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What Is This “Lobbying” That We Are So Worried About?

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INTRODUCTION	486
I. CURRENT LAW	492
A. “Lobbying” Regulated	493
1. Taxing Lobbying	494
2. Disclosing Lobbying	501
3. Limiting Interactions Between Government Employees and Lobbyists	504
4. Conclusion	507
B. “Lobbying” Defined	508
1. Lobbying Defined by Government Action	509
2. Lobbying Defined by Government Actor	511
3. Lobbying Defined by Government Action and Actor	513
4. Exceptions	515
C. Conclusion	518
II. INTEREST GROUP INFLUENCE	519
A. <i>How Interest Groups Influence Government Actions</i>	519
1. The Legislative Branch	522
2. The Executive Branch	526
3. The Judicial Branch	529
4. Conclusion	531
B. <i>The Relative Influence of Different Types of Interest Groups</i>	532
C. <i>Desirable Versus Undesirable Influence</i>	539
1. The Process for Determining the Public Interest	541
2. Distinguishing Positive from Negative Interest Group Influence	544

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III. DEFINING “LOBBYING”	545
A. <i>A Single Definition?</i>	545
1. Do Different Rules Require Different Definitions?	546
2. Do Different Interest Groups Require Different Definitions?	548
B. <i>Focusing on the Action or the Actor?</i>	550
C. <i>Which Actors?</i>	551
1. Which Federal Government Actors?	552
2. Which State, Local, and Foreign Government Actors?	554
D. <i>What About the Grassroots?</i>	558
E. <i>Exceptions</i>	562
CONCLUSION	565

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.¹ 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.²

Yet lobbying also has a long history as a pejorative term.³ 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

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

meetings, illicit campaign contributions, and other shadowy dealings that undermine democracy.⁴ 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.⁵

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.⁶ 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.⁷ 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.⁸ Yet no single existing legal defi-

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 (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.⁹

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.¹⁰ It has also tended to

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 EX-EMPT 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-*

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

focus on a particular set of rules rather than a comprehensive review of the regulation of lobbying and lobbyists.¹¹ 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.¹²

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-

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).