

## TOWARDS A MADISONIAN, INTEREST-GROUP-BASED, APPROACH TO LOBBYING REGULATION

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### ABSTRACT

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

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

In this manner, lobbying regulations both could produce more substantively informative disclosures and could increase the likelihood that the

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voting public pays attention to such disclosures, while also creating an incentive for elected officials to increase their own exposure to differing viewpoints before rendering policy decisions. As a result, voter competence at the ballot box, as well as the quality of legislative outcomes, should improve.

#### INTRODUCTION

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

In fact, in the twentieth century alone, lobbying reform has been the subject of over fifteen congressional investigations and has resulted in at least as many hearings and legislative markups.<sup>1</sup> Such congressional efforts

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1. See, e.g., *Regulation of Lobbying, Hearings Before the Committee on Standards of Official Conduct*, H.R. Res. 1031, 91st Cong. (1970) (investigation driven by scandals involving, *inter alia*, Lyndon Johnson aide Bobby Baker); *The Federal Lobbying Disclosure Laws: Hearings Before the Subcomm. on Oversight of Government Management of the S. Comm. on Governmental Affairs*, 102d Cong. (1991); *Public Disclosure of Lobbying Activity: Hearings Before the Subcomm. on Administrative Law & Governmental Relations of the H. Comm. on the Judiciary*, 96th Cong. (1979); *Lobby Reform Legislation: Hearings Before the S. Comm. on Government Operations*, 94th Cong. (1975); *Public Disclosure of Lobbying Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. (1975) (explaining that there were thirty-five bills introduced in the House regarding lobbying and disclosure in one year); *Hearings Before the H. Select Comm. on Lobbying Activities*, 81st Cong., pts. 1-10 (1950) (general lobbying reform investigation); *Registration and Regulation of Lobbyists: Hearing Before a Subcomm. of the S. Comm. on the Judiciary*, 74th Cong. (1935) (investigations on lobbying improprieties generally); *Investigation of Lobbying Activities: Hearings Before a S. Special Comm. to Investigate Lobbying Activities*, 74th Cong., pts. 1-10 (1935-1936) (investigation into lobbying activities of the utility industry); *Alleged Activities at the Geneva Conference: Hearings Before a Subcomm. of the S. Comm. on Naval Affairs*, 71st Cong. (1930) (investigations into lobbyist efforts to sink the Geneva Naval Limitation Conference); CONG. RESEARCH SERV., 99TH CONG., CONGRESS AND PRESSURE GROUPS: LOBBYING IN A MODERN DEMOCRACY 47 (Comm. Print 1986) [hereinafter CONGRESS AND PRESSURE GROUPS] (hearings instituted by Senator Case after receiving bribe offer for his vote on natural gas bill); S. REP. NO. 85-395 (1957) (special committee investigation of alleged lobbying improprieties involving the Natural Gas Act, the Federal Highway Act, and sugar legislation); H.R. REP. NO. 81-3239 (1951) (report and recommendations on Federal Lobbying Act); H.R. REP. NO. 81-3238 (1951) (investigation into expenditures by farm and labor organizations to influence legislation); H.R. REP. NO. 81-3137 (1950) (investigation into expenditures by corporation to influence legislation); H.R. REP. NO. 74-2214 (1936) (drafted in response to investigation of public utilities lobbying); S. REP. NO. 71-43 (1929) (investigation into lobbying improprieties involving Manufacturers Association of Connecticut); William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, in *THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LAW GOVERNING LAWYERS AND LOBBYISTS* 5, 7-8 (William V. Luneburg & Thomas M. Susman eds., 3d ed. 2005) (discussing *Hearings Before the Select Comm. of the H.R. Appointed Under H.R. 198*, 63d Cong. (1913), an investigation of alleged unscrupulous lobbying by the National Association of Manufacturers and H.R. 15,466, 63d Cong. (1914), the bill introduced after that investigation; and *Hearings Before a Subcomm. of the S. Comm. on the Judiciary on S. Res. 92, A Resolution Instruct-*

## 2007] Interest-Group-Based Approach to Lobbying Regulation 515

typically have followed on the heels of highly publicized lobbying scandals. Recent efforts to reform the lobbying process, including the Special Interest Lobbying and Ethics Accountability Act of 2005 (SILEAA),<sup>2</sup> sponsored by Representatives Meehan and Emmanuel, the Lobbying Transparency and Accountability Act of 2005 (LTAA),<sup>3</sup> sponsored by Senator McCain, and the Legislative Transparency and Accountability Act of 2007 (LTAII)<sup>4</sup>, which adds a number of internal Senate Rules changes to the text of the 2005 LTAA, are no exception—predictably having followed in the wake of well-publicized scandals involving lobbyist Jack Abramoff<sup>5</sup> and Representative Tom DeLay.<sup>6</sup> But if past experience is any indication, lobbying reforms enacted as a result of these scandals—if, indeed, any reforms are enacted at all—are unlikely to effect substantial change in the way that lobbying is practiced.

This Article examines the reasons for Congress's persistent failure to enact effective lobbying reform and argues that a fundamental shift in the philosophy underlying lobbying regulation is in order. For the past decade, lobbying has been regulated under the Lobbying Disclosure Act of 1995<sup>7</sup> (LDA) and related House and Senate rules restricting gift-giving by lobbyists to members of Congress.<sup>8</sup> All pending proposals to reform the lobbying process, including the SILEAA and the two LTAAs, are styled as amendments to the LDA, ostensibly designed to expand the reach<sup>9</sup> and efficacy of

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*ing the Comm. on the Judiciary to Investigate the Charge That a Lobby Is Maintained to Influence Legislation Pending in the Senate*, 63d Cong. (1913), a special investigation of tariff lobbying).

2. See H.R. 2412, 109th Cong. (2005).

3. See S. 2128, 109th Cong. (2005) (as reported by Senate, Mar. 3, 2006); see also Lobbying and Ethics Reform Act of 2005, S. 1398, 109th Cong.; Stealth Lobbyist Disclosure Act of 2005, H.R. 1302 and H.R. 1304, 109th Cong.; Lobby Gift Ban Act of 2005, H.R. 3177, 109th Cong.; Terrorist Lobby Disclosure Act of 2005, S. 1972, 109th Cong.; H.R. 3623, 109th Cong. (2005) (a bill "to increase to 5 years the period during which former Members of Congress may not engage in certain lobbying activities"); H.R. Res. 81, 109th Cong. (2005) (requiring "the Clerk of the House of Representatives to post on the official [House website] all lobbying registrations and reports filed with the Clerk under the [LDA]").

4. See S. 1, 110th Cong. (2007).

5. See, e.g., Carl Hulse, *Abramoff Conviction Gives New Impetus to Moves in Congress to Toughen Curbs on Lobbying*, N.Y. TIMES, Jan. 6, 2006, at A18; Neil A. Lewis, *Official Tipped Abramoff on Client's Case, Filing Says*, N.Y. TIMES, Jan. 29, 2006, at 20.

6. See, e.g., Marie Cocco, *DeLay's Worst: A Dirty Drama of Bondage*, NEWSDAY, May 10, 2005, at A34 (describing public outrage over reports that lobbyists paid for a Scottish golf junket taken by DeLay, his wife, and aides); Anne E. Kornblut & Glen Justice, *Inquiry Focusing on Second Firm with Connections to DeLay*, N.Y. TIMES, Jan. 8, 2006, at 1.

7. S. Res. 1060, 104th Cong., 109 Stat. 691 (1995) (codified at 2 U.S.C. §§ 1601-1612 (2000) and other scattered sections).

8. See S. Res. 158, 104th Cong. (1995); H.R. Res. 250, 104th Cong. (1995). The bans were adopted separately by each chamber in the form of resolutions and, *inter alia*, limit the value of gifts (e.g., meals and entertainment) that members of Congress may accept from lobbyists (no individual gift to a senator may exceed \$50 in value and no more than \$100 in cumulative gifts may be given by any one source) as well as prohibit representatives from accepting free travel to substantially recreational events such as charity trips where congressmen and lobbyists golf and ski together to raise money for charities. See S. Res. 158, § 1(a)(2); H.R. Res. 250, § 2(a)(2).

9. For example, Title I of the 2007 LTAA would add to Senate Standing Rules a requirement that all committee and conference reports include a list disclosing any proposed earmarks, their Senate sponsor, and their avowed purpose—and that such disclosures be made publicly available on the Internet at least forty-eight hours prior to Senate consideration of the relevant bill or resolution. See S. 1, §§ 103-

disclosure,<sup>10</sup> revolving door,<sup>11</sup> and gift reporting<sup>12</sup> requirements already imposed by the Act, and by House and Senate gift rules. Not surprisingly, given their common starting point, existing lobbying regulations and most of the proposed reforms suffer from the same flaw: They are classic cases of “symbolic legislation,”<sup>13</sup> designed to appease the public superficially without effecting any real change in how elected officials conduct business with lobbyists or the interest groups whom lobbyists represent. Moreover, the LDA, internal rules, and pending reform proposals all make lobbyists—rather than the legislators whom they target or the interest groups whom they represent—the focal point of lobbying regulation. Worse, they cast Congress as a victim, or at least a passive actor, in the lobbying process<sup>14</sup> and essentially ignore the public’s underlying concerns about the influence that lobbyists exercise over legislators.

I argue that the key to effective lobbying reform is to abandon this misguided approach to lobbying regulation, which focuses on lobbyists as the main actors and views disclosures about who hires lobbyists as magical cure-alls that somehow “will increase public confidence in the integrity of Government.”<sup>15</sup> If lobbying reform is to be meaningful, it should regulate not only lobbyists but also those actors with whom the public is most concerned—the elected officials whom lobbyists seek to influence. Further, if lobbying reform is to be both meaningful and successful, it should take into account a third, currently overlooked, set of actors in the lobbying process—the interest groups who hire lobbyists to represent their positions. In other words, lobbying reform should become less concerned with disclosure for the sake of disclosure and more concerned with the dynamics created by disclosure—how disclosures will be used and whom they can benefit in the legislative process.

Thus far, the conventional wisdom behind congressional lobbying regulation has been that requiring lobbyists to disclose their clients’ names and

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104, 110th Cong. (2007).

10. Title I of the LTAAAs, labeled “Enhancing Lobbying Disclosure,” would amend the LDA to provide for, *inter alia*, quarterly filings of lobbying disclosure reports, electronic filing of such reports, creation of a public database for accessing such reports, application of the LDA’s disclosure requirements to grassroots lobbying, and increased penalties for violations of the LDA’s disclosure requirements. *See* S. 1, 110th Cong. §§ 211, 214, 216, 219 (2007); S. 2128, 109th Cong. §§ 101-103, 105, 107 (2005). SILEAA provides for these same expansions, in virtually identical language. *See* H.R. 2412, 109th Cong. §§ 101-103, 106, 402 (2005).

11. *See* S. 1, §§ 110-113 (prohibiting former officeholders from lobbying for one year after leaving office, prohibiting spouses of officeholders from lobbying and requiring disclosure of employment negotiations between officeholders and lobbying firms); S. 2128, §§ 201-203 (“Title III—Slowing the Revolving Door”); H.R. 2412, §§ 201-03 (“Title II—Slowing the Revolving Door”).

12. *See* S. 1, § 109 (restrictions on lobbyist participation in travel and disclosure); S. 2128, §§ 301-304 (“Title IV—Ban on Provision of Gifts or Travel by Lobbyists in Violation of the Rules of Congress”); H.R. 2412, §§ 301-304 (“Title III—Curbing Excesses In Privately Funded Travel”) (providing travel and gift restrictions only slightly different from those in the Senate bill).

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

14. *See* discussion *infra* Part II.C.2.

15. 2 U.S.C. § 1601(3) (2000).

## 2007] Interest-Group-Based Approach to Lobbying Regulation 517

lobbying expenditures will cause the clients (i.e., interest groups) and lobbyists to behave in a more open and honest manner. But the more likely real world consequence of disclosure requirements is that they will enable those actors with the greatest capacity to capitalize on information in the lobbying game—interest groups—better to police each other’s activities, contacts, and expenditures on a given issue. Although the public may not realize it, this is not necessarily a bad thing. In fact, greater transparency and increased monitoring across interest groups could lead to more balanced political participation by interests on both sides of an issue, as opposing groups seek to match or “check” each other’s efforts in true Madisonian fashion.<sup>16</sup> Thus, the key to more effective lobbying regulation may be to embrace the fact that interest groups are the entities with the greatest incentive to take advantage of lobbying disclosures and, accordingly, to structure lobbying regulations in a manner that encourages organized interests, in maximizing their own positions, also to further public goals.

Part I of this Article highlights the symbolic nature of the LDA, illustrating that the statute was designed to enable legislators publicly to claim credit for imposing restrictions on the lobbying process while in practice permitting lobbyists to conduct business as usual. Part I also explores how the 1995 LDA fails the public, positing that there is a disjunct between public versus congressional perceptions of the role played by lobbyists in the legislative process. Part II discusses the goals that a public-regarding, rather than symbolic, approach to lobbying regulation should seek to achieve—including improved voter competence and more informed legislating. Part III argues that the key to accomplishing such public-regarding reform is to focus not on lobbyists, as Congress has done for the past two centuries, but on the two entities between which lobbyists mediate: elected officials and interest groups. First, the Act’s disclosure requirements should be expanded to require information from elected officials, in both the legislative and executive branches, as well as from lobbyists. Second, lobbying reforms should be designed to take advantage of interest groups’ natural incentives to use disclosed information to increase their access to elected officials and to make disclosed information accessible to the public. Part III ends with a policy proposal outlining specific lobbying reforms dictated by an interest-group-based approach to lobbying regulation and comparing and contrasting these suggested reforms with the pending proposals introduced in the 109th and 110th Congresses. Part IV discusses the political conditions that must exist in order for Congress to enact the suggested reforms and possible strategies for creating such conditions.

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16. See THE FEDERALIST NO. 10, at 56 (James Madison) (E.H. Scott ed., 1894); see also discussion *infra* Part III.A.

## I. THE LOBBYING DISCLOSURE ACT OF 1995: SYMBOLIC REFORM

A. *How and Why the LDA Is a “Symbolic” Statute*

Unlike most lobbying reform efforts,<sup>17</sup> the LDA was not drafted in response to any particular lobbying scandal. Rather, it represented the effectuation of a series of campaign promises—by Ross Perot and Bill Clinton in 1992 and by Republican congressional candidates in 1994—to change the way that lobbying was practiced in Washington and to curb the influence wielded by special interests in the lawmaking process.<sup>18</sup> Thus, the Act’s preamble emphasizes the public’s right to be informed about behind-the-scenes activities that impact the formation of public policy. Specifically, the preamble lists three congressional findings that form the basis for the Act’s provisions: (1) that “responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decision-making process . . . of the Federal Government;” (2) that “existing lobbying disclosure statutes have been ineffective because of unclear statutory language [and] weak administrative and enforcement provisions;” and (3) that “effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials [would] increase public confidence in the integrity of Government.”<sup>19</sup> The disclosure provisions that follow the preamble, however, borrow wholesale from lobbying reform bills drafted in prior years. As a result, the LDA, like all previous congressional lobbying proposals,<sup>20</sup> focuses almost exclusively on regulating lobbyists—rather than

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17. See, e.g., H.R. 2412; S. 2128.

18. See, e.g., NANCY WATZMAN, INDECENT DISCLOSURE: HOW EXISTING LOBBYING LAW LETS LOBBYISTS GET AWAY WITHOUT DISCLOSING BASIC INFORMATION: AN EXAMINATION OF THREE MAJOR LOBBYING CAMPAIGNS (Public Citizen’s Congress Watch, 1993), reprinted in *Reform of Laws Governing Lobbying: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 89 (1995) (attachment to statement of Joan Claybrook, President, Public Citizen) (noting that the “theme” of 1992 elections was public disgust over “‘business as usual’ in Washington” and that “voters responded eagerly when candidates such as Ross Perot decried special interest influence”; commenting that President Clinton drew continued attention to “special interest lobbying [after taking office], calling for reform of . . . disclosure laws in his State of the Union address”); *Bill Targets Lobbying Law Loopholes*, 53 CONG. Q. WKLY. REP. 3477, 3477 (1995) (noting that many members of the Republican freshman class “were elected on pledges to change the way Congress operates”); Jonathan D. Salant, *Members Urge Action on Lobbying Issue*, 53 CONG. Q. WKLY. REP. 2857, 2857 (1995) (reporting that the LDA was being pushed through in part by Republican freshmen seeking to live up to their campaign pledges); Warren P. Strobel, *Clinton Says Lobby-Reform Bill Will ‘Pull Back The Curtains’; Measure Reflects Bipartisan Consensus, Has Major Curbs*, WASH. TIMES, Dec. 20, 1995, at A8 (noting that Clinton called for lobbying reform in his State of the Union Address and that “[l]obby reform also was a plank in the House Republicans’ ‘Contract with America’”).

19. See 2 U.S.C. § 1601 (2000).

20. See, e.g., Federal Regulation of Lobbying Act, ch. 753, 60 Stat. 839 (1946) (previously codified at 2 U.S.C. §§ 261-270) (requiring disclosures, by lobbyists, of contacts with members of Congress), repealed by Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, § 11(a), 109 Stat. 691; Foreign Agents Registration Act of 1938, as amended, ch. 327, § 1, 52 Stat. 631 (codified at 22 U.S.C. §§ 611-621 (2000)) (provision requiring all persons who are agents of foreign principals to file informational statements with the State Department); Merchant Marine Act of 1936, ch. 858, § 101, 49 Stat. 1985 (codified at 46 U.S.C. app. §§ 1101-1295 (2000)) (provision requiring registration by those who presented, advocated, or opposed matters within the scope of the Merchant Marine Act and related shipping legislation before Congress, the Federal Maritime Board, or the Secretary of Commerce); Eskridge,

## 2007] Interest-Group-Based Approach to Lobbying Regulation 519

the federal officials whom they contact—and operates on the fundamental premise that simple disclosure of the names of lobbyists' clients, issue areas, and the amounts expended on lobbying will revolutionize the way that lobbying is practiced. The result is symbolic legislation<sup>21</sup> that promises sweeping change but delivers lobbying as usual.

For, beyond elected officials' surface rhetoric,<sup>22</sup> the LDA discernibly is more concerned with appearances than with substantive reform. The statute nowhere even purports to require or promote any change in how lobbyists behave; in fact, the Act's preamble makes clear that it seeks only to ensure that all lobbyists make publicly available information about their clients, funding, and the issue areas with respect to which they lobby.<sup>23</sup> Likewise, Congress, in enacting the LDA, made no claims that its regulations would require lobbyists to alter their business practices. Rather, the congressional pitch was that if the LDA forced lobbyists to disclose to the public their clients' names, lobbying expenditures, and issue areas of concern, then the principles of representative government would be served and "public confidence in the integrity of Government" (automatically) would increase.<sup>24</sup> In

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*supra* note 1, at 8 (discussing S. 1095, 70th Cong. (1928), a lobbyist registration and reporting measure contemplated in the wake of a lobbying scandal involving opponents of a federal estate tax bill, and H.R. 15,466, 63d Cong. (1914), a bill introduced in response to 1913 lobbying scandal involving the National Association of Manufacturers).

21. Scholars have coined the term "symbolic legislation" to describe a law whose primary purpose is to appease public demand for action while in practice effecting little of what it promises. *See, e.g.*, EDELMAN, *supra* note 13, at 22-29; Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 733-34 (2005). As Elizabeth Garrett has explained, symbolic legislation is "an attempt to defuse an issue that has roused a normally quiescent and inattentive public while leaving the underlying process of lawmaking, bargaining, and interest group interaction largely unchanged." *Id.*

22. Congress, for example, widely touted the LDA, and the gift ban resolutions that followed, as breakthroughs in lobbying regulation that would "chang[e] the political culture in Washington." Jonathan D. Salant & Richard Sammon, *Senate Bans Lavish Gifts From Interest Groups*, 53 CONG. Q. WKLY. REP. 2237, 2237 (1995) (quoting Senator Paul Wellstone's comments about the gift ban) (internal quotation marks omitted); *see also* 141 CONG. REC. S10,845, S10,857 (daily ed. July 28, 1995) (statement of Sen. Hatfield) (commenting that LDA and Senate gift rule reforms "take significant steps" to improve the lobbying process); 140 CONG. REC. H10,283, H10,285 (daily ed. Sept. 29, 1994) (statement of Rep. Cantwell) (commenting that the 1993 bill upon which the 1995 LDA was based "includes the broadcast [sic] and strictest lobbying disclosure requirements ever enacted" and "permanently limits the influence of lobbyists and special interests on Capitol Hill"); Lobbying Disclosure Act, 140 CONG. REC. H1966, H1987 (daily ed. Mar. 24, 1994) (comments to same effect by Rep. Hoyer); Salant & Sammon, *supra*, at 2237 (quoting Sen. William Cohen's remarks that "[t]here has been a major step forward [and] [o]verall, we can claim we moved the institution toward reform" (internal quotation marks omitted)). President Clinton similarly promised that the LDA would help "give ordinary Americans a greater stake in our government" by "pull[ing] back the curtains from the world of Washington lobbying" and ensuring that "the days of secret lobbying are over." President William J. Clinton, Remarks by the President at Signing Ceremony for the Lobbying Disclosure Act of 1995 (Dec. 19, 1995), available at <http://www.clintonfoundation.org/legacy/121995-speech-by-president-at-lobbying-reform-bill-signing.htm>.

23. *See* 2 U.S.C. § 1601(3) (2000).

24. *Id.*; *see also* *Lobbying Disclosure Reform Proposals: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 7 (1995) [hereinafter *Hearing: Lobbying Disclosure Reform Proposals*], available at 1995 WL 527076 (statement of Sen. Levin) ("Lobbying disclosure will enhance public confidence in government by ensuring that the public is aware of the efforts that are made by paid lobbyists to influence public policy."); Phil Kuntz, *New Lobbying Reform Bill Has Watchdogs' OK; Passage Predicted, But Groups Agree It Still Leaves Some Loopholes*, S.F.

other words, Congress designed the LDA not to repair improprieties in the lobbying system but to shed light on that system, in the hope that educating the public about how the lobbying process operates would “erase the *appearance* of impropriety” popularly associated with lobbyists’ activities.<sup>25</sup>

There also was some suggestion by those drafting the LDA that the Act’s disclosure requirements might lead to better lobbying practices on the part of lobbyists and their clients by revealing links between lobbying expenditures and success in the legislative process.<sup>26</sup> But the suggestion was little more than rhetoric given that the LDA does not require disclosures about specific issues, proposals, votes, or pieces of legislation that a lobbyist is hired to influence, nor does it require lobbyists to name the specific officials they contact<sup>27</sup> or to reveal the success or failure of their activities on behalf of particular clients.<sup>28</sup> Thus, even if Lobbyist X were to disclose that he lobbied the House of Representatives on behalf of Client A regarding Issue Q, and even if a watchful public citizen knew that the House reported out a bill dealing with Issue Q, it would be difficult for the citizen to gauge Lobbyist X’s success without knowing Client A’s preferences concerning specific components of Issue Q and how those preferences were reflected in, or rejected by, the bill passed by the House.<sup>29</sup>

Further, the disclosures required by the Act are minimal and are made in a format that is neither easily accessible nor decipherable by average citizens. Currently, lobbyists comply with the Act by filling out forms created by the Clerk of the House and the Secretary of the Senate and return these forms to the Clerk’s and Secretary’s offices, where the forms are reviewed

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EXAMINER, Jan. 30, 1994, at A4 (noting, with respect to 1993 bill on which the LDA is based, that “[s]upporters envision a sunshine-filled world of computerized and cross-indexed data that will illuminate how power is leveraged in Washington—thus producing a better-informed public and a more perfect democracy”). For further discussion, see *supra* Part I.A and specifically note 16 and accompanying text.

25. *Reform of Laws Governing Lobbying: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 2 (1995) (statement of Rep. Charles T. Canady, Chairman, Subcomm. on the Constitution) (expressing hope that through the LDA Congress “can work to bring the relationship between lobbyists and government officials into the light and erase the *appearance* of impropriety from their dealings”) (emphasis added).

26. *See, e.g., Hearing: Lobbying Disclosure Reform Proposals*, *supra* note 24, at 7 (statement of Sen. Levin) (“In some cases, such disclosure will perhaps encourage lobbyists and their clients to be sensitive to even the appearance of improper influence.”).

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

28. *See id.* § 1603(b)(5)(A)-(B) (requiring lobbyists to identify the “general issue areas” regarding which they expect to lobby for the named client and leaving it in lobbyists’ discretion to disclose “to the extent practicable” specific issue “areas”—not specific bill provisions, preferences, or stances—on which they already have lobbied).

29. A lobbying client’s preferences on an issue usually are more complicated and multifaceted than a simple “yes” or “no” position on a bill, and lobbyist “success” on a particular issue is rarely complete. *See* Allan J. Cigler & Burdett A. Loomis, *Introduction* to Diana M. Evans, *Lobbying the Committee: Interest Groups and the House Public Works and Transportation Committee*, in *INTEREST GROUP POLITICS* 257, 257 (Allan J. Cigler & Burdett A. Loomis eds., 3d ed. 1991). Most members of the public do not have access to lobbying clients’ preference breakdowns and, in any event, are not willing to do the research necessary to piece together various pieces of disclosed information; thus, it is highly unlikely that the disclosure requirements imposed by the LDA would frighten lobbyists or their clients into changing their lobbying practices in any substantial manner. *See id.* at 258.



## 2007] Interest-Group-Based Approach to Lobbying Regulation 521

and then made available to the public—in hard copy at the Legislative Resource Center and at the Senate Office of Public Records in Washington, D.C. and, to a more limited extent, online through the Senate’s official website.<sup>30</sup> In keeping with the Act’s requirements,<sup>31</sup> the form consists primarily of lines asking lobbying firms to list the name, address, and principal place of business of (1) the registering lobbying firm; (2) the client on whose behalf the firm has or will engage in lobbying; (3) any affiliated organization that has contributed more than \$10,000 towards the registering firm’s lobbying activities; and (4) any foreign entities that hold at least 20% ownership in the client or any of its affiliated organizations.<sup>32</sup> A very small section asks lobbyists to list a three-letter code describing their “[g]eneral lobbying issue areas” and then to describe their “[s]pecific lobbying issues (current and anticipated).”<sup>33</sup> Such disclosures cannot go very far towards enlightening the public. For although the names of lobbying firms, individual lobbyists, and even clients may have currency for members of Congress who deal with these entities on a regular basis, they are of little use or relevance to average members of the public.

Perhaps most revealing of its symbolic nature, the LDA requires lobbyists to reveal little information about the governmental officials whom they contact. In fact, lobbyists need only state generally that they contacted the House of Representatives or the Senate or a particular federal agency, such as the Department of Energy at large, rather than specify individual legislators, committees, or federal employees with whom they corresponded.<sup>34</sup> It is difficult to see how the American public is to derive from such vague, general disclosures a better understanding of the manner in which the lobbying process operates, let alone gain renewed faith in its elected officials or in the integrity of its government.

Finally, the LDA’s status as a primarily symbolic law is evident from its weak enforcement provisions. The sole penalty for violation of the Act’s registration provisions is a judicially imposed civil fine of up to \$50,000.<sup>35</sup> For lobbying firms that earn hundreds of thousands to millions of dollars in revenues each year,<sup>36</sup> this is barely a slap on the wrist. Further, only the

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30. See Office of the Clerk of the House of Representatives, Lobbying Disclosure, <http://lobbyingdisclosure.house.gov/index.html> (last visited Jan. 27, 2007); United States Senate Office of Public Records, Lobby Filing Disclosure Program, <http://sopr.senate.gov/> (last visited Jan. 27, 2007).

31. See 2 U.S.C. § 1603.

32. See Clerk of the House of Representatives and Secretary of the Senate, Lobbying Registration, Form LD-1, <http://www.senate.gov/reference/resources/pdf/ld-198.pdf> (last visited Feb. 2, 2007) [hereinafter Form LD-1]; see, e.g., United States Lobby Report Images, 2005 Mid-Year Termination Lobbying Report of Paul Marcone & Assocs., L.L.C., on behalf of client Mercyhurst College (May 2005), available at [http://sopr.senate.gov/cgi-win/opr\\_gifviewer.exe?/2005/01/000/212/000212190|2](http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2005/01/000/212/000212190|2).

33. See Form LD-1, *supra* note 32, at 2.

34. See 2 U.S.C. § 1604(b)(2)(B).

35. See *id.* § 1606. Section 12(b) of the LDA, which amended 18 U.S.C. § 219(a) (2000) to make it illegal for public officials to act as lobbyists in connection with the representation of a foreign entity, is the only part of the LDA that creates any criminal sanctions. See Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691; see also 18 U.S.C. § 219(a).

36. See, e.g., Andy Metzger & Anna Palmer, *In '04 Returns, A Landslide for Lobbyists*, BROWARD

United States District Attorney for the District of Columbia has authority to prosecute violations of the Act,<sup>37</sup> and the Act leaves unclear how that office is to gain evidence of such violations.

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

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

*1. The Public's Concerns About Lobbying*

The public perceives two main categories of problems with the lobbying process: quid pro quos and unequal access. First, the public fears that through campaign contributions, personal gifts, and perhaps even outright bribery, lobbyists make elected officials beholden to them.<sup>38</sup> As a result, the public believes, lobbyists are able to exert undue influence on the policy-making process by pressuring elected officials to vote in their clients' interests under threat of losing lobbyists' financial support.<sup>39</sup> Such beliefs are

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DAILY BUS. REV. (Fort Lauderdale, Fla.), Mar. 24, 2005, at 9 (reporting that top 50 Washington lobbying firms earned more than \$840 million in fees in 2004 and cataloguing individual firms' revenues as follows: "Patton Boggs (\$65.8 million . . .), Akin Gump Strauss Hauer & Feld (\$64.2 million), Hogan & Hartson (\$51.6 million), . . . DLA Piper Rudnick Gray Cary (\$42.4 million)[,]" and Preston Gates Ellis & Rouvelas Meeds (\$21.4 million)).

37. See 2 U.S.C. § 1605(8) ("The Secretary of the Senate and the Clerk of the House of Representatives shall . . . notify the United States Attorney for the District of Columbia that a lobbyist or lobbying firm may be in noncompliance with this chapter.").

38. See, e.g., *Lobby Reform Legislation: Hearings Before the S. Comm. on Gov't Operations*, 94th Cong. 18 (1975) (joint statement of Sen. Stafford and Sen. Kennedy) (describing widespread public "view that government itself is the puppet of wealthy citizens and powerful interest groups"), quoted in CONGRESS AND PRESSURE GROUPS, *supra* note 1, at 59.

39. Common Cause representative Fred Wertheimer's comments before Congress are illustrative:

## 2007] Interest-Group-Based Approach to Lobbying Regulation 523

fueled by scandals, including Senator Francis Case's revelation in 1956 that he was offered a \$2,500 campaign contribution to influence his vote on a pending natural gas bill<sup>40</sup> and President Clinton's 2001 pardon of fugitive commodities trader Marc Rich amidst disclosures that Rich's wife, who lobbied for the pardon, had contributed heavily to Clinton's library foundation.<sup>41</sup> For the most part, Congress has sought to address these types of quid pro quo concerns through laws other than the LDA. For example, the Federal Election Campaign Act of 1971<sup>42</sup> (FECA) and its successor, the Bipartisan Campaign Reform Act of 2002<sup>43</sup> (BCRA), seek both to prevent the actual purchasing of elected officials by special interests and to dispel the appearance that elected officials can be purchased by setting limits on campaign contributions and requiring that such contributions be disclosed.<sup>44</sup> In addition, a federal anti-bribery statute outlaws the giving and receiving of quid pro quos in general,<sup>45</sup> and the House and Senate gift ban resolutions implemented in 1995 aim to eliminate the appearance of undue influence by prohibiting lobbyists from wining and dining elected officials.<sup>46</sup> The LDA itself addresses the public's concerns about quid pro quo corruption only minimally, through the requirement that lobbyists disclose the amounts that their clients have paid for their lobbying activities.<sup>47</sup>

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

CONGRESS AND PRESSURE GROUPS, *supra* note 1, at 22.

40. *See id.* at 47.

41. Denise Rich reportedly gave at least \$450,000 to President Clinton's library foundation. *See* Marc Lacey, *Resurrecting Ghosts of Pardons Past*, N.Y. TIMES, Mar. 4, 2001, at 26 (discussing, *inter alia*, "[t]he appearance of a quid pro quo" (quoting Rep. Henry A. Waxman) (internal quotation marks omitted)); Don Van Natta Jr. & David Johnston, *Clinton Library Will Yield Details on Big Donations*, N.Y. TIMES, Mar. 3, 2001, at A9. The incident drew sharp criticism from Congress as well. *See, e.g.*, 147 CONG. REC. S3154-56 (daily ed. Mar. 29, 2001) (statement by Sen. Arlen Specter) (noting that Clinton's last minute pardons had sparked public outrage and commenting that this was "rightly so").

42. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455 (2000)).

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

44. *See* John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 593 (2005).

45. *See* 18 U.S.C. § 201 (2000).

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

47. *See* 2 U.S.C. § 1604(b)(3) (2000) (requiring lobbying firms to include in their registration reports "a good faith estimate of the total amount of all income from the client (including any payments to the registrant by any other person for lobbying activities on behalf of the client)"); *id.* § 1604(b)(4) (requiring that registrants engaged in lobbying activities on their own behalves include in their registration reports "a good faith estimate of the total expenses that the registrant and its employees incurred in connection with lobbying activities").

Second, and perhaps more troubling to the public than the fear of outright bribery, is the special access, or inside edge, that lobbyists maintain in communicating with elected officials. Whether because of the “revolving door”<sup>48</sup> or because of lobbyists’ other close personal connections,<sup>49</sup> the public perceives that lobbyists receive special face time with elected officials.<sup>50</sup> Irrespective of where that face time occurs—in scheduled meetings, on a train ride,<sup>51</sup> over a game of poker,<sup>52</sup> or on the golf course<sup>53</sup>—it creates opportunities for lobbyists to persuade elected officials of their clients’ positions—opportunities that ordinary citizens do not have.<sup>54</sup> In other words, the

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48. “Revolving door” is a term used to describe the common phenomenon whereby congressional and executive staffers, and even some members of Congress and higher-level executive officials themselves, become lobbyists upon leaving public office. See, e.g., Michael Wines, *For New Lobbyists, It's What They Know, Not Whom They Know*, N.Y. TIMES, Nov. 3, 1993, at B14 (reporting that “[o]f the 121 lawmakers who left Capitol Hill after [the November 1992 election],” forty-eight had become lobbyists within one year, as had “at least 50 of their top aides [and] more than 30 senior officials” of the outgoing Bush I Administration”).

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

50. See, e.g., Martin Tolchin, *Senators at Hearing Support a Bill To Tighten Lobbyist Restrictions*, N.Y. TIMES, Apr. 30, 1986, at A32 (noting Senator David L. Boren’s reports of “public concern over the fact that some former officials earned as much as 20 times their former salaries [by becoming lobbyists] within a short time of leaving government[.]” and that “some Oklahoma farmers attributed their problems in exporting farm products to the efforts of former officials who le[ft] government to become high-priced lobbyists”); Wines, *supra* note 48 (referencing a Public Citizen report labeling the revolving-door phenomenon “government service for sale” (internal quotation marks omitted)).

51. On a “Victory Train” going from Washington, D.C., to the 1992 Democratic convention in New York, for example, “lobbyists paying several thousand dollars apiece rode for three hours with members of Congress.” See Charles Lewis, *The Rainmakers in Bill's Parade*, THE NATION, Dec. 7, 1992, at 693.

52. Newspaper reports in 1995 outed Senator Alfonse D’Amato’s long-standing tradition of hosting Thursday night poker games in his office for “a small group of influential lobbyists and other Washington insiders . . . [including many who represent] banks, securities firms, credit unions, and other financial institutions” with business before D’Amato’s Banking Committee. Douglas Frantz & Jane Fritsch, *High-Stakes Poker Put Lobbyists Close to D’Amato’s Ear*, N.Y. TIMES, Oct. 26, 1995, at A1. Needless to say, “the games were an extraordinary opportunity to reach a Senator whose actions are crucial to their clients.” *Id.*

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

54. In the words of Representative Frank R. Lautenberg, “[t]he meal involves time, and time means access. Ordinary citizens do not have that access.” Salant & Sammon, *supra* note 22, at 2238 (quoting Rep. Frank R. Lautenberg) (internal quotation marks omitted). Public Citizen Director Pamela Gilbert similarly testified during hearings on the 1993 LDA that “the vast, vast majority of American citizens never hire anybody to be able to wine and dine a Member of Congress, so you have a tremendous disadvantage. It is not a level playing field.” *Lobbying Disclosure Act of 1993: Hearing on H.R. 823 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 103d Cong. 202 (1993) [hereinafter *1993 LDA Hearing*] (statement of Pamela Gilbert, Director, Public Citizen’s Congress Watch).

## 2007] Interest-Group-Based Approach to Lobbying Regulation 525

public's concern is not just that elected officials will engage in blatant vote-selling to lobbyists but, more subtly, that they will become partial to the causes of lobbyists' clients because they spend a lot of time in lobbyists' company. Public concern with the lobbying process thus reflects an underlying view that lobbyists have the ability—through some combination of monetary and personal clout—to make elected officials forego their independent judgment and take actions that are in the lobbyists' clients' best interests, as distinct from the interests of the general public.<sup>55</sup>

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

Viewed from the above perspective, the LDA fails even to attempt to address the public's concerns. First, although the public's misgivings about the lobbying process focus on lobbyists' ability to command the attention of and exert influence over elected officials, the LDA essentially leaves elected officials out of the scope of its regulations. The Act requires disclosures only from lobbyists, not elected officials, and even the information it demands of lobbyists is general and vague, revealing nothing about lobbyists' contacts with any elected official.<sup>56</sup> Disclosure requirements in the FECA and the BCRA ensure that lobbyists at least must disclose their campaign contributions to elected officials, but tying such disclosures to lobbyists' activities on behalf of a particular client requires substantial cross-referencing and, in any event, reveals nothing about the amount or kind of face time that individual lobbyists obtain vis-à-vis elected officials.

This focus on disclosures by and about lobbyists is, from the public's standpoint, a little upside down. After all, the social contract upon which our government is based is not between lobbyists and the public; it is between the public and its elected officials. It is elected officials,<sup>57</sup> not lobbyists, who are agents of the public, and who hold their positions and make policy at the public's behest. If the public has an interest in knowing who is exerting influence in the legislative game, that interest must stem from its political contract with the officials it elects and from its desire to know how those officials are executing their political charge—the public is interested in lobbyists (and their clients) only to the extent that they interact with elected officials and influence public policy. Particular lobbyists and their clients are not the starting point of the public's concern; rather, citizens are interested in whom their state representatives or the members of a particular

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

56. See *supra* notes 30-34 and accompanying text.

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

congressional committee are meeting with, listening to, and otherwise consulting about policy decisions. Thus, it would make far more sense for the LDA to require some disclosure about lobbyists' contacts with individual elected officials, cross-referenceable by official, than it does for the Act to require that lobbyists disclose their clients and fees, and list the legislative chamber or executive department contacted on behalf of a client, cross-referenceable by lobbyist or client name. Indeed, the LDA differs in this respect from its close cousins, the FECA and BCRA, which require candidates for elective office to make detailed disclosures about the sources of contributions to their political campaigns.<sup>58</sup>

Second, and related to the first failure, the LDA fails to address the public's concerns about the purchasing of *access to legislators*, as distinct from the outright purchasing of votes. Further, it ignores the perceived disparity between the access that elected officials afford to well-connected lobbyists and the wealthy interests who are able to hire them versus to ordinary members of the public and less wealthy interests. That is, the Act in no way attempts to level the playing field between moneyed and not-so-moneyed interests in the lobbying game. In fact, if anything, the LDA seems to promote inequalities between such groups: notably, one of its provisions effectively prohibits certain nonprofit organizations, known as 501(c)(4)s, from lobbying or hiring lobbyists by denying them federal funds if they engage in lobbying activities.<sup>59</sup>

The LDA does minimally address the revolving-door problem by placing a one-year ban on lobbying by former members or elected officials of Congress.<sup>60</sup> But it does not preclude such individuals from advising clients on lobbying strategy during this one-year cooling-off period or from letting their names be dropped by clients seeking to gain access to a friendly bureaucratic ear.<sup>61</sup> Further, because the restrictions that the Act does impose last only for one year, it follows that once that year has passed, elected officials can lobby the very committees and offices in which they formerly served, no matter how high a post they once held.<sup>62</sup> While there may be legitimate reasons for allowing, or even desiring, such insiders to serve as

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58. See Bipartisan Campaign Reform Act, 2 U.S.C. § 434(b) (2000) (stating disclosure requirements for individual candidates' political committees); *id.* § 434(c), (e), (f) (requiring disclosure by individuals and entities under certain circumstances). The FECA also initially required individuals making contributions or expenditures exceeding \$100 to file a statement with the Federal Election Commission. See Pub. L. No. 92-225, § 302, 86 Stat. 3 (1972).

59. See 2 U.S.C. § 1611 (referencing 26 U.S.C. § 501(c)(4) (2000)). Specifically, the Act provides that any civic league or nonprofit organized for the promotion of social welfare will lose all federal grants, loans, or other awards if it engages in lobbying activities. Compare *id.*, with 26 U.S.C. § 501(c)(4).

60. See 18 U.S.C. § 207(e) (2000).

61. See Wines, *supra* note 48.

62. Former Senate Energy Committee Chairman J. Bennett Johnston became a lobbyist in 1996, as did one of his top aides; "[t]heir client roster brims with energy interests." Abramson, *supra* note 49. Ann M. Eppard, once a top aide to former House Transportation Committee Chairman Bud Shuster, similarly left her job in 1994 to become a transportation lobbyist. See *id.*

## 2007] Interest-Group-Based Approach to Lobbying Regulation 527

lobbyists on policy matters in their areas of expertise,<sup>63</sup> the practice as currently condoned feeds the public's vision of a small cadre of hired-gun lobbyists controlling public policy, on their clients' terms, without regard for anyone else's interests.

Gift ban resolutions similarly address only the quid pro quo problem but not the purchase of access to elected officials: Although they bar lobbyists from paying for officials' meals or travel expenses, the resolutions cannot and do not ban elected officials from socializing with lobbyists (e.g., at charity golf or skiing events organized by lobbyists to benefit causes supported by elected officials). Nor do the gift ban resolutions forbid lobbyists from inviting elected officials to speak at events that they host.<sup>64</sup> Thus, the resolutions do not eliminate moneyed interests' special access to legislators; they only limit such interests' ability to shower small favors upon legislators.

Finally, the LDA's weak enforcement provisions thwart the public's underlying desire to hold elected officials and, perhaps to a lesser extent lobbyists and their clients, accountable for lobbying improprieties. The sanctions created by the LDA apply only to lobbyists,<sup>65</sup> not the elected officials who are the focal point of the public's concerns or the interests whom the lobbyists represent. In addition, prosecutions under the Act are so few and far between<sup>66</sup> that there is little incentive for lobbyists to make adequate disclosures even of the little information they are required to report.<sup>67</sup> Further, there is no way for the public to learn about underreporting or other violations of the Act unless the House Clerk or Secretary of the Senate decides to divulge this information.<sup>68</sup> The House and Senate gift ban resolu-

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63. See discussion *infra* Part II.C.

64. See S. Res. 158, 104th Cong. § 1 (1995) (amending Senate Rule XXXV).

65. See 2 U.S.C. §§ 1605(8), 1606.

66. See, e.g., Kate Ackley, *LDA Enforcement: Is It Strong Enough?*, ROLL CALL, June 27, 2005, available at 2005 WLNR 10116594 (quoting comment by a spokesman for the U.S. Attorney's Office that there have been "few" prosecutions related to the LDA); Kenneth P. Doyle, *Senate Passed 2,000 Possible LDA Violations To DOJ, Dodd Reports; DOJ Pursued 13 Cases*, BNA MONEY & POLITICS REP., Feb. 14, 2006 (recounting DOJ report that it has pursued possible enforcement action in only thirteen lobbying-reporting-violation cases since 2003); Carl Weiser, *Enforcement of Law Almost Non-Existent*, U.S.A. TODAY, Nov. 16, 1999, at 11A (reporting that between January 1, 1996, when the LDA took effect, and the date of the article in November 1999, "no lobbyist ha[d] been prosecuted or referred for prosecution [under the Act,]" and commenting that "no one knows whether lobbyists are complying with the law").

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

68. For most of the LDA's life, the Senate Office of Public Records (SOPR), which oversees LDA enforcement on the Senate side, has refused to make public the number of its LDA-related referrals to the U.S. Attorney's Office, much less to provide any details about individual cases. See Ackley, *supra* note 66; Doyle, *supra* note 66. In a Senate Rules and Administration Committee meeting held on February 7, 2006, in the wake of the Abramoff and DeLay scandals, the SOPR for the first time reported that, between 2003 and early 2006, it referred over 2,000 cases of possible LDA violations to the Justice Department; the Justice Department responded that it has received only about 200 such referrals. Doyle,

tions suffer from similar flaws because although the resolutions do require disclosures from elected officials themselves, they too are subject to lax enforcement and widespread noncompliance, as proved by recent events.<sup>69</sup>

### C. Why Congress Opted for Symbolic Reform

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

#### 1. First Amendment Concerns

First Amendment concerns are the reason that Congress typically gives to explain why the LDA is structured as a disclosure statute, rather than a conduct-regulating statute, and why the Act lacks strong enforcement mechanisms.<sup>70</sup> Irrespective of what the public might want, Congress understands—and to some extent hides behind—the fact that it cannot prohibit, or even substantially restrict, substantive lobbying practices without violating citizens' First Amendment rights of petition, speech, and association.<sup>71</sup> First

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*supra* note 66.

69. See, e.g., Mary Curtius & Chuck Neubauer, *DeLay Reports 5 Trips Last Year—All in U.S.*, L.A. TIMES, June 16, 2005, at A29 (reporting that in the wake of the DeLay scandal, “other House members . . . and staff members [began filing] a flurry of reports about past trips they [previously] had failed to disclose”); Editorial, *Lobby Control*, ROLL CALL, June 8, 2005, available at 2005 WLNR 9072447 (reporting that to date, members of Congress “have ignored [the LDA’s] report-filing requirements and, under scrutiny, are now scrambling to fulfill their obligations” and noting that Republicans’ response to criticism of DeLay’s travel practices was, in effect, that “everybody does it”).

70. See, e.g., *1993 LDA Hearing*, *supra* note 54, at 1 (opening statement of committee chairman John Bryant) (commenting that the 1993 LDA “is designed to provide for the effective disclosure of the efforts of paid lobbyists to influence Federal, legislative, or executive branch officials in the conduct of government actions so that the public can see what influences these important actions affecting their lives while continuing to afford the fullest opportunity to the people to exercise their right to petition their Government for a redress of grievances and to express their opinions freely and provide information to the Government”); 141 CONG. REC. H1703, H1704 (Sept. 6, 1995) (extension of remarks by Rep. Lee H. Hamilton) (“Lobbying reform is needed, but it must be balanced. We must not reach too far and try to restrict legitimate lobbying activities and public contact with Members of Congress. Almost any attempt by the government to limit private and nongovernmental entities from using their own private funds to lobby will be difficult due to the First Amendment.”); see also Robert L. Koenig, *Senator Offers Legislation to Close Lobbying Loopholes*, ST. LOUIS POST-DISPATCH, Feb. 28, 1992, at 16A (reporting comments by Senator Carl Levin that lobbying is protected by the First Amendment and that “[t]he way to protect the public interest is through disclosure” (internal quotation marks omitted)).

71. First Amendment issues raised by lobbying regulations are discussed more fully *infra* Part III.C.2. In brief, the concern is that “[t]he First Amendment protects [the] right not only to advocate [one’s] cause but also to select what [one] believe[s] to be the most effective means for so doing[.]” including hiring a lobbyist. *Meyer v. Grant*, 486 U.S. 414, 424 (1988); see also *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 522 (1991) (First Amendment freedom of expression protects the decision whether to engage in or hire someone to engage in political lobbying). Legislative restrictions on political advo-



## 2007] Interest-Group-Based Approach to Lobbying Regulation 529

Amendment concerns, for example, are behind the Act's failure to place caps on the dollar amounts that a group may spend for lobbying activities<sup>72</sup> or to restrict campaign contributions by those who engage in lobbying activities.<sup>73</sup> They also explain the weakness of the penalties imposed for noncompliance with the LDA's disclosure requirements: the previous lobbying regulation statute, the 1946 Federal Regulation of Lobbying Act (FRLA), had imposed criminal penalties and prohibited future lobbying by those found to have violated its provisions, and these penalties widely had been criticized as constitutionally suspect.<sup>74</sup> Further, First Amendment arguments formed the focal point of interest group opposition to proposed LDA provisions that would have required disclosure of grassroots lobbying activities.<sup>75</sup> But First Amendment concerns do not explain why the LDA

cacy or advocacy of the passage or defeat of legislation thus violate the First Amendment, whether those restrictions are placed directly on those who seek to benefit from the passage or defeat of legislation or on those who are hired to advocate on others' behalfs. *Cf. Buckley v. Valeo*, 424 U.S. 1, 48 (1976). Even disclosure requirements can run afoul of the First Amendment if their effect is to chill citizens' exercise of their right to advocate or of their right to associate for fear that public exposure of their affiliation with a particular position or interest group might result in adverse economic or private consequences. *See, e.g., Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982); *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971). For detailed treatments of how lobbying is protected under the First Amendment, see David E. Landau, *Public Disclosure of Lobbying: Congress and Associational Privacy After Buckley v. Valeo*, 22 *HOW. L.J.* 27 (1979); Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 *HARV. J.L. & PUB. POL'Y* 149 (1993); and Steven A. Browne, Note, *The Constitutionality of Lobby Reform: Implicating Associational Privacy and the Right to Petition the Government*, 4 *WM. & MARY BILL RTS. J.* 717 (1995).

72. *See* Browne, *supra* note 71, at 729-47.

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

74. The 1946 Act contained a provision that made violations of the Act a misdemeanor, punishable by a fine of \$5,000 or imprisonment of up to twelve months, and prohibited persons who were convicted of violating the Act from engaging in lobbying activities for a subsequent period of three years. *See* 2 U.S.C. § 269(a)-(b), *repealed by* Lobbying Disclosure Act of 1995, Pub. L. 104-65, § 11(a), 109 Stat. 701. The District Court for the District of Columbia found this provision to be "obviously unconstitutional" on the ground that a person convicted of a crime cannot for that reason be stripped of his constitutional privileges, including the right to petition the government. *See Nat'l Ass'n of Mfrs. v. McGrath*, 103 F. Supp. 510, 514 (D.D.C. 1952), *vacated by* *McGrath v. National Ass'n of Mfrs.*, 344 U.S. 804 (1952). Although the Supreme Court later vacated this ruling and found the 1946 FRLA constitutionally valid, it left for another day the question of whether the Act's penalty provisions were constitutional. *See United States v. Harriss*, 347 U.S. 612, 627 (1954). Most scholars and commentators continue to view such sanctions as unconstitutional. *See, e.g.,* Elizabeth Garrett, Ronald M. Levin & Theodore Ruger, *Constitutional Issues Raised by the 1995 Lobbying Disclosure Act*, in *THE LOBBYING MANUAL*, *supra* note 1, at 143, 149 (calling the sanction "highly questionable" and applauding Congress for abandoning its use in the 1995 LDA).

75. *See, e.g.,* 140 *CONG. REC.* S14,207, S14,208 (daily ed. Oct. 5, 1994) (statements of Sen. Dole) (discussing request by certain members of Congress to remove grassroots regulations from conference report for 1993 LDA because of "wide" and "diverse" interest group concern that the Act's grassroots lobbying provisions "will seriously impair our ability to exercise our rights guaranteed under the First Amendment" (internal quotation marks omitted)); 140 *CONG. REC.* H10,283, H10,291 (daily ed. Sept. 29, 1994) (statement of Rep. Doolittle) (criticizing grassroots lobbying provisions as a "gag rule" that "will have a chilling effect on free speech" and citing diverse list of grassroots groups opposed to the legislation, including the ACLU, U.S. Chamber of Commerce, Defenders of Property Rights, and the Christian Coalition). The concerns expressed were that regulation of grassroots lobbying would result in the disclosure of interest groups' membership lists and possibly chill the political participation of religious organizations. *See, e.g.,* 141 *CONG. REC.* S10,654, S10,654 (daily ed. July 25, 1995) (statement of

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

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

One overlooked, but key, reason for the disjunct between public concerns about lobbying and the LDA's actual provisions is that Congress's conception of lobbyists and their role in the legislative process differs significantly from the public's. While the public views lobbyists as soulless mercenaries, skilled at arm-twisting and bribing legislators into appeasing their clients' interests at the expense of the public good,<sup>76</sup> members of Congress, for the most part, view lobbyists as invaluable policy experts who provide elected officials with useful information about the underlying subjects of proposed legislation.<sup>77</sup> Broadly speaking, the public seems to have adopted a "pluralist"<sup>78</sup> view of the lobbying process in which interest groups—through their hired lobbyists—barter in the political marketplace to obtain the best possible package of goods and services for themselves with

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Sen. Smith) (discussing concern that prior version of bill containing grassroots lobbying provision threatened to "make grass roots lobbyists divulge their entire mailing lists"); Jonathan D. Salant, *House Postpones Vote On Tougher Rules*, 53 CONG. Q. WKLY. REP. 3589, 3589 (1995) (noting that Republicans had opposed the LDA in the prior year because they believed it "could limit the political participation of religious organizations by forcing them to disclose their grass-roots lobbying efforts"). Because of the vociferous opposition to such regulation, the final version of the LDA passed in 1995 contains no regulation of grassroots lobbying. See 141 CONG. REC. H13,099, H13,103 (daily ed. Nov. 16, 1995) (statement of Rep. Bryant) (presenting the 1995 LDA for consideration and noting that the prior year's "controversial" grassroots lobbying provision was not in the current bill); 141 CONG. REC. S15,513, S15,514 (daily ed. Oct. 24, 1995) (statement of bill sponsor Sen. Levin) (explaining that "[w]e struck any reference to grassroots lobbying from the lobbying reform bill this year in order to make progress").

76. See, e.g., Adam Clymer, *Lobbyist Disclosure Is Backed in Senate; Gift Issue Is Put Off*, N.Y. TIMES, July 25, 1995, at A1 (quoting comment by Senator William S. Cohen indicating that a perception had developed "that just a few key people are being paid very high dollars in order to shape and influence and alter public policy in ways that are very damaging to the overall good of the country" (internal quotation marks omitted)).

77. See, e.g., 1993 LDA Hearing, *supra* note 54, at 127 (statement by Rep. Barney Frank) (commenting that he finds lobbyists to be "very useful sources of information"); Clymer, *supra* note 76 (reporting that Senator Cohen "defended lobbyists as providing an important, democratic service"); David Shribman, *Lobbying: Business by Nuance, Feint and Gamble*, N.Y. TIMES, Nov. 21, 1981, at 11 [hereinafter Shribman, *Lobbying*] (quoting comment by Representative John J. LaFalce, D-NY, that legislators "almost by definition, have to be generalists, but . . . also have to deal with very technical issues requiring the skills of specialists" and that lobbyists provide such useful specialized information (internal quotation marks omitted)); David Shribman, *Lobbyists Proliferate—So Do the Headaches*, N.Y. TIMES, July 25, 1982, at E5 [hereinafter Shribman, *Lobbyists Proliferate*] (reporting that "members of Congress admit they depend upon lobbyists to brief them on issues," and that "with the work of Congress reaching into increasingly technical areas, individual members often feel they are unable to sort out issues without [lobbyists]").

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

## 2007] Interest-Group-Based Approach to Lobbying Regulation 531

little thought for the broader public interest.<sup>79</sup> Congress, by contrast, seems to subscribe to a “deliberative” model of the legislative process<sup>80</sup> in which lobbyists, motivated by their clients’ best interests, present specialized information to elected officials who take that information into account when debating various policy proposals and then come to their own conclusions about how best to serve the public good.<sup>81</sup>

Congress is aware of the public’s opinions and concerns about the lobbying process, but considers these opinions to be uninformed and misguided.<sup>82</sup> Elected officials, for instance, firmly (and sometimes vexedly) reject the popular notion that lobbyists direct or control their policy decisions.<sup>83</sup> Similarly, the revolving door that is so reviled by the public does not seem such a bad thing to members of Congress, because it means that

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79. See, e.g., Clymer, *supra* note 76 (quoting comment by Senator Carl Levin that public opinion polls show that “a majority of Americans feel that lobbyists are the real power in Washington, only 22 percent believe it’s Congress, and only 7 percent the President” (internal quotation marks omitted)); David E. Rosenbaum, *Senate Refuses to Weaken Bill to Limit Gifts from Lobbyists*, N.Y. TIMES, May 6, 1994, at A1 (referencing a 1992 New York Times/CBS News poll finding that “75 percent of [American] adults said the Government was run by a few big interests, while only 19 percent said it was run for the benefit of all the people”).

80. See Sunstein, *supra* note 78, at 46–47 (describing civic republicanism, or deliberative, concept of representative government as one in which elected officials engage in a careful process of information-gathering, discussion, and debate, from which a common good ultimately emerges).

81. See, e.g., *Lobbyists Praised by Bono for Their Efforts to Educate Congress*, COMMUNICATIONS DAILY, Feb. 22, 1996 [hereinafter *Lobbyists Praised*], available at 1996 WLNR 3292400 (quoting Representative Bono’s observations that “‘education by lobbyists’ is very valuable to Congress and after lobbyists have done their work, ‘ethics take over’ when members decide how to vote on issues” (internal quotation marks omitted)); Shribman, *Lobbying*, *supra* note 77 (quoting comment by Representative Henry A. Waxman that “[l]obbyists help us see the full impact of legislation we might adopt” but indicating that he knows to be “sensitive to the fact that they often think their self-interest and the public interest are the same thing” (internal quotation marks omitted)); *id.* (quoting explanation by Representative John J. LaFalce that “[w]e often have to turn to lobbyists for information” but that he knows how to “use lobbyists rather than have the lobbyists use [him]” and how to “get the perspective of lobbyists who differ with each other”); Shribman, *Lobbyists Proliferate*, *supra* note 77 (reporting, based on interviews with members of Congress, that legislators “listen to lobbyists representing more than one side of an issue and proceed to make their decisions” (internal quotation marks omitted)).

82. See, e.g., *1993 LDA Hearing*, *supra* note 54, at 126–27 (statement by Rep. Barney Frank) (“People who think that adopting the most stringent forms of regulation and disclosure will materially change the public policy of this country are wrong. I think there is a misperception that public policy is shifted more by this than, in fact, is the case . . .”); Rosenbaum, *supra* note 79 (reporting that senators had said they “knew they were honorable public servants and that they should stop beating up on themselves to vanquish a misguided public perception” that their votes could be bought); see also Michael Wines, *House Hardens Rule on Lobbyists; Bans Accepting Gifts From Them*, N.Y. TIMES, Mar. 25, 1994, at A1 (reporting legislator comments on the House floor indicating that they had been wounded “by the mistaken perception that they can be swayed by free skiing vacations, tickets to National Football League games and dinners in four-star restaurants”).

83. See, e.g., *1993 LDA Hearing*, *supra* note 54, at 196 (statements of Rep. John Bryant) (“What I am concerned about, though, is the impression that is constantly given is that Members are induced to make different decisions after they have been elected and come here simply because somebody is taking them to dinner or spending funds on them. . . . I really think it is wrong of you and wrong of anyone to suggest that this place changes its mind because of things like that.”); S. REP. NO. 79-1400, at 27 (1946) (Senate Judiciary Committee report disdainfully referencing those who come to Washington “under the false impression that they exert some powerful influence over Members of Congress”); LESTER W. MILBRATH, *THE WASHINGTON LOBBYISTS* 352 (1963) (congressional respondents in a study reported that other factors are more important in shaping policy outcomes than lobbying); *Lobbyists Praised*, *supra* note 81 (quoting Representative Bono’s comment that although lobbyists help educate members of Congress, members make their own independent decisions about how to vote on legislation).

elected officials and government employees who have developed expertise in a particular policy area can continue to share their knowledge with Congress even after they have left government service.<sup>84</sup> In fact, members of Congress have been known to rely on lobbyists, revolving-door and otherwise, for help in writing speeches and even drafting parts of legislation.<sup>85</sup> Thus, in enacting the LDA, Congress neither wanted to nor saw a need to change many aspects of the lobbying process that troubled the public. Accordingly, when drafting lobbying regulations, Congress tended to focus on superficially appeasing, rather than substantively addressing, the public's concerns about this practice. That is, Congress wanted to enact lobbying regulation in order to repair its image with the—in its view misinformed—public, but it wanted to do so without substantially changing the way that lobbying is practiced. This explains why, for example, Congress drafted the LDA to impose a one-year ban on revolving-door lobbying rather than banning such lobbying outright, as the public might have preferred,<sup>86</sup> and why legislators, in drafting the House and Senate gift ban resolutions, themselves commented that these reforms were designed to address the public's misconceptions but were unlikely to effect real change in the lobbying process.<sup>87</sup>

Congress does have its own concerns about the lobbying process, but these concerns differ substantially from those expressed by the public. Unsurprisingly, the primary congressional concern is about protecting members of Congress from harassment by lobbyists. As then-Senator John F. Kennedy once wrote, “[T]he problem is pressure on the legislative branch of the Government.”<sup>88</sup> In Congress's view, although some lobbyists can be valuable information sources, the sheer number and ubiquity of lobbyists can make interacting with them exacting and confusing for elected officials.

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84. See, e.g., Tolchin, *supra* note 50 (“We do not want to prevent a person from using his expertise and his knowledge when he leaves the government.” (quoting David H. Martin, Director, Office of Government Ethics) (internal quotation marks omitted)).

85. See CONGRESS AND PRESSURE GROUPS, *supra* note 1, at 18 (quoting lobbyist Charles Walker's descriptions of last-minute phone calls from legislators asking for speech-writing help); Wines, *supra* note 48 (noting that “Jan Schoonmaker, a revolving-door lobbyist[,] . . . has twice helped House appropriators write legislative language”).

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

87. See, e.g., Rosenbaum, *supra* note 79 (quoting Senator J. Bennett Johnston's comment that “[t]he assumption is that if we pass this bill, somehow it will satisfy the American public who has unjustly believed that we can be bought for a sack of fruit” (internal quotation marks omitted)); Wines, *supra* note 82 (noting that Representative John Bryant “and many other lawmakers said their behavior would not change because they do not socialize with lobbyists nearly as much as the public believes”); see also Adam Clymer, *G.O.P. Filibuster Deals a Setback to Lobbying Bill*, N.Y. TIMES, Oct. 7, 1994, at A1 (quoting comment by then-Senate Minority Leader Bob Dole that “[w]e're prepared to correct all the abuses, real or perceived, that have tarnished the credibility of Congress's” (emphasis added) (internal quotation marks omitted)); Wines, *supra* note 82 (quoting comment by lobbyist Allen Klein that “[t]he House gift resolution's going to have a positive effect on the public perception, but it's going to have a very limited effect on the way business is done here” (internal quotation marks omitted)).

88. John F. Kennedy, *Congressional Lobbies: A Chronic Problem Re-Examined*, 45 GEO. L.J. 535, 556 (1957).

## 2007] Interest-Group-Based Approach to Lobbying Regulation 533

Thus, the aim of lobbying regulation, from Congress's perspective, is to help level the playing field between lobbyists, who hold all of the information, and elected officials, who hold none—by, for example, forcing lobbyists to identify the interests on whose behalf they are advocating so that elected officials will know who is behind the data (and pressure) that they are receiving.<sup>89</sup>

House and Senate reports studying the lobbying process also reveal a congressional concern about the unequal access obtained by big business versus less affluent interests. A House Select Committee Report on Lobbying published in 1950, for example, acknowledged that “the advantage in lobbying would always lie with those interests which [are] best organized, best financed, and had the easiest access to mass media of communication” and that, for this reason, “[o]rganized business has always gained the most from lobbying.”<sup>90</sup> The problem with this disparity is that it skews the spectrum of information presented to legislators and, therefore, the shape of public policy. As Congress has recognized, “[f]acts are seldom presented for their own sake, or without having been carefully selected for maximum impact,” and it is only “where a full hearing is available for all interested groups” that Congress can “rely on competitive watchfulness and public scrutiny as partial safeguards against misrepresentation of the facts by any one group.”<sup>91</sup> But, concluding that it had no feasible way to remedy this situation, Congress essentially abandoned this concern when contemplating the shape of lobbying regulation and focused instead on obtaining more information from lobbyists.<sup>92</sup>

Thus, whereas the public views lobbyists as dangerous influence-peddlers who create deleterious effects in the policymaking process, Congress views them as useful, if sometimes annoying, political actors without whom the legislative system could not function.<sup>93</sup> Given these divergent underlying assumptions, the goals that Congress seeks to accomplish through lobbying regulations differ substantially from the public's ideal. Factor in Congress's dismissiveness of the public's “misinformed” views, tempered by its electoral obligation to address the public's concerns, and symbolic legislation is the unsurprising result.

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89. See H.R. REP. NO. 81-3138, at 30 (1950) [hereinafter *1950 House Report*] (“The all-pervading purpose and intent of the Lobbying Act was to bring into the open activities intended to influence legislation, directly and indirectly, and to provide full public disclosure of the financing and expenditures involved in these activities.”); Kennedy, *supra* note 88, at 566.

90. *1950 House Report*, *supra* note 89, at 63.

91. *Id.* at 27.

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

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

### 3. *Legislator Self-Interest*

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

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

### A. *Is Symbolism Enough?*

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

While there is nothing wrong with symbolism per se, the LDA's approach to lobbying regulation—an approach that has been accepted without question by those who seek to reform the lobbying process—leaves something to be desired. First, the Act's approach discounts the public's concern with lobbyist access to elected officials, focusing almost exclusively on the financial aspects of lobbyists' activities.<sup>94</sup> As a result, the disclosures that

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94. Significantly, lobbyists themselves confirm the public's concerns, stating that their objective is to ensure access to policy makers and that they make contributions to help them gain access, not to buy

## 2007] Interest-Group-Based Approach to Lobbying Regulation 535

current regulations produce are incomplete and provide no information with which to gauge any correlation between lobbyists' and interest groups' monetary contributions and their legislative access. In this respect, the LDA falls far short of achieving its own symbolic goals of increasing public awareness about the lobbying process and improving public confidence in the integrity of government.

Second, the LDA's lax enforcement provisions leave substantial room for lobbyists to circumvent its disclosure requirements through incomplete, intentionally vague, and even egregiously late filings. Further, they enable lobbyists and interest groups, working together, to avoid full disclosure by registering an affiliate or coalition name rather than a recognizable interest group name under the "client" category with little fear of detection, let alone sanction.<sup>95</sup>

Third, even if the LDA's disclosure requirements had been sufficient to satisfy the public's needs when enacted, Congress's passage of the BCRA in 2002 at least arguably made more aggressive lobbying disclosure necessary. In restricting interest groups' ability to make campaign contributions, BCRA closed off one prominent tactic used by interest groups to obtain political access to elected officials.<sup>96</sup> Because money is fungible, cutting off its use in one political arena inevitably will lead to increased expenditures in another;<sup>97</sup> thus, if the law limits how much interests can spend on campaigns, interests presumably will begin to spend more on other political activities, including lobbying.<sup>98</sup> This, in turn, means that the political stakes associated with lobbying will increase and that lobbying likely will play an increasingly significant role in the legislative process.

Ultimately, then, the problem with the LDA's approach is not merely that it is symbolic but that it offers only a narrow, static solution to a dynamic problem. The Act's approach assumes that requiring minimal disclosures about lobbyists' clients, fees, and issue areas automatically will result

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the votes of elected officials. *See, e.g.*, Evans, *supra* note 29, at 267. While this statement should, of course, be taken with a grain of salt given its self-serving nature, it undoubtedly describes at least some lobbyists' behavior.

95. This problem is discussed in greater detail *infra* Part I.B.2.

96. Before BCRA, interest groups could circumvent legal caps on contributions to political candidates by donating unlimited amounts to political parties, who in turn passed this money on to their candidates. *See, e.g.*, Note, *Soft Money: The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323, 1324-26 (1998). BCRA makes such "soft money"—money not subject to a contribution cap—contributions unavailable to political parties and, thereby, political candidates by subjecting all political party expenditures to contribution limits. *See* 2 U.S.C. § 434 (2000); *see also* de Figueiredo & Garrett, *supra* note 44, at 598-99.

97. For an excellent discussion of this hydraulics principle, see Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1715-16 (1999), noting, for example, that "[c]ampaign money is increasingly seeking the path of least resistance."

98. *Cf.* Jeffrey Milyo, *Bribes and Fruit Baskets: What Does the Link Between PAC Contributions and Lobbying Mean?*, 4 BUS. & POL. 157, 158-59 (2002) (citing Micky Tripathi, Stephen Ansolabehere & James M. Snyder Jr., *Are PAC Contributions and Lobbying Linked? New Evidence from the 1995 Lobby Disclosure Act*, 4 BUS. & POL. 131, 135-55 (2002)) (noting that expenditures on lobbying and PAC contributions tend to move in tandem and arguing that there is strong empirical support indicating that PAC contributions, like lobbying, are used to gain access to elected officials).

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

### B. Voter Competence

Voter competence is a crucial component of any democratic government that claims to be run based on the consent of the governed. Voting is, of course, the only form of control that most citizens can exercise over those who make public policy decisions with often far-reaching private consequences. It stands to reason that if voting is conducted based on inadequate or inaccurate information, then voters will not get the government they expect (or will not expect the government that they get), and public confidence in the political process accordingly will disintegrate. Hence, disclosure statutes are justified in part on the theory that they provide useful information to citizens and legitimize the political process, as illustrated by the preamble to the LDA<sup>99</sup> and the Supreme Court's jurisprudence in the campaign finance context.<sup>100</sup> But if this is their purpose, then the information elicited by disclosure statutes should be that which is most helpful to citizens in deciding how to vote.<sup>101</sup>

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99. See 2 U.S.C. § 1601 (2000) (listing congressional findings that "(1) responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decision-making process" and "(3) the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government").

100. See *McConnell v. FEC*, 540 U.S. 93, 196 (2003) (citing, *inter alia*, state interest in "providing the electorate with information" as justification for BCRA's application of disclosure requirements to all "electioneering communications"); *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (citing governmental interests in "provid[ing] the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate'" and in "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity" as sufficient to justify intrusion on First Amendment rights by FECA's disclosure requirements (quoting H.R. REP. NO. 92-564, at 4 (1971))).

101. See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 296 (2005).



## 2007] Interest-Group-Based Approach to Lobbying Regulation 537

As Elizabeth Garrett and Daniel Smith have noted in the context of campaign finance regulation, political scientists define voters as competent “if they cast the same votes they would have cast had they possessed all available knowledge about the policy consequences of their decision.”<sup>102</sup> That is, if knowledge of Candidate X’s position on 100 political issues would render a voter competent in an election, then if Citizen A does not know these facts and cannot access other facts that allow her to make the same choice at the ballot box, she cannot vote competently.<sup>103</sup> But, on the other hand, if there exists another, related, set of facts that leads her to make the same choice she would have made had she known Candidate X’s position on 100 political issues (e.g., the related fact that Candidate X is endorsed by the NRA) then knowledge of the full set of facts is not necessary for Citizen A to cast a competent vote.<sup>104</sup> In other words, voters need not possess all available information about a candidate in order to vote competently; they can instead “rely on particular pieces of information, connected non-accidentally to accurate conclusions about the consequences of [their] vote[s]” and still make competent electoral decisions.<sup>105</sup> Smaller, digestible, “particular pieces of information” thus serve as cues, or heuristics, that enable citizens to vote competently with limited information.<sup>106</sup>

As the use of the NRA in the above example suggests, an incumbent’s or challenger’s (if the challenger has held prior elective office) connection to a particular interest group can serve as one important heuristic for voters.<sup>107</sup> In fact, the Supreme Court has acknowledged as much when discussing the value of campaign finance rules requiring disclosure of the names of those who have contributed to a candidate’s campaign:

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102. *Id.* at 296 & n.3 (quoting Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections*, in *CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS* 147, 149 (Stephen L. Elkin & Karol Edward Soltan eds., 1999)) (internal quotation marks omitted).

103. *See id.* at 296 (citing Arthur Lupia & Richard Johnston, *Are Voters to Blame? Voter Competence and Elite Maneuvers in Referendums*, in *REFERENDUM DEMOCRACY: CITIZENS, ELITES AND DELIBERATION IN REFERENDUM CAMPAIGNS* 191, 194-95 (Matthew Mendelsohn & Andrew Parkin eds., 2001)).

104. *Id.* (employing this example with the NRA, NARAL Pro-choice America, the Concord Coalition, and the Sierra Club).

105. *Id.*

106. *See id.* *See generally* Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 *UCLA L. REV.* 1141 (2003) (arguing that strengthening heuristic cues in direct democracy is the best means for rehabilitating voter competence).

107. *Cf.* Kang, *supra* note 106, at 1157 (citing ELISABETH R. GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* 18 (1999), for the proposition that the political orientation of many interest groups is well known); Arthur Lupia, *Dumber than Chimps? An Assessment of Direct Democracy Voters*, in *DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA* 66, 69-70 (Larry J. Sabato, Howard R. Ernst & Bruce A. Larson eds., 2001) (listing “interest-group endorsements,” along with personal reputations and political ideologies, as an example of an informational shortcut that voters may use to help themselves make electoral decisions in ballot initiative context); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 *AM. POL. SCI. REV.* 63, 71 (1994) (finding that voters who were ignorant about the substantive content of insurance-related ballot initiatives, but knew the interest group positions, voted almost exactly like substantively knowledgeable voters).

[D]isclosure provides the electorate with information ‘as to where political campaign money comes from and how it is spent by the candidate’ in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate’s financial support also *alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.*<sup>108</sup>

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

Meaningful, dynamic lobbying regulation thus must require some disclosure of elected officials’ (and their staffs’) <sup>109</sup> lobbying contacts with particular interest groups so that the public can use this information to predict, reward, or punish its elected representatives’ behavior. In order to prove useful to the public, moreover, lobbying regulations must ensure that the information disclosed (1) is accurate and (2) is presented in a form that both is easily accessible to the public and is likely to garner the public’s attention. The accuracy of information about lobbying contacts obviously is crucial, as incorrect or incomplete cues about the interests to which an elected official responds could lead the public to draw erroneous conclusions about how to vote. As discussed earlier,<sup>110</sup> current lobbying regulations do nothing to ensure the accuracy or thoroughness of lobbyist disclosures, giving the Secretary of the Senate and the Clerk of the House no authority to investigate whether the information reported by lobbyists is true or to catch entities who engage in lobbying activities but fail to register.<sup>111</sup>

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108. Buckley v. Valeo, 424 U.S. 1, 66-67 (1976) (quoting H.R. REP. NO. 92-564, at 4 (1971)) (emphasis added).

109. In order to obtain an accurate picture of lobbyists’ access and opportunities to influence elected officials, it is imperative that contacts with members of an elected official’s staff be covered by disclosure requirements. See, e.g., Evans, *supra* note 29, at 266 (explaining that the majority of the lobbyists interviewed in her study of the House Public Works and Transportation Committee “considered lobbying staff a key part of their strategy” and opining that such meetings were at least as fundamental to an interest group’s success as were meetings with the chairmen and ranking members of the House Committee and Subcommittee themselves); E-mail from Bill Dauster, Democratic General Counsel, U.S. Sen. Fin. Comm. (Aug. 23, 2005, 07:54 EST) (on file with the author).

110. See discussion *supra* Part I.B.2 and accompanying notes.

111. The LDA does give the Secretary of the Senate and the Clerk of the House authority to “review, and, where necessary, verify and inquire to ensure the accuracy, completeness, and timeliness of registration and reports,” 2 U.S.C. § 1605(2) (2000), but that authority is different from, and falls short of, conferring power to audit or investigate the information that lobbyists submit. See, e.g., Weiser, *supra* note 66 (quoting comments by Pam Gavin, superintendent of the Senate office that collects lobbying forms, indicating that “[w]e do not have the authority to investigate” and “[w]e only have the authority to inquire,” and noting that while House and Senate officials have power to write to lobbyists asking for

## 2007] Interest-Group-Based Approach to Lobbying Regulation 539

This structure encourages incomplete and inaccurate reporting by lobbyists.<sup>112</sup> Lobbying reforms that strengthen the LDA's enforcement mechanisms and give real investigative authority to those charged with enforcing the Act can change this unfortunate dynamic,<sup>113</sup> increasing lobbyists' incentives to provide thorough and reliable information and thus helping to improve the accuracy of voting cues. Reforms that enable enforcers and the public to cross-reference information disclosed under the Act—by, for example, comparing lobbyists' disclosures about their contacts with elected officials (and officials' staff) against disclosures made by elected officials and staff members themselves<sup>114</sup>—also would enhance the reliability of the information provided to the voting public.

In addition, the format of information disclosed under the LDA is integral to its usefulness as a voting heuristic. Most voters are disengaged from politics and have little time or attention to devote to digesting information disclosed by lobbyists; thus it is imperative that lobbying regulations be designed to provide voters with “the information most crucial to improving their ability to vote consistently with their preferences”<sup>115</sup> and to do so in a format that readily translates into a voting cue. Current lobbying regulations provide information in a decidedly non-voter-friendly manner: The disclosures required by the LDA offer no connection between lobbyists' activities and the officials whom voters have elected, and the registration forms available online are searchable only by lobbyist name, client name, year filed, or federal agency/congressional committee contacted (though, as indicated above, lobbyists rarely list the names of the committees they have contacted).<sup>116</sup> Lobbying reforms could ameliorate this problem in a number of ways. First, they could require disclosure of lobbyist contacts with elected officials and their staffs on behalf of specific interests, thereby giving voters information that enhances their capacity to evaluate elected officials' conduct in office and increasing their ability to vote consistently with their preferences. Second, reforms to the LDA could require maintenance of online databases with better search and indexing capabilities to ensure that voters have easier access to the information that concerns them most.

Interestingly, reforms requiring disclosure of the lobbyists and interest groups who receive access to specific elected officials may even increase voter respect for some elected officials by demonstrating that these officials do, in fact, exercise independent judgment in making policy decisions. Such might be the case if, for example, lobbying disclosures reveal that an offi-

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more information and to notify the U.S. Attorney's office if a lobbyist is not complying, they would “never know” if someone is lobbying but not reporting (internal quotation marks omitted).

112. See *supra* note 67 and accompanying text.

113. See proposal discussed *infra* Part III.B.3.b.

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

115. Garrett & Smith, *supra* note 101, at 2.

116. See *supra* notes 27-34 and accompanying text.

cial or his aides met with a particular group often but the official nevertheless voted against that group's legislative interests, or that an official or his aides met with groups on both sides of an issue before deciding how to vote.<sup>117</sup>

### C. More Informed Legislating

As members of Congress have acknowledged,<sup>118</sup> lobbyists and the interests they represent play an important role in informing and educating elected officials about the need for, and the effects of, specific policy decisions. But the information that officials receive is only as good as its source. No one doubts that lobbyists and their clients present facts in the light most favorable to their policy interests;<sup>119</sup> thus, the political, economic, or other agendas of those interest groups whose hired lobbyists succeed in securing the ear of elected officials (and their aides) inevitably affect the shape of the public policy that is enacted.<sup>120</sup> Accordingly, the identity and views of the lobbyists and interests with whom elected officials and their staff consult are highly consequential features of the legislative process.

Relatedly, the relative ideological diversity of the lobbyists and groups with which individual officials and their aides meet can be a crucial determinant of where along the political spectrum each official's policy preferences on particular issues will fall.<sup>121</sup> Legal scholarship on the subject of group polarization<sup>122</sup> suggests that if an elected official consults with a homogenous set of interest groups representing only one side of an issue—

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

118. See *supra* notes 77, 81, and accompanying text.

119. See, e.g., 1950 House Report, *supra* note 89, at 27 (noting that in lobbyists' communications with members of Congress, "[f]acts are seldom presented for their own sake, or without having been carefully selected for maximum impact").

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

121. See, e.g., Evans, *supra* note 29, at 257-59 (concluding, based on a study of the House Public Works and Transportation Committee's behavior during consideration of a highway reauthorization bill, that interest groups are most effective at getting the majority of their policy preferences accepted when they face no competition for elected officials' attention from opposing interests).

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

## 2007] Interest-Group-Based Approach to Lobbying Regulation 541

whether because those interests contributed to his campaign or because those interests share the official's political ideology—then the public policy generated by that official will become polarized, or skewed in an extreme direction, because the official is hearing from a “limited ‘argument pool[.]’” whose ideas tend to feed off each other and push the official to an extreme position.<sup>123</sup> Lobbying by coalitions of like-minded interest groups, a growing phenomenon,<sup>124</sup> only makes this problem worse. Sunstein posits that such polarization creates “deliberative trouble” because “widespread error and social fragmentation are likely to result when like-minded people, insulated from others, move in extreme directions simply because of limited argument pools and parochial influences.”<sup>125</sup> Thus, to the extent possible, it is important to ensure that elected officials hear from interests on both sides of a policy issue.<sup>126</sup> When elected officials, or the staff who make policy recommendations to such officials, receive information from and hear the concerns of interests on both sides of an issue, their policy positions are likely to become tempered, balanced, and more informed—rather than polarized. Indeed, Sunstein speculates that polarization will end or reverse when the argument pool is expanded and new members add new arguments.<sup>127</sup>

Current lobbying regulations provide no mechanism or incentive for such diversity of access because they reveal nothing about how individual officials allocate access across different lobbyists and their interest group clients. Lobbying reforms that require elected officials to disclose their contacts with particular lobbyists on behalf of particular interests, however, would shed some light on whether a particular elected official takes all of her cues from interests of a particular stripe or whether she gives audience to interests on all sides of an issue. The threat of such exposure, moreover, could encourage (or force) elected officials, or at least their staffs, to split their dance cards more evenly between opposing interests for fear of how it will look to the electorate, and other interest groups, if lobbying disclosures reveal them to be unduly partial to one set of interests. Such a shaming mechanism may be the most effective institutional method available to ensure that deliberating legislators do not isolate themselves from competing views.

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123. See Sunstein, *supra* note 122, at 104-05.

124. See Scott Ainsworth, 95 AM. POL. SCI. REV. 475, 475 (2000) (reviewing KEVIN W. HULA, LOBBYING TOGETHER: INTEREST GROUP COALITIONS IN LEGISLATIVE POLITICS (2000)) (noting increase in coalitions of interest groups).

125. Sunstein, *supra* note 122, at 105.

126. See, e.g., CONGRESS AND PRESSURE GROUPS, *supra* note 1, at 13 (quoting statement by ACLU that “[w]hen groups push on both sides of an issue, officials can more freely exercise their judgment than when the groups push on only one side” (quoting MILBRATH, *supra* note 83, at 345) (internal quotation marks omitted)).

127. See Sunstein, *supra* note 122, at 95-96.

## III. HOW TO FIX THE LDA: INTEREST GROUPS, THE OVERLOOKED FACTOR

Lobbying regulations traditionally have paid little attention to interest groups; in fact, the only portion of the LDA directed towards such groups is the requirement that lobbyists disclose the names of their clients.<sup>128</sup> This is because in focusing on lobbying regulation as a means of (1) combating quid pro quo corruption, and the appearance thereof, and (2) protecting elected officials from lobbyist harassment,<sup>129</sup> Congress has ignored the public's underlying concern with the preferential access and disproportionate ability to influence legislative agendas that the lobbying process affords to certain interests. Moreover, Congress has ignored the fact that interest groups are the driving force behind the lobbying process and that, without them, lobbyists would have no one to advocate for and no need to seek access to elected officials. This Part suggests that the LDA's ignorance of interest groups' role in the lobbying process is almost as glaring an omission as the Act's failure to impose any regulations on elected officials. Indeed, given Congress's distorted incentives, a focus on interest groups may well be the key to effecting meaningful lobbying regulation.

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

In crafting lobbying reform, it is important to consider not only what current regulations fail to achieve but also what incentives and consequences they succeed in producing. One oft-overlooked consequence of current disclosure requirements is that they create a system through which opposing interests can obtain information about their competitors' lobbying activities.<sup>130</sup> Interest groups, unlike ordinary citizens, tend to be familiar with the names of other interest groups; thus the LDA, in permitting the public to look up lobbyist registration statements by client name, enables interest groups to discover which lobbyists their competitors have hired, how much their competitors have spent on lobbying, the general issues on which their competitors' lobbying activities have focused, and even, to some extent, the federal departments or congressional committees that have been lobbied on their competitors' behalves. The Act thus provides organized interests with information they can use to step-up their own lobbying efforts to match those of their competitors. Herein lies the great promise of lobbying regulation: Instead of shuddering in horror at this realization, reformers should embrace it. That is, reformers should approach lobbying reform with the view that since organized interest groups are the political

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128. See *supra* notes 31, 32, and accompanying text.

129. See *supra* notes 44, 88, 89, and accompanying text.

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

## 2007] Interest-Group-Based Approach to Lobbying Regulation 543

actors with the greatest incentive to take advantage of disclosures in the lobbying game, it is most efficient to structure lobbying regulations in a way that makes it likely that, as these interests act to maximize their own best interests, they also will further public goals. In other words, lobbying regulations should be designed to ensure that opposing interests get the kind of information that will help them to counterbalance each other as well as encourage them to bring their competitors' disclosures to the public's attention—i.e., lobbying regulations should produce information not only about which lobbyists competing interests hire, or how much those lobbyists are paid, but also about the amount of access that those lobbyists obtain vis-à-vis specific elected officials. This interest-group-based suggestion, of course, dovetails naturally with the public's interest in learning how much access its elected officials provide to particular lobbyists and their interest group clients.

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

What I am advocating, in other words, is that lobbying regulations embrace the familiar Madisonian concept of allowing factions to check factions in service of the public good.<sup>131</sup> The idea is to shift vigilance over lobbying activities away from members of the public, whom current regulations disingenuously assume will pay attention to lobbying disclosures of their own initiative, and towards interest groups. Instead of relying on reactions from the all-too-often disengaged public, lobbying regulations should rely on the normal workings of the political process—on competing interests' natural incentives to bring elected officials' contacts with lobbyists and interest groups to the public's notice and to press officials to listen to groups on both sides of an issue. This potential vigilance from within the political process is, after all, what Madison heralded as the saving grace of a large republic composed of numerous and varied interests.<sup>132</sup>

But the suggestion that would-be reformers use interest groups' natural incentives to promote more balanced legislating is not purely utilitarian; I do not advocate it because I believe it to be the only type of reform that will work given the irremediable reality of interest group (faction) behavior.

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131. See THE FEDERALIST NO. 10 (James Madison).

132. *Id.*

Rather, I believe that using competing interests to broaden elected officials' views is a normatively good idea. As Sunstein has acknowledged in the context of group polarization, the ideal solution to one-sided interest group interactions with elected officials is not necessarily to eliminate private group deliberation and ensure that all policymaking occurs within a large and heterogeneous public sphere—indeed, such a solution would produce the countervailing problem of drowning out minority viewpoints.<sup>133</sup> Instead, some private “enclave deliberation” should continue to occur in order to “increase the diversity of society’s aggregate ‘argument pool’” and protect minority interests.<sup>134</sup> A system of lobbying regulation that employs competing interests to ensure that legislators hear from advocates on both sides of an issue incorporates the best of both kinds of group deliberation: Majority concerns and a variety of viewpoints can be brought to light on the House and Senate floors and in conference committees, while enclave deliberation by like-minded people with intense preferences on either side of an issue can occur within interest groups themselves and in private meetings between elected officials and interest groups.

In addition to promoting equal access and more balanced legislating, competing interests can and should be encouraged to use lobbying disclosures to increase voter competence. Voters are, for the most part, “civic slackers,” disengaged from politics and disinclined to spend their free time learning about candidates for elective office, let alone combing lobbying disclosure statements to uncover candidates’ relationships with lobbyists.<sup>135</sup> Thus, they need “information entrepreneurs”<sup>136</sup> to bring information to them in an accessible and useful form. Interest groups are ideal information entrepreneurs because they have inherent incentives to examine lobbying disclosures thoroughly and to present information gleaned therefrom to voters in terms that voters can understand and that relate directly to electoral issues. For example, a disfavored interest group might, in furtherance of its own self-interest, seek to alert voters that, “*Congressman A met with representatives of the Gun Lobby X times for a total of Y hours last year but never [or only once or only for Z hours] with groups favoring tougher handgun regulation.*” Groups that enjoy the greatest power and access conversely might use the disclosed information to boast to their members about how much access they receive, noting for example that, “*Our gun lobbyists spent 20 hours with Congressman B last year and the other side spent only 15 minutes with him. Look what great access we’re getting. Keep those checks coming!*” Both such uses of lobbying disclosure would result in greater public awareness of specific elected officials’ contacts with lobby-

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133. Sunstein, *supra* note 122, at 105.

134. *Id.* at 75, 105.

135. See Issacharoff & Karlan, *supra* note 97, at 1727 (quoting Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 901-02 (1998)) (internal quotation marks omitted).

136. See, e.g., Garrett & Smith, *supra* note 101, at 5.



ists for specific interests and would provide the public with useful heuristic cues about how specific elected officials are likely to approach various policy issues if (re)elected. Of course, lobbying reforms designed to encourage interest groups to publicize lobbying disclosures in furtherance of their own narrow political interests may result in soundbite-type dissemination of information about elected officials' lobbying contacts rather than in an impartial presentation of the facts. But at least such reforms would provide voters with *some* information about lobbyists' access to elected officials—far more than can be said of current lobbying regulations.

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

The preceding subpart describes the potential promise of using interest group incentives to craft lobbying reforms designed to achieve the public goals of voter competence, equal access, and more balanced legislating. But how precisely should reformers go about harnessing interest group incentives? This subpart discusses some possibilities and compares lobbying reforms recently proposed in Congress with those dictated by an interest-group-based approach to lobbying regulation.

*1. Who and What Must Be Disclosed*

*a. Disclosure by Public Officials*

First, lobbying regulations must require disclosure of the information that is most useful to competing interests and the public. If, as I have suggested, interest groups care about the relative political access they receive to elected officials, as compared to that received by their competitors, then lobbying reforms cannot be effective unless they compel lobbyists to reveal the extent of their lobbying contacts with individual elected officials. This means that lobbying regulations must require disclosure not only of the particular elected officials and staff members whom a lobbyist has contacted, but also of the approximate amount of time the lobbyist has spent with the official or staff members. Further, in order to address the public's concerns and enable interest groups to gauge the relative responsiveness of specific officials, elected officials—in addition to lobbyists—should be required to file lobbying disclosure statements listing the lobbyists (and their interest group clients) with whom they have met, and approximating the aggregate amount of time spent with each lobbyist or interest group. Such disclosures should include a description of the general context of elected officials' meetings with lobbyists (e.g., in-office, fundraiser, lunch, travel, golf course). In fact, elected officials could be required to make an "office disclosure," listing the approximate aggregate amount of time spent by the official and/or members of his staff in meeting with a particular lobbyist on behalf of a particular client as well as breaking down that larger number into

time spent with the official and time spent with staff. To avoid constitutional problems, these disclosures need not reveal the specifics of what was discussed between lobbyists and elected officials, but need only describe the issue or bill concerning which the lobbying contact was made. In addition, time spent by officials or their staff reviewing informational reports or memoranda provided by a lobbyist should be listed on the disclosure form so as to avoid circumvention problems.<sup>137</sup>

Mandatory disclosures of elected officials' contacts with lobbyists would provide interest groups with a method for evaluating their success, vis-à-vis opposing interests, in gaining access to specific elected officials. Indeed, disclosures of this kind would enable interests to discover patterns in an elected official's lobbying contacts, as well as to identify particular officials whom they may have overlooked and whom they may wish to devote additional resources educating in the future, in order to counterbalance their competitors' efforts. In addition, such disclosures would enable other interested parties, including candidates for elective office and the press, to act as information entrepreneurs and bring data about an incumbent's lobbying contacts to the public's attention, at least in election years. Perhaps of less immediate interest to the public, disclosures about the access that lobbyists receive vis-à-vis elected officials also would help academics, think tanks, and public interest groups conduct research studies—comparing, for example, the relative effectiveness of campaign contributions versus lobbying in influencing elected officials or evaluating how effective campaign contributions are in helping to secure access to elected officials—<sup>138</sup> which then could be shared with society at large and used to inform future regulatory reform efforts.

Some of the reform proposals currently under consideration by Congress take a step in the right direction by advocating that lobbyists disclose their contacts with specific elected officials.<sup>139</sup> But pending proposals do not go far enough because they (1) require no estimation of the amount of time (i.e., the amount of access) that a group has received to a particular official and (2) fail to require any disclosures whatsoever by elected officials. In so doing, pending proposals ignore the public's official-centric and access-related concerns about the lobbying process as well as the substantial dynamic benefits to be gained from disclosure by both officials and lobbyists about the amount of access granted to various interests. Lobbying regulations that require disclosure of lobbyist-official contacts both from lobbyists and from elected officials are likely to engender more accurate reporting

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137. It seems unnecessary to require disclosure of other written communications (e.g., letters) because such writings do not encapsulate the special access with which the public seems to be concerned, but rather, constitute communications of the type that ordinary citizens themselves can and do engage in.

138. See, e.g., de Figueiredo & Garrett, *supra* note 44, at 609-10 (speculating about such issues in the absence of substantial empirical work); Wright, *supra* note 120, at 418 (similarly hypothesizing about such issues).

139. See Special Interest Lobbying and Ethics Accountability Act of 2005, H.R. 2412, 109th Cong. § 104; Lobbying and Ethics Reform Act of 2005, S. 1398, 109th Cong. § 104.

## 2007] Interest-Group-Based Approach to Lobbying Regulation 547

from both sets of actors than are regulations that require disclosures only from one side. This is because the ability to cross-reference lobbyists' reports of elected-official access with elected officials' own reports increases either side's incentives to make thorough reports, lest they be accused of underreporting based on inconsistencies between the two sets of reports. Further, requiring disclosure by elected officials might give such officials greater incentive to pay attention to the interest groups behind the lobbyists with whom they are meeting, since lobbying regulations would require officials to disclose not only the names of the lobbyists they have consulted but also the interests on whose behalf those lobbyists were acting. Elected officials, of course, have an interest in knowing who is lobbying them—indeed, that is a significant part of the rationale behind the current disclosure-based system of lobbying regulation<sup>140</sup>—but to the extent that current disclosures do not provide enough information about the real interests a lobbyist represents or that certain officials may be less than fully diligent in ascertaining such interests,<sup>141</sup> regulations requiring disclosures by officials themselves should force officials more seriously to contemplate the source of the information provided by lobbyists. Finally, disclosure by elected officials could be used to help level the playing field between moneyed and non-moneyed interests. There has been some concern that the costs of filing disclosure reports may, at the margin, discourage nonprofits and other less wealthy interests from lobbying.<sup>142</sup> If elected officials were required to disclose their contacts with such interests, then regulators would have some latitude to ease reporting burdens on nonprofits and to rely on officials' reports to provide information about nonprofits' lobbying activity—if Congress should deem this to be an equitably necessary solution.

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140. See *United States v. Harriss*, 347 U.S. 612, 625 (1954) (“Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures.”); see also sources cited *supra* notes 88, 89, and accompanying text.

141. Insiders indicate that public officials meet many people without knowing whether they are lobbyists or not, let alone what interests they represent, particularly in contexts such as receptions or fundraisers. “The Senator is approached by someone that he does not know, who gives his or her name and then starts to harangue the Senator about a public policy issue. The petitioner may be a lobbyist or not. The Senator does not know.” E-mail from Bill Dauster, Democratic General Counsel, U.S. Sen. Fin. Comm. (Aug. 23, 2005, 07:54 EST) (on file with the author).

142. See also *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986). The Court expressed concern, in the related context of election-related political activity, that

[d]etailed record-keeping and disclosure obligations . . . impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage. . . . Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, . . . it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.

*Id.* at 254-55; see also *1993 LDA Hearing*, *supra* note 54, at 207-13 (statement of Nan Aron, Executive Director, Alliance for Justice) (“[W]e are nevertheless deeply concerned that the principal effect of the bill will not be to increase the amount of information available to the public, but will be to decrease the amount of advocacy undertaken by public interest and other citizen organizations.”).

Requiring elected officials to make disclosures about their lobbying contacts in this fashion is not an entirely unprecedented or fanciful idea. The importance of having disclosure statutes require information both from elected officials and from those who seek to influence them long has been accepted in the related context of campaign finance regulations, which require candidates to report the names of those who contribute to their political campaigns. And at least a few observers and academics had suggested, even before the recent spate of reform proposals, that lobbying regulations should require *lobbyists* to disclose the specific members of Congress or executive branch officials whom they contact.<sup>143</sup> Further, the recent scandals involving Jack Abramoff and Representative DeLay prompted former Speaker of the House Newt Gingrich, on at least one occasion, to call for weekly Internet disclosures of all contacts between lobbyists and elected or appointed officials.<sup>144</sup> Perhaps most relevantly, an analogous disclosure requirement already exists in the administrative context of *ex parte* communications between FCC decision-making personnel and interested parties.<sup>145</sup> The FCC's *ex parte* communication rule mandates that any party who makes a written or oral presentation to FCC decision-making personnel or their staff members must, by the next business day, submit copies or summaries of these presentations to the FCC Secretary for inclusion in the public record;<sup>146</sup> the Secretary, in turn, is required to issue a public notice at least twice a week listing any such *ex parte* presentations.<sup>147</sup> The proposed lobbying disclosure requirements, by comparison, would require less substantive revelations about what was discussed or presented and would do so on a less frequent basis.

### *b. Grassroots Lobbying*

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

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143. See, e.g., Letter from John L. Zorack, President, The Prof'l Lobbying & Consulting Ctr. to Honorable John Bryant, Chairman, Subcomm. on Admin. Law & Gov't Relations of H. Comm. on the Judiciary (Mar. 22, 1993), printed in *1993 LDA Hearing*, supra note 54, at 284-85; Garrett et al., supra note 74, at 147; *1993 LDA Hearings*, supra note 54, at 303, 305 (statement of Wright H. Andrews, Jr.); see also WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 313 (3d ed. 2001) (calling the LDA's failure to require that disclosure reports reveal the names of specific legislators or staff members with whom lobbyists have met a "significant gap").

144. See, e.g., Todd S. Purdum, *Go Ahead, Try to Stop K Street*, N.Y. TIMES, Jan. 8, 2006, at 41; see also Editorial, *Newt as Diogenes in a Dark Capitol*, N.Y. TIMES, Jan. 7, 2006, at A10 (quoting former Speaker of the House Newt Gingrich as warning Republicans that "[y]ou can't have a corrupt lobbyist without a corrupt member or a corrupt staffer on the other end" (internal quotation marks omitted)).

145. See 47 C.F.R. § 1.1200-.1216 (2006).

146. *Id.* § 1.1206(b)(1)-(2).

147. *Id.* § 1.1206(b)(4).

## 2007] Interest-Group-Based Approach to Lobbying Regulation 549

constituents—either through media and mail advertising or through direct meetings—in order to convince them of the groups’ position (if they are not already disposed to favor it)<sup>148</sup> and to encourage them to participate in letter or telephone campaigns expressing their views, en masse, to elected officials.<sup>149</sup> Grassroots lobbying is a fast-growing and important lobbying tactic in today’s world;<sup>150</sup> absent mandatory disclosure of this lobbying technique, interest groups cannot obtain a complete picture of their competitors’ efforts to influence elected officials or particular policy outcomes. Indeed, disclosure of grassroots lobbying efforts may in some ways be *more* important than disclosure of other lobbying activities. Because votes are the ultimate currency in politics and officials must win reelection in order to continue in their jobs, lobbyists’ and interest groups’ ability to demonstrate (or generate the appearance of) public support for their positions may be the most critical element in convincing elected officials to support their policy preferences.<sup>151</sup> Moreover, if grassroots lobbying is left unregulated by LDA reforms, it consequently will become more prevalent, as lobbyists and interest groups gain a substantial incentive to shift their resources to this tactic in an effort to avoid full disclosure of their lobbying activities.<sup>152</sup> In addition, failure to include grassroots lobbying regulation in the LDA would exacerbate the unequal access problem by disproportionately shielding from disclosure the lobbying activities of those interest groups that have substantial resources to spend on advertising campaigns and other means of reaching constituents and that are well organized enough to orchestrate letter or telephone campaigns.

In terms of specifics, grassroots lobbying regulations need not require disclosure of the names of individuals who belong to or are contacted by particular interest group organizations or their lobbyists; the regulations need only mandate disclosure of the fact that a group or its lobbyist has spent \$X for, e.g., “television advertisements in the State of Kansas educating residents about proposed revisions to emissions standards in the Clean Air Act” or “grassroots lobbying, contacting residents of Denver, Colorado, to encourage them to let their Congressmen know that they support our position on the minimum wage.” The SILEAA and LERA reform proposals under consideration in the 109th Congress contained a well-worded disclo-

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148. Grassroots lobbying campaigns typically are targeted towards those who already are members of the interest group running the campaign or who otherwise are inclined to support the group’s public policy goals. See, e.g., Ron Faucheux, *The Grassroots Explosion*, CAMPAIGNS & ELECTIONS, Dec./Jan. 1995, at 20, 22 (defining “grassroots lobbying” in the Grassroots Lobbying Glossary Box).

149. See *id.* (describing methods of contacting legislators).

150. See, e.g., *id.* at 20; Peggy Schmidt, *The New Tax Bill; Legislative Mills Stir Up Lobbying*, N.Y. TIMES, Oct. 12, 1986 (N.J. Careers Insert), at 16.

151. See Issacharoff & Karlan, *supra* note 97, at 1723 (“[V]oters ultimately control politicians’ access to representational opportunities through the vote, and money thus is useful solely in influencing voters’ choices.”).

152. Cf. de Figueiredo & Garrett, *supra* note 44, at 623-24 (describing how political actors, in the analogous campaign finance context, responded to each successive campaign finance reform effort by directing their money to those avenues of spending that had been left unregulated).

sure provision that would capture this kind of information about grassroots lobbying communications while explicitly exempting communications from an interest group to its own members,<sup>153</sup> but the latest version of the LTAA, passed by the Senate in 2007, eliminated the grassroots disclosure requirement.<sup>154</sup> This is an unfortunate setback for lobbying reform that will make it difficult for competing interests to monitor their rivals' lobbying activities.

*c. Aggressive Client Disclosure*

Experience in the analogous field of campaign finance and direct democracy (referenda) teaches that many interests will seek to avoid full disclosure of their lobbying activities by creating separate organizations, subsidiaries, or coalitions with unrelated names that then can be used as the vehicles for making campaign contributions or hiring lobbyists; in this way, only the name of the separate organization, subsidiary, or coalition—rather than the recognizable name of the parent organization or interest group—need appear on campaign finance or lobbying disclosure forms.<sup>155</sup> Such “veiled political actors”<sup>156</sup> can subvert the entire purpose of disclosure statutes by effectively shielding their lobbying activities from public view and causing voters and competing interests to draw inaccurate conclusions about the true nature of the groups to whom elected officials have granted political access, and by whom such officials may have been influenced, on a particular issue. This problem is exacerbated by the fact that at least some interests intentionally seek to mislead voters through the use of patriotic or populist sounding names, which in some instances make them appear to represent neutral policy positions or even positions directly opposite to their true ones.<sup>157</sup>

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153. The section defines grassroots lobbying as:

an attempt to influence legislation or executive action through the use of mass communications directed to the general public and designed to encourage recipients to take specific action with respect to legislation or executive action, except that such term does not include any communications by an entity directed to its members.

Special Interest Lobbying and Ethics Accountability Act of 2005, H.R. 2412, 109th Cong. § 106(a); Lobbying and Ethics Reform Act of 2005, S. 1398, 109th Cong. § 106(a). Perhaps less well worded, but also sufficient, is the definition contained in the LTAA, which characterizes as grassroots lobbying “any attempt to influence the general public, or segments thereof, to engage in lobbying contacts whether or not those contacts were made on behalf of a client” but excepting “any attempt . . . by a person or entity directed to its members, employees, officers or shareholders, unless such attempt is financed with funds directly or indirectly received from or arranged by a retained registrant.” Lobbying Transparency and Accountability Act of 2005, S. 2128, 109th Cong. § 105(a)(2) (as introduced in Senate, Dec. 16, 2005).

154. The amendment stripping the grassroots disclosure requirement from the LTAA was passed on January 18, 2007, by a 55-43 vote. 153 CONG. REC. S737-43 (2007) (Senate Roll Call Vote no. 17).

155. See Garrett & Smith, *supra* note 101, at 28.

156. See *id.* at 2.

157. See *id.* at 22, 35 (describing, for example, creation of organization with neutral-sounding name “U.S. Term Limits” by Republican oil executives who wished to hide their party affiliation); *id.* at 42-43 & n.124 (describing conservative foundations' use of nonprofit organizations named the “American Civil Rights Coalition” and “American Civil Rights Institute” to promote anti-affirmative action initiatives).

## 2007] Interest-Group-Based Approach to Lobbying Regulation 551

The LDA already requires disclosure of “the name, address, and principal place of business of any organization” that “contributes more than \$10,000 toward the lobbying activities” of the registered lobbyist.<sup>158</sup> Some pending reform proposals would go one step further, providing that individual members of lobbying coalitions or associations be treated as lobbyist “clients” and mandating disclosure of such members’ names.<sup>159</sup> These proposals are a good start, but in order effectively to combat the inevitable veiled actor problem, lobbying reforms also should require elected officials and lobbyists to identify the names of organizations who own more than a threshold percentage of the named client organization or of any organization that contributes more than \$10,000 to the lobbying activities of the named *client* organization. In other words, lobbying regulations should ensure the exposure of all major entities that may be involved in a layered organizational structure underlying the named lobbying entity or lobbying *client*. For the sake of consistency, the wording of such a provision can track that currently used by the LDA to ensure disclosure of any layered organizational structures involving foreign entities and can adopt the 20% ownership threshold employed in that section.<sup>160</sup> All such disclosure requirements should apply equally to nonprofit organizations that, as shown by Garrett and Smith in the direct democracy context, otherwise are likely to be used by corporate entities or wealthy political activists to circumvent other lobbying disclosure rules.<sup>161</sup>

## 2. Technical Reforms

### a. Quarterly Filings

If competing interests are to be expected to counterbalance each other effectively and bring information about elected officials’ lobbying contacts to voters’ attention in time for popular elections, then they must themselves receive such information in a timely fashion. Disclosed information is, of course, most useful if disseminated while it is current and still accurately

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158. 2 U.S.C. § 1603(b)(3)(A) (2000).

159. See H.R. 2412, § 107; S. 1398, § 107.

160. See 2 U.S.C. § 1603(b)(4):

Each registration under this section shall contain—

.....

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

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

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

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

161. Garrett & Smith, *supra* note 101, at 30, 35.

describes the lobbying practices of those involved; as the lag between the lobbying activity described and the date of disclosure increases, the value of the disclosed information becomes proportionately less and less useful. Yet, the LDA currently requires that lobbying disclosures be made only once every six months, by which time the information revealed will have become quite stale. Worse, as discussed earlier, even this six-month disclosure period has been treated in an exceedingly casual manner, with 20% of lobbying disclosure forms filed more than three months late and thousands filed more than six months late.<sup>162</sup> In order to ensure the usefulness of lobbying disclosures, LDA reforms must require more frequent and more stringent reporting deadlines. In this respect, recent reform proposals offered in the 109th and 110th Congresses are on the correct track, with provisions requiring that lobbying disclosures be filed on a quarterly, rather than a semiannual, basis<sup>163</sup> and that such disclosures be filed electronically in order to ensure timely public access.<sup>164</sup> Quarterly filings, which were the norm under the 1946 FRLA,<sup>165</sup> would provide reasonably up-to-date information without overly burdening lobbyists or interest groups, while the enforcement reforms suggested *infra* Part II.C.3.b should ameliorate the late filing problem.

*b. Accessibility of Disclosed Information*

In order to be most useful to competing interests and the public, lobbying disclosure forms also should be easily accessible, searchable, cross-referenceable, and user-friendly. Immediate online availability of disclosure forms, as occurs with campaign finance disclosures, is a must for widespread accessibility. Current reform proposals recognize this and accordingly require mandatory electronic filing of all lobbying reports.<sup>166</sup> In addition, lobbying disclosure forms should be downloadable so that interest groups can make use of and disseminate information from such forms quickly and simply. Disclosure forms also should be easily searchable, by interest group name, bill number or general issue area, elected official contacted, lobbyist name, and filing date, so that competing interests, members of the public, the press, campaign officials, academics, and other interested parties can discover any information they seek efficiently and accurately. Recent reform proposals appear to address the need for such electronic manipulability, requiring that a public database of lobbying disclosure information be made available over the Internet, at no charge, "in a searchable,

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162. See sources cited *supra* note 67.

163. See Legislative Transparency and Accounting Act of 2007, S. 1, 110th Cong. § 211 (2007); H.R. 2412, § 101; Lobbying Transparency and Accountability Act of 2005, S. 2128, 109th Cong. § 101 (as introduced in Senate, Dec. 16, 2005); S. 1398, § 101.

164. S. 1, § 219; H.R. 2412, § 102; S. 2128, § 102; S. 1398, § 102.

165. See Act of Aug. 2, 1946, ch. 753, tit. III, § 305, 60 Stat. 839, 840 (repealed 1995).

166. See S. 1, § 219; H.R. 2412, § 102; S. 2128, § 102; S. 1398, § 102.



sortable, and downloadable manner” that links directly to information disclosed under certain sections of the FECA.<sup>167</sup>

### 3. Restrictions and Penalties

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

As mentioned earlier, the current LDA contains one particularly troubling provision that renders certain nonprofit organizations, as defined in Section 501(c)(4) of the Internal Revenue Code, ineligible to receive federal awards, grants, contracts, and loans if they engage in lobbying activities.<sup>168</sup> This provision appears to have arisen in response to the general anti-lobbying mood of the 1992-1995 period and the related notion that public funds should not be used to subsidize an activity that is hated by the public on behalf of organizations with whose positions not all taxpayers agree.<sup>169</sup> But the practical impact of such a provision is to create unequal access between different types of interest groups. Its effect, in essence, is to preclude or substantially restrict the ability of certain interests—those that rely on federal funds to operate and that have particular types of missions, as defined in the tax code—to compete in the information-providing-influence-seeking lobbying game, thus tipping the legislative balance in favor of those interests that have more money.<sup>170</sup> Nonprofit organizations should not have to muster the support of the entire citizenry—an impossible standard given the variety of viewpoints held by citizens throughout the country on a broad spectrum of issues—in order to be allowed to share their members’ views with elected officials or to educate elected officials on the effects of certain policy decisions without foregoing their entitlement to federal assistance.

The LDA’s restrictions on lobbying by 501(c)(4) undermine the goal of relying on interest group competition to produce a balanced presentation of information to elected officials and, thereby, more balanced legislating. There cannot be balanced legislating if certain interests effectively are shut out of the access/influence game. Thus, it is imperative that proposals for reform of the LDA include the elimination of restrictions on 501(c)(4) organizations. Unfortunately, none of the recent lobbying reform proposals offered in Congress has addressed this issue.

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167. See S. 1, § 214(a)(3); H.R. 2412, § 103(a)(3); S. 2128, § 103(a)(3); S. 1398, § 103(a)(3).

168. 2 U.S.C. § 1611 (2000); see *supra* note 59 and accompanying text.

169. See, e.g., 141 CONG. REC. S10,539-40 (daily ed. July 24, 1995) (statement of Sen. Alan Simpson, sponsor of the 501(c)(4) provision); *Lobbying By Groups Receiving Federal Funds: Hearing Before the Subcomm. Economic Growth, Natural Resources, and Regulatory Affairs of the H. Comm. on Gov’t Reform*, 109th Cong. (1995) (testimony of Terrence Scanlon, President of the Capital Research Center), available at 1995 WL 407997.

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

Current law also limits the amount that nonprofits organized under 501(c)(3) of the Internal Revenue Code may spend on lobbying activities without paying taxes, providing that once a qualifying organization exceeds the limit, it will have to pay taxes on 25% of its excess lobbying expenditures.<sup>171</sup> This provision is admirably tailored to promote equitable treatment of nonprofit versus for-profit interests. However, as LDA reforms become effective and more information becomes available regarding the relative lobbying expenditures and access obtained by nonprofits versus their competitors, Congress may wish to tinker with the lobbying limits or tax rate figures currently in effect.

*b. LDA Enforcement*

A system of lobbying regulation that depends on transparency and on political actors' responses to disclosed information will be only as effective as its disclosures are accurate. As discussed earlier, meaningful enforcement is crucial to ensuring the accuracy and usefulness of information disclosed under the LDA.<sup>172</sup> The Act's current enforcement mechanisms are truly symbolic: They provide for no investigations, audits, or other checks on the validity of information disclosed by lobbyists and for little punishment, even if a disclosure violation miraculously is found. In order to remedy this situation, lobbying reforms must give substantial investigative and enforcement authority over the LDA to an executive agency that can, through cross-referencing and other investigative techniques, identify inaccuracies in the information reported on lobbying disclosure forms. Separation of powers concerns dictate that this enforcement authority be located in the executive branch, rather than left with the Clerk of the House or the Secretary of the Senate, because, *inter alia*, placing such authority in the hands of agents of Congress impermissibly would encroach upon the executive branch's constitutional duty to "take Care that the Laws be faithfully executed."<sup>173</sup> Notably, the Department of Justice has expressed concern that even the current LDA, which expressly provides that its provisions should not be "construed to grant general audit or investigative authority to the Secretary of the Senate or the Clerk of the House,"<sup>174</sup> may infringe on the executive branch's authority.<sup>175</sup> Moreover, giving such enforcement authority to the Clerk of the House or the Secretary of the Senate would be ineffective. The House Clerk and Senate Secretary are too close to the lobbying process and daily congressional affairs to be entirely impartial or vigilant in discovering and punishing lobbyists who violate the Act's disclosure re-

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171. See 26 U.S.C. § 4911(a)(1) (2000).

172. See *supra* notes 66-69 and accompanying text.

173. U.S. CONST. art. II, § 3.

174. 2 U.S.C. § 1607(c) (2000).

175. See Letter from Andrew Fois, Assistant Att'y Gen. to the Honorable Henry Hyde, Chairman, House Comm. on the Judiciary (Nov. 7, 1995), *printed in* H. REP. NO. 104-339, at 26-29 (1995).

## 2007] Interest-Group-Based Approach to Lobbying Regulation 555

quirements. Indeed, some lobbyists are former members of Congress with whom the Clerk and Secretary once may have worked closely.

The Federal Election Commission (FEC), which oversees enforcement of campaign finance regulations, seems an ideal agency in which to situate enforcement authority for the LDA. First, there are obvious synergies between the disclosures made under campaign finance laws and those made under the LDA, including the fact that both statutes call for disclosure of lobbyist contributions to candidate campaigns. The agency charged with oversight of the LDA thus will have to engage in at least some cross-referencing with the FEC in order to check the accuracy of lobbying disclosures. Further, because lobbying and campaign contributions tend to be complementary activities, often conducted in tandem,<sup>176</sup> many of the providers of lobbying disclosure information are likely to be the same entities who provide information about campaign contributions; likewise, many of the consumers of lobbying information—the reporters, public interest groups, and academics who wish to track lobbying—also will be the consumers of campaign finance information. Accordingly, much of the FEC's experience dealing in the realm of campaign finance can translate directly to the lobbying context. Second, and related to the first, expenses and administrative hassles can be kept to a minimum if the LDA confers authority for its enforcement in an existing agency rather than by creating a new agency, with new offices, personnel, etc. While the FEC's budget would have to be increased and other enhancements made to enable it to absorb the new duties associated with lobbying oversight, such enhancements would prove less burdensome than would creating an entire new agency.

In addition, the penalties for inaccurate reporting or noncompliance with lobbying regulations must be enhanced in order to give lobbyists and interest groups greater incentives to be diligent and forthright in their reporting. Specifically, fines for inaccurate reporting should be changed from the current flat sum of \$50,000 to something like 20% of the lobbyist's fees or the interest group's lobbying expenditures; this would make penalties more equitable across lobbyists and interest groups and more painful to the bank accounts of wealthy lobbyists and interests. Moreover, the FEC or other oversight agency should be directed to distribute to major news outlets a list of all lobbyists and interest groups that have been fined for making inaccurate lobbying disclosures.<sup>177</sup> Fear of public reprisal resulting from the revelation of such information should encourage lobbyists and interest groups to engage in more accurate reporting. Finally, in order to ensure that the FEC's newly conferred investigative powers have teeth and are not used in a tar-

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176. See Tripathi et al., *supra* note 98, at 151-52; Wright, *supra* note 120, at 418 (citing LARRY J. SABATO, PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES 124 (1984)).

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

geted partisan manner to harass particular officials or lobbyists, lobbying regulations could mandate random auditing of lobbyist and official disclosure reports on a periodic basis.

#### *4. How and Where Pending Lobbying Reform Proposals Fall Short*

The numerous reforms proposed by the 109th and 110th Congresses address and, in some instances even match, the proposals suggested above. But they do not go nearly far enough in bridging the gap between the public's and Congress's concerns. Many of the proffered reforms are superficial, calling for improvements such as quarterly reporting and mandatory online accessibility to disclosure forms without substantively addressing the public's concerns about the access that lobbyists obtain to elected officials. The SILEAA's and LERA's requirement that lobbyists disclose the names of specific elected officials with whom they have met, for example, pays only lip service to the public's concerns because it provides no information whatsoever about the relative amount of access that different lobbyists obtain to elected officials and places no responsibility on public officials themselves to account to the voters who elected them.

Further, despite the substantial weaknesses that have been identified in the LDA's enforcement mechanisms, recent reform proposals offer only minimal, symbolic enforcement reforms. The SILEAA, LTAA, and LERA would leave all enforcement authority as it is—in the hands of the House and Senate clerks and with power in the U.S. Attorney's office to prosecute offenders—but would add a requirement that the Government Accounting Office (GAO) investigate and report to Congress semi-annually regarding how well the House and Senate clerks are performing their duties.<sup>178</sup> The SILEAA proposal then would require the House Administration Committee and Judiciary Committee to hold hearings to consider the implications of any recommendations made by the GAO's reports.<sup>179</sup> Thus, all enforcement authority essentially would remain with the legislative branch, no entity would be charged with investigating the accuracy of lobbying disclosures, and no other checks or balances would exist to ensure accurate reporting. Moreover, the SILEAA, LTAA, and LERA reform proposals offer only minimal changes in the civil penalties applicable for violations of the Act, increasing the potential fine for failing to file lobbying reports—not for making inaccurate disclosures—from \$50,000 to \$100,000.<sup>180</sup> Such a penalty remains a purely symbolic one, amounting to merely a drop in the bucket for many lobbyists and interest groups, and is likely to be far less effective than are fines based on a percentage of lobbying income or lobby-

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178. See Special Interest Lobbying Ethics Accountability Act of 2005, H.R. 2412, 109th Cong. § 401; Lobbying Transparency and Accountability Act of 2005, S. 2128, 109th Cong. § 401 (as introduced in Senate Dec. 16, 2005); Lobbying and Ethics Reform Act of 2005, S. 1398, 109th Cong. § 401.

179. H.R. 2412, § 403.

180. H.R. 2412, § 402; S. 2128, § 107; S. 1398, § 108.

## 2007] Interest-Group-Based Approach to Lobbying Regulation 557

ing expenditures, or the threat of media publicization of the names of entities who make inaccurate disclosures.

The most promising reform proposals are those tacked onto the 2007 LTAA by the 110th Congress, requiring disclosure of earmarks and lobbyist fundraising activity. The earmarks proposal, unlike most of the reforms offered in the wake of the Abramoff scandal, focuses on elected officials rather than on lobbyists. Moreover, it has the potential to (1) improve voter competence by making public elected officials' heretofore secret favors to pet interests, and (2) promote more informed legislating by other Senators, who will be made aware of their colleagues' special favors before voting to implement them.<sup>181</sup> Indeed, the earmark reforms may even aid interest groups in monitoring their competitors' lobbying successes. The chief downside to this reform is that it binds only Senators, not other elected officials, and is limited to the narrow context of earmarks—leaving untouched the bulk of the conduct with which lobbying regulation (and the public) is concerned. The new provision requiring disclosure of lobbyist fundraising activities (including bundling) likewise is a promising, though limited, step towards increasing the information available to voters and competing interests.

Pending lobbying proposals also offer a number of less promising reforms not dictated by an interest-group-based approach to lobbying regulation, including extension of the ban on revolving-door lobbying by former members of Congress to two or more years;<sup>182</sup> creation of an internal ethics task force;<sup>183</sup> and stricter disclosure requirements/bans on lobbyist-sponsored travel by elected officials.<sup>184</sup> These reforms are little more than direct, symbolic responses to the scandal-of-the-day—lobbyist Jack Abramoff's donation of travel expenses and other expensive gifts to numerous elected officials and their aides. While these proposals may prove useful in inspiring Congress to ratchet up internal oversight of its own members, reforms of this kind fail to address the public's primary underlying concern about whom elected officials consult with when making policy decisions and about how much access specific interest groups and lobbyists receive to particular elected officials. Extension of the ban on lobbying by former members of Congress, for example, sounds good but accomplishes little, as it merely delays the onset of a practice that the public considers suspect. It thus is a classic example of a symbolic solution that allows Congress to appease the public superficially while continuing as usual a lobbying prac-

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181. Specifically, Title I, Section 103 of the 2007 LTAA would amend the Standing Rules of the Senate to require that all Senate committee and conference reports (1) provide a list of earmarks contained therein, (2) identify the Senate member who proposed the earmark, (3) explain the earmark's "essential government purpose," and (4) make such information available to the public on the internet at least 48 hours prior to its consideration in the Senate. *See* S. 1, §§ 103-104, 110th Cong., 1st Sess. (Jan. 18, 2007).

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

183. H.R. 2412, § 404.

184. H.R. 2412, §§ 301-304; S. 2128, §§ 301-304; S. 1398, §§ 301-307.

tice that Congress finds useful. Likewise, creation of an ethics task force and the institution of stricter travel rules enable Congress to appear tough on its members but will do little to change the way that lobbying is practiced or to provide the public with more information about lobbyist interactions with (as opposed to monetary expenditures for) members of Congress.

The one non-interest-group-based reform proposal that goes beyond symbolism is the 2007 LTAA's ban on lobbying by spouses of elected officials. The ban, admirably, strikes at a core public concern—undue influence exerted by lobbyists based on their special personal ties to an elected official, rather than on the value of the information or technical expertise they provide—and does so in a way that at least does not appear open to blatant circumvention.

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

### *C. Possible Objections and Concerns Regarding the Proposed Reforms*

#### *1. Practical Concerns*

The primary criticism likely to be leveled against the proposed reforms is that they will be unduly burdensome, requiring lobbyists and elected officials to spend an excessive amount of time tracking their contacts with each other. But while reforms requiring lobbyists and elected officials to disclose the approximate amount of time they have spent together undoubtedly will increase the administrative paperwork required of both entities, neither lobbyists nor elected officials will have to reinvent the wheel in order to comply with the new disclosure requirements. Many lobbyists already maintain time logs, for client billing purposes, of their contacts with congressional and executive branch officials on behalf of specific clients. Similarly, elected officials and their staffs already keep calendars listing their appointments, lunches, speaking engagements, and the like with particular lobbyists and interest groups. Such records could be used at least as a starting point for disclosure of lobbying contacts between elected officials and lobbyists.

## 2007] Interest-Group-Based Approach to Lobbying Regulation 559

Further, the disclosure requirement itself can be crafted with some sensitivity to this concern by, for example, including a *de minimis* provision exempting from disclosure communications with a lobbyist that total less than half an hour in a three month period and allowing elected officials to approximate the amount of time spent with a lobbyist rather than requiring strict, law-firm-style billing specificity.

A second potential problem with reforms that require greater disclosure of lobbyist interactions with elected officials is that they might lead the already misinformed public to draw inaccurate and unfair conclusions about lobbyists' influence. Faced, for example, with the knowledge that Congresswoman A spent twenty hours meeting with Interest Group X and that she voted in favor of Legislation Q, which was supported by interest group X, the public might assume that Congresswoman A voted the way she did because of pressure from Interest Group X—although, in fact, Congresswoman A always may have supported Legislation Q and may have met with Interest Group X in order to strategize with its members about how to get the law enacted.<sup>185</sup> But while fears that the public will misinterpret disclosed information are not unrealistic, neither are they a problem that should prove fatal to the proposed reforms. The most effective way for Congresswoman A to combat misinterpretations of this kind is to spend equal or near-equal amounts of time meeting with Interest Group X *and* its competitors so that she may be in a position to explain to the public that it was not pressure from either group, but her own convictions after considering information presented by either side, that formed the basis for her vote. As Sunstein's polarization work suggests, reforms that inspire or force Congresswoman A to provide equal time to Interest Group X's competitors in this manner, even if she does so purely for the sake of public appearances, are likely to result in some tempering of Congresswoman A's views and, accordingly, in a less extreme final version of Legislation Q.

Relatedly, the proposed reforms might be criticized on the ground that they will produce more, rather than less, lobbying—a result that could anger the lobbying-hating public and undermine the goal of increasing public confidence in the political process. In other words, the public may view disclosures detailing the time elected officials spend with lobbyists and interest groups as evidence that special interests, rather than public concerns, control government policy. This, again, is a realistic danger but not one that augurs against adopting the proposed reforms. More lobbying, as explained above, is not necessarily a bad thing—particularly if it results in a more balanced presentation of viewpoints and data to elected officials. Indeed,

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185. A substantial body of political science literature suggests that this kind of interaction between lobbyists and legislators is common—that lobbying efforts do not persuade legislators but merely reinforce or encourage those who already agree with them. *See, e.g.*, RAYMOND A. BAUER, ITHIEL DE SOLA POOL & LEWIS ANTHONY DEXTER, *AMERICAN BUSINESS AND PUBLIC POLICY* 353 (2d ed. 1972); DONALD R. MATTHEWS, *U.S. SENATORS AND THEIR WORLD* 191 (W.W. Norton & Co. 1973) (1960); MILBRATH, *supra* note 83, at 328-31; Wright, *supra* note 120, at 419.

more evenhanded lobbying by interests on either side of an issue may do a great deal of good for the legislative process. The problem, then, is not with lobbying per se but with the public's one-dimensional view of all lobbying as unequivocally malevolent. The democratically correct solution cannot be to avoid reforms that are good for the legislative process out of fear that the public will misinterpret the consequences; rather, it should be to educate the public about the value that lobbyists add to the political process. Specifically, elected officials, perhaps aided by public interest groups, should emphasize the informational expertise that lobbyists provide, both when campaigning for passage of reforms to the LDA and when making disclosures thereunder. For example, when enacting LDA reforms, elected officials should explain to the public that policymakers depend on lobbyists to educate them about the impact of certain policy proposals and that the purpose of lobbying reforms is (1) to enable the public to see the type of help and influence that lobbyists provide and (2) to encourage public officials to consult with and obtain information from groups on both sides of an issue. Similarly, when making disclosures under the Act, elected officials should be specific about the informational assistance provided by lobbyists—explaining, for example, that they or their staff, “*Met with Interest Group X for approximately twenty hours, during which time the group’s lobbyist provided me with data including Regulation No. 5555’s long-term impact on the quality of drinking water.*” In this manner, disclosures revealing that elected officials have met with interests on both sides of an issue may help to undermine the notion that officials are controlled, rather than assisted, by interest groups. While efforts such as these may not solve the public perception problem entirely, they ought at least to improve the public’s views about the lobbying process.<sup>186</sup>

A third possible concern that may be raised against the proposed reforms is that they could disadvantage incumbents. After all, at election time, voters will have information about the lobbying contacts only of those who already have held office, leaving challengers for elective office with substantial ammunition to use against incumbents but providing incumbents with no comparable weapon. Again, this is a realistic concern but not one that should be considered debilitating. Many challengers for elective office themselves will be prior officeholders, as elected officials often are career public servants who are likely to have served in other federal positions or in state government before seeking higher or federal office. In such cases, information about a challengers’ prior lobbying and interest group contacts also should be available in some capacity, particularly if reforms requiring elected officials to disclose their lobbying contacts are adopted by state governments. Even if no lobbying contact information is available for a challenger, however, it hardly is unfair to force incumbents to defend the

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186. Of course, some of the public’s perceptions about lobbying may be unalterable, but to the extent that this is the case, there is little short of outlawing lobbying entirely that LDA reforms can do to satisfy the public.



## 2007] Interest-Group-Based Approach to Lobbying Regulation 561

choices they have made, including the people to whom they have chosen to listen, while serving at the people's pleasure. Indeed, it is appropriate for an incumbent's prior record to come under greater scrutiny than his challenger's because the incumbent already has been serving in the position for which he is seeking reelection and should be held accountable to his constituents for the manner in which he has performed. In fact, to the extent that the proposed disclosure requirements act to disadvantage incumbents, this may even be a beneficial development that helps to balance out the incumbency advantage—name recognition, franking privilege, etc.—currently enjoyed by those running for reelection.

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

*wholeheartedly with either side but because I wanted to take into account all viewpoints before making a final decision*”—and to make a forceful case to the public that the diversity of the groups with whom they have met in fact demonstrates that political access does not equate to arm-twisting or a pledge of ideological allegiance.

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

## 2. *Constitutional Concerns*

Any proposal to reform the LDA must be sensitive to the fact that lobbying is an activity protected by the First Amendment rights “to petition the Government for a redress of grievances”<sup>187</sup> and to freedom of speech,<sup>188</sup> and that regulations which burden or chill the exercise of these rights may be constitutionally suspect. The reforms suggested in this paper should survive constitutional scrutiny for a number of reasons.

First, although lobbying is a protected First Amendment activity, the protection it enjoys is not absolute. As with other First Amendment rights, Congress may impose disclosure requirements that burden the rights of petition and speech if it can “convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest”<sup>189</sup> and if the disclosure requirements are narrowly tailored to achieve the state’s interests.<sup>190</sup> Specifically, lobbying disclosure requirements have received the Supreme Court’s express stamp of approval when their purpose is “to maintain the integrity of a basic governmental process.”<sup>191</sup> The disclosure requirements proposed above fit this description, as they are designed to restore the public’s faith in the “integrity of [the] governmental process” by providing information that directly addresses the public’s concerns about lobbyist access.<sup>192</sup> The underlying premise behind the proposed reforms is that the public cares about lobbyists’ ability to interact with and influence elected officials and that the best way to satisfy the public and to ensure its belief in the integrity of government thus is to re-

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187. U.S. CONST. amend. I.

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

189. *Gibson v. Fla. Legislative Investigation Comm’n*, 372 U.S. 539, 546 (1963).

190. *United States v. Harriss*, 347 U.S. 612, 632 (1954).

191. *Id.* at 625.

192. *Id.*

## 2007] Interest-Group-Based Approach to Lobbying Regulation 563

quire elected officials and lobbyists to disclose their contacts with each other.

Further, Supreme Court decisions in the campaign finance context suggest that the proposed reforms would be found to intrude only minimally upon the freedom of speech and that the specific purposes the reforms are designed to achieve would be held to justify such intrusions. In *Buckley v. Valeo*, for instance, the Court ruled that the governmental interests in (1) providing the electorate with meaningful information about candidates and the interests to which they are likely to be responsive and (2) deterring actual corruption and the appearance of corruption, justified campaign finance regulations limiting individual contributions and requiring identification of individuals who contribute to a campaign.<sup>193</sup> Like the campaign finance regulations in *Buckley*, the disclosure requirements proposed in this Article are designed to provide the electorate with meaningful information about candidates—i.e., information about the relative amount of access that such candidates have provided to particular lobbyists, on behalf of particular interest groups, in the course of making policy decisions while in office thus far. In so doing, the proposed reforms also are meant to combat the “appearance of corruption” by demonstrating to the public that political access does not always translate into legislative success. Moreover, the proposed reforms require only the minimum intrusion necessary to address the public’s concerns about lobbyist access—that is, disclosure of elected officials’ contacts with lobbyists. They do not prohibit any type of lobbying conduct or require disclosure of ordinary citizens’ contacts with officials. In this respect, the proposed reforms are far less burdensome of First Amendment rights than FECA’s spending caps, which prohibit conduct, or FECA’s requirement that *individual* campaign contributors be identified—both of which were upheld in *Buckley*.<sup>194</sup>

Similarly, in *McConnell v. FEC*,<sup>195</sup> the Court ruled that the important governmental interest in combating the appearance of “undue influence on an officeholder’s judgment” justified even greater restrictions on campaign spending in the form of soft money donations.<sup>196</sup> The *McConnell* Court noted that if it were to deny Congress the ability to regulate the appearance of undue influence, then “the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”<sup>197</sup> This governmental concern applies equally in the lobbying context, where the risk of “undue influence [over] an officeholder’s judgment” is at least as great as it is in the campaign contribution context.<sup>198</sup> Indeed, influencing officials’ judgment is precisely the point of lobbying

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193. 424 U.S. at 66-68.

194. *Id.*

195. 540 U.S. 93 (2003).

196. *Id.* at 143 (quoting *FEC v. Colo. Republican Fed. Campaign*, 533 U.S. 431, 441 (2001)).

197. *Id.* at 144.

198. *Id.* at 143 (quoting *Colo. Republican Fed. Campaign*, 533 U.S. at 441).

interactions, and a failure to regulate lobbying is at least as likely as is a failure to regulate large campaign contributions to promote the cynical assumption that well-connected interests, rather than voters, control the legislative process. The Court in *McConnell* implicitly acknowledged as much, observing that the purpose of large campaign contributions, the regulation of which it upheld, is to gain political *access* to elected officials.<sup>199</sup> Under *McConnell*, it is difficult to imagine that the Court would find lobbying regulations that require disclosures about political access *qua* political access to be unconstitutional.

Despite these compelling governmental interests, however, opponents may argue that the proposed reforms violate the First Amendment because they (1) force lobbyists and interest groups to reveal their lobbying strategies and thus might have a chilling effect on certain interest group or lobbyist behavior; (2) require disclosure of grassroots lobbying communications with members of Congress; and (3) violate associational rights by mandating identification of the members of lobbying coalitions and major contributors to interest groups that engage in lobbying. These arguments are misguided. As Bill Eskridge has noted in testimony concerning the 1993 LDA, any useful disclosure requirement necessarily will reveal some interest group strategy and probably also will deter groups from making certain calculated moves.<sup>200</sup> But this fact does not *ipso facto* render the requirement unconstitutional. Interest groups, like all citizens, have a right to petition their government and to engage in political discussions with elected officials; they do not have a right to hide the fact that they have exercised their rights of petition and political discussion, or the manner in which they have exercised these rights, from the rest of the citizenry—particularly where exposure of interest group strategy is itself likely to serve the public interest. More specifically, the chilling effect argument against disclosure of elected officials' lobbying contacts is unpersuasive. While an interest group understandably may prefer that its lobbying contacts remain secret, the prospect of disclosure generally should not destroy the value of the contact or cause the interest to abandon a particular strategy unless there was something dishonest or manipulative about the strategy in the first place. "If you're afraid to disclose what committee or agency you're contacting, you might be up to no good."<sup>201</sup> It is not for nothing that Justice Brandeis observed that

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199. See, e.g., *id.* at 148 n.46, 148-50 ("[T]hose checks open the doors to the offices of individual and important Members of Congress and the Administration . . . Labor and business leaders believe—based on experience and with good reason—that such access gives them an opportunity to shape and affect governmental decisions . . ."); *id.* at 149 ("The majority of those who contribute to political parties do so for business reasons, to gain access to influential members of Congress" (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 489 (D.D.C. 2003)) (internal quotation marks omitted)).

200. See *1993 LDA Hearing*, *supra* note 54, at 234, 249 (statement of William N. Eskridge, Jr.).

201. *Id.* at 249-50. Eskridge illustrates the point with a hypothetical involving a lobbyist, acting on behalf of Jane Doe Ministries, who makes an *ex parte* contact with the FCC and also contacts a staff member of the relevant House oversight committee. *Id.* at 248-49. Such disclosures would reveal the client's strategy of working the FCC from within the agency as well as through congressional pressure. *Id.* at 249. Disclosure requirements that force the lobbyist to report the contacts with both the FCC and

## 2007] Interest-Group-Based Approach to Lobbying Regulation 565

“[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman.”<sup>202</sup> Indeed, arguing against or invalidating disclosure of lobbying contacts on this ground would be akin to invalidating source disclosure requirements in the campaign finance context because some interests might be dissuaded from running campaign advertisements on the theory that their message would be less effective if taken in light of its source. In fact, a similar chilling effect argument already has been rejected by the Supreme Court in *Harriss*, which held that any First Amendment restraint resulting from interest group reluctance to engage in lobbying activities for fear of disclosure consequences “is at most an indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from criminal libel laws.”<sup>203</sup> Again, to the extent that there are legitimate retaliatory concerns that may result in the chilling of a pariah group’s lobbying activity, provision can be made allowing lobbyists and elected officials to seek an FEC ruling excusing them from disclosing that particular interest’s information.

The argument that mandatory disclosure of grassroots lobbying violates the First Amendment is similarly unconvincing. The reforms proposed in this Article, and in the SILEAA and LERA, would not require disclosure of communications from constituents—the “grassroots”—to members of Congress. Nor would they require revelation of interest groups’ membership lists or communications with their members.<sup>204</sup> The proposed reforms would require disclosure only of communications made to the grassroots from lobbying organizations in an effort to drum up support for a particular position. In other words, the disclosure sought in these reforms is of expenditures made by hired guns to generate grassroots, or “astroturf,”<sup>205</sup> activity. There is no constitutional right to secrecy regarding the fact that a hired lobbyist has tried to persuade citizens of a particular viewpoint.<sup>206</sup> On the other hand, there is a strong governmental interest in such disclosure because grassroots lobbying is a common lobbying tactic in the modern era, whose omission

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the committee may deter the lobbyist from engaging in this strategy because the FCC might then discount any phone calls that it gets from the committee, given the revelation that the committee is acting at the lobbyist’s behest rather than based on its own conviction. *Id.* But if this is in fact what happens, Professor Eskridge observes, it may well be in the public’s best interest. *Id.*

202. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting *LOUIS BRANDEIS, OTHER PEOPLE’S MONEY* 62 (1933)) (internal quotation marks omitted).

203. *United States v. Harriss*, 347 U.S. 612, 626 (1954).

204. Indeed, such communications explicitly are exempted from disclosure by the SILEAA. *See* Special Interest Lobbying and Ethics Accountability Act of 2005, H.R. 2412, 109th Cong. § 107.

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

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

would leave the public with an incomplete picture of the lobbying process.<sup>207</sup> Further, as is the case with disclosures of lobbyists' contacts with elected officials, if the mere prospect of disclosure deters lobbyists from engaging in grassroots lobbying, then this suggests that the grassroots tactic owes its effectiveness in part to misrepresentation rather than that the regulation of grassroots lobbying is unconstitutional.

Finally, while regulations requiring disclosure of major contributors to a lobbying client and of the members of interest group coalitions do intrude on contributors' and coalition members' First Amendment rights, such reforms should survive constitutional scrutiny so long as they are tailored to serve the governmental interest in guarding against circumvention of disclosure requirements. In fact, in the analogous campaign finance context, the Supreme Court specifically has recognized the validity of regulations designed to prevent the circumvention of other, first-order, regulations that aim to combat the appearance of corruption.<sup>208</sup> The Court similarly has suggested, in the context of direct democracy referenda, that regulations requiring disclosure of the identity of the proponents of a ballot question and the total amount of money spent for a petition campaign would be appropriately tailored to serve the state's substantial interest in controlling special interests' domination of the initiative process.<sup>209</sup> The government's interest in preventing circumvention of lobbying disclosure laws should be considered as strong as its interest in preventing circumvention of campaign contribution limits or silent domination of the referendum process by undisclosed interest groups: Interest group circumvention of lobbying disclosure requirements both would give voters an incomplete picture of how particular lobbyists and groups interact with elected officials and would skew individual interests' ability to compete effectively with their issue opponents; thus, the government cannot achieve its interest in providing "meaningful information" to the electorate unless it is permitted to require disclosure of interest group coalition members and major financial contributors to lobbyists' clients.<sup>210</sup> Further, the lobbying reforms proposed herein are narrowly tailored to serve the government's interests without unduly infringing upon First Amendment rights, in that they would require identification of the major players behind a lobbying client while permitting de minimis contributors of less than \$10,000 to remain unnamed.<sup>211</sup>

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207. See, e.g., Faucheux, *supra* note 148, at 20.

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

209. See *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 202-03 (1999).

210. See *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976).

211. See discussion *supra* Part III.B.1.c.

#### IV. GETTING LDA REFORMS ENACTED

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

##### *A. Keys to Convincing Congress*

###### *1. Lessons from the Campaign Finance Context*

An important starting point for gauging the likelihood that Congress will enact lobbying reforms requiring disclosures from elected officials—rather than merely from lobbyists—is to understand why Congress was willing, in the related campaign finance context, to enact regulations that require disclosures from candidates for elective office. Put slightly differently, why did Congress impose disclosure requirements on public officials in the campaign finance context but not do so in the lobbying context? The answer, I believe, is twofold. The first fold lies in differences between the manner and frequency with which campaign finance issues, versus lobbying process issues, are brought to the public's attention. Campaign finance issues become part of the public consciousness, on some level, at least every two years—i.e., every time a national election takes place. The public may pay more attention to campaign finance issues in certain election years than in others, but candidates' fundraising efforts are a topic always in the news, at least in the background, during an election year. Concerns about the lobbying process, by contrast, rise to the level of news only in the wake of a scandal. Further, when scandals in either sphere grab headlines, the press tends to frame campaign finance abuses differently than it does lobbying abuses: Campaign finance abuses tend to be tied to the particular candidates or political parties who solicited and received the questionable contributions, whereas lobbying abuses tend to be tied more to the interest groups or lobbyists responsible for the questionable tactic. The Clinton Administration's infamous sale of stays in the Lincoln Bedroom, for example, prompted criticism and outrage against the President and his staff, not against the donors who bought themselves a date with history; by contrast, the Keating savings and loan scandal, which involved five United States Senators, tellingly was named after the corrupt Lincoln Savings and Loan chairman, Charles Keating, rather than the elected officials who engaged in questionable behavior.<sup>212</sup> The recent scandal involving Representative DeLay was unusual in lobbying history for its focus on a particular elected

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

official—and, not coincidentally, has prompted one of the only serious reform proposals calling for disclosure of the specific elected officials whom lobbyists contact—but even this scandal focused at least as much on the activities of lobbyist Jack Abramoff as it did on Representative DeLay.<sup>213</sup> As a result of such media and congressional portrayal, lobbying abuses generally have been viewed as the work of specific lobbyists, on behalf of specific interests, directed towards Congress as a whole, whereas campaign finance abuses have been seen as stemming from the soliciting candidate's campaigns. Thus, elected officials are viewed as passive acceptors of lobbyist gifts, whose transgressions lie in taking advantage of lavish perks and allowing such gifts to influence them, while candidates campaigning for office are viewed as responsible for, if not the architects of, questionable contribution schemes.

The second reason for Congress's willingness to impose disclosure requirements on its own members in the campaign finance context is more practical: The majority of actors on the other side of campaign finance contributions are individual citizens, not lobbyists. Congress would have come under serious political fire if it had sought to place the burden of disclosure on individual citizens rather than on candidates running for elective office. When the entity on the other side of a campaign contribution is not a citizen but a PAC, campaign finance regulations do require disclosure from that entity in addition to candidate disclosure. Further, even prior to enactment of campaign finance laws, candidates' reelection committees kept track of contributions made to candidates' campaigns; thus, candidate-side disclosure of campaign finance contributions did not require reinventing the wheel but could instead build upon existing internal records.

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

## 2. *Engendering Public Support*

Not surprisingly, then, one key ingredient for successful reform of the LDA is public perception and public support for specific reforms. In order for elected officials to be persuaded to enact specific reforms—e.g., disclo-

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



## 2007] Interest-Group-Based Approach to Lobbying Regulation 569

sure of lobbyist contacts with specific officials, disclosure by officials, disclosure of grassroots lobbying, stronger penalties and enforcement mechanisms—the public first must agitate against failures in the current lobbying regulation system that correspond to these reforms. Instead of vague dissatisfaction with lobbyists and criticism of the influence that interest groups exert over elected officials, the public would need to express concern or even ire about grassroots lobbying, inadequate oversight of compliance with lobbying disclosure rules, and the fact that lobbying regulations fail to require any information about lobbyist access to elected officials, let alone any disclosures by elected officials themselves.

Experience teaches that such specific public pressure is likely to occur only if one of two developments takes place: (1) the public receives news of a large scandal involving grassroots lobbying, or particular officials' contacts with lobbyists, or widespread noncompliance with lobbying regulations; or (2) political elites—whether candidates for elective office, party heads, or heads of public interest organizations such as Ralph Nader—orchestrate a national campaign highlighting deficiencies in the current LDA and calling for reforms akin to those proposed in this Article. The power of a public scandal to prompt reforms tailored (sometimes myopically) to prevent recurrences of similar scandals in the future is historically obvious and needs little exposition. The power of political elites to shape public opinion is perhaps less well understood, except by political scientists. In brief, some political scientists have posited that public opinions overwhelmingly are developed through heuristic cue-taking from political elites.<sup>214</sup> The public pays little attention to political facts on its own; it becomes interested only when political actors, often in political speeches, make such facts symbolically threatening or reassuring—and even then the public responds to the cues from the political elites' speeches, not to direct knowledge of the facts.<sup>215</sup> Thus, efforts by political candidates, parties, or prominent political figures (e.g., Ralph Nader or Ross Perot) to connect public dissatisfaction with the lobbying process to a particular cause and to generate public support for specific reforms aimed at eradicating that cause—i.e., to make lobbying facts symbolically meaningful—could be the key to successful LDA reform. This is precisely what happened in 1992 when presidential candidate Ross Perot made revolving-door lobbying a campaign issue<sup>216</sup> and roused public sentiment to such an extent that mainstream candidate Bill Clinton also took on the cause and, upon winning the

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214. See, e.g., Kang, *supra* note 106, at 1162 (citing JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 40-52 (1992)).

215. See EDELMAN, *supra* note 13, at 172.

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

election, issued an executive order restricting revolving-door lobbying by executive branch officials.<sup>217</sup>

The first condition for reform, public scandal, undoubtedly was satisfied during the summer and fall of 2005 by revelations of Representative Tom DeLay's ethics violations involving lobbyist-paid travel and other gifts. Predictably, this scandal inspired several reform proposals, including the SILEAA and LERA, which took the unusual step of calling for disclosures of lobbyist contacts with specific public officials. But the second condition, support from political elites, also must exist if lobbying reform is to make it past the proposal stage and become law. Indeed, history teaches that championing by political elites plays a *more* important role than the existence of a public scandal in effecting successful lobbying reform: Despite numerous previous attempts at reform in the wake of lobbying scandals, Congress ultimately enacted the FRLA and the LDA, not in response to a public scandal, but as the result of internal pressure to reorganize the way Congress operated (1946)<sup>218</sup> and public pressure, generated by political elites, to "change the way business is done in Washington" (1992 and 1994),<sup>219</sup> respectively.

It is, at this point, unclear whether the requisite support from political elites will emerge. Various Senators and Representatives started the ball rolling, but then abandoned it, allowing political in-fighting to delay passage of, and even strip key provisions (e.g., grassroots lobbying) from, their proposed reforms. Speaker Nancy Pelosi seems to have made lobbying reform a priority in the 110th Congress, and Senators McConnell and Reid have put the issue back on the table with some meaningful proposals in the 2007 LTAA. But it still is unclear whether these reforms ultimately will stick, and more championing from elites will be necessary if the reforms suggested in this Article are to succeed. The Democratic Party (insofar as it seeks to keep the DeLay scandal fresh in the public's mind) or public interest groups could be ideal candidates for pushing forth the reforms suggested in this Article, particularly those relating to stronger penalties and transfer of enforcement authority to the FEC. Given legislators' self-interested behavior, however, it is unlikely that any current member of Congress will take up the mantle in favor of disclosure by elected officials; thus, this reform likely would have to be brought to the fore by an outsider, akin to a Ross Perot in 1992, in order to succeed. Newt Gingrich may perhaps be able to fulfill this role, if he is so inclined, given his name recognition and his

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

218. The FRLA was enacted as a last-minute add-on to the Legislative Reorganization Act of 1946 and was "in effect carried through on the coattails of the other Congressional reforms regarded as more important by Congress." See Kennedy, *supra* note 88, at 548.

219. See sources cited *supra* note 18 and accompanying text.

## 2007] Interest-Group-Based Approach to Lobbying Regulation 571

penchant for no-nonsense comments such as, “You can’t have a corrupt lobbyist without a corrupt member or a corrupt staffer on the other end.”<sup>220</sup>

### 3. Political Reality

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

### B. Interest Group Support

Madisonian ideals aside, the political reality is that we live in a Mancur Olson<sup>221</sup> world where wealthy, powerful, organized interests tend to exert disproportionate influence over the legislative process. While Congress has proved capable of enacting lobbying reforms without the support of organized interests,<sup>222</sup> the reforms proposed in this Article, particularly those calling for disclosure of lobbyist contacts with specific elected officials on behalf of specific interests, would face an exceedingly uphill battle if opposed by those interests that currently hold the most power and access to legislators. Thus, interest group reaction is an important factor to consider in

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220. Editorial, *supra* note 144 (quoting former Speaker of the House Newt Gingrich) (internal quotation marks omitted).

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

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

evaluating the likelihood that the reforms proposed herein might successfully be enacted. For the reasons outlined below, I believe that interest groups should be inclined to support the proposed reforms.

First, special interests, and particularly those “Mancur-Olson” interests that are best organized and currently receive the most access to elected officials, may gain from having an official system that tracks access to lawmakers. As discussed earlier, such a system would help organized interests legitimate their claims to group members that they have been successful in making their case to elected officials and in achieving desired group objectives.<sup>223</sup>

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

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

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223. See discussion *supra* Part III.A.

## 2007] Interest-Group-Based Approach to Lobbying Regulation 573

ment officials” and will provide more accurate and thorough information about these activities.<sup>224</sup>

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

## CONCLUSION

Interest group attempts to match each other’s efforts always will be a guessing game: Lobbying disclosures of necessity will be retrospective and thus will not enable interests to discover their opponents’ current lobbying practices, but only will reveal the access that a group has obtained in the last reporting period. Moreover, interest groups always will be one step ahead of lobbying reforms and regulations, seeking new ways to avoid disclosing certain information. The hydraulics principle that as one hole is plugged another will open certainly applies here. As a result, lobbying reforms may produce their own share of unintended consequences; we may, for example, next see an increase in elected officials lobbying each other—i.e., members of Congress lobbying executive agencies, executive officials lobbying Congress—or a shift to lobbying of political parties rather than individual elected officials in an effort to circumvent disclosure requirements. Thus, lobbying reforms should be enacted with the expectation that they will need to be reevaluated and revised in the not-too-distant future.

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

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224. See Robert H. Salisbury, *Putting Interests Back Into Interest Groups*, in INTEREST GROUP POLITICS, *supra* note 29, at 371, 382.