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# What Is This "Lobbying" That We Are So Worried About?

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## YALE LAW & POLICY REVIEW

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*Lloyd Hitoshi Mayer\**

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## INTRODUCTION

Lobbying has a prominent and positive place in our laws and our history. It is protected by the First Amendment right to petition the government for redress and by similar provisions in numerous state constitutions.<sup>1</sup> Lobbyists and the groups they represent often bring useful information to policymakers and facilitate public participation in, and knowledge about, government decision making. Indeed, under the consensus definition of lobbying—any attempt to influence the actions of government—the most successful “lobbyists” include American heroes such as Patrick Henry, Susan B. Anthony, and Martin Luther King, Jr.<sup>2</sup>

Yet lobbying also has a long history as a pejorative term.<sup>3</sup> The mere mention of Jack Abramoff’s name is enough to conjure up images of back-room

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1. U.S. CONST. amend. I; John Delvin, *Constructing an Alternative to “State Action” as a Limit on State Constitutional Rights Guarantees*, 21 RUTGERS L.J. 819, 828 & n.38 (1990) (noting that virtually all state bills of rights guarantee the right to petition the government for redress of grievances, with the exception of Minnesota and New Mexico).

2. Current scholarship defines “lobbying,” at its broadest, as attempting to influence the actions of any government branch. *See, e.g.*, FRANK R. BAUMGARTNER & BETH L. LEECH, *BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE* 34 (1998) (noting that seeking to influence the policy process is the “common thread” for the scholarly definition of lobbying); JEFFREY M. BERRY & CLYDE WILCOX, *THE INTEREST GROUP SOCIETY* 6 (4th ed. 2007) (defining lobbying in this manner).

3. *See, e.g.*, E. PENDLETON HERRING, *GROUP REPRESENTATION BEFORE CONGRESS*, at vii (1929) (noting that the term “lobby” has “unfortunate connotations” but no other label so aptly describes the process by which private groups seek to influence

meetings, illicit campaign contributions, and other shadowy dealings that undermine democracy.<sup>4</sup> The public also has a long-standing belief, whether or not justified, that lobbyists exert undue influence on public policy, even when their activities are on the right side of the law.<sup>5</sup>

Given this widely held suspicion, it is not surprising that over time Congress has imposed a variety of restrictions on lobbying and lobbyists. These restrictions include tax rules that increase the cost of lobbying, registration and disclosure requirements that seek to expose lobbying activities, and limitations on interactions between government officials and lobbyists.<sup>6</sup> But the piecemeal nature of the legislative process in this area has resulted in the creation of almost as many definitions of lobbying as there are statutory provisions that regulate it.<sup>7</sup> There are numerous ways to influence government actions, ranging from suing government agencies to commenting on executive branch rulemaking to urging legislators to propose legislation.<sup>8</sup> Yet no single existing legal defi-

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government action, particularly legislation); Edward B. Logan & Simon N. Patten, *Lobbying*, 144 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (Supp. I 1929) (noting long-standing public suspicion of “the lobby”).

4. See STAFF OF S. COMM. ON INDIAN AFFAIRS, 109TH CONG., “GIMME FIVE”: INVESTIGATION OF TRIBAL LOBBYING MATTERS (Comm. Print 2006) (detailing many of Jack Abramoff’s questionable and illegal activities); STAFF OF H. COMM. ON GOV’T REFORM, 109TH CONG., STAFF REPORT (2006) (same).
5. See, e.g., Robert C. Byrd, *Lobbyists*, in 2 THE SENATE, 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 491, 492 (Mary Sharon Hall ed., 1991) (describing the historical suspicion of interest groups engaged in lobbying); Allan J. Cigler & Burdett A. Loomis, *Introduction: The Changing Nature of Interest Group Politics*, in INTEREST GROUP POLITICS 1, 3-4 (Allan J. Cigler & Burdett A. Loomis eds., 7th ed. 2006) (same); Press Release, Harris Interactive, Large Majorities of U.S. Adults Believe PACs, Big Companies and Lobbyists Have Too Much Power and Influence in Washington (Mar. 7, 2007), [http://www.harris-interactive.com/harris\\_poll/index.asp?PID=737](http://www.harris-interactive.com/harris_poll/index.asp?PID=737) (reporting that, in a February 2007 poll, seventy-nine percent of respondents felt political lobbyists had too much influence on government policy, politicians, and policymakers in Washington).
6. See *infra* Section I.A.
7. See *infra* Section I.B. The various laws do not necessarily use the specific term “lobbying.” See *infra* note 89. But all of the activities that they regulate can be viewed as lobbying in the broadest sense, so for the sake of simplicity that term will be used throughout this Article.
8. The breadth of possible advocacy activities has been well documented since at least the early part of the twentieth century. See, e.g., HERRING, *supra* note 3, at 59-77 (describing the various tactics used by interest groups in the early twentieth century); Logan & Patten, *supra* note 3, at 52-65 (same).

inition of lobbying encompasses the entire range of these activities, and each covers a different, although often overlapping, subset.<sup>9</sup>

The question raised by this divergence is whether these varying definitions further the purposes for the existing restrictions on lobbying or whether a single, uniform definition would better serve those purposes. A related question is what the definition, or definitions, should be to ensure that these purposes are furthered. Previous scholarship in this area has primarily focused on the legal rules, addressing the definition of lobbying only briefly.<sup>10</sup> It has also tended to

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9. See *infra* Section I.B. Historically, lobbying has tended to be defined at its broadest as any attempt to influence legislation, as evidenced by its apparent origin as a reference to the lobbies of legislative buildings where those seeking to influence legislation gathered. See BAUMGARTNER & LEECH, *supra* note 2, at 33-36 (describing the origin of the term “lobbying” and the various definitions of lobbying used in scholarship) (1998); BERRY & WILCOX, *supra* note 2, at 6 (describing the origin of the term “lobbying”); see also *United States v. Rumely*, 345 U.S. 41, 47 (1953) (in part because of constitutional concerns, defining the phrase “lobbying activities” in a congressional resolution as only reaching “lobbying in its commonly accepted sense, that is, representations made directly to the Congress, its members, or its committees” as opposed to attempts to influence public opinion); Logan & Patten, *supra* note 3, at 3 (identifying the broadest definition of lobbying as “attempt[ing] to influence legislation in any way whatsoever”). But more contemporary scholarship tends to define “lobbying,” at its broadest, as attempting to influence the actions of any government branch. See *supra* note 2 and accompanying text.
  10. See, e.g., Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L. REV. 201, 297 (1987) (as part of recommendations for revising the tax rules governing lobbying by organizations described in I.R.C. § 501(c)(3), proposing a narrower definition of “legislative activity”); Jasper L. Cummings, *Tax Policy, Social Policy, and Politics: Amending Section 162(e)*, 9 EXEMPT ORG. TAX REV. 137, 149 (1994) (concluding that Congress’s decision to deny a business expense deduction for lobbying expenditures may have been reasonable, without discussing whether Congress should have revisited the definition of lobbying); Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J.L. & PUB. POL’Y 1, 51-52 (2006) (noting the difficulties that complex definitions of “lobbying” create, but not discussing possible solutions); Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 545-58 (2007) (proposing various changes to rules governing disclosure of lobbying but generally not discussing the definition of lobbying except to argue for including grassroots lobbying within the reach of the disclosure rules); William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGIS. 32, 43-56 (2006) (same, and also arguing for the elimination of the ability to use certain tax definitions of lobbying for purposes of the disclosure rules); Elizabeth J. Reid, *Understanding the Word “Advocacy”: Context and Use*, in [1 STRUCTURING THE INQUIRY INTO ADVOCACY] NON-PROFIT ADVOCACY AND THE POLICY PROCESS 1, 6-7 (Elizabeth J. Reid ed., 2000), <http://www.urban.org/UploadedPDF/structuring.pdf> (briefly discussing the difficulty of defining both advocacy generally and lobbying specifically, but without proposing a definitive definition of either term). *But see* Miriam Galston, *Lobby-*

focus on a particular set of rules rather than a comprehensive review of the regulation of lobbying and lobbyists.<sup>11</sup> This Article fills this gap by focusing on the definition of lobbying in the context of all of the generally applicable federal rules. This approach—looking comprehensively at all the legal rules governing a particular activity in light of the most current research on that activity instead of at a particular law or set of laws—could be productively applied to numerous other types of activities.<sup>12</sup>

Part I of this Article reviews the current federal laws governing lobbying, describing the restrictions imposed by those laws, the reasons for those restrictions, and the various definitions of lobbying used by each set of rules. These laws include various tax provisions, the Lobbying Disclosure Act, and the ethics laws and rules covering both members of Congress and executive branch officials. This Part concludes that, despite the varied histories of these laws, they share a common underlying justification: concern that interest groups will unduly influence government actions to the detriment of the overall public interest. Part II then draws on the extensive legal and non-legal literature exploring interactions between interest groups and government officials. While much about how interest groups influence government remains unclear, Part II concludes that the means of exercising such influence vary significantly depending on what type of government *actor* is the target of the advocacy effort as opposed to what type of government *action* is desired. Part II also notes that not all interest group influence is actually or potentially detrimental, and so not all interest group efforts should be subject to the rules described in Part I.

Finally, Part III proposes that Congress adopt in most instances a single definition of lobbying for all of the relevant rules, a definition that focuses on the type of government actor whom interest groups are seeking to influence. The covered government actors would include officials and employees of the legislative branch, and also the most senior officials and employees of the executive branch. This definition would be better than the existing multiple defi-

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*ing and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX. L. REV. 1269, 1340-43 (1993) (proposing, for purposes of the tax rules governing lobbying, dividing lobbying into two categories, “educational advocacy lobbying,” which would be allowed without limit for tax-exempt organizations and be deductible for businesses, and all other attempts to influence lawmakers, which would be prohibited for tax-exempt organizations and not deductible for businesses).

11. See, e.g., Chisolm, *supra* note 10 (focusing on the tax rules); Galston, *supra* note 10 (focusing on the tax rules); Johnson, *supra* note 10 (focusing on the disclosure and lobbyist rules); Krishnakumar, *supra* note 10 (focusing on the disclosure rules); Luneburg & Susman, *supra* note 10 (focusing on the disclosure rules).
12. See, e.g., JOHN COPELAND NAGLE, LAW'S ENVIRONMENT: HOW ENVIRONMENTAL LAW AFFECTS THE NATURAL ENVIRONMENT (forthcoming 2008) (exploring how the entire universe of applicable federal and state environmental laws together affect the use of particular properties or environmental resources).

nitions of lobbying for two main reasons. First, it would provide a better match than the existing definitions with the shared common purpose of the various federal laws relating to lobbying, which is to limit the influence of interest groups on government actions when that influence is likely to be detrimental to the overall public interest. Second, the adoption of a single definition of lobbying would increase the effectiveness of those laws by simplifying compliance and enforcement. The definition would not, however, reach “grassroots” lobbying efforts—i.e., attempts to influence the public to contact government actors—because such attempts are both less as likely to result in government actions contrary to the public interest and may provide significant benefits.

By focusing solely on the definition of lobbying, this Article necessarily does not explore certain related topics. It does not weigh the constitutional or public policy merits of the existing restrictions, but rather takes these restrictions as a given.<sup>13</sup> It also focuses on federal laws, although the analysis is also applicable to state laws governing lobbying. It does not cover laws relating to more specific situations, such as restrictions on using federal grants funds for lobbying,<sup>14</sup> restrictions on federally created or chartered organizations engaging in lobbying,<sup>15</sup> or the additional registration and reporting requirements for indi-

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13. See sources cited *supra* note 10.

14. E.g., 7 U.S.C.A. § 2008j (West 2007); 7 U.S.C. § 6005, 7444 (2000); 16 U.S.C.A. §§ 1166, 3709 (West 2007); 18 U.S.C.A. § 1913 (West 2007); 25 U.S.C. § 640d-29 (2000); 31 U.S.C.A. §§ 1352, 5134 (West 2007); 42 U.S.C.A. §§ 2996f, 10410, 10603b, 10706, 13014, 13925 (West 2007); 42 U.S.C. §§ 300g-9, 300j-1, 4368 (2000); 49 U.S.C.A. §§ 60114, 60130, 60134 (West 2007). A related issue is whether Congress can bar federal grant recipients from using any funds, whether from federal or other sources, to engage in lobbying. See, e.g., 2 U.S.C.A. § 1611 (West 2005) (barring organizations that are tax-exempt under 26 U.S.C. § 501(c)(4) and engage in lobbying activities from being eligible for federal awards, grants, or loans); Rebekah Diller, *Efforts To Restrict the Advocacy Rights of Nonprofits That Partner with Government*, 9 N.Y. CITY L. REV. 315 (2006); Timothy C. Layton, Note, *Welfare for Lobbyists or Nonprofit Gag Rule: Can Congress Limit a Federal Grant Recipient's Use of Private Funds for Political Advocacy?*, 47 SYRACUSE L. REV. 1065 (1977); Amy E. Moody, Note, *Conditional Federal Grants: Can the Government Undercut Lobbying by Nonprofits Through Conditions Placed on Federal Grants?*, 24 B.C. ENVTL. AFF. L. REV. 113 (1996).

15. E.g., 6 U.S.C.A. § 311 (West 2007) (Home Security Organization and FEMA); 7 U.S.C. § 3405 (2000) (Wheat Industry Council); 12 U.S.C.A. § 1701y (West 2007) (National Homeownership Foundation); 16 U.S.C.A. § 1852 (West 2007) (regional Fishery Management Councils); 16 U.S.C. § 5807 (2000) (National Natural Resources Conservation Foundation); 20 U.S.C.A. § 4353 (West 2007) (Galludet University and the National Technical Institute for the Deaf); 22 U.S.C. § 4604 (2000) (United States Institute of Peace); 36 U.S.C.A. §§ 20106 (Agricultural Hall of Fame), 20707 (American Council of Learned Societies), 20908 (American Ex-Prisoners of War), 22907 (Army and Navy Union of the United States of America), 23106 (Aviation Hall of Fame), 40506 (Congressional Medal of Honor Society of the United States of America), 50107 (Daughters of Union Veterans of the Civil

viduals and entities who lobby on behalf of foreign governments,<sup>16</sup> since each of those situations raise issues that do not apply to the more general laws governing lobbying.<sup>17</sup> Finally, this Article will only occasionally refer to the rules and definitions governing campaign contributions or independent communications meant to influence an election. Such activities are governed by a separate set of more restrictive rules supported in significant part by different concerns than those that underlie the laws governing lobbying generally.<sup>18</sup>

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War 1861-1865), 60107 (82nd Airborne Division Association), 70307 (Former Members of Congress), 70507 (Foundation of the Federal Bar Association), 80507 (Gold Star Wives of America), 100107 (Italian American War Veterans of the United States), 150108 (National Academy of Public Administration), 151507 (National Federation of Music Clubs), 152107 (National Mining Hall of Fame and Museum), 152707 (National Ski Patrol System), 152908 (National Society, Daughters of the American Colonists), 154507 (Navy Wives Clubs of America), 170308 (Pearl Harbor Survivors Association), 170507 (Polish Legion of American Veterans, U.S.A.), 210308 (369th Veterans' Association), 220108 (United Service Organizations), 220707 (United States Submarine Veterans of World War II), 240107 (Women's Army Corps Veterans' Association) (West 2007); 42 U.S.C.A. §§ 2996e (Legal Services Corporation), 9843a (Head Start), 10707 (State Justice Institute), 12664 (Points of Light Foundation) (West 2007).

16. See 18 U.S.C. § 219 (2000); 22 U.S.C.A. §§ 611-621 (West 2007). See generally Charles Lawson, Note, *Shining the "Spotlight of Pitiless Publicity" on Foreign Lobbyists? Evaluating the Impact of the Lobbying Disclosure Act of 1995 on the Foreign Agents Registration Act*, 20 VAND. J. TRANSNAT'L L. 1151 (1996).
17. These other issues include whether organizations that have close ties to the federal government through government grants or federal chartering should be permitted to lobby that government even though they are in some respects extensions of that government and likely strongly influenced by government officials and the extent to which either national security concerns or other possible threats require foreign governments seeking to influence U.S. government actions to fully disclose their activities in this regard.
18. See *FEC v. Wis. Right to Life*, 127 S. Ct. 2652, 2659 (2007) (distinguishing speech relating to the election of public officials from speech relating to issues of general public interest but noting that making this distinction is often difficult); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978) (distinguishing between speech relating to election of public officials and speech relating to general public interest). See generally Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 630-48 (2007) (summarizing the federal election and tax laws governing election-related activity).

## I. CURRENT LAW

Congress's ability to regulate lobbying is constitutionally limited.<sup>19</sup> While the exact parameters of this limit are not completely known, the Supreme Court has held that Congress cannot prohibit individuals or entities, including corporations, from expending funds on speech aimed at influencing government actions in most instances.<sup>20</sup> This constitutional protection extends to both direct contacts with government officials and indirect attempts to influence government actions by urging the public to contact government officials, commonly known as grassroots lobbying.<sup>21</sup>

Although lobbying therefore enjoys significant constitutional protection, policymakers have long been concerned about reducing its possible nefarious effects.<sup>22</sup> James Madison feared that subsets of citizens united by common passions or interests would form organizations—or interest groups—to pursue government action (or inaction) that furthered their own interests but were adverse to the overall public interest.<sup>23</sup> This worry about lobbying continued into

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19. See generally Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right To Lobby*, 16 HARV. J.L. & PUB. POL'Y 149, 158-72 (1993) (reviewing cases addressing the extent of First Amendment protections relating to lobbying); 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, 1899-1915 (2005) (same).
  20. See *Bellotti*, 435 U.S. at 784 (concluding that First Amendment speech protections apply regardless of whether the speaker is an individual or a corporation).
  21. See *Wis. Right to Life*, 127 S. Ct. at 2671-73 (rejecting as unconstitutional an attempt to prevent the use by a nonprofit corporation of its treasury funds to engage in what was arguably grassroots lobbying, even though the nonprofit corporation had other, albeit more burdensome, avenues for engaging in the speech at issue); *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 525 (2002) (noting that the First Amendment's right to petition protects attempts to influence directly the actions of any of the branches of government).
  22. See, e.g., THE FEDERALIST NO. 10 (James Madison); THE FEDERALIST NO. 51, at 323-24 (James Madison) (Clinton Rossiter ed., 1961) (describing this concern but noting that the existence of a multiplicity of interests works against it).
  23. See THE FEDERALIST NO. 10, at 77-78 (James Madison) (Clinton Rossiter ed., 1961); cf. HERRING, *supra* note 3, at 241-42 (concluding that the development of organized groups of citizens tended to lead to the elevation of a particular group's interest over the national welfare). While Madison was primarily concerned about the influence of a faction that constituted a majority, having concluded that lesser factions would fail in the face of majority opposition under the governmental structure established by the Constitution and the multiplicity of interests existing in the United States, it is now well recognized that even factions that are a minority may be able to achieve their desired governmental action, possibly to the detriment of the majority of citizens and the public interest, because of the difficulties of organizing majority opposition when the detriment is small for each citizen

the second half of the nineteenth century, as illustrated by a series of Supreme Court decisions that found contingency fee lobbying contracts void on public policy grounds because of the risks of corruption and other forms of improper influence such contracts allegedly created.<sup>24</sup>

At the beginning of the twentieth century, Congress began to pass measures specifically designed to curb perceived undue influence of interest groups. Congress has found three ways to regulate lobbying that have avoided successful First Amendment challenge. Section A briefly describes these legal rules, reviewing both their historical origins and the justifications that have allowed them to survive, and concludes that a common purpose now unites them: limiting the influence of interest groups. Section B explores how, despite this common purpose, the definition of lobbying varies among, and even within, these three sets of rules.

#### A. “Lobbying” Regulated

One way Congress regulates lobbying is to increase its cost by barring individuals and entities from deducting lobbying expenditures in most instances.<sup>25</sup> A second way is to require public disclosure of information about lobbying activities and sources of funds for lobbying, although the exact extent of disclosure that Congress may constitutionally require remains uncertain.<sup>26</sup> Third, and

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in the majority. See THE FEDERALIST NO. 10, at 80 (James Madison), NO. 51, at 323-25 (James Madison) (Clinton Rossiter ed., 1961). See generally MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (developing the still dominant theory of how organizational costs associated with forming groups, including free rider concerns, can lead to relatively small groups that can effectively achieve their goals; Olson published a revised version of this book in 1971 under the same title).

24. See, e.g., *Hazelton v. Sheckells*, 202 U.S. 71, 79 (1906) (declaring void a contingency fee contract for lobbying because such contracts tend to induce improper solicitations of government officials); *Trist v. Child*, 88 U.S. (21 Wall.) 441, 449-52 (1874) (same); *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 335-36 (1853) (same); see also *Providence Tool Co. v. Norris*, 69 U.S. (2 Wall.) 45, 54-56 (1864) (applying the same reasoning to void a contingency fee contract relating to procuring a government contract from an executive branch official).
25. See *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (rejecting both First Amendment and Equal Protection Clause challenges to the prohibition against substantial lobbying by organizations described in I.R.C. § 501(c)(3)); *Cammarano v. United States*, 358 U.S. 498, 512-13 (1959) (rejecting a First Amendment challenge to the denial of a business expense deduction for expenditures incurred to oppose ballot initiatives).
26. See *Krishnakumar*, *supra* note 10, at 562-65 (reviewing the existing case law regarding the constitutional limits on Congress’s authority to require disclosure of lobbying activities); *Luneburg & Susman*, *supra* note 10, at 35-39 (same). See generally Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Ano-*

finally, Congress restricts interactions between government officials and lobbyists that go beyond mere speech.<sup>27</sup> Such restrictions include not only prohibiting outright bribery but also placing limitations on gifts and travel that government officials may receive and placing restrictions on former government officials engaging in lobbying.<sup>28</sup>

### 1. Taxing Lobbying

Why are there tax rules for lobbying? Because lobbying requires spending money, and when money is spent, there is always the question of how to treat those expenditures for tax purposes. The money in lobbying is provided by interest groups that hire outside paid lobbyists, direct their own paid staffs to engage in lobbying, or pay for communications to either government actors or the public in a bid to influence government actions.<sup>29</sup> Even if an interest group relies primarily on unpaid volunteers to visit with their legislators, such activities still require funding to pay for travel and lodging expenses, pre-visit meeting rooms, written materials to be left behind, and the like. So it is not surprising that the first regulation of lobbying by the federal government occurred in the tax laws, when the Treasury Department faced the issue of whether lobbying expenditures could be deducted as ordinary and necessary business expenses. Initially, Congress's reasons for enacting the tax restrictions focused less on concerns about interest group influence and more on ensuring equal treatment of citizens seeking to influence government action, whether embodied in legis-

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*Anonymous Speech*, 82 NOTRE DAME L. REV. 1537 (2007) (discussing the extent of constitutional protection for anonymous speech).

27. These limitations have generally not been subject to constitutional challenge in the courts, which is perhaps not surprising given that, with the exception of the anti-bribery statutes, most of them have been implemented by placing restrictions and imposing penalties only on the government officials involved, not the lobbyists.
28. See *infra* Subsection I.A.3.
29. See BERRY & WILCOX, *supra* note 2, at 14-15 (noting that Americans tend to view lobbying by interest groups as the primary source of government problems); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991); Johnson, *supra* note 10, at 8-9 (noting that lobbyists, by definition, are paid to act on behalf of others); Krishnakumar, *supra* note 10, at 542 (noting that ultimately the public's concerns about lobbyists are driven by concerns about the influence of the interest groups that pay to employ them); see also Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159, 1196 (2006) (noting that lobbyists represent interest groups but also "shake down" those same groups by charging them fees and are in turn "shaken down" by legislators, who require lobbyists to personally provide campaign contributions).

lation or other government acts.<sup>30</sup> But most recently its focus has been more on the possible negative effects of interest group influence and less on equal treatment.

Current law increases the cost of lobbying by almost always requiring individuals and entities to use after-tax dollars to pay for lobbying.<sup>31</sup> By denying a deduction for such expenditures, Congress effectively requires taxpayers to pay tax on the funds they use for lobbying.<sup>32</sup> The mechanism Congress uses to accomplish this goal is the denial, for the most part, of a deduction for lobbying expenditures even if the lobbying expenditures would otherwise qualify as "ordinary and necessary" business expenses.<sup>33</sup> In addition, federal tax law bars otherwise qualified organizations from being eligible to receive tax-deductible charitable contributions if the organization engages in lobbying as a substantial part of its activities.<sup>34</sup> Tax law also prohibits private foundations from spending

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30. This goal is presumably based on seeking to make real a pluralist vision of democracy, where all members of society have sufficient interest group representation. See BERRY & WILCOX, *supra* note 2, at 11 (describing attempts to make the pluralist vision of politics a reality by supporting the formation of interest groups for the previously disenfranchised and underrepresented).
31. For a more detailed overview of the tax rules governing lobbying, see Judith E. Kindell & John Francis Reilly, *Lobbying Issues*, in EXEMPT ORGANIZATIONS—TECHNICAL INSTRUCTION PROGRAM FOR FY 1997, at 261 (1997), <http://www.irs.gov/pub/irs-tege/eotopic97.pdf>.
32. See Gregg D. Polsky, *A Tax Lawyer's Perspective on Section 527 Organizations*, 28 CARDOZO L. REV. 1773, 1775-78 (2007) (explaining how Congress uses a similar mechanism to require the use of after-tax dollars with respect to election-related activities).
33. I.R.C. § 162(e) (2000); Treas. Reg. §§ 1.162-20(c)(5), 1.162-28(a)(1) (as amended in 1995). Other tax provisions bar attempts to avoid this non-deductibility rule through paying dues or making contributions to tax-exempt organizations that lobby. I.R.C. §§ 162(e)(3), 170(f)(9), 6033(e) (2000); Treas. Reg. § 1.162-20(d) (as amended in 1995); John Francis Reilly & Barbara A. Braig Allen, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, in EXEMPT ORGANIZATIONS—TECHNICAL INSTRUCTION PROGRAM FOR FY 2003, at L-1, L-19 to L-52 (2002), <http://www.irs.gov/pub/irs-tege/eotopiclo3.pdf> (explaining the operation of I.R.C. §§ 162(e), 6033(e)).
34. See I.R.C. § 170(c)(2)(D) (2000) (denying a charitable contribution deduction if the recipient is disqualified for tax exemption under I.R.C. § 501(c)(3) by reason of attempting to influence legislation); *id.* § 501(c)(3) (2000) (denying tax exemption if an otherwise eligible organization has attempting to influence legislation as a substantial part of its activities); Treas. Reg. § 1.170A-1(j)(5)(i) (as amended in 2005) (echoing I.R.C. § 170(c)(2)(D) and denying a charitable contribution deduction for any lobbying expenditures); Treas. Reg. § 1.501(c)(3)-1(b)(3)(i), -1(b)(3)(iii), -1(c)(3)(ii), -1(c)(3)(iv) (as amended in 1990) (interpreting I.R.C. § 501(c)(3) as also prohibiting tax exemption under that provision if the otherwise charitable organization has as a main or primary objective that is only attainable

any funds on lobbying, subject to a few narrow exceptions discussed below.<sup>35</sup> As detailed immediately below, the rationale for this tax treatment has not always been clear but in recent years Congress has indicated it is now driven primarily by concerns about the undue influence of interest groups.

a. Lobbying as a Business Activity

The tax rule regarding deducting lobbying expenditures as a business expense came first historically, and so it is appropriate to start with how the reasons for this rule's enactment have evolved over time. Establishing what remained the rule for almost fifty years, the Treasury Department issued a ruling in 1915 that denied deductibility for lobbying expenditures simply because they were not "an ordinary and necessary expense in the operation and maintenance of a business."<sup>36</sup> The first set of decisions by the Board of Tax Appeals, the predecessor to today's Tax Court, picked up on this rationale by adopting a case-

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by the passage or defeat of legislation); Rev. Rul. 80-275, 1980-2 C.B. 69 (denying a charitable contribution deduction for a contribution earmarked for use in influencing specific legislation). Such organizations are, however, generally able to receive deductible contributions if they engage in lobbying as only an *insubstantial* part of their activities, including if they elect to be subject to a sliding scale system that allows some smaller organizations described in I.R.C. § 501(c)(3) to spend up to twenty percent of their budgets on lobbying. See I.R.C. § 501(h) (providing for this election) (2000); *id.* § 4911(c)(2) (providing a sliding scale, beginning at twenty percent, for permitted lobbying expenditures).

35. See I.R.C. § 507 (2000) (terminating private foundation status and imposing a tax equal to the lesser of the tax benefit received by donors to the foundation and the foundation as a result of its I.R.C. § 501(c)(3) status or the value of the foundation's net assets for willful repeated violations or a single willful and flagrant violation of, among other rules, the prohibition on lobbying); *id.* § 4945(a), (b), (d)(1) (imposing an excise tax on and requiring the correction of any private foundation expenditures for attempting to influence legislation). Private foundations are charitable organizations that rely on financial support from a small group of donors or from investments. See I.R.C. § 509(a) (2000) (defining the term "private foundation").
36. T.D. 2137, 17 Treas. Dec. Int. Rev. 57, 57-58 (1915); see also I.T. 2290, 5-1 C.B. 53, 53-55 (1926) (denying a deduction for a contribution to a chamber of commerce to cover expenses related to obtaining a revision of freight rates from the Interstate Commerce Commission for the same reason). The Treasury Department shortly thereafter promulgated a regulation denying a deduction for lobbying expenditures. Treas. Reg. § 33, art. 143 (1918), *reprinted in* 132 INTERNAL REVENUE ACTS OF THE UNITED STATES, 1909-1950: LEGISLATIVE HISTORIES, LAWS, AND ADMINISTRATIVE DOCUMENTS 75 (Bernard D. Reams, Jr. ed., 1979).

by-case approach to the question of deductibility, focusing on whether expenses related to influencing government action were in fact ordinary and necessary.<sup>37</sup>

The executive branch abandoned this rationale, however, in later litigation. It argued—and the courts agreed—that the potential harm lobbying inflicted on the legislative process provided a public policy justification for disfavoring compensation.<sup>38</sup> In reaching this conclusion in 1941, the Supreme Court noted that its line of cases voiding contingency fee lobbying contracts as against public policy provided sufficient grounds for the Treasury Department to exclude lobbying expenses from deductible business expenses on public policy grounds.<sup>39</sup>

This line of reasoning for this rule then shifted subtly, albeit temporarily, in 1958, when the Supreme Court again visited this issue. The shift arose out of the related tax provisions applicable to charities.<sup>40</sup> In 1930, Judge Learned Hand had found contributions to a purported charity were not deductible because the recipient organization engaged in lobbying—seeking the repeal of laws preventing birth control—as a more than incidental activity.<sup>41</sup> He reasoned that to allow a deduction to such an organization would necessarily provide government support for the lobbying effort, which the Treasury must avoid.<sup>42</sup> Relying on this reasoning in the face of a constitutional challenge to the denial of a business deduction rule, the Supreme Court rejected the challenge on the ground that businesses “are simply being required to pay for those [lobbying] activities en-

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37. E.g., *Textile Mills Sec. Corp. v. Comm’r*, 38 B.T.A. 623, 630-31 (1938), *rev’d en banc*, 117 F.2d 62 (3d Cir. 1940), *aff’d*, 314 U.S. 326 (1941); *Old Mission P. Cement Co. v. Comm’r*, 25 B.T.A. 305, 320 (1932), *aff’d in part, rev’d in part*, 69 F.2d 676, 681 (9th Cir. 1934) (affirming the denial of a lobbying expenditure deduction because the outlay was not an ordinary and necessary business expense), *aff’d*, 293 U.S. 289 (1934); *Los Angeles & Salt Lake Ry. Co. v. Comm’r*, 18 B.T.A. 168, 179 (1929). See generally Dean E. Sharp, *Reflection on the Disallowance of Income Tax Deductions for Lobbying Expenditures*, 39 B.U. L. REV. 365, 366-79 (1969) (reviewing the treatment of this rule by the courts over time).
38. E.g., *Textile Mills*, 314 U.S. at 338-39; see also *Comm’r v. Heininger*, 320 U.S. 467, 473 (1943) (giving this rule as one example of rules adopted to support a sharply defined public policy). See generally Note, *Tax Treatment of Lobbying Expenses and Contributions*, 67 HARV. L. REV. 1408, 1414-15 (1954) (discussing *Textile Mills*).
39. *Textile Mills*, 314 U.S. at 338-39.
40. For purposes of this Article, the term “charities” will be used to refer to organizations that qualify for tax-exempt status under I.R.C. § 501(c)(3) (2000). I use this term only in the tax, as opposed to lay, sense, in that by virtue of this status such organizations are eligible to receive deductible “charitable” contributions under I.R.C. § 170(a), (c)(2) (2000).
41. *Slee v. Comm’r*, 42 F.2d 184, 185 (2d Cir. 1930).
42. *Id.* (“Political agitation as such is outside the statute, however innocent the aim, though it adds nothing to dub it ‘propaganda,’ a polemical word used to decry the publicity of the other side. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.”).

tirely out of their own pockets, as everyone else engaging in similar activities is required to do . . . .”<sup>43</sup>

The problem with this shift in rationale is that it has a fatal flaw. Businesses are routinely permitted to deduct expenses relating to their business activities, expenses that individuals are not permitted to deduct if such expenses are for their personal purposes.<sup>44</sup> For example, if a business purchases advertising for its products, that cost is deductible to the business, but if an individual buys advertising for non-business reasons (e.g., a personals ad), that cost is not deductible. Why? Because the business’s cost is one that is incurred to generate income and denying the business a deduction would lead to an inflated amount of income being subject to tax. Carried to its logical extreme, a denial of a deduction for business expenses would transform the income tax into a gross receipts tax for businesses.

Congress recognized this flaw in 1962, when it concluded that a business deduction should be permitted for business-related lobbying expenses because such a deduction “is necessary to arrive at a true reflection of [a business’s] real income for tax purposes.”<sup>45</sup> In the first statute explicitly addressing this issue, Congress permitted businesses to deduct lobbying expenses that were of “direct interest” to the business.<sup>46</sup> Congress also felt that permitting such a deduction would improve the flow of information to members of Congress, would reduce the administrative burden on businesses, and would eliminate the disparity between the treatment of lobbying expenditures—then defined in a way that limited lobbying to seeking to influence legislation—and expenditures that attempted to influence other types of government actions.<sup>47</sup> As detailed below, however, Congress did not extend this deductibility to expenditures for grass-

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43. *Cammarano v. United States*, 358 U.S. 498, 533 (1959). The Court also relied heavily on the reenactment doctrine, noting that Congress had repeatedly reenacted the underlying statute over a more than forty-year period without altering the Treasury Department’s regulatory interpretation of it in this area. *Id.* at 531-32.

44. See Note, *Deductibility of Expenses To Influence Legislation*, 46 VA. L. REV. 112, 119-20 (1960) (discussing the point as part of an analysis of the *Cammarano* decision). Compare I.R.C. § 162(a) (2000) (permitting a deduction for ordinary and necessary business expenses), with I.R.C. § 262 (2000) (generally denying a deduction for personal, living, or family expenses).

45. H.R. REP. NO. 87-1447, at 17 (1962); see also S. REP. NO. 87-1881, at 23-24 (1962) (same language); Shannon King, Note, *The Lobbying Deduction Disallowance: Policy Considerations, Comparisons, and Structuring Activities Under Amended Section 162(e)*, 15 VA. TAX REV. 551, 581 (1996) (explaining the net income rationale for permitting a deduction for business-related lobbying expenses).

46. Revenue Act of 1962, Pub. L. No. 87-834, § 3, 76 Stat. 960, 973 (1962) (codified as amended at I.R.C. § 162(e)).

47. H.R. REP. NO. 87-1447, at 17 (1962); S. REP. NO. 87-1881, at 24 (1962).

roots lobbying (defined as attempts to influence legislation by appealing to the public).<sup>48</sup>

This limited allowance of a business deduction for lobbying expenditures remained the rule for over thirty years. But in the early 1990s, the Clinton Administration proposed to reverse course and to deny any business deduction for lobbying expenses.<sup>49</sup> The stated reason brought concerns about interest group influence to the fore again: "[t]he deduction for lobbying expenses inappropriately benefits corporations and special interest groups for intervening in the legislative process."<sup>50</sup> Congress acquiesced to this proposal.<sup>51</sup> Once again, the dominant reason for this tax rule became limiting the perceived undue influence of interest groups as opposed to ensuring equal treatment of all attempts to influence government action.

b. Lobbying as a Charitable Activity

In contrast to the shifting business expenses deduction rule, the rule for charities has remained essentially the same since 1934, when Congress codified the requirement that charities not engage in lobbying as a "substantial part" of their activities.<sup>52</sup> Whether Congress was directly influenced by Judge Hand's

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48. See *infra* Subsection I.C.3.

49. DEP'T OF THE TREASURY, SUMMARY OF THE ADMINISTRATION'S REVENUE PROPOSALS 45 (1993).

50. *Id.*; see also WILLIAM CLINTON & ALBERT GORE, PUTTING PEOPLE FIRST: HOW WE CAN ALL CHANGE AMERICA 25 (1992) (proposing the elimination of the tax deduction for "special interest lobbying expenses" in order "[t]o help put government back in the hands of the people").

51. The written congressional history only reflects a concern about raising additional revenues. H.R. REP. NO. 103-111, at 659 (1993). But Congress was almost certainly aware of the Administration's publicly stated concerns. See King, *supra* note 45, at 583 (concluding, even given the lack of clear legislative history, that Congress seems to have been trying to discourage lobbying by making business-related lobbying expenditures non-deductible); sources cited *supra* notes 49-50.

52. Revenue Act of 1934, Pub. L. No. 74-216, § 23(o), 48 Stat. 680, 690 (1934); see also *id.* §§ 101(6), 406, 517, 48 Stat. at 700, 755, 760 (including the same restriction on a charity's tax exemption and eligibility to receive contributions exempted from the estate and gift taxes); Revenue Act of 1935, Pub. L. No. 74-407, § 102(c), 49 Stat. 1014, 1016 (1935) (incorporating the same requirement into the charitable contribution deduction provision for corporations); I.R.C. § 170(c)(2)(D) (2000) (current law).

Prior to the 1934 statute, the Treasury Department had issued a regulation stating that disseminating controversial or partisan propaganda was not "educational" within the meaning of the charitable contribution deduction statute, possibly out of concern about the growing influence of interest groups. See T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919); Tommy F. Thompson, *The Availability of the Federal Educational Tax Exemption for Propaganda Organizations*, 18 U.C. DAVIS

reasoning in *Slee* is unclear, but the record indicates that the Senate Finance Committee added the “no substantial part” lobbying restriction because it was worried that, absent this limitation, a donor with selfish legislative ends might inappropriately receive a charitable contribution deduction if the recipient charity engaged in a significant amount of lobbying.<sup>53</sup> According to a detailed analysis by Professor Oliver Houck, this concern was not merely an abstract one, as Senator Reed, the ranking member of the Senate Finance Committee who appears to have played a critical role in passage of the rule, had some specific charities and donors in mind.<sup>54</sup> Indeed, the legislative history indicates that the Committee recognized the added language was broader than necessary to accomplish its goal, but it could not apparently draft any narrower language that still accomplished its purpose.<sup>55</sup> Despite this (very limited) history, the breadth of the actual statutory language has led IRS commentators to conclude that the provision may have been enacted “simply because there was a general sentiment that lobbying by charities should be restricted.”<sup>56</sup> Even though the restriction on charities has now been in place for over seventy years, Congress has never more fully elaborated on the reasons for its existence. The closest Congress came was in 1987, when the House Subcommittee on Oversight cryp-

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L. REV. 487, 536-37 (1985) (noting that Treasury’s regulation coincided with the rise of organized interest groups following World War I). The only significant change since the initial statutory enactment has been the addition of an elective sliding scale regime. *See supra* note 34. While significant as a practical matter, this change did not disturb the general rule that charities can only engage in a limited amount of lobbying.

53. 78 CONG. REC. 5861, 5959 (1934) (statement of Senator David Reed). Senator David Reed was the ranking minority member of the Committee and made this comment during a colloquy with Senator Pat Harrison, the Chairman of the Committee. *See SENATE FIN. COMM., HISTORY OF THE COMMITTEE ON FINANCE*, S. DOC. NO. 97-5, at 140 (1981) (listing the members of the Committee in 1934).
54. Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 16-23 (2003) (detailing Senator Reed’s long running battle with the National Economy League over veteran’s benefits and his citing of it as the prime example for why the lobbying restriction on charities should be enacted); *see also* William J. Lehrfeld, *The Taxation of Ideology*, 19 CATH. U. L. REV. 50, 63-64 (1969) (reaching the same conclusion).
55. 78 CONG. REC. 5861, 5959 (1934). For additional speculation about the reasons behind the restriction and its perhaps unintended consequences, see Chisolm, *supra* note 10, at 222-23 n.109; Elias Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439, 447-48 (1960); and Myron Walker & Tim Rothermel, Note, *Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969*, 38 GEO. WASH. L. REV. 1114, 1118 (1969).
56. Kindell & Reilly, *supra* note 31, at 265.

tically stated its belief that the restriction “continue[s] to represent sound tax policy.”<sup>57</sup>

The legislative history for the enactment of the prohibition on private foundations engaging in lobbying does, however, hint at why Congress maintains the limitation on lobbying by charities. The prohibition on private foundation lobbying was part of a larger body of restrictions targeted at private foundations.<sup>58</sup> The legislative history for those restrictions indicates that the lobbying prohibition arose out of concern that private foundations had been using more and more of their wealth to influence legislation, both directly and through grassroots lobbying, and that the existing limitation on lobbying by charities was not sufficiently limiting these efforts.<sup>59</sup> While the legislative history is sparse, it strongly indicates that both the current general denial of a business expenses deduction for lobbying expenses and the limitations on charities engaging in lobbying are at least currently based on a common concern that if these restrictions did not exist, the affected entities would wield undue influence with respect to government actions. Concerns about treating all attempts, by all types of groups, to influence government action equally have faded to the extent they ever had much weight.

## 2. Disclosing Lobbying

Congress has not, however, limited itself to providing adverse tax rules for lobbying expenditures. It has also enacted the Lobbying Disclosure Act of 1995 (LDA), which requires “lobbyists” that lobby certain federal government officials to register and report on their lobbying activities.<sup>60</sup> Lobbyists are either in-

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57. STAFF OF SUBCOMM. ON OVERSIGHT OF THE WAYS AND MEANS COMM., REPORT AND RECOMMENDATIONS ON LOBBYING AND POLITICAL ACTIVITIES BY TAX-EXEMPT ORGANIZATIONS, H.R. DOC. NO. 100-12, at 37 (1987).

58. See Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, 513-540 (1969).

59. H.R. REP. NO. 91-413, at 4, 19-43 (1969); S. REP. NO. 91-552, at 6, 25-62 (1969); see also THOMAS A. TROYER, THE 1969 PRIVATE FOUNDATION LAW 20 & n.55 (2000) (noting that certain controversial grants by the Ford Foundation, including ones relating to school decentralization, appear to have provided support for the 1969 prohibition on private foundations engaging in lobbying); Walker & Rothermel, *supra* note 55, at 1127-29 (discussing the background of the 1969 prohibition). See generally Jeffrey M. Berry, Ensuring Nonprofit Passivity 16-17 (Sept. 1-4, 2006) (unpublished manuscript, <http://ase.tufts.edu/polsci/faculty/berry/paper-np-passivity.pdf>) (concluding that concerns about the negative effects of interest groups on democratic politics drives the limits on political involvement by charities).

60. 2 U.S.C. §§ 1601-1612 (2000). See generally CONG. RESEARCH SERV., LOBBYING CONGRESS: AN OVERVIEW OF LEGAL PROVISIONS AND CONGRESSIONAL ETHICS RULES 2-5 (2006) (describing the LDA). There has not been any court decision addressing a constitutional challenge to the LDA, but the Supreme Court found

dividuals or organizations that are hired by a client to engage in lobbying, or individuals or organizations that lobby on their own behalf.<sup>61</sup> Lobbyists, or the organizations that employ them, are required to provide identifying and contact information for both themselves and their clients, to identify the chamber of Congress and the specific federal agencies contacted on behalf of clients, to list the specific issues upon which they lobbied (whether on their own behalf or on a client's behalf), and to give an estimate of the lobbying expenses incurred, on a semiannual basis.<sup>62</sup>

There are, however, numerous exceptions to this disclosure regime. Some of these exceptions are to the definition of lobbying and will be discussed in Section I.B. There are also exceptions to the registration and reporting requirements for relatively small amounts of lobbying. The most significant exception is that "lobbyists" do not include individuals whose lobbying activities constitute less than twenty percent of the time spent providing services to the lobbying client (e.g., an attorney who spends eighty-five percent of her time for a particular client on non-lobbying related legal work).<sup>63</sup> Furthermore, a lobbyist is not required to register on behalf of a particular client if lobbying income from the client is \$2,500 or less and is not required to register at all if total lobbying expenses are \$10,000 or less.<sup>64</sup>

In contrast to the tax laws regarding lobbying, there is no lack of clarity regarding the reasons Congress enacted the Lobbying Disclosure Act of 1995

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the predecessor to the LDA constitutional, although only after adopting a narrow definition of "lobbying." See *United States v. Harriss*, 347 U.S. 612 (1954). Congress recently amended the LDA to increase the frequency, scope, and visibility of disclosure reports; to increase the penalties for noncompliance; and to require registered lobbyists to disclose political contributions and fundraising activities in their LDA reports. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, §§ 201-203, 205, 207-211, 121 Stat. 735, 741-44, 746, 747-49 (2007) (codified at scattered sections of 2 U.S.C.); see also Lobbying Disclosure Act Guidance, [http://www.senate.gov/legislative/common/briefing/lobby\\_disc\\_briefing.htm](http://www.senate.gov/legislative/common/briefing/lobby_disc_briefing.htm) (last visited July 25, 2007) (describing the recent changes).

61. 2 U.S.C.A. § 1602(2), (10) (West 2007).

62. 2 U.S.C.A. §§ 1603(b) (required registration information), 1604(b) (required semiannual report information) (West 2007).

63. See 2 U.S.C.A. § 1602(10) (West 2007); Lobbying Disclosure Act Guidance, [http://www.senate.gov/legislative/common/briefing/lobby\\_disc\\_briefing.htm](http://www.senate.gov/legislative/common/briefing/lobby_disc_briefing.htm) (last visited July 25, 2007) (discussing a similar scenario in the "Relationship Between 20% of Time and Monetary Threshold" subsection).

64. See 2 U.S.C.A. § 1603(a)(3) (West 2007) (providing these exceptions); Notice Regarding January 1, 2005 Increase in Registration Thresholds, [http://www.senate.gov/pagelayout/legislative/one\\_item\\_and\\_teasers/Registration\\_thresholds\\_page.htm](http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/Registration_thresholds_page.htm) (providing the figures effective for 2005 through 2008). Both figures apply for each semiannual reporting period and are adjusted every four years for inflation. 2 U.S.C.A. §§ 1603(a)(3), 1604(a) (West 2007).

(LDA) and its predecessor, the Federal Regulation of Lobbying Act of 1946 (FRLA).<sup>65</sup> As stated in the Senate Report that accompanied FRLA:

Too often . . . the true attitude of public opinion is distorted and obscured by the pressures of special-interest groups. Beset by swarms of lobbyists seeking to protect this or that small segment of the economy or to advance this or that narrow interest, legislators find it difficult to discover the real majority will and to legislate in the public interest. As Government control of economic life and its use as an instrument of popular welfare have increased, the activities of these powerful groups have multiplied. . . . Full information regarding the membership, source of contributions, and expenditures of organized groups would prove helpful to Congress in evaluating their representations and weighing their worth. Publicity is a mild step forward in protecting government under pressure and in promoting the democratization of pressure groups.<sup>66</sup>

Consistent with these concerns, Congress enacted the LDA fifty years later "to strengthen public confidence in government by replacing the existing patchwork of lobbying disclosure laws with a single, uniform statute which covers the activities of all professional lobbyists"<sup>67</sup> and to ensure "responsible representative government."<sup>68</sup> Congress also sought to remedy perceived flaws in FRLA and other earlier lobbying disclosure laws.<sup>69</sup> A similar motivation lay be-

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65. Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (1995); Legislative Reorganization Act of 1946, Pub. L. No. 79-601, §§ 301-311, 60 Stat. 812, 839-42 (1946).

66. S. REP. NO. 79-1400, at 4-5 (1946); *see also* United States v. Harriss, 347 U.S. 612 (1954) (upholding the constitutionality of the FRLA based on conclusion that challenged sections do not violate guarantees of freedom to speak, to publish, or to petition the government); Note, *The Federal Lobbying Act of 1946*, 47 COLUM. L. REV. 98, 103 (1947) (describing some of the revelations regarding lobbying by interest groups that had led to earlier, more-limited-in-scope federal disclosure laws); Comment, *Improving the Legislative Process: Federal Regulation of Lobbying*, 56 YALE L.J. 304, 311-13 (1947) (providing a more detailed account of the lobbying activity that led to federal disclosure provisions).

67. H.R. REP. NO. 104-339, at 2 (1995).

68. *Id.* at 12; *see also* 2 U.S.C. § 1601(1), (3) (2000) (stating that "responsible representative Government" requires lobbying disclosure, and that "the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government").

69. H.R. REP. NO. 104-339, at 2 (1995); *see also* 2 U.S.C. § 1601(2) (2000) (stating the perceived problems with earlier statutes).

hind the Clinton Administration's efforts to limit interest group influence by reforming lobbying disclosure laws.<sup>70</sup>

### 3. Limiting Interactions Between Government Employees and Lobbyists

Finally, current law regulates interactions between lobbyists, government employees, and former government employees.<sup>71</sup> Lobbyists and government employees (for all three branches) are, of course, subject to the general statutory prohibitions against bribery.<sup>72</sup> Government employees from all branches are also prohibited from soliciting or receiving anything of value that may give rise to a conflict of interest, subject to certain exceptions, and so are subject to various restrictions on receiving income and gifts from non-governmental sources, including payment or reimbursement of travel expenses.<sup>73</sup>

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70. CLINTON & GORE, *supra* note 50, at 23-26 (supporting tougher lobbying disclosure as one way to "take away power from . . . special interests that dominate Washington").

71. See generally CONG. RESEARCH SERV., *supra* note 60, at 2-16 (describing these various rules). Congress recently enacted a number of significant changes to these rules, including prohibiting lobbyists from violating the congressional gift and travel reimbursement rules, making those rules stricter in various ways, and increasing limits both on the lobbying activities of persons related to Members of Congress and on post-government service private employment by some government officials. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, §§ 206, 301-305, 531-533, 541-544, 552-553, 735, 747, 751-54, 764-66, 766-71, 773 (2007) (adding 2 U.S.C. § 1613 and amending the Rules of the House of Representatives and the Standing Rules of the Senate). Some states and localities have additional rules governing lobbyists. See Johnson, *supra* note 10, at 18-48 (describing the federal, state, and local rules governing lobbyists, including state and local rules specifically barring false statements by lobbyists, limiting campaign contributions or other campaign-related activities by lobbyists, limiting lobbying activities by family members of government officials, and limiting charity fundraising by lobbyists on behalf of government officials or employees).

72. 18 U.S.C. § 201(b)(1)-(2) (2000) (defining bribery as making and soliciting or accepting gifts or other payments for the purpose of influencing official action, encouraging fraud on the United States, or inducing violation of official duties).

73. See 2 U.S.C. § 31-2 (2000) (limiting gifts and the payment of travel expenses for Senators, officers and employees, and in some instances their close family members); 5 U.S.C. § 7353 (2000) (generally prohibiting soliciting or accepting anything of value from a person seeking official action or whose interests may be substantially affected by the actions of the relevant government employee); 31 U.S.C. § 1353 (2000) (limiting the acceptance of travel and related expenses by executive branch employees from non-federal sources); 5 C.F.R. §§ 2635.101(b)(4), 2635.201-2635.205 (2007) (limiting gifts to executive branch employees); RULES OF THE HOUSE OF REPRESENTATIVES: ONE HUNDRED TENTH CONGRESS, R. 25, at 39 (2007), available at <http://www.rules.house.gov/ruleprec/110th.pdf> [hereinafter H.

## WHAT IS THIS “LOBBYING” THAT WE ARE SO WORRIED ABOUT?

But stricter rules apply to relationships between lobbyists registered under the Lobbying Disclosure Act and some government employees, primarily legislative branch employees who are covered by the congressional rules in this area.<sup>74</sup> These rules prohibit Members, officers, and employees of Congress from accepting gifts from a registered lobbyist or a private entity that employs registered lobbyists unless a specific exception (of which there are many) applies.<sup>75</sup> Such prohibited gifts include reimbursement of travel expenses by such individuals and entities in most instances.<sup>76</sup> Even reimbursement for trips that meet the few exceptions provided is prohibited if a registered lobbyist is involved in planning or arranging the trip.<sup>77</sup> These new rules are almost certainly a response to Rep. Tom DeLay’s much-publicized golfing trips to Scotland.<sup>78</sup> One might

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RULES] (limiting outside income and gifts to House Members, officers, and employees); *STANDING RULES OF THE SENATE*, S. DOC. NO. 110-9, R. 35-36, at 46-55 (2007), available at <http://rules.senate.gov/senaterules/Rules091407.pdf> [hereinafter *S. RULES*] (limiting, in Rule 35, gifts to Senate Members, officers, and employees and limiting, in Rule 36, outside earned income of Senate Members, officers, and employees). Each agency may also set its own, agency-specific rules. *See, e.g.*, 5 C.F.R. §§ 7501.101-7501.106 (2007) (rules for employees of the Department of Housing and Urban Development).

74. *See* H. RULES, *supra* note 73, R. 25, § 5(g)(1), at 43 (defining a registered lobbyist as a lobbyist registered under the Federal Regulation of Lobbying Act or its successor); S. RULES, *supra* note 73, R. 35, § 5, at 48 (same); *see also* Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, § 11(a), 109 Stat. 691, 701 (1995) (repealing the Federal Regulation of Lobbying Act).
75. H. RULES, *supra* note 73, R. 25, § 5(a)(1)(A)(ii), (a)(3), at 40-41; S. RULES, *supra* note 73, R. 35, § 1(a)(2)(B), at 46; *see also* 2 U.S.C.A. § 1613 (2007) (prohibiting LDA registered lobbyists and related entities from making gifts that violate either the House or Senate rules). Other prohibited gifts for registered lobbyists include anything provided to an entity controlled by a House Member, officer, or employee; a charitable contribution made on the basis of a recommendation by a House Member, officer, or employee; a contribution to the legal defense fund of a House Member, officer, or employee; and a contribution to a conference or similar event sponsored by an official congressional organization, for or on behalf of House Members, officers, or employees. H. RULES, *supra* note 73, R. 25, § 5(e), at 43.
76. H. RULES, *supra* note 73, R. 25, § 5(b)(1)(A)-(B), at 42; S. RULES, *supra* note 73, R. 35, § 2(a)(1), (d)(1), at 51-53; *see also* 2 U.S.C.A. § 1613 (West 2007) (prohibiting LDA registered lobbyists and related entities from providing travel if doing so violates either the House or Senate Rules).
77. H. RULES, *supra* note 73, R. 25, § 5(c)(3), at 42-43; S. RULES, *supra* note 73, R. 35, § 2(d)(1), at 53.
78. *See* R. Jeffrey Smith, *DeLay Airfare Was Charged to Lobbyist’s Credit Card*, WASH. POST, Apr. 24, 2005, at A01 (noting that expenses for food, phone calls, and other items were charged to the credit cards of Jack Abramoff and Edwin A. Buckham,

expect such congressional rules to be lax given that the very members of Congress who most benefit from the largesse of lobbyists are the ones writing these rules (a classic fox guarding the henhouse situation), yet, in large part because of public pressure in the wake of various scandals, these rules place real limitations on the ability of lobbyists to influence government officials, particularly members and employees of Congress.<sup>79</sup>

Finally, certain former legislative and executive branch members, officers, and employees are prohibited by statute from engaging in certain types of lobbying activities—typically, direct contact with their respective congressional chamber or government agency—within a certain period after ending their government employment.<sup>80</sup> Other, lengthier restrictions apply for matters in which former government employees had a personal involvement.<sup>81</sup> Individuals who are registered lobbyists and persons related to them are also prohibited from serving in certain government roles.<sup>82</sup>

The reasons for the rules governing financial transactions with government officials and employees, including the House and Senate rules governing gifts, are not difficult to fathom. Such transactions raise the risk of both improper interference with official duties and responsibilities—corruption—and the appearance of such interference—the appearance of corruption.<sup>83</sup> It is, therefore,

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both registered lobbyists, but that DeLay claimed to believe the expenses to have been covered by a nonprofit, the Center for Public Policy Research).

79. See, e.g., Press Release, Joan Claybrook, President, Pub. Citizen, The 110th Congress Delivers on Lobbying and Ethics Reforms (Sept. 14, 2007), <http://www.citizen.org/pressroom/release.cfm?ID=2511> (calling the passage of the most recent legislation regulating lobbyists legislation “the most far-reaching ethics reforms on lobbyists and lawmakers in decades”); Press Release, Meredith McGehee, Policy Dir., Campaign Legal Ctr., Lobbying & Ethics Reforms (Sept. 14, 2007), <http://www.campaignlegalcenter.org/press-2894.html> (applauding same as “a substantively strong measure that surpasses expectations”).
80. 18 U.S.C. § 207 (2000) (prohibiting legislative branch members and certain executive branch employees from this type of lobbying for one or two years after leaving government service). By Executive Order, a five-year ban applied to certain senior appointees lobbying any employee in their former agency during the Clinton Administration, but that requirement ended in 2001. See Exec. Order No. 12,834, 58 Fed. Reg. 5911 (January 20, 1993); Exec. Order No. 13,184, 3 C.F.R. 341 (2000) (revoking Exec. Order No. 12,834 effective Jan. 20, 2001).
81. 18 U.S.C. § 207(a)(1) (2000).
82. See, e.g., 2 U.S.C.A. § 352 (West 2007) (prohibiting service on the Citizens’ Commission on Public Service and Compensation for registered lobbyists); *id.* § 1381 (prohibiting service in the Office of Compliance for Congress for registered lobbyists who lobby Congress).
83. See CONG. RESEARCH SERV., *supra* note 60, at i (noting that the various restrictions on interactions between lobbyists and Congress’s Members, officers, and

perhaps inevitable that highly publicized influence-peddling accusations involving government officials often result in revisiting and extending these rules, with the Jack Abramoff scandal being only the latest example.<sup>84</sup>

As a result, lobbyists have become subject to special scrutiny and to tighter restrictions. A 1994 Senate committee report in support of special gift rules for lobbyists stated the reasons for this special treatment:

[I]t seems appropriate to single out registered lobbyists . . . for special treatment, because this category includes people who are, by definition, in the business of seeking to influence the outcome of public policy decisions. Because registered lobbyists . . . are paid to influence the actions of public officials, including legislative branch officials, their gifts are uniquely susceptible to the appearance that they are intended to purchase access and influence.<sup>85</sup>

Similar concerns motivated the adoption by the House of Representatives of its special rules for gifts from lobbyists and the 2007 revisions to both the LDA and various lobbyist-related House and Senate Rules.<sup>86</sup> Furthermore, the limitations on post-government service lobbying by former government officials and employees also have their origins in concerns about improper influence.<sup>87</sup>

#### 4. Conclusion

Even with their disparate origins, all of the federal laws governing lobbying and lobbyists appear now to share a common purpose: to limit both the actual

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employees had been adopted to limit potential or perceived undue or improper influences on government officials).

84. See Krishnakumar, *supra* note 10, at 514-15 & n.1 (noting that efforts to reform rules relating to lobbying tend to follow highly publicized lobbying scandals, including the most recent ones involving Jack Abramoff and Tom DeLay).

85. S. REP. NO. 103-255, at 3-4 (1994).

86. H.R. REP. NO. 104-337, at 8 (1995); see also 153 CONG. REC. S220 (daily ed. Jan. 8, 2007) (statement of Sen. Reid) ("When we make leaders accountable to the people, not the special interests or lobbyists, there is no limit to what we can accomplish."). Senator Reid gave this statement as part of his introduction of the Honest Leadership Act, which became the Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (2007).

87. See PRESIDENT'S COMM'N ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR: REPORT OF THE PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM 55-56 (1989) [hereinafter PRESIDENT'S COMMISSION REPORT] (noting that the purpose of the "one-year cooling-off period" for senior executive branch employees was to limit the use in lobbying of their presumed special influence and access and recommending that for the same reason that period should be extended to legislative and judicial branch senior employees).

and perceived influence of interest groups on government actions.<sup>88</sup> This purpose is in contrast to ensuring a level playing field for all those seeking to influence government action by any branch, a purpose that has been cited in the past with respect to at least the tax rules but appears to have supplanted by interest group influence concerns, particularly in recent years.

The pursuit of this interest group limiting purpose is tempered by the need for reliable information, by practical realities, and perhaps also by government officials' desire to enjoy lobbyist-funded favors, the most important being re-election support. Over time, however, and particularly in the past decade or so, concerns about the negative effects of lobbying appear to have dominated. This conclusion is supported by the denial of deductibility for business-related lobbying expenditures in 1993, the passage of the Lobbying Disclosure of 1995, and the recent tightening of congressional rules governing lobbying in the wake of the Abramoff scandal. Given this common purpose, one might naturally expect that how "lobbying" is defined for these various rules would be very similar, if not exactly the same. This, however, is not the case.

### B. "Lobbying" Defined

The definitions of "lobbying" vary significantly.<sup>89</sup> The tax laws provide three definitions of lobbying, while the LDA provides another definition. Even more confusingly, the LDA permits some organizations to use tax law definitions instead of the LDA definition. Finally, the application of the lobbyist restrictions turns on whether an individual is, or an organization employs, a lobbyist registered under the LDA, which in turn can depend on either the LDA

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88. In a congressionally ordered report, the U.S. General Accounting Office (now the U.S. Government Accountability Office (GAO)) concluded that the various tax rules and the LDA, and specifically the definitions of lobbying under those rules, were adopted "to achieve different purposes." U.S. GEN. ACCOUNTING OFFICE, FEDERAL LOBBYING: DIFFERENCES IN LOBBYING DEFINITIONS AND THEIR IMPACT 22 (1999) [hereinafter GAO REPORT]. A careful reading of the report shows, however, that what the GAO identified was that the different rules used different methods—taxing versus disclosure—but did not explore whether the different methods served the same ultimate purpose. *Id.* at 4-5.

89. For the sake of simplicity, this Article uses the term "lobbying" to encompass the activity regulated by the various laws at issue, although the various rules do not always use the specific term "lobbying" or use it to only refer to a subset of the regulated activity. See 2 U.S.C.A. § 1602(7)-(8), (10) (West 2005) (defining the terms "lobbying activities," "lobbying contact," and "lobbyist"); I.R.C. § 162(e) (2000) (using the term "lobbying" only in the subsection heading); *id.* § 501(c)(3) (using the terms "propaganda" and "influence legislation," but not "lobbying"); *id.* § 501(h)(2)(A) (defining the term "lobbying expenditures"); *id.* § 4911 (same); *id.* § 4945(d)(1) (using the same terms as I.R.C. § 501(c)(3)).

definition alone or a hybrid of the LDA definition and one of the tax definitions.

This Section will explore the range of definitions for lobbying, first by examining two broad approaches to the definition of lobbying. One approach focuses entirely on what government *action* an individual or entity seeks to influence. Two tax definitions define lobbying this way. The other way of thinking about lobbying is to focus entirely on what government *actor* an individual or entity seeks to influence. The LDA definition falls under this approach. Then there are definitions that use a combination of government action and government actor to define lobbying. The definitions that fall into this middle ground are the third tax definition, which applies to businesses, and a hybrid of the LDA and tax definitions that certain entities can choose to use under the LDA for some purposes.<sup>90</sup>

### 1. Lobbying Defined by Government *Action*

Tax law defines lobbying solely by the type of government action charity and private foundations seek to influence. As section 501(c)(3) of the Internal Revenue Code currently states, the key is whether a substantial part of a purported charity's activities "is carrying on propaganda, or otherwise attempting, to influence *legislation*."<sup>91</sup> Legislation is defined to include any items voted on by Congress, by any state legislature, by any local council or similar body, or by the public in a referendum or like procedure.<sup>92</sup> This definition of lobbying encompasses efforts targeting members of the legislative branch or the public, the latter not just with respect to referenda on which the public votes directly but also with respect to grassroots lobbying.<sup>93</sup> But lobbying does not include at-

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90. None of these laws take the approach found in the Foreign Agents Registration Act, which reaches all attempts to influence federal government actions regardless of the specific federal government actor or action involved. See 22 U.S.C.A. § 611(o) (West 2007) (defining "political activities" broadly to cover any activity intended to influence any federal agency or official or the public with respect to any federal government policy). Assuming that concerns about the possible influence of those acting on behalf of foreign interests justify the breadth of this definition, for the reasons described in Sections II.C and III.C, such a broad definition is not justified with respect to the laws governing lobbying by those representing domestic interests.

91. I.R.C. § 501(c)(3) (2000) (emphasis added).

92. See Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1990) (defining "legislation"); Kindell & Reilly, *supra* note 31, at 270-71 (distinguishing than an action is a "similar matter" when it is an item voted upon by the legislative body).

93. See Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii)(a) (as amended in 1990) (explicitly including within "attempting to influence legislation" the urging of members of the public to contact legislative branch members for the purpose of influencing legislation); Rev. Rul. 67-293, 1967-2 C.B. 185 (same).

tempts to influence actions by administrative agencies other than actions relating to influencing legislation.<sup>94</sup> It also does not include attempts to influence the judicial branch, unless again that influence is designed to cause judicial branch officials or employees to influence legislation.<sup>95</sup>

Most charities also have the option of choosing an alternate lobbying restriction that replaces the vague “no substantial part” limit with a bright-line dollar limit calculated as a percentage of total expenditures.<sup>96</sup> A definition of lobbying that is similar to the one used under the default, no substantial part limit, applies for purposes of this alternate regime. The primary difference between the two definitions is that this second, elective definition is more detailed, including with respect to its exceptions, and some of the exceptions may not be available under the default definition.<sup>97</sup> “Lobbying expenditures” for such charities “means expenditures for the purpose of influencing legislation.”<sup>98</sup> Leg-

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94. Treas. Reg. § 1.501(c)(3)-1(c)(3) (flush language) (as amended in 1990) (2007) (defining “legislation” as action by the Congress, any state legislature, a local council, or similar governing body, or by the public in a referendum or similar procedure); *id.* § 56.4911-2(d)(1) (defining “legislation” as including action by any legislative body or the public in a referendum or “similar procedure”); *id.* § 56.4911-2(d)(3) (defining a “legislative body” as not including any administrative or judicial bodies); Kindell & Reilly, *supra* note 31, at 271.

95. See Treas. Reg. § 56.4911-2(d)(3)-(4); Kindell & Reilly, *supra* note 31, at 271.

96. See I.R.C. § 501(h)(1)-(8) (2000) (permitting this election for most charities other than churches and church-related entities), *id.* § 4911(d) (defining the term “influencing legislation”).

97. See Rev. Rul. 66-258, 1966-2 C.B. 213 (holding similarly to Rev. Rul. 64-195, 1964-2 C.B. 138), *modified and superseded on other grounds by* Rev. Rul. 76-456, 1976-2 C.B. 151; Kindell & Reilly, *supra* note 31, at 270-77 & n.20, 295-311 (describing the two definitions and the exceptions applicable to each one, and also noting that the IRS has never published a precedential document accepting certain exceptions to the default definition). Compare I.R.C. § 4911(d)(2)(A)-(E) (2000) (listing five exceptions available under the alternate regime), and Treas. Reg. § 56.4911-2(b) (2007) (providing a detailed definition for lobbying and a detailed description of the statutory exceptions), with I.R.C. § 501(c)(3) (2000) (not including any explicit exceptions), and Treas. Reg. § 1.501(c)(3)-1 (as amended in 1990) (2007) (providing a less detailed definition of influencing legislation and not including any explicit exceptions, except that subparagraph 1.501(c)(3)(iv) suggests that an exception exists for making the results of nonpartisan analysis, study, or research available to the public), and Rev. Rul. 70-449, 1970-2 C.B. 111 (providing an exception for testimony before a legislative committee provided in response to an official request), and Rev. Rul. 64-195, 1964-2 C.B. 138 (concluding that nonpartisan study and research on a public policy issue would not affect the exempt status of an IRC § 501(c)(3) organization that is not involved in presenting suggested bills or urging support for or opposition to a constitutional amendment on the same issue).

98. I.R.C. § 4911(c) (2000).

islation is in turn defined as the introduction, amendment, enactment, defeat or repeal of Acts, bills, resolutions, or similar items by the Congress, any state legislature, any local council, or similar governing body, or by the public in a referendum or similar procedure.<sup>99</sup> The definition includes attempts to influence members and employees of the legislative branch, “any other government official or employee who may participate in the formulation of legislation,” and the public.<sup>100</sup> Essentially the same definition applies for purposes of the private foundation lobbying prohibition.<sup>101</sup> For all types of charities, therefore, the determinative issue is whether the target of the attempted influence is legislation.

## 2. Lobbying Defined by Government Actor

The Lobbying Disclosure Act focuses almost entirely on the government actor sought to be influenced, in contrast to the tax definition for charities described above.<sup>102</sup> This difference is also in contrast to the LDA’s predecessor, the Federal Regulation of Lobbying Act, which, like the current tax definitions of lobbying for charities, focused solely on whether legislation was at issue.<sup>103</sup> The LDA creates two categories of government actors, “covered executive branch officials” and “covered legislative branch officials.”<sup>104</sup> Under the LDA, communications with individuals who fall within either of these two categories constitute lobbying if those communications are with regard to legislation, executive branch action, a federal program or policy, or the nomination or confirmation of a person for a position subject to confirmation by the Senate.<sup>105</sup> The LDA definition of lobbying therefore does not include grassroots lobbying. The only government actions that appear to be exempt from LDA coverage are presidential clemency orders and pardons.<sup>106</sup>

Covered legislative branch officials include any member, officer, or employee of the House or Senate.<sup>107</sup> Covered executive branch officials include the

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99. *Id.* § 4911(e)(2)-(3).

100. *Id.* § 4911(d)(1). *See generally* Treas. Reg. § 56.4911-2(b)(1) (1990).

101. I.R.C. § 4945(d)(1), (e) (2000).

102. *See* 2 U.S.C.A. § 1602(8)(A) (West 2007) (defining “lobbying contact” by reference to the government actor contacted).

103. The Regulation of Lobbying Act was included as Title III to the Legislative Reorganization Act of 1946, Pub. L. 79-601, 60 Stat. 812 (defining lobbyist by reference to whether they seek to influence legislation) (repealed 1995).

104. 2 U.S.C.A. § 1602(3), (4), (8)(A) (West 2007).

105. *Id.* § 1602(8)(A).

106. *See* Kathryn L. Plemmons, “Lobbying Activities” and Presidential Pardons: Will Legislators’ Efforts To Amend the LDA Lead to Increasingly Hard-Lined Jurisprudence, 18 *BYU J. PUB. L.* 131, 131 (2003).

107. 2 U.S.C.A. § 1602(4) (West 2007); 5 U.S.C.A. § 109(13) app. (West 2007).

President, the Vice President, any officer or employee in the Executive Office of the President, any officer or employee in Executive Schedule levels I through V (usually assistant secretary or deputy director level, or above), any military officer with a rank of O-7 or above (i.e., Brigadier General/Rear Admiral, or above), and other federal employees serving in confidential, policy-determining, policy-making, or policy-advocating positions.<sup>108</sup> The last category, known as "Schedule C" employees, are employees who may be appointed and removed at the discretion of the appointing official (usually a political appointee of the President), subject to approval of the White House Office of Presidential Personnel and the Office of Personnel Management.<sup>109</sup> To aid individuals and groups in their compliance with the LDA, contacted executive (and legislative) branch officials and employees must indicate whether they are covered by the LDA, if asked.<sup>110</sup>

With the exception of the military officers, these categories essentially correspond to the positions that may be filled without being subject to the competitive appointment process that usually applies to federal government positions, and from which employees may be removed without the termination protections that also normally apply to such positions.<sup>111</sup> Military officers whom a service seeks to promote above the O-6 rank (i.e., to a rank covered by the LDA definition) must be nominated by the President and confirmed by the Senate.<sup>112</sup> While this line drawing choice may reflect a belief that positions falling outside of normal civil service or military hiring and promotion rules are most vulnerable to undue influence, the only explicit explanation was the cryptic statement by the original sponsor of the LDA that the law made this distinction because it is with these executive branch officials that "lobbying really has an impact."<sup>113</sup>

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108. 2 U.S.C.A. § 1602(3) (West 2007); *see also* 5 U.S.C.A. §§ 5312-5316 (2007) (listing the positions to which levels I through V of the Executive Schedule apply); 37 U.S.C. § 201 (2000) (listing the military ranks); STAFF OF H. COMM. ON GOV'T REFORM, 108TH CONG., POLICY AND SUPPORTING POSITIONS (Comm. Print 2004) [hereinafter POLICY POSITIONS] (listing the legislative and executive branch positions that may be subject to noncompetitive appointment as of Sept. 30, 2004).

109. 5 U.S.C.A. § 7511(b)(2)(B) (West 2007); 5 C.F.R. § 300.301 (2006).

110. 2 U.S.C.A. § 1609(c) (West 2007).

111. *See* POLICY POSITIONS, *supra* note 108, at iii (noting that these positions are included in the ones that may be subject to noncompetitive appointment).

112. *See* Military Commissioned Officer Promotions, <http://usmilitary.about.com/od/promotions/l/bl/officerprom.htm> (last visited Aug. 9, 2007).

113. 141 CONG. REC. S10512, S10551 (daily ed. July 24, 1995) (statement of Sen. Levin upon his introduction of the LDA).

3. Lobbying Defined by Government Action *and* Actor

The definition of lobbying for purposes of both denying (prior to 1962) and permitting (from 1962 through 1993) a business expense deduction for lobbying expenditures was very close to the two definitions used for charities, in that it depended on whether the government action at issue was legislation or not.<sup>114</sup> When, at the urging of the Treasury Department, Congress revisited this issue in 1993, it defined lobbying in a manner similar to that for electing charities and private foundations, still focusing on the government action at issue.<sup>115</sup> But Congress also expanded the reach of the denial to include direct communication “with a covered executive branch official in an attempt to influence the official actions or positions of such official.”<sup>116</sup>

Thus, Congress effectively created a hybrid definition of lobbying for a third tax definition, which relied in part on the government action at issue (legislation) but also in part on the government actor at issue (certain very senior executive branch officials). The definition of a “covered executive branch official” is much narrower in this context than in the LDA context, with the tax definition including only the President, the Vice President, Cabinet officers or their equivalents and their immediate deputies, the two most senior-level officers of each agency within the Executive Office of the President, and other officials or employees of the White House Office of the Executive Office of the President.<sup>117</sup> The legislative history is silent as to why Congress expanded the definition in this manner.<sup>118</sup>

The LDA also gives certain non-lobbying-firm entities the option of choosing to use the hybrid action/actor definition of lobbying that applies for tax purposes for some purposes.<sup>119</sup> One purpose is when estimating the amount

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114. *E.g.*, Treas. Reg. § 45, art. 562 (1921) (last sentence), *reprinted in* 134 INTERNAL REVENUE ACTS OF THE UNITED STATES, 1909-1950: LEGISLATIVE HISTORIES, LAWS, AND ADMINISTRATIVE DOCUMENTS 144 (Bernard D. Reams, Jr. ed., 1979); Treas. Reg. § 1.162-15(c) (1960); *see also* Revenue Act of 1962, Pub. L. No. 87-834, § 3, 76 Stat. 960, 973 (I.R.C. § 162(e) as initially enacted).

115. *Compare* sources cited *supra* notes 98-101, with I.R.C. § 162(e)(4) (2000).

116. I.R.C. § 162(e)(1)(D) (2000).

117. *Id.* § 162(e)(6).

118. *See* H.R. REP. NO. 103-213, at 174, 601-02, 604-07 (1993) (noting, without explanation, that the Senate amendment added contacts with certain high-ranking federal executive branch officials, defined in manner similar to the current LDA definition, but the conference agreement limited “covered executive branch officials” to the current, significantly smaller group).

119. 2 U.S.C.A. § 1610(a)-(b) (West 2007). For this option to be available, the non-lobbying-firm entity must be either a business subject to § 162(e) or a charity that uses the alternate, elective regime for defining lobbying. An individual would have this option if he or she operated a sole proprietorship, such as solo law practice,

spent on lobbying expenditures for LDA reporting purposes, for which the tax definition replaces the LDA definition.<sup>120</sup> This change has the effect of both expanding and shrinking the range of expenditures reported. It expands the definition because the tax definitions include activities not covered by the LDA, most significantly, grassroots lobbying and lobbying of state and, for electing charities but not businesses, local governments.<sup>121</sup> It shrinks the definition because the tax definitions exclude certain activities covered by the LDA. Most significantly, the tax definition for businesses reaches only non-legislation-related communication with a very small group of executive branch officials, and the tax definition for electing charities does not reach executive branch communications unrelated to legislation at all.<sup>122</sup>

The other purpose is when determining whether an individual has engaged in sufficient lobbying contacts and activities to be required to register as a lobbyist.<sup>123</sup> For this purpose, the LDA only partially uses the definition, sweeping into lobbying any government-action-related contacts with covered legislative branch officials (as defined by the LDA) but only including government-action related contacts with executive branch officials to the extent that such contacts are considered lobbying under the applicable tax definition.<sup>124</sup> This change both expands and shrinks the range of activities that can result in an individual having to register as a lobbyist. For businesses, it expands the definition by including legislation-related contacts with any executive branch officials, regardless of whether they are “covered executive branch officials” under the LDA. At the same time, this hybrid scheme narrows the definition by not reaching non-legislation-related contacts with senior executive branch officials other than a handful of very senior such officials.<sup>125</sup> For electing charities the result is almost the same, except that the modified definition does not reach non-legislation-related contacts with any executive branch officials.<sup>126</sup>

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because then the individual would be a “business” for tax law purposes. See INTERNAL REVENUE SERV., TAX GUIDE FOR SMALL BUSINESS 2 (2006) (defining “sole proprietor”).

120. 2 U.S.C.A. § 1610(a)(1), (b)(1) (West 2007).

121. Compare I.R.C. §§ 162(e)(4), 162(e)(6), 4911(d)(1) (2000), with 2 U.S.C.A. § 1601(3), (4), (8) (West 2007).

122. See *supra* note 121.

123. 2 U.S.C.A. § 1610(a)(2), (b)(2) (West 2007).

124. *Id.*

125. I.R.C. § 162(e)(6) (2000).

126. Compare I.R.C. § 4911(d)(1) (2000), with 2 U.S.C.A. § 1601(3), (8) (West 2007).

## 4. Exceptions

While the various definitions used in these three sets of lobbying rules contain numerous exceptions, these exceptions can be grouped into three categories. One class of exceptions is designed to ensure that the flow of accurate and helpful information to government officials and to the public is not unduly hindered.<sup>127</sup> This category includes exceptions for testimony or other information provided in response to official requests or as part of official proceedings,<sup>128</sup> making the results of nonpartisan analysis available,<sup>129</sup> and other informational communications to the public.<sup>130</sup> For the most part, these exceptions appear designed to exclude communications that are relatively public and therefore subject to review and, if inaccurate or improper, challenge by competing interest groups, the media, and the public.<sup>131</sup> It should be noted, however, that Congress has favored charities over other types of interest groups with respect to these exceptions as they exist in the tax rules, as all of these exceptions are available to

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127. See H.R. REP. NO. 104-339, at 14-17 (1995) (elaborating on the reasons for the various exceptions).
128. I.R.C. § 4911(d)(2)(B) (2000); Treas. Reg. § 56.4911-2(c)(3) (1990); Rev. Rul. 70-449, 1970-2 C.B. 111; see also 2 U.S.C.A. § 1602(8)(B)(vi)-(x), (xii)-(xvii), (xix) (West 2007) (excepting various types of communications with government officials). Some of the LDA exceptions also relate to very specific types of government actions or proceedings that are distinct from efforts to influence government actions that have general applicability. These exceptions include one for contacts relating to law enforcement activities, 2 U.S.C.A. § 1602(8)(B)(xii)(I) (West 2007), matters required by law to be confidential *id.* § 1602(8)(B)(xii)(II), agency adjudications pursuant to written agency procedures, *id.* § 1602(8)(B)(xiii), personnel matters for a specific individual, *id.* § 1602(8)(B)(xvi), whistleblowing activity protected by law, *id.* § 1602(8)(B)(xvii), and communications between certain recognized self-regulatory organizations and specific government agencies, *id.* § 1602(8)(B)(xix).
129. I.R.C. §§ 4911(d)(2)(A), 4945(e) (2000); Treas. Reg. § 56.4911-2(c)(1) (1990) (excluding nonpartisan analysis, defined as “independent and objective exposition of a particular subject matter,” from the definition of influencing legislation); Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv) (as amended 1990); Rev. Rul. 64-195, 1964-2 C.B. 138; Rev. Rul. 70-79, 1970-1 C.B. 127.
130. See 2 U.S.C.A. § 1602(8)(B)(ii) (West 2007) (media communications made for newsgathering purposes); *id.* § 1602(8)(B)(iii) (communications to the general public). The LDA also excludes communications by public officials, whether federal or not, acting in performance of their official duties. *Id.* § 1602(8)(B)(i).
131. See S. REP. NO. 103-37, at 29 (1993) (noting, for an earlier version of the LDA, that the exceptions include communications that are “already subject to formal procedural safeguards and record-keeping requirements”).

charities but none are available for the business expenses deduction rule.<sup>132</sup> For the LDA, various types of communications with government officials are exempted for all types of entities and individuals; since the LDA does not reach communications with the public, no LDA exceptions related to such exceptions are needed.<sup>133</sup>

The second category encompasses communications that facilitate the organization's internal communications or protect its very existence. These exceptions include membership communications<sup>134</sup> and "self-defense" lobbying, where an organization's tax status or ability to function is at issue.<sup>135</sup> These exceptions only exist in the tax context, and only with respect to charities (including private foundations), not businesses.<sup>136</sup>

The third and final category includes exceptions that appear to have been designed to reduce the administrative burdens of the relevant rules. This category excludes communications with non-legislative government officials when influencing legislation is not the principal purpose of the communication,<sup>137</sup> excluding communications with local councils,<sup>138</sup> excluding communications with

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132. Compare I.R.C. § 4911(d)(2)(A) (2000) (providing exceptions for private foundations and charities that elect the optional sliding percentage regime for measuring lobbying, including for nonpartisan analysis and technical advice), *with id.* § 162(e) (not providing any comparable exceptions).

133. See sources cited *supra* notes 128 & 130.

134. I.R.C. § 4911(d)(2)(D), (d)(3) (2000); Treas. Reg. § 56.4911-5 (1990).

135. I.R.C. §§ 4911(d)(2)(C), 4945(e) (2000); Treas. Reg. § 56.4911-2(c)(4) (1990).

136. Compare I.R.C. § 4911(d)(2)(A) (2000) (providing exceptions for private foundations and charities that elect the optional sliding percentage regime for measuring lobbying, including for certain membership communications and communications relating to decisions that "might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization"), *with id.* § 162(e) (not providing any comparable exceptions). The self-defense exception is not necessary under the existing LDA disclosure regime because that regime does not prevent or limit lobbying but only requires its disclosure. This is in contrast to the tax rules for charities, which limit lobbying by charities (or prohibit it, in the case of private foundations). A membership communications exception is also not necessary for the LDA definition, since the LDA does not reach any communications with the public.

137. I.R.C. § 4911(d)(2)(E) (2000); see also 2 U.S.C.A. § 1601(8)(B)(v) (West 2007) (excepting communications that do not include an attempt to influence government action, such as a request for a meeting or for the status of an action).

138. I.R.C. § 162(e)(2) (2000); see Julian Avakian-Martin, *New Business Provisions Outlined by Congressional Staff Members*, TAX NOTES TODAY, Sept. 22, 1993, LEXIS, 93 TNT 196-4 (reporting that Kathleen Nilles, House Ways and Means Committee tax counsel, explained that the reason for the local and Indian tribe lobbying exceptions was that the perceived difficulty of distinguishing between legislative and administrative functions at the local level).

the public that do not include a "call to action,"<sup>139</sup> and various de minimis exceptions.<sup>140</sup>

Besides usually falling into one of these three categories, there are two patterns to these exceptions. First, Congress has tended to favor charities in the tax rules by granting them a number of exceptions that it denies to businesses. It is unclear, however, why Congress did so. One possibility is that the substantive rule for charities is more draconian, limiting lobbying to an insubstantial activity for most charities and absolutely prohibiting it for private foundations, as compared to the rule for businesses, which disallows a deduction for their lobbying expenditures but still permits them to engage in as much lobbying as they desire.<sup>141</sup> Another possibility is that Congress felt that charities were more likely to exercise their influence in a positive way, particularly with respect to providing information to government actors and to the public. Constitutional concerns may also have driven the single LDA exception that favors a particular class of entities: the exception for communications by churches, church-related entities, and religious orders.<sup>142</sup>

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139. Treas. Reg. § 56.4911-2(b)(2)(ii) (1990). This requirement does not apply to certain mass media communications relating to highly publicized legislation. *Id.* § 56.4911-2(b)(5). This and many of the other bright-line rules embodied in the I.R.C. § 4911 (2000) regulations resulted from a firestorm of negative comments from both members of Congress and the public in response to an initial set of regulations that defining lobbying in a relatively broad and vague manner. See Kindell & Reilly, *supra* note 31, at 283-84 (summarizing this history). It has been argued that this exception and others embodied in I.R.C. § 4911 were designed not just for administrative convenience but intentionally to encourage and support additional lobbying by charities. See Thomas A. Troyer et al., *Analysis of the Differing Definitions of "Lobbying" in Federal Law*, 16 EXEMPT ORG. TAX REV. 795, 797-98 (1997). As discussed below, while that may have been true in a marginal sense, Congress did not purport to be abandoning the general limitation of lobbying by charities to an insubstantial part of their activities.
140. E.g., I.R.C. § 162(e)(5)(B)(i) (2000) (excluding in-house lobbying expenses that do not exceed \$2000 annually). The elective charity and private foundation definitions also exclude examinations of broad social problems, Treas. Reg. § 56.4911-2(c)(2) (1990), and the private foundation definitions exclude certain communications related to projects funded jointly by government agencies and private foundations, Treas. Reg. § 53.4945-2(a)(2) (as amended in 1990). The LDA also excludes communications already disclosed under the Foreign Agents Registration Act of 1938, 2 U.S.C. § 1602(8)(B)(iv) (2000).
141. This almost certainly is the reason behind the exception for so-called "self-defense" lobbying. See I.R.C. § 4911(d)(2)(C) (2000) (excluding communications relating to decisions that "might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization"); Treas. Reg. § 56.4911-2(c)(4) (1990) (elaborating on this exception and characterizing it as pertaining to "self-defense").
142. 2 U.S.C. § 1602(8)(B)(xviii) (2000).

Second, the exceptions vary because of differences in the overall definition of lobbying under each set of rules. For example, the LDA does not require exceptions for certain types of communications with the public because the LDA does not cover *any* communications with the public. In a like way, the tax rules do not require exceptions for communications that are part of proceedings only affecting particular entities or individuals, such as personnel proceedings or agency adjudications, because the tax rules do not, for the most part, reach communications with executive branch officials that are unrelated to legislation.<sup>143</sup>

### C. Conclusion

As discussed in Section I.A, the common purpose underlying the various federal laws regulating lobbying is limiting the actual and perceived undue influence of interest groups. Taking this purpose as a given does not, however, answer the question of whether the varying definitions of lobbying under these rules should be altered or reconciled so as to better further this common purpose.<sup>144</sup> Answering this definitional question requires a better understanding of how interest groups actually influence government actions. Part II reviews the extensive scholarship addressing the role of interest groups in United States politics and how it helps to define lobbying.<sup>145</sup>

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143. See S. REP. NO. 103-37, at 25 (1993) (noting, for an earlier version of the LDA, that the exceptions include “many communications with executive branch officials [that] should not be covered by this bill[] because they are routine in nature, [or] inherently confidential”).
144. The question of whether the existing rules, even when paired with the best possible definition of lobbying, are actually effective in serving this purpose is beyond the scope of this Article, although this question is the subject of much debate. See, e.g., Johnson, *supra* note 10, at 56 (concluding that disclosure rules have only a limited ability to address bad practices associated with lobbying and so more legal prohibitions should be adopted); Krishnakumar, *supra* note 10, at 518-23 (arguing that the existing disclosure rules are ineffective and so primarily symbolic); Luneburg & Susman, *supra* note 10, at 33-34 (identifying various shortcomings with the existing disclosure rules).
145. For the most recent reviews of interest group research, see generally BERRY & WILCOX, *supra* note 2; and INTEREST GROUP POLITICS, *supra* note 5. As detailed in the next Section, an apparent paucity of studies about group influence generally and lobbying by interest groups, specifically before the late 1990s, has at least been partially cured in the past decade. See BAUMGARTNER & LEECH, *supra* note 2, at xvi, xviii. As a historical note, the first significant academic studies of lobbying in the United States were in the 1920s. See, e.g., HERRING, *supra* note 3, at viii (noting that a 1929 book was one of the first to address the role of interest groups); Frederick K. Beutel, *The Pressure of Organized Interests as a Factor in Shaping Legislation*, 3 S. CAL. L. REV. 10, 20 & n.40 (1929) (noting the limited existing scholarship about lobbying); Logan & Patten, *supra* note 3, at 1 (noting the need, in 1929, to

## II. INTEREST GROUP INFLUENCE

Both the apparent rapid growth of federal lobbying activity—lobbying expenditures grew from \$1.47 billion in 1999 to \$2.61 billion in 2006—and recent scandals involving government employees has brought the issue of interest group influence back into focus.<sup>146</sup> This Part reviews the most current research on how interest groups influence government actions.<sup>147</sup> The first Section describes what this research reveals about how interest groups influence government actions, and, more specifically, how that influence varies depending on the type of government actor involved. The second Section examines whether certain types of interest groups wield greater influence than others and why, focusing in particular on the commonly assumed advantage of business groups over non-business groups. The third and final Section then asks whether all such influence is in fact undesirable—and should be subject to some or all of the rules reviewed above—or whether some types of influence tend to be beneficial and thus should not be reached by those rules.

A. *How Interest Groups Influence Government Actions*

Almost all studies of interest group influence focus on the government actors who are the subject of the attempted influence instead of the government actions that are ultimately sought.<sup>148</sup> While the reasons for this focus are not often made explicit, they are not difficult to discern. It is ultimately the government actors that make the decisions, and so it is their interests—and the extent to which interest groups can help further those interests—that determines the

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study lobbying). Earlier accounts were primarily anecdotal, not systematic, although often quite entertaining. *See, e.g.*, HUDSON C. TANNER, “THE LOBBY” AND PUBLIC MEN (1888) (describing lobbying of the New York legislature during the 1800s).

146. *See* THE POLICY COUNCIL, CHANGING OF THE GUARD: 2007 STATE OF THE INDUSTRY FOR LOBBYING AND ADVOCACY 8 (2007) (listing annual lobbying expenditures reported under the Lobbying Disclosure Act of 1995); Lobbying Database, <http://www.opensecrets.org/lobbyists/index.asp> (last visited Aug. 9, 2007) (reporting similar figures).
147. For information about the development of interest group scholarship, see generally, in chronological order, ARTHUR BENTLEY, THE PROCESS OF GOVERNMENT (1908); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (1951); JAMES Q. WILSON, POLITICAL ORGANIZATIONS (1973); and BAUMGARTNER & LEECH, *supra* note 2.
148. *See* the numerous studies cited in this Section. It is generally accepted that interest groups use a variety of tactics and target a variety of government officials, depending on the particular issue involved. *E.g.*, BAUMGARTNER & LEECH, *supra* note 2, at 147-48.

extent of interest group influence.<sup>149</sup> Of course, the motivations of individual government actors are not the only influence on their decisions. Institutional structures also play a role in shaping decision making by the legislature, executive branch agencies, and the courts.<sup>150</sup> But such motivations are a key path to influence government actions.<sup>151</sup>

This focus on government actors may also be explained by the fact that government actors are usually not institutionally constrained from influencing their subset of government actions. For example, members of Congress, if they choose, can have significant influence on executive branch agency actions. There is still an unresolved scholarly debate over whether such influence occurs only rarely—in response to clear agency overreaching—or is a constant and significant part of each agency's environment.<sup>152</sup> But through many mecha-

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149. See, e.g., WILLIAM NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 4-5 (1971) (concluding that to develop a viable theory of bureau behavior, including of government bureaus, requires incorporating the personal preferences of bureaucrats); Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 *LAW & SOC. INQUIRY* 959, 974 (1997) (reviewing NIEL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994)) (noting that institutions, including different parts of government, can be differentiated by focusing on the motivations of institutional actors); Jeffrey J. Rachlinski & Cynthia A. Farina, *Cognitive Psychology and Optimal Government Design*, 87 *CORNELL L. REV.* 549, 562-63 (2002) (developing two models to explain government decisions, one focusing on the self-interest of the individual government actors, the other on their flawed judgments).
150. See, e.g., KOMESAR, *supra* note 149, at 60 (arguing that a focus on such motivations is misplaced, in part because it overlooks the dynamics of institutional decision-making that is only “tenuously related to the motives of the individual participants”).
151. See, e.g., Merrill, *supra* note 149, at 974 (noting that Professor Komesar’s approach risks ignoring the important role of individual motivations). Such influence may be exercised to either cause government to act or to prevent government from acting (e.g., by preventing certain legislative proposals or proposed regulations from becoming law).
152. Compare THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 106-07 (2d ed. 1979) (arguing that the federal government in the latter part of the twentieth century is characterized by congressional delegation of decision making authority to executive branch agencies with, implicitly, little congressional oversight), and NISKANEN, *supra* note 149, at 29-30 (arguing that for a variety of reasons, the sponsor of a bureau—such as Congress for an executive branch agency—usually exercises minimal oversight over that bureau’s actions), with Randall L. Calvert et al., *A Theory of Political Control of Agency Discretion*, 33 *AM. J. POL. SCI.* 588, 605-08 (1989) (based on a model of agency action, concluding that through a variety of mechanisms Congress—and the President—exercise significant control over executive branch agency actions), and Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *VA. L. REV.* 431, 440-44 (1989)

nisms, including fine-tuned legislation, legislative member and staff communications with agency personnel, oversight hearings, budget setting, agency structuring, and congressionally ordered investigations and reports, Congress can certainly influence agency actions.<sup>153</sup>

Members of the executive branch may in turn influence legislative actions and agendas. There are the obvious methods, such as the President’s power to veto (and threaten to veto) legislation.<sup>154</sup> The President and other executive branch officials and employees also have more subtle methods, including recommending legislation, using the bully pulpit of their offices to influence public opinion about pending legislation, and providing testimony and other information to Congress.<sup>155</sup>

The one limited exception to this general cross-branch influence is members of the judicial branch. While they have the ability to affect both legislative branch and executive branch actions, that ability is usually only available and exercised *ex post*. So, for example, the courts may rule on the constitutionality of an enacted legislative provision, the reasonableness of a completed agency rulemaking, or the appropriateness of a final agency determination. But aside from a few special situations—the recent attempts by federal judges to obtain higher salaries, for example—judges are not directly involved in legislative or executive branch activities before a final action or lawmaking, or at least no

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(arguing that Congress can effectively exercise *ex ante* control over an agency’s policies through mandating the agency’s structure and procedures). *See generally* JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 123-30 (1997) (assessing the evidence of Congress and other political players’ influence on executive branch agency procedures and concluding that none of the major theories for the role of such influence is conclusively supported).

153. *See* JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 130-34 (1990) (listing various ways Congress oversees executive branch activities); CHRISTOPHER H. FOREMAN, JR., *SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION* 11-18 (1988) (discussing same); CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 213-20 (3d ed. 2003) (listing various ways that Congress oversees agency rulemaking).
154. U.S. CONST. art. I, § 7.
155. *See* Vasana Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 63-64 (2002) (describing how the President’s constitutional roles of reporting on the State of the Union to Congress and recommending legislation involve the President in the legislative process); Kathryn Marie Dessayer, Note, *The First Word: The President’s Place in “Legislative History,”* 89 MICH. L. REV. 399, 404-13 (1990) (describing the various ways that the President can influence the legislative process).

more so than ordinary citizens.<sup>156</sup> In fact, judicial political activity is more constrained than a typical citizen by the need to preserve both their impartiality and appearance of impartiality.<sup>157</sup>

Given the ability of government actors to influence government actions in different branches of government, the most important question for interest groups and those concerned about their influence is therefore what actually influences government actors, regardless of the government action at issue. Here the existing scholarship has developed a relatively clear picture with respect to legislators and a somewhat less clear picture with respect to the judicial branch and to executive branch officials and employees.

### 1. The Legislative Branch

Legislators and, by extension, their staffs, have their actions shaped by a number of different but interrelated preferences: their personally desired policy results, which usually includes results that further their ideological goals and/or their view of the public interest; the policy results preferred by those they represent; a desire for power and authority within the legislature; a desire to be re-elected; and more self-interested desires, such as to become wealthy, to become publicly recognized, and so on.<sup>158</sup> Interest groups can and do try to affect legislators by using all of these pressure points to achieve their desired goals.<sup>159</sup>

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156. See JOHN G. ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (2007), <http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf> (addressing only a single issue, the failure to raise judicial pay).

157. See CODE OF CONDUCT FOR U.S. JUDGES, Canon 4 (2000), <http://www.uscourts.gov/guide/vol2/ch1.html> (explicitly permitting federal judges to engage in law-related activities, including consulting with executive or legislative officials, but only as long as doing so would not cast reasonable doubt on the judge's impartiality); *id.* Canon 5A & 5B (requiring that judges' ability to speak on non-legal subjects and participate in civic and charitable activities be consistent with the dignity of the judge's office, the performance of the judge's duties, and the need to be and appear to be impartial); *id.* Canon 7 (prohibiting federal judges from publicly supporting candidates for public office).

158. See, e.g., FARBER & FRICKEY, *supra* note 29, at 33 (concluding, after reviewing the existing political science and economic literature regarding legislative conduct, that constituent interests, special interest groups, and ideology all influence such conduct); Margaret F. Brinig, *The Public Choice of Driving Competence Regulations*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 405, 430 (2007) (noting that public choice scholars have generally found that legislators are influenced by their voting public, their own preferences, and the interest groups that support their reelection campaigns); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 59-60 (1995) (noting that members of Congress serve their party colleagues as well as the voting public in their districts or states); Nancy J. Knauer, *How Charitable Organizations Influence Federal Tax Policy: "Rent-Seeking" Charities or Virtuous Politicians?*, 1996 WIS. L. REV. 971, 1031 (1996)

More specifically, interest groups may try either to convince a legislator that the group's position matches the legislator's personal policy preferences or to shift those preferences to better align with the group's preferences. As critically, groups also try to convince the legislator that their position is important enough to deserve the legislator's limited attention.<sup>160</sup> Interest groups also try to convince the legislator's constituents that the group's position should be preferred by them and, if they are successful, the groups then try to communicate that preference to the legislator.<sup>161</sup> Interest groups may also influence other legislators, who can put pressure upon the targeted legislator in various ways.<sup>162</sup>

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(noting but not resolving the conflict between the "public choice" self-interested politician model and the "public interest" public-spirited politician model); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 193 (1990) (developing a model of government actor behavior that predicts that government actors will reject interest group pressures in favor of either personal policy preferences or what the public views as being in the general interest depending on whether an issue is high on the public agenda (which would favor the general interest) and whether the perceived benefits of pursuing their personal policy preferences outweigh whatever benefits the relevant interest groups can provide (which determines which set of preferences prevails in situations where issues are not high on the public agenda)).

159. See, e.g., JEFFREY M. BERRY, *LOBBYING FOR THE PEOPLE: THE POLITICAL BEHAVIOR OF PUBLIC INTEREST GROUPS* 212-52 (1977) (describing the various lobbying tactics used by charities); Clyde Wilcox, *The Dynamics of Lobbying on the Hill*, in *THE INTEREST GROUP CONNECTION: ELECTIONEERING, LOBBYING, AND POLICY-MAKING IN WASHINGTON* 89, 90-98 (1998) (describing the various tactics used by interest groups to influence congressional action).
160. See BERRY, *supra* note 159, at 216-18, 222-23, 269 (noting that lobbyists tend to focus their efforts on legislators who already agree with their position, leaving policy "enemies" alone); BERRY & WILCOX, *supra* note 2, at 99 (noting that legislators and their aides tend to be impatient and that therefore a lobbyist's credibility and factual accuracy are key to his or her getting results); Wilcox, *supra* note 159, at 91 (noting that lobbyists will usually not bother attempting to contact legislators with strong or pronounced ties to the opposing position or industry).
161. See BERRY, *supra* note 159, at 233-38, 243-50, 269-70 (noting that forty-seven percent of surveyed lobbyists view constituency-based letter-writing campaigns as "an effective tool"); BERRY & WILCOX, *supra* note 2, at 115-22 (noting that lobbyists view support from a legislator's constituents as making their task easier); Wilcox, *supra* note 159, at 96-98 (noting that constituency-based lobbying contains an "implicit threat" that the interest group will work against the targeted legislator's reelection if he or she does not support the lobbyist's position). See generally KEN KOLLMAN, *OUTSIDE LOBBYING: PUBLIC OPINION AND INTEREST GROUP STRATEGIES* (1998) (describing constituency-based lobbying by interest groups).
162. See BERRY & WILCOX, *supra* note 2, at 133 (noting the power of even a single committee member to secure valuable earmarks for other legislators).

Interest groups also provide needed campaign financing and reelection support such as individual and bundled campaign contributions, campaign volunteers, campaign-related advertising, and voter mobilization efforts—not to mention wielding the threat of electoral opposition.<sup>163</sup> Finally, interest groups also have historically sought to appeal to less high-minded personal preferences by providing lavish gifts, lucrative honoraria, desirable social connections, comfortable post-government service positions, and even pleasant companionship.<sup>164</sup> The importance of these latter tools has diminished, however, with increased

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163. See, e.g., BERRY & WILCOX, *supra* note 2, at 74-94 (describing the role of interest groups in elections for public office); DENNIS C. MUELLER, *PUBLIC CHOICE III*, at 475 (2003) (same); Marian Currinder et al., *Interest Group Money in Elections*, in *INTEREST GROUP POLITICS*, *supra* note 5, at 182, 193-201 (same). Under some theories, reelection is essentially the only goal for legislators and so aiding reelection presumably is the primary method by which interest groups wield political influence. See, e.g., DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 5-6 (1974) (assuming this to be the case and concluding that this assumption both “fits political reality rather well” and helps better understand the legislative process); MUELLER, *supra*, at 494 (noting the ongoing academic disagreement over whether a representative’s ideology or the ideology of her constituents affects her actions, or only economic concerns (i.e., primarily campaign contributions)); Rachlinski & Farina, *supra* note 149, at 564-65 & nn. 69, 71 (noting that under public choice theory, the primary goal of legislators is their own reelection and citing sources). While such theories may lead to greater understanding of legislative motivations, they are almost certainly inaccurate if taken to the extreme of excluding all other possible motivations. See *supra* note 158 and accompanying text. The fact that at the federal level billions of dollars are spent on direct lobbying efforts alone (not including campaign contributions and other reelection support) supports this conclusion—at least if interest groups are being rational in their financial investments. See *supra* note 146 and accompanying text.
164. See HERRING, *supra* note 3, at 38-40 (documenting the giving and withholding of gifts and social invitations to influence legislators); Logan & Patten, *supra* note 3, at 52 (identifying social lobbying as having “its place in the important methods” of lobbying); Thomas M. Susman, *Lobbying in the 21st Century: Reciprocity and the Need for Reform*, 58 *ADMIN. L. REV.* 737, 747-49 (2006) (explaining how psychological studies indicate that even relatively small favors can trigger a sense of obligation on behalf of the recipients of those favors and arguing that therefore even small gifts and favors from lobbyists may influence the actions of legislators, despite the self-serving denials of members of Congress). Concerns about the effect of even small gifts and favors are not limited to the lobbying context. See, e.g., Dana Katz et al., *All Gifts Large & Small*, 3 *AM. J. BIOETHICS* 39 (2003) (applying similar research to the giving of gifts by drug companies to physicians and arguing that physicians are in fact influenced by such gifts); James Westphal & Michael Clement, *Sociopolitical Dynamics in Relations Between Top Managers and Security Analysts*, *ACAD. MGMT. J.* (forthcoming) (studying how favors provided by company executives, such as providing useful contacts and helping to obtain country club memberships, influence stock analysts and concluding that such favors have a significant effect).

regulation and even prohibition of many of these methods, as well as less public tolerance for accepting the few personal favors that are still permitted.<sup>165</sup>

This is not to say that interest groups are always successful in their attempts to influence legislators. They face competition from other interest groups with different goals.<sup>166</sup> In some circumstances, legislators may even be able to play interest groups off against each other while extracting significant benefits, such as campaign contributions, from all the groups involved.<sup>167</sup> While the influence of interest groups will vary both across issues and across different legislators, there is little doubt that these pressure points exist and are used by interest groups, sometimes to significant effect.<sup>168</sup>

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165. See *supra* Subsection I.A.3. Despite these laws, such efforts have not completely disappeared. See, e.g., Philip Shenon, *Federal Lawmakers from Coast to Coast Are Under Investigation*, N.Y. TIMES, July 27, 2007, at A16 (reporting on pending investigations of more than a dozen current and former members of Congress, most related to alleged financial benefits provided by lobbyists or interest groups); *60 Minutes: Under the Influence* (CBS television broadcast Apr. 1, 2007), <http://www.cbsnews.com/stories/2007/03/29/60minutes/main2625305.shtml> (noting that fifteen government officials and employees involved with the passage of the Medicare prescription drug bill in 2003, including congressional staffers and members, are now employed by the pharmaceutical industry).
166. See BERRY & WILCOX, *supra* note 2, at 177-78 (arguing that even business interests often have competing policy positions); Sean Nicholson-Crotty & Jill Nicholson-Crotty, *Interest Group Influence on Managerial Priorities in Public Organizations*, 14 J. PUB. ADMIN. RES. & THEORY 571, 572 (2004) (listing studies indicating the rise of competing interest groups); Beth L. Leech et al., *Does Money Buy Power?: Interest Group Resources and Policy Outcomes* 29-31 (Apr. 12, 2007) (unpublished manuscript, on file with author and available at [http://lobby.la.psu.edu/\\_document/MP/MPSA\\_2007\\_Does\\_Money\\_Buy\\_Power.pdf](http://lobby.la.psu.edu/_document/MP/MPSA_2007_Does_Money_Buy_Power.pdf)) (noting the competitive nature of current interest group lobbying).
167. See McCaffery & Cohen, *supra* note 29, 1172-74 (arguing for an *ex ante* rent-extraction model in which legislators extract campaign contributions and other support by using their agenda-setting powers to cause interest groups to flourish).
168. See, e.g., JEFFREY M. BERRY, *THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS* 62-76 (1999) (describing the interplay of forces affecting the congressional agenda, which include but are not limited to interest groups); FARBER & FRICKEY, *supra* note 29, at 17 (acknowledging that legislators are in fact influenced by interest groups, while arguing that they also have some autonomy); Nicholson-Crotty & Nicholson-Crotty, *supra* note 166, at 571 (noting that "most authors conclude that interest groups exercise a non-trivial degree of influence over decision making in public organizations").

This more recent scholarship is in contrast to earlier approaches that assumed at least legislative decisions were almost completely dictated by interest groups, as opposed to the more recent view that interest groups represent only one of several sources of influence over such decisions. See, e.g., Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 158 Q.J. ECON. 371, 372 (1983) ("Politicians, political parties, and voters will receive little attention because

## 2. The Executive Branch

The President and other senior executive branch officials appear to respond to similar pressures. Senior executive branch officials have, of course, their personal policy preferences.<sup>169</sup> They are also concerned with the views of their constituents, although here their constituency is the entire nation and not a geographic or interest-based subset.<sup>170</sup> The President does not need the support of the entire electorate to win a second term, and so presumably he or she and other senior executive branch officials primarily will be concerned with the interests of those groups that form part of the President's electoral coalition.<sup>171</sup> Senior executive branch officials are also motivated by prestige and power within the executive branch. And they are certainly susceptible to purely self-interested concerns, although current laws limit the ability of interest groups to use this

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they are assumed mainly to transmit the pressure of active groups.”); Levine & Forrence, *supra* note 158, at 169 (noting the dominance of the theory that government actors pursue purely self-interested goals, including job retention (i.e., reelection for elected officials and those dependent on their reelection), pursuit and exercise of power, and perhaps post-government service personal wealth, which are satisfied by interest groups that then effectively control their actions); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 223 (1986) (noting the commonly held perception that the legislative process serves primarily the interests of private groups, at the expense of the public interest generally).

169. See FARBER & FRICKEY, *supra* note 29, at 24 (noting the importance of ideology to politicians such as Ronald Reagan and Margaret Thatcher); Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 893 (1999) (acknowledging that many government regulators are drawn to their positions by a sense of mission).
170. See MASHAW, *supra* note 152, at 152 (noting that Congress's broad delegation of authority to executive branch administrators may improve the responsiveness of the government to the desires of the general electorate given that Presidents are accountable to and elected by a national constituency); Calabresi, *supra* note 158, at 59 (noting that the President, uniquely in the federal system, is “accountable to a national voting electorate and no one else”); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105-06 (1994) (arguing that presidential control over executive branch agencies tends to counter interest group influence because of the President's national constituency).
171. Rachlinski & Farina, *supra* note 149, at 566-67 (noting that at least first-term Presidents are motivated by reelection concerns); cf. RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 8-10, 215, 225-26, 233-34 (1978) (describing the importance of the “reelection constituency” to members of the House of Representatives and the resulting lesser importance of individuals and groups who fall outside of that constituency).

particular lever.<sup>172</sup> Finally, one common and very personal concern for everyone except the President and perhaps the Vice President is securing employment after leaving government (i.e., the revolving door).<sup>173</sup>

Lower-level executive branch officials and employees, however, are influenced by a different set of concerns. The line is usually drawn roughly between, on the one hand, presidential appointees and positions that are exempt from civil service competition and termination rules, and, on the other, career civil servants who enjoy typical civil service protections.<sup>174</sup> Scholars have argued that both types of bureaucrats desire, at a minimum, to maintain their current position and to maximize their authority.<sup>175</sup> They may also seek to maximize both their agency's discretionary budget as well as its relative power.<sup>176</sup> Such goals re-

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172. See *supra* Subsection I.A.3.

173. See, e.g., BERRY & WILCOX, *supra* note 2, at 104-05 (describing recent revolving door activity); PRESIDENT'S COMMISSION REPORT, *supra* note 87, at 50-51 (recommending the extension of limitations on negotiating future employment while still in government service from just executive branch employees to legislative and judicial employees as well); *id.* at 62-63 (recommending creating two-year post-employment bar on sharing non-public information by legislative and executive branch employees as part of lobbying effort); Saul Levmore, *Efficiency and Conspiracy: Conflicts of Interest, Anti-Nepotism Rules, and Separation Strategies*, 66 *FORDHAM L. REV.* 2099, 2101 (1998) (noting the limited reach of anti-revolving-door provisions, including the fact they completely ignore the issue of whether private sector employees moving into government may favor their previous colleagues); Rachlinski & Farina, *supra* note 149, at 567-68 (noting that for non-career administrators, seeking lucrative post-government employment is an important concern).

174. BERRY & WILCOX, *supra* note 2, at 136 (distinguishing between presidential appointees, who usually reflect and often have a mandate to implement the President's ideological agenda and share the President's reelection and other political concerns, with career civil servants who are more insulated from constituency pressures and often view themselves as technocrats); see also NISKANEN, *supra* note 149, at 22 (using the term "bureaucrat" to mean a "senior official of any bureau with a separate identifiable budget," although also discounting the distinction between temporarily appointed and career bureaucrats).

175. Rachlinski & Farina, *supra* note 149, at 567-68.

176. See, e.g., *THE BUDGET-MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE* 81 (André Blais & Stephané Dion eds., 1991) (concluding that there is continuing evidence that bureaucrats seek to maximize their discretionary resources and possibly their overall budgets as well); NISKANEN, *supra* note 149, at 38-41 (asserting a theory that bureaucrats seek to maximize their agencies' budgets because doing so increases the bureaucrats' personal utility, which depends on salary, perquisites of office, public reputation, bureau output, ease of making changes, and ease of managing the bureau); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 *CORNELL L. REV.* 1, 37-62 (1982) (treating in depth the ways in which collective action often has very little to do with the actual public welfare).

quire, of course, legislative and sometimes public support.<sup>177</sup> The need for such support can provide an avenue for interest group influence, as interest groups are often able to affect congressional budget decisions.<sup>178</sup> At the same time, as was the case with legislators, executive branch officials may be able to play competing interest groups against one another to achieve the officials' own goals.<sup>179</sup>

The idea that executive branch officials and employees view maximizing their agency's budget as in their self-interest, however, is not universally accepted, particularly when it comes to lower-level, career civil servants.<sup>180</sup> Such employees may instead be more concerned about their long-term reputation within the government and so may feel constrained to avoid anything that would suggest they are anything other than neutral.<sup>181</sup> This need to avoid the perception of partiality to any particular interest group is reinforced by the procedures and oversight that govern most agency actions and which expose many agency decisions to both public view and comment by a range of interest

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177. See, e.g., KENNETH J. MEIER, *POLITICS AND THE BUREAUCRACY: POLICYMAKING IN THE FOURTH BRANCH OF GOVERNMENT* 52 (4th ed. 2000) (noting the influence of public opinion on executive branch agency decisions, but also noting both that the extent of that influence is debated and that the possibility of rapid changes in public opinion make it an unreliable source of support).
178. See, e.g., MEIER, *supra* note 177, at 55 (summarizing studies demonstrating the ability of interest group and public support to increase or, in the face of budget cuts, protect agency budgets); Rachlinski & Farina, *supra* note 149, at 569 (noting that agencies are dependent upon Congress for their budgets and grants of jurisdictional authority).
179. See, e.g., PETER H. ARANSON, *AMERICAN GOVERNMENT: STRATEGY AND CHOICE* 485-86 (1981) (noting the complex interactions between bureaucrats and interest groups, including the possible manipulation of interest groups by bureaucrats).
180. See, e.g., THE BUDGET-MAXIMIZING BUREAUCRAT, *supra* note 176, at 52 (concluding that the existing evidence indicates that there is little relationship between the salaries and promotions of career civil servants and the budgets of their agencies); MUELLER, *supra* note 163, at 359-85 (summarizing the scholarship relating to government bureaucrat motivations, but ultimately concluding that more empirical work is needed); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 916, 932-34 (2005) (arguing that career bureaucrats may have significant goals other than maximizing their agencies' budgets, including maximizing their discretionary budget, maximizing their inactivity and leisure, and maximizing accomplishment of the agency's specific mission, and that even pursuit of a maximized budget is tempered by the influence of their political appointee principals, Congress, and outside interests).
181. See BERRY & WILCOX, *supra* note 2, at 97-98 (describing how civil servants may "feel constricted" when dealing with lobbyists because of the need to maintain an appearance of neutrality and formal rules limiting ex parte contacts in some circumstances).

groups.<sup>182</sup> There is therefore also an institutional restraint, particularly for career civil servants, on the extent of any particular interest group's influence. This restraint is particularly strong for certain executive branch employees, such as administrative law judges, who enjoy additional protections to ensure their impartiality.<sup>183</sup>

### 3. The Judicial Branch

As for the judiciary, the research regarding judges' motivations reveals a very different picture.<sup>184</sup> It is generally agreed that interest groups of all stripes also use the courts to pursue their political agendas.<sup>185</sup> But life-tenured federal

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182. See BERRY & WILCOX, *supra* note 2, at 135 (noting that the rulemaking notice and comment process is designed to facilitate public input, although interest groups often also successfully try to become part of the actual drafting process); KERWIN, *supra* note 153, at 73-84 (describing the procedural requirements for agency rulemaking); Pablo T. Spiller, *Politicians, Interest Groups, and Regulators: A Multiple-Principals Agency Theory of Regulation, or "Let Them Be Bribed,"* 33 J.L. & ECON. 65, 68-69 (1990); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1790-1800 (1975) (advocating several administrative reform measures, including popular election of agency officials, selection of certain agency officials by interest groups, and increased judicial oversight of administrative agencies); Peter L. Strauss, Speech, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 750-72 (1996) (describing the growth in formal oversight of agency rulemaking); Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 198-99 (noting that one of the central purposes of the Administrative Procedure Act's standard for administrative decision making is to ensure that agency decisions are not simply the result of interest group pressures); Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 292-93 (1986) (arguing for the importance of nonjudicial review mechanisms for administrative decisions); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006) (noting that there is empirical evidence that the Administrative Procedure Act has opened the door for non-business and governmental interest groups to comment on agency rulemaking, but concluding that business groups usually still dominate such rulemaking).
183. See, e.g., James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1220-25 (2006) (describing the limited protections for administrative law judges, which exceed those for other executive branch employees but are less than those for Article III judges).
184. See, e.g., Rachlinski & Farina, *supra* note 149, at 565 & n.72 (noting that the interests of federal judges have been much more difficult to model and citing sources).
185. See, e.g., BERRY, *supra* note 159, at 225-26 (noting that interest groups tend to initiate litigation only as a last resort, after an unsuccessful advocacy attempt before a government agency); BERRY & WILCOX, *supra* note 2, at 140-43 (describing recent uses of the courts). See generally PUBLIC INTEREST LAW: AN ECONOMIC AND IN-

judges lack reelection, job retention, and, usually, promotion concerns, and so appear to be primarily motivated by other preferences that are not easily satisfied by interest groups.<sup>186</sup> Those other preferences appear to include reducing the less-interesting part of their workloads, improving their reputations, and pursuing their personal ideological agendas.<sup>187</sup> It is assumed, therefore, that life-tenured, Article III federal judges are immune to interest group influence, except through the well-accepted and public route of filing legal briefs in pending

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STITUTIONAL ANALYSIS (Burton A. Weisbrod et al. eds., 1978) (describing and analyzing the use of litigation and the courts to achieve public policy goals). For example, amicus briefs may have a significant effect on the Supreme Court's agenda. See Gregory Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988) (concluding based on data from the 1982 term that amicus curiae briefs filed by interest groups, whether in support of or, to a lesser extent, in opposition to the grant of certiorari, significantly and positively increased the chance of such a grant); Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 LAW & SOC'Y REV. 807 (1990) (reaching a similar conclusion, based on the same data, with respect to which cases are chosen by the Court for the "discuss list"); Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 716, 722-23 (1993) (concluding based on data from 1955 through 1987 that in cases involving obscenity laws amicus curiae briefs filed by interest groups in support of granting certiorari significantly and positively increased the chance of such a grant).

186. Rachlinski & Farina, *supra* note 149, at 565-66 (noting that judges, especially life-tenured federal judges, lack both the reelection motivation and probably the desire to expand their authority (which could easily lead to more work but no significant benefits)). *But see* Calabresi, *supra* note 158, at 60-62 (arguing that federal judges are subject to influence by state or local political bases because of the political mechanism for their selection and promotion).
187. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 9-10 (1998) (developing and providing evidence for a "strategic account" of judicial decisionmaking at the Supreme Court level which concludes that the Justices are primarily motivated by their personal policy preferences, but in seeking to see those preferences fulfilled they make strategic choices based on "the preferences of other actors, the choices they expect others to make, and the institutional context in which they act"); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 430-35 (2002) (concluding that decisions of the Justices are primarily driven by their personal ideological preferences); Levinson, *supra* note 180, at 961-62 (noting that the limited existing scholarship indicates that life-tenured federal judges are motivated by some combination of reducing their less-interesting workload, enhancing their reputations, and following their ideological preferences); Merrill, *supra* note 149, at 975 (noting that if judges are primarily motivated by the desire to make "correct" decisions, then expenditures for attempting to influence judges will likely hit a point of sharply diminishing returns much sooner than for institutional actors, such as legislators, that have other motivations (e.g., reelection)).

cases.<sup>188</sup> The sharp procedural limits on the courts, including the constitutional requirement of an actual case or controversy, limitations on *ex parte* contacts, and public availability of court filings, further limit interest group influence.

#### 4. Conclusion

The existing research reveals that interest groups can and do take advantage of a range of motivations of government actors. The strength of these pressure points depends not only on the government official involved, but also on the particular policy issues at stake. Particular policy issues are vulnerable to interest group pressure depending on the extent to which the issue is publicly prominent and whether it stimulates strong ideological positions (by government actors or the public).<sup>189</sup> For example, a firmly committed ideologue with a secure congressional seat—for example, Ron Paul, the libertarian-oriented candidate for the Republican presidential nomination in 2008—feels interest group pressure differently than a moderate, freshman member of Congress in a swing district—for example, many of the new, as of 2006, Democratic members of the House of Representatives.<sup>190</sup> Nevertheless, some generalizations can be made.

First, all government actors share some motivations. All are to some extent driven by their personal policy or ideological preferences, although the influence of these preferences will vary depending on the strength of other concerns. All government actors are also vulnerable to being influenced by gifts and other personal favors, although current laws sharply limit their ability to receive such

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188. See, e.g., Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 63 (1985) (stating that courts review administrative decisions to ensure they are not mere responses to political pressures, apparently assuming that the courts are sufficiently shielded from such pressures). *But see* KOMESAR, *supra* note 149, at 125 (noting that judges are actually, in one respect, less independent than average citizens, in that judges must wait for a lawsuit to be filed and evidence to be heard before they may form an opinion about or comment upon a particular administrative decision); Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 *HARV. J.L. & PUB. POL'Y* 219 (1997) (arguing that courts are not immune from interest group influence, although in some circumstances they may be less susceptible to such influences). This assumption may very well not apply to elected state court judges, however. See *infra* note 284 and accompanying text.
189. See generally Vincent Di Lorenzo, *Legislative Chaos: An Exploratory Study*, 12 *YALE L. & POL'Y REV.* 425 (1994) (suggesting that given these variations, including across both individual legislators and issues, a form of chaos theory should be applied to legislative decisions making).
190. See FENNO, *supra* note 171, at 221 (describing how among eighteen members of the House of Representatives studied during the 1970s, the strength of reelection concerns varied in comparison to other concerns, such as influence in the House).

favors legally. For this reason, government actors cannot be easily distinguished on these grounds.

Second, legislators, their staffs, the President, Vice President, and those dependent on them for their positions in the executive branch are concerned about reelection. These reelection-sensitive government officials are thus affected both by the views of their constituencies and by the resources available to aid their campaigns, although this latter concern is more muted for the executive branch side, particularly in a President's second term, unless the President hopes to influence the election of his or her successor or party allies. These reelection-sensitive officials are also concerned about post-government service employment opportunities, since many of them do not have permanent government careers. And they are concerned about increasing their own power and authority, which to a significant extent is dependent on their legislative colleagues (for legislators) and the legislature generally (for executive branch officials).

Third, such motivations distinguish these high-level officials from career civil servants and judicial branch officials and employees. These latter government actors are insulated by civil service protections or Article III from election concerns. They also are less vulnerable to revolving door concerns in that their government careers are often their only career or their last career. Furthermore, their job security and authority are usually less directly affected by legislative actions, either because for most career civil servants their salaries and any budgets they may control are set primarily by internal agency processes and not explicit congressional action and, for the judicial branch, their salaries are constitutionally protected and their other common motivations are not easily subject to interest group manipulation through legislative or executive branch actions. These differences are reinforced by institutional procedures that limit the ability of interest groups to influence such government actors.

These differences will be important in developing one or more definitions of lobbying that match these data. But first a separate issue must be addressed: whether different types of interest groups differ with respect to the kind or effectiveness of the pressures they bring to bear.

#### *B. The Relative Influence of Different Types of Interest Groups*

All interest groups are not alike. Defined most broadly, they can range from groups with single-issue agendas and limited public or financial support (e.g., the National Organization for the Reform of Marijuana Laws) to groups with broad, multi-pronged agendas and deep financial and public support (e.g., the AARP). Interest groups may also include political parties and governments.<sup>191</sup>

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191. See BAUMGARTNER & LEECH, *supra* note 2, at xxii (defining interest group broadly to include any "organization or institution that makes policy-related appeals to the government"); *id.* at 25-30 (noting the broad range of definitions for "interest group" used by scholars); BERRY & WILCOX, *supra* note 2, at 4-5 & n.9 (noting that

But for reasons that will become clear, scholars and others have usually differentiated between groups not on the basis of the narrowness or breadth of their policy agendas, but on their relative financial resources and ability to organize.

More specifically, commentators have sought to distinguish the influence of business interest groups from those of other interest groups, particularly charities.<sup>192</sup> For example, many scholars have argued that the tax rules governing lobbying and political involvement should be altered to bring the influence of charities into parity with that of business groups.<sup>193</sup> Some of these arguments

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at the simplest level, an interest group is an organization that tries to influence government, including other levels of government); Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL'Y REV. 553, 557-59 (1997) (noting that a "special interest" can include both groups with relatively narrow economic ideological agendas and groups with very broad agendas, including political parties and governments). Some scholars do not even require that "groups" be organized in any formal sense, see BAUMGARTNER & LEECH, *supra* note 2, at 26-27, although that broad a definition is not used in this Article because the legal rules governing lobbying necessarily only apply to groups that have a sufficient legal existence to both be subject to the rules and to control financial resources.

192. As stated in note 40, for purposes of this Article the term "charities" will be used to refer to organizations that qualify for tax-exempt status under I.R.C. § 501(c)(3) (2000). Another possible distinction could be made between those groups whose members share common business or occupational interests (e.g., the American Bar Association) and groups that advocate around issues not linked by such interests. BERRY, *supra* note 168, at 2 & n.1 (labeling the latter "citizens groups"); see also Leech et al., *supra* note 166, at 16 & n.8 (using this distinction).
193. See, e.g., BERRY & WILCOX, *supra* note 2, at 11 (describing attempts to make the pluralism vision of politics a reality by supporting the formation of interest groups for the previously disenfranchised and underrepresented); *id.* at 171-78 (describing disproportionate influence of businesses, or at least big businesses). See generally FARBER & FRICKEY, *supra* note 29, at 36-37 (noting the concern regarding interest groups that not everyone is equally represented by such groups). Similar arguments have been made to justify the differing treatment of lobbying by private foundations (prohibited) and public charities (permitted as an insubstantial activity). E.g., Comm'n on Philanthropy and Pub. Needs, *Limitations on Lobbying by Charitable Organizations*, in 5 RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 2945, 2953 (1977) (arguing that both charities and private foundations can become the conduits for the personal political preferences of individuals, which justifies the prohibition on lobbying by foundations and the limit on lobbying by other charities); Jeffrey Hart, *Foundations and Social Activism: A Critical View*, in THE FUTURE OF FOUNDATIONS 43, 47 (Fritz F. Heimann ed., 1973) (criticizing private foundations "as a kind of shadow government" that "are not responsible to any electorate" and that "are undertaking these [political] activities with public money"). But see Galston, *supra* note 10, at 1305 (arguing that it is questionable whether the differing treatment of private foundations and public charities with respect to lobbying truly creates a level playing field); John G. Simon, *Foundations and Public Controversy*:

arose during the period when businesses could deduct their direct lobbying expenditures and so are less compelling today.<sup>194</sup> But those arguments certainly have not been limited to tax parity concerns, and instead have in large part been driven by the financial and organizational advantages that businesses enjoy over other types of interest groups.<sup>195</sup>

Evidence that this distinction is justified is not completely compelling, however. It is true that Mancur Olson's groundbreaking 1965 insight appears to still be true today: groups with relatively few members, such as industry-specific business groups, have a substantial organizational advantage over groups with a much larger number of members.<sup>196</sup> Recent studies also confirm that businesses (and occupational organizations such as the American Bar Association), taken as a group, have a clear advantage over other types of interest groups with respect to material resources.<sup>197</sup> But surprisingly, these studies also indicate that these advantages in organizational ability and material resources often provide

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*An Affirmative View*, in *THE FUTURE OF FOUNDATIONS*, *supra*, at 58 (countering arguments against the political involvement of foundations, while at the same time proposing a number of "cautionary guidelines" for activities that might be perceived to have a political component or effect).

194. *E.g.*, Chisolm, *supra* note 10, at 250-51; Galston, *supra* note 10, at 1300-02.
195. *E.g.*, Dara Z. Strolovitch, *A More Level Playing Field or a New Mobilization of Bias?: Interest Groups and Advocacy for the Disadvantaged*, in *INTEREST GROUP POLITICS*, *supra* note 5, at 86, 101 (concluding that despite the growth of organizations representing marginalized groups, the growth of organizations representing powerful interests such as businesses has been greater and their power remains dominant, although less so than in the past). *See generally* BERRY, *supra* note 168, at 9-13 (summarizing scholarship adopting the view that the interest group universe is unbalanced because corporate business interests have inherent organizational and financial resource advantages, but arguing that this imbalance can be significantly reduced by stimulating "citizen group" mobilization).
196. *See* OLSON, *supra* note 23, at 141-48 (arguing that the business community is able to generate the largest number of lobbying organizations because each industry usually only consists of a limited number of firms so there is a relatively small number of actors to organize into a single lobbying group); *see also* E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 30-31 (1960) (suggesting that businesses tend to be well represented among interest groups in part because businesses are already highly organized as well as because of an upper-class bias in the interest group system). *But see* BAUMGARTNER & LEECH, *supra* note 2, at 87 (acknowledging the accuracy of Olson's view that not all interests are able to organize, but also acknowledging that many groups lacking the organizational advantages identified by Olson have nevertheless managed to organize themselves).
197. BERRY & WILCOX, *supra* note 2, at 179; Leech, *supra* note 166, at 19-22; *see also* Schuck, *supra* note 191, at 576-78 (noting that differences in financial resources between interest groups affect their influence, although also noting that so do differences in other, non-financial resources).

only a weak advantage in influencing government actions.<sup>198</sup> Why this weak correlation between these helpful characteristics and actual results? There may be a variety of reasons.

First, well-resourced and easily organized groups may split on issues, often resulting in a fairly even division of resources and organizational ability between each side of an issue (and at least one recent study concludes that interest groups tend to coalesce around two, as opposed to three or more, positions with respect to most issues).<sup>199</sup> Second, non-business interest groups bring other resources to the table that business groups are not able to match and which limit the advantage of business groups. These other resources may include public legitimacy, as a non-business group can often more credibly state it is working for the public good and not the personal gain of its members, and also committed members who can visit government officials, work on re-election

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198. Leech, *supra* note 166, at 24-25. See also OLSON, *supra* note 23, at 145-47 (concluding that business-wide groups such as the Chamber of Commerce also have the disadvantage of having to organize a relatively large number of actors, which hinders their effectiveness as an interest group as compared to industry-specific groups with relatively few firms as members); WILSON, *supra* note 147, at 311 (in 1973, noting that business-wide groups such as the Chamber of Commerce and the National Association of Manufacturers generally only took public policy positions that enjoyed unified support among businesses). *But see* Strolovitch, *supra* note 195, at 101 (noting that the needs of even marginalized societal sectors are at least occasionally addressed through interest group action, though ex post work in the courts is generally more effective for such sectors than ex ante advocacy). See generally MARK A. SMITH, *AMERICAN BUSINESS AND POLITICAL POWER: PUBLIC OPINION, ELECTIONS, AND DEMOCRACY* (2000) (concluding that even when businesses unify around a single policy position, such as the adoption of a position by the broad-based U.S. Chamber of Commerce, they are nevertheless often unable to translate their material wealth into policy victories because the very source of that wealth—a diverse group of business interests—leads to unity only on “business-wide” questions—such as healthcare—that also attract the attention of the public and other powerful, business and non-business, interest groups with conflicting positions).

199. See BAUMGARTNER & LEECH, *supra* note 2, at 97-98 (concluding that economic diversity has led to policy splits within the business community); *id.* at 112-14 (citing studies supporting this conclusion); BERRY & WILCOX, *supra* note 2, at 178 (noting that “substantial unity [among businesses] is commonly absent”); Nicholson-Crotty & Nicholson-Crotty, *supra* note 166, at 572 (listing studies indicating the rise of competing interest groups); Frank R. Baumgartner et al., *The Structure of Policy Conflict* 17 (working paper, 2006), available at [http://lobby.la.psu.edu/\\_documentation/MPSA2006\\_Structure\\_of\\_Policy\\_Conflict.pdf](http://lobby.la.psu.edu/_documentation/MPSA2006_Structure_of_Policy_Conflict.pdf) (noting both the competitive nature of lobbying and the tendency, in the ninety-eight issue areas studied, for different material resource-rich interest groups to be found on different sides of each issue and for interest groups to coalesce around only two positions for each issue).

election campaigns, and vote for or against elected officials.<sup>200</sup> Charities and advocacy organizations such as the NRA or the Sierra Club are most likely to have these other advantages, while labor groups may not enjoy the same halo effect as charities but can often deploy numerous volunteers. Third, an interest group's priority issue may not make it onto the political agenda of even favorable government actors for any number of reasons; for example, other pressing concerns (e.g., healthcare reform, Iraq) may crowd out the group's primary issue, or institutional biases may work against the raising of certain issues.<sup>201</sup> Many of these developments, particularly the growth of effectively organized non-business interest groups, appear to be relatively recent developments.<sup>202</sup>

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200. BERRY, *supra* note 168, at 120-52 (describing the variety of resources that non-business interest groups may have at their disposal); D.E. Apollonio, *Predictors of Interest Group Lobbying Decisions*, 3 FORUM 13 (2005) (concluding that non-financial interest group resources, such as committed members and experience, appear to provide a substitute for (direct) lobbying expenditures); Leech, *supra* note 166, at 7-8 (noting that large memberships and policy goals shared with lawmakers can counter significant material resources); *see also* OLSON, *supra* note 23, at 132-35 (arguing that non-business groups may be able to overcome the difficulty of mobilizing large groups of actors by organizing primarily for non-political reasons, such as to engage in collective bargaining (labor unions) or to provide non-collective goods (professional associations)). While it is true that non-business groups such as the NAACP may have as actual members a relatively small proportion of the group they purport to represent, *see* OLSON, *supra* note 23, at 142, that small proportion can still represent hundreds of thousands of individuals. *See* BAUMGARTNER & LEECH, *supra* note 2, at 97 (noting that non-business oriented groups often have the advantage in terms of the numbers of potential members).
201. *See* Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 952 (1962) (discussing the agenda-setting influence of institutional biases); Leech et al., *supra* note 166, at 35 (discussing why purported government allies may not adopt an interest group's priorities as their own).
202. *See* BAUMGARTNER & LEECH, *supra* note 2, at 88-92, 97 (noting the growth of new, non-business oriented interest groups and the relatively high level of involvement by members of the public in interest groups, although only a relatively small group of individuals are extremely active in multiple groups); *id.* at 111 (concluding that most recent studies indicate that non-business interest groups are growing in both number and influence); *id.* at 116-17 (noting that it remains unclear what degree of mobilization is sufficient to matter in politics, particularly when a relatively low proportional involvement can still translate into significant resources and committed individuals for a sufficiently large latent group); BERRY, *supra* note 168, at 16-33 (concluding that interest group politics changed significantly from the 1960s to the 1990s because of the growing influence of ideological citizen groups); SMITH, *supra* note 198, at 201-02 (noting the growth in competition among interest groups over time, particular with respect to the rise non-business groups that opposed business-group-supported positions); WILSON, *supra* note 147, at 341-42 (noting the declining political influence, as of 1973, of groups organized around material interests, such as business groups); Allan J. Cigler, *Interest Groups: A Subfield in Search of an Identity*, in 4 POLITICAL SCIENCE:

The end result is that while business groups may remain overrepresented among interest groups, they do not, at least today, appear to enjoy an overwhelming advantage in actually achieving favored government action and blocking disfavored government action.<sup>203</sup> That said, there is some evidence that industry-specific business interests are often able to prevail with respect to administrative rulemaking, which focuses on narrow issues and receives less scrutiny from other interest groups and the public.<sup>204</sup>

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LOOKING TO THE FUTURE 99, 121 (William Crotty ed., 1991) (noting that by the late 1970s a less stable public policy environment had emerged, in part because of the increasing numbers of interest groups); Schuck, *supra* note 191, at 592 (noting the apparently reduced influence of interest groups, perhaps because of increased competition among such groups, among other factors).

That change may in turn have been driven in large part by the growth in the number, resources, and range of positions of interest groups. *See, e.g.*, BERRY & WILCOX, *supra* note 2, at 16-20 (citing studies confirming the growth of interest groups and their lobbying efforts); Cigler & Loomis, *supra* note 5, at 10-12 (same). In contrast, studies from the first part of the 1970s and earlier commonly found both a greater dominance of business oriented groups as well as more instances of a disproportionate alignment by interest groups on one side of particular issues. *See* BAUMGARTNER & LEECH, *supra* note 2, at 94-96 (noting studies reporting the dominance of business oriented groups); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by the Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 43-44 (1990) (noting studies finding interest groups often on one side of an issue). The reasons for this growth are beyond the scope of this Article, but for a summary of reasons why Olson's insights are not always controlling, see Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 564-65 (2001).

203. *See supra* notes 200 & 202. It could be argued that since the current public policy status quo already favors interest groups with abundant material resources, any defeat of attempts by those groups to make public policy even more favorable to their interests, or to block attempts to reduce their existing advantage, still leaves such groups with an enviable advantage. The merits of this argument would, however, require reaching a determination that the status quo does, in fact, favor such interests "unfairly," which is well beyond the scope of this article.
204. *See* SMITH, *supra* note 198, at 201-02 (noting that business interests may have particularly strong influence on narrow issues that are less likely to result in active opposition to their positions); Revesz, *supra* note 202, at 567 (citing studies finding that at least at the federal level, business interest groups participated in many more regulatory proceedings than non-business interest groups); Webb Yackee & Webb Yackee, *supra* note 182, at 135-36 (based on a study of comments on proposed rules submitted to four federal agencies over eight years, concluding that it appears businesses have an advantage over nonbusinesses in the regulatory rule-making process, perhaps because businesses have substantial material resources that permit them to submit more comments).

Charities, on the other hand, may not always be pure protectors of the public interest.<sup>205</sup> Some supporters of loosening the lobbying rules for charities have therefore proposed identifying the types of charities most likely to represent otherwise underrepresented groups and only loosening the rules for them.<sup>206</sup> Another danger of more liberal rules for charities is that business interests may find ways to take advantage of the charitable form, even though the tax laws specifically prohibit a charitable contribution deduction if the contribution is made to evade the denial of a business deduction for lobbying expenses.<sup>207</sup> The extent to which such abuse of charities might occur is uncertain, however.<sup>208</sup> And while many charities may represent interests that have other avenues for influencing government actions, charities are the only potential avenue of representation for many disadvantaged groups.<sup>209</sup> So there are some real differ-

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205. See, e.g., Galston, *supra* note 10, at 1315-17 (describing, but not accepting, the view that charities have a countermajoritarian tendency harmful to democracy, which lobbying will only increase); Todd J. Zywicki, *Baptists?: The Political Economy of Environmental Interest Groups*, 53 *CASE W. RES. L. REV.* 315, 349 (2002) (concluding that lobbying behavior of environmental groups is best explained as an effort to secure government support for their point of view and to secure wealth and power for their organizations). Of course, charities and their supporters usually believe their positions are in the overall public interest, rightly or not. See Bruce Yandle & Stuart Buck, *Bootleggers, Baptists, and the Global Warming Battle*, 26 *HARV. ENVTL. L. REV.* 177, 188-89 (2002) (equating environmentalists with Baptists in the era of prohibition, who saw their position as one driven by moral necessity). But it is not unusual for business interests to also take this position, although generally with less credibility; as a onetime corporate president put it, "What's good for the country is good for General Motors, and vice versa." *THE NEW DICTIONARY OF CULTURAL LITERACY* 472 (E.D. Hirsch, Jr., Joseph F. Kett, & James Trefil eds., 3d ed. 2002); see also SCHATTSCHEIDER, *supra* note 196, at 27 (using this quote as illustrating the need to explain private interests in terms of the common public interest when engaged in public discussions).
206. See Chisolm, *supra* note 10, at 283-87, 294-95 (proposing to only liberalize the lobbying limitations on charities for broadly supported subset of charities that further "charitable," as opposed to solely educational or religious, purposes).
207. See SMITH, *supra* note 198, at 32 (describing the funding of think tanks by business interests to change public opinion on policy issues); Note, *The Political Activity of Think Tanks: The Case for Mandatory Contributor Disclosure*, 115 *HARV. L. REV.* 1502, 1513-14 (2002) (describing how some think tanks classified as charities for tax purposes have advanced the business interests of their donors).
208. See Galston, *supra* note 10, at 1334-35 (acknowledging this possibility, but noting it is likely that wealthy interests would probably engage in a similar amount of lobbying even without the charity option, although through a less tax-favored and less publicly favored vehicle).
209. See BAUMGARTNER & LEECH, *supra* note 2, at 92-93 (concluding that the then existing research demonstrates that individuals with higher social status are more involved in the interest group system than those with lower social status); BERRY,

ences between types of interest groups that may justify some difference in how lobbying is defined for each type. But before turning to the possible definitions there is one final question to be answered: what exact forms of interest group influence are of concern?

### C. *Desirable Versus Undesirable Influence*

Not all interest group influence of government actors is detrimental and so should be constrained. Some commentators paint interest groups as ultimately destructive to our democratic form of government,<sup>210</sup> but the more widely accepted and long-standing view of both scholars and lawmakers is that interest groups provide significant benefits.<sup>211</sup> These benefits include supplying valuable information and advice for government decision makers, informing citizens of proposed and current government actions and thus increasing the transparency of government, and creating a mechanism through which citizens can both participate in politics generally and influence specific government actions, all of

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*supra* note 168, at 4 (noting that the landscape of interest group politics in Washington has long been dominated by corporate and professional interests, perhaps creating an upper-class bias); Galston, *supra* note 10, at 1335-36 (arguing that the potential gain to the wealthy from liberalizing the rules limiting lobbying by charities needs to be weighed against the potential gain for the nonwealthy).

210. *E.g.*, MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 41-47 (1982) (arguing that interest groups tend to use government to redistribute wealth from society as a whole to themselves); JONATHAN RAUCH, *DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT* 64-97 (1994) (referring to lobbyists and the groups that employ them as part of “the parasite economy”); Glenn Harlan Reynolds, *Is Democracy Like Sex?*, 48 *VAND. L. REV.* 1635, 1642-44 (1995) (citing OLSON, *supra*, and RAUCH, *supra*, and agreeing that interest groups are “political parasites” that “not only pursue their own self-interested agenda, but also force others into a political ‘arms race’ to protect their own interests”); *see also* BAUMGARTNER & LEECH, *supra* note 2, at 85-86 (summarizing recent literature taking this view); BERRY, *supra* note 168, at 13-14 (describing the view that interest groups corrupt democratic politics, primarily by directing money to politicians one way or another, and so need to be constrained).
211. *See, e.g.*, BAUMGARTNER & LEECH, *supra* note 2, at xv (concluding that virtually all commentators have recognized that interest groups are a “mixed blessing”); *id.* at 83 (noting that the interest group system “is seen simultaneously to be a route for popular representation and a threat to good government because of the biases that it allows”); HERRING, *supra* note 3, at 1 (describing interest groups as a “powerful medium for the highly effective expression of opinion on the part of various elements within the body politic”); Logan & Patten, *supra* note 3, at 72, 78 (noting the long-held concession that “there is some lobbying activity which is desired and which is useful” and pointing out that lobbyists often introduce into the legislative dialogue important facts or considerations “which otherwise would be overlooked or would be beyond the legislator’s capacity to acquire”).

which supports our representative form of government.<sup>212</sup> Interest groups may also serve to counter the tyranny of the majority—the problem that an engaged majority can selfishly work against the interests of the minority.<sup>213</sup> At the same time, however, interest groups can influence government decision making in ways that have a significant chance of causing such decisions to no longer serve the public interest but only to serve the interest of that particular interest group.<sup>214</sup> Methods that are particularly problematic include providing distorted

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212. See, e.g., BAUMGARTNER & LEECH, *supra* note 2, at 86-88 (describing the “pluralist” view that interest groups are broadly representative of the interests of society and play a positive role in the creation of better citizens); BERRY & WILCOX, *supra* note 2, at 6-8 (listing the various roles of interest groups); STEPHEN MACEDO ET AL., *DEMOCRACY AT RISK: HOW POLITICAL CHOICES UNDERMINE CITIZEN PARTICIPATION AND WHAT WE CAN DO ABOUT IT* 4-5 (2005) (stating that citizen involvement in government, whether through interest groups or other channels, is essential to American democracy because it provides decision makers with required information, legitimates government actions, and enhances the quality of citizens’ lives); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 297-300 (1986) (noting the role of interest groups in providing information that legislators need to make decisions but are often otherwise unable to obtain); David Epstein & Sharyn O’Halloran, *A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy*, 11 J.L. ECON. & ORG. 227 (1995) (concluding that interest groups provide Congress with useful information about executive branch activities, thereby aiding Congress’ oversight); Johnson, *supra* note 10, at 9 (acknowledging the positive role of lobbyists and, by extension, the interest groups they represent); Rogan Kersh, *The Well-Informed Lobbyist: Information and Interest Group Lobbying*, in *INTEREST GROUP POLITICS*, *supra* note 5, at 389, 396-97 (describing how lobbyists gather and share information that otherwise might not be available to government actors); Schuck, *supra* note 191, at 580-88 (noting the role of interest groups in facilitating citizen participation in politics and the larger society, providing useful and needed information to government officials and the public, and helping to define what is in fact the public interest); see also 141 CONG. REC. 20,007 (statement of Sen. Levin) (acknowledging, upon his introduction of the LDA, that “[l]obbying is part of democratic government, an inherent part of it, a constitutionally protected part of constitutional and democratic government”).
213. See KOMESAR, *supra* note 149, at 97 (developing a “two-force” model that recognized the possibility of majoritarian influence and bias as well as minoritarian (i.e., interest group) influence and bias).
214. See, e.g., Margaret F. Brinig et al., *The Regulation of Lobbyists*, 77 PUB. CHOICE 377, 377 (1993) (noting that a public interest view of lobbyist regulation is that such regulation promotes legislation that takes “more account of the general welfare and less account of private interests,” while an economic model suggests that such regulation benefits legislatures by raising the cost of lobbying and so revealing the strength of interest group interest in particular legislation); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 548-49 (2000) (contrasting the view that private actors in the administrative law context are “menacing outsiders whose influence threatens to derail legitimate ‘public’ pursuits” with

facts to both government officials and the public, and providing social, financial, or political favors, including campaign support, that personally benefit government actors.<sup>215</sup>

The exact trade-off between the positive and negative aspects of interest group influence is a subject of much debate.<sup>216</sup> But, given the concerns that animate them, restrictions on such influence should reach only those activities that create an actual or perceived danger to government decision making in the public interest. Actions by interest groups that contribute positively to government decision making in the public interest should not be unduly restricted, lest that positive effect be lost.

### 1. The Process for Determining the Public Interest

Determining "positive" versus "negative" interest group influence requires considering the unresolved debate about how government decision makers and institutions determine what is in the "public interest." The current prevailing view is that "public interest" is a procedural concept—that whatever is the result of the appropriate decision making procedure will be in the "public interest" as opposed to in the interest of some sub-group to the detriment of the general public.<sup>217</sup> This view, however, leaves unanswered the question of what is

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their role as "regulatory resources capable of contributing to the efficacy and legitimacy of administration").

215. See, e.g., BERRY, *supra* note 168, at 15 (noting the criticisms and benefits of interest groups); MUELLER, *supra* note 163, at 496 (noting the incentives for interest groups to provide distorted information); Johnson, *supra* note 10, at 12 (listing these concerns); Nicholson-Crotty & Nicholson-Crotty, *supra* note 166, at 572 (finding a correlation between interest group influence and access).
216. See generally FARBER & FRICKEY, *supra* note 29, at 17-33 (reviewing the non-legal scholarship regarding interest groups); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1055-74 (1997) (reviewing the changing scholarly views of interest groups and their effect on judicial perceptions of administrative agencies); Hanne B. Mawhinney, *Theoretical Approaches to Understanding Interest Groups*, 15 EDUC. POL'Y 187 (2001) (reviewing the major theoretical perspectives found in interest group scholarship, which reflect differing assumptions regarding the potential threat that such groups pose to democratic government).
217. See, e.g., FARBER & FRICKEY, *supra* note 29, at 59 (arguing that a legislative decision has a good claim to represent the public interest when the political process guides existing preferences in a manner that reflects society's understandings about relevance, equity, and majoritarian rule); Schuck, *supra* note 191, at 556 (noting this procedural notion of the public interest is widely accepted today, in contrast to the Madisonian concept of an objective public interest). *But see* SCHATTSCHNEIDER, *supra* note 196, at 23-24 (defining "the public interest" as referring "to general or common interests shared by all or by substantially all members of the community" in contrast to private or special interests, and providing national

the appropriate decision making process for leading to decisions that further public, as opposed to private, interests.

Over time, scholars have developed a number of different models for how lawmaking occurs, with each model having important implications on which lawmaking processes promote the public interest. These models also inform our thinking about how interest groups contribute to, or undermine, that process. One view emphasizes the expertise, autonomy, or good faith of lawmakers, who are seen as only needing enough accurate information and sufficiently robust analytical tools to reach decisions that further the public interest.<sup>218</sup> In this view, the role of interest groups should be limited to providing needed data and tools, and perhaps then only at the invitation of government actors who have determined that they need such items.<sup>219</sup> Greater involvement by interest groups is harmful, because they use political pressure to force government actors to further the groups' narrow interests over the public interest, and so government actors should be insulated to a significant degree from such groups.<sup>220</sup>

The competing view is epitomized by what Professor Richard Stewart has labeled the "interest representation" model.<sup>221</sup> According to this view, the public interest is best determined by open government actors who are responsive to the concerns of all affected interests.<sup>222</sup> Interest groups therefore play a critical and pervasive role in government decision making, formalized through pre-lawmaking procedures for their participation and post-lawmaking rights to challenge government actions in court.<sup>223</sup> While government actors need not—

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survival as one such common interest); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 168 (1990) (noting that the "best" government policies could be defined as ones that have "a primarily public or other-regarding cast, one that goes beyond individual self-interest").

218. See, e.g., Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 440-41 (2003) (describing the development of this "regulatory managerialism" approach in the administrative law context).

219. *Id.* at 441.

220. See, e.g., Freeman, *supra* note 214, at 558-59 (commenting on what are arguably two versions of this model, the "public interest theories" that view private actor participation in government decision making with suspicion because while the concept of "public interest" evades rigorous definition, it at a minimum means "resisting pressure from third parties (who only have their narrow self-interest in mind)" and "civic republican" theories that seek to insulate government decision makers from private actors because those decision makers are supposed to pursue "some conception of the common good"); Galston, *supra* note 10, at 1137-39 (describing and accepting the similar "deliberative" model).

221. Stewart, *supra* note 182, at 1723; see also Stewart, *supra* note 218, at 442.

222. Freeman, *supra* note 214, at 559-60; Stewart, *supra* note 182, at 1760.

and should not—be completely responsive to the competing interest groups, the law should require them to actively seek and consider input from such groups and should not impede groups from providing such input.<sup>224</sup>

The former approach suggests the definition of lobbying for tax, disclosure, and actor-limitation purposes should be relatively broad. Only activities that provide government actors with needed data and tools should escape the definition. In contrast, the latter approach suggests a relatively narrow definition of lobbying, covering only those activities that are most likely to be inconsistent with the involvement of all affected interests in the decision making process, while permitting all other advocacy activities to proceed unimpeded by tax, disclosure, or other burdens.

I believe the latter approach is preferable in this context for two reasons. First, the existing lobbying laws do not—and almost certainly constitutionally cannot—absolutely prevent any interest group from pursuing any particular avenue of influence short of outright bribery.<sup>225</sup> These laws therefore only have the potential to discourage whatever activities are identified as “lobbying.” Furthermore, the extent to which that potential is actually realized appears uncertain, as there is little or no empirical research on the subject. Therefore, even if the former view is correct, that most interest group involvement is detrimental to the process of reaching decisions in the public interest, none of the laws at issue here will flatly prevent such involvement or any particular type of involvement, and it is not even clear that they would significantly reduce the less-favored behavior.

Second, because these views focus on reaching decisions in the public interest, they downplay or ignore the other significant benefits of relatively unimpeded interest group involvement. Those other benefits include legitimizing that process by providing an avenue for individuals both to learn about and participate in government decisions and, more generally, facilitating citizen political involvement.<sup>226</sup> Another way to think about this point is to view the public interest as including a participatory element as well as a results element. Whether a government action furthers the public interest could be measured

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223. Stewart, *supra* note 182, at 1723-60; Strauss, *supra* note 182, at 745-72 (describing the historical development of these procedures and rights).

224. Freeman, *supra* note 214, at 560-61 (noting that this model can be consistent with administrative government actors exercising independent judgment regarding what is in the public interest, although that judgment is informed by the views of private actors; contrasting this approach with related public choice theories that assume interest groups effectively capture government actors by appealing to those actors’ personal preferences).

225. See *supra* notes 20-21, 43 (listing the leading Supreme Court cases addressing the constitutional limits on Congress’ ability to regulate lobbying) and accompanying text.

226. See *supra* note 212 and accompanying text.

not only by its results but also by its perceived legitimacy, which is enhanced by the ability of citizens, through interest groups, to be informed about and, if they so choose, participate in the decision making process.<sup>227</sup> It is true that interest groups do not equally represent all individuals or interests, as both business interests and those with higher social status dominate the interest group universe.<sup>228</sup> But at least in recent years, they have come to represent a relatively broad range of views and individuals.<sup>229</sup>

## 2. Distinguishing Positive from Negative Interest Group Influence

Once we adopt the interest representation model as best capturing the potential benefits and harms of interest group influence on government decision making, we are then able to distinguish positive from negative interest group influence. Some actions are clearly negative, because they are highly likely to lead to government decisions that further the interests of a specific group, while not furthering participation by all affected interest groups.<sup>230</sup> Such actions include, for example, explicit trading of personal financial benefits for official actions and have been absolutely prohibited.<sup>231</sup> Others are at least perceived as negative, because they create the impression of such a result. Such actions include providing gifts or other personal benefits even where there is no explicit quid pro quo and have been sharply limited if not completely banned.<sup>232</sup>

Certain types of actions are more difficult to categorize as clearly negative (or positive). For example, interest groups are commonly viewed as a positive influence to the extent they convey information to government decision makers, but only if the information is conveyed through a process that is available to other affected interest groups as well.<sup>233</sup> For this reason, it may make sense to

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227. See Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions (Installment One)*, 24 STAN. ENVTL. L.J. 3, 36-37 (2005) (arguing that in the context of land use regulation, lack of sufficient avenues for public participation has resulted in both serious legitimacy problems for government decisions and poor land use decisions).

228. See *supra* notes 204, 209 and accompanying text.

229. See *supra* note 202 and accompanying text.

230. See FARBER & FRICKEY, *supra* note 29, at 35 (rejecting the view that all government actions providing economic benefits to a subset of the population are unjustified since such actions may serve interests of justice and other, non-economic social values, but conceding that some rent-seeking legislation may not be justifiable under any theory of social justice).

231. See *supra* note 72.

232. See *supra* notes 73-77.

233. Compare *supra* note 212 and accompanying text, with *supra* note 215 and accompanying text.

## WHAT IS THIS “LOBBYING” THAT WE ARE SO WORRIED ABOUT?

distinguish, for example, between conveying information to a government actor behind closed doors, which is less susceptible to challenge or participation by other parties, and conveying information in a more public and more accessible manner, such as through testimony in a congressional hearing or formal written comments. There may be reasons unrelated to achieving an unfair advantage for interest groups to seek closed door meetings—such as when the information they are providing involves proprietary business strategies or revelations that would result in possible consumer or public backlash. But none of the laws at issue here would absolutely prohibit such meetings; they would make the costs of such meetings greater (because of the need to pay for such costs with after-tax dollars) and make the fact that such meetings occurred subject to disclosure.

### III. DEFINING “LOBBYING”

The research summarized above is far from conclusive in many respects. It does, however, provide us with a clearer picture of how interest groups, through their lobbying expenditures and paid lobbyists, influence government actions than would have been available to Congress and the Treasury Department when they created the various definitions of lobbying in existing federal law. This is particularly true for the tax definition applicable to most charities, which has remained relatively unchanged since 1934.<sup>234</sup> The LDA and the business expenses definition definitions, both adopted in their current forms in the 1990s, may, however, reflect some of these research results.<sup>235</sup> But before we discuss how lobbying should be defined given this research, we must first address a threshold question: whether there should be a single definition of lobbying for purposes of the federal laws regulating that activity.

#### A. A Single Definition?

The lack of a uniform definition of lobbying does not appear to have been a matter of conscious congressional choice but instead a product of the varied histories of the relevant laws.<sup>236</sup> Congress in fact asked the U.S. Government Accountability Office (then named the U.S. General Accounting Office) to determine whether the definitions should be harmonized in the late 1990s.<sup>237</sup>

There are numerous benefits to a single definition. It would reduce the administrative costs of complying with these various rules, and it would eliminate the apples and oranges problem the different definitions create for comparing

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234. See *supra* note 52 and accompanying text.

235. See *supra* notes 102, 116 and accompanying text.

236. See *supra* Section I.B.

237. GAO REPORT, *supra* note 88.

reported lobbying expenditures under the different rules.<sup>238</sup> Despite these advantages, there are two arguments for adopting multiple definitions that need to be considered. First, lobbying rules use different methods to accomplish their common purpose, so different definitions may fit these different methods sufficiently better so as to offset the benefits of a single definition. Second, the differences among types of interest groups may be sufficient to justify using different definitions for different types of interest groups.

### 1. Do Different Rules Require Different Definitions?

Do these different ways of restricting disfavored advocacy activities require different definitions for what is a disfavored activity (that is, what is lobbying)? The legislative history for an earlier version of the LDA noted the definitional difference with the tax laws but simply stated that the different purposes of the tax laws justified a different definition without elaboration.<sup>239</sup> But if, as asserted above, the ultimate purposes of the tax laws and the LDA appear to be the same—discouraging certain types of advocacy activities—this statement does not withstand scrutiny.<sup>240</sup> Rather, different definitions need to be justified by the difference in methods used to achieve their shared purpose.

The burdens placed on lobbying by these two sets of rules are different but share many common characteristics. Neither taxing lobbying nor requiring its disclosure prohibits lobbying activity. While it is true that the tax laws limit the amount of lobbying by charities, and bar it completely for private foundations, it is now well accepted that a charity can effectively engage in unlimited lobbying by creating a closely affiliated social welfare organization that receives non-deductible contributions.<sup>241</sup> For example, the Natural Resources Defense Coun-

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238. This problem exists even within the LDA rules because some organizations are given the option of using either the LDA definition or one of the tax definitions for purposes of determining whether and to what extent they have engaged in lobbying. See GAO REPORT, *supra* note 88, at 4 (concluding that harmonizing the definitions could improve the comparability of LDA disclosure reports); Luneburg & Susman, *supra* note 10, at 50-52 (noting the comparison problem created by the current ability of some organizations to use a tax definition of lobbying for LDA purposes).

239. S. REP. NO. 103-37, at 29 (1993) (“Unlike this bill, the Internal Revenue Code is not primarily intended for the purpose of ensuring public disclosure, and the Committee recognizes that the different purposes of the tax laws justify a different definition of lobbying.”).

240. See *supra* Section I.B.

241. See, e.g., Ward L. Thomas & Judith E. Kindell, *Affiliations Among Political, Lobbying and Educational Organizations*, in EXEMPT ORGANIZATIONS-TECHNICAL INSTRUCTION PROGRAM FOR FY 2000, at 255, 259-60 (2000), <http://www.irs.gov/pub/irs-tege/eotopicsoo.pdf> (stating that a charity may establish and control a social welfare organization, which may engage in a substantial amount of lobbying,

cil, a charity, has the affiliated Natural Resources Defense Council Action Fund, a social welfare organization; Focus on the Family, a charity, has the affiliated Focus on the Family Action, a social welfare organization.<sup>242</sup> The key requirement is that the finances and legal structures of the two entities remain distinct, but even with this requirement the entities may share directors, officers, staffs, and facilities as long as costs are appropriately allocated.<sup>243</sup>

The administrative burdens imposed by each set of rules are also similar. The tax rules require affected organizations to identify lobbying activities and allocate expenses to those activities.<sup>244</sup> For charities, this requirement is necessary to ensure that the charity is not violating the lobbying limit and to properly report such expenditures on its annual information return, if it files one.<sup>245</sup> In the case of a business, this is necessary to determine what expenses are not deductible.<sup>246</sup> For LDA purposes lobbying activities must be identified and lobbying expenditures reported, although to date the figures reported have not required the exactness required by the tax laws.<sup>247</sup> But a single definition would tend to reduce, not increase, this burden, as it would permit organizations to only have to keep track of one set of activities for both sets of laws. Congress recognized this advantage when it permitted business and charities that choose the optional election regime for tracking lobbying expenditures to use that definition for LDA purposes.<sup>248</sup> By still allowing organizations to use a different, LDA-specific definition, however, Congress created an apples and oranges

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as long as the charity observes the legal formalities of the separate legal existence of each entity).

242. See NRDC: The Earth's Best Defense, <http://www.nrdc.org> (last visited March 12, 2008); NRDC's Action Center, <http://www.nrdc.org/action/> (last visited March 12, 2008); Focus on the Family, <http://www.family.org> (last visited March 12, 2008); Focus on the Family Action, <http://www.focusaction.org> (last visited March 12, 2008).
243. Ward & Kindell, *supra* note 241, at 259.
244. See, e.g., Treas. Reg. § 1.162-28 (1995) (providing detailed rules for allocating costs to lobbying activities), Treas. Reg. § 56.4911-3 (1990) (same).
245. See IRS Form 990, sched. A, pts. VI-A, VI-B (2006), available at <http://www.irs.gov/pub/irs-pdf/f990sa.pdf> (requiring reporting by charities of lobbying expenditures).
246. See IRS Instructions for Form 1120, at 12 (2007), available at <http://www.irs.gov/pub/irs-pdf/f1120.pdf> (noting that lobbying expenditures may not be included in the deductions listed on these forms).
247. See 2 U.S.C. § 1605(b)(4), (c) (2000) (requiring a good faith estimate of lobbying expenses, rounded to the nearest \$20,000).
248. See 2 U.S.C. § 1610(a), (b) (2000) (permitting this option for some entities); H.R. REP. NO. 104-339, at 23 (1995) (noting that permitting this option for charities would allow to avoid having to maintain two sets of records of lobbying activities).

problem when comparing LDA reports by organizations that choose to use different definitions.<sup>249</sup>

In conclusion, neither differing purposes nor differing methods justify having differing definitions. There is one respect, however, in which the tax definition(s) of lobbying should differ from the LDA and lobbyist restrictions definition(s). Any tax definition must address the question of how to treat attempts to influence government actors or actions for governments other than the U.S. federal government. While states and localities can and have for the most part created their own disclosure rules for and limits on lobbyist activities, none of these other governments has the authority to affect the federal tax rules for lobbying expenditures. But, as I argue below, the same basic definition that applies at the federal level for tax, disclosure, and lobbyist restriction purposes should also apply at the state, local, and other government levels for tax purposes since the same concerns that exist at the federal level also exist at least with respect to state and local governments, although with some different nuances. There is one remaining issue relating to whether to have one or more definitions that must first be addressed.

## 2. Do Different Interest Groups Require Different Definitions?

As detailed above, there is a long-standing view that different types of interest groups should be subject to different restrictions with respect to lobbying in order to create a more level playing field for those whose interests they represent.<sup>250</sup> This argument, which distinguishes between business-related interest groups and charities, is not without its flaws.<sup>251</sup> But it is certainly true that historically underrepresented segments of the population are more likely to be represented by charities, or at least non-business-related interest groups, than business-related interest groups.<sup>252</sup> And it also appears that, at least with respect to relatively narrow governmental actions, the greater material resources of business interests provide them with an advantage.<sup>253</sup>

Even accepting that there are grounds for distinguishing among different types of interest groups, however, the question remains whether the differences among groups justifies a difference in the definition of lobbying. There are three problems with creating such a distinction. The first is that it is unclear whether a narrower definition of lobbying for charities will significantly advance the

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249. See *supra* note 238.

250. See *supra* Section II.B.

251. See Galston, *supra* note 10, at 1339-42 (proposing a single definition of “educational advocacy lobbying” for both charities and businesses and for which businesses would be able to deduct their expenses and charities would be able to do in an unlimited amount); *supra* notes 198-203, 205-207, and accompanying text.

252. See *supra* note 209 and accompanying text.

253. See *supra* note 204 and accompanying text.

public interest generally or the interests of historically underrepresented groups more specifically. For example, if businesses have to treat efforts to influence senior executive branch officials with respect to their official duties as lobbying but charities do not, charities will still be on the same footing as businesses with respect to legislation, just not with respect to administrative actions. Yet there is no particular reason to believe that hearing the voices of charities is any less important with respect to legislation than it is with respect to administrative actions—if anything, the reverse may be true. And while business groups may enjoy an advantage with respect to the narrower government actions that tend to be more of a focus of the executive branch, it has not been demonstrated that this advantage is somehow improper. Thus, a difference in the general definition of lobbying appears to be the wrong tool to distinguish between different types of interest groups.

Second, it is difficult to distinguish between charities that pursue the public interest or the interests of underrepresented groups from those that may pursue the interests of already well-represented and established groups.<sup>254</sup> For example, many charities reflect business friendly views and are business funded, even if their activities fall within the tax law definition of charitable activity.<sup>255</sup> Furthermore, non-charitable entities, such as social welfare organizations, may also pursue the public interest or the interests of historically underrepresented groups, yet the tax definition of social welfare is even more elastic than the tax definition of charitable, further complicating any attempt to differentiate interest groups.<sup>256</sup> Attempts to distinguish between different types of interest groups, therefore, appears to be doomed to be significantly both under and over-inclusive.

Finally, where a difference is created an incentive to exploit that difference is created. It is already common for businesses to fund charities that are relatively pro-business in their views.<sup>257</sup> If those charities enjoyed a significant advantage with respect to advocacy activities because they were subject to a narrow definition of lobbying, that practice would presumably only increase. It is unclear how significant this regulatory arbitrage may become, but it certainly poses a danger and undermines the basis for providing charities with a narrower definition of lobbying.

For all of these reasons, the differences among interest groups does not justify having multiple definitions. A single definition is preferable for all the rules governing lobbying, even given variations among interest groups. There is, however, one respect where a difference may be justified. Charities are required

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254. See *supra* note 205 and accompanying text.

255. See *supra* note 207.

256. See Treas. Reg. § 1.501(c)(4)-1(a)(2) (1990) (defining promoting social welfare as “promoting in some way the common good and general welfare of the people of the community”).

257. See *supra* note 207.

to serve the public interest, including with respect to their educational activities.<sup>258</sup> For this reason, reports and similar publications by charities are usually given more credence than similar documents from other sources. Congress may have recognized this difference when it created various education-related exceptions to the definition of lobbying for charities that elect the optional lobbying limitation regime but rejected those same exceptions for businesses.<sup>259</sup> It is worth considering whether this distinction should remain with respect to exceptions from the general definition of lobbying.

*B. Focusing on the Action or the Actor?*

Earlier definitions of lobbying focused on the type of government action that was the target of the influence attempts.<sup>260</sup> It was only the most recent definitions—for businesses in the tax rules and then in the LDA—that shifted the focus in part or in whole to the type of government actor that was the target.<sup>261</sup> The LDA's legislative history indicates that this shift was at least in part because of concerns about scandals involving executive branch officials, particularly the Reagan-era Wedtech scandal.<sup>262</sup> As with the Abramoff scandal, the fact that the laws in existence at the time of the scandal proved, for the most part, sufficient to criminalize the undesirable behavior did not deter Congress from expanding the reach of the LDA to such officials.<sup>263</sup>

This modern shift from government action to government actor is strongly supported by the existing interest group research and the reality of how government operates. As noted above, both the legislative branch and the executive branch have numerous formal and informal ways of influencing the activity of the other branch.<sup>264</sup> At the same time, vulnerability to different types of influence—including methods most likely to detract from the public interest—varies

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258. See Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (1990) (requiring all organizations described in I.R.C. § 501(c)(3) to serve “a public rather than a private interest”).

259. See *supra* note 132 and accompanying text.

260. See *supra* Section I.C.

261. See *supra* notes 102-103, 114-116 and accompanying text.

262. 141 CONG. REC. 20,007 (1995) (statement of Sen. Levin) (citing the Wedtech scandal as an example of why seeking to influence high-level executive branch officials should be included within the scope of the LDA). The Wedtech scandal involved a company that became a multi-million dollar military contractor by both falsely claiming it was a minority-owned business and by bribing various government officials, including members of Congress. See generally JAMES TRAUB, TOO GOOD TO BE TRUE: THE OUTLANDISH STORY OF WEDTECH (1990).

263. See TRAUB, *supra* note 262, at 348-63 (describing the criminal convictions that resulted from the Wedtech scandal).

264. See *supra* notes 152-155 and accompanying text.

primarily based on the government actor involved, not the government action at issue.<sup>265</sup> It therefore makes more sense to focus on the government actor, not the government action.

The most likely objection to a government-actor-focused definition is that it is more difficult to administer than a government-action-focused definition. At least at the federal level, this does not appear to be a major concern. The LDA uses a government actor definition, yet, thanks to the specificity of that definition and the detail of the federal job classification system, it is reasonably easy to determine who falls within the definition.<sup>266</sup> Congress essentially publishes a list of such positions every four years, and that government officials are currently required, if asked, to identify whether they are covered by the LDA or not.<sup>267</sup> It is true that unlike the term “legislation,” it is not intuitively obvious who is a covered government official under the LDA because of the complexities of the federal job classification system. But this administrative problem could be easily overcome by requiring an administering agency to issue a list of all covered officials and employees on a regular basis (probably using the congressional list as a starting point). The IRS would probably be best suited for this role, both because of its insulation from political influences and its experience with producing regularly updated guidance in a timely fashion.<sup>268</sup>

The tax law definition of lobbying raises a significant issue if extended to governments other than the federal government. Namely, the issue is which executive branch officials will be included in the definition. This is hard to resolve given the variations among state, local, and non-U.S. governments. It was in part because of such variations that Congress chose to completely exempt advocacy at the local level from the definition of lobbying for business expenses deduction purposes.<sup>269</sup>

### C. Which Actors?

Most of the research previously summarized focuses on the federal government.<sup>270</sup> The LDA and federal restrictions on lobbyists also only apply at the

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265. See *supra* Subsection II.A.4, Section II.C.

266. See *supra* notes 108 and accompanying text.

267. See 2 U.S.C. § 1609(c) (2000); POLICY POSITIONS, *supra* note 108.

268. See Mayer, *supra* note 18, at 671 (noting the various reasons why the IRS is relatively insulated from partisan political influences); see, e.g., 2007-1 I.R.B. (including eight detailed revenue procedures that the IRS updates on a yearly basis).

269. See *supra* note 138.

270. For exceptions, see, for example, Pranab Bardhan & Dilip Mookherjee, *Capture and Governance at Local and National Levels*, 90 AM. ECON. REV. 135 (2000) (attempting to assess “the relative susceptibility of national and local governments to interest-group capture”); and JEFFREY M. BERRY ET AL., POWER AND INTEREST GROUPS IN CITY POLITICS (2006), <http://www.ksg.harvard.edu/rappaport/down->

federal level since the states have their own disclosure requirements and rules limiting interactions with lobbyists.<sup>271</sup> It is therefore appropriate to start with that level of government and attempts to influence those actors who should be encompassed within the definition of lobbying.

### 1. Which Federal Government Actors?

There are several methods that interest groups may use to influence government actors to prefer the interests of those groups over the more general public interest without significant offsetting benefits to the government decision making process.<sup>272</sup> Looking at the activities of interest groups and their lobbyists in this fashion reveals some easy choices. Members of Congress and their staffs are most vulnerable to the problematic methods because of their reliance on reelection, the often temporary nature of their government service,<sup>273</sup> and their ability to have closed door meetings with lobbyists that protect the information they receive from outside scrutiny. While certain methods of influence, such as providing gifts or outright bribery, have been foreclosed or sharply limited, these rules do not extend to these other methods. Attempts to influence their actions should therefore usually be considered lobbying.

At the other extreme, federal judges and their staffs are for the most part not vulnerable to these problematic methods. Judges are not elected, and they and their staffs usually do not depart for post-government service positions.<sup>274</sup> One significant exception are the law clerks hired for a year or two of service by most federal judges, but there is no evidence that these usually newly minted lawyers have been compromised by post-clerk employment offers. The reason for this lack may be the significant institutional limitations on the judiciary. Judges are limited by judicial canons that emphasize actual and perceived impartiality and are restricted by procedural rules that sharply limit *ex parte* con-

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loads/berry\_interest\_groups.pdf (focusing on capture at the local level, using research on eight cities in eastern Massachusetts).

271. See generally PETER C. CHRISTIANSON ET AL., *LOBBYING, PACs, AND CAMPAIGN FINANCE: 50 STATE HANDBOOK* (2007) (providing a comprehensive and detailed overview of both lobbying and campaign finance laws in all fifty states, as well as at the federal level).
272. See *supra* note 215 and accompanying text. *But see supra* note 212 and accompanying text (presenting contrasting methods such as providing accurate information to government actors, gathering information about government actions that can be shared with the group's members and the public as a whole, and providing a vehicle through which the group's members and other individuals can participate in the political process along with other affected interest groups).
273. Although for some members of Congress this incentive is lessened because they are able to retain their seats for many years.
274. See *supra* Subsection II.A.3.

tacts and expose information they receive to the typically intense scrutiny of an opposing party and its lawyers. While there may be a few avenues for problematic interest group influence, such as the process by which federal judges are initially selected for nomination, the interest of a particular judge in being elevated to the next level, or the funding of judicial conferences in pleasant locales, none of these avenues has been demonstrated to have a significant effect on federal judicial decisions.<sup>275</sup> For these reasons, attempts to influence judges and their staffs should not be included within the definition of lobbying.

The extent to which the definition of lobbying should include attempts to influence executive branch officials and employees, which for these purposes would include officials and employees of independent agencies as well as the President, Vice President, and all who report directly or indirectly to them, is a more difficult question. Most of the research has indicated that government actors in the executive branch have many of the same vulnerabilities as government actors in the legislative branch, including: reelection concerns (for the President, Vice President, and their successors, most immediately); the need for post-government service employment (a particularly strong concern given the limited tenure of any given President and Vice President); and the ability to meet behind closed doors with interest group representatives.<sup>276</sup> But such research has focused in large part on the higher-level officials, and at least some researchers have noted (albeit with limited or no empirical evidence) that career civil servants may have different motivations and so may be less vulnerable to the more problematic interest group methods.<sup>277</sup>

More specifically, career civil servants are insulated to a significant extent from reelection concerns (and indeed are legally prohibited from engaging in partisan politics).<sup>278</sup> Even motivations that may be subject to indirect influence through legislative branch actors or higher level executive branch actors, such as a desire for a larger discretionary budget or greater authority, may be limited or non-existent for most career civil servants because they do not control a par-

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275. *But see* Calabresi, *supra* note 160, at 60-62 (arguing that most federal judges are, in fact, accountable in some way to a local political base); Douglas T. Kendall & Jason C. Rylander, *Tainted Justice: How Private Judicial Trips Undermine Public Confidence in the Judiciary*, 18 *GEO. J. LEGAL ETHICS* 65 (2004) (arguing that such trips at least create an appearance of impropriety). Judges are also already required to disclose the receipt of gifts and reimbursements exceeding \$250 that were paid for by private organizations. *See* Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (codified at 5 U.S.C. § 101 (2000)).

276. *See supra* notes 169-173 and accompanying text.

277. *See supra* note 174 and accompanying text. This conclusion assumes that such lower-level executive branch officials are sufficiently deterred by anti-bribery and similar statutes so as not to be vulnerable to most blatant appeals to personal self-interest. *See supra* note 72 and accompanying text.

278. *See* 5 U.S.C.A. §§ 7321-7326 (West 2007) (sharply limiting the political activities of executive branch employees). This is commonly known as the Hatch Act.

ticular budget that is set by such other government actors and more authority can easily translate into more work and distraction from the core mission, and so may not be desired.<sup>279</sup>

There are also institutional constraints on the extent to which interest groups can influence career civil servants other than through providing information in a public—and therefore verifiable—manner. These include the Administrative Procedure Act and other procedural rules and practices, as well as a general culture that promotes appearing neutral.<sup>280</sup> These are in addition to the legal prohibitions on partisan political activity already and, of course, the prohibitions or sharp limits on the ability to receive financial or other personal favors.<sup>281</sup>

The data on the differences between executive branch actors are limited. But for all of the reasons just stated, it appears that it would be reasonable to distinguish career civil servants from other, higher-level executive branch actors, with attempts to influence the former not being considered lobbying while attempts to influence the latter would. The LDA already makes exactly this distinction on account of the perception that these high-level executive branch officials are more susceptible to interest group influence. It would be reasonable and consistent to adopt that distinction for tax purposes as well.<sup>282</sup>

## 2. Which State, Local, and Foreign Government Actors?

The LDA's detailed line drawing for executive branch actors does not, however, address where the line should be drawn in the tax rules for state, local, and foreign government actors. Turning first to state and local governments, there are again some simple choices. There is no reason to believe that state legislatures, elected state executive branch officials and their immediate staffs, and elected officials and their immediate staffs at the local level, are any less vulnerable than federal elected officials to the problematic interest group influence methods already identified.<sup>283</sup> Attempts to influence such government actors should therefore be included in the definition of lobbying.

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279. See *supra* note 180 and accompanying text.

280. See *supra* note 182 and accompanying text.

281. See *supra* notes 71-72 and accompanying text.

282. See *supra* note 113 and accompanying text.

283. It is often more difficult to distinguish at the local level between a "legislative branch" official and an "executive branch" official, particularly since local governments often are not cleanly divided into two such branches. See, e.g., 26 C.F.R. § 56.4911-2(d)(4) (2007) (defining administrative (i.e., executive branch) bodies as including "school boards, housing authorities, sewer and water districts, zoning boards, and other similar . . . special purpose bodies, whether elective or appointive"); Avakian-Martin, *supra* note 138, at (reporting a congressional staffer's explanation that Congress chose not to deny a business expense deduction for ex-

Judges at the state and local levels make for a more problematic comparison to the federal judges, however, since many of them are elected. The potential effects on their decision-making from having to raise campaign funds and solicit votes have been extensively discussed by others.<sup>284</sup> Not surprisingly, these discussions indicate at least a potential for influence through means similar to those found problematic for legislative and executive branch elected officials, particularly through the provision of campaign contributions and other reelection aid and through the possibility of lucrative post-government service employment. At the same time, however, state and local judges are subject to much the same type of institutional restraints as federal judges, including legal requirements to be—and appear to be—impartial and sharp limitations on ex parte contacts. Also, for the most part, they are limited to deciding specific cases and controversies, although their decisions, and particularly those of the higher courts, can establish precedents that affect many individuals and entities beyond the parties in front of the court.

These factors make it a closer call with state and local judges than with federal judges. However, both the institutional limitations on state and local judges and the necessarily public nature of cases brought before them arguably tilt the balance toward excluding attempts to influence them—which are primarily through litigation—from the definition of lobbying. The administrative con-

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penditures for attempts to influence the actions of local officials because of the difficulty of determining whether such action related to “legislation”). For this reason, I will refer to local elected officials generally without distinguishing between legislative and executive branch officials.

284. See, e.g., James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 AM. POL. SCI. REV. 59 (2008) (concluding, based on survey data, that campaign contributions and election-related attack ads lead to a reduction in the perceived legitimacy of state courts with elected judges, although policy pronouncements made during campaigns do not have this effect); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. (forthcoming 2008) (concluding that as judicial elections have come to resemble other candidate elections, they also have become more subject to political influence, including the influence of interest groups); Margaret S. Williams & Corey A. Ditslear, *Bidding for Justice: The Influence of Attorneys’ Contributions on State Supreme Courts*, 28 JUST. SYS. J. 135, 135 (2007) (finding little evidence of “a systematic relationship between attorneys’ campaign contributions and the votes” of elected Wisconsin judges, but also finding evidence suggesting that “some individual judges may be influenced”); Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary* (Univ. of Chicago Law & Econ. Olin Working Paper No. 357, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1008989](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008989) (concluding that the available empirical evidence does not support the common view that elected judges are more vulnerable to political pressures than appointed judges). See generally RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS (Matthew J. Streb ed., 2007) (describing the current state of judicial elections, including proposed reforms).

venience of having a consistent definition at the federal, state, and local levels also weighs, at least in a minor way, toward excluding such attempts from the definition.

Making distinctions among those who report, directly or indirectly, to elected state executive branch officials and elected local officials is more difficult, however.<sup>285</sup> Probably for this reason Congress chose not to extend the “covered executive branch official” concept to state and local officials (even elected ones) when it chose to deny a business expenses deduction for expenditures for attempts to influence the official actions or positions of such officials.<sup>286</sup> To attempt to draw a line between “career civil servants” and those who are not for all fifty states, the District of Columbia, and all localities ultimately would be a mammoth undertaking and practically impossible to comply with and enforce.

Using some type of distinction between government officials with protections “similar to” those enjoyed by federal career civil servants and others would also introduce significant uncertainty into the definition, which could lead to confusion and possibly a significant chilling effect on charities contacting state executive branch and local officials. The existing rules for charities—and particularly the vague definition of lobbying that applies to most charities—have almost certainly had a chilling effect on their participation in public policy debates.<sup>287</sup> For example, a recent survey of charity executives found that almost thirty percent of them did not know they could (albeit to a limited extent) support or oppose federal legislation at all.<sup>288</sup> It was in large part for this reason that Congress created the optional, elective regime for measuring the permitted amount of lobbying by public charities.<sup>289</sup>

For this reason, the tax definition of lobbying should only extend to attempts to influence the official acts or positions of elected officials. To prevent

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285. Elected state legislatures usually have staffs whose very employment depends on the reelection of particular legislators and pleasing those legislators, so it is an easy call to say that attempts to influence state legislative staffs as well as state legislators should be included within the definition of lobbying.

286. See 26 U.S.C. §§ 162(e)(1)(D), 162(e)(6) (2000) (including only federal officials within the definition of a “covered executive branch official”).

287. JEFFREY M. BERRY & DAVID F. ARONS, *A VOICE FOR NONPROFITS* 60-65 (2003) (citing evidence strongly supporting this point); see also Berry, *supra* note 195, at 22-28 (reiterating and expanding on this point).

288. TUFTS UNIV. ET AL., *SNAP: STRENGTHENING NONPROFIT ADVOCACY PROJECT: OVERVIEW OF FINDINGS* 54-56 (2002), <http://www.ombwatch.org/snap> [hereinafter *SNAP SURVEY*]; see also GARY D. BASS ET AL., *SEEN BUT NOT HEARD: STRENGTHENING NONPROFIT ADVOCACY* 35-37, 174-81 (2007) (discussing the results of the *SNAP SURVEY*, which indicate that confusion about the existing tax laws deters many charities from engaging in permitted advocacy and lobbying).

289. BERRY & ARONS, *supra* note 287, at 64-65.

## WHAT IS THIS “LOBBYING” THAT WE ARE SO WORRIED ABOUT?

circumvention of this rule, however, the definition should also include *indirect* attempts to influence such actions by contacting other government officials. Without this latter provision, it would be relatively easy for interest groups to have a closed door meeting with an appointed executive branch official who would then, at the group’s request, communicate whatever information was provided in that meeting—whether accurate or not, and possibly including indications of reelection aid or post-government service employment—to the elected official (legislative or executive) with the authority to act on the request. Even with this latter provision an interest group’s attempts to influence an appointed elected official with regard to that official’s own duties or positions would not be captured, but given the line drawing difficulty already discussed the only practical way to avoid this underinclusion would probably be to include all attempts to influence state executive branch and local government officials and employees, which would almost certainly be highly overinclusive. Given that the effectiveness of the tax rules in curtailing interest group use of problematic methods is unclear (although assumed for purposes of this article), it is probably better to be underinclusive rather than overinclusive in this situation.

For foreign government actors somewhat different considerations apply. The IRS has made it clear that under the current definition of lobbying, seeking to influence the official duties of such actors can fall within the various tax rules, at least with respect to charities.<sup>290</sup> But the reality is that given the enormous variety of foreign government structures and centers of political power (for example, in many European countries political parties are often the key decision makers, not individual elected officials), and the interests those governments have in regulating advocacy directed at their own government’s actions (and the lesser U.S. interest in regulating such advocacy as compared to advocacy directed at U.S. governmental actors or actions), a simple, easy-to-administer definition is probably preferable to trying to create a fine-tuned but complicated definition. For this reason, a similar definition as used for state and local governments would be appropriate—attempts to influence legislators, their staffs, and other elected officials besides judges with respect to their official duties or positions—but with an express caveat that for foreign governments the determination of whether a particular government official or employee falls within the definition would only need to be reasonable and made in good faith to be accepted. Such a provision should limit the burden on both taxpayers and the IRS in administering the tax rules regarding lobbying. An even simpler alternative would be to exclude attempts to influence foreign government actors from the definition of lobbying—which may be effectively the rule many if not most businesses and charities currently follow given the relative obscurity of the

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290. See Rev. Rul. 73-440, 1973-2 C.B. 177-78 (including action by foreign legislative bodies within the definition of legislation for charities).

tax ruling extending the definition of lobbying to reach advocacy directed at foreign governments.<sup>291</sup>

*D. What About the Grassroots?*

There is one other major decision regarding the scope of the lobbying definition that needs to be addressed before turning to possible exceptions. Interest groups do not try to influence government actors only by direct contacts. They also use indirect or *grassroots* lobbying—the long-standing tactic of encouraging members of the public who are sympathetic with the group’s positions and part of the actor’s constituency to contact the actor themselves.<sup>292</sup> Interest groups also engage in less targeted efforts to modify public opinion on issues relating to possible future government action, although such efforts can be difficult to distinguish from more general commercial advertising and public education.<sup>293</sup>

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291. The extension of these rules to attempts to influence foreign government legislation is only found in a single Revenue Ruling from 1973 relating to charities. *Id.* Even though that ruling has been cited in various informal IRS documents, it is unlikely that most charities are aware of it. *See, e.g.,* Kindell & Reilly, *supra* note 31, at 272 (briefly describing this ruling). At least one commentator has also argued for relaxing the lobbying limitation for charities because that limitation inhibits efforts to promote democracy in other countries. Nina J. Crimm, *Democratization, Global Grant-Making, and the Internal Revenue Code Lobbying Restrictions*, 79 TUL. L. REV. 587 (2005).
292. *See* HERRING, *supra* note 3, at 7 (“Man has . . . always sought to advance his cause by alliance with like-minded fellows.”); *id.* at 59 (noting that the first and most important function of any lobbying group is to dispense “propaganda” to the public); Logan & Patten, *supra* note 3, at 61-62 (noting that legislators are likely to be swayed by communications from their constituents, even when it is apparent that those communications were prompted by a lobbyist’s instigation); *id.* at 64-65 (molding public opinion generally); *id.* at 83-85 (concerns regarding grassroots activities). For early examples, see *Cammarano v. United States*, 358 U.S. 498 (1959); *Textile Mills Sec. Corp. v. Comm’r*, 314 U.S. 326 (1941); and Logan & Patten, *supra* note 3, at 9. For recent examples of such efforts, see BERRY & WILCOX, *supra* note 2, at 113-18; and KOLLMAN, *supra* note 161, at 25 (noting that while policy preferences among the public remain fairly static, the salience of issues to voters can change frequently and rapidly, and that lobbyists can help to effect such changes in issue salience).
293. *See* HERRING, *supra* note 3, at 61 (noting that even a journal sent by an association to its members can serve as effective lobbying material); KOLLMAN, *supra* note 161, at 37 (noting that half of surveyed interest groups advertise in some form and that one fourth hold press conferences on occasion); Logan & Patten, *supra* note 3, at 61-62 (noting that, as lobbyists refine their tactics, “it will become increasingly difficult for legislators to distinguish a manufactured [public] sentiment from a real one”).

Perhaps for this reason, to the extent rules governing lobbying have reached such activities they have only extended to efforts clearly tied to legislation.<sup>294</sup>

Several commentators have argued for grassroots lobbying to be included in the definition of lobbying, either for purposes of the disclosure rules or for purposes of the tax rules.<sup>295</sup> These commentators advance various arguments for including grassroots lobbying within the reach of the disclosure rules. One argument is that such disclosure will better inform competing interest groups about these activities, and so lead to greater and more equally matched interest group competition.<sup>296</sup> Another argument is that such disclosure will expose so-called “astroturf” campaigns, where an interest group generates fake or at least short-lived and shallow public support for its position through sophisticated marketing techniques.<sup>297</sup> Such campaigns could also create the false impression that many members of the electorate may vote against the targeted legislator unless he or she supports their position. A third argument is that the primary benefit of lobbying is the provision of useful information to government decision makers, and that benefit can readily and more easily be provided through direct lobbying.<sup>298</sup> Grassroots lobbying in contrast, it is argued, provides no more information than that an interest group could provide more easily through direct lobbying.<sup>299</sup>

The problem with these arguments is that they assume grassroots lobbying presents a risk of harm to the democratic process that is equal to some of the direct lobbying techniques discussed previously while at the same time having minimal offsetting benefits. If that were the case, then the administrative burden and potential chilling effect of including such efforts within the definition

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294. See I.R.C. § 162(e)(1)(C) (2000) (reaching attempts to influence the public “with respect to . . . legislative matters[] or referendums”); Treas. Reg. § 1.162-20(b)(2) (as amended in 1995) (including in lobbying seeking to influence legislators indirectly “by urging or encouraging the public to contact [legislators] for the purpose of proposing, supporting, or opposing legislation”); Treas. Reg. § 56.4911-2(b)(2)(ii) (1990) (defining grassroots lobbying as only including communications that refer to specific legislation, reflect a view on such legislation, and encourage the recipient to take action with respect to such legislation).

295. *E.g.*, Galston, *supra* note 10, at 1338-1343 (tax rules); Krishnakumar, *supra* note 10, at 548-51 (disclosure rules); Luneburg & Susman, *supra* note 10, at 44-46 (disclosure rules).

296. Krishnakumar, *supra* note 10, at 548-51.

297. Luneburg & Susman, *supra* note 10, at 44-46; *see also* KOLLMAN, *supra* note 161, at 157-60 (arguing that “astroturf” lobbying is only a concern where both the popularity and salience (intensity of support) of a policy are low, in which case the lobbying effort can result in a least a temporary misleading impression of public support).

298. Galston, *supra* note 10, at 1339.

299. *Id.* at 1348.

of lobbying for one or all of the applicable rules might be appropriate. But neither of these assumptions appears to be correct.

First, the two screens that any grassroots lobbying effort must pass through in order to influence government actors limits its effectiveness. The initial screen is that a sufficient number of members of the public must be convinced that the issue at stake is a significant enough concern to them personally that it is worth taking the time to communicate the interest group's position to the relevant government officials. While savvy marketing may almost always generate some response, it would be presumptuous to assume that a significant response could be obtained without the influenced members of the public at least agreeing to some extent with the interest group's position and agreeing strongly enough to respond to the request for action.<sup>300</sup> It would appear that it is for this reason that grassroots lobbying is more of a preferred technique for interest groups that have large, committed memberships who can be relied upon to respond to a grassroots lobbying request because they usually agree with the group's positions.<sup>301</sup> The other screen is the government actors themselves, who are undoubtedly well aware of the long-standing practice of generating apparent grassroots support for an interest group's position.<sup>302</sup> Probably for these reason, many government actors appear to significantly discount the results of grassroots lobbying efforts which appear to be primarily organized by a central organization and not have required much effort by the individual members of

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300. See BERRY & WILCOX, *supra* note 2, at 118 (noting that even so-called "astroturf" campaigns rely in large part on identifying sympathetic citizens, even if those citizens are not longstanding members of a particular interest group); FARBER & FRICKEY, *supra* note 29, at 82 (noting problems with assuming voters are constantly fooled); Shaviro, *supra* note 200, at 49-50, 56; Troyer, *supra* note 139, at 803. *But see* Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003) (arguing that individuals are much more influenced by their situations, including marketing efforts, than is commonly acknowledged).

301. See KOLLMAN, *supra* note 161, at 100 (noting "strong empirical support" that interest groups generally only use grassroots lobbying when the group's position corresponds to public preferences, although strength of support is more important than overall popularity because well targeted grassroots lobbying can rely on intense supporters of an otherwise unpopular policy); *id.* at 158 (concluding that grassroots lobbying is relatively rare when both popularity and salience (intensity of support) for a policy are low, which are the conditions where such lobbying is mostly likely to create an incorrect impression of public support).

302. See BERRY & WILCOX, *supra* note 2, at 116 ("Of course, policymakers know that these communications are coordinated and that interest groups have spent time and money to encourage their members to be active."); sources cited *supra* note 292 (documenting both early and recent instances of sophisticated and extensive grassroots lobbying campaigns).

the public.<sup>303</sup> Indeed, it is the fact that elected government officials serve as filters for the transformation of public opinion into government actions that most scholars have cited as one of the primary reasons why our current constitutional structure is resistant to interest groups.<sup>304</sup> Government officials may also be able to check on the relative support and perhaps even salience of a particular issue by looking to other sources such as opinion polls, if given sufficient time. It is true that the growth of electronic communications has almost certainly reduced the time and effort required by individuals to respond to a grassroots lobbying appeal by contacting their representatives. But even assuming the response rate to such appeals has significantly increased, it is still likely that government actors are able to differentiate between mere electronic forwarding of a form message written by a central organization and more personalized messages that represent a greater level of commitment to an issue or position, and to assign different weights to the communications they receive as a result.

Second, grassroots lobbying efforts often provide two significant benefits. Such efforts may keep the public informed about pending government actions, thereby increasing the transparency of government.<sup>305</sup> Perhaps just as importantly, such efforts may stimulate the provision of information to government actors that they may otherwise lack—at a minimum, such efforts reveal that an interest group is willing to spend significant resources to support a particular position.<sup>306</sup> The ability of grassroots lobbying to provide inaccurate information—to the public and, through them, to government officials—is also tempered by its relatively public nature and therefore exposure to scrutiny by competing interest groups, the media, and the public.

Given these benefits and the limited ability of grassroots lobbying to influence government actors to choose the interests of a particular interest group over the public interest, grassroots lobbying should not be included within the

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303. KOLLMAN, *supra* note 161, at 73-75 (citing research indicating that members of Congress are much less responsive to constituent communications that appear to be highly orchestrated by a central organization).
304. See Reynolds, *supra* note 210, at 1649-51 (arguing that this intermediary role served by elected public officials provides resistance to both minority and majority tyranny, in contrast to direct popular democracy that would open the door to majority tyranny).
305. See BERRY & WILCOX, *supra* note 2, at 6-8 (noting that interest groups contribute to government transparency in six key ways: representing constituents, increasing public participation, educating the public, framing political issues, building legislative agendas, and monitoring programs already implemented).
306. See *id.* at 116 (noting that grassroots lobbying efforts provide important signals about an interest group’s commitment to a given position); KOLLMAN, *supra* note 161, at 155 (concluding that it appears grassroots lobbying by interest groups “often communicates real content about public opinion to policymakers”); MACEDO, *supra* note 212, at 12 (arguing that for many issues citizens may provide expertise that government actors lack).

single definition of lobbying. This would be a significant change for the tax rules, which have always reached grassroots lobbying (the LDA and its predecessor have never reached grassroots lobbying and recent efforts to extend the LDA in this fashion have fallen short). But its effects would probably be less far-reaching than might be expected for two reasons. First, businesses may spend what they deem advisable to spend on lobbying, including grassroots lobbying, regardless of the tax consequences because the potential costs of legislation or other government actions heavily outweigh any possible tax costs. Second, for charities and private foundations grassroots lobbying is currently defined so narrowly that it is relatively easy to engage in “public opinion” campaigns that carefully avoid falling within that definition by, for example, simply excluding a “call to action” that would either explicitly ask or strongly suggest that the target of the communication contact a government official.<sup>307</sup> But even if the effect is significant, inhibiting grassroots lobbying either through taxing it or disclosing it does not appear justified. It should therefore not fall within the definition of lobbying.

Similar considerations argue, although not as strongly, for excluding attempts to influence the public with respect to ballot initiatives, referenda, and other voter-determined lawmaking. While such attempts lack the double-filter of public and government actor—the voters being in effect the legislature—the public nature of such attempts both encourage public involvement in political decision making and expose such attempts to scrutiny by opponents, the media, and the public. They therefore arguably have more in common with grassroots lobbying than direct lobbying of government actors who be misled by privately provided inaccurate information or enticed by promises of electoral support or other benefits.

### *E. Exceptions*

This section will not try to develop all of the possible exceptions in detail—which could be an article in itself—but will instead provide general guidelines for the types of exceptions that should exist. Broadly speaking, the current definitions provide three types of exceptions: communications to government actors and the public with characteristics that make them likely to be accurate, such as testifying before a congressional committee or publishing a widely distributed analytical report; communications that facilitate internal communications or protect the survival of charities; and administrative convenience excep-

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307. See Treas. Reg. § 56.4911-2(b)(2) (1990) (providing that a communication will only qualify as a grassroots lobbying communication if it includes: a specific request to contact a legislator or legislative branch employee; contact information for such a person; a petition or tear-off postcard to communicate with such a person; or specific identification of one or more legislators as linked them in some way to the legislation at issue or as the recipient’s representative).

tions.<sup>308</sup> Differences between the exceptions provided by the various sets of rules appear to be driven by two considerations: differences in the general definition of lobbying, such as the fact that the LDA does not reach any communications with the public so no LDA exceptions are needed relating to such communications; and a bias in favor of charities in the tax rules. The first set of differences become unnecessary if Congress adopts a single definition of lobbying, as this article proposes. The second set of differences suggests that perhaps the exceptions should differ for charities as opposed to for business. But before turning to that issue, we should address the question of what exceptions should exist for all types of groups.

These existing exceptions, when combined with the earlier discussion of interest group influence, suggest that several categories of exceptions should exist to the proposed single definition of lobbying. First, there should be a set of exceptions for communications to covered government actors that are done in a setting that exposes such communications to scrutiny by competing interest groups, the media, and the public, thereby deterring the provision of both inaccurate information and explicit or implicit promises of non-informational aid (e.g., campaign contributions). Such exceptions might include, for example, public testimony, publicly available comments submitted in response to a public request for comments, and participation on government advisory committees.<sup>309</sup>

Second, with the tax rules now having a definition based on the government actor, not the government action, there should be a common set of exceptions for communications relating to proceedings that only affect a specific entity or individual, that are subject to confidentiality requirements, or that are part of a congressionally recognized private-public relationship, such as exist in the LDA. Such exceptions might include communications that are part of a law enforcement or congressional investigation, communications that are part of a whistleblower complaint protected by law, communications that are required by law to be kept confidential, agency adjudications, and personnel matters for specific individuals.<sup>310</sup>

Third, there should be some exceptions to recognize situations where the administrative burden of tracking lobbying activity is considered excessive. These exceptions might include de minimis exceptions, for example.<sup>311</sup> Communications with foreign government actors might also be included among these exceptions (for tax law purposes), for the reasons already discussed.<sup>312</sup>

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308. See *supra* Subsection I.C.4.

309. See *supra* notes 128-130 and accompanying text.

310. See *supra* note 128.

311. See *supra* note 140.

312. See *supra* notes 290-291 and accompanying text.

Finally, there should be an exception to clarify that communications with the public—which are not covered by the proposed single definition of lobbying—are not swept into the definition of lobbying by virtue of the fact that they reach a covered government actor in that actor’s capacity as a member of the public. For example, if a group sends out a large-scale direct mailing that happens to include a member of Congress, that fact should not transform the entire mailing into lobbying (or even the single letter that happens to reach the member, although a *de minimis* exception would probably cover that eventuality).

That leaves the question of whether there should be any differences in the exceptions provided because of differences between types of interest groups. The bias in favor of charities noted above probably arises from the fact significantly stricter rules apply to charities as compared to the rules that apply to businesses. The charity rules limit lobbying to no more than an insubstantial activity and completely prohibit lobbying for private foundations, and impose the possible draconian sanction of revocation of tax-exempt status. The rules for businesses do not limit the amount of lobbying at all but only deny a deduction for lobbying expenditures, and impose at worst interest and penalties on a business that deducts its lobbying expenditures in violation of this rule. Given the stricter rules for charities, Congress may have wanted them to have access to a larger range of exceptions. The difference may also be driven by a congressional determination that charities are more likely to be sources of accurate information, or of some combination of these two reasons.<sup>313</sup>

The fact that charities are subject to the strictest rules under the tax laws argues for maintaining the tax law exclusions only available to charities for so-called self-defense lobbying and membership communications.<sup>314</sup> The more difficult question is whether charities should have a broader set of information-providing exceptions either because they face stricter rules, because they are more likely to provide accurate information given their public interest nature, or because they may speak for groups that otherwise lack access to the political process.<sup>315</sup> While this is a closer call, it would appear that for all of these reasons the existing exception for providing nonpartisan research should be continued for charities but not provided to other types of interest groups.<sup>316</sup>

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313. See *supra* notes 141 and accompanying text.

314. See *supra* notes 134-135.

315. See Troyer, *supra* note 139, at 801-02 (noting that Congress defined lobbying much more broadly for businesses than for charities so that more business activities would be caught by the language, making it relatively easier for charities to advocate safely outside the definition’s scope).

316. See *supra* note 128.

CONCLUSION

It is difficult to overstate the importance of the definitional changes proposed here. While in most respect the LDA definition of lobbying, and therefore the definition of who is a registered lobbyist, would not change significantly, the tax definitions would be radically altered. This in turn would have an effect on the LDA and the lobbyist restrictions.

The biggest effect would be on charities. They would face both an expanded and contracted definition of lobbying for purposes of the limitation on lobbying to an insubstantial amount.<sup>317</sup> The definition would be expanded because it would now include not only attempts to influence legislation, but also all attempts to influence the official actions or positions of legislative officials and employees *and* a large group of senior executive branch officials. The definition would at the same time be significantly contracted, however, because it would no longer reach any attempts to influence the public, including grassroots lobbying. Business would experience a similar change, although their tax definition of lobbying includes attempts to influence a limited set of very senior executive branch officials, and they are not, of course, limited in their amount of lobbying, but only limited with respect to their ability to deduct their lobbying expenditures.

This change in tax definition would also have a ripple effect on the LDA and the rules restricting lobbyists. With only minor differences between the tax definition and the LDA definition as they applied to federal lobbying—relating to specific tax exceptions for charities—there would be no significant justification to give entities the option of using the tax definition for LDA purposes. All organizations would therefore be reporting information under the same definition of lobbying under the LDA, and all individuals who had to register as lobbyists because of that definition would be subject to the restrictions on registered lobbyists. Thus the apples and oranges problem created by the current ability of organizations to select which definition to use for LDA purposes would be eliminated, allowing both more accurate and more easy to compare reporting.<sup>318</sup> A single definition also has the benefit of reducing the administrative burden on those subject to these laws.

As importantly, this review reveals that long-standing legal rules need to be tested against current research results and viewed in the context of the universe of legal rules that affect the same behavior. When Congress and the Treasury Department initially defined lobbying they did not have the benefit of the now-decades of research into how interest groups influence government actions and how government functions. Slowly the results of that research crept into the law, particularly with respect to the LDA, but only in a haphazard and inconsis-

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317. And for private foundations, for purposes of the prohibition on their lobbying. *See supra* note 35 and accompanying text.

318. *See supra* note 238 and accompanying text.

tent fashion, as demonstrated by the default definition of lobbying for charities being essentially unchanged since 1934. At the same time, most examinations of these rules have focused on only one or two sets of restrictions, ignoring the totality of the federal laws governing lobbying and, therefore, both the administrative burdens and the potential for regulatory arbitrage created by differences between them.

This examination of the definition of lobbying is therefore only one example of how review of both up-to-date information and rules from multiple substantive areas can lead to important insights regarding how legal rules should be changed to best accomplish their purposes currently and into the future. Examination of a particular statute or other legal rule can still provide valuable insights, but when the ultimate goal is to determine whether particular activities of a regulated community are likely to be changed in the desired direction by a particular legal rule, it is necessary to examine all of the legal rules that have a significant effect those activities. Failure to do so can lead to inconsistencies, loopholes and even contradictory incentives or disincentives. Other possible examples of where this approach could be useful include the previously cited case of looking at how all applicable environmental laws affect the use of a particular property or environmental resource,<sup>319</sup> examining both the election law and the tax rules that regulate election-related activities,<sup>320</sup> and exploring how both tax and applicable non-tax laws, such as real property laws, influence charitable contributions.<sup>321</sup> While such an analysis is more difficult from a scholarly perspective because it requires understanding multiple bodies of laws and their interactions, it potentially is highly rewarding because it can expose unnecessary or even harmful inconsistencies, as occurred here.

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319. See *supra* note 12.

320. For examples, see Mayer, *supra* note 18, and the articles cited in that article, *id.* at 628 n.12, which all discuss the combined effect of election laws and tax laws on “527” groups.

321. See, e.g., Danaya C. Wright & Scott A. Bowman, *Charitable Deductions for Rail-Trail Conversions: Reconciling the Partial Interest Rule and the National Trails System Act*, 32 WM. & MARY. ENVTL. L. & POL’Y REV. (forthcoming 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1081655](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081655).