Lobbying and the Democratic Process

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INTRODUCTION

Lobbying has a bad reputation. It is perceived as an activity through which businesses control the democratic process; a manner for transmitting false and misleading information to serve the interests of those funding the lobbyists; an expression of collusion between interest groups and policy-makers; and a process that prioritizes the interests of the well-to-do, thus distorting the already crowded public agenda. The exponential growth in lobbying and the increased presence of interest group activity create the perception that severe harm is being caused to public interest, to the point that some who have defined lobbying by interest groups as “the most serious and worrisome problem of American democracy.”

But is lobbying inherently problematic? Despite its negative reputation, lobbying is an important vehicle for ensuring citizen participation in the democratic process and the exercise of constitutional rights, allowing a vibrant and participatory democracy. This article is based on the pluralistic theory of democracy, which views democracy as an arena in which interest groups struggle to attain the utmost realization of their interests. Accordingly, we reject the notion that lawmakers should pursue laws that realize the substantive interpretations of the "public interest" or the "common good". We adopt instead a minimalist approach — laws express the public interest to the extent that they mirror the interests of the majority of the citizens.

Beginning with Mancur Olson’s groundbreaking work in 1965, social scientists have repeatedly shown that the modus operandi of lobbyists and interest groups casts a heavy shadow over the pluralistic vision of a vibrant and participatory democracy, and that interest groups’ lobbying comes often at the expense of the

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1 This warning was made by social scientists as early as 1965. See Grant McConnell, Private Power and American Democracy 25 (1965). In recent years lobbying is growingly perceived as a top concern for many Americans. A recent survey has shown that for 32% of Americans believe that reducing the influence of lobbyists should be a top priority in 2010; even global warming, a known and publicized concern, was considered less urgent (28%). See Pew Center, Public Priorities for 2010, available at http://people-press.org/report/584/policy-priorities-2010.

majority—which by nature is a diffuse group that has difficulty in organizing. This may give priority on the crowded public agenda to certain subjects, at the expense of other subjects, which are no less important. Additionally, the dramatic growth in the number of politicians joining lobbying firms (the "revolving door" phenomenon) raises serious concern about personal corruption. These issues raise particular concerns that the legal arrangements that are the by-products of lobbying do not reflect the interests of the majority of citizens.

This article focuses on another, often overlooked, aspect of lobbying which, it is argued, constitutes a serious failure in the democratic process. Empirical research shows that the lion’s share of lobbying occurs in niches characterized by no involvement of the public and almost no rivalry. This constitutes a failure in the democratic process from the perspective of the pluralistic theory, for it is exactly in those niches that rent-seeking lobbying succeeds. Consequently, regulation of lobbying should focus on those methods that do not correspond to the pluralistic ideal of competition among opposing groups.

The U.S. Lobbying Disclosure Act, 1995 sets several transparency requirements, among them the disclosure of the names of politicians to whom the lobbyist contributes funds and the submission of quarterly reports. These reports should disclose the identities of the clients the lobbyist represents, the subjects on which the lobbyist has worked, the number of laws that she has sought to advance or areas of legislation is which she has lobbied, and all activity conducted in conjunction with the bureaucracy. This article argues that these transparency requirements do not attain the goal of creating a rivalry of the type that the pluralistic conception seeks to advance, and proposes instead to expand the scope of the transparency requirements in the law, by requiring lobbyists to concurrently publish online all written material transmitted to politicians and to list all areas of lobbying activity. This requirement, we believe, will reduce monitoring costs for rival interest groups and is likely to increase competitive lobbying.

Part I begins by explaining decision-makers' motivations for cooperating with lobbyists. Part II evaluates the lobbying phenomenon from the perspective of political theory and adopts a pluralistic approach that views this phenomenon as an important means for ensuring public participation in the democratic process. The article

3 JACK WALKER, MOBILIZING INTEREST GROUPS IN AMERICA (1991). Also see cites at Part III.3.
continues (Part III) by identifying three flaws in the democratic process: personal corruption (the revolving door phenomenon and the dependence on campaign financing); unequal power of influence resulting in the distortion of the public agenda; and niche lobbying without competitive counter lobbying. Finally, Part IV evaluates regulatory responses to these flaws and proposes to expand the current transparency requirements to include the real time online publishing of associated lobbying activities, as response to niche lobbying and non-competition.

I. WHY DO DECISION-MAKERS COOPERATE WITH LOBBYISTS?

While lobbying is certainly not a novel phenomenon, it is different today in both its scope and modes of operation. The past decade has seen a dramatic rise in the number of lobbyists around the world. Between the years 2000 and 2006, the number of registered lobbyists in the United States had more than doubled; presently registered federal lobbyists number approximately 30,000. A dramatic growth was also recorded in the number of lobbyists active in institutions of the European Community in Brussels, with no fewer than 15,000 lobbying on behalf of 1,400 organizations. Similar processes are taking place in other democratic countries: England, Canada, and Australia. Lobbying activity in the past was conducted in a less-established manner through lawyers, accountants and public relations personnel, whereas in recent years a large proportion of lobbying activity is carried out by professional commercial lobbyists—firms that supply lobbying services to a variety of clients.

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5 See Dan Bilefsky, Lobbying Brussels: It’s getting Crowded, N.Y. TIMES (Oct., 29, 2005), at __.


7 For a description of the dramatic increase in the number of lobbyists in Canada, see LANCE W. ROBERTS ET AL., RECENT SOCIAL TRENDS IN CANADA, 1969-2000, 421 (2005).

8 JULIAN FITZGERALD, LOBBYING IN AUSTRALIA (2006).

9 Conor C. McGrath, Towards a Lobbying Profession: Developing the Industry's Reputation, Education and Representation, 5 J. PUB. AFF. 124 (2005). In addition to commercial lobbyists, in-house lobbyists, are hired personnel who are employed by one employer.
The great majority of lobbying activity is undertaken for businesses or professional interests, and only a small proportion for the benefit of ideological organizations or citizen groups.\textsuperscript{10}

The motivation of special interest groups for investing in lobbying is clear.\textsuperscript{11} Growing governmental involvement in nontraditional fields of a citizen's life creates powerful incentives to influence decision-makers and to make a large profit.\textsuperscript{12} A recent study revealed that firms that lobbied for a provision relating to a tax holiday on repatriated earnings created by the American Jobs Creation Act, 2004 received a return in excess of $220 for every $1 spent on lobbying or a 22,000% gain on their initial spending.\textsuperscript{13} A more comprehensive study revealed that firms that increased their lobbying expenditures by 1% substantially lowered their effective tax rates. Taking into account lobbying expenditures, the study concludes, that "for each additional $1 spent on lobbying the mean firm receives somewhere in the range of $6 to $20 of tax benefits."\textsuperscript{14}

What, though, motivates decision-makers to want to cooperate with lobbyists? Political scientists assume that the most powerful motivation is their desire to be re-

\begin{itemize}
\item \textsuperscript{11} The motivation of ideological NGO's for investing in lobbying activities may be other than influencing decision makers. A study that analyzed the lobbying activity of ideological organizations in the United States reveals that organizations frequently make use of lobbying even when chances of success are very low. What motivates them in such cases is the desire to show their supporters that they are active and to consequently ensure their continued support of the organization. See David Lowery, Why Do Organized Interests Lobby? A Multi-Goal, Multi-Context Theory of Lobbying, 39 Polity 29, 36-37 (2007). Lowey argues that women’s organizations knew well in advance that lobbying against the Bush Administration’s nominations to the courts would not be successful, but nonetheless acted, mainly in order to show action and thereby assure recruitment of new members to their organizations.
\item \textsuperscript{12} Beth L. Leech et al., Drawing Lobbyists to Washington: Government Activity and the Demand for Advocacy, 58 Pol. Res. Q. 19 (2005) (showing that the levels of lobbying increase as government activities increase).
\end{itemize}
Three theories attempt to explain why cooperating with lobbyists furthers politicians’ aspirations for reelection: lobbying as an exchange, lobbying as persuasion, and lobbying as a legislative subsidy.

The theory of lobbying as an exchange offers a simple and intuitive explanation for politicians’ quid pro quo cooperation with lobbyists: Politicians receive assurances of voter support, as well as money, both of which are vital for furthering her re-election. A significant benefit that interest groups offer to politicians—and in many cases also to bureaucrats—is the reward of corporate employment, often in a lobbying firm, at the end of public service. This phenomenon is termed “the revolving door.”

Despite the attractiveness of this approach, it seems to provide at most only a partial explanation for cooperation. First, with respect to guaranteeing voter support, this approach can only explain a politician’s cooperation with interest groups that are backed by a large number of supporters, such as some ideological interest groups or labor unions. It does not explain cooperation with businesses, which usually cannot directly assure voter support on a similar scale. Second, with respect to financial exchanges (contributions to an election campaign), many democratic countries have legislation limiting corporate donations to election campaigns and also provide public funding for these campaigns. Despite these regulations, lobbying still grows at a significant pace in those countries. Thus, politicians’ growing dependence on money cannot fully account for the exponential growth of lobbying and the willingness of the lawmakers to cooperate with lobbyists.

The second attempt to explain this phenomenon is found in the theory of lobbying as persuasion. According to this theory, such cooperation increases the chances of a representative's re-election, because the lobbyist supplies information relating to what voters want; thus politicians gain knowledge about which way the wind is blowing. Since representatives frequently have no clear idea of the necessary stances to be taken in order to be re-elected, interest groups—through lobbyists—

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15 See, ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1950); Melvin J. Hinich, and Peter Ordeshook. Plurality maximization vs. vote maximization: a spatial analysis with variable participation. 64 AMERICAN POLITICAL SCIENCE REVIEW 772 (1970).

invest in obtaining information about the opinions of citizens residing in the politician's district. Lobbyists then use the promise of sharing this information to persuade the representative to support the desired legislation. Responding to the will of the voters increases the chances of a politician's re-election.

The persuasion theory cannot account for the rise of lobbying in those Western democracies that adopt a system of proportional and national elections and in those democracies in which the power of political parties is strong. In such democracies, it is more important for representatives to know what the members of the party's central bodies want, and it is less important to know what the voters wish. Information transmission through grass-roots lobbying is efficient in countries that hold regional elections and in which representatives are accountable to a defined community of voters; therefore it is of utmost importance that politicians in these countries receive constant information about the voting public's preferences in that region. In addition, this approach cannot explain why lobbyists sometimes supply the elected representatives with information that is more sophisticated than a mere description of the preferences of the voters. For instance, lobbyists frequently supply information that includes detailed references to complex issues and often substantiate reasons for the adoption of a certain policy. Furthermore, sources other than lobbyists, such as the local media in the particular district or surveys of public opinion can provide similar information.

The principal problem facing these two explanatory theories is that empirical research teaches us that lobbyists customarily work with representatives who already favor their interests and, in the main, do not operate to convince those representatives who oppose them. The theory of lobbying as a legislative subsidy attempts to explain this finding, which appears, at least at first glance, to be paradoxical. According to this theory, the lobbyist fulfills an important function for the representative: the supply and editing of complex information. Thus, lobbying may be viewed as a subsidy proffered on the part of the lobbyist to the lawmaker.

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19 Richard Hall & Alan Deardorf, Lobbying as Legislative Subsidy, 100 AM. POL. SCI. REV. 69 (2006).
subsidy theory explains the fact that lobbyists tend to focus on a representative who already favors their interests by suggesting that the principal effort of lobbyists is not to convince the representative to adopt their stand but to create an incentive for the representative, whose time and resources are limited, to choose to advance the lobbyist's interest in place of other matters in which that representative may also believe, through the supply and editing of information for the representative.

Whereas according to the persuasion theory lobbyists transmit information about voters' preferences, the subsidy theory argues that they convey information pertaining to desired policies relating to complex issues. In regard to such issues an informational asymmetry frequently exists between representatives and bureaucrats, as well as between representatives and the lobbyists. This asymmetry, which works to the disadvantage of the representatives, emanates from the fact that the interest groups and the bureaucrats usually acquire knowledge and develop expertise in a certain area to a larger extent than representatives, who handle a wide variety of issues.20 Frequently, information that interest groups feed representatives helps them to overcome the information gap that exists in favor of the bureaucrats. Furthermore, politicians frequently suffer from lack of research means and time. According to the subsidy theory, lobbyists also feed information to politicians regarding other policymakers with similar ideologies and interests, thus advancing the chances of forming coalitions needed to further legislative initiatives. This information is vital for politicians, who prefer not to waste time on initiatives with little chance of success.

II. LOBBYING AND DEMOCRACY

Our point of departure in the attempt to arrive at normative conclusions in relation to lobbying is the advantages of a democratic form of government over other forms. Democracy enables the realization of two values: First, it expands the autonomy of individuals to the sphere of collective decision-making, it enables collective self-

20 The following cite of John F. Kennedy is illuminating in this regard: "Lobbyists are, in many cases, expert technicians and capable of explaining complex and difficult subjects in a clear, understandable fashion… the lobbyists who speak for the various economic, commercial and other functional interests of this country serve a very useful purpose and have assumed as important role in the legislative process.” See Daniel T. Ostas, The Law and Ethics of K Street: Lobbying, the First Amendment, and the Duty to Create Just Laws, 17 BUS. ETHICS Q. 2007 (thanks to Mark Kagan for referring to this).
determination. Second, democracy embodies the value of equality among individuals. When individuals living in a community cannot agree how to manage their lives in a polity, the right of equal say for every individual acknowledges the equal value of every person and recognizes the fact that every individual's good and every person's interest must be considered.

Are these values of collective self-determination and equality exhausted in the right to participate in the election of representatives every few years, or should citizens be allowed to express their opinions and to attempt to influence the lawmaking processes of those whom they elected? If citizens are entitled to exert influence not only by voting, can we distinguish between legitimate and illegitimate means of influence? Answers to these questions derive from ideas regarding the essence of democracy and the democratic process. Three theories are discussed in the literature on democracy; and each enables arriving at a conclusion as to the desirability of lobbying.

One theory, competitive elitism, identified principally with Joseph Schumpeter, holds that citizen participation in democracy should be limited to elections. This theory views elections as a competition for the right to take the reins of leadership until the next elections; it is a competition in which the citizens decide the winner. This approach argues that it is desirable that decision-making on legislation and policy be entrusted only to the representatives, and that any citizens' influence on decision-making is undesirable. The reason is that, given the reality of the modern state, issues awaiting a decision require expertise in economics, transportation, ecology, and so on. Most citizens are not knowledgeable on these subjects, unlike their elected representatives (assuming, and with the hope, that the latter come from among the educated elite). Further, citizens tend to exert pressure to achieve arrangements that serve their interests instead of the general interest. According to this theory, those elected should be left to their own provisions to govern, and in the


22 PETER SINGER, DEMOCRACY AND DISOBEIDENCE 30-41(1973); JEREMY WALDRON, LAW AND DISAGREEMENT ch. 5 (1999).

23 See SCHUMPETER, supra note 15. For a discussion on this approach to democracy, see DAVID HELD, MODELS OF DEMOCRACY ch. 5 (3rd ed., 2006).
event they perform badly or prove corrupt, the voters have the option of replacing them in the next elections.

It appears, then, that according to the theory of competitive elitism, lobbying is undesirable. As mentioned, this theory assumes that the majority of the public does not sufficiently understand the issues requiring a decision, and that citizens tend to advance sectarian interests rather than the policy promoting the general interest. It seems, therefore, that this theory ought to support the banning of lobbying. The elitist theory, however, is currently not widely-held. It has been severely criticized on the ground that it excludes citizens from the democratic process of lawmaking. Citizens’ participation in the democratic process does not, and should not, end in voting at elections. The inability of citizens to influence decisions of elected officials stands in contrast to the concept that democracy is the self-rule of the people.

The pluralistic theory and the deliberative theory, on the other hand, favor citizens’ increased proactive participation in the decision-making process. The point of departure of the pluralistic theory is that citizens have different, and often conflicting, interests. Democracy, according to this approach, is an arena in which interest groups struggle to attain the utmost realization of their interests. A proper democratic process exists when the struggle among interest groups is conducted fairly. The product of such a process is arrangements that constitute a compromise reflecting the inter-group power relations, i.e., how many citizens have a certain preference and to what degree of intensity.\textsuperscript{24} For pluralists, such arrangements are legitimate because they realize the values of collective self-determination and equality that are embodied in a democracy.

It seems that for the pluralists lobbying is a desirable phenomenon. It enables groups to clarify their interests to the elected representatives and constitutes part of the normal democratic process of attempting to influence outcomes, along with means such as participation in the public discourse or contribution of funds to political parties and election candidates. Pluralists view the fear of the competitive elitism theory—that lobbying allows citizens to pressure their representatives—as lack of understanding of the essence of democracy and the democratic process, since the objective of true democracy is to do what is good for as many as possible.

\textsuperscript{24} ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1959); HELD, supra note 23.
For *deliberative democrats*, laws are legitimate only to the extent that they were preceded by public discourse in which arguments were presented in a manner accessible to all. In other words, citizens and their representatives need to base their arguments on public reason and to appeal to the interests of the entire community. Additionally, only rational arguments that any reasonable person can accept may be presented. A proper democratic process is grounded not in raw power but in attempts to arrive at an agreement (as distinct from compromise) after a process of persuasion. For the deliberative democrats, attempts by the majority to exploit its numerical advantage in order to force its preferences or understandings are improper. 25 Despite the fact that deliberative democrats do not expressly relate to the issue of lobbying, it seems to follow that the legitimacy of lobbying is dependent on the very objectives it is striving to achieve. When lobbying is used to advance sectarian interests instead of the general good, it is improper. But lobbying whose objective is to advance the common interest is legitimate.

Choosing a stand on lobbying demands determining which theory of democracy is the most persuasive: We support choosing the pluralistic theory. The theory of competitive elitism reasons that citizens lack the exigent understanding to influence their representatives and instead attempt to promote issues that support their own narrow interests. There is, of course, some truth to this contention. Indeed, Madison and the Federalists were concerned that pressure on elected representatives could result in populist legislation, and they created structural hurdles to reduce this type of pressure (e.g., separation of powers, bicameralism). 26 There is, however, another side to the coin. First, the success in reaching optimal decisions that are completely isolated from the wants of citizens faces skepticism. For example, in promulgating a free market and objecting to economic management Hayek argued that it is difficult to see issues from above. 27 Without receiving true input on essential matters and dilemmas, representatives will not know nor will they understand reality.


27 See the discussion in Russell Hardin, Representing Ignorance, 21 SOC. PHIL. & POL. 76, 85-7 (2004).
particularly of the citizens in their community. Second, the competitive elitism theory paints an overtly optimistic picture of the elected representatives. Can we really trust the representatives to work for the good of the entire public? Should we not fear that they will knowingly shun the needs of vulnerable groups while employing the rhetoric of the public interest? Accordingly, clarifying the community's needs and preferences to the representatives makes it difficult for them to neglect the interests of vulnerable groups. Third, even if political parties and candidates specify their positions on various issues during an election campaign, it is clear that many questions arise between elections that were not previously discussed and thus representatives will not know their constituents’ attitudes on these matters or the their priorities in relation to them.

The deliberative democrats' support of the concept of "public reason" or "public good" engenders significant difficulties as well. First, can goods which are shared by everyone really exist, and is a conflict among the goods of different groups unavoidable? Second, even if there are no problems at the ontological level, how can we discover, on the epistemological level, what those shared goods are? Most modern democracies are heterogeneous societies; hence an agreement about common goods seems unreasonable. Third, even if such agreement were to exist, is it reasonable to assume that people will work only for those goods? After all, experience teaches us that citizens and politicians tend to act in a manner that suits their particular interests or those of the group to which they belong. It is more appropriate, therefore, to define the public interest as the aggregation of the private interests of citizens.

Hence, the essence of our criticism of the deliberative theory is that it is unrealistic, since it requires rising above personal or group interests. In contrast, a pluralistic conception of democracy better reflects what may be expected from voters and representatives. A normative political theory, which demands certain behaviors, must account for the structure of people’s motivations. "Ought implies can," as Kant said. The pluralistic theory, on the other hand, reflects pragmatism and assumes that it is unlikely that people will be very altruistic; instead of negating the idea of competition, it seeks to manage it under fair conditions. The theory embodies some sort of equality and fairness when it seeks to assure, for both individuals and groups, equality of opportunity to influence the democratic process, even if in the final
analysis what we have is a contest in which the results are determined according to the balance of power.\textsuperscript{28}

III. LOBBYING AND FAILURES IN THE DEMOCRATIC PROCESS

Can it be assumed, however, that fair competition exists between interest groups in recognized democracies? Advocates of the pluralistic theory assumed that the existence of freedom of assembly and freedom of speech would be enough to ensure fair terms of competition, and equal opportunity to influence legislation and policy. But this assumption proved erroneous. Olson generated a revolution when he analyzed why large groups tend not to organize for political activity that may benefit their members, whereas small groups tend to do so.\textsuperscript{29} For example, often millions of consumers would not succeed to "out organize" a small number of producers who are lobbying for a change in legislation to improve their own lot. It is therefore worthwhile for these producers to organize and to invest significant resources in an attempt to influence legislation. In addition, in small groups it is easy to identify free riders—those who avoid contributing to the collective effort. In contrast, for each one of the millions of consumers who purchase the product, the expected loss, from which the producer will gain benefit, amounts to a negligible figure. No consumer will find it worthwhile to invest the required effort to assure the other consumers' interest. Each consumer would prefer that another shoulder this burden, and thus free-riding becomes a widespread phenomenon in large groups. It is also evident that it is easier to organize the action of a small number of producers rather than to appeal to, motivate, and organize millions of people.

It seems, as noted by Olson, that for the most part the groups which will efficiently organize to effect influence will be small in size and will try to gain benefits for themselves, with the cost of these benefits incurred by the diffused public, whose interests frequently are not represented.\textsuperscript{30} Research has supported Olson's

\textsuperscript{28} We do not argue here that pluralists reject the importance of a system of rights that, in certain domains, will prevent application of the pluralistic principle of power struggle. However, the prime purpose of rights under the pluralistic conception is to set the fair rules of the democratic game.

\textsuperscript{29} OLSON, supra note 2.

claims by steadily recording that for-profit corporations rule the arena of interest
groups in the United States, at the expense of consumers and the public's interests.31

The first way in which lobbying creates a failure in the democratic process is
tied to Olson's fundamental insight. Due to their great financial resources and their
superior ability to organize, businesses dominate the lobbying activities, and hence
the inequality of influence on decision-makers is evident. As explained, lobbyists
focus on supplying and editing information for sympathetic representatives. Inequality
exists in lobbyists' ability to influence the agenda in favor of those subject-matters
that are important to well-organized interest groups, at the expense of the dispersed
majority. This version of “jumping the queue” is especially problematic in an era in
which the public agenda is already very crowded.

The second failure in the democratic process created by lobbying relates to the
'revolving door' phenomenon. While in the 1970s only 3% of congressmen became
lobbyists upon their retirement from Congress, in the 1990s this percentage jumped
dramatically to 22%.32 A more recent study reveals that 43% of lawmakers who left
Congress between 1998 and 2004 became lobbyists.33 The shift into what may be
termed "a business model" of the political career34 raises some serious agency
concerns, particularly that members of Congress and bureaucrats cooperate with
lobbyists because of personal financial interests (e.g., earning a high paying position
in a lobbying firm at the end of the term of public service).

Third—and on this point the article focuses—the vast majority of lobbying
activities takes place in narrowly defined niches with no involvement of the public
and very limited competition.35 In these niches almost no conflict is anticipated, thus
chances of success are higher. As is shortly detailed below, this state of affairs
constitutes a democratic failure from the pluralistic theory perspective, since it is
exactly in these niches, far from the public eye, that rent-seeking lobbying succeeds.

31 BAUMGARTNER & LEECH, supra note 18, at 1. [referring to the literature].
32 JEFFERY BIRNBAUM, THE MONEY MEN: THE REAL STORY OF FUND-RAISING’S INFLUENCE ON
POLITICAL POWER IN AMERICA 190 (2000).
33 Press Release, Public Citizens, Members of Congress Increasingly Use Revolving Door to Launch
Lucrative Lobbying Careers (July 27, 2005), available at
34 KAISER, supra note 4.
35 WALKER, supra note 4.
Businesses refrain from investing in lobbying in matters having broad implications. The public is more aware of issues that are discussed within the political discourse, and therefore the chances of success in rent-seeking are smaller. Research shows that the existence of public involvement in a specific subject-matter through grass-roots lobbying is a credible deterrent for businesses to invest in lobbying.

Strategies of interest groups are influenced by assessment of the public's position. When organizations estimate that the public will side with their position, they engage in outside lobbying, i.e., lobbying whose objective is to instill the matter into the public's consciousness through demonstrations, conferences, and grassroots lobbying. By contrast, when organizations fear public opinion, they engage in inside lobbying—lobbying that addresses representatives and administrators—or make donations to election campaigns, all of which are methods whose objective is to influence decisions while circumventing public opinion. One study showed a strong tendency to employ inside lobbying in matters in which the level of conflict was high. In addition, groups with economic gain motives tended to use inside lobbying more than others. As a rule, activity in a niche framework is especially characteristic of businesses and professional associations, whereas labor unions, non-profits, and civil organizations tend to operate in more ideological areas, in which a large number of rivals exist.

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36 On a discussion of the distinction between narrow matters and broad matters, see BAUMGARTNER & LEECH, supra note 18, at 38-41.


39 Interest groups that give political activity committee (PAC) donations seem to be more successful when the case is of low salience—that is, when the general public is not involved. See Diana M. Evans, PAC Contributions and Roll-call Voting: Conditional Power, in INTEREST GROUP POLITICS (Alan J. Cigler & Burdett A. Loomis eds. 2nd ed. 1986); Woodrow Jr. Jones, Robert K. Keiser, Issue Visibility and the Effect of PAC Money, 68 SOC. SCI. Q. 170 (1987); Alan Neustadt, Interest Group PACsmanship: An Analysis of Campaign Contribution, Issue Visibility, and Legislative Impact, 69 SOC. FORCES 549 (1990).


41 In addition, businesses can afford to maintain a full staff of professional lobbyists and constantly monitor every subject; in contrast, organizations with more limited resources focus lobbying on one subject that in general draws much of the media attention. See William P. Brown, Organized Interests
Baumgardner and Leech conducted research based on 19,000 reports submitted pursuant to the requirements of the Lobbying Disclosure Act and showed that the top five issues (out of 137 identified issues) attracted no less than 45% of the lobbying activity, while the bottom 50% of the issues attracted merely 3% of lobbying activity. They conclude that "for every issue that attracts hundreds of interest groups, there are many more issues in which only one or a few become involved – and in those issues the business community is much more likely to be lobbying alone." It is clear, then, that from a pluralistic conception of democracy, lack of competition in lobbying poses a real threat to the validity of the democratic process. Where there is no competition and the public is uninvolved, the chances of special interest groups to succeed in rent-seeking are greater.

IV. RESPONDING TO THE FAILURES: REGULATING LOBBYING

In the wake of Olson's critiques, pluralists such as Robert Dahl recognized that economic gaps in a capitalist society might lead to gaps in political power, and that differences exist in the ability of groups to exert influence, which do not reflect their relative size. Those pluralists insisted on the need to intervene in the democratic process in order to guarantee competition on a more equal basis; their position may best be described as neo-pluralism and we find this approach appropriate. In other words, the democratic process should allow competition among groups, but steps must be taken to guarantee fair competition among groups.

This part discusses possible ways of addressing failures in the democratic process that emanate from lobbying. We will briefly discuss feasible regulatory responses to the first two problems (the revolving door, and the distorting of public


Beth Leech and Franck Baumgartner, Does Money Buy Power? Interest Group Resources and Policy Outcomes (Paper submitted at the annual meeting of the Midwest Political Science Association, Chicago, Apr. 12-15, 2007) pp. 29, available at http://ase.tufts.edu/polisci/faculty/berry/moneyBuyPower.pdf (one reason why interest groups’ investment of large amounts of resources in lobbying may not translate into outcomes is that lobbying in issues of high-profile is so competitive).

See HELD, supra note 23, at 169-72 n.26; DAHL, supra note 24.
agenda) and will then focus on a proposal to mitigate the third problem (lack of rivalry in niche lobbying).

IV.1 Corruption and the Revolving Door

Corruption of the democratic process resulting from job offers to decision-makers by lobbyist firms or corporations represented by lobbyists can be dealt with in two ways. The first is to set a long cooling off period. In Canada, for example, the "cooling-off period" for bureaucrats and ministers is five years. In the U.S. the period has recently been extended to two years, despite strong opposition by many Congress members. Kaiser shows that in the past it was customary for lobbying firms to pay the retired Congress member's salary during the one-year cooling period. Thus, multiplying the costs of employing a retired Congressperson—through the extension of the cooling period—is an important tool in reducing corruption. The second solution addresses the source of another problem: the growing dependence of Congressmen on campaign contributions. Thus, Lessig advocates the public funding of political campaigns and allowing only small-dollar donations, measures that would reduce the politicians' dependence on lobbyists. These solutions are appropriate in mitigating corruption and financial dependency, though we suspect that the likelihood of their success is low given the strong opposition of Congress members to the recent extension of the cooling period.

IV.2 Distorting the Agenda


46 An 2007 amendment to the Lobbying Disclosure Act, 1995 expands the cooling-off period to Senators, Members of the House and senior staff ("elected officers") as well as senior executive branch personnel to two years.

47 KAISER, supra note 4, at 343 ("Requiring a two-year hiatus actually would have slowed down the revolving door. Lobbying firms that had been willing to pay fat salaries to members and senior staff for a year when they could not lobby … would have resisted doing so for two years."). Lawrence Lessig goes as far as to suggest 7 years cooling period for retired Congress members see his, How to Get Our Democracy Back?, THE NATION, Feb. 3, 2010, available at http://www.thenation.com/doc/20100222/lessig).

48 Lessig, supra note 47. Also see The Fair Elections Now Act (S. 752 and H.R. 1826) (proposing to establish a public funding system for Senate elections)

Lobbying distorts the democratic process by manipulating the over-crowded public agenda and prioritizing specific issues that are determined by lobbyists. The democratic failure in this case is not necessarily reflected in the outcome of the actual public debate on agenda issues. Currently, there is no data supporting the conclusion that lobbyists succeed in rent-seeking in issues of high profile on the public agenda. Instead, interest groups invest in lobbying and "subsidize" the legislative process for lawmakers in order that issues of their interest "jump the queue."

It is difficult however to address this type of failure in the democratic process, because any attempt to equalize the power of influence requires normative judgments that are controversial. Most democracies, however, attempt to equalize the power of influence during elections, which is conceived as a critical time vis-à-vis the validity of the democratic process. Most Western democracies limit contributions to campaign financing through regulations in election laws, and provide public funding for elections to ensure substantive equality. The logic of this approach is well presented in the Canadian Harper decision, in which the Supreme Court upheld a law limiting advertising expenditures in electoral campaigns:

The Court’s conception of electoral fairness … is consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society. This model is premised on the notion that individuals should have an equal opportunity to participate in the electoral process. Under this model, wealth is the main obstacle to equal participation. Thus, the egalitarian model promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power.

The U.S. Supreme Court in Citizens United however, rejected this line of reasoning, and generally viewed attempts to equalize influence as impermissible restrictions on First Amendment rights. Given this approach to election law, it is clear, then, that

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50 Beth Leech et al., supra note 43 (concluding that "resource rich organizations were no more likely than resource-poor organizations to be on the winning side of the policy debate). See also Yael V. Hochberg et al., A Lobbying Approach to Evaluating the Sarbanes-Oxley Act of 2002, 47 J. ACC. RES. 519, 575 (2009) (showing that the lawmaking of the Sarbanes-Oxley Act of 2002 attracted a great number of lobbyist activities from both sides: the investors and the corporations. The study concludes that the law opted to prefer the interests of the investors and to improve corporate governance despite the substantial costs of compliance bore on corporations).


52 Citizen United v. Federal Election Commission, __ U.S. __ (2010). Justice Kennedy, writing for the majority, ruled that "[t]he appearance of influence or access, furthermore, will not cause the electorate
any attempt to regulate *lobbying* with that said purpose in mind will fail on constitutional grounds.53 To the best of our knowledge, there is no such regulation in any democracy around the world.

Interestingly, though, lobbying in the U.S. is heavily regulated in tax law. The government uses allocative powers in this area of law, which are considered less restrictive than the use of coercive powers. Under the terms of American constitutional law, the use of the government’s allocative powers is considered a "governmental speech" and hence is generally constitutionally permissible even when it adversely affects the exercise of constitutional rights.54 It should be noted, however, that the intent behind regulation of lobbying in American tax laws is not equalizing the power of influence. Its aim is rather to ensure that lobbying expenditures correspond to the purposes for which the specific organization was established.55

Should the existing tax laws be supplemented with additional requirements that aim to equalize the lobbying influence? Such an attempt would be problematic for the following three reasons: First, the assumption that use of the state’s allocative power to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.” *Id.* at 44.

53 *See* United States v. Rumely, 345 U.S. 41 (1953) *aff'ing* Rumely v. United States, 197 F.2d 166, 173-74, 177 (D.C. Cir. 1952). ("It is said that indirect lobbying by the pressure of public opinion on the Congress is an evil and a danger. That is not an evil; it is a good, the healthy essence of the democratic process").


55 One method of encouraging charitable activity, or activity within the framework of a civil society, is subsidization: allowing donors to deduct their contributions as a recognized expense. The ability to deduct these expenses, though, is conditional upon the nature of the organization’s lobbying actions. Thus in the United States, tax law distinguishes between public charities, such as hospitals, educational institutions, churches, etc., which have a broad public objective, and private charities, which are for the most part private foundations that do not meet the definition of a public charity. American tax law lays down requirements for recognizing an institution to which donations may be deducted. Public charities can benefit from such a status only if their attempt to influence legislation through lobbying does not constitute a substantial slice of their total activity. See I.R.C. sec. 501(c)(3) (2000) (which is subject to a number of exceptions). Lobbying by public charities is allowed as long as it does not constitute a substantial part of its activities, i.e., an activity for which expenditures do not exceed 20% of the organization’s annual budget. Expenditures for grassroots lobbying cannot exceed a quarter of the organization’s lobbying expenses. Private charities, by contrast, can enjoy such a status only if they completely refrain from lobbying. Insofar as businesses are concerned, U.S. tax law states that expenses can be deducted for lobbying only if it is necessary for carrying out the business. In any case, businesses cannot deduct expenses related to attempts to influence appointments or referenda; nor is it permitted to deduct grassroots lobbying. Thus, while the state is not allowed to set lobbying limits through its coercive power, the state can raise the cost of lobbying by refusing to recognize associated expenditures, and thus may curtail corporate attempts to influence the broad political discourse in this manner.
power is a less drastic means in comparison with the state's coercive power seems to us too simplistic. So far as underprivileged populations are concerned, conditional funding (or subsidy) might have serious implications for their ability to organize and exert impact, significantly reducing their ability to realize their basic rights. Second, the shifting of serious normative questions regarding the types of lobbying activities to be encouraged or discouraged in connection with the highly technical and complex tax law only makes the debate on these challenging questions less transparent and hence sub-optimal.

Third, attempts to use tax law to encourage certain lobbying activities (e.g., NGO's lobbying) and to discourage other types of lobbying activity (e.g., business lobbying) requires normative judgments that will be controversial. The need to draw controversial distinctions can be avoided by setting, for example, a uniform annual cap for lobbying expenditures. But this is an artificial solution. Thus, for example, if a certain interest group has a preference of a high intensity about a certain issue, it will not be able to express the intensity of its preference because its access though lobbying will be barred when it arrives at the lobbying expenditure cap. From the stance of the pluralistic approach, it is unacceptable to prevent citizens from expending money in an attempt to influence issues of personal importance. Hence

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56 Moshe Cohen-Eliya, Is Conditional Funding a Less Drastic Means, 1 L. & ETHICS OF HUM. RIGHTS 354 (2007). It is more appropriate to place different regulatory means on a continuum with the central parameter being the degree of coercion. For an argument in this spirit within the context of freedom of expression, see LARRY ALEXANDER, IS THERE A RIGHT TO FREEDOM OF EXPRESSION ch. 5 (2005).

57 In two comprehensive articles published on the U.S. regulation of lobbying in tax law provisions, Miriam Galston examines the contribution of these arrangements in advancing civil participation in the democratic process. See Miriam Galston, Civic Renewal and the Regulation of Nonprofits, 13 CORNELL J. L. & PUB. POL’Y 289 (2004); Lobbying and the Public Interest: Rethinking the Internal Revenue Code’s Treatment of Legislative Activities, 71 TEX. L. REV. 1269 (1993). Galston opines that existing arrangements impose many limitations, some of which are unjustified, on the ability of active citizens in civil society to participate in and influence results of the democratic process. She claims that these arrangements adversely affect the ability of weak groups in society to participate in the democratic discourse. Thus, for example, she shows that the poor prefer to participate through church-based activities. Galston points out that the rich can influence the political process by means of personal donations or announcements of support of candidates or private, non-charitable organizing (such as social clubs). In her opinion, therefore, existing U.S. tax laws create unfair limitations on organizations that work toward a public goal. See Galston, id. at 368. The regulations are not sensitive to the extent to which certain organizations encourage citizens’ participation. Galston criticizes the absence of a distinction between organizations in which the members’ activity is exhausted by writing a check and organizations that encourage members to participate more actively. She also criticizes limitations on grassroots lobbying in which she finds important participatory value. Galston also claims that these arrangements were set in a period in which involvement in civil society was energetic, prior to the significant and worrisome decline in civilian participation and in civil society noted by Putnam. See ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2001).
any attempt to solve the problem caused by distortion of the public agenda resulting from the unequal power of influence is constitutionally suspect and raises serious conceptual difficulties.

IV.3 Niches, Competition, and Transparency

While additional regulation does not seem to provide a solution for the distortion issue, we believe that an expansion of contemporary transparency requirements can mitigate the lack of competition in niche lobbying. The majority of countries already regulate lobbying by setting requirements for transparency. In the United States, for instance, it is mostly the lobbyists themselves that are regulated, rather than the parties (politicians and bureaucrats) they approach. The Lobbying Disclosure Act sets registration, identification, and disclosure requirements. The law requires lobbyists, whether in-house or commercial, to register with a registrar of the House of Representatives. The online registration system is updated continuously and open to the public at large. The duty to disclose the scope of lobbying activities is carried out in two ways: First, lobbyists are required to list their clients and specify the scope of their lobbying expenditures. Second, those who hire lobbying services must also detail all expenditures.

Lobbying legislation in the U.S. has been frequently amended. Recently in 2007 following the Abramoff scandal, the law was amended again. Section 5 of the Lobbying Disclosure Act requires lobbyists to submit a report every three months revealing "each general issue area" and a list of the "specific issues"


60 Abramoff and his partners were lobbyists who convinced Indian tribes to spend no less than $85 million in lobbying fees to lobby for Indian casino interests. See KAISER, supra note 4, at 3-24.
detailing lobbying activities. In addition, the law requires the strict reporting of contributions, above a certain amount, given by a registered lobbyist to politicians.

It seems that the core purpose of these transparency policies is to shame and sanction those politicians who cooperate with the lobbyists. The policies’ aim is to prevent political corruption. But these transparency policies do very little to promote competitive lobbying, which constitutes an important mechanism for preventing rent-seeking and for ensuring a more informed power struggle among special interest groups. As shown earlier, much of the businesses lobbying activity tends to be niche-oriented and conducted in narrowly defined areas in which there are almost no rivals. For pluralists who view democracy as an arena in which special interest groups struggle to promote their interests, the challenge is to ensure that such competition and rivalry do take place.

Research suggests that a major obstacle in creating competitive lobbying is the high information costs which groups have to incur when monitoring the lobbying activities of their competitors.61 One way to reduce these costs is by requiring lobbyists to continuously publish on an internet site all written materials that they submit to lawmakers and to report all lobbying activity in real time. A simple, low-cost internet search by potential rival organizations can attract opposition to niche lobbying activities. A government or privately-run computerized system can be established to classify lobbying activities by subject-matter and send updates to potential rivals with an expressed interest in receiving said information.62 Ongoing updating could increase the creation of rivalry amongst lobbyists and reduce the risks of uninformed decision-making.

This proposal builds on the logic of the recent amendment to the transparency requirements of the Lobbying Disclosure Act, which has cut by half

61 Amy McKay, Susan W. Yackee, Interest Group Competition on Federal Agency Rules, 35 AM. POL. RES. 336, 349 (2007) (“given that organized interest are generally strategic in spending their lobbying resources, the cost of commenting – including the possibility of what we view as a new cost, the observation of opponent behavior – must be high enough to dissuade some from taking an active role in commenting”).

62 A useful example of how such a website might look is the following: Prior to his election President Barack Obama launched a website which invited groups and individuals wishing to influence his agenda during the transition period to upload written materials. This allows everyone to monitor these attempts by a simple key-words search on the web-site, and to comment on them. See http://change.gov/open_government/yourseatatthetable (last visited May 13, 2010).
the amount of time lobbyists are given to submit reports to the lobbyists’ registrar. In the internet age there is no reason to refrain from requiring lobbyists to upload all written materials in real time. The loophole of course lies in the likelihood that lobbyists will prefer to informally disseminate information to lawmakers over dinner or in Congress’ corridors. While this possibility cannot be ruled out, the chances for this to occur in highly complex and very technical niches are rather low. A significant part of the work of professional lobbyists is devoted to conducting and disseminating research and writing memos. As noted in Part I, lobbyists provide legislative subsidy for already sympathetic lawmakers; thus, the receipt of written materials by the decision-maker is crucial in their gleaming knowledge about the subject-matter in the highly technical and complex niches.

Strict transparency policies have been criticized for two reasons: First, the dissemination of highly technical information without its processing in a user-friendly manner is ineffective and sometimes even counterproductive to the realization of the aims of many "targeted transparency" policies. Second, revealing large amounts of data without attaching related context might result in unjustified shaming of politicians and consequently unjustified reduction in the public's trust in Congress. Yet, these objections are irrelevant within the context of the article's proposal. Publication of written lobbying materials on an internet site is designed to reduce informational and monitoring costs of primarily sophisticated players and special interest groups, who will know how to make use of this information in order to protect their interests. The purpose of this proposal is obviously not to shame or sanction politicians, but rather to encourage rivalry and competition to ensure the public’s participation in the democratic process and narrow the risk of rent-seeking that is inherent in nontransparent lobbying.


64 ALLAN J. CIGLER & BURDETT A. LOOMIS, INTEREST GROUP POLITICS 393 (7th ed. 2007) (noting that only 22% of lobbyists' time is dedicated to "building relationships"; while 17% time is dedicated to providing and seeking information; 16% is dedicated to research and analyzing legislative information; and 10% to preparing for, attending, and testifying at Congressional hearings).


66 Lawrence Lessig, Against Transparency, NEW REPUBLIC (Oct. 9, 2009).