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Regulating Lobbyists: Law, Ethics, and Public Policy

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I. CONCERNS ABOUT LOBBYING

Widespread concerns[1] about the influence of lobbyists have been addressed only half-heartedly through legal regulation. At the federal,[2] state,[3] and local[4] levels of American government, numerous rules have

[1] *See, e.g.*, Editorial, *Lobby Reform Lite*, N.Y. TIMES, Mar. 31, 2006, at A20 ("[An] easy money, quid pro quo culture . . . now bedevils the Capitol. . . . [L]egislators shameless[ly] use . . . executive jets . . . eagerly offered by corporate officials bent on insider access. . . . [T]he people's representatives blatantly designate lobbyists to head their fund-raising teams."). Disturbing reports about the influence of lobbyists are common. *See, e.g.*, Edmund L. Andrews, *Vague Law and Hard Lobbying Add Up to Billions for Big Oil*, N.Y. TIMES, Mar. 26, 2006, at A1 (explaining how lobbyists turned a "supposedly cost-free incentive . . . [into a] multibillion-dollar break for an industry making record profits").

[2] *See* Lobbying Disclosure Act of 1995, 2 U.S.C.A. §§ 1601–12 (West 2005); *see also* CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 692 (5th ed. 2000) [hereinafter GUIDE TO CONGRESS] ("The first comprehensive lobbying law was enacted in 1946, and . . . there have been other piecemeal changes since then . . . ."); *id.* at 716–23 (discussing the history of federal lobbying regulations). *See generally* William H. Minor & Karen A. Regan, *Federal, in* LOBBYING, PACS, AND CAMPAIGN FINANCE: 50 STATE HANDBOOK §§ 10.1–10.42 (Peter C. Christianson et al. eds., 2003) (summarizing federal lobbying laws); KARL SCHRIFTGIESSER, THE LOBBYISTS: THE ART AND BUSINESS OF INFLUENCING LAWMAKERS (1951) (explaining why the Lobbying Act of 1946 "was so long in coming . . . [and] how it was finally passed").

[3] Lobbying "has always existed in state legislatures, often more corruptly and brazenly than in Washington." SCHRIFTGIESSER, *supra* note 2, at 260. By 1951, "thirty-eight states and Alaska regulate[d] lobbies by law other than those laws forbidding bribery." *Id.* Today, every "state in the union . . . has enacted legislation regulating the conduct of those who 'lobby' the state's legislative or executive officials." Florida League of Prof'l Lobbyists, Inc. v. Meggs, 87 F.3d 457, 458 (11th Cir. 1996) (footnote omitted). Many states have requirements similar to the federal lobbyist registration requirements, and "the trend at both the national and state levels is for greater disclosure and tighter oversight of lobbying activities." William P. Horn, *Introduction to the Legislative Process, in* THE LEGISLATIVE LABYRINTH: A MAP FOR NOT-FOR PROFITS 51 (Walter P. Pidgeon, Jr., ed., 2001). "State lobby laws generally apply to the state legislature, the executive branch (including state agencies), or both." Chip Nielsen et al., *State Lobby and Gift Laws, in* CORPORATE POLITICAL ACTIVITIES 2005: COMPLYING WITH CAMPAIGN FINANCING, LOBBYING & ETHICS LAWS 663 (Jan Witold Baran, et al. eds., 2005) (emphasis omitted). *See generally* LOBBYING, PACS, AND CAMPAIGN FINANCE: 50 STATE HANDBOOK (Peter C. Christianson et al. eds., 2003) (setting forth, state-by-state, registration rules, reporting requirements, and prohibited activities).

[4] Some states, such as Georgia, Minnesota and New York, "regulate and require statewide reporting of attempts to influence action by local legislative bodies (such as city councils) and administrative agencies." Nielsen et al., *supra* note 3, at 665. Most states, however, leave local lobby regulation to local governments." *Id.* at 663. Furthermore, "[m]any major municipal and regional governments separately regulate

been adopted to govern the conduct of lobbyists. Yet, many of those laws are so weak[5] or incomplete[6] that they do little to advance the cause of good government.[7] Even the reforms recently passed by Congress[8] are said by lobbyists to contain "ample loopholes for those seeking to buy access to lawmakers, mainly through campaign fund-raising."[9]

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lobbying." *Id.* at 665. For examples of codes in major cities that specifically regulate lobbyists, see AUSTIN, TEX., AUSTIN CITY CODE §§ 4-8-1 to -11 (2006), *available at* http://www.amlegal.com (follow "library" hyperlink; then follow "Texas" hyperlink; then follow "Austin(Code)" hyperlink; then follow "Frames" hyperlink; then follow "Chapter 4. Business Regulation and Permit Requirements" hyperlink; then follow "4–8" hyperlink); DALLAS, TEX., CODE OF ETHICS §§ 12A-1 to -43 (2006), *available at* http://www.amlegal.com (follow "library" hyperlink; then follow "Texas" hyperlink; then follow "Dallas" hyperlink; then follow "Frames" hyperlink; then expand "More" folder; then follow "Chapter 12A" hyperlink); MIAMI, FLA., CHARTER AND CODE OF THE CITY OF MIAMI, §§ 2-651 to -658 (2006), *available at* http://www.municode.com (follow "Online Library" hyperlink; then follow "Florida" hyperlink; then follow "Miami" hyperlink; then follow "Miami Code of Ordinances" hyperlink; then expand "Chapter 2 ADMINISTRATION" folder; then expand "Article VI. LOBBYISTS" folder); SAN ANTONIO, TEX., CODE OF ETHICS OF THE CITY OF SAN ANTONIO §§ 2-62 to -71 (2006), *available at* http://www.sanantonio.gov/atty/Ethics/codetext.htm (setting forth a detailed regime of lobbyist prohibitions and disclosure requirements); SAN FRANCISCO, CAL., CAMPAIGN AND GOVERNMENTAL CONDUCT CODE §§ 2.100 to 2.160 (2006), *available at* http://www.municode.com (follow "Online Library" hyperlink; then follow "California" hyperlink; then follow "San Francisco" hyperlink; then follow "San Francisco Campaign and Governmental Conduct Code" hyperlink); SAN JOSE, CAL., SAN JOSÉ MUNICIPAL CODE § 12.12.010 to .12.550 (2006), *available at* http://www.amlegal.com (follow "library" hyperlink; then follow "California" hyperlink; then follow "San Jose" hyperlink; then follow "Frames" hyperlink; then expand "Title 12. ETHICS PROVISIONS" folder).

[5] *See, e.g.*, NEB. REV. STAT. ANN. § 49-1492(4)–(5) (LexisNexis 2002) (identifying "practices which reflect discredit on the practice of lobbying or on the Legislature" as Class III misdemeanors); MONT. CODE ANN. § 5-7-302 (2005) ("No lobbyist or principal shall engage in or directly or indirectly authorize any unprofessional conduct.").

[6] *See, e.g.*, Kathryn L. Plemmons, "Lobbying Activities" and Presidential Pardons: Will Legislators' Efforts to Amend the LDA Lead to Increasingly Hard-lined Jurisprudence?, 18 B.Y.U . J. PUB. L. 131, 131–32 (2003) ("[T]he lobbying that results in . . . presidential pardons slips below the media's radar primarily because of a controversial loophole in the Lobbying Disclosure Act of 1995. . . [T]he LDA does not require that contributions to presidential libraries be disclosed.").

[7] *Cf.* Leah Rush & David Jimenez, *States Outpace Congress in Upgrading Lobbying Laws: 24 States Have Made Disclosure Strides Since 2003*, CENTER FOR PUBLIC INTEGRITY, Mar. 1, 2006, http://www.publicintegrity.org/hiredguns/report.aspx?aid=781 ("A Center for Public Integrity survey that evaluated the strength of lobbying disclosure laws nationwide found the federal law to be weaker than those of 47 of the 50 states.").

[8] *See* David D. Kirkpatrick, *Senate Passes Vast Overhaul in Ethics Rules*, N.Y. TIMES, Jan. 19, 2007, at A1 (discussing reforms).

[9] David D. Kirkpatrick, *Senate Feels Heat as House Cranks Up Ethics Overhaul*, N.Y. TIMES, Jan. 5, 2007, at A13 [hereinafter Kirkpatrick, *Senate Feels Heat*]. *See also* David D. Kirkpatrick, *Congress Finds Ways to Avoid Lobbyist Limits*, N.Y. TIMES, Feb.

Citizens following media reports might easily conclude that the situation is hopeless.[10] However, this unfortunate state of affairs reflects a lack of political will[11]—and the powerful influence of lobbyists[12]—more than uncertainty as to what should be done. There are valuable legal steps that can and should be taken to minimize the risks that lobbying will corrupt the exercise of governmental power. As this article demonstrates, for virtually every problem that one can identify relating to lobbyists, some legislative body, somewhere in the country, has already found a plausible solution.

It is important to remember that regulating lobbyists is a continuing task that faces every generation. Even when reforms are passed, they are often eroded by legal changes subsequently made to "loosen" the rules when public attention is focused elsewhere. For example, the ban on gifts

11, 2007, at A1 (discussing arrangements to circumvent new lobbyist restrictions, including one where a "$2,500 contribution from a lobbyist's political action committee entitles the company's lobbyist to join . . . [a Congressman] at a Starbucks near his Capitol Hill office four times").

[10] *See* David D. Kirkpatrick, *Senate Bill Puts Campaign Gifts in the Spotlight*, N.Y. TIMES, Jan. 20, 2007, at A1 (reporting that the Senate passed a bill that would require lobbyists to disclose "the tens or hundreds of thousands of dollars they raise from clients and friends and deliver as sheaves of checks" to members of Congress, "a tradition known as bundling," but that House passage of the measure is "far from assured"). *Cf.* Editorial, *Ethics Reform Measures Littered with Loopholes*, SAN ANTONIO EXPRESS-NEWS, May 25, 2006, at 6B ("Give federal lawmakers a bill, a policy or an edict, and they will find a loophole to circumvent it."); Editorial, *The Lobbyist Empowerment Act*, N.Y. TIMES, Apr. 26, 2006, at A22 (criticizing a proposed reform as an "Orwellian shell of righteous platitudes about transparency and integrity").

[11] *See* Sheryl Gay Stolberg, *Push to Tighten Lobbying Rules Loses Strength*, N.Y. TIMES, Mar. 11, 2006, at A1 (reporting that "the drive for a tighter lobbying law . . . is losing momentum"). *Cf.* Editorial, *Razzle-Dazzle 'Em Ethics Reform*, N.Y. TIMES, June 21, 2006, at A16 (opining that congressional "lawmakers, globe-trotting at the giddy rate of $10 million a year in free private excursions, . . . killed . . . [a proposed ban on privately funded travel] and substituted cosmetic panaceas for their promised ethics reform").

[12] *See* Editorial, *Full Disclosure of Back-Scratching*, N.Y. TIMES, Feb. 1 2007 (reporting that "K Street lobbyists" and others have stalled efforts to force disclosure of "the huge sums in campaign donations that lobbyists package to grease privileged access in the Capitol," a practice known as "bundling"); Jeffrey H. Birnbaum, *Lobbyists Foresee Business As Usual: Post-Abramoff Rules Expected to Be Merely a Nuisance*, WASH. POST, Mar. 19, 2006, at A1 [hereinafter Birnbaum, *Lobbyists*] ("An estimated $10 billion is spent annually to influence legislation and regulations."); GUIDE TO CONGRESS, *supra* note 2, at 716 ("[T]he relative absence of limitations on lobbying is [due in part to] . . . the lobbies' consolidated and highly effective opposition to more regulation."); James A. Thurber, *From Campaigning to Lobbying*, in SHADES OF GRAY: PERSPECTIVES ON CAMPAIGN ETHICS 152 (Candice J. Nelson et al. eds., 2002) ("15,000 full-time lobbyists [are] registered by Congress representing virtually every type of interest in America. . . . [And] there are thousands more individuals lobbying state legislatures, city councils and executive branches at every level of American government.").

recently enacted by the U.S. House of Representatives[13] is reminiscent of reforms passed in the mid-1990s, which substantially tightened the rules on gifts, but were relaxed after just four years in force.[14] Regulation of lobbyists is a never ending task, just as ethics in government is a goal never permanently achieved.

Any effort to regulate lobbyists must begin by placing their conduct in context. It is essential to understand both the surrogate role that lobbyists play in communicating with public representatives, as well as the constitutional principles that bear upon that endeavor. Only when both that functional role and those constitutional principles are taken into account is it possible to craft a legal regime to effectively minimize the risk that lobbying will distort official decision-making.

The debate over the conduct of lobbyists is often so complex, politicized, and confused as to leave those who might lead or support reform efforts bewildered and hopeless. This Article addresses those problems by describing clear points of reference for evaluating existing rules and improving the standards of conduct governing lobbyists. Part II of this Article examines the American practice of citizen participation in government, including: the constitutionally protected right to petition the government (subpart II.A); the role of lobbyists as citizen surrogates (subpart II.B); the historical lineage of lobbying (subpart II.C); the perils that can arise from improper lobbying practices (subpart II.D); and the goals that should animate lobbyist restrictions (subpart II.E). Part III discusses the prohibitions (subpart III.A) and disclosure requirements (subpart III.B) that can be employed to regulate lobbying activities. Part III also addresses the definitional and drafting problems inherent in any attempt to expose to public scrutiny information about well-funded lobbying that takes place "behind closed doors." Finally, Part IV offers a brief assessment of which types of lobbyist regulations are the most effective in terms of furthering the interests of good government.

II. CITIZEN PARTICIPATION IN GOVERNMENT

A. RIGHTS GUARANTEED BY THE CONSTITUTION

In the American democracy, citizens play a vital role in government by providing public officials and employees with requests for action, information, and perspectives relating to the issues of the day.[15] The right

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[13] *See* discussion *infra* subpart III.A.2.

[14] *See* Rules of the U.S. House of Representatives, Gifts and Travel, *available at* http://www.house.gov/ethics/Gifts_and_Travel_Chapter.htm (last visited Feb. 11, 2007); *see also*, *infra* note 156 and accompanying text.

[15] *See* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127,

to petition the government has long been recognized in Anglo-American law.[16] Enshrined in the United States Constitution[17] and many state

137 (1961) ("In a representative democracy . . . [the executive and legislative] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.").

[16] Indeed, the right to petition was recognized before American independence. *See*, for example, *McDonald v. Smith*, where the Supreme Court stated:

> The historical roots of the Petition Clause long antedate the Constitution. In 1689, the Bill of Rights exacted of William and Mary stated: "[I]t is the Right of the Subjects to petition the King." . . . This idea reappeared in the Colonies when the Stamp Act Congress of 1765 included a right to petition the King and Parliament in its Declaration of Rights and Grievances. . . . And the Declarations of Rights enacted by many state conventions contained a right to petition for redress of grievances.

472 U.S. 479, 482–83 (1985) (quoting 1 Wm. & Mary, Sess. 2, ch. 2) (citation omitted). *See also* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 685–711 (2003) (tracing the right to petition as far back as the Magna Carta and providing a detailed review of the right to petition in the colonies and early American republic). Of course, citizen involvement in lawmaking is not unique to the Anglo-American legal tradition. See generally Vincent Robert Johnson, The French Declaration of the Rights of Man and Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris, 13 B.C. INT'L & COMP. L. REV. 1, 35–36 & n.8 (1990) (discussing Article VI of the French Declaration, which recognized that persons have the right to participate in the formation of laws). The Declaration of the Rights of Man was greatly influenced by provisions in early American state constitutions, which Benjamin Franklin was instrumental in distributing in France while he was an ambassador in Paris from 1776 to 1784. *Id.* at 9–10 (citing J. MOORE, THE ROOTS OF FRENCH REPUBLICANISM 67–68 (1934). *See also* Sue Bentch, Confidentiality, Corporate Counsel, and Competition Law: Representing Multi-National Corporations in the European Union, 35 ST. MARY'S L.J. 1003, 1010 (2004) (referring to "intense lobbying" in Europe).

[17] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). *See also* Edwards v. South Carolina, 372 U.S. 229, 235 (1963) ("First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States."); Carol Rice Andrews, *After* BE & K: *The "Difficult Constitutional Question" of Defining the First Amendment Right to Petition Courts*, 39 HOUS. L. REV. 1299, 1302 (2003) ("In the context of petitions to the legislative or executive branches of government, the Supreme Court has held that the right does not include a duty of response by those branches and does not include the right to file sham or maliciously false petitions.") (citing *McDonald*, 472 U.S. at 484, Minn. State Bd. of Cmty. Colls. v. Knight, 465 U.S. 271, 282, 285 (1984), and *E. R.R. Presidents Conference*, 365 U.S. at 127)); Wishnie, *supra* note 16, at 668 & n.4 ("Oral as well as written communications are protected as petitioning activity.").[15] *See, e.g.*, ILL. CONST. art. I, § 5 ("[P]eople have the right . . . to make known their opinions to their representatives and to apply for redress of grievances."); MASS. CONST. pt. 1, art. 19 ("The people have a right . . . to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."); PA. CONST. art. I, § 20 (2006) ("The citizens have a right . . . to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.").

constitutions,[18] the right to petition is an "important aspect of self-government,"[19] which is "recognized . . . as one of 'the most precious of the liberties safeguarded by the Bill of Rights.'"[20] Indeed, the Supreme Court has said on multiple occasions that the right to petition "is implied by the very idea of a government, republican in form."[21]

The right to petition is set against a backdrop of other important constitutional guarantees, which, like the Petition Clause, are rooted in the First Amendment. Freedom of association[22] allows persons to join together in groups to form and express their views.[23] Likewise, freedom of speech[24] and freedom of the press[25] broadly promote free expression by shielding those who speak or write on subjects of public concern from civil[26] or criminal[27] liability.

In considering the demands that the First Amendment imposes on legal regulations, Justice Brennan famously observed that there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[28] This commitment to vigorous public debate is reflected in many arenas, ranging from the

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19 *McDonald*, 472 U.S. at 483.

20 BE & K Constr. Co. v. NLRB, 536 U.S. 516, 524 (2002) (quoting Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 222 (1967)).

21 *Id.* at 524–25 (citing United States v. Cruikshank, 92 U.S. 542, 552 (1876)) (internal punctuation omitted).

22 *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. . . . Exercise of these basic freedoms in America has traditionally been through the media of political associations.").

23 *See Jaycees*, 468 U.S. at 622 ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."); NAACP v. Button, 357 U.S. 449, 460 (1958) ("[It] is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

24 U.S. CONST. amend. I.

25 *Id.*

26 *See*, *e.g.*, Gertz v. Robert Welch, Inc, 418 U.S. 323, 347 (1974) (holding that, in a defamation suit by a private person suing with respect to a matter of public concern, a state may "not impose liability without fault" as to the falsity of the statement).

27 *See*, *e.g.*, Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (reversing a criminal defamation conviction because "even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood").

28 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

protection of academic freedom[29] to the passage of anti-SLAPP[30] statutes in twenty-two states.[31] Anti-SLAPP statutes make it easier for courts to dismiss defamation suits and other[32] retaliatory claims filed against persons who speak out on public issues.[33]

America's commitment to the open debate of public issues logically extends beyond discussions among the citizenry to include communications between citizens and public officials or employees. The interests of democracy cannot be served by requiring those who petition the government to do so with trepidation or excessive caution about what they say or how frequently they express their views. The right to petition, along with the related rights of association, speech, and press,[34] must be interpreted[35] in a manner that invites vigorous,[36] and sometimes

[29] *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth."); *see also* Omosegbon v. Wells, 335 F.3d 668, 677 (7th Cir. 2003) (finding that the plaintiff's academic freedom was not violated where he failed to allege that he was "restricted from or sanctioned for speaking publicly about an issue"); Dow Chemical Co. v. Allen, 672 F.2d 1262, 1275 (7th Cir. 1982) ("[T]o prevail over academic freedom the interests of government must be strong and the extent of intrusion carefully limited.").

[30] SLAPP is an acronym for a strategic lawsuit against public participation. "In general terms, a SLAPP suit is 'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 54 Cal. Rptr. 2d 830, 834 (Cal. App. 1996) (citing Wilcox v. Superior Court 33 Cal. Rptr. 2d 446 (1994)).

[31] Stephen L. Kling, *Missouri's New Anti-SLAPP Law*, 61 J. MO. B. 124, 125 (2005) ("Twenty-two states have adopted anti-SLAPP legislation to further protect citizens in exercising their rights of free speech and to petition government as guaranteed by the First Amendment."). *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (West 2006); IND. CODE ANN. § 34-7-7-9 (West 2006); NEV. REV. STAT. §§ 41.635–.670 (2005).

[32] *See* Street Beat Sportswear, Inc. v. Nat'l Mobilization Against Sweatshops, 698 N.Y.S.2d 820 (App. Div. 1999) (holding that an action for tortious interference with business relationships amounted to a SLAPP, in violation of statute).

[33] The core provisions of these laws are: (i) establishment of a process for motions to dismiss or strike claims targeting public participation; (ii) expediting the hearing of such motions and suspending or sharply limiting discovery until a ruling is made; and (iii) shifting the attorneys' fees and costs to the filer when the target prevails on the motion.

Kling, *supra* note 31, at 125 (citing Lori Potter, *Strategic Lawsuits Against Public Participation and Petition Clause Immunity*, 31 ENVTL. L. REP. 10852, 10856 (July 2001)).

[34] Wishnie, *supra* note 16, at 719 ("The modern Supreme Court has generally regarded the right to petition as subsumed within the more familiar rights of speech and association, and the Court's extensive speech jurisprudence thus supplies a useful reference for examining the Petition Clause . . .").

[35] *Id*. at 715 ("Few litigants have pressed claims under the Petition Clause, and few courts have engaged in significant analysis of the scope or content of the rights it protects.").

controversial,[37] discussion of public affairs.[38]

B. PETITIONING THE GOVERNMENT THROUGH SURROGATES

In some instances, it is necessary or appropriate for persons seeking to petition the government to channel their efforts through volunteer or paid intermediaries. Such representatives, at least when they are paid, are often called lobbyists.[39] Though widely vilified,[40] lobbyists representing

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[36] *Cf.* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961) (holding that a publicity campaign by railroads directed toward obtaining governmental action adverse to the interests of trucking companies was not illegal even though it may have been affected by an anticompetitive purpose). In *E. R.R. Presidents Conference*, Justice Black wrote:

> To hold . . . that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. . . [S]uch a construction . . . would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 137–38.

[37] *See* Whitehill v. Elkins, 389 U.S. 54, 57 (1967) ("[T]he First Amendment, which protects a controversial as well as a conventional dialogue . . . extends to petitions for redress of grievances . . . as well as to advocacy and debate.").

[38] *Cf.* Adderley v. Florida, 385 U.S. 39, 49–50 (1966) (Douglas, J., dissenting) ("The right to petition for the redress of grievances has an ancient history and is not limited to writing a letter or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor."). However, the mere fact that legal regulations may place some burden on the exercise of the right to petition does not mean that the regulations are unconstitutional. *See* Pell v. Procunier, 417 U.S. 817, 828 n.6 (1974) ("[T]he alternative means of communication with the press that are available to prisoners, together with the substantial access to prisons that California accords the press and other members of the public satisfies whatever right the inmates may have to petition the government through the press."). In *Pell*, the inmates had argued that a regulation which precluded face-to-face interviews with the media was unconstitutional under the First and Fourteenth Amendment rights to petition the government. *Id.* at 817.

[39] William Safire traces the political use of the term "lobbyist" to the mid-seventeenth century, when citizens would use a large anteroom, or lobby, near the English House of Commons to plead their cause to members of Parliament"). GUIDE TO CONGRESS, *supra* note 2, at 691 (citing WILLIAM SAFIRE, WILLIAM SAFIRE'S POLITICAL DICTIONARY 383 (1980)). In America, "[t]he first recorded use of the word, according to H.L. Mencken, was in 1829, the year in which Andrew Jackson became President. It originally appeared as 'lobby-agent' and was applied to seekers after special privilege at the Capitol in Albany. . . From the beginning it was a term of reproach . . ." SCHRIFTGIESSER, *supra* note 2, at 5.

[40] "For most Americans the words 'Washington lobbyist' have roughly the same cachet as, say, 'deadbeat dad."' Meredith A. Capps, Note, *"Gouging the Government": Why a Federal Contingency Fee Lobbying Prohibition Is Consistent with First Amendment Freedoms*, 58 VAND. L. REV. 1885, 1886 (2005) (quoting David Segal, *Main*

individuals or groups can make a valuable contribution to informed and effective government. Lobbyists can direct ideas and opinions to appropriate decision makers and clearly express the views of citizens who have too little time or skill to do so personally.[41] Lobbyists also illuminate the practical consequences of proposed government conduct[42] by ensuring that the insights and professional expertise of a particular business or industry become part of the deliberative process.[43]

Lobbying, as an exercise of the right to petition, is not necessarily evil.[44] In addition to the interests of the business community, lobbyists routinely advance the interests of nonprofit institutions[45] and public interest groups.[46] Some of the most vulnerable segments of society, including young children,[47] the elderly,[48] and laborers,[49] have benefited

Street America Has Advocates Aplenty: On the Hill, Lobbyists for All, WASH. POST, July 10, 1995, at A1). *See generally* JEFFREY M. BERRY WITH DAVID F. ARONS, A VOICE FOR NONPROFITS 48–49 (2003) (discussing lobbying as a "dirty word"); GUIDE TO CONGRESS, *supra* note 2, at 691 (discussing the "pejorative connotation" of lobbying).

[41] *See generally* John Chwat, *The Use of Outside Legislative Consultants: When and How to Hire a Lobbyist*, *in* THE LEGISLATIVE LABYRINTH: A MAP FOR NOT-FOR-PROFITS 111 (Walter P. Pidgeon, Jr., ed., 2001) (discussing the skills of effective lobbyists).

[42] *See* GUIDE TO CONGRESS, *supra* note 2, at 691 ("[I]t is in large part through lobbying that government gets its information.").

[43] *See* Gary Scharrer, *Lobbying Didn't Let Up When the CHIP was Down*, SAN ANTONIO EXPRESS-NEWS, Apr. 14, 2006, at 1A (quoting the executive director of the Center for Public Policy Priorities, a group that tracks issues affecting low- and middle-income Texans, as stating that "[l]obbyists bring expertise about how the real world works. . . . You couldn't do without the lobby"); *see also* BRUCE C. WOLPE & BERTRAM J. LEVINE, LOBBYING CONGRESS: HOW THE SYSTEM WORKS 50 (2d ed. 1996) (opining that lobbyists "who can volunteer substantive assistance—legislative proposals, speeches, floor statements, drafts of op-ed articles—are cultivated" by legislators); Birnbaum, *Lobbyists*, *supra* note 12 (quoting a Washington lawyer as stating that at the federal level "legislation and regulations are so complex that the need for professional lobbyists will not diminish").

[44] *See generally* GUIDE TO CONGRESS, *supra* note 2, at 700–15 (discussing lobbying by business groups, labor, environmentalists, farmers, public-interest groups, civil-rights groups, education groups, churches, and others).

[45] *See* Chwat, *supra* note 41, at 111 ("[H]iring an outside legislative consultant or lobbyist is a widely accepted practice by trade and professional associations, corporations, unions, and not-for-profit organizations."). *See generally* BERRY, *supra* note 40, at 25–31 (discussing nonprofit organizations as lobbies).

[46] *See* WOLPE & LEVINE, *supra* note 43, at 3 (discussing public-interest groups); *see also Women's Caucus Converges on Washington to Lobby Congress*, TRIAL, June 2005, at 10 (describing lobbying efforts by women trial lawyers "to tell lawmakers how proposed medical malpractice legislation would hurt women, children, senior citizens, and all consumers").

[47] Mary Gereau, one of the first women lobbyists in Washington, D.C., actively promoted the Higher Education Act of 1965 and the Head Start Act. *See* Yvonne Shinhoster Lamb, *Mary Gereau, 89; Lobbyist on Education, ERA*, WASH. POST, Mar. 2, 2006, at B6.

from lobbying. Indeed, even cities and other local government entities hire lobbyists to advocate their interests in state legislatures[50] or before the federal government.[51]

From a business standpoint, hiring a lobbyist is often the smart thing to do. According to some experts, "[s]uccess in the legislative labyrinth is . . . directly proportional to hiring the right" lobbyists or legislative consultants.[52] Viewed systemically, "[t]he relationship between special interests, acting through lobbyists, and legislators is central to understanding much of the legislative process."[53]

C. HISTORICAL LINEAGE

The roots of lobbying in the United States reach back to the early days of the republic. According to one source, when the Adamses from the Bay Colony trekked to the "first Continental Congress as representatives of the restless New Englanders . . . they were met by a group of lobbyists, sent to . . . steer the[m] . . . away from any dangerous ideas of independence they might be prepared to press."[54]

> All through the sessions of the Congress lobbying went on in full force. . . . The hogsheads of Madeira and port that were dispensed and the huge dinners of mutton and pork, duck and turkey . . . were not offered without a purpose. The merchants, the landowners, the Quakers, the followers of the powerful John Dickinson, used all the wiles of wealth and social prestige to prevent the

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[48] *See* GUIDE TO CONGRESS, *supra* note 2, at 694 (discussing lobbying by the AARP).

[49] "Much of the Great Society legislation of the 1960s, under President Lyndon B. Johnson, was the product of lobbying by organized labor." GUIDE TO CONGRESS, *supra* note 2, at 702. *See also* WOLPE & LEVINE, *supra* note 43, at 3–4 (discussing labor unions); Sanford Nowlin, *Swarming Capitol Paid Off for SBC*, SAN ANTONIO EXPRESS-NEWS, Apr. 13, 2006, at 1A (discussing lobbying by the Communications Workers of America union).

[50] *See* Greg Jefferson, *San Antonio Gears Up to Draw on Its "Hired Guns" at Legislature*, SAN ANTONIO EXPRESS-NEWS, Apr. 13, 2006, at 8A (discussing six lobbyists hired for a total cost of $575,700); *see also* Nowlin, *supra* note 49, at 1A (stating that the Texas Municipal League lobbies on behalf of cities).

[51] *See* Jodi Rudoren & Aron Pilhofer, *Hiring Lobbyists for Federal Aid, Towns Learn That Money Talks*, N.Y. TIMES, July 2, 2006, at 1 ("Cities and towns—and school districts and transit authorities and utility agencies—across the country are increasingly . . . putting lobbyists on retainer to leverage local tax dollars into federal tax dollars.").

[52] Chwat, *supra* note 41, at 112.

[53] Fred S. McChesney, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 46 (1997).

[54] SCHRIFTGIESSER, *supra* note 2, at 4.

> delegates from the other colonies from insisting upon any drastic action that might endanger the colonial way of life.[55]

The taverns that served the stage coaches running to the nation's capital also became places where "men and even women 'lobbied' for different causes or needs"[56] in a "very informal, unorganized and spontaneous" manner.[57] "Alexander Hamilton's Philadelphia Society for the Promotion of National Industry, [was the first formal] business lobby formed for the purpose of influencing legislatures on behalf of a powerful faction."[58] The later success of the Boston Manufacturing Company's lobbying effort, which persuaded Congress to enact the first protective tariff in 1816, emboldened other manufacturers to send lobbying agents to the capital.[59]

In earlier eras, government ethics rules were even weaker than they are today. In the 1830's, outside interests could and did hire sitting members of Congress to represent them. "Thus, when President Andrew Jackson was battling with the Bank of the United States, Sen. Daniel Webster of Massachusetts was one of the bank's biggest defenders."[60] Decades later, "[a] lobby headed by Thomas A. Scott, President of the Pennsylvania Railroad, and Iowa congressman Grenville M. Dodge . . . convinced southern congressmen that the only way the Texas & Pacific Railway would be built from East Texas to the Pacific coast depended upon a Republican victory"[61] in the disputed presidential election of 1876.[62]

D. THE DARK SIDE OF LOBBYING

Despite lobbying's ancient lineage and constitutional pedigree, past

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[55] *Id*.

[56] Robert V. Remini, THE HOUSE: THE HISTORY OF THE HOUSE OF REPRESENTATIVES 38 (2006).

[57] *Id*.

[58] *Id*. at 6. *But see* 2 ROBERT C. BYRD, Lobbyists, in THE SENATE, 1789–1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 491, 492 (1988) ("William Hull was hired by the Virginia veterans of the Continental army to lobby for additional compensation for their war services. In 1792, Hull wrote to other veterans' groups, recommending that they have their 'agent or agents' cooperate with him during the next session to pass a compensation bill. In 1795, a Philadelphia newspaper described the way lobbyists waited outside Congress Hall to 'give a hint to a Member, teaze [sic] or advise as may best suit.'").

[59] *See* REMINI, *supra* note 56, at 102 (discussing the tariff and lobbying).

[60] *Cf.* GUIDE TO CONGRESS, *supra* note 2, at 692.

[61] REMINI, *supra* note 56, at 216.

[62] *See generally* WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004).

experience shows that some types of lobbying can have detrimental effects on the performance of official duties and thereby erode public confidence in government. During the Civil War, for example, "[l]obbyists were increasingly employed to serve the interests of . . . entrepreneurs and found many congressmen of both parties only too happy to cooperate in 'sweetheart arrangements' for a financial consideration. . . . Bribes and secret deals were not uncommon, and conflict of interest was rampant."[63] Although modern practices are more subtle, lobbying continues to pose threats to the proper operation of government. This is particularly true in cases where lobbyists distort relevant facts, produce decisions based on favoritism rather than the merits,[64] or give some segments of the community a real or perceived unfair advantage in securing access to members of government.

Lobbying activities that occur outside the scrutiny of neutral third parties are of particular concern,[65] for, as a general matter, bad practices thrive in contexts where there are reduced risks of detection and exposure.[66] For example, when dubious Congressional "earmarking"[67] practices are coupled with lobbying, "dollars are doled out, often in secret, at the whim of a lone legislator—often under the influence of a lobbyist—rather than through a competitive process."[68] There is also

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[63] REMINI, *supra* note 56, at 183.

[64] *Cf. Id*. at 241 (arguing that the railroads' powerful lawyers and lobbyists all but rendered the Interstate Commerce Commission "virtually powerless" in the late 1800s).

[65] *See* Trist v. Child, 88 U.S. 441, 451 (1874) (invalidating a contingent-fee agreement to lobby Congress, the Supreme Court observed that "[n]ot unfrequently [sic] the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring-head and the stream of legislation are polluted"). *Cf.* Thurber, *supra* note 12, at 152 (opining that "the lack of transparency in the relationship between elected officials and campaign consultant-lobbyists" poses "a problem for democracy").

[66] Similar issues are raised by in-person solicitation of clients by lawyers under circumstances screened from the watchful eye of third parties. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978) (addressing the effect of in-person solicitation, the Court observed, "there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual"). *See also* Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 28–29 & n.92 (1988) (discussing solicitation issues).

[67] Earmarking is "a budgetary process used by members of Congress to send federal dollars to favored projects." Adam Nagourney, *House at Stake, Midterm Election Gets Early Start*, N.Y. TIMES, June 6, 2006, at A1, 2006. Sometimes it involves "lucrative favors that lawmakers secretly cram into spending bills at the behest of deep-pocketed contractors." Editorial, *The Million-Dollar House on the Hill*, N.Y. TIMES, June 10, 2006, at A12.

[68] An examination of one lobbying firm showed that "$9.8 million in lobbying fees translated into $173 million in earmarks, or a return of $18.41 on every dollar spent."

widespread apprehension about lobbying by former public servants who, after entering the private sector, exploit connections to those still in power.[69] The same is true of lobbying that involves the expenditure of large amounts of money.[70] Each of these practices create the risk that other members of the community will not fairly be heard by the persons elected, appointed, or employed to act on behalf of the government. Left unchecked, pernicious lobbying practices threaten public confidence in government and, as a result, the legitimacy of government itself.[71]

Regulation of such lobbying practices is necessary in order to adequately address these risks. However, ethical or legal restrictions on lobbyists must neither intrude upon constitutional rights, nor impede unnecessarily the "uninhibited, robust, and wide-open"[72] debate of public issues.

E. THE GOALS OF LOBBYIST REGULATIONS

Lobbying regulations are not meant to discourage persons from exercising their right to petition the government, nor to harass those who take advantage of that right. Rather, carefully crafted lobbyist rules should address five concerns of great importance to democratic institutions. The rules governing lobbyists should ensure (1) that all persons have a fair opportunity to be heard by the government, (2) that

Rudoren & Pilhofer, *supra* note 51, at 16. *See also* Editorial, *Lobbyists, Yes. The People, Maybe.*, N.Y. TIMES, July 10, 2006 ("The news that the Washington lobbying industry is rapidly extending its tentacles into cities, towns and school districts across the country should be an outright embarrassment to Congress [because] [e]lected lawmakers—not high-paid lobbyists—are supposed to be best attuned to meeting the needs of their localities.").

[69] *See* Vincent R. Johnson, *Ethics in Government at the Local Level*, 36 SETON HALL. L. REV. 715, 744 (2006) [hereinafter Johnson, *Ethics in Government*] ("Citizens are often deeply cynical when former city officials and employees represent private interests in dealings with the city government. The citizens suspect, sometimes rightly, that the former city officials and employees are trading on their connections with those still in government service, and that the private interests they represent will have an unfair advantage in achieving the results they seek.") (citations omitted).

[70] *See* Lisa Sandberg & Kelly Guckian, *Lobbyists' Money Talks—Softly, But It's Heard*, SAN ANTONIO EXPRESS-NEWS, Apr. 12, 2006, at 1A (stating that Texas' "best-paid lobbyist says it would be naive to suggest that big bucks aren't effective . . . 'There isn't a level playing field.'"). *Cf.* Editorial, *Still a Bad Deal*, N.Y. TIMES, July 28, 2006 [hereinafter *Still a Bad Deal*] (stating that "with so much pro-India lobbying money sloshing around" on Capitol Hill, there is little hope that Congress will effectively address a bad nuclear cooperation deal with India).

[71] *Cf.* Archibald Cox, *Ethics in Government: The Cornerstone of Public Trust*, 94 W. VA. L. REV. 281, 288 (1991–92) ("The public will not give the necessary trust to those who present government as the place where one feathers his own nest, exchanges favors with friends and former associates, and takes good care of those who will reward them.").

[72] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

government enjoys the confidence of the people, (3) that official decisions are based on accurate information, (4) that the citizenry knows how the government operates, and (5) that the performance of public business benefits from the wisdom of the community.

The first objective is sometimes referred to as the "level-playing-field" concern.[73] America has long been deeply committed to this principle.[74] The right to a level playing field is sometimes called equal protection of the laws, as set down by the Equal Protection Clause of the Fourteenth Amendment.[75] The Equal Protection Clause is the basis of the important rules that prevent invidious discrimination in education, hiring, and public accommodations or that hold that jobs in the public sector should be awarded on the basis of qualifications rather than as a form of patronage.[76] The root idea is that in pursuing desirable things in life, each person should have a chance to compete on equal terms—or as Abraham Lincoln said, a "fair chance in the race of life."[77] In the lobbying context, practices that improperly give some persons advantages over others (such as gifts to public officials) run afoul of the "level-playing-field" principle.

The second objective in regulating lobbyists is to preserve public confidence in political institutions by ensuring that they are fair not only in operation, but also in appearance.[78] In other words, it is necessary to avoid the "appearance of corruption."[79] Perceived corruption, like

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[73] *See* Vincent R. Johnson, *America's Preoccupation with Ethics in Government*, 30 ST. MARY'S L.J. 717, 725–33 (1999) [hereinafter Johnson, *America's Preoccupation*] (discussing rules applicable to judges, lawyers, and public servants that seek to ensure a level playing field in public life).

[74] *See id*. at 735–45 (arguing that the search for social equality was a dominant theme in twentieth century America).

[75] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[76] *See* Gretchen Reuthling, *Chicago Officials Convicted in Patronage Arrangement*, N.Y. TIMES, July 6, 2006, at A14 (describing a successful criminal prosecution based on actions that "violated a 30-year-old federal court order, the Shakman decree, that prohibits political considerations in hiring and promotions for about 37,000 city jobs").

[77] Lincoln described the Northern cause in the Civil War as saving a form of government "whose leading object is to elevate the condition of men – to lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all, an unfettered start, and a fair chance in the race of life." 4 ABRAHAM LINCOLN, *Message to Congress*, *in* IV COLLECTED WORKS OF LINCOLN 438 (Roy Basler ed. 1953).

[78] *Cf*. Lobbying Disclosure Act of 1995, 2 U.S.C.A. § 1601(3) (West 2005) ("[T]he 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.").

[79] *Cf*. McConnell v. Federal Election Comm'n, 540 U.S. 93, 142 (2003) (recognizing "the Government's important interest in preventing corruption and the

corruption itself, can destroy a democratic institution.[80] Thus, lobbyist rules should restrict practices that create an appearance of impropriety, such as business transactions between legislators and lobbyists,[81] the presence of lobbyists on the floor of the House or Senate,[82] or service by a lobbyist as the treasurer for a legislator's re-election campaign.[83]

The third goal of lobbyist rules is to guarantee that public decisions are based upon accurate information. In this, as in other contexts, the law "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues,"[84] than from a single voice. To avoid misunderstandings, the First Amendment favors the dissemination of more information, not less.[85] Consequently, government ethics rules should not only ban culpable falsehoods by lobbyists, but also seek to move the debate of public issues into public view,[86] where arguments can be considered, contested, and judged on their merits. In addition, through

appearance of corruption" in the context of campaign contribution restrictions).

[80] *Cf.* TOM WICKER, THE NIXON YEARS, 1969-1974: WHITE HOUSE TO WATERGATE 184–85 (1999) (discussing President Nixon's declaration, "I am not a crook," and subsequent resignation). Chief Justice Rehnquist wrote about Martin T. Manton, a distinguished Second Circuit judge who accepted bribes during the 1930s depression and then defended himself against criminal charges by claiming that he had only sought bribes from parties "in whose favor he had already decided to rule on the basis of the law." WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 123 (1992). Because the appellate court sat in panels and other judges testified that Manton's "conduct in conference had in no way reflected bias," it may have been true that none of the bribes had played a pivotal role in the resolution of cases. JOHN T. NOONAN, JR., BRIBES 569 (1984). Nevertheless, it was necessary for Manton to step down because his conduct created a grave appearance of impropriety that impaired public confidence in the administration of justice. *Id.* The same analysis would apply to a judge who takes bribes from both parties and then claims to be uninfluenced. *See id.* (discussing the fall of Lord Chancellor Francis Bacon in the 1600s).

[81] *See* discussion *infra* subpart III.A.6.

[82] *See, e.g.*, IND. CODE. ANN. § 2-7-5-4 (LexisNexis 2002) ("No past member of the general assembly who is a lobbyist may be on the floor of either house while that house is in session."); KY. REV. STAT. ANN. § 6.811(10) (West 2004) ("A . . . lobbyist shall not go upon the floor of either house . . . except upon invitation of that house."); W. VA. CODE ANN. § 6B-3-8 (LexisNexis 2003) (including the foyer of either house).

[83] *See infra* notes 177–87, 284–301 and accompanying text.

[84] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (quoting Judge Learned Hand in *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

[85] *Cf.* Bates v. State Bar of Arizona, 433 U.S. 350, 375 (1977) (stating that with respect to potentially misleading lawyer advertising, "the preferred remedy is more disclosure, rather than less").

[86] *Cf.* John M. Black, *Silicosis Still a Problem*, TEX. LAW., Nov. 25, 2002, at 35 (discussing a "lobbying effort [that] led to countless unnecessary exposures to a known hazard in Texas petrochemical plants"), *available at* 11/25/2002 TEXLAW 35 (Westlaw).

disclosure requirements, ethics rules should assist public representatives in scrutinizing the petitioners who come before them. As Chief Justice Earl Warren remarked:

> [L]egislative 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. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.[87]

The fourth goal in regulating lobbyists is to ensure that people have access to accurate information about how the government operates.[88] This knowledge is an essential component of representative government.[89] Otherwise, the citizenry cannot accurately evaluate the performance of their representatives or cast ballots at the voting booth reflecting that assessment.[90] In the words of Judge J. Skelly Wright, "the public has an interest in knowing who is influencing or attempting to influence their public officers, for what purpose, the means adopted to that purpose, and the results achieved."[91] These concerns animate the lobbyist registration and reporting requirements that have been adopted at the federal, state, and local levels.[92]

Finally, as a fifth objective, lobbyist rules should not impede

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[87] United States v. Harriss, 347 U.S. 612, 625 (1954) (holding that the disclosure requirements of the Federal Regulation of Lobbying Act, which "wants only to know who is being hired, who is putting up the money, and how much," did not violate the First Amendment freedoms "to speak, publish, and petition the Government").

[88] ACLU of N.J. v. N.J. Election Law Enf. Comm'n, 509 F. Supp. 1123, 1129 (D. N.J. 1981) (recognizing that regulation of lobbying serves the state's "strong interest in promoting openness in the system by which its laws are created"). "Disenchantment . . . with the political process today stems from a lack of knowledge of its details. . . " *Id*. (quoting THE ELECTION LAW REV'N COMM'N, REPORT TO THE GOVERNOR AND LEGISLATURE PURSUANT TO P.L. 1964, C. 29; P.L. 1965, C. 73; P.L. 1969, C. 192; P.L. 1970, C. 42 at 2 (1970).

[89] *Cf*. Lobbying Disclosure Act of 1995, 2 U.S.C.A. § 1601(1) (West 2005) ("[R]esponsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decisionmaking process.").

[90] *See ACLU of N.J.*, 509 F. Supp. at 1129 (recognizing that "regulation of lobbying serves the needs of the electorate" by enabling the "voting public . . . to evaluate the performance of their elected officials").

[91] Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 492 (D.C. Cir. 1968) (J. Skelly Wright, concurring).

[92] *See* discussion *infra* subpart III.B.

lobbyists and their clients from contributing to the effective resolution of public issues. Because the American public is often reluctant to provide funding for the staffing and expertise needed by legislative bodies, administrative agencies, and other organs of government,[93] official decision makers frequently operate with minimal support. Indeed, "[c]ongressional staffs rarely have the resources to gather their own data and examples."[94] Such obstacles are also present at the state and local levels. Lobbyists who provide clear arguments and accurate information to public servants can play an important role in closing the gap between needs and resources.[95] Consequently, the rules governing lobbyists should not impede those practices that assist the government in doing its work.

Regulating lobbyists involves essentially the same challenges at the federal, state, and local levels of government. In each venue, the objective is to ensure that lobbying does not deprive other persons of the chance to be heard, diminish confidence in government, distort through falsehood the exercise of governmental power, or deprive voters and officials of relevant information. The smaller size of local governments may dictate a more streamlined regulatory regime than might be appropriate at the state capitol or in Washington, D.C. However, throughout the American democracy, the obstacles created by pernicious lobbying practices are basically the same.

III. THE LEGAL TOOLS FOR REGULATING LOBBYISTS

The legal tools for regulating lobbyists come in two basic varieties: prohibitions and disclosure requirements. Legal prohibitions identify practices that are impermissible, either on all occasions or beyond specified limits. Such rules may be used to prohibit false statements,[96]

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[93] *Cf.* Vincent R. Johnson, *Liberating Progress and the Free Market from the Specter of Tort Liability*, 83 NW. U.L. REV. 1026, 1048–51 (1989) [hereinafter Johnson, *Liberating Progress*] (discussing the budgetary limitations of administrative agencies and arguing that "[h]istory demonstrates that they are frequently underfunded and lack the personnel and other resources that are needed"); Editorial, *Voters Should Pass Prop. 81, Measure A*, CONTRA COSTA TIMES (Walnut Creek, Cal.), May 14, 2006, at F4 (criticizing inadequate funding for libraries); Editorial, *For Oregon Schools, Let the Round-Up Begin*, OREGONIAN (Portland, Or.), Feb. 15, 2006, at C8 (noting that "[d]uring the past five years, a majority of states have been sued about inadequate school funding"); Editorial, *Local Help for Indigent Mentally Ill is Hard to Find*, ST. PETERSBURG TIMES, Jan. 5, 2006, at 12A (discussing inadequate funding for care of the mentally ill).

[94] GUIDE TO CONGRESS, *supra* note 2, at 697.

[95] *See supra* note 89 and accompanying text. *Cf.* David Epstein & Sharyn O'Halloran, 11 J.L. ECON. & ORG. 227, 227 (1995) (contending that "lobbyists can facilitate Congress's oversight role . . . [by] reduc[ing] informational asymmetries between Congress and the bureaucracy").

[96] *See* discussion *infra* subpart III.A.1.

limit gifts to public officials or employees,[97] restrict the scope or frequency of revolving-door employment,[98] or bar lobbyists from collecting contingent fees[99] or exacting economic reprisals against legislators.[100]

Disclosure requirements, in contrast, do not ban particular practices. Rather, they expose information to community scrutiny by making data available to the public.[101] For example, disclosure regimes typically seek to reveal whom a lobbyist represents and how much money the lobbyist's client is spending to influence a decision on a particular issue. While conceptually appealing, disclosure requirements are hard to implement because it is difficult to determine what information should be reported, who should be required to report, and how that information can be made available to the public in a timely fashion. As a result, some disclosure schemes are exceedingly complex and, as a result, lack the ethical clarity and efficacy that simpler rules might provide.[102]

A. PROHIBITIONS

1. False Statements

False statements of fact can distort the decision-making process. This is as true in politics as it is in business. In the commercial context, numerous rules protect consumers and entities from the harm that erroneous information can cause. Tort actions for fraud[103] and negligent

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97 *See* discussion *infra* subpart III.A.2.

98 *See* discussion *infra* subpart III.A.4.

99 *See* discussion *infra* subpart III.A.5.

100 *See, e.g.*, IDAHO CODE ANN. § 67-6621(b)(5) (2006) (providing that a lobbyist shall not "[e]xercise any economic reprisal, extortion, or unlawful retaliation upon any legislator by reason of such legislator's position with respect to, or his vote upon, any pending or proposed legislation").

101 *Cf.* THE BETTER GOVERNMENT ASSOCIATION, THE BGA INTEGRITY INDEX 17 (2002), http://www.bettergov.org/pdfs/IntegrityIndex_10.22.02.pdf ("[R]equiring disclosure [of campaign contributions] where they are allowed will prevent certain abuses of authority, particularly with regards to undue influence by lobbyists.").

102 *Cf.* Mark Davies, *Governmental Ethics Laws: Myths and Mythos*, 40 N.Y. L. SCH. L. REV. 177, 178 (1995) (opining that "whenever possible, ethics codes should contain bright-line rules and never three-armed lawyer gobbledygook—that is, on the one hand this, on . . . the other hand that, and on the third hand something else"); Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 25, 41 (2000) [hereinafter Johnson, *Virtues and Limits of Codes*] (recommending that "[a]t a minimum, an ethics rule should be understandable, memorable, predictable, and capable of efficient enforcement," and stating that rules which are "[i]ntricately drafted, finely nuanced, and exhaustive . . . [may] generate uncertainty in the minds of those seeking to follow or apply them").

103 *See* RESTATEMENT (SECOND) OF TORTS § 525 (1977) (discussing liability for

misrepresentation,[104] along with statutory claims for deceptive trade practices,[105] exist in virtually all jurisdictions. However, there is an important distinction between political speech and commercial speech. The latter is afforded less protection by the Constitution[106] and is therefore more susceptible to legal regulation.[107] However, with respect to political speech, the Supreme Court has recognized that the "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[108] Thus, civil or criminal liability is not typically imposed (on lobbyists or others) for false statements related to matters of public concern absent proof of "actual malice." Actual malice requires evidence that the defendant acted with knowledge of the falsity or in reckless disregard for the truth. [109]

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fraudulent misrepresentation); *see also* Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentation by Lawyers about Credentials or Experience*, 57 OKLA. L. REV. 529, 557 (2005)("A cause of action for fraud protects the plaintiff's decision-making process from being infected by false, misleading, or incomplete information.").

[104] *See* RESTATEMENT (SECOND) OF TORTS § 552 (1977) (discussing liability for negligent misrepresentation).

[105] "[E]very state in the union has passed some form of legislation aimed at protecting consumers from sales abuses." DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3:1 (2005).

[106] *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) ("[The Constitution] accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

[107] *See, e.g.*, Florida Bar v. Went for It, Inc., 515 U.S. 618, 623 (1995) (stating that commercial speech enjoys "'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression'" (quoting Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989)).

[108] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 271–79 (1964). Addressing the rule of defamation law which held that truth was a defense, Justice Brennan wrote:

> Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

Id. at 279.

[109] *See* McDonald v. Smith, 472 U.S. 479, 485 (1985) (holding that the Petition Clause did not provide absolute immunity to defendants charged with expressing libelous and damaging falsehoods in petitions to government officials, but that state law only allowed for damages for defamation if the defendant acted with "knowledge . . . that the words are false, or . . . without probable cause or without checking for truth by the means at hand"); *New York Times Co. v. Sullivan*, 376 U.S. at 279–80 ("[C]onstitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that

Liability for deception further requires a provably false assertion of fact.[110] A pure statement of opinion that does not imply false facts does not give rise to liability.[111] Presumably, these constitutional principles apply just as readily to lobbyist regulations as in other areas of the law.[112] For example, a lobbyist's deliberate misrepresentation of product test results might give rise to legal sanctions, since test results are a matter of fact. However, a lobbyist's views about whether a proposed law would be beneficial to consumers would be beyond legal reproach, if such statements were purely opinion.

Prohibitions against false statements of fact by lobbyists are an important tool for preventing abuse. The Code of Ethics of the American League of Lobbyists supports the view that honesty and integrity[113] are essential aspects of effective lobbying.[114] Thus, provisions at the state[115] and local[116] levels which bar false statements by lobbyists stand on solid

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the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

[110] *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (holding that an obscene parody could not support an action for intentional infliction of emotional distress unless the publication contained a false statement of fact).

[111] *See* Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) (finding that a statement in a newspaper column alleging that the petitioner lied at a hearing was "sufficiently factual to be susceptible of being proved true or false" in a defamation action).

[112] *Cf.* Lobbying Disclosure Act of 1995, 2 U.S.C.A. § 1607(a)(3) (West 2005) (providing that the act shall not "be construed to prohibit or interfere with . . . the right to express a personal opinion").

[113] AMERICAN LEAGUE OF LOBBYISTS' CODE OF ETHICS §§ 1.1–9.2, http://www.alldc.org/ethicscode.htm. Article I of the code provides:

> A lobbyist should conduct lobbying activities with honesty and integrity.
> 1.1. A lobbyist should be truthful in communicating with public officials and with other interested persons and should seek to provide factually correct, current and accurate information.
> 1.2. If a lobbyist determines that the lobbyist has provided a public official or other interested person with factually inaccurate information of a significant, relevant, and material nature, the lobbyist should promptly provide the factually accurate information to the interested person.
> 1.3. If a material change in factual information that the lobbyist provided previously to a public official causes the information to become inaccurate and the lobbyist knows the public official may still be relying upon the information, the lobbyist should provide accurate and updated information to the public official.

Id. at art. I.

[114] *See* WOLPE & LEVINE, *supra* note 43, at 13 (discussing why not telling the truth "will come home to haunt the lobbyist and harm his or her prospects on this and other issues").

[115] *See, e.g.*, ALASKA STAT. § 24.45.121(a)(3) (2004) (barring intentional deception). *See generally* Nielsen et al., *supra* note 3, at 667 ("[M]any states prohibit lobbyists from 'deceiving' officials with regard to material facts or information pertinent to pending action.").

[116] *See* SAN ANTONIO, TEX., CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-

ground in terms of ethical and business principles. However, if such legal rules do not expressly include a culpability requirement,[117] presumably they must be applied in a manner that is consistent with the First Amendment and the actual malice standard. This is important, for it is often difficult to establish actual malice.[118] Even so, prohibitions against false statements by lobbyists are an important tool for preventing abuse. First, a ban on misrepresentations by lobbyists is an essential symbol, without which the moral force of a law purporting to regulate lobbyists is seriously undercut. Second, such restrictions are readily understood by the public, urged by reformers, and invoked by government "watchdogs." Third, the nature of modern communication sometimes makes it possible to prove actual malice. Lobbyists often rely on extensive written material to make the case for their clients.[119] Electronic messages, including email,[120] and surreptitious recordings can often be used to prove what was said and to scrutinize those statements.[121]

67(a) (2006) ("A person who lobbies or engages another person to lobby, or any other person acting on behalf of such persons, shall not intentionally or knowingly make any false or misleading statement of fact to any city official, or, knowing a document to contain a false statement, cause a copy of such document to be received by a city official without notifying such official in writing of the truth."); *see also id.* at § 2-67(b) ("A registrant who learns that a statement contained in a registration form or activity report filed by the registrant during the past three (3) years is false shall not fail to correct that statement by written notification to the City Clerk within thirty days of learning of the falsehood.").

[117] *See, e.g.*, CAL. GOV'T CODE ANN. § 86205(b) (West 2005) (stating that no lobbyist or lobbying firm shall "[d]eceive or attempt to deceive any elected state officer, legislative official, agency official, or state candidate with regard to any material fact pertinent to any pending or proposed legislative or administrative action").

[118] *See generally* Vincent R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 991–95 (3d ed. 2005) (discussing proof of actual malice in defamation litigation).

[119] *See* GUIDE TO CONGRESS, *supra* note 2, at 696 (quoting a legislative aide as stating that "there's a new breed of lobbyist around. There's less of the slap-on-the-back . . . approach. Now it's 'Here's a twenty-page paper full of technical slides, charts, . . . , a table . . . , and some language in case you'd like to introduce an amendment.'"). *But see* Barry M. Aarons, *So You Want to be a Lobbyist?*, ARIZ. ATT'Y, Dec. 1998, at 26 (quoting a veteran state lobbyist as saying, "You won't ever use . . . mounds of paper at the legislature. . . [I]f you can't put it on one sheet of paper, it is useless"), *available at* 35-DEC Ariz. Att'y 26 (Westlaw).

[120] *Cf.* Pete Yost, *Bush Official is Tied to Guilty Lobbyist: Procurement Chief Accused of Hiding Abramoff's Moves*, SAN ANTONIO EXPRESS-NEWS, May 25, 2006, at 9A (discussing a criminal prosecution where "hundreds of e-mails" between a White House procurement officer and a lobbyist were "the focal point of the case"); Thomas B. Edsall, *E-mails Detail Dealings of Safavian, Abramhoff*, WASH. POST, Apr. 15, 2006, at A5 (indicating that e-mail documented "a collapse of traditional borders separating lobbyists seeking favored treatment and government officials, including members of Congress").

[121] *Cf. Court Filing: Lawmaker Taped Taking $100,000: U.S. Rep. Jefferson's Comments Reportedly Recorded by FBI Informant*, ASSOC. PRESS, May 21, 2006

Consequently, there may be sufficient evidence for a factfinder to determine whether misrepresentations of fact were culpably false.

One type of falsehood that commonly arises in the government context is the creation of a false appearance of public approval for a particular government action. This manufacturing of an artificial substitute for authentic grassroots support is sometimes referred to as "astroturfing."[122] Such misrepresentations by lobbyists are banned in some states[123] and cities. For example, a San Antonio ordinance provides that "[a] person who lobbies . . . shall not cause any communication to be sent to a city official in the name of any fictitious person or in the name of any real person, except with the consent of such real person."[124]

Prohibitions against false statements of fact by lobbyists can be enforced by civil[125] and criminal sanctions,[126] such as fines and mandatory bans on all lobbying activities for a period of years.[127] Some regulations also prohibit any person (including a public official or employee) from "intentionally or knowingly . . . aid[ing] or assist[ing] another person to engage in conduct violative of the obligations imposed by" the laws applicable to lobbyists.[128] If the false statement is contained in a sworn filing, such as the registration statements[129] or periodic activity reports[130] many lobbyists must file, that document can serve as the basis for a perjury prosecution.[131] In addition, if the false statement is

(discussing a Louisiana congressman whose conversations were recorded), *available at* http://www.msnbc.msn.com/id/12903856/?GT1=8199.

[122] *See* Greg Aljer & Jessica Burnette-Lemon, *Ethics in the Real World*, COMM. WORLD, Mar. 1, 2006 (discussing "astroturfing" in the lobbying context), *available at* 2006 WLNR 3967436 (Westlaw).

[123] *See, e.g.*, ALASKA STAT. § 24.45.121(a)(5) (2004) (barring communication with legislators under fictitious or assumed names); *see also* Nielsen et al., *supra* note 3, at 667 (indicating that some states prohibit lobbyists from "creating the false appearance of public support for an action").

[124] *See* SAN ANTONIO, TEX., CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-67(e) (2006).

[125] *See, e.g., id.* at § 2-87(f) (discussing civil sanctions). *See also* Lobbying Disclosure Act of 1995, 2 U.S.C.A. § 1606 (West 2005) (providing for enforcement of lobbyist disclosure requirements by a civil fine of not more than $50,000).

[126] *See, e.g.*, CODE OF ETHICS OF THE CITY OF SAN ANTONIO §2-87(g) (discussing criminal sanctions).

[127] *See, e.g., id.* at § 2-87(f)(3)(a) (contemplating a sanction whereby the violator is "prohibited from lobbying on behalf of clients before the city for a period not to exceed three (3) years"); *see also* ARK. CODE ANN. § 21-8-607(b)–(c) (2004) (prohibiting purposeful falsehood by lobbyists, enforceable by a three-year ban from acting as a registered lobbyist).

[128] CODE OF ETHICS OF THE CITY OF SAN ANTONIO §2-72.

[129] *Id*. at § 2-65 (discussing registration of lobbyists).

[130] *Id*. at § 2-66 (discussing quarterly activity reports).

[131] *Id.* at § 2-87(g) ("Any person who files a false sworn statement under division 5

part of a public filing, some laws treat each day during which the false statement is not corrected as a new violation subject to an additional fine.[132]

2. Gifts, Meals, Entertainment, and Travel

When lobbyists bestow gifts upon public servants, there is both an actual risk and an appearance of impropriety. The risk is that the lobbyist's client will enjoy an unfair advantage because the offering will induce the official or employee to make a decision calculated to repay the favor, rather than based on the merits.[133] Even if the recipient has not been influenced by the gift, the public will perceive that the lobbyist's client enjoys an unfair advantage vis a vis others.[134] Consequently, the gift will diminish confidence in the government, making democracy less effective.[135]

Two common types of gifts that lobbyists give to public servants are meals and entertainment. It is difficult to see why either of these practices should be tolerated. Where the meals or entertainment are extravagant—as in the case of weekends at resorts,[136] skybox seats,[137] or

(Lobbyists) . . . is subject to criminal prosecution for perjury.").

[132] *Id.* at § 2-87(f)(5) ("Each day after any filing deadline imposed by division 5 (Lobbyists) . . . for which any required statement has not been filed, or for which a statement on file is incorrect, misleading, or incomplete, constitutes a separate offense.").

[133] *Cf.* Jeffrey H. Birnbaum, *Senators Vote to Forgo Lobbyist-Bought Meals*, WASH. POST, Mar. 9, 2006, at A4 (quoting Sen. Christopher Dodd as stating that "[t]here is an undue advantage given to those who are able to take a member or senior staff member out for a meal").

[134] *Cf.* Liz Austin, *$700,000 Pours in for Craddick Apartment: Watchdog Groups Say the High-Profile Donors Could Benefit in the Future*, SAN ANTONIO EXPRESS-NEWS, at 6B (stating that "watchdog groups [were] aghast" that "persons who could benefit from future legislation," including "[b]usinessmen, a lobbyist and a major corporate foundation," donated almost $700,000 to renovate the Texas House Speaker's apartment inside the state capitol building); Julie Mason et al., *Embattled DeLay Will Quit the Race*, HOUS. CHRON., Apr. 4, 2006, at A1 (stating that a member of Congress had "been under a near-constant ethical cloud since . . . he was shown on national TV wearing knickers and playing golf on a trip paid for by lobbyists"); Editorial, *In This Corner, Reid's Hypocrisy: Senate Minority Leader Accepts Boxing Tickets After Proposing A Bill That Would Impact the Sport*, SAN ANTONIO EXPRESS-NEWS, June 1, 2006, at 6B (opining that "the mere appearance of wrongdoing can be as damaging as the transgression itself").

[135] *See* John D. Feerick et al., *Municipal Ethical Standards: The Need for a New Approach*, 10 PACE L. REV. 107, 129 (1990) (arguing that "[i]n a democracy, distrust can be as damaging as corruption itself"); *cf.* Stolberg, *supra* note 11 ("Comprehensive lobbying reform is the right thing to do. . . [T]o regain the trust of the American people in this institution, we must go further than prosecuting the bad actors." (quoting Speaker of the House Dennis Hastert)).

[136] *See* William Kistner & Steve Henn, *The Lobbyist*, AM. RADIOWORKS, http://americanradioworks.publicradio.org/features/staffers/a1.html (discussing a lobbyist—the younger brother of a congressman—who "set out to influence a $300

trips abroad[138]—the ethical issues are obvious.[139] Where the amounts spent are small—as in the case of lunches during a legislative session[140]—the expenditures nevertheless erode the public's confidence in its elected representatives. It appears that the parties footing the bills enjoy privileged standing that is not available to others who fail to proffer such gratuities. At the federal level, members of Congress[141] and other public officials and employees[142] are paid a living wage. There is no reason to rely on lobbyists to feed, clothe, or entertain federal public servants. At the state and local levels, some public officials are not paid adequately,[143] but the solution to that problem is to pay them fair compensation, not to rely on lobbyists to cover the deficiency.

Public servants should not be permitted to sell their time. While "a steak . . . might not 'buy' lawmakers, . . . it's almost certain to buy access

billion highway bill" by taking "two key congressional staffers to a celebrated resort" where they spent the weekend with the lobbyist's client).

137 *See* Fredreka Schouten & Larry Weisman, *Senators Will Have to Pay for Their Seats in Skyboxes if Ban Approved*, USA TODAY, Jan. 15, 2007, at 1 (stating that under Senate rules lawmakers have long enjoyed luxury skyboxes "because the tickets often bore no prices or were valued at below the [$50] gift limit").

138 *See, e.g.*, Jim Morris, *Privately Sponsored Trips Hot Tickets on Capitol Hill: Study Finds Almost $50 Million Spent on Travel For Lawmakers, Aides*, CTR. FOR PUB. INTEGRITY, June 5, 2006, http://www.publicintegrity.org/powertrips/report.aspx?aid=799# (discussing the former House majority whip's $28,000 golf trip to Scotland, which was sponsored by a lobbyist who later pleaded guilty to fraud, conspiracy and tax evasion).

139 *See* REMINI, *supra* note 56, at 480 (noting scandals between 1975 and 1990 where federal officers "were guilty of accepting personal gifts . . . and other gratuities such as luxury hotel accommodations, golf outings and the like"). The problems posed by extravagant meals and entertainment are similar to those posed by large expenditures in political campaigns. *See* Thurber, *supra* note 12, at 153 (discussing how the "amount of issue advertising expenditures can dwarf the input from constituents and less well-funded groups" and result in "a narrowing of public policy options because only those groups that have sufficient resources are heard").

140 *Cf.* Scharrer, *supra* note 43, at 1A (quoting a former Texas state legislator as saying, "[y]ou can walk into the Legislature any day and watch when they break for lunch. . . . [L]egislators look up to the gallery and just point to a lobbyist—'Take me to lunch.'").

141 "The current salary for rank-and-file members of the House and Senate is $165,200 per year." *Salaries and Benefits of U.S. Congress Members*, http://usgovinfo.about.com/library/weekly/aa031200a.htm.

142 U.S. OFF. OF PERSONNEL MGMT., SALARIES AND WAGES: 2006 SALARY TABLES AND RELATED INFORMATION (2006), http://www.opm.gov/oca/06tables/index.asp.

143 In San Antonio, Texas, city council members receive no salary and are paid a mere $20 for attending each council meeting. *See* Vincent R. Johnson, *A Well-Run City Worth the Cost*, May 9, 2004, SAN ANTONIO-EXPRESS-NEWS, at 5H (supporting a proposed city charter amendment to pay salaries to members of city council; the amendment failed).

[to them]."[144] Recent figures for the Texas legislature show that "[s]pending on food, entertainment, and gifts . . . [amounted] to about $15,900 worth of perks for each of the 181 lawmakers—more than double their $7,200-a-year salary."[145] Until recently, many members of Congress flew on corporate jets at heavily discounted rates, "a practice that gives precious access to lobbyists, who often go along for the trip."[146] Such "[t]rips 'violate the principle of fairness. In order to get this special kind of access, you have to pay a lot of money.'"[147] Recently, the House[148] and Senate[149] banned such travel. The public is right to be concerned about gifts to public officials and their staff members, for "[a] review of thousands of state records shows legislation is often introduced by powerful lawmakers after lobbyists spend lavishly on their campaigns and entertain them."[150]

The best practice[151] is to ban gifts from lobbyists entirely. A total ban is easy to understand and enforce. However, total bans on gifts are extremely difficult to enact or continue in force. According to the Better Government Association, more than half of the states have not enacted any restrictions on gifts, trips, and honoraria given by lobbyists.[152] When the funds originate with lobbyists, only six states have banned all gifts, only six states have banned all trips, and only three states have banned all

144 Sandberg & Guckian, *supra* note 70 (quoting Robert Stern, president of the nonpartisan Center for Governmental Studies in California).

145 *Id*.

146 Sheryl Gay Stolberg, *Senate Approves Lobbying Limits by Wide Margin*, N.Y. TIMES, Mar. 30, 2006, at A1 (discussing a bill that failed to "rein in" use of corporate jets). *See also* BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 137–38 (2006) (discussing the comforts enjoyed by politicians flying on private jets).

147 *See* Morris, *supra* note 138 (quoting Professor Dennis Thompson of Harvard University).

148 *See* Rules of the House of Representatives, H.R., 110th Cong. XXV, cl.5 (2007), *available at* http://www.rules.house.gov/ruleprec/110th.pdf; *see also* H. Res. 6, 110th Cong. §§ 205–08 (2007) (enacted), *available at* http://www.rules.house.gov/110/text/110_Hres6.pdf (last visited Jan. 30, 2007); Kirkpatrick, *Senate Feels Heat*, *supra* note 9 (stating that the new House rules "ban lawmakers from using corporate jets and reimbursing the owners").

149 *See* Kirkpatrick, *supra* note 8 (discussing the reform).

150 Sandberg & Guckian, *supra* note 70 (discussing lobbying in Texas).

151 *See* BGA INTEGRITY INDEX, *supra* note 101, at 26 (stating that a statute implementing "best practices" would provide, among other things, that "state officers and employees are prohibited from accepting any gifts/trips/honoraria from lobbyists"); Editorial, *What Real Reform Looks Like*, ST. LOUIS POST-DISPATCH, Jan. 12, 2006, at B8 [hereinafter *Real Reform*] ("True reform would totally ban gifts and privately paid travel; if a trip is worth taking to do the people's business, it's worth the people paying for it.").

152 *See* BGA INTEGRITY INDEX, *supra* note 101 app. Gifts, Trips and Honoraria Detail.

honoraria.[153] In some states, local restrictions are more stringent than state limitations. Yet, even where such variation is permitted by state law,[154] there is often a lack of political resolve to enact restrictions. At the federal level, the House recently passed a total ban on gifts from lobbyists,[155] but a similar ban had been the law just a decade earlier,[156] only to be jettisoned for more lenient rules when that was politically feasible. The recent House reform was quickly followed by a similar reform in the Senate.[157]

Absent a total ban, a dollar limitation can be imposed on gifts from lobbyists.[158] Such a restriction can be enforced through disclosure requirements that compel recipients[159] or their lobbyist-donors[160] to reveal the source, nature, and value of gifts.[161] However, disclosure is not a panacea. A study of privately funded congressional travel found that disclosure forms were often too vague or incomplete to determine whether the trip was legitimate.[162]

To be effective, a dollar limitation on gifts, trips, and honoraria

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153 *See id*.

154 "Many state gift laws also cover local officials and employees. Some states permit local jurisdictions to impose restrictions more stringent than under state law. Other states leave local gift regulation entirely to local governments and agencies." Nielsen et al., *supra* note 3, at 633.

155 *See* Rules of the House of Representatives, H.R., 110th Cong. XXV, cl.5 (2007); Kirkpatrick, *Senate Feels Heat*, *supra* note 9 (reporting that "[t]he new House rules bar members from taking gifts, meals or trips paid for by lobbyists, or the organizations that employ them").

156 *See* Jane Hook, *Lobbyists Still Cozy Up, Even With Gift Ban*, L.A. TIMES, Mar. 10, 1996, at 1 (indicating that under the earlier House rules "members and their staffs generally . . . [could not] accept gifts from anyone but family and friends," although there were complicated exceptions); David Jackson, *Congress May Lift Gift Ban for Party Conventions*, CHI. TRIB., Mar. 28, 1996 (stating that under the strict House rules, members could "accept no gifts or meals. Not a pencil or a pad of paper.").

157 *See* Kirkpatrick, *supra* note 8 (discussing the change).

158 *See, e.g.*, SAN ANTONIO, TEX., CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-67(i) (2006) (providing that "[a] person who lobbies . . . shall not give gifts to a City official or a City employee or his or her immediate family, save and except for (1) items received that are of nominal value; or (2) meals in an individual expense of $50 or less at any occurrence, and no more than a cumulative value of $500 in a single calendar year, from a single source . . ., or (3) other gifts" specifically permitted by a general rule on gifts).

159 *See, e.g.*, *id.* at § 2-74(n) (requiring city council members and others to disclose in writing gifts worth more than $100, with certain exceptions).

160 *See, e.g.*, *id.* at § 2-66(a)(6) (requiring lobbyists to disclose in writing gifts to city officials greater than $50 in value, with certain exceptions).

161 *See* BGA INTEGRITY INDEX, *supra* note 101, at 26 (recommending that in state government, "[a]ll gifts/trips/honoraria valued more than $10 received from lobbyists must be disclosed").

162 *See* Morris, *supra* note 138.

must be low. The Better Government Association uses a scoring system for rating integrity in state government. A state receives a score of zero if it has no cap; a score of 1 if the cap is above $250; a score of 2 if the cap is between $100 and $250; a score of 3 if the cap is below $100; and the highest score of 4 if the state has a total ban.[163] In each of three categories, (gifts, trips, and honoraria) a majority of the states received a score of zero.[164] It is also important for rules limiting gifts to public officials to define the list of restricted gifts broadly to include any type of benefit with pecuniary value[165]— i.e. loans and the like.[166] Otherwise, it will be possible to circumvent the ban through artful planning.

In comparison to an outright ban, a rule with dollar limitations and disclosure requirements is further hampered by the subtle temptations posed by gifts. More than half a century ago, former Senator Paul Douglas correctly observed that "[w]hat happens is a gradual shifting of a man's loyalties from the community to those who have been doing him favors."[167] As Douglas explained, "[t]hroughout this whole process the official will claim—and may indeed believe—that there is no causal connection between the favors he has received and the decisions which he makes."[168] Thus, the "whole process may be so subtle as not to be detected by the official himself."[169]

Beyond the issue of whether there is political resolve to limit gifts from lobbyists lies an important issue of equitable dimensions. That issue is the question of how to define a "lobbyist" for purposes of applying the rule. Does the term "lobbyist" only refer to someone who is paid to petition the government on behalf of another, or does the term also include persons who volunteer their services to represent others, or even individuals who act on their own behalf in petitioning the government?[170]

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163 *See* BGA INTEGRITY INDEX, *supra* note 101, at 25–26.

164 *Id.* at app. Gifts, Trips and Honoraria Detail.

165 However, state lobbyist codes often contain exceptions. "Recognizing the 'incidental' nature or 'public benefit' of certain gifts, many laws exempt simple meals, token items or mementos, tickets to social, charitable or political events, randomly selected prizes, educational or fact-finding trips, and certain other things of minimum value from the definition of a 'gift.'" Nielsen et al., *supra* note 3, at 669.

166 *Cf.* REMINI, *supra* note 56, at 424 (reporting that, during the 1970s, a proposal in the House to investigate bank lobbyists was voted down because it would have embarrassed a member of Congress who was the "lucky beneficiary of more than $100,000 in relatively unsecured loans from half a dozen banks").

167 Cox, *supra* note 71, at 291–92 (citing PAUL H. DOUGLAS, ETHICS IN GOVERNMENT 44 (1952)).

168 *Id.* at 292.

169 *Id.*

170 For purposes of lobbyist regulations, sometimes a person who might logically be considered a "client" is deemed to be a "lobbyist." *See* SAN ANTONIO, TEX., CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-62(g) (2006) ("If an agent or employee engages

What good reason could justify allowing individual citizens or volunteer surrogates seeking to influence legislation or official decisions to give gifts to public servants, if paid surrogates are restricted from freely doing so? Should not the same rules apply to each type of actor? There is a serious risk that a rule drafted too narrowly will be circumvented. For example, although lobbyists are now prohibited from paying for travel by members of Congress, their clients may do so if the trip is connected to the members' official duties.[171] A recent study showed that during a six-year period, "[p]rivate groups, corporations or trade associations—many with legislation that could affect them pending before Congress—paid nearly $50 million . . . to send members of Congress and their staffers on at least 23,000 trips overseas and within the United States."[172]

Gifts (including meals, travel, and entertainment) given by individuals or entities are arguably just as pernicious as gifts from paid lobbyists. Yet prohibiting such gratuities may be difficult or impossible. A rule of such breadth would be even more difficult to enact than one that applies only to paid lobbyists. Politicians opposed to ethics reform often propose such wide-reaching rules, knowing they cannot be enacted.[173] In addition, enforcing a ban on gifts given to public servants by any person in the community may necessitate considerably broader enforcement mechanisms than a rule targeting only paid lobbyists.

Similar issues arise with respect to the rules governing false statements of fact,[174] but perhaps not as sharply. The fact that paid lobbyists are formally prevented from knowingly or recklessly lying does not imply that such conduct is permissible on the part of others. Lying is *malum in se*.[175] Moreover, few persons would seek to circumvent the ban on lobbyist falsity by lying to public servants personally. In contrast, a ban on gifts from lobbyists might imply that gifts from others are permissible. Such conduct is merely *malum prohibitum*,[176] not *malum in*

in lobbying for a principal or employer, both the agent and the principal, or the employee and the employer, are lobbyists.").

171 *See* Philip Shenon, *Firm Says House Lawyers Approved Payments for Trips*, N.Y. TIMES, June 21, 2005, at A13 (discussing congressional trips paid for by lobbyists' clients).

172 James Kuhnhenn, *Study: Millions Spent on Trips for Congress*, FORT WORTH STAR-TELEGRAM, June 6, 2006, at A4 (citing a study conducted by the Center for Public Integrity, American Public Media, and Northwestern University's Medill News Service).

173 Ben Smith, *Legislature 2004: Amendments Put Ethics Bill in Danger*, ATLANTA J. CONST., Mar. 16, 2004, at D1 (discussing approval of an ethics bill in the Georgia Senate with amendments "so strict and potentially unconstitutional" that it "stood little chance of passage in the House").

174 *See* discussion *supra* subpart III.A.1.

175 *See* BLACK'S LAW DICTIONARY 978 (8th ed. 2004) (defining "*malum in se*" as a "crime or an act that is inherently immoral").

176 *See id.* (defining "*malum prohibitum*" as "[a]n act that is a crime merely because

se. In addition, it is foreseeable that a client might seek to avoid the ban by making gifts personally or through a volunteer.[177] Obviously, these issues are complex, and more will be said below about the challenges of defining the term "lobbyist."[178]

Another important question related to rules banning gifts is which public servants should be subject to the ban. Studies of privately funded congressional travel show that "[a]lmost three-quarters of all trips were taken" not by members of Congress but "by aides, who often influence how their bosses vote, negotiate in committee and interact with other government officials."[179] It might reasonably be urged that lobbyists should be prohibited from giving gifts to *any* public official or employee, including staff members, on the assumption that, if the gift is given, the lobbyist believes there is an advantage to be obtained. However, "many states have elaborate ethics statutes specifically proscribing [which] officials are covered."[180] Such laws create exemptions from coverage that are unwise and reflect a lack of political will on the part of lawmakers to effectively address the dangers associated with gratuities. The new House Rules wisely frame their ban on gifts from lobbyists in broad terms that apply not just to members, but to any employee of the House.[181]

Cynics can argue with historical accuracy that public life has never been free from gifts by lobbyists to public officials.[182] In the nineteenth century, legislators rode the trains for free, "courtesy of railroad lobbyists."[183] However, history is no justification for failing to improve the laws. During the past century, great progress was made in improving

it is prohibited by statute, although the act itself is not necessarily immoral").

177 *See* Birnbaum, *Lobbyists*, *supra* note 12 (quoting an individual affiliated with a major lobbying firm as stating that "[i]f meals [paid for by lobbyists] are heavily restricted, we're likely to see executives from the home office picking up checks because they're not lobbyists").

178 *See* discussion *infra* subpart III.B.1.

179 Morris, *supra* note 138.

180 Nielsen et al., *supra* note 3, at 668.

181 Rules of the House of Representatives, H.R., 110th Cong. XXV, cl.5(a)(1)(A)(ii) (2007), *available at* http://www.rules.house.gov/ruleprec/110th.pdf (providing that "[a] Member, Delegate, Resident Commissioner, officer, or employee of the House may not knowingly accept a gift from a registered lobbyist . . . or from a private entity that retains or employs registered lobbyists or agents of a foreign principal except as provided in subparagraph (3) of this paragraph").

182 *See* BERRY, *supra* note 40, at 48 (arguing that "[i]n spite of numerous reforms throughout our history, 'interested money' has always found its way to receptive legislators"). Recently, members of Congress have received huge advances on book contracts from large corporations with interests before Congress. *Id*. "While Congress forbade bribery of judges in 1790, bribing a legislator was not illegal until 1853." *Cf.* GUIDE TO CONGRESS, *supra* note 2, at 692

183 BERRY, *supra* note 40, at 48.

the position of the poor, the disabled, immigrants, women, minorities, employees, and consumers through laws that addressed the needs of those groups and that were more fair than those previously in existence. Ethics in government is now accorded a higher priority than at any time in American history.[184] By passing laws that ban or limit gifts from lobbyists to public officials or employees, legislators will help to ensure that all voices will be heard by public representatives on equal terms. It is important to continually reform the laws in a quest for a more just society.

When restrictions on gifts, entertainment, and travel are enacted, the money that would have been spent on those gratuities may be used to advance the interests of lobbyists' clients in other ways. "[I]ndustries and interest groups have [already] turned to more sophisticated tactics. . . . [Lobbyists] are increasing their campaign contributions, widening their use of the Internet to stir voter activism, and donating large sums to think tanks and charities affiliated with" members of the House or Senate.[185] However, that redirection of funds may further the interests of democracy if those expenditures result in a more transparent and open political process. For example, it might be a desirable development for "The Business Roundtable, which represents big-business chieftains, . . [to embrace] a new technique of advertising on Web sites for grassroots advocates."[186] The goal behind regulating gifts from lobbyists is to remove impediments to political discourse and even-handed decision making, not to discourage individuals from pursuing innovative ways to petition the government.

3. Campaign Contributions and Fundraising

The great exception to limitations on gifts by lobbyists is lawful campaign contributions made or orchestrated by lobbyists. Campaign money often dwarfs lobbyists' expenditures on gratuities such as meals, travel, and entertainment.[187] Like gifts, those contributions can be a way

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[184] *Cf.* Cox, *supra* note 71, at 281 ("For twenty years or more, extraordinary public attention has been focused upon the ethics of government officials.").

[185] Birnbaum, *Lobbyists*, *supra* note 12.

[186] However, the same cannot be said where "organizations from the left and right are increasingly offering meetings with top government officials in exchange for hefty dues." *Id.*

[187] *See* Thurber, *supra* note 12, at 156 (stating that in the 2000 election cycle, "the top twenty-five lobbying firms spent over $4 million"). "Many of the top twenty-five . . . firms also contributed services (either in-kind or for a fee), such as strategic advice about finance, media, and grassroots activities, directly to the 2000 presidential and congressional campaigns." *Id.* at 157. *See also* Anne E. Kornblutt et al., *The Abramoff Case: The Overview, Lobbyist Accepts Plea Deal and Becomes Star Witness in a Wider Corruption Case*, N.Y. TIMES, Jan. 4, 2006, at A1 (discussing a lobbyist who "helped

to buy access to legislators[188] and perhaps votes.[189] In some cases, "[r]egular contributors attend dozens of fund-raisers a year and become part of the 'circuit' of lobbyists around a cadre of lawmakers and their committees . . . . Contacts are made, relationships formed, and networks established."[190] Occasionally, the intent of a contribution is blatant. In 1995, an Ohio congressman "passed [campaign contribution] checks from tobacco lobbyists to other congressmen on the House floor while lawmakers were considering ending a tobacco subsidy."[191]

Not surprisingly, some states impose special limitations on campaign donations by lobbyists. Kentucky has a flat ban on campaign contributions.[192] Alaska provides a slight exception to its ban when the lobbyist's contribution goes to the candidate from the district where the lobbyist will be eligible to vote on election day.[193] Austin, Texas, bars lobbyists' contributions greater than $25 to members of the city council.[194] The County of Los Angeles prohibits any contributions to county officials or candidates by persons who are presently or were, within the previous twelve months, registered as county lobbyists.[195]

funnel more than $1.5 million in campaign donations to hundreds of elected officials").

188 *See* WOLPE & LEVINE, *supra* note 43, at 50 (stating that contributions create access to legislators for lobbyists).

189 *See* Jennifer McKee, *Burns Did About-Face After Cash from Lobbyist*, MISSOULIAN, Dec. 3, 2005, at A1 (asserting that records show that a U.S. senator from Montana "changed his stance on a 2001 bill after receiving a $5,000 donation from a lobbyist's client who opposed the legislation"), *available at* 2005 WLNR 22479128 (Westlaw); *cf. Hardball with Chris Matthews* (CNBC television broadcast Sept. 28, 2005) (indicating that the House Ethics Committee admonished a Texas Congressman for "inviting energy lobbyists to a fund-raiser just before the energy bill was brought to the House floor"), *available at* 2005 WLNR 15339714 (Westlaw).

190 WOLPE & LEVINE, *supra* note 43, at 50.

191 Bart Mills, *In Washington, It's Now About Who Cheated the Least*, LIMA NEWS (Ohio), Jan. 19, 2006, *available at* 2006 WLNR 1039973 (Westlaw). *See also* Editorial, *A Hazy Culture*, BLADE (Toledo, Ohio), Mar. 6, 2006, (discussing campaign contributions from the tobacco industry), *available at* 2006 WLNR 3837524 (Westlaw).

192 KY. REV. STAT. ANN. § 6.811(6) (West 2004) ("A legislative agent shall not make a campaign contribution to a legislator, a candidate, or his campaign committee.").

193 ALASKA STAT. § 15.13.074(g) (2004).

194 AUSTIN, TEX., AUSTIN CITY CODE § 2-2-9 (2006) ("[N]o person who is compensated to lobby the city council . . . and no spouse of any such person may contribute more than $25 in a campaign period to an officeholder or candidate for mayor or city council, or to a specific purpose political committee involved in an election for mayor or city council.").

195 *See* LOS ANGELES, CAL., COUNTY CODE § 2-190.130 (2006), *available at* http://municipalcodes.lexisnexis.com/codes/lacounty (follow "Title 2. Administration" hyperlink; then follow "Chapter 2.190 Political Campaigns for County Offices" hyperlink; then follow "2.190.130 Lobbyist contributions" hyperlink) (providing in part that "[n]o person or firm who is registered . . . as a county lobbyist or county lobbying firm or who has been so registered at any time in the previous 12 months shall make any contribution to any county official or candidate for county office").

Several states also prohibit lobbyists from attempting to influence the votes of legislators by promising financial support for the member's candidacy, or by threatening to contribute financially to an opponent.[196] Unfortunately, laws in a number of states dilute the effectiveness of their restrictions by providing that a ban on campaign contributions applies only when the legislature is in session.[197] These half-hearted reform efforts seem to assume that either legislators or voters have very short attention spans.

Some lobbyists solicit contributions and hold fundraisers for candidates on behalf of clients seeking government contracts.[198] As recently as the summer of 2006, the (now-former) House majority leader held "fund-raisers at lobbyists' offices."[199] This conduct creates the perception "that these lobbyists may enjoy differential access and may have unfair advantages over others who are not participating in candidate events and fundraisers."[200] In some states, such conduct by lobbyists is unlawful. For example, Alaska provides, with limited exceptions, that a lobbyist may not host a fundraising event or otherwise engage in the fundraising activity of a legislative campaign or campaign for governor or lieutenant governor.[201] In South Carolina, the rule applies to both

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[196] *See, e.g.*, NEB. REV. STAT. ANN. § 49-1492(3), (5) (LexisNexis 2002) (prohibiting such conduct by "any person"); N.C. GEN. STAT. § 120-47.5(b) (2005) (stating that "no person" shall violate the rule).

[197] *See, e.g.*, COLO. REV. STAT. § 1-45-105.5(1)(I) (2005) ("No professional lobbyist, volunteer lobbyist, or principal . . . shall make or promise to make a contribution to, or solicit or promise to solicit a contribution for . . . [a] member of the general assembly or candidate for the general assembly, when the general assembly is in regular session."); IOWA CODE ANN. § 68A.504(1) (West 2006) (stating a similar rule including, "in the case of the governor or a gubernatorial candidate, . . . the thirty days following the adjournment of a regular legislative session allowed for the signing of bills"); NEV. REV. STAT. ANN. § 218.942(9)(a)–(c) (LexisNexis 2005) (stating a similar rule including short periods before and after legislative sessions).

[198] COMMISSION ON ETHICS AND PUBLIC TRUST, A COMMUNITY'S RESOLVE TO RESTORE INTEGRITY, ACCOUNTABILITY AND PUBLIC TRUST: THE MIAMI-DADE EXPERIENCE (1996–PRESENT) (Jan. 2004), at 8–9 [hereinafter MIAMI-DADE EXPERIENCE].

[199] Mike McIntire, *New House Majority Leader Keeps Old Ties to Lobbyists*, N.Y. TIMES, July 15, 2006, at A1.

[200] MIAMI-DADE EXPERIENCE, *supra* note 198, at 9.

[201] ALASKA STAT. § 24.45.121(a)(8) (2004). Maryland has extensive rules relating to fundraising and political activities by lobbyists. MD. CODE ANN., STATE GOV'T § 15-713(14)(i)–(iii) (LexisNexis 2004) (providing that a lobbyist shall not, "if serving on the State or a local central committee of a political party, participate: (i) as an officer of the central committee; (ii) in fund-raising activity on behalf of the political party; or (iii) in actions relating to filling a vacancy in a public office"); *id.* at § 15-714(d)(1)(i)–(v) (stating that a lobbyist may not, with respect to a number of state offices, engage in "(i) soliciting or transmitting a political contribution from any person, including a political committee; (ii) serving on a fund-raising committee or a political committee; (iii) acting as a treasurer for a candidate or official or as treasurer or chairman of a political

lobbyists and their principals.[202] Miami Beach, Florida "bans lobbyists from serving as fundraisers if they actively lobby the city."[203]

Some lobbying firms have formed their own political action committees (PACs), which presumably are more effective at achieving their clients' goals.[204] However, PACs have the added advantage of making the sources of campaign donations less clear to political watchdogs.[205] Such conduct appears to run afoul of laws prohibiting lobbyists from directly or indirectly collecting contributions for a candidate.[206]

The need to finance political campaigns is no reason for failing to address the problems raised by lobbyist contributions.[207] "Full public financing of campaigns, approved in three states for legislative and statewide races, is considered by many watchdogs to be the best way to end the campaign money hunt that empowers lobbyists as it drives candidates."[208]

4. Revolving-Door Employment

Perhaps no problem in government ethics is easier to understand, or more difficult to address effectively, than that posed by "revolving-door employment."[209] The risk is obvious that a client represented by a public-servant-turned-lobbyist will have, or will appear to have, an unfair

committee; (iv) organizing or establishing a political committee for the purpose of soliciting or transmitting contributions from any person; or (v) forwarding tickets for fund-raising activities, or other solicitations for political contributions, to a potential contributor").

[202] *See* S.C. CODE ANN. 1976 § 2-17-110(F) (2005) ("A lobbyist, a lobbyist's principal, or a person acting on behalf of a lobbyist or a lobbyist's principal may not host events to raise funds for public officials. No public official may solicit [those persons] to host a fundraising event for the public official.").

[203] MIAMI-DADE EXPERIENCE, *supra* note 198, at 9.

[204] *See* Sandberg & Guckian, *supra* note 70 (quoting one lobbyist as complaining that the political action committees of influential lobbying firms "shut out other lobbyists, creating in effect a cartel").

[205] *See id.* (quoting a representative of Texans for Public Justice as stating that such practices "really muddle the source").

[206] ALASKA STAT. § 24.45.121(a)(8).

[207] *See* discussion *supra* subpart III.A.2.

[208] Peggy Fikac, *"Clean Elections" Might Wash Away Money's Imprint*, SAN ANTONIO EXPRESS-NEWS, Apr. 15, 2006, at 1A ("Once you kind of end the money chase, elected officials are far less susceptible to some of the attractions that lobbyists can offer –i.e., travel, food, gifts, campaign contributions." (quoting Mary Boyle of Common Cause)).

[209] *See generally* Editorial, *The Capitol's Revolting Door*, N.Y. TIMES, Nov. 4, 2005, at A26 [hereinafter *Revolting Door*] (discussing "Washington's ever-whirring carousel for business lobbyists and government appointees, who spin back and forth between the private and public sectors in a blur of opportunism").

advantage in petitioning the government.[210] This type of conduct poses a significant threat to the integrity of democratic institutions. Consequently, Congress[211] and a number of state legislatures[212] have enacted laws addressing revolving-door employment. Indeed, even cities,[213] including some with otherwise weak ethics codes,[214] commonly have revolving-door limitations prohibiting former public officials or employees from "representing" private parties before the government for specified periods of time. Depending on how the relevant terms are defined, these city ordinances may treat lobbying as a form of "representation" and thus limit revolving-door lobbying.[215] Yet, despite

[210] *See* Capps, *supra* note 40, at 1886 ("Critics claim that the flood of legislators into lobbying heightens the perception that lobbyists use personal contacts to take home big paychecks, and that taxpayers pay the price in the end.").

[211] *See* Minor & Regan, *supra* note 2, at §§ 10.52–.53 (discussing federal laws that restrict lobbying by former public officials and employees).

[212] *See, e.g.*, ALASKA STAT. § 24.45.121(c) (2004) (providing, with limited exceptions, that "[a] former member of the legislature may not engage in activity as a lobbyist before the legislature for a period of one year after the former member has left the legislature"); ARIZ. REV. STAT. ANN. § 41-1233(2) (2004) (providing that no person shall "[l]obby the legislature for compensation within one year after the person ceases to be a member of the senate or house of representatives"). *But see* LOBBYING, PACS, AND CAMPAIGN FINANCE, *supra* note 3, at §§ 31.52–.53 (stating that New Hampshire does not restrict the employment of former public officials or employees); §§ 35.52–.53 (stating that North Carolina has no restrictions on employment of former public officials and employees).

[213] *See, e.g.*, DALLAS, TEX., CODE OF ETHICS § 12A-14 (2006) (limiting subsequent representation of private interests); SAN ANTONIO, TEX., CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-56 (2006) (similar restrictions). For example, a former appointed board member might be prohibited only from representing persons for compensation before the same board, but a former elected city council member might be prohibited from representing any person before any city body. *See id.* at § 2-57. *See* Johnson, *America's Preoccupation*, *supra* note 73, at 745–47 (discussing key variables). *See generally* Mark Davies, *Keeping the Faith: A Model Local Ethics Law–Content and Commentary*, 21 FORDHAM URB. L.J. 61, 75–76 (1993) (finding that city prohibitions are typically short in duration (one or two years) and vary in terms of who is subject to the restrictions, what types of governmental contact are prohibited, and whether the ban applies only to compensated representation).

[214] *See, e.g.*, SAN JOSE, CAL., SAN JOSÉ MUNICIPAL CODE § 12.10.030 (2006) (establishing "revolving door" restrictions).

[215] The City of San Antonio, Texas, passed a new ethics code in 1998. As enacted, the code restricted, for a period of time, "representation" of private interests by former city officials and employees. SAN ANTONIO, TEX., CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-56 (1998). That rule clearly limited lobbying by former officials and employees, for the code, as adopted, included a definition stating that:

"Representation" encompasses all forms of communication and personal appearances in which a person, not acting in performance of official duties, formally or informally serves as an advocate for private interests. *Lobbying, even on an informal basis, is a form of representation* . Representation does not include appearance as a witness in litigation or other official proceedings. *Id.* at § 2-42 (emphasis added). By 2006, the definition of

such restrictions at all levels of government, "[s]ome of the most successful [lobbyists] are former lawmakers[,] or former aides to lawmakers[,] who cycle in and out of government."[216]

The problem with most restrictions on revolving-door employment is that they apply for too short a period of time.[217] For example, with respect to lobbying by former state legislators, six states only require a two-year moratorium, twenty states have only a one-year moratorium, and one state has a mere six month moratorium.[218] Other states have no revolving-door restrictions at all.[219] Retired or defeated members of Congress "must sit out one year before doing active lobbying, although they can offer 'guidance' at up to $500,000 a year."[220] Needless to say, the connections legislators accrue during years of service often last far longer than a year or two. This is particularly true at the federal level, where turnover in Congress is minimal due to careful redistricting that aggressively protects incumbents.[221]

"representation" had been gutted by an amendment, so that it now reads simply: "'Representation' is a presentation of fact—either by words or by conduct—made to induce someone to act. Representation does not include appearance as a witness in litigation or other official proceedings." SAN ANTONIO, TEX., CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-42(bb) (2006). The revised definition makes it much less clear that the representation rule bars lobbying, and to that extent substantially weakens the San Antonio ethics code.

[216] Sandberg & Guckian, *supra* note 70. Some argue that lobbyists with prior experience in government are an asset to the American political system. "Federal policy-makers, awash in a flood of competing voices, need reliable information; to the extent that their government experience fosters such reliability, these [lobbyists] better inform decision making." Kevin T. McGuire, *Lobbyists, Revolving Doors and the U.S. Supreme Court*, 16 J. L. & POL. 113, 135–36 (2000).

[217] However, in some circumstances, provisions can be too broad. A rule may, for example, expect an improper degree of continuing "loyalty" from one who served in government only as a volunteer member of a board or commission by imposing restrictions on subsequent activities that have no relationship to the volunteer's limited range of service in government. *See* Johnson, *Ethics in Government*, *supra* note 69, at 737–38 ("It is reasonable to expect a higher degree of loyalty from one who is elected to city office or on the payroll than from a person who has merely agreed to donate a few hours of service to the work of the government on an occasional basis by serving on a board or commission . . . [The] legitimate expectation of loyalty from a citizen-volunteer generally extends no further than the scope of the volunteer's official duties.").

[218] CTR. FOR PUB. INTEGRITY, STATE LEGISLATOR REVOLVING DOOR PROVISIONS (Mar. 1, 2006), http://www.publicintegrity.org/hiredguns/report.aspx?aid=783.

[219] *See* Fikac, *supra* note 208 (stating that Texas is one of twenty-three states with "no prohibition against legislators lobbying state government after they leave office").

[220] *Real Reform*, *supra* note 151. *See generally* Minor & Regan, *supra* note 2, at § 10.52 ("Under a federal criminal statute and congressional rules, Members of Congress may not lobby any Member, officer, or employee of Congress for one year after leaving office.") (citing 18 U.S.C. § 207(e)–(f); Senate Rule 37 §§ 8–9).

[221] *See* Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L. J. 179, 179

Revolving-door limitations on lobbyists can be strengthened in a variety of ways. The length of the ban can be increased (a two-year ban is stronger than a one-year restriction[222]); the number of persons subject to the ban can be broadened (a ban that applies to all government officials[223] is more potent than one that applies only within the legislative branch[224]); and the ban can be made more extensive with respect to matters in which the former public servant was closely involved (e.g., a rule might prohibit lobbying for a longer period of time with respect to matters in which the former official or employee "personally and substantially" participated[225]).

Some reformers also advocate placing limits on the ability of lobbyists to be appointed to positions in government. For example, during recent efforts to strengthen the law in Georgia an amendment was proposed that would have prevented "the appointment of lobbyists for one year following the expiration of the lobbyist's registration 'to any state office, board, authority, commission, or bureau' that regulates the activities of a firm on whose behalf they had lobbied."[226] The City of Austin, Texas, prohibits lobbyists from being appointed to a "city-established board, commission, or committee within three years of engaging in lobbying activity."[227] As a matter of public policy, these

(2003) (arguing that "the "2001-2002 Round of Congressional Redistricting was the most incumbent-friendly in modern American history" because new district lines insulated incumbents from competition and "froze into place . . . a 'distributional bias' that gives Republicans a roughly 50-seat head start in the battle for control of Congress").

[222] *Compare* ARIZ. REV. STAT. ANN. § 41-1233(2) (2004) (stating a one-year limitation), *with* KY. REV. STAT. ANN. § 6.811(8) (West 2004) (prohibiting legislators from serving as lobbyists for two years). *See also* Birnbaum, *Lobbyists*, *supra* note 12 (discussing proposed federal legislation to increase a one-year ban to two years).

[223] *See* SAN ANTONIO, TEX., CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-42(u) (2006) (defining city "officials" for purposes of the city ethics code, including its revolving-door provisions, as the mayor, members of city council, municipal judges and magistrates, and many others).

[224] *See* Lisa Berman, *Change in New Jersey Lobby Law Inspires Firm Subsidiary*, 27 NAT'L L.J. 10 (2006) (discussing how old regulations, which required lobbyists to register if they "wanted to influence regulations or legislation," were broadened in New Jersey to include "attempts to affect administrative and bureaucratic decisions in the executive branch").

[225] "Under the 1978 Ethics in Government Act, top executive branch officials are barred, for one year after leaving government, from representing anyone before their former agency; officials are permanently barred from lobbying on issues that are directly related to their former areas of responsibility." GUIDE TO CONGRESS, *supra* note 2, at 718. "Cabinet-level employees are subject to a more extensive prohibition that covers lobbying communications throughout the executive branch." Minor & Regan, *supra* note 2, at § 10.53 (*citing* 18 U.S.C. § 207(d)).

[226] Stephanie D. Campanella, et al., *Election: Georgia Ethics in Government Act*, 21 GA. ST. U. L. REV. 129, 137 (2004) (discussing a failed effort to reform state ethics laws).

[227] AUSTIN, TEX., AUSTIN CITY CODE § 2-1-8 (2006).

regulations make good sense. The underlying concern is similar to an "administrative capture" scenario, where an administrative agency is dominated by those it is supposed to regulate[228] and becomes less effective as a result.[229] By limiting the ease with which lobbyists are able to move into appointed governmental positions, revolving-door limitations preserve a healthy distance between those who seek the aid of government and those who make decisions.[230]

The general brevity and limited scope of existing revolving-door restrictions reflect present (although not necessarily inevitable) political realities. Consequently, stronger revolving-door limitations will likely appear at the margins, rather than through sweeping changes to existing practices.[231] Even so, there is reason to hope that, at the federal level, former members of Congress who become lobbyists will be banned from engaging in the most blatant practices, such as lobbying current members on the House floor or in the House gym and dining room.[232]

5. Contingent-Fee Lobbying

Some lobbyist compensation arrangements pose more serious threats to the public interest than others. A lobbyist whose fee is contingent on success has a greater incentive to "win at all costs," in contrast to lobbyists who are paid an hourly fee, a lump-sum fee, or a

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[228] *See* Ian Ayres & F. Clayton Miller, *"I'll Sell It to You at Cost": Legal Methods to Promote Retail Markup Disclosure*, 84 NW. U. L. REV. 1047, 1070 & n.87 (1990) ("Regulated agencies . . . can be 'captured' by the very firms they are mandated to regulate. Captured agencies have been the source of many inefficient regulations.").

[229] *See* Christopher Wyeth Kirkham, Note, *Busting the Administrative Trust: An Experimentalist Approach to Universal Service Administration in Telecommunications Policy*, 98 COLUM. L. REV. 620, 623 (1998) ("Administrative capture by special interests leads to policy approaches that often fail to account for the interests of the less influential public."). Administrative capture may occur as a result of revolving-door movement between the private and public sectors. *See* Johnson, *Liberating Progress*, *supra* note 93, at 1051–52 ("The risks that agency determinations may unfairly favor the interests of the companies seeking regulatory approval are all the more ominous in view of the revolving door between government work and the private sector, which tempts agency employees to render decisions which may enhance their own employment chances with the same regulated firms they are charged with overseeing.").

[230] *Cf.* Laura Mansnerus, *A Shadowy Web of State Agencies and Developers*, N.Y. TIMES, July 24, 2005, at 14 NJ 1 (discussing the questionable use of the appointment process in New Jersey to forge connections between state government and private enterprise). 'We put developers on boards who take care of other developers who sit on other boards who then take care of them,' said Jeff Tittel, the director of the state chapter of the Sierra Club." *Id*.

[231] *But see Real Reform*, *supra* note 151 ("True reform would . . . forbid former members of Congress—or their spouses—from sliding over into lobbying jobs.").

[232] *Id*. (arguing for the elimination of "sweetheart deal[s] that allow[] former members access to the House floor and privileges in the House gym and dining room").

monthly retainer.[233] As a result, contingent fee arrangements may promote the use of "improper means, such as distorting relevant facts, to ensure success."[234] Contingent fees, or "success fees,"[235] may also over-compensate lobbyists.[236]

In personal-injury tort litigation, contingent fees pose similar problems. A lawyer who will not be paid unless his or her client wins has a strong desire to prevail regardless of the facts unearthed during litigation. Nevertheless, contingent fee representation of personal injury claimants is widely permitted.[237] Such arrangements for financing the costs of legal services play an important role in ensuring that all injured persons, particularly the poor, will have equal access to the courts.[238] While contingent-fee legal representation may be a type of social "evil"—in the sense that it may result in overzealous lawyering or over-compensation—it is also a socially beneficial "necessary evil."

The same is not true with respect to lobbying. Relatively few lobbyists represent consumers and nonprofit organizations,[239] and even fewer serve the poor or disadvantaged.[240] Contingent-fee lobbying is more likely to promote the interests of big business, for business-related

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233 *See* Chwat, *supra* note 41, at 121–22 (discussing hourly rates and monthly retainers).

234 City of Hialeah Gardens v. John L. Adams & Co., Inc., 599 So. 2d 1322, 1324–26 (Fla. Dist. Ct. App. 1992) (noting that there "is a legitimate public policy concern" and calling the issue "to the attention of the Bench and Bar").

235 *See* Capps, *supra* note 40, at 1887 (demonstrating synonymous usage).

236 *See* MIAMI-DADE EXPERIENCE, *supra* note 198, at 8 ("There is some evidence to support the proposition that lobbyists receive exorbitant fees either in the form of hefty retainers or in the form of success fees.").

237 *Cf.* ABA Comm. on Ethics and Prof'l Resp., Formal Op. 94-389 (1994) ("[T]he charging of a contingent fee, in personal injury and in all other permissible types of litigation, as well as in numerous non-litigation matters, does not violate ethical standards as long as the fee is appropriate in the circumstances and reasonable in amount.").

238 *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 cmt. b (2000) ("Contingent-fee arrangements . . . enable persons who could not otherwise afford counsel to assert their rights, paying their lawyers only if the assertion succeeds."); Vincent R. Johnson and Virginia Coyle, *On the Transformation of the Legal Profession: The Advent of Temporary Lawyering*, 66 NOTRE DAME L. REV. 359, 393 (1990).

239 *See* Sandberg & Guckian, *supra* note 70 (stating that in Texas "[a]bout 30 of the 1,700 lobbyists work for consumer and environmental groups, according to Texans for Pubic Justice").

240 *See* Scharrer, *supra* note 43 ("[T]he interests of low income children and nonprofit institutions often lose out when they collide with money players in the state Capitol, where companies with deep pockets hire high-powered lobbyists to protect their interests."). *See also* Jeffrey H. Birnbaum, *Clients' Rewards Keep K Street Lobbyists Thriving*, WASH. POST, Feb. 14, 2006, at A1 [hereinafter Birnbaum, *Clients' Rewards*] ("Congressional critics complain that average voters are left out when private lobbyists rush in.").

lobbying is where the most money can be made.[241] One recent change in the tax laws, resulting from aggressive lobbying, saved sixty companies the breathtaking sum of "roughly $100 billion."[242] There is little reason to think that contingent-fee lobbying would benefit the poor[243] or reduce the disparities between "haves" and "have nots."[244]

Numerous court decisions have condemned lobbyists' contingent fees.[245] For example, more than 130 yeas ago in *Trist v. Child*,[246] the Supreme Court held that a contingent-fee agreement to lobby a private bill through Congress was void and unenforceable.[247] Justice Swayne's opinion for the Court condemned lobbying generally,[248] and contingent-

[241] Another reason may be that lobbying by non-profit organizations historically was limited by provisions in the Internal Revenue Code granting tax-free status. *See* 26 U.S.C. § 501(c)(3) (stating restriction); *see also* BERRY, *supra* note 40, at 47 (discussing how nonprofit organizations cope with the restrictions on lobbying, for example by telling their constituents to contact their legislators, but "refraining from telling them to urge their legislators to vote in a particular way"). However, since 1976, "tax-deductible nonprofits have [had] the option of the 'H' election, allowing them to ignore the 'substantial' limitation on lobbying." *Id.* at 54. Thus, there are really two federal policies on lobbying by nonprofits: "one policy sharply restricts lobbying; the other allows for virtually unlimited lobbying." *Id.* "The IRS has made it remarkably easy for a nonprofit to take the H election." *Id.* at 56. Yet, "[m]ost nonprofits have no idea that there is such a thing as the H election, and only about 2.5 percent . . . choose this path." *Id.* at 57.

[242] Birnbaum, *Clients' Rewards*, *supra* note 240 (indicating that the corporations spent $1.6 million dollars on lobbying efforts).

[243] *But see* Stacie L. Fatka & Jason Miles Levien, Note, *Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution*, 35 HARV. J. ON LEGIS. 559, 587 (1998) (arguing that bans on contingent-fee lobbying often preclude individuals and organizations with few financial resources from lobbying).

[244] *See* David Westphal, *Gap Between Rich and Poor Looks to Be Widening*, FRESNO BEE, Jan. 27, 2006, at A10 (discussing income inequality).

[245] *See, e.g.*, Grover v. Merritt Dev. Co., 47 F. Supp. 309, 319 (D.C. Minn. 1942) (holding that a contingent fee lobbying agreement was against public policy, *malum in se*, and void, and that no recovery could be had either for amount of fee or on a *quantum meruit* basis).

[246] 88 U.S. 441 (1874).

[247] *Id*. at 452; *but see* Oscanyan v. Arms Co., 103 U.S. 261, 276 (1880) (distinguishing an impermissible contingent fee from a permissible percentage fee established by the "custom of commission merchants and brokers").

[248] The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. . . . If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

fee lobbying in particular, regardless of whether there was evidence of actual abuse.[249] "Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased."[250] Other Supreme Court cases have held that "[c]ontingent fee contracts to secure Government business for the employer of the recipient are invalid because of their tendency to induce improper solicitation of public officers and the exercise of political pressure."[251]

However, "there are no modern federal cases dealing with contingency fee lobbying."[252] While *Trist* and related cases[253] have not been overruled, some have expressed doubt about their continuing validity.[254] Congress' recent failure to enact a ban on contingent-fee

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Trist v. Child, 88 U.S. 441, 451 (1874).

[249] No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking . . . The elder agent in this case is represented to have been a lawyer of ability and high character . . . This can make no difference as to the legal principles we have considered.

Id. at 451–53.

[250] *Id*. at 452.

[251] Muschany v. U.S., 324 U.S. 49, 64 (1945). *See also* Crocker v. United States, 240 U.S. 74, 78–79 (1916) (finding that there was "an obvious departure from recognized legal and moral standards" where a company employed an agent with "compensation contingent upon success, to secure the contract for furnishing . . . satchels" to the federal government. Because of their baneful tendency . . . [such] agreements . . . are deemed inconsistent with sound morals and public policy, and therefore invalid").

[252] Capps, *supra* note 40, at 1890.

[253] *See e.g.*, Marshall v. Baltimore & O. R. Co., 57 U.S. 314, 336 (1853) ("[A]ll contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, [are] void by the policy of the law."). In *Providence Tool Co. v. Norris*, a case involving a procurement contract, Justice Stephen Field wrote for the Court:

> Legislation should be prompted solely from considerations of the public good, and the best means of advancing it. Whatever tends to divert the attention of legislators from their high duties, to mislead their judgments, or to substitute other motives for their conduct than the advancement of the public interests, must necessarily and directly tend to impair the integrity of our political institutions. Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception. There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments.

69 U.S. (2 Wall.) 45, 54–55 (1864)

[254] *See* Florida League of Prof'l Lobbyists, Inc. v. Meggs, 87 F.3d 457, 458 (11th Cir. 1996) (discussing arguments that "interim developments of First Amendment law establish conclusively that the Supreme Court today would strike a contingency-fee ban

lobbying[255] led one law review article to conclude that "lobbyists are still free to receive contingency fees for lobbying members of Congress."[256] However, "[m]ost states prohibit the payment of fees contingent on the outcome of legislation and or administrative action."[257] The same is true of many cities.[258]

Yet, in other contexts no such action has been taken.[259] This void represents an opportunity for strengthening the rules governing the conduct of lobbyists. It is bad enough that lobbying firms sometimes solicit clients "with virtual guarantees that they . . . [can] deliver 'dollars for pennies' (or billions for millions)."[260] There is no need to add contingency fee incentives to the mix. When challenged, almost all bans on contingent-fee lobbying have been found to be constitutional.[261]

6. Business Transactions with and Employment by Lobbyists

Business transactions represent another means by which public officials and employees can become indebted to lobbyists. "[F]ormer House speaker James Wright was routinely paid huge sums of money for speaking to lobbyists, who covered the expense by 'buying' signed

on lobbying").

[255] *See* Capps, *supra* note 40, at 1888 ("[N]one of the proposed legislation has passed.").

[256] *Id*.

[257] Nielsen et al., *supra* note 3, at 667. *See, e.g.*, CAL. GOV'T CODE ANN. § 86205(f) (West 2005) (providing that no lobbyist or lobbying firm shall "[a]ccept or agree to accept any payment in any way contingent upon the defeat, enactment, or outcome of any proposed legislative or administrative action"); HAW. REV. STAT. ANN. § 97-5 (LexisNexis 2003) (stating a similar rule). "The following states are currently silent on the issue: Louisiana, Missouri, Montana, New Hampshire, and Wyoming. A couple of states (Tennessee and West Virginia) require special disclosure or written agreements for contingent fee lobbying. Delaware limits such fees to no more than half the compensation paid to a lobbyist." Nielsen et al., *supra* note 3, at 667. *See generally* LOBBYING, PACS, AND CAMPAIGN FINANCE, *supra* note 3 (detailing restrictions on contingent-fee lobbying, state by state).

[258] *See* MIAMI, FLA., CHARTER AND CODE OF THE CITY OF MIAMI, § 2-658 (2006) ("No person shall retain or employ a lobbyist for compensation based on a contingency fee."); *see also* Rome v. Upton, 648 N.E.2d 1085, 1088 (Ill. Ct. App. 1995) (holding that a state ban on contingent fee lobbying extended to city councils).

[259] *See* Capps, *supra* note 40, at 1887 ("Contingency fee lobbying contracts have become surprisingly common" and "the media has uncovered various examples at the state and local levels.").

[260] See Rudoren & Pilhofer, *supra* note 51, at 14.

[261] *See Meggs*, 87 F.3d at 458 (upholding a ban on "contingency-fee lobbying despite whatever doubts recent cases may have cast on its constitutionality"); Capps, *supra* note 40, at 1891 ("[State bans] have generally withstood constitutional challenge in the courts."). *But see* Montana Auto. Ass'n v. Greely, 632 P.2d 300, 308 (Mont. 1981) (striking down a ban on contingency-fee lobbying as overbroad).

copies of his book for all of their members."[262] Such transactions create an appearance of impropriety, threaten to bias public officials in favor of the lobbyist's clients, and generally compromise the goal of a level playing field in public life. Such ethical problems are exacerbated when the transaction involves payment of an amount in excess of fair market value. One newspaper reported that a city councilman offered his vanity-press *Frankenstein* sequel for $500 per autographed copy, and that an appreciative lobbyist paid that amount.[263] Indiana, quite sensibly, bars state officers and employees from receiving compensation for "the sale or lease of any property or service which substantially exceeds that which ... [he or she] would charge in the ordinary course of business."[264]

Despite the obvious problems associated with business transactions between lobbyists and public servants, various obstacles stand in the way of crafting an effective ban on fair-market-value transactions. For example, a member of a city council may also own a coffee shop. Should it be impermissible for a lobbyist who represents clients before the city council to patronize that member's coffee shop occasionally? What if the lobbyist patronizes the coffee shop every day, or recruits his or her clients and their friends to do business at the establishment? A rule banning *de minimis* business transactions probably serves no good purpose, but differentiating those purchases from ones that are objectionable is difficult. One possible approach would be to exclude "routine" transactions,[265] or transactions that do not create an appearance of impropriety. However, such vague distinctions may be subject to challenge on the ground that they fail to provide clear notice of what is

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[262] *See* BGA INTEGRITY INDEX, *supra* note 101, at 25.

[263] *See* Chris Williams, *Frankenstein Sequel Ready*, SAN ANTONIO EXPRESS-NEWS, Sept. 23, 1999, at 7B (describing the book written by city councilman Mario Salas); Chris Williams, *Contribution to Book Questioned*, SAN ANTONIO EXPRESS-NEWS, Sept. 23, 1999, at 1B (stating that a lobbyist's contribution to publication of a city councilman's novel "raised red flags among government ethicists and even other lobbyists"); Chris Williams, *Salas Ruling Questioned: City Attorney "Missed the Ball,"* SAN ANTONIO EXPRESS-NEWS, Sept. 28, 1999, at 1A (questioning an ethics opinion finding that the book-publishing deal did not violate the city ethics code).

[264] IND. CODE ANN. § 4-2-6-7(b)(1) (LexisNexis 2006).

[265] Other areas of the law have addressed similar drafting problems. Some ethics codes prohibit public officials from taking official action that affects the economic interests of a "client," and provide that "[t]he term *client* includes business relationships of a highly personalized nature, but not ordinary business-customer relationships." *See* SAN ANTONIO, TEX., CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-43 (2006). Under that type of provision, routine transactions fall outside the scope of the rule. "[A] city official who owns a coffee shop would not have to abstain from participation in a matter relating to one of the many hundreds of customers who occasionally buy a cup of coffee at the shop because the relationship is not 'highly personalized.'" *See* Johnson, *Ethics in Government*, *supra* note 69, at 770 n. 255.

prohibited.[266]

If it is problematic for public servants to engage in business transactions with lobbyists, it is even worse for them to be on a lobbyist's payroll. In Oregon, a now-former Speaker of the House announced, "almost a year before his legislative term would end, that he would not seek re-election and that he had accepted a job with the nurserymen's group."[267] Although the Speaker assured the public that he would "not lobby the legislature on issues that concerned the . . . [group] while he remained in office," he attended candidate endorsement meetings as a representative of the group, [while] the Oregon legislature continued to assemble" under the Speaker's leadership.[268] In a second Oregon case, another former Speaker of the House "started a lobbying firm and introduced legislation on behalf of his new clients before he left office."[269]

Sound principles of government ethics hold that public representatives should be prohibited from engaging in outside employment that conflicts with official duties.[270] Legislators should not

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[266] *Compare* People v. Moore, 85 Misc. 2d 4 (N.Y. Co. Ct. 1975) (finding an ethics rule that barred receipt of gifts by a public official "under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, . . . or was intended as a reward" was unconstitutionally vague), *with* Merrin v. Town of Kirkwood, 369 N.Y.S. 2d 878, 881 (App. Div. 1975) (upholding disciplinary action under a similar rule).

[267] Jeni L. Lassell, Comment, *The Revolving Door: Should Oregon Restrict Former Legislators from Becoming Lobbyists?*, 82 OR. L. REV. 979, 979 (2003).

[268] *Id*. at 979–80.

[269] *Id*. at 980.

[270] *See* 5 C.F.R. § 2635.101(b)(10) (2006) (providing that federal executive branch employees "shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities"); DEL. CODE ANN. tit.29, § 5806(b)(1)–(4) (2003) (providing that no state officer or employee "shall accept other employment …. which …. may result in … (1) Impairment of independence of judgment in the exercise of official duties; (2) An undertaking to give preferential treatment to any person; (3) The making of a governmental decision outside official channels; or (4) Any adverse effect on the confidence of the public in the integrity of the government"); CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-48 (barring "concurrent outside employment which could reasonably be expected to impair independence of judgment in, or faithful performance of, official duties"). *See generally* Johnson, *America's Preoccupation*, *supra* note 73, at 738 (discussing conflicting outside employment). Some codes restrict and discourage legislators from working as lobbyists at other levels of government. *See e.g*., CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-67(h) (prohibiting members of the city council from lobbying the Texas legislature when a session is pending or impending and stating that "[a]t any other time, the City of San Antonio strongly discourages members of the City Council and their spouses, agents and employees from lobbying before the Texas Legislature"); *see also id*. at § 2-67(g) (prohibiting members of the Texas Legislature from lobbying the city council when a session of the legislature is pending or impending and stating that "[a]t any other time, the City of San Antonio strongly discourages

be permitted to work simultaneously for a lobbyist if the interests of the lobbyist's clients could be affected by the official actions of the legislator. Yet, some states fail to prohibit such arrangements. Colorado merely requires the legislator to file a statement disclosing the employment and the amount being paid.[271] Kentucky expressly allows a legislator's spouse to work for a lobbyist, although usually not in a lobbying capacity.[272] Other states have enacted conditional bans which address problems created by simultaneous outside employment. In Kansas, "[n]o lobbyist shall offer employment or employ any state officer or employee or associated person thereof for a representation case, *with intent to obtain improper influence* over a state agency."[273] In Iowa, House and Senate rules prohibit lobbyists "from offering economic or investment opportunit[ies] or promise[s] of employment to Senators and Representatives *with intent to influence the performance of the legislator's duties*."[274] City ethics codes commonly contain provisions requiring public servants to recuse themselves from participation in any official action that affects the economic interests of the outside employer.[275]

members of the Texas Legislature and their spouses, agents and employees from lobbying before the City of San Antonio"). These provisions were passed because a "part-time state legislator acting as a lobbyist before the city" tried to use "the prestige of his state office for the benefit of private interests." Johnson, *Virtues and Limits of Codes*, *supra* note 102, at 42.

[271] COLO. REV. STAT. § 24-6-306 (2005) ("If any person who engages in lobbying employs or causes his employer to employ any member of the general assembly, any member of a rule-making board or commission, any rule-making official of a state agency, any employee of the general assembly, or any full-time state employee who remains in the partial employ of the state or any agency thereof, the new employer shall file a statement . . . . The statement shall specify the nature of the employment, the name of the individual to be paid thereunder, and the amount of pay or consideration to be paid thereunder.").

[272] KY. REV. STAT. ANN. § 6.626(2) (West 2004) ("Nothing in this code shall preclude . . . [a] legislator's spouse from being employed in some other capacity than a legislative agent [lobbyist] by the employer of a legislative agent.").

[273] KAN. STAT. ANN. § 46-273(a) (2000) (emphasis added). "'Representation case' means the representation of any person, . . . with compensation, in any matter before any state agency . . . [involving] the exercise of substantial discretion." *Id.* at § 46-226. Kansas law further provides that "[n]o lobbyist shall offer employment or employ any state officer or employee or associated person *to use or attempt to use threat or promise of official action in an attempt to influence a state agency* in any representation case." *Id.* at § 46-273(b) (emphasis added).

[274] LOBBYING, PACS, AND CAMPAIGN FINANCE, *supra* note 3, at § 17.32 (emphasis added).

[275] *See* CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-43(a)(5) (stating that a city official or employee must refrain from official action affecting the economic interests of "the outside employer of the official or employee or of his or her parent, child . . ., spouse, or [a] member of the household").

7. Reciprocal Favors

Basic principles of good government suggest that official power should not be used to unfairly advance or impede private interests.[276] That rule is sometimes expressly set out in city or state ethics codes.[277] These codes provide that a public servant shall "not enter into an agreement or understanding with any other person that official action by the official or employee will be rewarded or reciprocated by the other person, directly or indirectly."[278] In addition, municipal ethics codes [279] and other laws[280] often state that a public official or employee shall not take official action that supports the economic interests of a person with whom that official or employee is negotiating to secure subsequent employment. These are sound principles upon which to base the conduct of public affairs. Presumably, they should apply even when—or perhaps especially when—the reciprocal favor would be traded with a lobbyist, or when the subsequent employment would be arranged by a lobbyist.

Nevertheless, startling departures from these sound principles abound. In one recent case, a member of the United States Senate was criticized for regularly meeting with lobbyists at the Capitol. At the end of these meetings, a national political committee would distribute "lists of Washington-based lobbying job-openings and [discuss] which . . .

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[276] Johnson, *Ethics in Government*, *supra* note 69, at 732–34 (discussing unfair advancement of private interests).

[277] CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-44(b) ("A city official or employee may not use his or her official position to unfairly advance or impede private interests, or to grant or secure, or attempt to grant or secure, for any person (including himself or herself) any form of special consideration, treatment, exemption, or advantage beyond that which is lawfully available to other persons."). *See also* DEL. CODE ANN. tit. 29, § 5806(b)(2) (2003) (providing that no state officer or employee "shall accept . . . (2) An undertaking to give preferential treatment to any person").

[278] CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-44(b)(2) (prohibiting reciprocal favors); *see also* DALLAS, TEX., CODE OF ETHICS § 12A-4(b)(3) (2006) (stating a similar prohibition). Such provisions may be idealistic in the sense that "[r]eciprocity is one of the strongest embedded norms in public life." Thurber, *supra* note 12, at 153. But that does not mean that such laws are ill-advised principles for the conduct of government.

[279] *See, e.g.*, CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-43 ("[A] city official or employee shall not take any official action that he or she knows is likely to affect the economic interests of . . . a person or business entity with whom, within the past twelve months . . . the official or employee, or his or her spouse, directly or indirectly has . . . solicited an offer of employment for which the application is still pending, . . . received an offer of employment which has not been rejected, or . . . accepted an offer of employment.").

[280] At the federal level, executive branch and congressional employees must normally recuse themselves from matters affecting "any person or organization with whom … [they are] negotiating or … [have] any arrangement concerning prospective employment." 18 U.S.C. § 208 (2006).

congressional aides and former lawmakers [were] best suited for those jobs."[281] Even though the Senator in question stated publicly that, "he would end his regular meetings," he merely moved them to a location away from the Capitol, "at the same time and on the same day of the week."[282]

8. Lobbying by Closely Related Persons

There is an obvious appearance of impropriety when a public servant is lobbied by a close family member, who is acting on behalf of a third party.[283] In such circumstances, it appears to observers that the family member is selling access to the public servant. This harms public confidence in government almost as much as if the public official personally charged petitioners for the privilege of being heard.

Harm to confidence in government can also occur when an elected representative dates a lobbyist who is representing private clients on matters for which the representative has official responsibility. This problem is not new. Members of "the gentle sex" were employed as lobbyists in the late 1880s with instructions to win the votes of congressmen, or at least "keep them away from the House when the . . . [bills were] voted upon."[284] More recently, one member of Congress "tried to insert language into the Homeland Security Act to help Philip Morris tobacco while dating the company's lobbyist."[285]

Some lobbying firms also "openly hire the friends of a particular member in order to get the legislator's ear."[286] At times in American history, the "widows or daughters of former congressmen" have been employed to exert their influence with designated congressmen.[287] In addition, legislative staff members often move on to lobbying firms after

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281 *Id*.

282 Jeffrey H. Birnbaum & Charles Babington, *Senator Resumes Lobbyist Huddles; Santorum Suspended Sessions*, WASH. POST., Mar. 9, 2006, at A4.

283 *See* Rudoren & Pilhofer, *supra* note 51, at 14 (discussing how employing a lobbying firm where the daughter of a transportation committee member was an associate resulted in a meeting "the next day"); *see also* Jeffrey H. Birnbaum, *Panel Endorses More Information on Lobbyist Contacts*, WASH. POST, Feb. 28, 2006 [hereinafter Birnbaum, *Panel Endorses*] (discussing a proposed law approved by the Senate Rules Committee that would "bar the relatives of any senator from lobbying that senator's staff"); GUIDE TO CONGRESS, *supra* note 2, at 694–95 ("Linda Daschle, the wife of Senate Minority Leader Tom Daschle, . . . [who] lobbied successfully for clients in transportation-related industries in the late 1990s . . . took a personal oath to avoid lobbying the Senate when she became a lobbyist in 1997.").

284 REMINI, *supra* note 56, at 239.

285 Mills, *supra* note 191.

286 GUIDE TO CONGRESS, *supra* note 2, at 697.

287 REMINI, *supra* note 56, at 239.

leaving the public sector.[288] These problems relating to privileged access are sometimes susceptible to legal solutions. A rule banning lobbying by "friends" would be unenforceably vague and unworkable. However, provisions prohibiting lobbying by relatives or former staffers could be written in sufficiently specific terms that would pass constitutional muster.

Although Congress has not addressed these problems,[289] some states prevent persons closely connected to public servants from being used *by* lobbyists to gain an unfair advantage in petitioning the government. Arizona prohibits all persons from "improperly seek[ing] to influence the vote of any member of the legislature through communication with that member's employer."[290] Other states have similar provisions.[291]

Some municipalities have also enacted rules providing that a city official or employee must refrain from official action affecting the economic interests of "his or her parent, child, spouse, or other [close] family member."[292] These rules apply where the economic interest being advanced is that of "the outside employer of the official['s] . . . parent, child . . ., spouse, or [a] member of the household."[293] These provisions presumably require the public servant to recuse himself or herself from participation in any matter that would economically benefit in a special way[294] a client of a family member-lobbyist or a client of the lobbying firm that employs the family member.

9. Lobbyists as Campaign Treasurers, Consultants, and Staff

A variety of cozy relationships between lobbyists and candidates or officeholders have become prevalent in recent years. In some cases, candidates sometimes select lobbyists to serve as campaign treasurers[295]

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[288] *See* McIntire, *supra* note 199 (noting that ten of the House majority leader's "former staff members have gone to work for lobbying firms, and his former chief of staff . . . is married to a lobbyist").

[289] *See Ethics Fencing in the Senate*, N.Y. TIMES, Jan. 15, 2007, at A14 (opining that in discussing reform of the ethics rules relating to lobbyists, "Senators ducked a worthy amendment that would bar members from putting family members on campaign payrolls, or see kin become lobbyists").

[290] ARIZ. REV. STAT. ANN. § 41-1233(3) (2004).

[291] *See* UTAH CODE ANN. § 36-11-302 (2005) (prohibiting persons from seeking influence "through communication with the legislator's employer").

[292] SAN ANTONIO, TEX., CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-43(a)(2) (2006).

[293] *Id.* at § 2-43(a)(5).

[294] *Id.* at § 2-43(c)(1) ("An action is likely to affect an economic interest if it is likely to have an effect on that interest that is distinguishable from its effect on members of the public in general or a substantial segment thereof.").

[295] *See* Stephen Koff, *Outrage Over Abramoff Case Belies Lobbyists' Place in*

or in other campaign positions.[296] These relationships send the message that advancing a client's interests depends more upon campaign money than upon the merits of the matter in question.[297] Quite sensibly, some states bar lobbyists from serving in a fundraising capacity.[298] The rationale underlying these regulations is a desire to counteract the threat that fundraising lobbyists will crowd other voices out of the debate. Moreover, lobbyists are supposed to aid the legislative process by bringing "information to law makers, who often have small staffs that are young and insufficiently paid."[299] Where the focus is predominantly on fundraising, cogent arguments about the merits become less important.[300]

Politics, CLEV. PLAIN DEALER, Jan. 22, 2006, at A20 (discussing lobbyists hired as campaign treasurers), *available at* 2006 WLNR 1216376 (Westlaw).

[296] *See* McIntire, *supra* note 199 (stating that the House majority leader's "campaign committees recently hired two people from lobbying groups for the financial and insurance industries").

[297] *See* Sandberg & Guckian, *supra* note 70 (quoting an unnamed Texas lobbyist as stating that "[t]he system has changed in the last few years. . . . [Issues] matter less now than ever before because . . . a small group of clients with a tremendous amount of money control the system").

[298] The Alaska statute, for example, provides that a lobbyist may not:

> serve as a campaign manager or director, serve as a campaign treasurer or deputy campaign treasurer on a finance or fund-raising committee, host a fund-raising event, directly or indirectly collect contributions for, or deliver contributions to, a candidate, or otherwise engage in the fund-raising activity of a legislative campaign or campaign for governor or lieutenant governor . . .; this paragraph does not apply to a representational lobbyist as defined in the regulations of the Alaska Public Offices Commission, and does not prohibit a lobbyist from making personal contributions to a candidate . . . or personally advocating on behalf of a candidate.

ALASKA STAT. § 24-45.121(a)(8) (2004). Under the referenced regulations, "'[r]epresentational lobbyist' means that the individual is not employed by the person or group on whose behalf he is lobbying and receives no salary, fee, retainer, or any economic consideration whatsoever, other than reimbursement of travel and personal living expenses, for his services as a lobbyist." Ak. Pub. Offices Comm'n, Reg. 2 AAC 50.511 (2006). *See also* KAN. STAT. ANN. § 25-4144 (2000) ("No person who is registered as a lobbyist . . . shall be eligible for appointment as treasurer for any candidate or candidate committee."); KY. REV. STAT. § 6.811(5) (West 2004) ("A legislative agent [lobbyist] shall not serve as a campaign treasurer, or as a fundraiser . . . [of more than $3,000 in a jurisdiction with more than 200,000 people] for a candidate or legislator."); N.M. STAT. ANN. § 2-11-8.1(A) (LexisNexis 2004) ("No lobbyist may serve as a campaign chairman, treasurer or fundraising chairman for a candidate for the legislature or a statewide office.").

[299] *See* Scharrer, *supra* note 43 (discussing Texas).

[300] Guy Taylor, *Lobbying Scandal Heightens Scrutiny*, WASH. TIMES, Jan. 15, 2006, at A1 (quoting a Georgetown University professor as stating that the "fixation on campaign funds, dramatically has changed the tenor on Capitol Hill; . . . I had a corporate lobbyist tell me recently that his job wasn't much fun anymore . . . that he didn't feel that he needed to muster complicated arguments, just round up contributions for the majority").

This is also true where the fundraising involves not the public official's campaign, but charities and other private institutions favored by the official. Some states expressly prohibit lobbyists from engaging "in any charitable fund-raising activity at the request of an official or employee."[301] Other states have more flexible rules. For example, Kentucky allows legislators and candidates to solicit contributions "on behalf of charitable, civic, or educational entities *provided* the solicitations are broad-based and are not directed solely or primarily at legislative agents [i.e., lobbyists]."[302]

Some lobbying groups also provide campaign "consultants" to candidates. Those consultants can ultimately play a "key part in access and lobbying battles after candidates become elected public officials."[303] For this reason, it becomes "hard to tell where lobbying end[s] and public service beg[ins]."[304] Astute observers of government rightfully ask whether it is "ethical to have reciprocal relationships among consultants, lobbyists, and public officials [where] those alliances are not transparent and . . . seem to go against the public interest."[305]

In certain cases, officeholders select lobbyists to serve as a chief of staff[306] or in other trusted positions.[307] These arrangements allow officials to take advantage of "having an unpaid lobbyist in the back room where the decisions . . . [are] being made."[308] In some states there are laws prohibiting lobbyists from serving "as . . . member[s] of a state board or commission, if the lobbyist's employer may receive direct economic benefit from a decision of that board or commission."[309] Although these laws are not violated in cases of executive and legislative staff appointments, the ethical lesson is clear. The interests of good government are best served when there is some distance between

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301 MD. CODE ANN., STATE GOV'T § 15-713(10) (LexisNexis 2004) ("including soliciting, transmitting the solicitation of, or transmitting a charitable contribution").

302 KY. REV. STAT. ANN. § 6.626(1) (emphasis added).

303 *See* Thurber, *supra* note 12, at 151.

304 *Revolting Door*, *supra* note 209 (discussing lobbying in Washington, D.C.).

305 *See* Thurber, *supra* note 12, at 154.

306 *See* Scharrer, *supra* note 43, at 10A (stating that the governor of Texas hired as his chief of staff a man who had lobbied for the tobacco industry and who subsequently "returned to his lucrative lobbying business").

307 *See* Sandberg & Guckian, *supra* note 70 (discussing a Texas lobbyist who was tapped by the state House speaker to join his "transition team" thus becoming "in essence a government insider for a few months, while keeping his day job representing big money clients"); *Revolting Door*, *supra* note 209 (discussing a lobbyist who was appointed as the Interior Department's secretary and then left public service to return to the private sector as a lobbyist).

308 Scharrer, *supra* note 43.

309 ALASKA STAT. § 24.45.121(a)(7) (2004); *see also* MO. ANN. STAT. § 105-967 (West 2006) (prohibiting lobbyists from serving on certain commissions).

lobbyists and the exercise of official power.

One way to address these types of problems is to bar elected officials from voting on issues involving lobbyists who served as campaign consultants. Good ethics codes normally preclude public officials or employees from taking official action that would economically benefit themselves or any closely connected person or entity.[310] A campaign consultant who is or becomes a lobbyist is connected to a public official by a relationship so important in nature that the public interest would be best served by requiring the official or employee to step aside and allow others to act on the matter in question.[311] The City and County of San Francisco currently prohibit

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[310] For example, San Antonio's code of ethics provides:

> (a) General Rule. To avoid the appearance and risk of impropriety, a city official or employee shall not take any official action that he or she knows is likely to affect the economic interests of:
>
> (1) the official or employee;
> (2) his or her parent, child, spouse, or other family member within the second degree of consanguinity or affinity;
> (3) his or her outside client;
> (4) a member of his or her household;
> (5) the outside employer of the official or employee or of his or her parent, child . . ., spouse, or member of the household . . . ;
> (6) a business entity in which the official or employee knows that any of the persons listed in Subsections (a)(1) or (a)(2) holds an economic interest . . . ;
> (7) a business entity which the official or employee knows is an affiliated business or partner of a business entity in which any of the persons listed in Subsections (a)(1) or (a)(2) holds an economic interest as defined in Section 2-42;
> (8) a business entity or nonprofit entity for which the city official or employee serves as an officer or director or in any other policy making position; or
> (9) a person or business entity with whom, within the past twelve months:
>
> (A) the official or employee, or his or her spouse, directly or indirectly has
>
> (i) solicited an offer of employment for which the application is still pending,
> (ii) received an offer of employment which has not been rejected, or
> (iii) accepted an offer of employment; or
>
> (B) the official or employee, or his or her spouse, directly or indirectly engaged in negotiations pertaining to business opportunities, where such negotiations are pending or not terminated.

SAN ANTONIO, TEX., CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-43(a) (2006). *See also* DALLAS, TEX., CODE OF ETHICS § 12A-3 (2006) (stating a similar rule).

[311] To be effective, recusal must be carefully choreographed. *See, e.g.*, CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-43(b) (providing that a city official or employee with a conflict of interest "shall: (1) immediately refrain from further participation in the

campaign consultants from communicating with officers of the city and county who are their current or previous clients.[312]

10. Make-Work Legislative Proposals

Many states prohibit lobbyists from introducing legislation solely for the purpose of securing future employment either to ensure the law's passage or defeat.[313] Such limitations share a common objective with ethics rules[314] and other laws[315] that prohibit attorneys and their clients from engaging in frivolous litigation. The goal in both of these contexts is to avoid wasting valuable public and private resources on initiatives that do not further legitimate purposes.

B. DISCLOSURE REQUIREMENTS

Lobbyist rules typically rely heavily on disclosure. The federal Lobbyist Disclosure Act, [316] for example, requires lobbyists to register[317] and file periodic activity reports.[318] Disclosure regimes endeavor to expose to public scrutiny the identity of persons seeking to influence official decisions and how much money is being spent on their efforts.[319]

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matter, including discussions with any persons likely to consider the matter; and (2) promptly file with the City Clerk the appropriate form for disclosing the nature and extent of the prohibited conduct" and in addition "(3) a supervised employee shall promptly bring the conflict to the attention of his or her supervisor, who will then, if necessary, reassign responsibility for handling the matter to another person; and (4) a member of a board shall promptly disclose the conflict to other members of the board and shall not be present during the board's discussion of, or voting on, the matter").

312 SAN FRANCISCO, CAL., CAMPAIGN AND GOVERNMENTAL CONDUCT CODE § 2.117 (2006) (providing, with certain exceptions, that "[n]o campaign consultant, individual who has an ownership interest in the campaign consultant, or an employee of the campaign consultant shall communicate with any officer of the City and County who is a current or former client of the campaign consultant on behalf of another person or entity (other than the City and County) in exchange for economic consideration for the purpose of influencing local legislative or administrative action").

313 *See, e.g.*, ALASKA STAT. § 24.45.121(a)(4).

314 MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003) (stating in part that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous").

315 FED. R. CIV. PROC. 11 (2006) (requiring certification that a claim "is not being presented . . . to cause unnecessary delay or needless increase in the cost of litigation" and is "warranted by existing law or by a nonfrivolous argument," and allowing sanctions against "the attorneys, law firms, or parties that have violated" the rule.).

316 2 U.S.C. §§ 1601–12 (2006).

317 *Id*. at § 1603 (detailing the registration process).

318 *Id.* at § 1604 (requiring semi-annual reports).

319 *Cf.* GUIDE TO CONGRESS, *supra* note 2, at 692 (stating that the standard approach to regulating lobbyists at the federal level has been to "'monitor lobbyists' activities and reveal them publicly when they go too far").

At the state level, the scope of lobbyist disclosure obligations varies widely.[320] State laws may require disclosure of "fees paid to lobbyists, matters lobbied, the names of employees or contractors [who do the] lobbying, the total amount spent on lobbying, [and the nature of] gifts made to public officials . . . ."[321] Some cities have adopted similar registration and disclosure regimes.[322] However, many cities have no such requirements.

Lobbying that occurs in the open is less objectionable than lobbying that occurs behind closed doors. Statements made in public by lobbyists can be scrutinized by others and challenged with competing facts and arguments. The resulting public debate is consistent with a healthy political process. In contrast, statements made by lobbyists that are hidden from public view cannot easily be probed or disputed. Consequently, inaccurate assertions may go uncontested. Lobbyist disclosure requirements reflect these concerns. As a result, statements made by lobbyists at public meetings,[323] in publicly-available documents,[324] or through mass media[325] are typically exempted from the definition of what constitutes lobbying. Such activities, as well as expenditures or income related thereto, normally do not need to be revealed.

The expenditure of large amounts of money on lobbying poses risks to good government. Beyond a certain point, expenditures suggest an effort to overwhelm the facts through excessive spending.[326] Some lobbyist rules address this problem through disclosure regimes that come into effect when client expenditures or lobbyist income on particular

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320 *See* Nielsen et al., *supra* note 3, at 667–68 (stating that "the amount and method of disclosure varies widely state-to-state" and summarizing state registration and reporting requirements).

321 *See id.* at 668.

322 *See, e.g.*, SAN ANTONIO, TEX., CODE OF ETHICS OF THE CITY OF SAN ANTONIO §§ 2-62 to 2-71 (2006).

323 *See, e.g.*, 2 U.S.C. § 1602(8)(B)(vii) (2006) (exempting from the definition of "lobbying contact," "testimony given before a committee, subcommittee, or task force of the Congress, or submitted for inclusion in the public record of a hearing conducted by such committee, subcommittee, or task force").

324 *See, e.g.*, *id.* at §§ 1602(8)(B)(xiv)–(xv) (exempting from the definition of "lobbying contact" a communication that is "a written comment filed in the course of a public proceeding or any other communication that is made on the record in a public proceeding" or "a petition for agency action made in writing and required to be a matter of public record").

325 *See, e.g.*, *id.* at § 1602(8)(B)(iii) (discussing communications made "through radio, television, cable television, or other medium of mass communication").

326 *Cf. Still a Bad Deal*, *supra* note 70 (discussing how an "army of lobbyists" ensured that the House approved a deal with India "with minimal restrictions").

public issues reach a certain level.[327] In other words, once the issues and expenditures have been linked, the public can scrutinize the decisions made by public servants and, if necessary, hold those actors accountable. In spite of the apparent simplicity of this concept, it is difficult to implement effectively for reasons related to regulatory complexity[328] and timely dissemination of information.[329]

1. Regulatory Complexity

Lobbyist disclosure regimes are necessarily complex due to the multiple ways money is used to influence the resolution of public issues.[330] Some persons make expenditures directly without hiring someone to act on their behalf. Other persons are represented by lobbyists who are in-house staff members.[331] Still other persons engage

[327] From one perspective, identifying the issue—the purpose of the lobbying—should not be difficult. Lobbyists are admonished to "[d]efine the issues in a lobbying visit. Determine at the outset what you want." *See* WOLPE & LEVINE, *supra* note 43, at 20. "Definition is crucial because of the relatively narrow temporal focus of legislators and their staff." *Id.* Yet, on another level, issue definition may be far less certain. A city ethics code may define lobbying as efforts to influence the resolution of a "municipal question." *See* CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-62(h) (defining "lobbying"). "Municipal question" may itself be defined, but that definition may be less than fully satisfactory. *See id.* at § 2-62(j) (stating, in part, that "[t]he term 'municipal question' does not include the day-to-day application, administration, or execution of existing city programs, policies, ordinances, resolutions, or practices, including matters that may be approved administratively without consideration by a board, a commission, or the City Council"). If a lobbyist represents a developer in seeking a variance of the tree-preservation ordinance on property zoned for commercial use, is that activity "lobbying," and if so, is the issue that must be disclosed on the lobbyist registration and activity reports "variance," "zoning," "tree ordinance," or something else? If multiple lobbyists represent multiple clients with respect to the same or similar matters, it is possible the issue will be identified differently in the various filings, and that it will be difficult or impossible for persons scrutinizing those filings to determine how much money was spent by various clients to influence those issues. Presumably, issue identification by legislative lobbyists can be simplified by reference to bill numbers, but those references do not apply to non-legislative lobbying or legislative lobbying where a bill has yet to be drafted.

[328] *See* discussion *infra* subpart III.B.1.

[329] *See* discussion *infra* subpart III.B.2.

[330] Horn, *supra* note 3, at 51 (discussing lobbying by the "small to modestly sized nonprofit organization"). Horn says there are three basic approaches: first, "hiring one or more staff members . . . [to run] the group's legislative or political operation"; second, simply retaining a lobbyist when the need for legislative action arises; and third, joining a "coalition of similarly situated or interested entities" that hire full-time staff or retains lobbying professionals. *Id.* at 51.

[331] *See* Sandberg & Guckian, *supra* note 70 ("Most [lobbyists] work in house for a single interest, like a corporation or a trade association. A smaller number of hired guns hang a shingle outside an office and work for whoever hires them. Some work alone, others in informal or formal partnerships.").

outside lobbyists, who either work alone, in small boutiques, or as part of larger firms (such as law firms) which devote all or part of their time to lobbying.[332] Any effective regulatory regime must take account of all of these types of lobbying. On the one hand, regulators must exercise care not to omit relevant lobbying approaches from the registration and reporting regime. To the extent that any such omissions could become "loopholes" for lobbyists to exploit, they could bring the entire disclosure regime into disrepute.[333] On the other hand, a regime that imposes strict requirements may trigger an excessive amount of disclosure which, because of its abundance or possible inconsistency, will obscure, rather than reveal important information. To avoid both pitfalls, a properly drafted disclosure regime should embrace an interlocking set of obligations and exemptions[334] to ensure that the disclosures required are not overly burdensome, yet capture all relevant information. Not surprisingly, the challenge of defining who should register and disclose information is more complex than might first appear.[335]

Similar difficulties arise with respect to defining what type of conduct constitutes "lobbying."[336] Disclosure laws typically incorporate intricate formulations that exclude from the definition of "lobbying" the activities of media outlets,[337] churches,[338] whistle blowers,[339] persons

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[332] *See* Chwat, *supra* note 41, at 115–17 (discussing various types of lobbying firms, including "one-stop shops," "boutique" firms, and law firms).

[333] *See* Johnson, Virtues and Limits of Codes, *supra* note 102, at 41 ("As far as a regulatory document is concerned, no criticism so discredits its content as the charge that the document contains 'loopholes.' Such allegations . . . call into question not merely the substance of the enactment, but the competence of the drafters and the value of the project at all.").

[334] *See, e.g.*, San Antonio, Tex., Code of Ethics of the City of San Antonio § 2-64(g) (2006) (granting an exemption from the registration and periodic filing requirements to "[a]n agent or employee of a lobbying firm or other registrant that files a registration statement or activity report for the period in question fully disclosing all relevant information").

[335] *See generally* San Jose, Cal., San José Municipal Code §12.12.190 (2006) (defining "contract" lobbyists, "in-house" lobbyists, and "expenditure" lobbyists).

[336] *Id*. at § 12.12.80 ("'Lobbying' means influencing or attempting to influence a city official or city official-elect with regard to a legislative or administrative action of the city or redevelopment agency . . . . "Influencing" means the purposeful communication, either directly or through agents, for the purpose of promoting, supporting, modifying, opposing, causing the delay or abandonment of conduct, or otherwise intentionally affecting the official actions of a city official or city official-elect, by any means, including, but not limited to providing or using persuasion, information, incentives, statistics, studies or analyses.").

[337] *See, e.g.*, 2 U.S.C. § 1602(8)(b)(ii) (2006) (providing that the term "lobbying contact" does not include communications "made by a representative of a media organization if the purpose of the communication is gathering and disseminating news and information to the public).

responding to agency requests for public comment,[340] individuals seeking to resolve problems related to government benefits, employment, or personal matters,[341] certain governmental entities,[342] and others.[343] In addition to direct contacts with government officials or employees, [344] disclosure laws regulate indirect or "grassroots" lobbying.[345]

Problems also arise with regard to the definition of "expenditures." For example, a law may be insufficiently specific in identifying which expenditures must be reported. The federal Regulation of Lobbying Act of 1946:

> left it up to each group or its lobbyists to determine what portion of total expenditures to report. As a result, some organizations whose Washington office budgets ran into the millions of dollars reported spending only very small amounts on lobbying, contending that the remainder was spent on research, general public information, and other matters.[346]

Disclosure regimes that seek to trace the influence of money often require disclosure of lobbyist compensation in order to measure the total amount spent on a lobbying effort.[347] However, such provisions may be difficult or impossible to enact because legislative bodies may be reluctant to require disclosure of lobbyists' income. As a result, a well-crafted reform proposal may be gutted by an amendment[348] that strips a

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338 *See, e.g., id.* § 1602(8)(b)(xviii) (discussing tax exempt entities and religious entities).

339 *See, e.g., id.* § 1602(8)(b)(xvii) (discussing whistle blowers).

340 *See, e.g., id.* § 1602(8)(b)(x) (discussing notices published in the Federal Register and other publications).

341 *See, e.g., id.* § 1602(8)(b)(xvi) (discussing matters "involving only that individual").

342 *See, e.g.*, San Antonio, Tex., Code of Ethics of the City of San Antonio § 2-64(c) (2006) ("provided the communications relate solely to subjects of governmental interest").

343 *See, e.g.*, Nielsen et al., *supra* note 3, at 665 (exemptions for bona fide salespersons may apply to limitations on "procurement lobbying").

344 *See* Nielsen et al., *supra* note 3, at 666 ("All lobby laws capture 'direct contacts' with officials or employees.")

345 *Id*. But see Code of Ethics of the City of San Antonio § 2-64(b) (exempting non-profit entities seeking to mobilize constituents).

346 Guide to Congress, *supra* note 2, at 718.

347 *See, e.g.*, 2 U.S.C. § 1604(b)(3) (2006) (requiring "a good faith estimate of the total amount of all income from the client"). Cf. Code of Ethics of the City of San Antonio § 2-62(c) (defining compensation).

348 *See* Stephanie D. Campanella et al., *supra* note 226, at 139 (discussing an amendment "deleting the section of . . . [a Georgia ethics] bill that would have required the disclosure of lobbyists' income").

proposed law of the ability to link dollars to issues. Other regulations impose a duty to register and disclose only after a certain amount is spent on lobbying.[349] Ideally, that threshold should enable regulators to focus on the "major players," and to avoid ensnaring unwitting citizens. However, opponents of reform efforts may seek to muddy the waters by lowering the threshold so that the law generates a great deal of useless information that will make it more burdensome for government watchdogs to track the conduct of those who should be scrutinized.[350]

In addition, it is necessary to anticipate when dollars will be counted to determine whether the registration threshold has been passed. If a lobbyist is compensated with an hourly fee, but the money will not be paid until two years have elapsed, when is compensation actually received? Codes sometimes deal with this problem by providing that "[c]ompensation which has not yet been received is considered to be received on the date that it is earned, if that date is ascertainable; otherwise, it is received on the date on which the contract . . . is made, or on the date lobbying commences, whichever is first."[351] Similarly, if a client offers to pay a lobbyist (a) $10 for pleading the client's case to members of the city council and (b) $10,000 for cutting the client's lawn, which amounts should be counted toward determining whether the threshold has been surpassed? One possible solution is "[i]f a lobbyist

[349] Under federal law, a lobbyist need not register with respect to a client if income from the client does not exceed $5,000 or total expenditures on lobbying do not exceed $20,000. 2 U.S.C. § 1603(a)(3)(A) (2006).

[350] When the City of San Antonio, Texas, passed a new ethics code in November, 1998, a person who engaged in lobbying (broadly defined) was required to register only if "(a) with respect to any client, the person engage[d] in lobbying activities for compensation of more than one thousand dollars ($1000) in a calendar quarter; or (b) the person expend[ed] more than one thousand dollars ($1000) for lobbying in a calendar quarter." An agitated citizen who buys two tickets to a $250-a-plate dinner for the opportunity to button-hole the mayor about a particular municipal issue would not be required to register. Subsequent to 1998, the San Antonio ethics code was amended so that it now provides that "a person . . . who engages in lobbying must register . . . if: (a) with respect to any client, the person or entity engages in lobbying activities for compensation; or (b) the person or entity expends monies for lobbying activities." SAN ANTONIO, TEX., CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-63 (2006). The elimination of the $1000 threshold has numerous untoward consequences. The hypothetical citizen who goes to the dinner to talk to the mayor has inadvertently violated the ethics codes–which will anger and embarrass the citizen, and bring the code into disrepute. The amendment requires more filings from "small time" lobbyists and makes it harder to track the major players. And the change may discourage persons who are aware of the sweep of the new rule from engaging in the type of civic involvement that no one would really be much concerned about, and thereby protect the "turf" of big-time lobbyists.

[351] CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-62(c). The federal law is framed in terms of compensation or expenditures that are "expected." 2 U.S.C. §§ 1603(a)(3)(A)(i)–(ii) (2006).

engages in both lobbying activities and other activities . . ., compensation for lobbying includes all amounts received . . ., if, for the purpose of evading the . . . [rules], the lobbyist has structured the receipt of compensation in a way that unreasonably minimizes the value of the lobbying activities."[352]

2. The Limits of Sunshine

An ethics reporting regime makes little sense unless someone scrutinizes the content and truthfulness of the information that has been disclosed.[353] On occasion, the media unearths stunning omissions, discrepancies, and outright falsehoods in lobbyists' filings.[354] However, journalistic review of voluminous public documents is haphazard at best given the limited resources of many newspapers and broadcasters, as well as the distraction of other public events that command reporters' attention. Moreover, while media outlets might scrutinize filings by lobbyists at the federal and perhaps at the state level, at the local level, there is often only one newspaper in the city. Aside from a paucity of staff time to review tedious documents, there may be political and other pressures that cause the sole newspaper in town to be less than aggressive in reviewing lobbyists' filings.

Public interest groups also play a role in scrutinizing lobbyists' disclosures. Nonprofit organizations, such as the National Legal and Policy Center, sometimes identify serious problems.[355] But again, when one looks at the various levels of government nationally, the process of review is hit-or-miss.

"The oversight of lobby and gift laws differs by state, ranging from aggressive, independent agencies dedicated to enforcement and interpretation of lobby and/or gift laws to jurisdictions with almost no enforcement."[356] In Texas, "the state agency in charge of monitoring lobbyists has received 1,500 sworn complaints since its founding in 1992 . . . [but] has never conducted a complete audit or subpoenaed a single

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[352] CODE OF ETHICS OF THE CITY OF SAN ANTONIO § 2-62(c).

[353] *Cf.* GUIDE TO CONGRESS, *supra* note 2, at 718 (stating that under a former federal law requiring reports by lobbyists "the Justice Department eventually adopted a policy of investigating [falsity, which was a crime,] only when it received complaints . . . . [T]here were only six prosecutions between 1946 and 1980").

[354] *Cf.* Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491 (D.C. Cir. 1968) ("[T]he right to petition is subject to abuse and misuse and a vigilant press can expose abuses to public view.").

[355] *See* Editorial, *No Ethics in Congress without Enforcement*, SAN ANTONIO EXPRESS-NEWS, Apr. 13, 2006, at 6B [hereinafter *No Ethics*] (discussing a complaint filed with the U.S. attorney for the District of Columbia by the NLPC).

[356] Nielsen, *supra* note 3, at 671.

document, or subpoenaed and met with a witness in person."[357] At the federal level,[358] and in many states, independent enforcement of lobbyist laws would be a great step forward. But legislators, not surprisingly, are reluctant to fund such efforts. Montana addresses this concern by allowing citizens to bring actions to enforce the lobbying rules if the attorney general and other officials choose not to do so.[359]

One of the chief objections to disclosure regimes is that the information often comes too late. Lobbyists do not file reports daily, rather, they typically file on a semi-annual or quarterly basis.[360] Thus, by the time someone reviews the data, decisions have often been made about the underlying issues and public debate has moved on to other subjects. Oftentimes there is nothing more than a vague hope that when information becomes public, busy citizens will learn things about the past and remember to hold elected officials accountable at some point in the future.

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[357] Sandberg & Guckian, *supra* note 70 ("Since 1992, the [Texas Ethics Commission] has initiated only one sworn complaint, has conducted one formal hearing and has not forwarded a single case to a law enforcement agency for criminal prosecution.")

[358] *See* Editorial, *Ethical Notes on the Reforming Class*, N.Y. TIMES, May 6, 2006, at A14 (criticizing a Florida Congresswoman's "bumbling attempts" to explain away a $2,800 dinner for two with a defense contractor, despite a "$50 limit on feeding a lawmaker," and opining that "the real bottom line was that with no one enforcing ethical rules in the House–hey, bon appétit"); *see also No Ethics*, *supra* note 355 (discussing "why Congress can't police itself").

[359] The Montana code provides:

> Any individual who has notified the attorney general, the commissioner, and the appropriate county attorney in writing that there is reason to believe that some portion of this chapter is being violated may bring in the name of the state an action . . . authorized under this chapter if: (i) the attorney general, the commissioner, or the appropriate county attorney has failed to commence an action within 90 days after notice; and (ii) the attorney general, the commissioner, or the county attorney fails to commence an action within 10 days after receiving a written notice that a citizen's action will be brought if the attorney general, the commissioner, or the county attorney does not bring an action

MONT. CODE ANN. § 5-7-305(4) (2005). However, the incentives to bring a citizen's action are slight. "If the individual who brings the citizen's action prevails, the individual is entitled to be reimbursed by the state of Montana for costs and attorney fees incurred. However, . . . [if the] action . . . is dismissed and . . . the court also finds [the case] was brought without reasonable cause, the court may order the individual commencing the action to pay all costs of trial and reasonable attorney fees incurred by the defendant." *Id*. at § 5-7-305(4)(c). In addition, "[a]ll civil penalties imposed pursuant to this section must be deposited in the state general fund." *Id*. at § 5-7-305(6).

[360] *See* Birnbaum, *Lobbyists*, *supra* note 12 (discussing proposed legislation that would "require lobbyists to file quarterly rather than the current biannual reports about their activities as well as a new, once-a-year disclosure that would detail their donations to federal candidates, officeholders and political parties").

"An increasing number of states require (or permit) disclosure of lobbying activity by electronic means."[361] Improvements in on-line filing[362] and searchable databases, coupled with ethics-in-government blogs,[363] might help to close the gap between information collection and accountability. However, even then there will be reason to question whether the disclosure of practices that are potentially harmful to the public interest is the best the law can do to ensure good government. As one editorial lamented, a law that requires disclosure of gifts and campaign money, rather than banning them entirely, is the equivalent of posting of "price lists for the cost of doing business" with law makers.[364] Another commentator remarked that, "disclosure laws have 'legitimized a form of official corruption' [through publication]."[365]

IV. THE FUTURE OF LOBBYIST REGULATIONS

There is no shortage of news stories identifying weaknesses in the rules that regulate lobbyists. The interesting thing is that if one looks at the law nationally, for virtually every issue that someone can identify, some legislature, somewhere, has passed a rule that effectively addresses the problem, or has taken action that would assist reformers in crafting appropriate solutions. Thus, the challenge in regulating lobbyists is not to re-conceptualize the field or to develop radically innovative solutions, but to employ the tools that are already available.

In recent years, the dominant approach has been to embrace disclosure and sunshine. While no one suggests abandoning that progress, there are limits as to what can be achieved by regimes that seek to thrust masses of information on a citizenry too busy, distracted, or simply unable to utilize that information. In many respects, legal prohibitions that directly address bad practices offer a more efficient, albeit sometimes overlooked,[366] means for resolving problems related to

361 Nielsen et al., *supra* note 3, at 668.

362 *See* Birnbaum, *Lobbyists*, *supra* note 12 (discussing a proposed federal measure that "would mandate much more extensive use of the Internet in filing the new and additional disclosures"). *See also* Jeffrey H. Birnbaum, *Online System for Disclosures Frustrates Lobbyists*, WASH. POST, Feb. 16, 2006 (discussing glitches in an online filing system for lobbyists which was originally "hailed by lawmakers, lobbyists and government watchdog groups as a boon to public disclosure" when it was adopted in 2005).

363 *See* Editorial, *New Rules in Yonkers*, N.Y. TIMES, Oct. 9, 2005, at WE15 (discussing an "acid-tongued" blogger seeking to expose "hidden outrages").

364 Editorial, *Now You See It, Now You Don't*, N.Y. TIMES, Apr. 30, 2006 at WK 13.

365 *See* Plemmons, *supra* note 6, at 155 n.148 (quoting former White House counsel John Dean).

366 For example, "Maine has permissive lobbying regulations, with few explicit prohibitions." LOBBYING, PACS, AND CAMPAIGN FINANCE, *supra* note 3, at § 21.34.

lobbying. Banning harmful practices outright takes greater political resolve than requiring disclosure. Yet, there is reason to think that with respect to lobbying, progress can be made in the continuing quest for ethics in government.

Similarly, in Wyoming, "regulation of lobbyists consists of registration and limited financial disclosure . . . [and does not] describe specific prohibited practices." *Id.* at § 52.31.