause. Fundamentally, it is an abridgment of agent-based expressive activity that is protected by the First Amendment.

Part II of this Note addresses the failure of existing doctrine to identify and protect agent-based expression under the Petition Clause. It does so by reviewing the relevant provisions of the LDA, and by discussing how courts have dealt with its disclosure framework. Part III explores the historical support for reading an agency interest into the Petition Clause. It studies the protections afforded to lobbyists during the colonial and early republican periods, and analyzes their importance in the formative years of our Constitution. Part IV discusses how protecting agent-based petitioning is consistent with other First Amendment doctrine, particularly in the realms of speech and association. By this analysis, the Note aims to distill the kind of protection lobbying should enjoy under the Petition Clause. Finally, Part V discusses the implications for the LDA of an agent-conscious Petition Clause, focusing on the proof necessary to establish an "access distortion" claim. It also explores how strict scrutiny analysis might change if the Petition Clause is given independent legal effect in the lobbying context.

I. INTRODUCTION

Lobbying occupies a unique and indispensable role in our democracy. Fundamentally, lobbyists bridge the gap between civic participants and policymakers: acting as innovators and problem-solvers in Congress and

the bureaucracy.[1] These agents are hired to represent client interests in the fluid (and often explosive) universe of politics, and are expected to leverage their skills to obtain favorable policy outcomes.[2] Successful lobbying professionals, therefore, are experts of their trade. They navigate congressional procedure, master statutory drafting and interpretation, build relationships with key stakeholders, and identify opportunities for policy change.[3] In short, lobbyists are vital to the clients they serve and the legislators they advise.

Despite modern disdain for the profession, lobbying is also a mainstay of the American tradition. Even in the early eighteenth century, lobbyists petitioned colonial authorities on behalf of citizens and interest groups.[4] These agents kept local officials responsive to the needs of the people and helped their clients navigate relations with London.[5] By the time of the Revolution, agent-based petitioning was widely accepted in the American colonies.[6] Our Founding Fathers believed the practice was natural in an ordered society[7] and viewed it as giving the citizenry unprecedented access to the government.[8] Because of its political importance, the Framers did not

1. FRANK R. BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 55 (2009) (discussing how the "informational richness" of lobbyists fosters the stability of policy-making institutions).

2. THOMAS T. HOLYOKE, INTEREST GROUPS AND LOBBYING: PURSUING POLITICAL INTERESTS IN AMERICA 116 (2014) (describing lobbying as the practice of aligning client interests with those of legislators and their constituencies).

3. *See* Nicholas W. Allard, *Lobbying Is an Honorable Profession: The Right to Petition and the Competition to Be Right*, 19 STAN. L. & POL'Y REV. 23, 34 (2008) ("The successful practice of public policy is rooted in the mastery of procedures and the ability to explain how a given position advances the public interest. Like litigation, this advocacy work is conducted in a highly competitive, complex, and professional environment.").

4. *See* John D. Runcie, *The Problem of Anglo-American Politics in Bellomont's New York*, 26 WM. & MARY Q. 191, 203 (1969) (highlighting the mercantile lobby's influence on trade policy in colonial New York).

5. *Id.* at 207 (cataloguing the petitioning activities of one New York merchant to the Board of Trade in London).

6. *See* ROBERT LUCE, LEGISLATIVE PRINCIPLES: THE HISTORY AND THEORY OF LAWMAKING BY REPRESENTATIVE GOVERNMENT 523 (1930) ("[B]y the time trouble with the mother country began, the custom of bringing influence to bear upon legislative bodies by the use of petitions was thoroughly entrenched.").

7. James Madison, recognized as the philosopher of the Constitution, noted that special interests are "sown in the nature of man." THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961). He observed that the public pursuit of private interests "involves the spirit of party and faction in the necessary and ordinary operations of the government." *Id.* Although he later argued for limits on faction, Madison's proposals were never intended to eradicate pressure politics. He made this point forcefully by declaring that "[l]iberty is to faction what air is to fire, an aliment without which it instantly expires." *Id.* at 78.

8. The drafters of the Bill of Rights believed that, by securing expressive rights, "the people may therefore publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body; in all these ways they may communicate their will." *See* Proceedings in the House of Representatives, June 8, 1789, *in* 1 ANNALS OF CONG. 738 (1789) (Joseph Gales ed., 1834), *reprinted in* RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS

preclude lobbying from First Amendment protection. Viewing the activity as part of a broader expressive right, they asserted that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[9]

Notwithstanding this grant, lobbying has long been the target of government regulation. Contemporary efforts began with the Federal Regulation of Lobbying Act (FRLA) in 1946, which required disclosure of petitioning activities under threat of criminal prosecution.[10] Although the FRLA survived the tests of time and litigation,[11] lackluster enforcement led to its obsolescence even in the post-Watergate years.[12] These failures engendered ethics reform initiatives, which culminated in the passage of the Lobbying Disclosure Act of 1995 (LDA).[13] The law was viewed with optimism at first, but the notorious Jack Abramoff scandal rekindled a national debate on the propriety of lobbying.[14] Spurred by the public backlash from those events, Congress amended the LDA through the Honest Leadership and Open Government Act of 2007 (HLOGA).[15] These statutes comprise current lobbying law, but their constitutionality is not clear.

Despite some attention by academia, the LDA remains largely unchallenged on First Amendment grounds.[16] Worse yet, courts addressing

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LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 110 (2012).

9. U.S. CONST. amend. I. Federal courts recognize that "[w]hile the term 'lobbyist' has become encrusted with invidious connotations, every person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition." Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491 (D.C. Cir. 1968).

10. Federal Regulation of Lobbying Act § 310, 2 U.S.C. § 269 (1994) (repealed 1995).

11. *See* United States v. Harriss, 347 U.S. 612, 625 (1954) (narrowing the FRLA's scope of enforcement and holding that, as construed, the Act did not impinge on First Amendment freedoms).

12. By 1979, even the Department of Justice acknowledged that the law had been reduced to a virtual non-entity. William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, *in* THE LOBBYING MANUAL 5, 14 (William V. Luneburg et al. eds., 4th ed. 2009). It is estimated that only 20%–40% of covered lobbyists actually complied with the FRLA. *Id.*

13. Lobbying Disclosure Act, 2 U.S.C. §§ 1601–1614 (2012) (amended 2007).

14. Jack Abramoff, a renowned Washington heavy-hitter, was exposed for enriching himself at the expense of Native American tribes. *See* Susan Schmidt, *A Jackpot from Indian Gaming Tribes*, WASH. POST, Feb. 22, 2004, at A1. Abramoff was also caught arranging lavish trips to Europe for former Congressman Tom Delay, his wife, and several members of his staff. Thomas M. Susman & William V. Luneburg, *History of Lobbying Disclosure Reform Proposals Since 1955*, *in* THE LOBBYING MANUAL, *supra* note 12, at 23, 32.

15. These amendments were incorporated into the LDA, which is codified at 2 U.S.C. §§ 1601–1614 (2012).

16. *See, e.g.*, Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 216 (2012) (arguing that lobbying regulation prevents rent-seeking behavior and inefficient legislation); William V. Luneburg, *The Evolution of Federal Lobbying Regulation: Where We Are Now and Where We Should Be Going*, 41 MCGEORGE L. REV. 85, 120 (2009) (discussing the ramifications of weak enforcement mechanisms in the LDA); Lloyd Hitoshi Mayer, *What Is This "Lobbying" That We Are So Worried About?*, 26 YALE L. & POL'Y REV. 485, 545 (2008) (discussing the need for a unitary definition of "lobbying" under all federal law).

the topic have missed the mark: focusing on the lobbyist instead of addressing the client's rights,[17] and relying on marginally related First Amendment grounds to justify regulation.[18] In an effort to fill the gap, this Note argues that the LDA's disclosure requirements violate the Petition Clause by distorting a lobbying client's fundamental right to access the government.[19] The distortion occurs when a lobbyist foregoes effective (and otherwise legal) petitioning strategies simply because they might spark public controversy and prompt retaliation when disclosed.[20] For example, a lobbyist might devote less of his time to representing an unpopular client or charge less than the stipulated amounts for representation. Adopting that kind of strategy allows the lobbyist to bill hours without surpassing the thresholds for disclosure. The client is thus forced to accept a diminished form of advocacy, which in turn, inhibits his petition from being properly heard.[21] Because that outcome cuts closely against the value of public access to government, this Note proposes that "access distortion" is a provable and redressable constitutional injury under the Petition Clause.[22] Fundamentally, it is an abridgment of agent-based expressive activity that is protected by the First Amendment.

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17. Autor v. Pritzker, 740 F.3d 176, 183 (D.C. Cir. 2014) (holding that an order to ban lobbyists from Industry Trade Advisory Committees "pressures *them* to limit *their* constitutional right to petition" (emphasis added)).

18. Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1, 9 (D.C. Cir. 2009) ("We agree with NAM that . . . compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." (internal quotation marks omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976))).

19. This Note relies on Professor Krotoszynski's hypothesis that the Petition Clause carries an expansive right of access to the government. KROTOSZYNSKI, *supra* note 8, at 170. In his seminal work on the subject, Professor Krotoszynski posits that "petitioners have a right to have their petitions be received and heard by the government," and that "this right to be heard must [also] include a right of proximity to the government officials to whom a petition is addressed." *Id.* His only caveat is that access does not also impose a duty on government to respond or otherwise act upon a petition. *Id.* at 172.

20. This distortion is analogous to the "chilling effect" on citizen advocacy brought on by Strategic Lawsuits Against Public Participation in Government (SLAPPs). *Cf.* GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 8 (1996) ("[W]e care about [SLAPPs] because they happen when people participate in government, and they effectively reduce future public participation."). Using the *Noerr–Pennington* doctrine, courts have relied on the Petition Clause to guard against this chilling effect. *See* United Mine Workers v. Pennington, 381 U.S. 657 (1965); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

21. It is no answer to impaired advocacy that a lobbying client can still petition the government directly or hire another lobbyist. Direct petitioning may actually lead to less access than what a cautious lobbyist can provide. *See* KEN GODWIN ET AL., LOBBYING AND POLICYMAKING: THE PUBLIC PURSUIT OF PRIVATE INTERESTS 40 (2013). Plus, the Supreme Court has warned against this type of argument. *See* Healy v. James, 408 U.S. 169, 183 (1972) (asserting that "the Constitution's protection is not limited to direct interference with fundamental rights," and that disclosure laws can form "an impermissible, though indirect, infringement of . . . [those] rights").

22. Although the scope of petition rights is often defined by freedom of speech, the Petition Clause must be construed as providing independent protection for lobbying. The Supreme Court has indicated the soundness of this approach in recent case law. In *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011), the Court noted that:

Part II of this Note addresses the failure of existing doctrine to identify and protect agent-based expression under the Petition Clause. It does so by reviewing the relevant provisions of the LDA and by discussing how courts have dealt with its disclosure framework. Part III explores the historical support for reading an agency interest into the Petition Clause. It studies the protections afforded to lobbyists during the colonial and early republican periods, and analyzes their importance in the formative years of our Constitution. Part IV discusses how protecting agent-based petitioning is consistent with other First Amendment doctrine, particularly in the realms of speech and association. By this analysis, the Note aims to distill the kind of protection lobbying *should* enjoy under the Petition Clause. Finally, Part V discusses the implications for the LDA of an agent-conscious Petition Clause, focusing on the proof necessary to establish an "access distortion" claim. It also explores how strict scrutiny analysis might change if the Petition Clause is given independent legal effect in the lobbying context.

II. PROBLEMS AND PROSPECTS IN THE JUDICIAL ASSESSMENT OF LOBBYING DISCLOSURE

Animating this Note is the reality that courts have not consistently identified *who* is harmed by lobbying disclosure and *how* that harm actually relates to the First Amendment. Rather than recognizing the Petition Clause's role in protecting agent-based expression, courts have instead justified disclosure by focusing on the wrong stake-holders and commingling constitutional doctrine. Section A explores the shaky foundations of First Amendment jurisprudence in the context of pre-LDA lobbying. Section B provides an overview of the LDA's framework, focusing on the statute's registration and reporting requirements. Section C studies how modern courts have imported problematic pre-LDA doctrine to justify modern disclosure regimes. And Section D evaluates how an agent-conscious Petition Clause might cure the doctrinal deficiencies of the existing approach.

> Courts should not presume there is always an essential equivalence in the two Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause claims . . . .
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> . . . .
>
> . . . There may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis; and if that is so, the rules and principles that define the two rights might differ in emphasis and formulation.

(internal citations omitted).

A. *Tracing the Roots: Disclosure and the First Amendment Before the LDA*

Common law actions in contract comprised the earliest attempts to regulate lobbying in the United States.[23] The excesses of corruption in the nineteenth century, however, also prompted legislation to limit interest group advocacy.[24] These reform initiatives were largely confined to the states, with Massachusetts providing an early example of disclosure requirements.[25] Although some federal limits on lobbying activity existed by the mid-nineteenth century,[26] the first serious efforts at prescription occurred during the Wilson administration.[27] Congress debated several legislative proposals during the 1920s and 1930s, but most bills failed to make it out of committee.[28] When Congress finally passed the FRLA in 1946, it did so without fanfare (the statute was one subchapter of the ambitious Legislative Reorganization Act).[29] Writing years later in his capacity as a U.S. Senator, John F. Kennedy remarked that even the staunchest opponents of lobbying disclosure were unwilling to block the omnibus bill because it included other titles with broad bipartisan support.[30]

Because the FRLA's disclosure regime was hardly debated in Congress, the lobbying community mounted a frontal attack on its constitutionality. The first prosecutions under the Act prompted vigorous litigation.[31] These early cases are significant in that the presiding courts seemed to grasp the gross impropriety of the law in light of the First Amendment. The analysis of the U.S. District Court for the District of Columbia in *National Association of Manufacturers (NAM) v. McGrath*[32] is

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23. ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 149–68 (2014) (cataloguing early case law on lobbying contracts which enunciated a view that "influence peddling" was an insidious and unenforceable type of transaction).

24. *See* Eskridge, *supra* note 12, at 6 (describing the *Credit Mobilier* scandal, in which railroad lobbyists used bribery and pressure tactics to obtain favorable deals on transcontinental railroad projects).

25. *Id.* at 7 (referring to 1890 Mass. Acts 456, which was repealed in 1973).

26. One federal statute, passed in 1852, prohibited any newspaperman from being on the House floor if he was hired "as an agent to prosecute any claim pending before Congress." TEACHOUT, *supra* note 23, at 151.

27. After President Wilson publicly decried lobbying on tariff reform, the Senate adopted a resolution calling for investigation of legislative corruption. *See* S. Res. 92, 63d Cong. (1913).

28. Prior to 1946, only two proposals on lobbying regulation were reported favorably by the Senate Judiciary Committee. One was a bill sponsored by Senator Thaddeus Caraway, S. REP. NO. 70-342 (1928); the other was a proposal put together by then-Senator Hugo Black, S. REP. NO. 74-602 (1935).

29. The FRLA was passed as Title III of S. 2177, 79th Cong. (1946). The legislation included other important provisions, such as the Administrative Procedure Act and the Federal Tort Claims Act.

30. John F. Kennedy, *Congressional Lobbies: A Chronic Problem Re-Examined*, 45 GEO. L.J. 535, 536–37 (1957).

31. *See, e.g.*, United States v. Slaughter, 89 F. Supp. 876 (D.D.C. 1950).

32. 103 F. Supp. 510 (D.D.C.), *vacated as moot*, 344 U.S. 804 (1952).

particularly relevant. The three-judge panel in *McGrath* strongly criticized the FRLA for abridging the right of petition and characterized lobbyists as political agents rather than independent actors.[33] The court noted that the FRLA's disclosure scheme created harm that "is no different than would be an enactment depriving a person of the right of counsel . . . . It is inconceivable that anyone would argue in support of the validity of such a provision."[34] This analogy to the Sixth Amendment's Assistance of Counsel Clause was powerful: it underscored the professional character of lobbying and framed the FRLA as an impediment on the lobbying client's expectation of unrestrained advocacy.[35]

Despite an optimistic start, the Supreme Court's intervention in *United States v. Harriss*[36] obliterated any chance of immunizing lobbyists against disclosure. In *Harriss*, two lobbyists representing the National Farm Committee failed to report their efforts to influence legislation on the price of agricultural commodities.[37] Upon being prosecuted, the lobbyists challenged the law on vagueness and First Amendment grounds. In a 5–3 decision, from which Justice Clark was absent, the Court upheld the disclosure regime by narrowly construing its operative provisions.[38] Writing for the majority, Chief Justice Warren navigated past the vagueness claim by limiting the scope of the FRLA's coverage.[39] Citing a constrained reading of the statute, he then dismissed the First Amendment challenge.[40] Chief Justice Warren viewed the FRLA as requiring only "a modicum of information" so that legislators could evaluate who was lobbying them.[41] He warned that, without these disclosures, "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal."[42]

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33. *Id.* at 514.

34. *Id.*

35. The policy behind effective representation in court reflects values of governmental access also inherent in the Petition Clause. *See* Allard, *supra* note 3, at 42 n.76. Part V of this Note revisits the Sixth Amendment analogy used in *McGrath*, and relies on it to distill the elements of an "access distortion" injury.

36. 347 U.S. 612 (1954).

37. *Id.* at 614–15.

38. *Id.* at 628 (reversing the dismissal of criminal charges below).

39. *Id.* at 623–24 (interpreting § 307 of the FRLA as only requiring disclosure from people who were hired to influence legislation through "direct communication" with Congress).

40. *Id.* at 625.

41. *Id.* This compelling interest did not enjoy broad applicability in later case law, since the routine work of a legislator has changed drastically. Congressmen today are not as personally involved with crafting policy positions: they can rely on staff members to identify and respond to interest group pressures.

42. *Id.*

The Court's handling of the First Amendment claim was problematic for several reasons. First, the Court failed to carefully identify the discrete rights affected by involuntary disclosure.[43] Unlike the *McGrath* panel, the Court also failed to discuss whether its First Amendment analysis treated lobbyists as agents or individuals.[44] Justice Jackson picked up on these deficiencies and refused to join the Court's opinion. In dissent, he posited that FRLA disclosures specifically violated the Petition Clause.[45] He argued that the right of petition must receive the same kind of protection as other First Amendment freedoms, and that as such, "it confers a large immunity upon activities of persons, organizations, groups and classes to obtain what they think is due them from government."[46] Although Justice Jackson acknowledged a countervailing interest in curbing corruption, he also viewed that concern as legally subordinate.[47] Speaking inclusively about lobbyists and their clients, he noted that the design of "our constitutional system is to allow the greatest freedom of access to Congress, so that the people may press for their selfish interests, with Congress acting as arbiter of their demands and conflicts."[48]

B. Bird's Eye View: A Brief Synopsis of the LDA's Disclosure Framework

Although Justice Jackson's dissent in *Harriss* touched on important considerations, his argument lost in the end.[49] The FRLA's disclosure framework was thus deemed valid, even if its scope was significantly narrowed. Reform proposals in the second half of the twentieth century capitalized on *Harriss* by seeking more stringent reporting requirements.[50]

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43. *Id.* (classifying the interest at stake as a unitary "freedom to speak, publish, and petition the Government").

44. One passage in the opinion suggests that only the lobbyist's interests were ever evaluated. In dismissing arguments about the FRLA's chilling effect, Justice Warren noted that "the restraint is at most an indirect one resulting from *self-censorship*." *Id.* at 626 (emphasis added).

45. *Id.* at 635.

46. *Id.* This is consistent with Professor Krotoszynski's view that the "accountability function of the Petition Clause would be significantly enhanced if the right of petition included a right to communicate directly with government officials." KROTOSZYNSKI, *supra* note 8, at 175.

47. *Harriss*, 347 U.S. at 635. Justice Jackson's refutation of an anti-corruption rationale foreshadows modern jurisprudence on the subject. *See* Citizens United v. FEC, 558 U.S. 310, 359 (2010) (noting that "[r]eliance on a generic favoritism or influence theory . . . is at odds with standard First Amendment analyses" (internal quotation marks omitted)).

48. *Harriss*, 347 U.S. at 635.

49. The dissenting viewpoints in *Harriss* fell on deaf ears, as proposals for FRLA reform quickly surfaced. *See, e.g.*, Barbara Bado, Comment, *Federal Lobbying Disclosure Legislation*, 26 AM. U. L. REV. 972, 995–997 (1977); Guy Paul Land, Note, *Federal Lobbying Disclosure Reform Legislation*, 17 HARV. J. ON LEGIS. 295, 300–03 (1980).

50. The closest Congress came to amending the FRLA was in the immediate aftermath of the Watergate scandal. *See* Susman & Luneburg, *supra* note 14, at 26. However, differing views on how the law should be reformed doomed all proposals to failure. *Compare* H.R. 15, 94th Cong. (1976), *reprinted in* H.R. REP. NO. 94-1474 (1976) (focusing on expenditure thresholds to activate disclosure

After decades of fruitless debate, Congress finally passed the LDA in 1995.[51] The law resembled the FRLA, but this time it had a detailed coverage formula for those subject to registration and reporting.[52] The 2007 amendments under HLOGA tweaked these requirements somewhat, but left the regime largely untouched.[53] Following is a review of the provisions that have engendered the contemporary First Amendment debate.

The threshold question for LDA compliance is whether registration with the Clerk of the House and the Secretary of the Senate is required. Under Section 4 of the Act,[54] an individual must be registered if he: (1) has been hired[55] to make more than one "lobbying contact"[56] on a client's behalf,[57]and (2) he will devote at least 20% of his time[58] to "lobbying activities"[59] for that client. Separate registration is needed for each client project, although some activities fail to trigger the filing duty as a matter of

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duty), *with* S. 2477, 94th Cong. (1976), *reprinted in* S. REP. NO. 94-763 (1976) (relying on lobbying activity levels to trigger registration and reporting).

51. *See* 2 U.S.C. §§ 1601–1612 (2006).

52. Section 4 of the Act defined the registration trigger. § 1603. Section 5 imposed periodic disclosure duties. § 1604. And Section 7 imposed penalties for noncompliance. § 1606. This general framework was preserved when the LDA was amended in 2007.

53. With respect to the LDA's disclosure provisions, HLOGA added new Section 5 reporting duties and authorized criminal sanctions under Section 7. *See generally* Pub. L. No. 110–81, 121 Stat. 735 (2007).

54. 2 U.S.C. § 1603.

55. There must be some form of compensation for the lobbying work. § 1602(10). This means covered persons include members of a lobbying firm, employees lobbying for their own organization, and self-employed advocates. § 1602(9). Notably, this definition excludes self-advocacy and volunteer lobbying. § 1602(5).

56. This crucial term is defined by § 1602(8) as: (1) an oral or written communication (2) directed at a covered legislative or executive official (3) that is made on behalf of a client (4) with regard to an enumerated government action. In turn, each of these elements has independent legal significance. For example, are casual conversations and informal e-mails "communication" within the meaning of the LDA? *See* William V. Luneburg & A.L. Spitzer, *The Lobbying Disclosure Act of 1995: Scope of Coverage*, *in* THE LOBBYING MANUAL, *supra* note 12, at 56. Do the highly technical definitions for "covered official" in § 1602(3)–(4) create a compliance conundrum for lobbyists? *See id.* at 60–63. Is there a possibility that lobbyists can try to influence political outcomes not fitting into any of the government actions listed in § 1602(8)(A)(i)–(iv)? *See id.* at 56.

57. The narrow definitions of "lobbyist" and "client" under § 1602 may have unexpected ethical outcomes in the course of representation. *See* Luneburg & Spitzer, *supra* note 56, at 54. Are clients of lawyer-lobbyists more or less protected from scrutiny than clients of non-lawyer lobbyists? *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013).

58. The LDA mandates that the 20% threshold be calculated in "a 3-month period," but is entirely silent about which date to use as the benchmark. *See* § 1602(10). The Clerk and Secretary have said that any date can function as a trigger, but the threshold is often calculated from the time of registration. *See* SEC'Y OF THE SENATE AND CLERK OF THE HOUSE OF REPRESENTATIVES, LOBBYING DISCLOSURE ACT GUIDANCE 6 (Jan. 1, 2008) (reviewed and reissued Dec. 15, 2014), *available at* http://www.senate.gov (last visited Sept.27, 2015) [hereinafter LDA GUIDANCE].

59. Under § 1602(7), this term includes "lobbying contacts" as well as any activities carried out in support of them (e.g., research, preparation, strategy sessions). In response to vocal concerns about ambiguity, recent legislative proposals have argued for a more precise meaning of support activities. *See* Charles Fried et al., *Lobbying Law in the Spotlight: Challenges and Proposed Improvements*, *in* REPORT OF THE ABA TASK FORCE ON FEDERAL LOBBYING LAWS 16–18 (Jan. 3, 2011).

law.[60] A potential registrant is also exempted from filing if he earns income[61] or incurs expenses[62] falling below the statutory minimums.[63] Although the coverage formula pertains to an individual lobbyist, actual filing is carried out by his employer.[64] The filing must occur within forty-five days of the triggering events[65] and includes several pieces of information. Noteworthy disclosures include: (1) identification of the registering entity, the client, and all lobbyists working on the project, (2) a description of the issues to be lobbied, and (3) notice of affiliated organizations with an interest in the project.[66] Since this filing triggers various obligations, registration may be withdrawn once the lobbying project has concluded.[67]

Undoubtedly, the most significant impacts of registration are the LDA's periodic reporting duties. Under Section 5, the registering entity must disclose all lobbying activity carried out on behalf of a client over the preceding three months.[68] Reports must be filed within twenty days of the end of each quarter, as defined by statute.[69] As with registration, the quarterly report pertains to a specific client and includes: (1) all income and expenses from lobbying activity, (2) the policy topics and specific issues lobbied, (3) the legislative and executive bodies contacted, (4) a list of all lobbyists involved in the project, and (5) any updates to the information

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60. The LDA exempts nineteen kinds of communication from the definition of "lobbying contact" under § 1602(8). Some of the significant exemptions include: correspondence with media organizations, administrative requests and petitions, congressional testimony, and identification requests for purposes of LDA compliance. For a full catalogue of exemptions, see Luneburg & Spitzer, *supra* note 56, at 63–75.

61. The income-based monetary threshold applies to lobbyists working for a lobbying firm. § 1603(a)(3)(A)(i).

62. The expense-based monetary threshold applies to lobbyists advocating for their employer. § 1603(a)(3)(A)(ii).

63. The thresholds are set at $2,500 for income and $10,000 for expenses, but the Clerk and Secretary must adjust these values based on the Consumer Price Index. *See* § 1603(a)(3)(B). The adjusted values since 2013 are $3,000 for income and $12,500 for expenses. *See Registration Thresholds*, UNITED STATES SENATE, http://www.senate.gov/legislative/Public_Disclosure/new_thresholds.htm (last updated Jan. 1, 2013).

64. § 1603(a)(2).

65. The filing deadline depends on whichever of the following comes earlier: (1) the day on which the lobbyist was hired, or (2) the day on which the second "lobbying contact" occurred. § 1603(a)(1).

66. *See* § 1603(b). For a detailed outline of these disclosures, see William V. Luneburg & A.L. Spitzer, *Registration, Quarterly Reporting, and Related Requirements*, *in* THE LOBBYING MANUAL, *supra* note 12, at 113–25.

67. § 1603(d).

68. *See* § 1604(a). Since the registering entity is the one making these filings, the "lobbying activity" reported is a compilation of the work carried out by each lobbyist participating on the specific project. *See* LDA GUIDANCE, *supra* note 58, at 13.

69. As described in § 1604(a), reports are due on January 20th, April 20th, July 20th, and October 20th.

given at registration.[70] Furthermore, the registrant *and* each lobbyist listed must also file semi-annual "contribution reports."[71] These supplements were inserted into Section 5 by HLOGA[72] and require the filer to: (1) disclose any political action committees (PACs) in his control, (2) itemize his electoral contributions and disbursements, and (3) certify his compliance with congressional gift rules.[73] The semi-annual "contribution reports" are unique from the rest of the Act in that they reveal individual activity that is tangentially related to specific lobbying projects.

C. A Ship with No Compass: The Failure of First Amendment Claims Against the LDA

On the whole, modern lobbying disclosure is complex and far-reaching. Even a cursory review of the LDA shows how congressional power to regulate lobbyists was enhanced by *Harriss*. And although it took Congress half a century to act on that authority, the underlying constitutional debate was never truly resolved.[74] In the years before contemporary reform, courts presiding over lobbying disclosure cases continued to articulate similar concerns that *McGrath* had expressed.[75] But despite a rising tide of criticism, the Supreme Court never seized the chance to revisit its Petition Clause precedents. The absence of constitutional guidance on protections for lobbyists became all the more problematic when the LDA became law. Since the statute was amended in 2007, only one federal appeals court has reexamined the First Amendment quandary.

Against a backdrop of criticism, the U.S. Court of Appeals for the District of Columbia Circuit relied on the flawed rationale of *Harriss* to reaffirm LDA disclosures. At issue in *National Association of*

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70. *See* § 1604(b); Luneburg & Spitzer, *supra* note 66, at 127–41. Some critics have pushed for broad reassessment of these disclosures. *See* William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGIS. 32, 49 (2006) (proposing that quarterly reports identify the specific covered officials contacted by a registered lobbyist).

71. § 1604(d)(1).

72. *See* Pub. L. No. 110-81 § 203, 121 Stat. 735, 742–44 (2007).

73. *See* § 1604(d)(1); William V. Luneburg & A.L. Spitzer, *Semiannual Reports on Contributions and Disbursements by Registrants and Lobbyists*, *in* THE LOBBYING MANUAL, *supra* note 12, at 167–75.

74. *Cf.* United States v. Rumely, 345 U.S. 41, 48 (1953) (dodging a First Amendment challenge to the FRLA by way of statutory interpretation, despite a strongly-worded concurrence by Justice Douglas).

75. *See, e.g.*, Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007) (lobbying activities "enjoy First Amendment protection"); Mont. Chamber of Commerce v. Argenbright, 226 F.3d 1049, 1056 n.5 (9th Cir. 2000) (the First Amendment protects "lobbying by corporations"); United States v. Fin. Comm. to Re-Elect the President, 507 F.2d 1194, 1201 (D.C. Cir. 1974) (reiterating Justice Jackson's concerns over the FRLA's "chilling of petitioning rights").

Manufacturers (NAM) v. Taylor[76] was one of the disclosures required by Section 4 of the LDA. Under the amended provision, affiliated entities who "actively participate" in a lobbying project must be identified at the time of registration.[77] Trade associations like NAM were concerned that the law forced them to reveal corporate members in violation of the First Amendment.[78] They filed suit against the U.S. Attorney to enjoin enforcement of those disclosures, arguing that Section 4 violated associational privacy and was impermissibly vague.[79] After considering the merits, the district court concluded that Section 4 was narrowly tailored to serve compelling governmental interests.[80] On appeal, NAM maintained that the provision chilled member participation in policy initiatives because disclosure engendered a fear of public retaliation.[81] NAM's argument reflected some of the concerns embodied in the "access distortion" problem, but relied on amorphous freedom of expression values to back up its claim.[82] This undisciplined approach blinded the D.C. Circuit to the clear Petition Clause injury.

Writing for the court, Judge Garland began from the premise that Section 4 disclosures pose potential injury to rights of association and belief.[83] Rather than explore the contours of associational privacy and its nexus to petitioning, the court analyzed NAM's claim through the lens of Speech Clause precedents in the campaign finance context.[84] Citing *Buckley v. Valeo*[85] and *McConnell v. FEC*,[86] the court concluded that the inconvenience to NAM of exposing its members was reasonable and minimally restrictive.[87] Relying on the balancing tests set forth in those cases, the court then analyzed whether Section 4 was backed by a compelling government interest, whether it effectively advanced that

76. 582 F.3d 1 (D.C. Cir. 2009).

77. *Id.* at 7 (discussing the operative terms of 2 U.S.C. § 1603(b)(3)).

78. *Id.* at 8.

79. *Id.* NAM's theory of associational privacy rested on *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 101–02 (1982), where the Supreme Court held that disclosure regimes sometimes place a gag on group expression by stigmatizing membership.

80. *Taylor*, 582 F.3d at 9.

81. *Id.*

82. *Id.* (quoting NAM's brief for the position that "the disclosures mandated . . . will discourage and deter speech, petitioning, and expressive association").

83. *Id.* The court completely ignored the other First Amendment premises which NAM identified in its written arguments. *See* Brief of Plaintiff-Appellant at 22–24, Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1 (D.C. Cir. 2009) (No. 08-5085).

84. *Id.* at 10 (cataloguing failed Supreme Court challenges to the Federal Election Campaign Act (FECA) and the Bipartisan Campaign Reform Act (BCRA)).

85. *See* 424 U.S. 1, 82 (1976).

86. *See* 540 U.S. 93, 195 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310, 365–66 (2010).

87. *Taylor*, 582 F.3d at 9–10, 19 (using marginally relevant cases from the 8th, 9th, and 11th Circuits for support).

interest, and whether it was narrowly tailored to meet the policy goal.[88] Studying the statutory language and legislative history, the court concluded that "increasing public awareness" was the animating interest for Section 4 disclosures.[89] It used *Harriss* to underscore that this interest was of "vital" importance, even though the portion it quoted from that opinion discussed a different interest altogether.[90]

Turning back to *Buckley*, the court asserted that "public awareness" is a normative principle that the government can rely on without empirical support as to its accuracy.[91] The court then held that Section 4 disclosures actually advanced that interest, even after acknowledging that exposure of affiliated entities was not necessarily a boon to public awareness.[92] Justifying the loose match between goals and outcomes, the court held that Section 4 was narrowly tailored because Congress could have chosen more restrictive means (e.g., banning lobbying altogether).[93] Having concluded that LDA disclosures survived the strict scrutiny test borrowed from the campaign finance cases, the court then turned to NAM's as-applied challenge. Discussing *NAACP v. Alabama ex rel. Patterson*,[94] the court recognized that Section 4 disclosures could hypothetically harm some trade associations that are vulnerable to public retaliation.[95] But after studying the record, the court held that five newspaper articles and one lawsuit did not evince the kind of prejudice against associational freedoms that *Patterson* had dealt with.[96] It again cited *Buckley*'s narrow holding to support that conclusion.[97]

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88. *Id.* at 10–11. The court concluded that *Buckley* and *McConnell* required this formulation, which is functionally equivalent to strict scrutiny. *Id.* at 10.

89. *Id.* at 11–13 (internal quotation marks omitted) (rejecting NAM's argument that the government's justification for Section 4 disclosures was to pierce the veil on "stealth coalitions"). Significantly, the court gave short shrift to the interest of "informing legislators" which Justice Warren had used in *Harriss*. *See supra* note 41 and accompanying text.

90. *Taylor*, 582 F.3d at 13–14.

91. *Id.* at 14–16 ("What we have instead is simply a claim that good government requires greater transparency. That is a value judgment based on the common sense of the people's representatives, and repeatedly endorsed by the Supreme Court as sufficient to justify disclosure statutes." (citations omitted)).

92. *Id.* at 17–18.

93. *Id.* at 19. To advance its conclusion, the court also chastised NAM for making a "straw man" argument about less restrictive options, such as anchoring the disclosure of affiliated entities to specific timeframes. *Id.*

94. *See* NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449, 462 (1958).

95. *Taylor*, 582 F.3d at 20–21.

96. *Id.* at 22. The court made a great deal about the size and economic power of NAM's member corporations. But by doing this, it completely dodged the inquiry required under *Patterson*: whether the corporate members were subjected to quantifiable harm from negative publicity and legal liability.

97. *Id.* (asserting that NAM's record evidence was similar to that rejected in *Buckley*'s as-applied challenge).

D. Shifting the Paradigm: Why the Contemporary Standard Must be Reassessed

Despite its analysis, the D.C. Circuit's flawed reasoning in *NAM v. Taylor* presents a fundamental setback to the right of petition. Indeed, the court failed to address the Petition Clause at all—relying instead on associational privacy to define the harm asserted.[98] This commingling of First Amendment doctrine clouded the already opaque legacy of *Harriss* and diverted attention from the true harm that Section 4 inflicts. The injury litigated should not have been that public exposure chills participation by group members since anonymous lobbying is inconsistent with traditional conceptions of the right of petition.[99] Rather, the court should have focused on the reality that LDA disclosures incentivized NAM lobbyists to engage in tactical acrobatics to avoid controversy. For example, the court should have inquired whether the lobbyists deliberately spent less time on NAM's account, or whether they only carried out representation below the expenditure limits. Put differently, the focus should have been on: (1) whether Section 4 caused a material distortion of advocacy, and (2) whether that distortion impaired the ability of association members to communicate with and influence officials.[100]

Further undermining the analysis in *Taylor* is the fact that Judge Garland used campaign finance cases to justify lobbying regulation. In *Borough of Duryea v. Guarnieri*,[101] the Supreme Court noted that Speech Clause doctrine is not always the proper frame of analysis for cases involving the Petition Clause.[102] More importantly, the Court's landmark opinion in *Citizens United v. FEC*[103] has brought into question many of the assumptions from *Buckley* and *McConnell* that Judge Garland used to uphold the LDA.[104] Of particular importance was the Court's narrow view

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98. *See supra* notes 82–83 and accompanying text.

99. Professor Krotoszynski's historical analysis catalogues the in-person characteristics of petitioning in Britain and the United States. KROTOSZYNSKI, *supra* note 8, at 171–72. During that era, it would not have been conventional for agents to deliver unsigned petitions. In fact, public advocacy for changes in the law was seen as a mode of civic virtue. *See* RAYMOND C. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 27 (1979).

100. This is a mirror formulation of the "ineffective assistance" claim that the Supreme Court carved out under the Sixth Amendment. For a discussion of why this prescription is doctrinally sound, *see infra* Part V.

101. Borough of Duryea v. Guarneri, 131 S. Ct. 2488 (2011).

102. *Id*. at 2494. The Supreme Court recently elaborated on *Guarnieri*'s differential analysis proposition. *See* Harris v. Quinn, 134 S. Ct. 2618, 2642–43 (2014) (holding that a union's advocacy campaign was of "great public concern").

103. Citizens United v. FEC, 558 U.S. 310 (2010).

104. *Id.* at 363–66 (reading *Buckley* and *McConnell* narrowly to discredit the Court's previous limitations on political speech by corporate entities).

in *Citizens United* of the anticorruption rationale that underpins the "public awareness" interest.[105] The discussion in *Citizens United* of "exacting scrutiny" has also undermined the *Taylor* court's failure to equate the test with strict scrutiny.[106] As a practical matter, this means that Section 4 disclosures may have been upheld under a standard more relaxed than the First Amendment demands.

The D.C. Circuit has itself picked up on these shortcomings, and has relied more recently on the Petition Clause to protect lobbying activity. In *Autor v. Pritzker*,[107] the court was asked to determine the constitutionality of banning registered lobbyists from Industry Trade Advisory Committees (ITACs). Judge Tatel authored the court's opinion, which held that the presidential order at issue unconstitutionally conditioned ITAC membership on a waiver of the right of petition.[108] Distinguishing cases like *Minnesota State Board for Community Colleges v. Knight*,[109] the court asserted that although "the government may choose to hear from some groups at the expense of others, it . . . may [not] also limit the constitutional rights of those to whom it chooses to listen."[110] Rejecting an argument that President Obama was choosing not to subsidize agent-based petitioning, the court noted that ITAC membership was not linked to any kind of compensation.[111] The ban, therefore, was more of an affirmative deprivation of petitioning than an abstention from its enhancement.[112] This fresh look at heightened Petition Clause protection is encouraging because it gives that provision independent effect. However, the D.C. Circuit's reasoning is far from being concretely founded on the value of governmental access, which the Petition Clause meant to protect.

III. THE HISTORICAL RATIONALE AGAINST LOBBYING REGULATION

The flaws in *Harriss* and *Taylor* highlight the need to reevaluate lobbying as a core First Amendment activity. In an effort to discern the full

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105. *Id.* at 359–60 (emphasizing the point that *Buckley*'s anticorruption interest pertains to the prevention of quid pro quo exchanges, not the mitigation of citizen influence over the policy-making process).

106. *See id.* at 340 ("[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny . . . ." (internal citations omitted)).

107. Autor v. Pritzker, 740 F.3d 176 (D.C. Cir. 2014).

108. *Id.* at 183.

109. *See* Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 289–90 (1984).

110. *Autor*, 740 F.3d at 181.

111. *Id.* at 183 (rejecting the government's reliance on the subsidy doctrine set forth in *Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 485 U.S. 360, 368 (1988)).

112. *Id.* ("The Supreme Court has never extended the subsidy doctrine to situations not involving financial benefits, and the government offers no reason, nor can we think of one, why we should do so here.").

extent of Petition Clause protection for lobbyists, it is useful to first understand how agent-based petitioning has evolved as part and parcel of the Anglo-American tradition. Section A captures the evolution of petitioning from its limited function in English politics to its central role in colonial lobbying. Section B studies how the colonial experience reinforced a theory of agent-based petitioning during the American Revolution. And finally, Section C discusses the central role lobbying played in the activities of the First Congress. This dialogue is meant to underscore that lobbying is neither foreign nor anathema to the American democratic experience.

A. Steeped in Tradition: Agent-Based Petitioning in England and the American Colonies

Petitioning first became a significant political activity in the thirteenth century when it was codified in the Magna Carta as a right of the nobility enforceable against King John.[113] By the reign of Edward III in the mid-1300s, petitioning was a common practice exercised by noblemen, knights, and burgesses.[114] The Crown had a formalized structure for receiving and responding to petitions, which were at times submitted by the landed elite on behalf of the English people.[115] In a very rudimentary way, noblemen became petitioning agents for their feudal constituencies. This model was followed by Parliament in the sixteenth century as its representative power grew.[116] The House of Commons received grievances from the citizenry, and accordingly, petitioned the Crown for changes in the general law.[117] As Parliament itself became the source of prescriptive power, citizen petitions were read and debated directly.[118] By the time of the English Revolution in 1688, petitioning was seen as a birthright of all citizens.[119] It was enshrined

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113. *See* Magna Carta c. 61 (1215), *as reprinted in* 5 THE FOUNDERS' CONSTITUTION 187, 187 (Philip B. Kurland & Ralph Lerner eds., 1987) ("[I]f we or our justiciar, or our bailiffs, or any of our servants shall have done wrong in any way toward any one . . . let [the] barons come to us . . . and let them ask that we cause that transgression to be corrected without delay.").

114. KROTOSZYNSKI, *supra* note 8, at 85 (citing Professor William Stubbs' extensive research on the practices and traditions of the English Crown in the high medieval period).

115. *Id.* at 85–86 ("Parliament itself generally petitioned the Crown to establish a [new] law; it did not purport to make laws in its own name. Only later, and not until after Charles I gave his consent to the Petition of Right in 1628, did Parliament consistently enact bills on its own authority . . . ." (footnote omitted)).

116. *Id.* at 86.

117. *See id.* at 86–87 (citing WILLIAM R. ANSON, THE LAW AND CUSTOM OF THE CONSTITUTION 346–48 (2d ed. 1892)) (documenting the work of the Committee of Grievances, which considered the vast array of petitions submitted to the House of Commons during the reigns of James I and Charles I).

118. *See* LUCE, *supra* note 6, at 516–17 (discussing a 1669 enactment which made consideration of petitions an inherent governmental duty of the House of Commons).

119. KROTOSZYNSKI, *supra* note 8, at 87 ("This growth in the importance and frequency of petitioning corresponds to the clearer demarcation of Parliament's legislative power.").

in the English Bill of Rights and was used as a method of redress for both private grievances and collective concerns.[120]

The view that petitioning could be carried out through agent-constituent relationships was also exported to the colonies, where it developed in unprecedented ways. Because North American settlements in the late seventeenth century were territorially disperse, agent-based petitioning became the most convenient method for the legislatures to keep a pulse on social needs.[121] These communities regularly lobbied for regulations on local trades and professions, and sought legislation on the sale of alcohol and lottery tickets.[122] Colonial legislatures also considered petitions made on behalf of disenfranchised groups,[123] and even accepted agent-delivered requests advancing purely private interests.[124] History tells us that the governor of New York was one of the first colonial officials to be subjected to organized lobbying efforts by English merchants.[125] But that example was not an isolated or anomalous political occurrence.

Virginia in particular had a well-established petitioning culture, where powerful landed interests played the game of pressure politics.[126] As early as the 1710s, agents of well-connected planters from the Chesapeake Bay lobbied Virginia authorities for "legislation . . . prohibiting the export of bulk tobacco from that colony, for regulation of the trade to prevent Scottish smuggling, for a long period of grace between the landing of tobacco and the paying of customs duties, and for the prevention of tobacco planting in England."[127] These lobbying tactics were also common in Pennsylvania, where religious groups wielded great influence. At the turn of the eighteenth century, Quaker lobbyists "worked for approval of a Pennsylvania act forbidding the importation of slaves, they supported the proprietorship as a form of government, they worked to keep the Three Lower Counties (now Delaware) part of Pennsylvania, [and] they backed

120. *Id*. at 86–87.

121. BAILEY, *supra* note 99, at 6 (underscoring that petitioning had been transplanted "literally during the first year of settlement at Jamestown, and by 1700 [it] had assumed an important role in the political process").

122. *See* MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 209–10 (1943).

123. In 1769, a group of freed black men lobbied the Virginia legislature to exempt their wives from a poll tax. *See* Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2185 (1998) (noting that this campaign "was as incendiary an action as could be conceived in the slave South. All the more stunning, then, that the petition was not simply heard, but granted").

124. *Id.* at 2183 (studying the lobbying campaigns of two women in colonial Georgia on behalf of their families).

125. *See* Runcie, *supra* notes 4–5 and accompanying text.

126. Alison G. Olson, *The Virginia Merchants of London: A Study in Eighteenth-Century Interest-Group Politics*, 40 WM. & MARY Q. 363, 368–70 (1989).

127. *Id.* at 369.

the separation of New York and New Jersey . . . ."[128] The Quaker lobby was also active in New England, where it pressured the Massachusetts, New Hampshire, and Connecticut assemblies for a variety of impost exemptions.[129] These provisions were extended in 1737, after the governor of Massachusetts had been "waited upon" by Quaker lobbyists from London.[130]

B. Of Revolutionary Spirit: Views on Petitioning in the Formative Years of the Republic

The foregoing examples demonstrate that factional pressures were an accepted political reality by the 1770s. Indeed, dissenters to the English Crown used those exact tactics to spark the cause of independence.[131] American revolutionaries drew from the tradition of agent-based petitioning to craft their own political message.[132] Their "Olive Branch" Petition of 1775 was essentially a lobbying effort on behalf of American interests to secure political outcomes in Britain (namely that the colonies be given free trade incentives by repealing laws like the Stamp Act).[133] When these exhortations fell on deaf ears, the colonists found just cause for self-determination: their right to be heard by the sovereign was nothing more than a formality.[134] It was a rude awakening for those who believed they still had access to the British ruling class, and the frustration of that belief made agent-based petitioning an item of constitutional reform.[135]

Soon after independence, nine of the thirteen states adopted constitutions with sweeping protections for petitioning.[136] For example, the

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128. Alison G. Olson, *The Lobbying of London Quakers for Pennsylvania Friends*, 117 PA. MAG. HIST. & BIOGRAPHY 131, 135 (1993).

129. Kenneth L. Carroll, *American Quakers and Their London Lobby*, 70 QUAKER HIST. 22, 36 (1981).

130. *Id.* at 38.

131. Don L. Smith, The Right to Petition for Redress of Grievances: Constitutional Development and Interpretation 57–66 (Aug. 1971) (unpublished Ph.D. dissertation, Texas Tech University) (on file with author) (cataloguing the petitions filed with Parliament seeking redress of colonial wrongs inflicted by George III).

132. *See* Alice Tanner Boyer, *The "Olive Branch" Petition*, 22 U. KAN. CITY L. REV. 183, 185 (1953–1954) (describing the heated debates over independence that led to a last-ditch plea to the King for peaceable redress).

133. The Olive Branch Petition, *reprinted in* Boyer, *supra* note 132, at 189 (requesting that "measures be taken for preventing the further destruction of the lives of your Majesty's subjects; and that such Statutes as more immediately distress any of your Majesty's colonies be repealed . . . .").

134. Richard Penn ultimately delivered the Olive Branch Petition to the court of George III. *Id.* at 186. It is unclear if the King personally reviewed the petition, but whether by happenstance or deliberate inattention, the document was left unanswered. *Id.*

135. KROTOSZYNSKI, *supra* note 8, at 108 ("To the colonists, the right to petition for redress of grievances (and the concomitant right to have one's petition heard) was so fundamental that denial of the right was an act of tyranny and grounds for revolution.").

136. Mark, *supra* note 123, at 2199–2203.

Vermont Constitution of 1777 gave its citizens "a right to assemble together, to consult for their common good-to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition or remonstrance."[137] The assembly clause of that provision was particularly important, since it gave express recognition to the fact that citizens used agents to lobby on their own behalf. However, proposals for a more expansive federal right of petition led to heated debate at the Constitutional Convention.[138] Some delegates pushed for a right of the people to bind their representatives by "instruction," but luminaries like James Madison disagreed.[139] Madison believed that any right conferring more than access to officials could harm public discourse, and he was able to convince his colleagues of it on the floor of the Convention.[140] Significantly, however, he never suggested that petitioning should be separated from a citizen's ability to retain lobbying agents. Such a proposal would have been radical even for the time.

C. At the Heart of Democracy: The First Congress and its Engagement with Lobbyists

Records from the First Congress show that lobbying quickly became an effective method for obtaining policy outcomes in the nascent republic.[141] Attorneys frequently drafted and presented petitions on behalf of veterans, tradesmen, printers, and surveyors.[142] Notable examples include Josiah Simpson (who was hired to represent a group of Boston blacksmiths seeking wartime backpay), and Miers Fisher (who shepherded a patent bill through Congress on behalf of a Philadelphia newspaperman).[143] Other agents used in-person petitioning tactics, seeking out legislators at their homes and outside of their offices to secure political promises.[144]

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137. VT. CONST. ch. 1, art. XVIII (1777).

138. KROTOSZYNSKI, *supra* note 8, at 109.

139. *Id.* at 110.

140. *Id.* (citing congressional records which indicate that the proposals for a right of instruction "fell by the wayside").

141. For example, the first petition to arrive in the House of Representatives was a plea from the Baltimore business community seeking enactment of trade policies. *See* William C. diGiacomantonio, *Petitioners and Their Grievances: A View from the First Federal Congress*, *in* THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT 29 (Kenneth R. Bowling & Donald R. Kennon eds., 2012).

142. Jeffrey L. Pasley, *Private Access and Public Power: Gentility and Lobbying in the Early Congress*, *in* THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT, *supra* note 141, at 62. This account of agent-based lobbying is particularly revealing, and is worth a close read for the history student.

143. *Id.*

144. *Id.* at 63–64 ("One suspects a good deal of loitering around taverns was involved, because in some cases . . . there is little evidence of extensive or meaningful contact with members of Congress.").

Businessmen like George Cabot capitalized on those methods, using them to lobby for textile manufacturers who opposed taxation of foreign cotton.[145] Congress was even approached by a delegation from Rhode Island, which had been paid a hefty sum to lobby against federal impost and tonnage duties.[146]

Among these lobbying exploits, however, the antislavery campaign mounted by a well-funded and highly organized group of Quakers stands out. Retained by the Philadelphia and New York Yearly Meetings to push an abolitionist agenda, the Quaker lobbyists used every pressure tactic they could muster.[147] They "wrote supplemental briefs for the committee considering [antislavery petitions], accosted members outside the doors of Congress, visited them at their lodgings, and invited them for meals, all the while making themselves conspicuous in the House galleries, looming over the proceedings like the specters of a guilty national conscience."[148] Their efforts were so successful in stirring up debate that many representatives became suspicious of the initiative.[149] The report of the ad hoc committee on abolition reflected this concern, noting sourly that "every principle of policy and concern for the dignity of the House, and the peace and tranquility of the United States, concur to show the propriety of dropping the subject, and letting it sleep where it is."[150] However, with its back against the wall, the committee suggested: (1) taxing the importation of slaves, (2) issuing guidelines for humane treatment, and (3) banning the fitting of slave-trade vessels in American ports.[151] Although these policy recommendations were a far cry from banning slavery, they were still a victory for the Quaker lobbyists and their Philadelphia constituents.

IV. THE CONSISTENCY RATIONALE AGAINST LOBBYING REGULATION

The historical accounts demonstrate that lobbying has long been an element of American democracy. These facts notwithstanding, the *Harriss* and *Taylor* courts chose to uphold disclosure as a necessary antidote

145. *Id.*

146. *Id.* at 64.

147. William C. diGiacomantonio, *For the Gratification of a Volunteering Society: Antislavery and Pressure Group Politics in the First Federal Congress*, 15 J. EARLY REPUBLIC 169–97 (1995).

148. Pasley, *supra* note 142, at 65.

149. *Id.* at 66 (noting that the Quaker campaign was "unique in its openness, high degree of organization, and goal of effecting broad changes in government policy . . . .").

150. 1 ANNALS OF CONG. 1472 (1790) (Joseph Gales ed., 1834), *reprinted in* KROTOSZYNSKI, *supra* note 8, at 111–12 (footnote omitted) (internal quotation marks omitted).

151. KROTOSZYNSKI, *supra* note 8, at 112 (cataloguing the various policy proposals referred to the floor of the House of Representatives). Professor Krotoszynski characterizes this outcome as a political success, noting that "despite the vehement objections of Southern members of the House, the members considered, debated, and responded on the merits to the petitions seeking abolition of the slave trade." *Id.*

against interest group politics. Regrettably, by doing this, the courts also propagated a constitutional paradox: that agent-based expression deserves less protection under the Petition Clause than it does under the Speech Clause. Nowhere is that irony clearer than in cases where the Supreme Court has extended First Amendment coverage to individuals and organizations behaving as intermediaries (e.g., distributing an author's work, litigating claims on behalf of group members). In order to understand how agent-based protections for lobbyists *should* look, an analysis of those precedents is in order. Section A discusses the right of individuals and businesses to distribute offensive material, and explores why it is a necessary condition for protecting speech regardless of its content. Section B then analyzes the right of organizations to advocate on behalf of their members, and studies how representation enhances the marketplace of ideas.

A. Burning the House to Roast the Pig?: Preserving a Right to Distribute Offensive Speech

One of the Supreme Court's strongest defenses of agent-based expression was born from an obscure First Amendment case. In *Butler v. Michigan*,[152] the Court was asked to determine whether a Michigan statute banning the distribution of books unfit for children impermissibly restricted freedom of speech. The controversy arose when the owner of a Detroit bookstore sold a copy of *The Devil Rides Outside* to a police officer.[153] Because the novel had been targeted for containing violent and sexual content, the bookseller was charged under the state's anti-obscenity law.[154] Writing for a unanimous Court, Justice Frankfurter concluded that the statute had impermissibly abridged the First Amendment rights of both the author and his readers.[155] That conclusion led to the powerful implication that speech disseminated by one person on behalf of another is protected despite its content.[156] The Court found that, although there was a strong interest in protecting children from inappropriate subjects, here the statute

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152. 352 U.S. 380 (1957).

153. *Id.* at 381. For a detailed and colorful account of these events, see also Clay Calvert, *Of Burning Houses and Roasting Pigs: Why* Butler v. Michigan *Remains a Key Free Speech Victory More than a Half-Century Later*, 64 FED. COMM. L.J. 247, 252–53 (2012).

154. *Butler*, 352 U.S. at 381–82; *see also* Calvert, *supra* note 153, at 254.

155. *Butler*, 352 U.S. at 383–84.

156. *Id.* This conclusion is significant in that it depends on the premise that speakers, intermediaries, and content consumers form part of a broader expressive ecosystem. *Cf.* United States v. Rumely, 345 U.S. 41, 56 (1953) (Douglas, J., concurring) ("Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas.").

swept too broadly.[157] Justice Frankfurter observed that Michigan's anti-obscenity law had "burn[ed] the house to roast the pig."[158]

Half a century later, the *Butler* shield for content distributors remains strong. In *United States v. Playboy Entertainment Group*,[159] the Supreme Court considered the validity of a statute requiring cable television providers to use scrambling technology when airing sexually explicit programs, or transmit the content only at late-night hours.[160] In a 5–4 decision authored by Justice Kennedy, the Court held that the statute violated Playboy's First Amendment rights to have its content circulated in the marketplace of ideas.[161] The Court found that the requirement of using scrambling technology was too costly and unrealistic, and had forced virtually all cable providers to stop airing sexual content in the daytime.[162] This, in turn, prevented a large swath of viewers from accessing Playboy's content. Making *Butler*'s implied holding explicit, Justice Kennedy concluded that the effect was "a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection. It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree."[163]

Together, *Butler* and *Playboy* stand for the proposition that content distributors can assert First Amendment rights on behalf of the speakers they promote. The principle has effectively deputized booksellers and cable providers as agents under the Speech Clause. If such an expansive right is accepted in the context of speech, then why not also recognize it in the ambit of petitions? *Harriss* and *Taylor* tried to answer that question in the negative by pointing to interests against corruption.[164] In the process, however, those cases missed Justice Frankfurter's admonition against "burn[ing] the house."[165] As an empirical matter, it is not clear that

157. *Butler*, 352 U.S. at 383 ("The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children.").

158. *Id.*

159. 529 U.S. 803 (2000).

160. *Id.* at 808 (paraphrasing § 505 of the Telecommunications Act of 1996, 47 U.S.C. § 561 (Supp. 1996)).

161. *Id.* at 818 ("The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree . . . .").

162. *Id.* at 809 (discussing the "false choice" which led Playboy to lose millions of dollars in revenue).

163. *Id.* at 812.

164. *See supra* note 105 and accompanying text.

165. *See supra* note 158 and accompanying text.

disclosure actually exposes corruption or deters its future incidence.[166] But even if it did, just because the LDA imposes a mere inconvenience on lobbyists does not also mean that a grievous constitutional injury has been avoided.[167] Indeed, the tragedy is that asking for even "a modicum of information"[168] from lobbyists increases the risk of distorted advocacy.

B. First Person Plural: Promoting a Right to Speak on Behalf of Group Members

An even more compelling analogy emerges from cases elaborating on the right of organizations to speak for affiliated persons. In *NAACP v. Button*,[169] the Supreme Court considered the validity of a Virginia statute making it illegal for public interest groups with staff attorneys to solicit legal business.[170] The law, which had been in force since 1849, was being used to block NAACP lawyers from seeking and litigating racial discrimination cases.[171] After the state courts upheld the statute, the NAACP appealed to the Supreme Court on First Amendment grounds.[172] In an opinion written by Justice Brennan, the Court held that Virginia's law impinged on the NAACP's right to advocate for those people it was chartered to protect.[173] It noted that for NAACP clients, "litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government . . . . It is thus a form of political expression."[174] Quoting from a contemporaneous case, Justice Brennan also reasoned that an organization "is but the medium

166. *Cf.* BAUMGARTNER ET AL., *supra* note 1, at 212 ("While our analyses do not suggest that money is unimportant, they do show that money alone does not buy policy outcomes. The reasons for this are complex, but we believe they fundamentally have to do with the structure of political conflict.").

167. For an in-depth discussion on the character of constitutional injuries, see James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 437 (2003).

168. United States v. Harriss, 347 U.S. 612, 625 (1954).

169. 371 U.S. 415 (1963).

170. *Id.* at 423 n.7 (reproducing and explaining the framework of Virginia's champerty and barratry statutes).

171. *Id.* at 423–26. For an interesting account of *Button* and the abuse of ethics regulation during the civil rights era, see HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 75–90 (1965).

172. *Button*, 371 U.S. at 424.

173. *Id.* at 430 ("[T]here is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus we have affirmed the right to engage in association for the advancement of beliefs and ideas." (internal quotation marks omitted) (quoting NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449, 460 (1958))).

174. *Id.* at 429. The Court's observation here invokes the extensive protections afforded to politically oriented speech. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 397 (2009) (noting that the category of "political speech" contains clear, certain, and justifiable rules).

through which its individual members seek to make more effective the expression of their own views."[175]

This same rationale appeared decades later in the campaign finance context, and it has revolutionized the role of money in electoral politics. In *Citizens United v. FEC*,[176] the Court considered the validity of restrictions on corporate campaign expenditures. The controversy arose when a privately funded conservative group wanted to air a ninety-minute documentary criticizing Hillary Clinton.[177] After regulators rejected the film on grounds that it was an "electioneering communication" funded by corporate money, the group appealed to the Supreme Court.[178] In a controversial opinion written by Justice Kennedy, the Court held that campaign expenditure limits abridge the right of corporations and their members to express themselves.[179] The Court found that "[b]y suppressing the speech of manifold corporations, . . . the Government prevents their voices and viewpoints from reaching the public. . . ."[180] Justice Scalia picked up on this point in his concurring opinion, and noted that "the individual person's right to speak includes the right to speak *in association with other individual persons*."[181] Analogizing to political parties, Justice Scalia reasoned that partisan expression "is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different."[182]

Unmistakably, *Button* and *Citizens United* secure the right of organizations to speak on behalf of their members. It is irrelevant that the group is a public interest institution or a corporation, or that the form of speech varies from courtroom advocacy to campaign money. Both cases recognize that agent-based expression is necessary for the continued vitality of First Amendment liberties.[183] This is particularly true in

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175. *Id.* at 443 (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 459 (1958)).

176. 558 U.S. 310 (2010).

177. *Id.* at 319–20. A concise narrative of the events leading up to the Court's opinion is also available in TEACHOUT, *supra* note 23, at 229–31.

178. *See id.* at 320–21 (discussing Section 203 of the Bipartisan Campaign Reform Act (BCRA), codified at 2 U.S.C. § 441(b) (2006), which prohibited "electioneering communications" funded by corporate entities).

179. *Id.* at 365. The Court's holding was the product of overruling *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), which had impermissibly relied on broad conceptions of the anti-corruption interest.

180. *Id.* at 354.

181. *Id.* at 392 (Scalia, J., concurring).

182. *Id.* This analogy has been criticized on the ground that corporations may not reflect the public will, and therefore, should not be trustees of the American polity. *See* TEACHOUT, *supra* note 23, at 232.

183. *Cf.* NAACP v. Button, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." (citing Cantwell v. Connecticut, 310 U.S. 296, 311 (1940)).

situations where associated speech provides the kind of publicity that individual expression cannot—a fact of immense relevance in the context of democratic participation.[184] But if organizations are constitutionally entitled to speak on behalf of their members, then why should lobbyists not be able to petition on behalf of their clients free from disclosure constraints? *Harriss* and *Taylor* both failed to address that concern by citing government interests that have been narrowed or outright rejected.[185] Indeed, comparing those opinions to *Citizens United* reveals a deeper dichotomy in the Court's deference to democratic processes.[186] Spending to influence policy may trigger more scrutiny than spending to influence an election, even though the latter accomplishes the same end of public access to national power.

V. CONTOURS AND IMPLICATIONS OF THE "ACCESS DISTORTION" PROBLEM

The foregoing discussions have challenged core assumptions for validating lobbying disclosure laws. While Part II of this Note identified the flaws in our current treatment of lobbying, Parts III and IV showed that history and precedent support greater safeguards for the lobbying profession. Inspired by these observations and Justice Jackson's dissent in *Harriss*, this Note proposes that lobbying disclosure *must* be evaluated exclusively against the Petition Clause (and its concomitant guarantee of public access to government).[187] As Professor Krotoszynski contends,

184. Justice Thomas's dissent in *Citizens United* harped on this exact theme. 558 U.S. at 485 ("I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in core political speech . . . ." (citations omitted) (internal quotation marks omitted)). His arguments are significant in light of the disclosure framework challenged by this Note. *See supra* Part II.B (discussing Sections 4 and 5 of the LDA).

185. *See supra* notes 104, 105, and accompanying text.

186. The academy provides limited insight into this dichotomy. For example, one commentator has argued that the Court's historical treatment of the right to vote makes it distinct from (and perhaps more valuable to democracy than) the various First Amendment liberties. *See* Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 337 (1993). However, this thesis ignores the fact that the right to vote may owe its existence to the principles of participatory and accountable government enshrined in the right of petition. *See* KROTOSZYNSKI, *supra* note 8, at 81. Conceptually speaking then, the protections afforded to petitioning should be *as great as* the right to participate in an election.

187. In Adderley v. Florida, 385 U.S. 49, 50–51 (1966), Justice Douglas eloquently described the access principle as a core value of the Petition Clause. Doubtless, his words are as applicable to the citizen or corporation who chooses to hire an agent for legislative monitoring as they are for the citizen who chooses to hit the pavement with picket signs:

> The right to petition for the redress of grievances has an ancient history and is not limited to writing a letter or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor . . . . Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to

access is the anchoring value of the right of petition; it must be the starting point of any analysis under the corresponding constitutional provision.[188] To understand how an injury of the kind might look, this Note borrows from the Sixth Amendment comparison invoked by the district court in *NAM v. McGrath*.[189] Using the Assistance of Counsel Clause and its underlying policy, Section A discusses how LDA disclosures inflict an "access distortion" injury on lobbying clients. Section B then proposes a formula for access distortion claims, and explores how proof of injury would require new strict scrutiny analysis. Finally, Section C addresses some of the shortcomings of this approach. It focuses on structural challenges that arise when contextualizing the First and Sixth Amendments.

A. *A Concrete Injury: Defining the Nature of "Access Distortion" by Way of Analogy*

Conceptually, "access distortion" occurs when a lobbyist forgoes effective (and otherwise legal) petitioning strategies simply because they might spark public controversy and lead to retaliation when disclosed.[190] Sections 4 and 5 of the LDA create this exact incentive by giving lobbyists several statutory triggers to dodge. For example, a lobbyist might devote less than 20% of his time to representing each client,[191] or he might

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> public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable . . . .

(internal citations omitted).

188. KROTOSZYNSKI, *supra* note 8, at 168 ("[F]ederal courts should start from a presumption that favors the ability of ordinary citizens to engage their elected representatives, government officers, and party leaders . . . . In other words, when the speech at issue constitutes petitioning speech, there is a constitutional interest in reaching a particular audience." (emphasis omitted)).

189. As Judge Holtzoff asserted, lobbying disclosure creates harm that "is no different than would be an enactment depriving a person of the right of counsel." NAM v. McGrath, 103 F.Supp. 510, 514 (D.D.C. 1954). Inherent in this analogy is the presumption that lobbying, like legal representation, gives the citizen invaluable access to the processes of the state. Using this underlying policy to formulate an "access distortion" claim is doctrinally permissible. *See* KROTOSZYNSKI, *supra* note 8, at 81 ("Like the Free Speech Clause, the Petition Clause should be interpreted and applied dynamically or purposively—the federal courts should identify the core purpose, or purposes, of the Petition Clause and then use the clause to advance and secure them.").

190. This is not a hidden reality for public policy advocates. For example, one lobbying guidebook encourages the reader to jealously guard his reputation. DEANNA R. GELAK, LOBBYING AND ADVOCACY 33 (2008). The guide admonishes that "[w]hat has taken years to build up can be torn down overnight by one incident of carelessness or lapse in judgment. No lobbying strategy, no matter how brilliant, can undo the irreparable damage caused by national headlines charging one's organization with unethical activities . . . ." *Id.*

191. *See supra* note 58 and accompanying text. It would be easy for an advocate to limit the lobbying work he does over a three-month period, even if a client's matter requires more of his attention.

perform services worth compensation below the minimum amount.[192] He might also adjust how he communicates with officials in order to fit into one of the LDA's nineteen gaping exceptions,[193] or he might settle for mediocre outcomes in an attempt to escape compliance monitoring.[194] In short, the disclosure scheme encourages dodgy politicking, and it does so at the expense of professional expectations.[195] The lobbying client is thus left with the crippling choice of accepting a distorted form of advocacy or seeking different counsel (when doing so might come at a prohibitive price). Either way, the client has lost his ability to choose who will deliver his petition, and consequently, how that petition will be received in the legislature.

Put another way, access distortion is a deprivation of effective assistance in the legislative arena. Because a petition is not given its full effect when a lobbyist acts with precaution, his client loses meaningful opportunities to communicate with officials.[196] As the *McGrath* court presciently noted,[197] this injury mirrors the harms targeted by "ineffective assistance of counsel" suits in the criminal context. Those claims arise from a portion of the Sixth Amendment which states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defen[s]e."[198] Using that clause, the Supreme Court has

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192. *See supra* notes 61–63 and accompanying text. The lobbyist could calculate the costs of available petitioning strategies, and use a combination that is frugal but perhaps less effective at achieving the desired outcome.

193. *See supra* note 60 and accompanying text. Advocates could fashion their policy proposals as a media campaign, knowing that attention from the local press could apply enough pressure on a legislator to influence his vote.

194. *See supra* note 70 and accompanying text. The ambiguous reporting requirements allow the dodgy lobbyist to be selective about which "lobbying contacts" can ensure a policy outcome, even if it is not the most preferable one.

195. *See, e.g.*, THE LOBBYISTS' CODE OF ETHICS § 5.1 (2010) ("A lobbyist should devote time, attention, and resources to the client's or employer's interests that are commensurate with client expectations, agreements, and compensation."); MODEL RULES OF PROF'L CONDUCT R. 1.3 (2015) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

196. Professor Holyoke captures the essence of this representational harm from a political science perspective. HOLYOKE, *supra* note 2, at 271. In his seminal study of pressure politics, he notes:

> Lobbyists try to find positions on issues that the greatest number of their [clients] . . . will accept, but they are also under enormous pressure to advocate for alternate positions that may not be so favorable to their [clients]. In the context of honest representation in the political process, what arguably can be called lobbying ethics, *this* may be a problem. Pressure from government policy makers to modify group positions to fit the electoral needs of legislators or statutorily defined missions of agency officials, . . . or to find a position that can be supported by congressional majorities or survive challenges in court, . . . puts lobbyists in a bind. What they ought to do from an ethical standpoint appears to be in conflict with what they often must do to win, or at least to advance their personal careers.

Id.

197. *See* NAM v. McGrath, 103 F.Supp. 510, 514 (D.D.C. 1954).

198. U.S. CONST. amend. VI. The quoted portion is commonly referenced as the Assistance of Counsel Clause.

allowed relief to the criminal defendant whose lawyer provides inadequate expertise and judgment, and whose failure leads to an adverse judicial outcome (e.g., conviction).[199] The rationale behind an ineffective assistance claim is that inadequate representation has impaired the defendant's access to a fair judicial process.[200] This rationale is relevant in the realm of petitioning insofar as a lobbyist's distorted advocacy also impairs a client's access to the legislative process. If a lobbyist gives insufficient effect to a petition for fear of disclosure, and that failure leads to adverse policy results, the client should be able to recover on a theory of First Amendment liability.[201] This is a powerful conclusion, but accepting it also requires viewing legislative and criminal representation as facilitating similar kinds of access.

At least one commentator has indicated that there *is* a similar need for representation in both forums.[202] In the context of criminal prosecutions, the legal practitioner is best equipped to navigate motion practice, jury selection, presentation of evidence, and the potential appeal.[203] His work requires mastery of procedural and evidentiary rules, and demands a keen understanding of statutes and case law.[204] These complexities are similar to those that a legislative agent faces. The lobbyist must be a master of chamber procedure, policy analysis, legislative drafting, and vote-whipping.[205] This expertise empowers him to defend his client's liberty and property interests against the prescriptive power of the legislature, much like legal training allows the criminal attorney to shield a defendant from

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199. Strickland v. Washington, 466 U.S. 668, 687 (1984) (defining the elements of a justiciable "ineffective assistance" claim); *see also infra* Part V.B (discussing *Strickland* in more detail).

200. *Id.* at 685 ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled." (internal quotation marks omitted) (citing Adams v. United States *ex rel*. McCann, 317 U.S. 269, 275–76 (1942))).

201. KROTOSZYNSKI, *supra* note 8, at 156 ("[T]he Petition Clause should secure a baseline right of access to a particular intended audience, access that the other First Amendment expressive freedom guarantees have thus far failed to provide." (footnotes omitted)); *See also* James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 985 (1997) (arguing that the government should be held liable for constitutional torts under the First Amendment).

202. *See* Allard, *supra* note 3, at 42 n.76.

203. Rodney J. Uphoff, *The Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleaguered Dealer?*, 28 CRIM. L. BULL. 419, 425–28 (1992) (arguing that criminal defense lawyers are able to render competent representation regardless of the procedural milieu).

204. Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 KAN. L. REV. 1, 28 n.137 (1998) (noting that "[t]ime, money, commitment to professional ideals, and prior experiences undoubtedly affect the private lawyer's beliefs and behavior").

205. GELAK, *supra* note 190, at 346 ("While subject-matter expertise is increasingly important in public policy, legislative or executive branch experience is also virtually essential to effective lobbying. This type of experience provides first-hand insights into the process that cannot be matched with a textbook understanding of how government works . . . .").

the punitive power of the courts.[206] Indeed, without lobbying assistance, a client might be subjected to regulations that strip him of his livelihood or previously held entitlements. The outcome is analogous to that of a pro se defendant, who may be convicted after not being able to litigate the charges brought against him.[207]

B. The Injury at Work: Elements of Proof and Necessary Changes to Strict Scrutiny

Given its strong correlation to justiciable injuries under the Sixth Amendment, the formula for proving access distortion should rest on the Supreme Court's treatment of the Assistance of Counsel Clause. In *Strickland v. Washington*,[208] the Court had to determine whether a conviction should be set aside because counsel's assistance at trial was ineffective. The case arose from a brutal ten-day crime spree perpetrated by David Washington.[209] After an extensive police response, the defendant surrendered and confessed to the crimes.[210] Because the charges brought against him were punishable by death, the trial court appointed an experienced attorney to defend the case.[211] The lawyer, however, failed to present mitigating evidence at the sentencing hearing (even though he had

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206. GODWIN ET AL., *supra* note 21, at 203–06 (discussing in detail the important role lobbyists play in securing "private" and "collective" goods for their clients). A possible criticism of this view is that public policy outcomes do not have the same impact on the individual as conviction or incarceration does. However, this argument underestimates the true prescriptive and restrictive power of Congress. *See* BAUMGARTNER ET AL., *supra* note 1, at 243–47 (discussing and critiquing an "incrementalist theory" of policy change).

207. *See* Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676, 677 (2000) (finding that pro se representation creates a disorderly and unfair trial because the defendant is both unversed in courtroom etiquette and uneducated in the law).

208. 466 U.S. 668 (1984).

209. The crimes are summarized at length in the opinion prior to Supreme Court adjudication. *See* Washington v. Strickland, 693 F.2d 1243, 1247 (5th Cir. Unit B 1982) *rev'd*, 466 U.S. 668, 701 (1984):

> On September 20, 1976 Washington and an accomplice stabbed to death a minister, David Pridgen. Three days later Washington broke into the house of Mrs. Katrina Birk. After binding Mrs. Birk and her three elderly sisters-in-law, he shot and stabbed each of them, killing Mrs. Birk and inflicting severe injuries upon the others. Finally, on September 29 Washington kidnapped Frank Meli, a twenty-year-old college student, and tied him to a bed with the help of two accomplices. After an attempt to extort ransom money from Meli's family failed, Washington stabbed him to death.

(footnote omitted).

210. *Strickland*, 466 U.S. at 672.

211. *Id.* ("Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, . . . when he learned that, against his specific advice, respondent had also confessed to the first two murders.").

talked with potential character witnesses before the proceeding).[212] Ostensibly as a result of this failure, the trial court ordered the death penalty.[213] After his sentence was affirmed by the state courts,[214] the defendant filed a habeas corpus petition on Sixth Amendment grounds.[215] The lower federal courts rejected the validity of the defendant's ineffective assistance claim, but the Supreme Court granted review.[216]

Justice O'Connor delivered the opinion of the Court, which concluded that there was a justiciable ineffective assistance claim under the Sixth Amendment.[217] After considering several formulations of the cause of action, the Court settled on a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[218]

The test was justified on the ground that successful claims would flag situations in which access to fair adjudication was undermined.[219] Justice O'Connor reasoned that the Sixth Amendment should be a source of private claims "because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."[220] The Court then applied the new formula and determined that the defendant's access to a fair trial had not been abridged.[221]

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212. *Id.* at 673. The Court attributed this failure to the lawyer's "hopelessness" when the defendant refused to behave in the manner that he recommended. *Id.*

213. *Id.* at 675 (internal quotation marks omitted) (quoting the trial judge's conclusion that "there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances" (citing Washington v. State, 362 So.2d 658, 663–64 (Fla. 1978)).

214. The Florida Supreme Court concluded that the defendant failed to make out a prima facie case of either "substantial deficiency or possible prejudice." *See* Washington v. State, 397 So. 2d 285, 287 (Fla. 1981).

215. *Strickland*, 466 U.S. at 678.

216. *Id.* at 680–83 (cataloguing the ineffective assistance approach adopted by the new 11th Circuit).

217. *Id.* at 687. The Court's holding was supported by eight votes. Justice Thurgood Marshall was the lone dissenter, arguing that in its attempt to make a uniform standard for ineffective assistance claims, the Court created one so malleable as to be virtually useless. *Id.* at 707.

218. *Id.* at 687.

219. *Id.* at 686 ("Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions . . . .").

220. *Id.* at 685.

221. *Id.* at 700 (concluding that the arguments and evidence presented by the defendant failed both prongs of the test).

The *Strickland* test is powerful because of its simplicity, and because it captures the essence of a lobbying client's access distortion problem.[222] Therefore, it is the ideal rubric for a cause of action under the Petition Clause. Borrowing directly from *Strickland*, and thematically incorporating the discussions from Parts III and IV, this Note proposes the following test for challenging lobbying disclosure provisions:

> A lobbying disclosure scheme is unconstitutional against the Petition Clause of the First Amendment if a claimant can prove that: (1) he retained an agent to petition the government on his behalf, (2) he did so with a reasonable expectation of gaining access to public officials or the policy-making process, (3) his agent provided less than the expected access in order to avoid disclosure, and (4) he suffered from adverse policy outcomes that are fairly traceable to the agent's inability or unwillingness to fully advocate the claimant's position.[223]

Because the test reflects the same interests articulated by Justice O'Connor in *Strickland*, this formula for access distortion should also single out circumstances in which a lobbying client's expressive liberties are materially abridged by disclosure. As a doctrinal matter, courts should rely on historical and purposive conceptions of the Petition Clause when adjudicating claims of this sort.[224] Based on those judicially manageable standards, the courts should be able to create rules determining the sufficiency of proof under each element of access distortion.

The effects of recognizing access distortion as a justiciable injury are beyond the scope of this Note, but at least one is worth mentioning. In *Taylor*, the D.C. Circuit upheld LDA disclosures after applying its own version of strict scrutiny.[225] The court found that the challenged provisions were narrowly tailored to advance the compelling interest of "increasing 'public awareness.'"[226] However, a court presiding over an access

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222. *See supra* notes 196–201 and accompanying text.

223. To prove the first two elements, a plaintiff might rely on widely recognized empirical methodologies. *See, e.g.*, BAUMGARTNER ET AL., *supra* note 1, at 216–38 (describing the policy outcomes which can be expected when using a lobbyist); GODWIN ET AL., *supra* note 21, at 177–92 (elaborating on the merits of a "market approach" to lobbying); HOLYOKE, *supra* note 2, at 109–28 (discussing the implications of interest group advocacy). For the last two elements, a plaintiff might use the rules developed after *Strickland* as a rough guide. *See, e.g.*, Wiggins v. Smith, 539 U.S. 510, 512 (2003) (finding liability where counsel failed to investigate and present his client's difficult life history as a mitigating circumstance at trial); Kimmelman v. Morrison, 477 U.S. 365, 385 (1986) (finding liability where counsel did not perform pretrial investigation and failed to discover important evidence).

224. *See supra* Parts III and IV. These discussions are merely a starting point for the student of lobbying disclosure, the lawyer challenging LDA provisions, and the judge presiding over an access distortion claim.

225. *See supra* notes 88–92 and accompanying text.

226. *See supra* note 93, at 13, 19, and accompanying text.

distortion claim would be hard-pressed to follow the analysis conducted by *Taylor*. This is because proof of an access distortion injury would simultaneously show that disclosures *actually harm* public awareness.[227] In other words, the government could not argue that LDA reporting promotes public awareness if the plaintiff has shown that it motivates the lobbyist to avoid the statute's "sunshine effect."[228] From the standpoint of litigation strategy, the government would need to find new justifications for the disclosure framework. However, the Supreme Court's recent approach to the First Amendment indicates that defending this type of regime may become increasingly difficult.[229] In the post-*Citizens United* world, even the longstanding anti-corruption and anti-distortion rationales for regulation are in serious question.[230] The normative principles that once vindicated disclosure have lost credibility with a Court that is more deeply concerned with expressive freedom.[231]

C. *Anticipating the Skeptics: Why the Test for Access Distortion Is Not Flawed*

Holistically, the Sixth Amendment serves as an effective backdrop for projecting the access distortion injury. However, its descriptive capacity is not without limits. One shortcoming is that the Assistance of Counsel Clause pertains exclusively to rights afforded in the criminal setting.[232] This subject-matter limitation would seem to imply that representational interests have more force in the penal context than in the realm of public

227. This proposition might be less valid if the mere "value judgment" approach to identifying compelling interests is permitted. *See* NAM v. Taylor, 582 F.3d 1, 16 (D.C. Cir. 2009). At the same time, such a conclusion would require distinguishing or overruling at least one Supreme Court case. *See* Turner Broad. Sys. v. FCC, 520 U.S. 180, 196 (1997) ("[I]n the realm of First Amendment questions . . . Congress must base its conclusions upon substantial evidence . . . .").

228. An analogous effect has been observed in the context of agency deliberations subject to compelled disclosure. *Cf.* James T. O'Reilly & Gracia M. Berg, *Stealth Caused By Sunshine: How Sunshine Act Interpretation Results in Less Information for the Public about the Decision-Making Process of the International Trade Commission*, 36 HARV. INT'L L.J. 425, 463 (1995).

229. *See supra* notes 104–05 and accompanying text.

230. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1462 (2014) ("The Government has a strong interest . . . in combatting corruption and its appearance. We have, however, held that this interest must be limited to a specific kind of corruption—*quid pro quo* corruption—in order to ensure that the Government's efforts do not have the effect of restricting the First Amendment . . . .").

231. Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, The First Amendment, And The New Absolutism*, 76 ALB. L. REV. 409, 413 (2012–2013) (predicting a "new absolutist" approach to the First Amendment).

232. The subject-matter limitation on Sixth Amendment rights affects how scholars and courts view its descriptive power. *See, e.g.*, David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1147–1148 (2007) ("While the U.S. Constitution guarantees the effective assistance of counsel, it does so only in the context of criminal cases, and any judicial inquiry into attorney performance is limited to whether the attorney has met constitutionally minimal standards.").

policy.[233] To some, the discrepancy could be explained by the fact that legislatures use their power in broad strokes that have less immediate effects on the individual.[234] Thus, distorted legislative assistance would fail to create the kind of prejudice that the Sixth Amendment prevents during a prosecution (where liberty interests are most at stake).[235] However, the mere rarity of sweeping legislative action should not be determinative of constitutional rights. In fact, the Assistance of Counsel Clause is limited to the criminal context *specifically because* other provisions are supposed to cover non-criminal assertions of agent-based interests.[236] For example, the Supreme Court has developed a robust "third-party standing" doctrine within Article III's Case or Controversy Clause to accommodate representational rights in civil litigation.[237] Failing to give the Petition Clause a similar gloss for political expression would undermine that structural balance by devaluing its independent legal effect.

Another issue arises when comparing the affirmative grant of the Sixth Amendment ("the accused shall enjoy the right . . . to have the assistance of counsel")[238] against the negative language of the First Amendment ("Congress shall make no law . . . abridging . . . the right . . . to Petition the Government").[239] A formalistic reading of these provisions would seem to reveal that the First Amendment only *prohibits* interference with activities,

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233. *See* Allard, *supra* note 3, at 42 n.76.

234. *See* Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 640–41 (2014) (discussing how a broad reading of the Commerce Clause adheres to the macro-level functions the Framers envisioned for Congress).

235. *Cf.* Jenia Iontcheva Turner, *Effective Remedies for Ineffective Assistance*, 48 WAKE FOREST L. REV. 949, 956 (2009) (describing the harms of ineffective counsel and asserting that redress should be tailored to those contours).

236. *See* Patrick M. Garry, *Liberty Through Limits: The Bill of Rights as Limited Government Provisions*, 62 SMU L. REV. 1745, 1747 (2009) ("The Bill of Rights was not ratified to express or protect [an isolated] view of individual autonomy. Instead, it was included in the Constitution to reinforce and harmonize with the general structural scheme of the Constitution—that is, the provision and maintenance of a system of limited government.").

237. Generally, a plaintiff cannot rest his claim to relief on the legal rights or interests of others. Warth v. Seldin, 422 U.S. 490, 511 (1975). However, the Supreme Court has allowed *jus tertii* in certain situations. *See, e.g.*, Sec'y of State v. J.H. Munson Co., 467 U.S. 947, 956 (1984) (finding standing where there were substantial obstacles for the third party to bring a claim and the claimant effectively represented the same interests); Craig v. Boren, 429 U.S. 190, 194–95 (1976) (finding standing where there was a close relationship between the claimant and the third party). For present purposes, the most compelling of these third-party exceptions arises under the overbreadth doctrine. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("Litigants . . . are permitted to challenge a statute [on First Amendment grounds] not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech . . . .").

238. U.S. CONST. amend. VI; *see also* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2277 (1990) (noting that "the sixth amendment's [sic] affirmative protections are made necessary by its peculiar context: the government's initial deprivation of liberty" (footnote omitted)).

239. U.S. CONST. amend. I. For a detailed description of "negative rights" theory under the First Amendment, see Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1, 13–14 (2012).

whereas the Sixth Amendment *provides* a personal entitlement.[240] Under that view, it would be doctrinal overreaching to hold that the First Amendment confers an affirmative right to the "effective assistance" of a lobbyist. However, that conclusion ignores the fact that unencumbered representation in the political context may be a necessary precondition for meaningful petitioning.[241] In other words, granting a representational entitlement under the First Amendment could mean the difference between robust political expression and a dearth of democratic participation.[242] At this boundary line, the Supreme Court has held that First Amendment law should actively encourage expressive activity (as opposed to passively guard against its infringement).[243] Because a formalistic reading of the constitutional text would undermine that precise goal, it would be improper not to incorporate agent-based interests within the Petition Clause.

Finally, the Sixth Amendment analogy is problematic in that it fails to account for questions of content and viewpoint neutrality (both of which are dispositive elements under the First Amendment). In its Speech Clause cases, the Supreme Court has imposed strict scrutiny only for laws that "stifle[] speech on account of its message."[244] By contrast, the Court has been deferential to content-neutral laws that affect speech but are "designed to combat . . . undesirable secondary effects."[245] If lobbying disclosure were challenged under this bifurcated analysis, some argue that it would

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240. The clash between positive and negative rights in the Constitution has been debated at length. In one article, for example, Professor Cross argues that "negative rights can in fact be theoretically distinguished from positive ones and that our Constitution currently provides only negative rights, with some narrow exceptions." Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 862 (2001).

241. *See* HOLYOKE, *supra* note 2, at 20 ("The idea of citizens with similar interests proactively or reactively demanding that their government protect their self-interest is the cornerstone of democratic government, and using intermediaries to press these demands is the very definition of representation.").

242. *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 705 (1978) (arguing that chilling effect doctrine is predicated upon the assumption that speech is a "preferred value"); Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1506–08 (2013) (providing a detailed summary of the "positive rights" theory under the First Amendment).

243. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 237 (1963) ("[A] function of free speech under our system of government is to invite dispute. [The First Amendment] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."); United States v. Grace, 461 U.S. 171, 183–84 (1983) (striking down an ordinance that prohibited sidewalk picketing because the government had a duty to hold open certain forums for expression); Cox v. Louisiana, 379 U.S. 536, 552 (1965) ("Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy.").

244. Turner v. Broad. Sys. v. FCC, 512 U.S. 622, 641–42 (1994). Along these lines, the Court has made clear that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of Chi. v. Mosely, 408 U.S. 92, 95–96 (1972) (citations omitted).

245. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 49 (1986). This "secondary effects" test has been amply criticized in the literature. *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 60–61 (2000).

pass muster as a content-neutral regulation.[246] On its face, the LDA does not target the content of a petition; it merely sets "time, place, and manner" parameters which counteract the "secondary effects" of corruption.[247] However, using the Speech Clause standard here would constitute improper commingling of doctrine. The content and viewpoint concerns that underlie freedom of speech have tenuous relevance to the Petition Clause, which focuses on a *method* of communication as opposed to the communication itself.[248] But even if the Speech Clause test applied, lobbying disclosure laws do seem to have an impermissible content-based impact. Because disclosure relates only to citizens who hire lobbyists, Congress has effectively discriminated against a class of speakers on the basis of their socio-economic position.[249] This amounts to a viewpoint restriction on groups who can only "speak" through intermediaries (e.g., corporations and public interest groups).[250]

CONCLUSION

The foregoing discussions underscore and add to the substance of this Note's opening premise. Not only does lobbying occupy a unique and indispensable role in our democracy, it also forms part of the core First Amendment rights enshrined in our Constitution. In particular, lobbying is safeguarded by the Petition Clause, which secures for all citizens a right to be heard by the government. A theory of broad protection for agent-based

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246. At least one commentator has made this argument in the context of proposing lobbying disclosure provisions within the tax code. *See* Brent Coverdale, *A New Look at Campaign Finance Reform: Regulation of Nonprofit Organizations Through the Tax Code*, 46 KAN. L. REV. 155, 178 (1997).

247. *See City of Renton supra* note 245 at 41, 49; TEACHOUT, *supra* note 23, at 276 (urging the revival of anti-corruption principles).

248. Professor Andrews captures this distinction in her analysis of petitioning rights within the judicial system. She notes that "the Petition Clause preserves a *particular type* of speech . . . . It gives the people a chance at a peaceful and lawful alternative to self-help and force." Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 624 (1999) (emphasis added).

249. Recall that disclosure under the LDA depends on the threshold question of whether someone is a "lobbyist." *See supra* Part II.B. That, in turn, depends on finding that the agent represents a "client" (which the statute defines as "any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity."). 2 U.S.C. § 1602(2) (2012); *see also supra* note 55 and accompanying text. The bottom line of these inquiries is that "the Act is concerned with the efforts of persons who are paid for their lobbying efforts and not the efforts of volunteers." *See* Luneburg & Spitzer, *supra* note 56, at 54 (footnote omitted).

250. *See* Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 296 (1998) ("To exclude corporate speech would amount to an indirect but nonetheless dangerous form of viewpoint regulation, premised on an unsupportable prediction as to both the likely content and effectiveness of a particular type of speaker's expression." (footnote omitted)); *cf.* First Nat'l Bank of Bost. v. Bellotti, 435 U.S. 765, 776 (1978) (finding that corporate expenditure prohibitions may sometimes discriminate against corporations on the basis of commonly held viewpoints).

petitioning is supported by both history and constitutional jurisprudence, even though the Supreme Court has chosen to neglect both. That neglect has created major doctrinal flaws in the judicial assessment of lobbying regulation, and has allowed statutes like the LDA to remain valid—even in the face of serious harm to our expressive liberties. As long as Congress is allowed to impose disclosure on lobbyists, citizens from all walks of life will also continue to suffer from an "access distortion" problem. Our interest in promoting participatory government demands that legally cognizable relief be given for that injury.

Mateo Forero[*]

* J.D. Candidate, University of Alabama School of Law (May 2016); B.A., George Washington University: Elliott School of International Affairs (May 2013). Thank you to Professors Ronald Krotoszynski, William Andreen, and Shahar Dillbary for their invaluable guidance in making this Note a reality. Thank you also to Wendy Madden, Alyssa Backlund, Megan Root, and Thomas Carter for their editing suggestions and timely advice. I dedicate this research to my Mom and Dad, whose unwavering support has always been a guiding light.