Disclosure Regulation of Indirect Lobbying by Charitable Organizations: A Reassessment, with Possible Approaches for Reform

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I. Introduction: "Countdown to Fairness"

On Wednesday, June 4, 2003 a damp, unseasonable drizzle fell over lower Manhattan throughout the day. At 2:00 p.m. that afternoon, a crowd of several thousand gathered at City Hall Park, invited by flyers and radio spots announcing a "Rally for the Repeal of the Rockefeller Drug Laws."[1] Called the "Countdown to Fairness," the rally was sponsored by a newly-formed not-for-profit corporation named the Hip Hop Summit Action Network.

The flyers explained the purpose of the rally. "We are encouraging all High School teachers throughout the State of New York to teach all students about the unfair Rockefeller Drug Laws. On Wednesday, June 4, 2003 – 2pm at the City Hall of New York City, teachers should lead students to the Countdown to fairness Rally. Give students the educational opportunity to experience the power of their voice and presence on this important issue."[2] One radio spot stated, "Billions are being spent putting people in jail, while cutting billions from public education … there are kids in our schools with no desks, no books, no facilities, yet we're spending billions of dollars putting our brothers and sisters in prisons unfairly as a result of the Rockefeller drug laws .. We must demand repeal of the Rockefeller drug laws." A similar spot stated, "Now for three terms now, the Governor has been promising the repeal of these laws. They need to come off the books right now," and concluded, "Everybody is coming down to end the Rockefeller drug laws. Be there."[3]

For four hours, the crowd heard speeches by state and local politicians, film actors, and numerous hip hop music performers denouncing New York's drug-sentencing laws and calling for their repeal by the New York Legislature and the Governor.[4] The speakers' presentations were not reviewed in advance of the rally, nor were the speakers instructed on any limitations that should apply to the content of their remarks.[5] The remarks ranged from basic observations about civic process ("There are lots of people in the coalition who want to see change. But nothing happens without the power of the people, and your power is the reason why the Governor, the State Senators, and the State Assembly are at work today."), to personal stories from families directly affected by the sentencing laws ("It's a case of wrong place, wrong time … He'll be up for parole in August of 2006, but we have no guarantee that he'll be released"), to comments in the vernacular of the rally's sponsors ("Governor Pataki, you kinda wacky, homeboy").[6]

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[1] Hip Hop Summit Action Network, et al v. New York Temporary State Commission on Lobbying, et al, 03 Civ. 5553 (S.D.N.Y. 2003); Declaration of D. Benjamin Chavis in Support of Plaintiffs' Motion for a Temporary Restraining Order and a Preliminary Injunction ("Chavis Declaration"), Exhibit 5. New York's drug sentencing laws, which were amended in 2004, can be found at NY CLS Penal Law §60.06 et seq.

[2] Id.

[3] Chavis Declaration, Exhibit 4.

[4] Among those who spoke at the rally were Sean "P. Diddy" Combs, Mariah carey, Damon Dash, Jay-Z, Susan Sarandon, Tim Robbins, Thomas Golisano, Andrew Cuomo, 50 Cent, Busta Rhymes, Erykah Badu, Memphis Bleek, the D.O.C., Capone-N-Noriega, Fat Joe, Reverend Run of Run DMC, the Beastie Boys, Fabolous, Kool Rap, Joe Buddens, M-1 from Dead Prez, MIC Geronimo, Lemon (Def Poet), DJ Kid Capri, Grandmaster Caz, Red Café, Cherub, and others. Ordinary citizens whose lives had been directly affected by the drug sentencinglaws also spoke. Chavis Declaration at 11-13.

[5] Hip Hop Summit Action Network, supra, note 1; Brief Amicus Curiae of the Alliance for Justice, et al., p. 15.

[6] Hip Hop Summit Action Network, supra, note 1, Chavis Declaration, supra at 11-13; *Hip Hop Stars Headline Rally Against Rockefeller Drug Laws*, The New York Sun, June 5, 2003, p. 4.

Later that month, the New York Temporary State Commission on Lobbying ("the Commission") initiated an investigation into the activities of the Hip Hop Summit Action Network and other organizations opposed to the drug sentencing laws, loosely collaborating as the "Coalition for Fairness."[7] The investigation was first revealed in press accounts, in which the Executive Director of the Commission's staff opined, "They all appear to be lobbying to change the Rockefeller drug laws."[8] Upon a demand by the Commission that the organization register as a lobbying organization and report any expenditures made in an effort to influence legislation, the Hip Hop Summit Action Network filed registration statements as both a "NY State Lobbying" and a "NY State Client" in the name of the "Coalition for Fairness," and also filed a "Lobbyist's Report" disclosing certain expenditures.[9] In a cover letter accompanying the filings, Hip Hop Summit Action President Chavis asserted that the Commission lacked authority to compel registration and disclosure of its activities, citing federal precedents.[10] Dissatisfied with the disclosure, the Commission pressed a demand for further documentation of the Coalition's lobbying expenditures, including expenditures incurred in connection with the Countdown to Fairness rally, and also insisted on taking testimony from Mr. Simmons and Mr. Chavis.[11]

Rather than comply with the Commission's further demands, Simmons, Chavis, and the Hip Hop Summit Action Network filed suit in the United States District Court for the Southern District of New York against the Commission, its Chairman, and its Executive Director alleging that the Commission's investigation violated their right to free speech under the First Amendment and their right to due process under the Fifth and Fourteenth Amendments and should be enjoined.[12] The plaintiffs were joined by the New York Civil Liberties Union and, separately, eight other public interest legal and policy organizations in an *amicus curiae* role. Plaintiffs' motion for preliminary

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[7] The fact that the Coalition for Fairness was not a corporation or other legal entity, but rather an unincorporated association of charities temporarily cooperating in a joint project – a common advocacy strategy for community-based nonprofit groups – later created considerable confusion in the application of the NYS Lobbying Act to its participants' activities. When the Hip Hop Summit Action Network later registered "under protest" as a lobbying organization, it did so in the name of the Coalition for Fairness. However, the Coalition had not expended any funds on the rally or any other alleged lobbying activity, nor even maintained any bank account, in its own name. Hip Hop Summit Action Network, supra, note 1, Chavis Declaration at 19; *See* New York Temporary State Commission on Lobbying Opinion No. 42 (00-1)(February 18, 2000).

[8] *Amid Lobbyists, Talk of Lobby Bill*, Albany Times Union, June 19, 2003; Hip Hop Summit Action Network, supra, note 1, Chavis Declaration Exhibit 10. Executive Director David Grandeau's preliminary conclusion appears to have been based not only on the "Countdown to Fairness" rally, but also on meetings with the Governor's staff in which Thomas Golisano and Hip Hop Action Network founder Russell Simmons participated. However, the rally ultimately became the central focus of the dispute when Simmons contended that his appearances in Albany had occurred at the invitation of the Governor. Under limited circumstances, providing information to the legislators or the Governor is an exception to what would otherwise be lobbying activity under the New York statute. New York Legislative Law § 1-c(c)(5).

[9] Hip Hop Summit Action Network, supra, note 1,Chavis Declaration, Exhibit 18.

[10] Id, citing United States v. Harriss, 347 U.S. 312 (1954) and Commission on Independent Colleges and Universities v. New York Temporary State Commission on Lobbying, 534 F. Supp. 487 (N.D.N.Y. 1982).

[11] Hip Hop Summit Action Network, supra, note 1,Chavis Declaration at 16-18. The Commission's Executive Director was quoted in the press, "At this late date, you can't just hand in a registration and a bimonthly (report) and expect us to accept them on their face," and, separately, "There was legislation pending; if his spending was directed at that legislation, then he's a lobbyist. I mean, there were radio ads, there were rallies, all of those things are lobbying. The question is, who paid for it?" *Simmons-Cuomo Ally Files Lobbying Forms*, Associated Press Newswires, July 15, 2003; *Civil Liberties Union Faults Inquiry Into Rap Producer*, New York Times, July 17, 2003.

[12] Hip Hop Summit Action Network, supra, note 1, Complaint at §§ 42-70.

relief was argued and submitted, but the merits were never reached. The federal court abstained under the doctrine articulated in Younger v. Harris.[13]

Lobbying disclosure laws are typically touted by their supporters as a crucial control on the predations of private interests in the legislative process. States and localities have embraced statutory schemes that typically require registration prior to attempts to influence the prospects of proposed legislation, and reporting of expenditures made in such efforts in filings that are publicly available. In some instances, jurisdictions which already have lobbying disclosure statutes are expanding those laws to cover a wider range of lobbying behavior and require more frequent and more comprehensive reporting of lobbying activity.[14] Because they do not set limits on lobbying activity, these laws do not directly suppress an array of liberties and interests protected by the First Amendment that might otherwise be implicated by interference in communications between the governed and those who are elected to represent their interests.

However, the growing burden of more extensive and more frequent reporting certainly does affect the capacity of those subject to lobbying disclosure laws to petition the government, and that burden falls disproportionately on smaller charitable organizations. Nonprofit groups have a stake in legislative matters that is driven by their missions as well as by their financial interests, and are far more likely than business interests or individual citizens to assert their views in public fora both actual and virtual. The tools of "indirect lobbying" offer a more level playing field to groups that are without the financial resources that accord legislative access and without the authority to participate in the electoral process because of their status as exempt charities under the tax code.[15]

What was most remarkable about the litigation that focused on the "Countdown to Fairness" rally, prior to being cut short by abstention, was its timeless quality. The heart of the plaintiffs' case was based on free speech interests at the very core of the First Amendment, the right to stand up in the public square and espouse a view on the inaction of the government.[16] Also timeless, in another sense, were the precedents debated by the parties, United States v. Harriss and Rumely v. United States.[17] Each had been decided by the United States Supreme Court half a century earlier, yet their application in this instance was not apparent because the distinction between

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[13] Hip Hop Summit Action Network, et al v. New York Temporary State Commission on Lobbying, et al, 2003 U.S. Dist. Lexis 21229 (S.D.N.Y. 2003) citing Younger v. Harris, 401 U.S. 37 (1971). In subsequent litigation in the New York Supreme Court, Albany County, part of the NYS Lobbying Act was declared unconstitutional on due process grounds In the Matter of Chavis, 959-04 (Sup. Ct. Albany Co. 2004), but the plaintiffs' First Amendment claims were not reached. Id, Decision and Judgment, August 17, 2004.

In a curious but related sideshow to this litigation, the NYCLU filed a separate action in the Southern District in November, 2003 alleging that the Commission and its Executive Director had infringed *its* free speech rights by demanding that the NYCLU report expenses incurred in leasing a billboard outside of a mall in Smith Haven, New York that depicted a gagged individual and read "Welcome to the Mall. You Have the Right to Remain Silent. Value Free Speech. www.nyclu.org." The billboard message had been prompted by the removal of a visitor to the mall who was wearing a t-shirt bearing an anti-war message, at a time when legislation had been proposed in New York that would protect free speech on premises of that kind. The federal court also dismissed that litigation on abstention grounds, but the investigation was withdrawn and no state court litigation followed. New York Civil Liberties Union v. David Grandeau, 305 F. Supp. 2d 327 (S.D.N.Y. 2004).

[14] *See* Part V, infra.

[15] This paper uses the term "indirect lobbying" rather than "grass roots lobbying," the nomenclature of the tax code. *See* Part IV A, infra. While the activities involved are often functionally the same, the greater definitional precision of the tax code makes the latter term inaccurate in the context of state and local disclosure regulation of that activity.

[16] Thornhill v. Alabama, 310 U.S. 88, 101-102 (1940); Mills v. Alabama, 384 U.s. 214, 218 (1966).

[17] United States v.Harriss, 347 U.S. 312 (1954); Rumely v.United States, 345 U.S. 41 (1953).

"indirect lobbying" that is properly subject to lobbying disclosure laws and core First Amendment speech which may not be regulated had not been settled in the ensuing decades. Separating "orchestrated letter writing campaigns" from campaigns intended to influence public opinion on matters of policy remains elusive today.

This paper is intended to serve as a reassessment of the issues that arise in disclosure regulation of indirect lobbying, in light of the changing realities of lobbying reporting laws. First, in those cases in which indirect lobbying is discussed separately from direct lobbying communications, the various unsuccessful constitutional arguments challenging federal and state lobbying disclosure laws are reviewed. Next, the New York Lobbying Act is offered as an example of modern state and local lobbying disclosure laws, and its burdens are examined. Finally, several possible approaches to reforming lobbying disclosure laws as they apply to indirect lobbying by charitable organizations are considered. While all but the least venturesome of those approaches carry with them certain dangers and difficulties in their application, the paper concludes that smaller charitable organizations *are* in a different position from others with a stake in the legislative process and – in light of the enduring failure of the regulatory apparatus to distinguish protected speech from disclosable activity – their indirect lobbying should not be regulated to the same extent.

II. Constitutional Challenges to Disclosure Regulation of Indirect Lobbying

A. First Amendment Challenges To The Federal Regulation of Lobbying Act

Although not the earliest lobbying disclosure statute, the first challenges under the First Amendment to disclosure regulation of indirect lobbying involved the Federal Regulation of Lobbying Act.[18] By identifying constitutional interests inherent in the some forms of communication regarding the issues that are or may be the subject legislation, the Court recognized the existence of First Amendment limits on the government's ability to regulate that speech through disclosure laws. In this pair of opinions, however, the Court sowed seeds of confusion that continued to flourish thereafter in judicial efforts to distinguish indirect lobbying from nondisclosable public advocacy.

The Court's decision in United States v. Rumely has been hailed the first "important advancement toward a fully refined conception of lobbyists' First Amendment rights."[19] Edward A. Rumely was an official of an organization called the Committee for Constitutional Government, which was "engaged in the sale of books of a particular political tendentiousness."[20] The House Select Committee on Lobbying Activities (known as the Buchanan Committee, after its chairman) commenced an inquiry into whether this activity might require registration and reporting under the Federal Regulation of Lobbying Act, covering receipt of funds of $500 or more with a principal purpose of supporting lobbying activity. When he declined to disclose to the Committee the names of those who had made bulk purchases of those books for further distribution, he was convicted for his refusal to give testimony or to produce relevant papers upon a matter under Congressional inquiry.[21]

In setting aside his conviction, the Court interpreted the Congressional resolution of which Rumely had acted in defiance as excluding communications with the public on matters of

[18] 2 U.S.C. §§ 261-270. This statute was replaced by the Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601 et seq. By the time that these two challenges were decided, lobbying disclosure laws had already been enacted in twenty states. United States v. Harriss, 347 U.S. 612, 625 n.16.

[19] Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right To Lobby*, 16 Harv. J.L. & Pub. Pol'y 149, 161 (1993).

[20] 345 U.S. 41, 42.

[21] Id.

interest to the organization, which were to be protected by the First Amendment. For the majority, Justice Frankfurter observed, "Surely it cannot be denied that giving the scope to the Resolution for which the government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment."[22]

In Justice Frankfurter went on to tackle to permissible scope of lobbying disclosure regulation under the First Amendment. "As a matter of English, the phrase 'lobbying activities' readily lends itself to the construction placed on it below, namely, 'lobbying in its commonly accepted sense,' that is, 'representations made directly to the Congress, its members, or its Committees … and does not reach what was in Chairman Buchanan's mind, attempts to 'saturate the thinking of the community."[23]

The clarity of that construction was short-lived. In United States v. Harriss, the Court had occasion to revisit the constitutionality of the Federal Regulation of Lobbying Act, and its application to indirect lobbying, the following year. The National Farm Committee, a Texas corporation, was charged with the failure to report the solicitation and receipt of contributions to influence the passage of legislation which would cause a rise in the price of agricultural commodities and commodity futures and the defeat legislation that would cause a decline in those prices.[24] Criminal charges brought against members of the organization and others described a campaign in which two paid lobbyists were hired to express certain views on agricultural prices directly to members of Congress and also through "an artificially stimulated letter campaign."[25] The defendants challenged their convictions, in part, on grounds that the Federal Regulation of Lobbying Act could not be applied to activities other than lobbying communications directly with elected officials, for to do so would make the act unconstitutionally vague in violation of the First Amendment.

As in Rumely, the Court sidestepped the First Amendment issue by construing the legislative document to avoid constitutional infirmity. The language of the statute itself provided ample basis, applying by its terms to "any person who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits or collects money or any other thing of value …(b) to influence, *directly or indirectly,* the passage or defeat of any legislation by the Congress of the United states."[26] However, some contortion was necessary to preserve that scope yet adhere to the definition of "lobbying" that had been embraced in Rumely. The Court expanded the definition without acknowledging its maneuver, declaring, "As in Rumely, which involved the interpretation of similar language, we believe this language should be construed to refer

[22] 345 U.S. 41, 46. In fact, the activities of the Committee for Constitutional Government may not have been as divorced from the legislative process as the majority opinion described, and the defendant's organization was apparently engaged in a scheme to evade the federal statute. In his concurrence, Justice Douglas included a quote from the Select Committee's report that the organization attempted to influence legislation directly by distributing pamphlets and printed materials on legislative subjects to members of Congress and noting that "The policy of the Committee for Constitutional Government, Inc. of refusing to accept contributions of more than $490 unless earmarked for books, etc. may also involve (1) dividing large contributions into installments of $490 or less … [and] (2) causing the Committee for Constitutional Government's records as to 'contributions' to reflect less than the total amount of the contributions actually received, by labeling some part of such funds as payments for printed matter." 345 U.S. 41, 51-53 (Douglas, J. concurring).

[23] 345 U.S. 41, 47 (citations omitted).

[24] 347 U.S. 612, 614-615.

[25] 347 U.S. 612, 616-617.

[26] 347 U.S. 612 618-619 (emphasis added).

only to 'lobbying in its commonly accepted sense" – to *direct* communications with members of Congress on pending or proposed federal legislation. The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings *or through an artificially stimulated letter campaign.*"[27] The defendant's convictions were affirmed, and the constitutionality of disclosure regulation of indirect lobbying – at least of "artificially stimulated letter campaigns" – was confirmed. Lower courts were left to struggle with the meaning of that shorthand in relation to other lobbying disclosure laws.[28]

The rationale upon which the Court relied in Harriss for upholding the Federal Regulation of Lobbying Act involved "the integrity of the governmental process."[29] The Court described a legislative arena populated with elected officials without the capacity (or perhaps the will) to sort out the interests and motivations compelling the petitioners who beseech them. "Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly

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[27] 347 U.S. 612, 620 (emphasis added). The legislative history upon which the Court relied did reflect an intent to include indirect lobbying within its scope, albeit in a cartoonish depiction of three possible scenarios:

> The Senate and House reports accompanying the bill were identical with respect to Title III. Both declared that the Lobbying Act applies "chiefly to three distinct classes of so-called lobbyists:
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> "First. Those who do not visit the Capitol but initiate propaganda from all over the country in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts. This class of persons and organizations will be required under the title, not to cease or curtail their activities in any respect, but merely to disclose the sources of their collections and the methods in which they are disbursed.
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> "Second. The second class of lobbyists are those who are employed to come to the Capitol under the false impression that they exert some powerful influence over Members of Congress. These individuals spend their time in Washington presumably exerting some mysterious influence with respect to the legislation in which their employers are interested, but carefully conceal from Members of Congress whom they happen to contact the purpose of their presence. The title in no wise prohibits or curtails their activities. It merely requires that they shall register and disclose the sources and purposes of their employment and the amount of their compensation.
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> "Third. There is a third class of entirely honest and respectable representatives of business, professional, and philanthropic organizations who come to Washington openly and frankly to express their views for or against legislation, many of whom serve a useful and perfectly legitimate purpose in expressing the views and interpretations of their employers with respect to legislation which concerns them. They will likewise be required to register and state their compensation and the sources of their employment."
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> S. Rep. No. 1400, 79th Cong., 2d Sess., p. 27; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., pp. 32-33.

347 U.S. 612, 620 n.10.

[28] Indirect lobbying is no longer mentioned in the federal disclosure law. A "lobbying contact" in the Lobbying Disclosure Act of 1995 is defined as "any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client …" 2 U.S.C. 1602 (8)(A).

[29] 347 U.S. 612, 625.

evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent."[30] Two themes which have persisted throughout the jurisprudence of lobbying disclosure regulation emerged in this early analysis: secrecy and self-interest. There is considerable doubt, however, whether the rationale for applying such regulation to indirect lobbying weakens sufficiently to warrant an exception when neither circumstance is present – when the lobbying is not motivated by personal gain and/or when the lobbying takes place in a public forum.[31]

B. First Amendment Challenges to State Lobbying Laws

In construing the Federal Regulation of Lobbying Act to protect it from constitutional infirmity, the Supreme Court offered little guidance and engendered much confusion for lower courts that were later to interpret similar state statutes. In addition to its inverted use of the term "direct" and the uncertain scope of its reference to "orchestrated letter campaigns," the Court did not distinguish among a bundle of interests protected by the First Amendment that had potentially been at stake.[32] Other courts were left to sort out whether indirect lobbying activity addressed by state lobbying disclosure laws fared differently when measured against the right to free speech, the right to petition the government, or the right of free association. With few exceptions, the outcomes were the same: the interest in protecting the integrity of the legislative process was found to be more substantial than what were deemed minor incursions on First Amendment rights.

Although constitutional adjudication was avoided in both Harriss and Rumely, the latter's concurring opinion by Justice Douglas does address the dangers of "surveillance" of written speech by the government with some eloquence.[33] However, other courts deciding First Amendment challenges to state disclosure regulation of indirect lobbying have not been so concerned. Notwithstanding that the presumption of constitutionality is traditionally unavailable in deciding First Amendment challenges,[34] federal and state courts have had little difficulty in finding both a compelling state interest in lobbying disclosure laws and a substantial connection between that interest and the harm addressed – the potential corruption or distortion of the legislative process. The threat created by the participation of undisclosed interests outweighs any imposition on free speech or the right to petition the government.[35] As one court observed, "We begin by noting that lobbying disclosure laws are not subject to the same strict scrutiny as laws that impinge on pure speech. Laws

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[30] Id.

[31] *See* Part IV, infra.

[32] 347 U.S. 612, 625 ("Thus construed, §§ 305 and 308 also do not violate the freedoms guaranteed by the First Amendment – freedom to speak, publish, and petition the government.").

[33] 345 U.S. 41, 56-58 ("True, no legal sanction is involved here. Congress has imposed no tax, established no board of censors, instituted no licensing system. But the potential restraint is equally severe. The finger of government leveled against the press is ominous.").

[34] U.S. v. C.I.O., 335 U.S. 106, 140 (1948)(Rutledge, concurring); Thomas v. Collins, 323 U.S. 516, 529-531 (1945).

[35] Notwithstanding the very different interests at stake in these two First Amendment freedoms, judicial analysis in challenges to state lobbing disclosure laws seldom separately analyze them. *Cf.* Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961)(rejecting the claim that a public relations campaign to influence trucking legislation was a violation of the Sherman Antitrust Act, and noting that the right to petition would be implicated by a contrary interpretation); s*ee* Steven A. Browne, *The Constitutionality of Lobby Reform: Implicating Associational Privacy and the Right To Petition the Government*, 4 Wm BRJ 717, 729-742 (1995).

regulating such political activities in a neutral, noncensorial manner will be stricken as overbroad only as a last resort."[36]

Notwithstanding the imposition that may be involved in reporting expenditures incurred in what would be otherwise protected speech, the absence of any content-based restriction in lobbying disclosure laws, coupled with the perception that disclosure is based on compelling interests, has contributed to a consistent refusal to find significant First Amendment infringement.[37] In weighing that balance, the burdens on free speech and the right to petition imposed by lobbying disclosure laws have generally been found to be "incidental."[38] "Laws regulating or monitoring the raising or spending of money in the political arena have been enacted throughout the country as well as by the Congress. When these laws have been challenged, the courts have not had difficulty finding a compelling interest as a basis for enactment."[39]

Challenges to lobbying disclosure laws based on the First Amendment right to free association have fared somewhat more successfully than free speech claims. In its landmark holding in NAACP v. Alabama, the Court held that compelled disclosure of membership in unpopular groups was unconstitutional because it "exposed (members) to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[40] That ruling was later effectively narrowed in Buckley v. Valeo, in which the Court rejected a challenge to mandatory disclosure of campaign contributions, based, in part, on an alleged infringement of associational rights, because no factual showing of harm had been made and any inhibition was found to be speculative.[41] Because financing lobbying activity is often a function of membership support by like-minded individuals, many challenges to state lobbying disclosure laws have also alleged infringement of associational rights. The courts have divided on those claims, with some striking down the statutes based on the

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[36] Kimbell, et al v. Supreme Court of Vermont, 164 Vt. 80, 85 (1995) *citing* Broaderick v. Oklahoma, 413 U.S. 601, 612-613 (1973) *and* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L.Rev. 844, 920-921 (1970); *see also* New Jersey State Chamber of Commerce, et al v. New Jersey Election Law Enforcement Commission, et al, 82 N.J. 57, 70 (Sup. Ct. N.J. 1980).

[37] *Cf.* Thomas v. Collins, supra at note 31 (striking down registration statute applying to union organizers); Perry Education Ass'n. v.Perry Local Educators Ass'n, 460 U.S. 37 (1983)(differential access to public school internal mail system accorded to one union over another justified because that union was certified as exclusive bargaining representative).

[38] Fair Political Practices Commission v. Superior Court of Los Angeles County, et al, 25 Cal. 3d 33, 47 (Sup. Ct. Cal. 1979).

[39] Montana Automobile Ass'n, et al V. Greeley, et al, 193 Mont. 378, 383 (Sup. Ct. Mon.1981)(upholding central features of Montana's lobbying disclosure law); *see also* Commission on Independent Colleges and Universities v. New York Temporary State Commission on Lobbying, 534 F. Supp. 489 (N.D.N.Y. 1982)(upholding New York lobbying law); Fair Political Practices Commission, supra at note 34 (upholding California lobbying law);; Young Americans for Freedom, et al v. Gorton, et al, 83 Wn. 2d 728 (Sup. Ct. Wn.)(upholding Washington lobbying law); Minnesota State Ethical Practices Board v. National Rifle Ass'n of America, et al, 761 F.2d 509 D. Minn. 1985)(upholding Minnesota lobbying law); New Jersey State Chamber of Commerce, supra at note 32 (upholding New Jersey lobbying law); Kimbell, supra at note 32 (upholding Vermont lobbying law); Florida League of Professional Lobbyists v. Meggs, 87 F. 3d 457 (11th Cir. 1996)(upholding Florida lobbying law); *cf.* Pletz, et al V. Austin, et al, 125 Mich. App. 335 (Ct. App. Mich. 1983)(upholding some provisions of Michigan lobbying law, while striking down others); Moffett v. Killian, et al, 360 F. Supp. 228 D. Ct. 1973)(striking down registration fee provision in Connecticut lobbying law because amount exceeded cost of administration).

[40] NAACP v. Alabama, 357 U.S. 449, 462 (1958).

[41] Buckley v. Valeo, 424 U.S. 1, 70 (1976).

prospect of such an effect, and others rejecting the claims by distinguishing between compulsory disclosure of membership and disclosure of financial support for lobbying activity.[42]

When analyzing the particular provisions of lobbying disclosure laws that cover (or could be construed to cover) indirect lobbying, courts have given some pause at the potential impact on free speech. Nevertheless, all but one such challenge has been rejected. The uncertainties inherent in separating protected speech from disclosable communications have been insufficient to outweigh protection of the legislative process. In its first examination of the constitutionally permissible scope of the Michigan lobbying law, the Michigan Supreme Court observed, in an advisory opinion, "We find more troublesome, however, the disclosure provisions as they relate to the 'soliciting of others to communicate' with officials. Resolution of any problems which may arise respecting the interpretation and application of this language is better deferred until the issues are raised in a factual context ... In order to avoid manifest overbreadth, however, the words 'soliciting others to communicate' with an official 'for the purpose of influencing legislative or administrative action' must be interpreted to mean *express and direct requests* to so communicate. Even as so construed, the validity of the restraints placed upon such requests is more appropriately tested in the factual context of an actual case or controversy."[43]

When the Michigan Court of Appeals subsequently had such an opportunity, that court expressed similar discomfort and interpreted the authorization to require disclosure of indirect lobbying with the same limitation that the exhortation must be explicit.[44] However, the court reached that conclusion relying on a misreading of Harriss, distinguishing the Supreme Court precedent with the observation that, "[U]nlike the Federal lobbying act, the requirements of chapter 5 are not restricted to direct communications between the lobbyist and the lobbyist agent and the public official. Under section 12(3) lobbying is also defined as 'soliciting others to communicate' with an official in the executive branch or an official in the legislative branch for the purpose of influencing legislative or administrative action."[45]

The Supreme Court of New Jersey also confronted the difficulty in applying broadly drafted lobbying disclosure regulation to indirect lobbying when upholding that state's law.[46] The court noted, "The crucial phraseology, 'to influence,' is not defined. It is a term with amoebic contours; in normal parlance the word 'influence' may be impregnated with a variety of meanings."[47] Quoting the Pletz decision interpreting indirect lobbying "to mean express and direct requests to so communicate," the New Jersey court held, "Confronted by the unrestrained reach of the literal provisions of the act, we have no compunctions in concluding that judicial interpretations of the

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[42] *Compare* Pletz, supra note 36, at 363-364 ("The disclosure requirement of the act potentially would discourage individuals from associating with organizations devoted to lobbying."); Montana Automobile Ass'n, supra, note 36 at 310 ("The forced disclosure of contributions and membership fess, 'regardless of whether" paid solely for the purpose of 'lobby,' compels revelation of information that has no relationship to the ends that the Lobbying Act and the Initiative seek to achieve.") *with* Minnesota State Ethical Practices Board, supra, note 36 at 513 ("The Act does not focus on the group affiliation of a lobbyist, it focuses on lobbying activity. When persons engage in an extensive letter-writing campaign for the purpose of influencing specific legislation, the State's interest is the same whether or not those persons are members of an association."); Young Americans for Freedom, supra, note 36 at 733 ("If, however, the YAF does not receive funds earmarked for a specific campaign, but expends reportable amounts from its general funds, then there is no need to divulge the names and addresses of its membership.").

[43] Advisory Opinion on Constitutionality of 1975 PA 227, 396 Mich. 465 513 (Sup. Ct. Mich.1976). This

[44] Pletz, note 36 at 344.

[45] Id.

[46] New Jersey State Chamber of Commerce, supra, note 36.

[47] Id at 76.

crucial terms, "to influence … legislation," to reach a constitutionally compatible result is called for under all of the circumstances."[48]

The Supreme Court of Montana reached the opposite conclusion, also prompted in part by the confusion sown by the U.S. Supreme Court's terminology in Harriss. The Montana lobbying law included within its definition of a "principal" who is covered by the law the concept of indirect lobbying.[49] Citing Harriss, the Montana Supreme Court misinterpreted that authority: "The Court then construed 'lobbying activities' as being limited to representations made directly to Congress, its members, or its committees. Subsection (b) could not be construed in this manner, as it specifically covers solicitation by a person seeking lobbying efforts by others."[50] After quoting extensively from the U.S. Supreme Court's opinion in Mills v. Alabama about the importance of free speech and the free press in curbing government abuses of power,[51] the Montana court concluded, "We are unable to find any compelling state interest which requires the inclusion of subsection (b) in the Initiative.[52]

One of the more frustrating examinations of the line between constitutionally protected speech and disclosable lobbying communications can be found in the decision of the federal district court for the Southern District of New York upholding New York's Lobbying law, Commission on Colleges and Independent Universities v. New York temporary State Lobbying Commission.[53] The potential chilling effect of mandated disclosure of indirect lobbying communications was raised by the plaintiffs, an organization of college administrators, who argued that they would "feel compelled to curtail any public discussions or communications of any governmental action in order to avoid triggering the disclosure provisions of the lobbying law.[54] In rejecting that claim, the decision recognized that Harriss did not hold that only direct contact with government officials could be regulated by disclosure laws, but that indirect lobbying, "in the form of campaigns to exhort the public to send letters and telegrams to government officials," could also properly be included within the definition of lobbying activities.[55] By an examination of the legislative history of the statute, the court concluded that the legislation was not intended to go beyond the activities countenanced in Harriss, and the constitutionality of the act was upheld.[56]

However, the legislative history upon which the court relied in Commission on Colleges and Independent Universities was far from clear in identifying any line between protected speech and

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[48] Id at 78.

[49] "Principal was defined to include someone who makes payments … (b) in the case of a person other than an individual, to solicit, indirectly or by an advertising campaign, the lobbying efforts of another person." Montana Automobile Ass'n, supra note 36, at 389.

[50] Id at 391. The Montana court was not alone in failing to note the Supreme Court's inclusion of "artificially stimulated letter campaigns" within its use of the term "direct lobbying." That same misunderstanding was embraced by the Second Circuit in Stern v. General Electric Company, 924 F. 2d 472 (2d cir. 1991), which interpreted the federal lobbying statute and Harriss as applying only to direct communication with members of Congress.

[51] Mills v. Alabama , supra, note 16 at 218-220 ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of the Amendment was to protect the free discussion of government affairs. This of course, includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political process.").

[52] Montana Automobile Ass'n, supra note 36, at 392.

[53] Supra at note 36.

[54] Id. at 19.

[55] Id. at 20.

[56] Id. at 22.

disclosable lobbying communications. The court quoted extensively from a debate on the floor of the New York Assembly:

> Di Carlo: "If I get together with another person and put an ad in the New York Times, and I say that I think it is terrible that the Legislature wants to pass a Blue Law... If I do it on behalf of five people, and we get together. We think this is bad for his business, and my business, and we want to let the public know what is going on, am I a lobbyist?"
>
> Zimmer: "If you are doing this on behalf of other people, yes, you are a lobbyist, or a group of other people, you are a lobbyist."
>
> Mr. Di Carlo: That does not say that the mere placing of ads comes within this section, does it?
>
> Mr. Zimmer: It depends upon what the ad says.
>
> Di Carlo: "If a church group advertising in the newspaper says, "We think that is a rotten bill that the Legislature is passing, and it should be defeated, period' spends $ 2,500 on the ad, are they lobbyists under this bill?"
>
> Siegel: "I would think so."
>
> Di Carlo: "And they would have to register as lobbyists?"
>
> Siegel: "I would think so."
>
> Schumer: "Say I decide on my own or in conjunction with somebody else, as a citizen, not a legislator, to put up a $ 1,500 billboard to say, "Please urge your legislator to vote for a certain bill,' and I never talked to a legislator, never saw him, and never made a contribution to the legislator, am I still covered by this bill?"
>
> Siegel: "I think so."
>
> Schumer: "(F)or instance, in conjunction with somebody else over the course of a year, I publish leaflets-I know that happened in my District-$ 2,000 or $ 1,501 worth of leaflets, if they said, "I am against the death penalty.' for this reason am I covered by this bill?"
>
> Siegel: "I think so."
>
> Schumer: "For instance, if some tenants decided they wanted to prevent the Co-op Conversion Law, and they got together and put together a booklet on this, and they spent money for research, and this came to $ 1,501, are they covered?"
>
> Siegel: "I think so."

Notwithstanding the uncertainty reflected in this exchange, the court upheld the statute based on later reassurances by Assemblyman Siegel that the law was not intended to cover communications that were "just preaching" [57]

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[57] Commission on Independent Colleges and Universities, supra note 36 at 20 n.8, quoting Assembly Floor Debate, July 7, 1977, 9748, at 9753-54. The court found this exchange more instructive than it might appear on its face. "Plaintiffs claim that the legislative history of the New York lobby law indicates an

The hypothetical scenarios discussed by Assemblymen Di Carlo, Zimmer, Siegel, and Schumer illustrate the difficulties that the New York legislature experienced in identifying the limits of its own legislation. How much of the activity described in the Assembly debate could be considered "just preaching," and how much would be more akin to an "artificially stimulated letter campaign," is in the ear of the beholder. And reference to the definition of indirect lobbying in Harriss, which illuminated the meaning of that phrase only by its own hypothetical, provided little more guidance ("Those who do not visit the Capitol but initiate propaganda from all over the country in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts.").[58]

The cost of the uncertainty engendered by the Harriss opinion and the various lower court decisions misinterpreting it weighs particularly heavily on exempt organizations of all kinds whose missions are in any part to be achieved by public communications on issues of policy. Determining when such activity must be reported under lobbying disclosure laws is a matter of guesswork, and exempt organizations will naturally err on the side of caution and restrain their advocacy or over-report public communications that may not be required to be reported – undermining their own effectiveness or wasting limted resources.[59] This circumstance is aggravated by the expansive position that state authorities often take with regard to "support activities," defining expenditures for research and analysis as reportable lobbying activity if the product of those labors is later used in lobbying communications.[60] These consequences would not be sufficiently significant to warrant

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intention to include any conceivable attempt to influence government action. In support of this proposition plaintiffs selected quotes from the Assembly debate. It appears, however, that when these quotes are placed in the context of the entire debate, that the legislature wished to incorporate the Harriss definition of lobbying activities… On its face the quote indicates that an advertisement discussing the merits of pending legislation would be included in the definit ion of lobbying. However, as the discussion narrowed it became clear that Mr. Zimmer was trying to differentiate between advertisements that discuss the merits of legislation and those which can be classified as part of an artificially stimulated letter campaign …Again, on the surface, [these] quotes … show that this bill reached activities which are too remote to justify lobby disclosure. However, later in the debate Mr. Siegel differentiates between "just preaching" on the merits of legislation, and undertaking a campaign for direct contact with officials, because the 'Harriss case makes that clear.'"

[58] Harriss, supra, note 10 at 620 n. 10. The court was also swayed by an advisory opinion that the New York temporary State Commission on Lobbying issued while the litigation was pending "reflecting that the lobby law would not be applied in any context outside the definition of lobbying contained in Harriss." Id. At 22. Given the resurfacing of strikingly similar allegations twenty years later in the Hip Hop Summit Action Network dispute, the wisdom of relying on non-binding interpretations by the regulatory agency that is being challenged is called into question.

[59] In her analysis of the impact that the tax code's treatment of lobbying has on "systems change" organizations, Laura Chisholm has described this effect: ""Taken together, the explicit restrictions on advocacy and the further constraints that are inherent in their uncertain limits seriously curtail the participation of 501(c)(3) organizations in the formulation of public policy…. Not only the readily apparent constraints, but also nervousness about their possible reach, understandable in light of unresolved issues concerning the scope and application of the constraints, lead organizations to limit their social activism, even where they believe that system-focused advocacy is the most effective means of achieving their tax exempt ends." Laura B. Chisholm, *Exempt Organization Advocacy: Matching the Rules To the Rationales*, 63 Ind. L.J. 201, 241 (1987).

[60] *See, e.g.,* New York State Temporary Commission on Lobbying, Opinion No. 26 (79-4)("However, if the corporation or a person or form or association otherwise engages in attempts to influence the outcome of those governmental decisions listed in section 3(a) of the act and otherwise qualifies as a Lobbyist under the Act, such monitoring activity could be considered a part of a total lobbying effort. The cost of such monitoring would therefore have to be reflected in reports required under the Lobbying Act."); *Cf.* Treas. Reg. § 56.4911-2(b)(2)(v)("Where advocacy communications or research materials are subsequently

relief, however, if the accompanying administrative burdens associated with compliance with modern state lobbying disclosure laws were not so formidable.

III. The Burdens of State Lobbying Disclosure Laws

Every state has some form of lobbying registration and reporting law, [61] and many municipalities also have disclosure ordinances.[62] While the statutes vary in their particulars and exemptions, almost all require prior registration and periodic reporting of expenditures made in order to influence legislation.[63] Some lobbying disclosure laws require reporting of expenditures in any amount in support of lobbying activity, others have dollar thresholds above which reporting is required.[64] Although lobbying disclosure laws contain various exemptions, no statute excuses charitable organizations from registration and reporting.

In its basic outline, the New York Lobbying Act is typical of other state lobbying disclosure laws.[65] Its "Legislative Declarations" explain that in order "to preserve and maintain the integrity of the governmental decision-making process in this state, it is necessary that the identity, expenditures, and activities of persons and organizations retained, employed, or designated to influence the passage or defeat of any legislation … be publicly and regularly discussed."[66] "Lobbying" is defined as "any attempt to influence the passage or defeat of any legislation by either house of the state legislature, or the approval or disapproval of any legislation by the governor …"[67]

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accompanied by a direct encouragement for recipients to take action with respect to legislation, the advocacy communications or research materials themselves are treated as grass roots lobbying communications unless the organization's primary purpose in undertaking or preparing the advocacy communications or research materials was not for use in lobbying.").

[61] Browne, supra, note 35; Thomas, supra note 16, at 176; Florida League of Professional Lobbyists, Inc. v. Meggs, supra, note 35 at 485 n.1 (11th Cir. 1996). Massachusetts was the first to codify lobbying regulation. 1890 Mass. Acts Ch. 456.

[62] NYC Admin.Code Title 3, §3-211 *et seq.*

[63] Thomas, Supra, note 17 at 175-176 ("Forty-six states have mandated both registration and disclosure requirements for lobbyists, and one requires only registration.")

[64] *See* Advisory Opinion, supra, note 40 (review of Michigan law requiring reporting of "all expenditures in any way related to lobbying, including expense for advertising and mass mailings"); Florida League of Professional Lobbyists, supra, note 36 (challenge to Florida law requiring disclosure of "all lobbying expenditures, whether made by the lobbyist or by the principal"); Kimbell, supra, note 36 (challenge to Vermont statute defining "lobbyist" as "a person who engages in lobbying for compensation of more than $500 or who expends more than $500 lobbying in any calendar year); Montana Automobile Ass'n, supra, note 36 (challenge to Montana law defining "principal" as "a person who makes payments in excess of $1000 per calendar year to engage a lobbyist); Minnesota State Ethical Practice Board, supra, note 36 (challenge to Minnesota law defining "lobbyist" as one who is engaged for pay, or who spends, more than $250 or spends more than five hours in any month to influence legislation); Fair Practices Commission, supra, note 36 (challenge to parts of California law requiring reporting by any person who employs a lobbyist or spends more than $250 in a single month to influence legislation); Young American for Freedom, supra, note 36 (challenge to Washington law containing a separate threshold for "grass rots lobbying campaigns," covering "expenditures … exceeding five hundred dollars in the aggregate in any three month period or exceeding two hundred dollars in the aggregate within any one month period in presenting a program addressed to the public, a substantial portion of which is intended, designed or calculated primarily to influence legislation"). In one instance, regulations implementing a lobbying disclosure law that contained a $100 threshold on the grounds that the legislature had shown no inclination to set any minimum level of expenditure that must be reported. New Jersey State Chamber of Commerce, supra, note 36 at 89-95.

[65] Laws 1909, Ch. 37; Legislative Law Article 1-A.

[66] Legislative Law § 1-a.

[67] Legislative Law § 1-c(c).

Lobbyists are required to register with the New York Temporary State Commission on Lobbying, and both lobbyists and those who employ them are required to file periodic reports detailing the expenditures that they have made in an effort to influence legislation.[68]

However, the scope of the New York law is broader than that of other states, and is not limited to state legislative lobbying. The law covers administrative activity as well as legislative lobbying, by including "the adoption or rejection of any rule or regulation having the force and effect of law or the outcome of any rate making proceeding by the state" within the definition of lobbying.[69] The New York law also covers lobbying efforts in legislative and administrative bodies at the local level. In 1999, the Lobbying Act was amended to require registration and reporting of lobbying "to influence the passage or defeat of any local law, ordinance, or regulation of any municipality or subdivision thereof or the adoption or rejection of any rule or regulation having the force and effect of a local law, ordinance or regulation or any rate making proceeding by any municipality or subdivision thereof."[70] The addition of "municipal lobbying" means that those who appear solely in the legislative or administrative arena of New York City government, for example, are required to report their lobbying expenditures both to the New York Temporary State Commission and to the clerk of the City of New York.[71]

The principals who retain lobbyists, known as "clients" under the New York law, are required to file semi-annual reports with the New York Temporary State Commission.[72] In addition to identifying information, those reports must include a description of the general subject or subjects of the lobbying, the legislative bill numbers of any bills, and the rule, regulation, and ratemaking numbers of any rules, regulations, or rates or proposed rules, regulations, or rates on which each lobbyist retained, employed or designated by such client has lobbied and on which such client has lobbied.[73] The reports must also contain the name of the person, organization, or legislative body before which such client has lobbied, the compensation paid or owed to each such lobbyist, and any other expenses paid or incurred by such client for the purpose of lobbying.[74] All expenses incurred in the lobbying efforts must be separately listed if more than seventy-five dollars, along with details as to amount, to whom paid, and for what purpose.[75]

The Lobbying Act requires a biannual statement of registration, and also bi-monthly reports of lobbying activity, by any lobbyist who receives or expends annually, in the aggregate, more than $2000.[76] In addition to identifying information, the registration form requires the lobbyist to state the terms of employment (with a copy of any contract) and identify by bill number each item of legislation on which the lobbyist is focusing or is expected to focus. A separate registration statement that includes all of this information must be filed by the lobbyist for each client engagement.[77] In addition to identifying information, the bi-monthly lobbying reports must contain information about the compensation paid or owed to the lobbyist, and any expenses expended, received or incurred by the lobbyist for the purpose of lobbying, separately itemized if more than seventy-five dollars,

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[68] Legislative Law §§ 1-e; 1-h.
[69] Legislative Law § 1-c(c).
[70] Legislative Law § 1-c(c). Although added to the statute in 1999, the effective date of this provision was deferred until April 2001 to publicize this new obligation.
[71] NYC Admin.Code Title 3, §3-211 *et seq.*
[72] Legislative Law §1-j.
[73] Id.
[74] Id.
[75] Id.
[76] Legislative Law 1-e; 1-h.
[77] Legislative Law § 1-e.

including details as to amount, to whom paid, and for what purpose.[78] Where such expense is more than seventy-five dollars on behalf of any one person, the name of such person must be listed.[79]

The New York law contains both civil and criminal penalties for violations. Lobbyists or clients that willfully fail to comply may be shall be prosecuted for a class A misdemeanor and may be liable for civil penalties of up to $25,000, and repeat offenders may be prosecuted for a class E felony.[80] Separately, penalties of up to $25 per day ($10 per day for those not previously required to report) may be assessed without prior notice or opportunity to cure, against lobbyists who fail to file timely bi-monthly reports.[81]

The obligations of the New York law are especially burdensome for smaller charitable organizations. While many larger charities retain paid lobbyists to petition on their behalves, smaller organizations typically designate staff to pursue legislative and administrative attention along with other, nonlobbying responsibilities. While the New York law is interpreted by the enforcement authority to exclude lobbying activity by "individuals who lobby or petition the New York State Government or any agency thereof, solely on their own behalf," that exclusion does not apply to *organizations* lobbying on their own behalves or in furtherance of their missions.[82] As a result, those charities are obligated to file semi-annual reports as a lobbying "client" *and* bi-monthly report as "lobbyist."[83]

For smaller charities that exceed the $2000 annual threshold in lobbying activity, these multiple filing obligations can have an inhibiting effect. Much of the reportable expenditures for these organizations will be incurred in staff compensation, and tracking that time can be itself a demanding proposition. The record-keeping involved is made even more daunting because the statute covers not only the time and expenditures spent in the act of communicating with legislative authorities, but also time spent in researching and formulating legislative positions.[84] With the addition of "municipal lobbying" to the activity which must be reported, many organizations that lobby only before their local governments but not in Albany are now included within the ambit of the statute.[85] The prospect of civil and criminal penalties, including fines that can be imposed on unwitting noncomplying charities, only adds to the discouraging impact of the New York law.[86]

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[78] Legislative Law § 1-h.

[79] Id.

[80] Legislative Law § 1-n. The ability of the Commission to assess this $25,000 penalty without first holding a hearing was found to violate due process rights. *See* note 13, infra.

[81] Legislative Law § 1-h(c)(3). The per diem penalties were added in 1999; previously the statute imposed penalties only after notice and an opportunity to cure.

[82] New York Temporary State Commission on Lobbying *Guidelines to the Lobbying Act (Rev. 10/13/04)*.The Guidelines can be found at www.nylobby.state.ny.us/guidelin.html .

[83] Registrants in this circumstance can avoid having to file separate reports for each employee engaged in lobbying activity by registering the organization, rather than the individual employees, as the "lobbyist." The individual staff members engaged in lobbying must then be identified as "additional lobbyists" on the registration form.

[84] New York Temporary State Commission on Lobbying Opinion No. 26 (79-4).

[85] Legislative Law § 1-c(c), (k).

[86] This discouragement is further aggravated by the aggressive yet erratic enforcement practices of the Commission's staff. *See, e.g.*, Michael Cooper, *Watchdogs Worry That Ethics Groups Has Been Hobbled*, N.Y. TIMES, Mar. 24, 2004(noting that the Commission has been under attack from both inside and outside its ranks); Dionne Searcey, *Opposes Lobbying Law: A Noisy Watchdog*, NEWSDAY, April 23, 2004 (reporting that some officials worry that the Commission's Executive Director was pursuing questionable cases in the hope that the legislature would ultimately adopt a stronger lobbying law). One Nonprofit

Taken together, the uncertain application of the New York Lobbying Act to public advocacy (like the "Countdown to Fairness" rally), its broad scope (including both municipal lobbying and administrative advocacy along with legislative lobbying) and its onerous filing obligations (bimonthly lobbyist reports and semiannual client reports), the potential for a suppressing impact on the free expression of ideas by charitable organizations is considerable. However, judicial reluctance to strike down state lobbying disclosure laws, or to limit them to direct lobbying communications, has been widespread.[87] The only court that did consider the burdens accompanying the "transaction reporting requirements" of a state lobbying disclosure law struck down only its obligation to produce information about non-legislative transactions that the court found "irrelevant" to the legislative process.[88] Absent any content-based limitations, and given the perceived value of sunlight on the legislative process, distinguishing indirect lobbying activity from direct lobbying solely on the basis of the administrative burden seems likely to be an equally unwelcome proposition.[89]

IV. Relieving the Burden: Possible Approaches for Reform

Notwithstanding judicial reluctance to distinguish indirect lobbying activity, there are improvements that could be adopted to avoid unnecessary interference with protected speech and relieve the most inequitable burdens without serious danger to the goals of lobbying disclosure statutes. The most straightforward improvements would introduce a level of clarity into the definition of "indirect lobbying" that has been markedly absent for more than fifty years. Other possible reforms, all problematic in their implementation, might distinguish among the different fora in which the advocacy occurred, or distinguish between certain categories of legislative actors from others. However, a narrowly crafted exemption for smaller charitable organizations acting in furtherance of their missions would enable those groups to fulfill their purposes without the kind of suffocating burdens found in the New York Lobbying Act.

A. Explicit Versus Implicit Encouragement

Forum member relates an experience in which a bi-monthly report was rejected because his organization attempted to follow instructions by providing information that would not fit on the prescribed form on an attached sheet, because he had entered "see attached" rather than beginning the answer on the form and continuing it on the attachment.

[87] One court went so far as to observe, "In fact, the government interest in providing the means to evaluate these pressures may in some ways be stronger when the pressures are indirect, because then they are harder to identify without the aid of disclosure requirements." Florida League of Professional Lobbyists, supra, note 36 at461.

[88] Fair Political Practices Commission, supra, note 36 at 48-49 ("We are satisfied that the right to petition for redress of grievances similarly may not be conditioned on disclosure of irrelevant private financial matters unrelated to the petition activity.").

[89] *See, e.g.,* Commission on Independent Colleges and Universities, supra, note 36 at 493-494 ("Broaderick" differentiated between laws which are straightforward regulations of the content or quantum of speech and those which seek to regulate conduct and have an incidental impact of First Amendment rights."); New Jersey State Chamber of Commerce, supra, note 36 at 74 ("The act strives to ventilate the legislative process through the disclosure of sources and flow of money designed to impact upon this vital governmental function. It requires public revelation of those who endeavor to control or direct the destiny of legislation through the use of moneys. This, and the ultimate accountability of legislative representatives who respond to such endeavors, constitute governmental concerns of a compelling magnitude.").

In 1986, the Internal Revenue Service published a Notice of Proposed Rulemaking to implement the Tax Reform Act of 1976.[90] Among other changes, the Notice proposed to define "grass roots lobbying" in order to implement the specific lobbying limitations contained in the new law for 501(c)(3) organizations that choose to have their lobbying limits computed arithmetically by making an election under section 501(h) of the Code.[91] The proposed definition of a grass roots lobbying communication was quite broad, requiring only that the communication pertain to legislation under consideration, reflect a view on that legislation (unless disseminated to persons reasonably expected to have a common view), and communicated to reach members of the general public (and not academic, scientific, or other specialized audiences).[92] The Notice prompted a deluge of public comment, the largest number of which was focused on the definition's lack of a "call to action" or other specific encouragement to the audience to contact their legislators in response to the communication. In its generality, the IRS' proposed definition was not unlike the definition of "lobbying" found in the New York disclosure statute and that of any other states ("any attempt to influence the passage or defeat of any legislation…"), with the added provision that the communication be intended to reach the general public.[93]

In response to the comments, the IRS published a new set of proposed rules which significantly narrowed the public communications that would be considered grass roots lobbying.[94] Those rules limited grass roots lobbying communications to those which refer to specific legislation, reflect a view on that legislation, and "encourage the recipient to take action with respect to such legislation."[95] The proposed rules went on to describe the particular circumstances in which "encouragement" will be considered sufficiently explicit to be grass roots lobbying:

> The rules proposed in this document also indicate that a communication is not a grass roots lobbying communication unless it encourages its recipients to take action with respect to the

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[90] 51 FR 40211 (November 5, 1986).
[91] 26 U.S.C. §§ 501(h); 4911.
[92] The definition in the Notice provided:

> "Grass roots lobbying" means an attempt to influence the general public, or any segment thereof, with respect to any legislation. A communication shall be considered an attempt to influence the general public, or a segment thereof, with respect to legislation if the communication --
>
> (i) Pertains to legislation being considered by a legislative body, or seeks or opposes legislation,
>
> (ii) Reflects a view with respect to the desirability of the legislation (for this purpose, a communication that pertains to legislation but expresses no explicit view on the legislation shall be deemed to reflect a view on legislation if the communication is selectively disseminated to persons reasonably expected to share a common view of the legislation), and
>
> (iii) Is communicated in a form and distributed in a manner so as to reach individuals as members of the general public, that is, as voters or constituents, as opposed to a communication designed for academic, scientific, or similar purposes. A communication may meet this test even if it reaches the public only indirectly, as in a news release submitted to the media. If any part of an advertisement constitutes grass roots lobbying, the entire amount expended for, or in connection with, the advertisement constitutes a grass roots expenditure.

51 FR 40211.
[93] New York Legislative Law § 1-c(c)
[94] 53 FR 51826 (December 23, 1988).
[95] 53 FR 51826, 51828.

> specific legislation. As indicated in this document, a communication encourages its recipients to take action only if the communication:
>
> (1) States that the recipient should contact a legislator or an employee of a legislative body, or should contact any other government official or employee who may participate in the formulation of legislation (but only if the principal purpose of urging contact with the government official or employee is to influence legislation);
>
> (2) States the address, telephone number, or similar information of a legislator or an employee of a legislative body;
>
> (3) Provides a petition, tear-off postcard or similar material for the recipient to communicate his or her views to a legislator or an employee of a legislative body, or to any other government official or employee who may participate in the formulation of legislation (but only if the principal purpose of so facilitating contact with the government official or employee is to influence legislation); or
>
> (4) Specifically identifies one or more legislators who will vote on the legislation as: (a) Opposing the communication's view with respect to the legislation; (b) being undecided with respect to the legislation; (c) being the recipient's representative in the legislature; or (d) being a member of the legislative committee that will consider the legislation. Encouraging the recipient to take action under this fourth category does not include naming the main sponsor(s) of the legislation for purposes of identifying the legislation.[96]

This definition of grass roots lobbying was adopted in the final rules and continue to be the definition in the Internal Revenue Service's regulations today.[97]

The specificity of the IRS' approach to distinguishing between "just preaching" and indirect efforts to influence legislation stands in contrast to the confusion sown by Harriss and perpetuated by many of the lower courts that later faced this challenge. As discussed in Part II, *infra*, Michigan and New Jersey courts had recognized that only by requiring such specificity in the encouragement could the line effectively be drawn.[98] Yet this judicial narrowing is the exception and not the norm among the lower court decisions interpreting disclosure regulation of indirect lobbying, and many statutes have survived with broad language that can continue to inhibit protected advocacy.[99] Whether other reforms are warranted in order to preclude that inhibiting effect, a narrow and specific delineation of the kind of encouragement that will constitute indirect lobbying is certainly needed.[100]

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[96] Id. The proposed rule, and the final regulations, contained an exception to this definition of grass roots lobbying for mass media communications" within two weeks before a legislative vote on a highly publicized piece of legislation, which carry a presumption that the communication is grass roots lobbying if it reflects a view on the subject of pending legislation and either refers to the legislation *or* encourages the public to communicate with legislators about it. 51 FR 51826, 51838

[97] 26 C.F.R. 56.4911-2(b)(2).

[98] Pletz, supra, note 36; New Jersey State Chamber of Commerce, supra, note 36.

[99] *See, e.g.*, New York Legislative Law § 1-c(c); Commission on Independent Colleges and Universities, supra at note 36.

[100] *See* Mary Katherine Vanderbeck, Note, "First Amendment Constraints of the Federal Regulation of Lobbying Act," 57 Tex. L. Rev. 1219, 1237-1246 (1979). There is, of course, also precedent for this approach in the Federal Election Campaign Act's requirement that specific endorsement of a candidate, by

B. Public Versus Private Communications

Among other options for narrowing the scope of lobbying disclosure laws to minimize interference with protected activity is a distinction between communications that are made in a public manner, and those which take place behind out of public view. From the first, a central theme in the expressions of judicial concern about the effects of undisclosed lobbying is the corrosive effect that secret influences have on the legislative process.[101] On the other hand, the cherished value of the right to publicly criticize the government, including policies that are or may become the subject of legislative initiatives, has been a theme of those who have doubted the unyielding primacy of the government's interest in disclosure of indirect lobbying communications.[102] A line drawn between public efforts to influence legislation and private efforts to do so could preserve the desired sunlight for those communications that are not already in public view without burdening those that are already disclosed.

Such a distinction seems unworkable for at least two reasons. First, crafting the line between "public" and "private" communications in a world of modern communications technology is a formidable task that seems certain to fail. We may share the Harriss opinion's concern about "orchestrated letter writing campaigns," and we might readily extend that concern to electronic e-mail communications[103]. Whether we would also extend disclosure regulations to web sites, with our without password-protected barriers, is not a certainty. Government at all levels has proven ill-equipped to keep regulatory pace with rapid improvements in technology, and communications options are only likely to multiply further in the future.[104] Beyond the challenges of determining whether those communications mechanisms are sufficiently "public" to warrant exemption from disclosure laws, the sheer proliferation of electronic fora makes a distinction between "public" and "private" communications impracticable. In the cluttered bazaar of modern communications, it is difficult to judge which venues are sufficiently conspicuous to conclude that a minimum level of public awareness of the source of a legislative influence has really been achieved.

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the use of certain "magic words," must occur in order for expenditures incurred in mass communications prior to an election to be reportable. 11 C.F.R. 100.22; Buckley v. Valeo, 424 U.S. 1 (1976). While the inefficacy of that statute has been much analyzed and criticized – including its effect on the nonprofit sector in a prescient Nonprofit Forum paper by Miriam Galston in 2001, "Express Advocacy in the Post McCain-Feingold World" -- the FECA's requirement that the advocacy be "express" does draw the same useful line. *See also* Chisholm, supra, note 57 at 293.

[101] The Harriss opinion quotes the legislative history of the Federal Lobbying Act in its reference to a "class of lobbyists … [who] spend their time in Washington presumably exerting some mysterious influence with respect to the legislation in which their employers are interested, but carefully conceal from Members of Congress whom they happen to contact the purpose of their presence." Harriss, supra, note 10 n. 10.

[102] *See* Rumely, supra, note 15 at 56-58 (Douglas, J., concurring).

[103] Harriss, supra, note 10 at 620-621.

[104] *See, e.g.*, Pamela O'Kane Foster, Note, Lobbying *on the Internet and the Internal Revenue Code's Regulation of Charitable Organizations*, 43 N.Y.L.Sch. L. Rev. 567 (1999)(discussing the difficulty in applying IRS lobbying regulations to modern electronic communications). State regulatory officials have also experienced considerable difficulty in reconciling charitable solicitation registration statutes to modern technology, and in the absence of state legislative clarification have created nonbinding legal guidelines called "The Charleston Principles" for charities soliciting on the internet. Text can be found at www.nasconet.org.

Perhaps a more decisive reason for failure of a distinction between "public" and "private" communications is the fallacy that public statements of legislative preference would necessarily disclose the *source* of public pressures. Even a mandatory identification of the persons or entities that were responsible for public statements in the press, in the media, or on the internet would not reveal the source of the financing for such endeavors.[105] The easy availability of corporate or other organizational vehicles to finance a public campaign to influence legislation, without any other obligations of financial disclosure, provides additional means to conceal the true source of those pressures and thwart the intent of any exemption granted to public initiatives.[106] A distinction between "public" and "private" indirect lobbying, perhaps superficially attractive, would undercut the objectives behind lobbying disclosure statutes.

C. Public Versus Private Interests

Another distinction that could be applied to separate protected advocacy from disclosable indirect lobbying goes to the central character of lobbying, and why it has acquired its unsavory reputation: the difference between lobbying for pecuniary self-interest and lobbying to advance policy that is intended to benefit the public good.[107] Ever since Ulysses S. Grant entertained seekers of legislative favors in the foyer of the Willard Hotel, lobbying has been stained by the stereotype of grasping self-interest, contrary to the public good. While a substantial body of political theory holds that the resolution of competing self-interests is the core role of a properly functioning legislative system, other have argued that compromising self-interest in order to accommodate some middle ground of shared interest is the highest function in legislative process.[108] Wherever one might stand on this debate, one way to avoid inhibiting protected advocacy might involve permitting an exception from disclosure when such activity is motivated by other than pecuniary self-interest.

A distinction between private and public interests as a mechanism to separate and protect issue advocacy may be attractive in theory, but carries inherent difficulties that may make such an approach ultimately unworkable. Legislative matters typically have both policy

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[105] Although his role in the "Countdown to Fairness" rally was well-publicized, Russell Simmons funding of that effort was not apparent from the publicity for the event. *See* note 3, infra, and accompanying text.

[106] *See* Gallston. supra, note 102 at 1325. The "Countdown To Fairness" rally involved not one but two layers of organizational sponsors, the "Coalition for Fairness" and its member organizations, including the Hip Hop Summit Action Network, funded by Mr. Simmons. As an unincorporated association, the Coalition for Fairness would not have been obligated to report its financial activities, and Mr. Simmons' personal support of the Hip Hop Summit Action Network would not be a matter of public record.

[107] Thomas, note 17 at 149-150 ("The very word 'lobbying' unfailingly evokes images of furtive influence peddlers lurking in the lobbies outside congressional meeting places, awaiting their opportunity to pounce on defenseless elected officials and 'buttonhole' – the catchword of the lobby critic – them until they agree, however reluctantly, to sacrifice the public welfare to appease whatever special interest the lobbyist happens to represent that day.").

[108] "Public choice" theorists hold that legislative decision making can never accurately capture the aggregate of social preferences, because any collection of individual preferences is shifting and unstable. Gallston, supra, note 102 at 1311-1313. By contrast, the 'deliberative model" assumes that the most valued legislative outcomes are based on a shared consensus of community interest, and not merely from balancing competing self-interests. Id at 1337-1338. One commentator has contrasted these theories in describing the role that the tax system plays in shaping participation in the legislative process, concluding that current tax policy distorts and tilts the process toward self-interest and away from the objectives of "public interest" theory. Burt Neuborne, *Madison's Nightmare: The Tax-Driven Exclusion of Disinterested Voices from the Legislative Process*, presented to the National Center on Philanthropy and the Law, 1994.

implications *and* offer the promise of financial gain for the "winners" or loss for the losers. For example, when Donald Trump travels to Albany to urge legislators to vote against approval of gambling casinos operated by New York's native Americans, his arguments may be cast in terms of the deleterious impact such facilities can have upon underdeveloped communities without a sufficiently established social and transportation infrastructure, and proponents of those casinos will offer reasoned analyses about the economic development and employment opportunities that they will bring to those same rural areas.[109] Notwithstanding the merits of their arguments, both will stand to gain or lose financially depending upon the outcome.

Lobbying may involve only private benefit, entirely divorced from the realm of public interest (except to the extent that their success allocates public resources and may diminish the already sullied reputation of the legislative process). However, most legislation – even that with enormous potential for private gain – can and is advanced in terms of the public interest by its lobbying proponents.[110] Offering an exemption only in the complete absence of any economic advantage, including advantages derived from a generally improved economy, would dramatically narrow the field of subjects eligible for the exemption. The exemption would unavailable for many actors with much to contribute on wide areas of public importance on which public advocacy should be encouraged.

D. Exempting Charitable Organizations

Narrowing the "public interest" exemption to make it available only to charitable organizations engaged in indirect lobbying seems, at first blush, a sensible approach to guard against self-interest masquerading as public concern. The wisdom of the tax code's limitations on lobbying by 501(c)(3) organizations have struck some as counterintuitive, given that lobbying may be one effective way to facilitate the exempt purposes, and the absence of parallel limitations on associations and corporations.[111] However, this approach is broader than is necessary to respond to the burdens of lobbying disclosure laws, and it may, paradoxically, serve to disadvantage and drown out the voices of the smaller organizations that ought to receive greater protection through such reform.

Reference to two thoughtful examinations of the effect of the tax code's lobbying restrictions on tax-exempt entities serves to illuminate desirable reforms of state indirect lobbying disclosure laws. Both Laura Chisholm and Miriam Gallston have concluded that the current limitations on the amount of lobbying activity in which charities may permissibly engage are not well-crafted to suit the rationales behind those restrictions and have deleterious effects on

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[109] Mr. Trump has been the subject of enforcement attention by the New York Temporary State Commission for his opposition to native American-operated gambling casinos in New York state, and the issue continues to offer a mix of public and private interest that have proven difficult to differentiate and untangle. *See State Commission Investigates Trump Effort To Stop Casino*, New York Times, July 18, 2000; *Catskill Casino Politics: Game of Delicate Balance*, New York Times, January 31, 2005.

[110] The exceptions would be those lobbying campaigns that have no informational content but rather consist of "free vacations, substantial honoraria, lunches, and other financial sweeteners," which have been likened by one commentator to "sophisticated bribery." Neuborne, supra, note 104 at 4 n.6.

[111] Chisholm, supra, note 57 at 288, citing Fogel, *To the IRS, Tis Better To Give Than To Lobby*, 61 A.B.A. J. 960, 961 (1975); Gallston, supra, note 102 at 1322-1323. Whether the removal in 1994 of the business expense deduction for lobbying activity operated to level the playing field with charities, or whether a level playing field is even desirable, is a matter beyond the scope of this paper. *See* Neuborne, supra, note 104.

charities and on the legislative process.[112] In order to promote a better informed "deliberative" legislative process and promote self-development through increased citizen participation, Gallston would permit all exempt organizations to engage in unlimited direct "educational lobbying" on all subjects related to an organization's exempt purposes, and prohibit those organizations from engaging in any other lobbying, including lobbying for pecuniary organizational gain and lobbying on subjects unrelated to the organization's exempt purposes.[113] Her proposal is based on an objective of improving the quality of the legislative deliberations, a goal which also prompts a qualification that the lobbying rules incorporate a "rationality standard" that would be "designed to require that the public purpose behind a proposal and the manner in which the proposal urged will accomplish it be clearly explained."[114]

Chisholm proposes a restructuring of the tax code's limitations on lobbying by exempt organizations that is significantly narrower.[115] Her proposal would allow unrestricted lobbying by "system change" charities in furtherance of their exempt purposes if they were able to demonstrate sufficiently broad public support (by meeting a modified version of the public support test) and – to insure that the system change organization speaks for otherwise under-represented, public interests – would also call for some scrutiny of the organization's decision making processes.[116] Her rationale for these proposals is based on the view that the tax code's purported neutrality in its regulation of lobbying activity is a myth, and, rather than attempting to create a level playing field, lobbying regulation should encourage underrepresented interests such as those promoted by system change organizations.[117] Like Gallston, Chisholm seeks not only to improve the legislative process by providing more complete information, but also seeks to promote increased civic participation as a value in itself.[118]

Notwithstanding their shared conviction about the benefits of civic participation, Gallston and Chisholm have diametrically opposite views about the place of indirect lobbying in their ideal regulatory schemes.[119] Gallston would prohibit such lobbying by exempt organizations altogether, arguing that such communications are inherently coercive rather than informational. Conceding that "the political community has as much to learn from an enlightened citizenry as it does from enlightened representatives," she articulates a concern that indirect lobbying inevitably runs afoul of the prohibition against participation by charities in partisan electoral politics because of its coercive character.[120] In contrast, Chisholm would

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[112] Chishold, supra, note 57; Gallston, supra, note 102. I am indebted to both of these Nonprofit Forum members for the insightful and substantial work that served as a springboard for this paper's consideration of state indirect lobbying regulation.

[113] Gallston, supra, note 102 at 1338.

[114] Id at 1343. Organizations could satisfy the "rationality standard" by offering "empirical data, theoretical or policy arguments, or moral precepts," but it is not clear whether this requirement differs in substance from the "methodology test" for educational charities articulated in National Alliance, which must be "aimed at developing an understanding on the part of the addressees." 710 F. 2d at 874.

[115] Chisholm, supra, note 57 at 277.

[116] Id at 281-283. It is not clear how this assessment would be performed by the IRS, or what kind of additional information would be reported to make it possible.

[117] Chisholm, supra, note 57 at 247-252.

[118] Id at 266.

[119] Both authors note that the focus of their work is on direct lobbying, and not on the regulation of indirect lobbying activity.

[120] "The promise or threat of a grassroots lobbying campaign may be difficult to distinguish from the promise of electoral assistance or the threat of its opposite." Gallston, supra, note 102 at 1342. In arguing for an absolute prohibition on indirect lobbying, Gallston would preserve the tax code's current definition.

liberate all exempt organizations from any limitations on indirect lobbying "in the context of charitable organization activity."[121] She argues that indirect lobbying is an important tool in the role of exempt organizations as innovators, educators, and monitors of government process.[122] She also notes that the difficulty in distinguishing advocacy from indirect lobbying activity "creates difficult line-drawing problems that tend to inhibit activity which ought to be encouraged."[123]

Aside from the constitutional implications of such a proposal, an absolute prohibition on indirect lobbying while expanding direct lobbying by charities seems based on an unrealistic dichotomy between "informational" and "pressure" lobbying.[124] All lobbying is inherently coercive, even lobbying with extensive informational value. Communications that urge legislators to support or oppose legislative proposals (that is, that are not "nonpartisan study, analysis, or research") invariably carry elements of both persuasion and pressure. Whether consciously intended by the communicators or not, the perception of the officials receiving the lobbying message invariably calibrates the potential impact of any response that will occur during the next election cycle.[125] That pressure is inherently electoral in nature, the only consequence that ultimately may be visited upon elected officials for heeding or rejecting those entreaties. The contention that indirect lobbying communications can be distinguished from direct lobbying on the grounds that one is inherently more coercive than the other suggest a faith in the purity of informational lobbying that does not exist in practice.[126]

A more persuasive reason to treat direct lobbying more favorably is the relative paucity of informational content in many, if not most, indirect lobbying communications. It cannot be gainsaid that typical indirect lobbying communications are tilted heavily toward declaration and away from analysis, even if they are the product of a more thoughtful process than the stereotype of the "orchestrated letter writing campaign" would suggest. As far back as the legislative history of the Federal Lobbying Act, a common concern about indirect lobbying is that it does not constitute the considered policy expression of an informed citizenry, but rather is the product of manipulation by unseen forces, and can even induce requests that are contrary to

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"[T]he current definition of grass roots lobbying contained in the restrictions on public charities is so narrowly drawn that communication with the public, whether they constitute advocacy or not, are now permitted without limitation as long as they do not encourage members of the public to contact lawgivers." Id.

[121] Chisholm, supra, note 57 at 287-288.

[122] Id.

[123] Id.

[124] One state, Georgia, does have a complete ban on lobbying written into its constitution. Ga. Const. Art. I, § 2 (12). However, in practice, communications with legislators are permitted by attorneys and duly authorized representatives. *See* Cook Barwick, *Thou Shalt Not Talk To Thy Legislator,* 5 Mercer L. Rev. 311 (1954).

[125] For example, when the Government Relations Committee of the Nonprofit Coordinating Committee of New York expresses reservations on the merits of the Attorney General's proposed revisions to the New York Not-for-Profit Corporation Law, those articulations are founded on a untainted devotion to the best and highest legislative outcome. Nevertheless, they are undoubtedly perceived in Albany as a public position promoted by a membership organization of more than a thousand influential nonprofit groups who employ thousands of voters and have ready access to media opinion makers.

[126] This is not to deny that indirect lobbying activity has a coercive aspect. As the quotations from many of the speakers at the "Countdown to Fairness" rally make painfully clear, a tendency to threaten electoral retribution may be irresistible in the heat of policy advocacy. *See* infra, note 6 and accompanying text.

the speakers' views or interests.[127] Aside from the cynicism about the malleability of the electorate that is reflected in that view, it understates a different value communicated through indirect lobbying, in establishing the extent of public opinion on a particular policy subject. The fruits of successful indirect lobbying, although requiring only modest expenditures of individual energy in an age of electronic communications, may nevertheless represent in the aggregate a sufficient collective interest in a subject to place it on or move it up the legislative agenda. While never a substitute for information intended to guide the deliberative process, the extent and fervor of public opinion that is central to "public choice" political theory can and should play a role in setting legislative priorities. Knowing how many people seem to care and how much they seem to care is an important tool in prioritizing limited legislative resources.[128]

On the other hand, an unlimited dispensation for all exempt organizations from registration and reporting of indirect lobbying, even when lobbying only in furtherance of their exempt purposes seems unnecessarily broad and may undermine the objectives of lobbying disclosure laws. While removing limitations found in the tax code may liberate exempt organizations to communicate with the public on legislative issues to the same extent as private interests, exempt organizations and business interests are not now treated differently under lobbying disclosure laws. Even if the purported neutrality in the treatment of various lobbying actors under the tax code is a myth, charities, other exempt organizations, business corporations, and other taxable entities are all subject to the one-size-fits-all rules that are characteristic of lobbying disclosure laws. Lobbying disclosure rules are not disparate in their application; rather, the burden of compliance is felt unequally depending upon the circumstances of the lobbying entity.

The diversity of the charitable sector in both mission and size also militates against an unlimited dispensation for all exempt organizations from lobbying registration and disclosure laws. The Internal Revenue Service's liberal policy in recognizing tax exempt status based on general categories without assessing the merits of applicants' missions or their capacity to achieve their goals leads to an infinitely diverse set of views among charities on every public policy issue.[129] Of course, every exempt organization within this pluralistic universe contends that its views represent the common good, irrespective of the sources or extent of its support. Identifying a "public interest" that warrants an exemption from indirect lobbying disclosure laws by choosing from among charitable missions or, especially, based on positions taken as to particular issues, would be folly as well as an exercise for which government regulators are

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[127] Harriss, supra, note 10 at 620 n. 10.

[128] The campaign to reform the Rockefeller drug sentencing laws serves as an illustration of this value, inasmuch as proposals to enact reform had been pending in Albany for years before the public attention to the issue in 2004 compelled bipartisan and gubernatorial attention and the statutes were amended. *New York State Votes to Reduce Drug Sentences*, New York Times, December 8, 2004. In discussing the shortcomings of the "public choice' theory of legislation, both Gallston and Chisholm note the "free rider" problem that occurs because of the natural reluctance of many to bear a share of the cost advancing legislation when they stand to benefit, whether or not they pay. Gallston, supra, note 102 at 312-314; Chisholm, supra, note 57 at 254-255. Under these circumstances, small homogenous special interest organizations with more disciplined organizational structure are able to limit the "free rider" problem, and thus have an advantage over organizations with large membership and less control over their adherents. Indirect lobbying techniques help to reduce that difference, because they make it possible to stimulate expression of legislative preferences among those who might otherwise rely on the work of others.

[129] Treas. Reg. 1.501(c)(3)-1(d)(1)(i); Gallston, supra, note 102 at 1325.

particularly poorly suited.[130] There is also the prospect that exempt organizations may operate as policy voices for commercial interests, although the public support test should preclude those organizations from achieving public charity status without a sufficiently broad base of supporters.[131] Finally, the vast charitable sector is composed of hundreds of thousands of organizations for which compliance with state indirect lobbying disclosure laws may be an inconvenience, but not an expense which threatens to suppress their free expression on public policy issues to the same extent as their less affluent brethren in the sector. A more narrowly tailored exemption from this burden seems more appropriate.

E. Exempting Small Charitable Organizations

The burdens of lobbying disclosure laws fall disproportionately on small charitable organizations, which lack the administrative infrastructure to track the time and expenditures spent on lobbying activity and to prepare and file the mandated periodic reports.[132] In New York, which now requires the filing of eight reports each year and covers municipal lobbying and administrative advocacy as well as lobbying before the New York legislature, the burdens can be prohibitive. Those factors alone support the creation of an exemption from reporting of indirect lobbying by small charities, when those organizations are acting in furtherance of their charitable purposes.[133] In its regulation of indirect lobbying

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[130] Chisholm, supra, note 57 at 278-280. The Internal Revenue Service has demonstrated an inability to make principled distinctions of this kind. In the 1970's and early 1980's, the IRS created considerable mischief with a standard for distinguishing 501(c)(3) "educational" organizations that are engaged in social or civic advocacy from 501(c)((4) "action" organizations that was so vague as to invite content-based examinations of organizational missions. That "full and fair exposition" test was eventually abandoned in favor of an approach that examines the manner of presentation rather than its content. Big Mama Rag, Inc. V. United States, 631 F. 2d 1030 (D.C. Cir. 1980); National Alliance v. United States, 710 F. 2d 868 (D.C. cir. 1983).

[131] As exemplified by Mr. Trump's efforts in opposition to native American-operated casinos, virtually any lobbying stance can be articulated in terms of unselfish public policy objectives. Infra at note 107 and accompanying text; Chisholm, supra, note 57 at 278 ("Two 'charitable' may well reach different conclusions about the desirability of certain public policies. For example, one organization might oppose the proliferation of nuclear power plants on health and environmental protection grounds. The policies favored by this organization might also be favored by coal producers, who stand to derive a private benefit from the limitation of alternative energy sources. Another 'charitable' organization might take the position that the expansion of nuclear energy generation facilities would serve environmental protection and consumer interests. This organization's policy preferences might be consistent with those of the power companies which stand to gain from the promotion of nuclear facilities."). *See also* Oliver Houck, *With Charity for All*, 93 Yale L.J. 1415, 1517 (1984).

[132] In a comprehensive study of the nonprofit sector in New York City based on data collected in 2000, 75% of the over 9,000 operating charities in the New York metropolitan area had annual operating budgets of less than $1 million, but those charities employed only 12% of the workers in the sector. John E. Sely and Julian Wolpert, *New York City's Nonprofit Sector*, Tables 3.1, 4.4, The New York City Nonprofits Project (2002).

[133] These burdens also fall inequitable on smaller charities that engage in direct lobbying, and a strong argument – outside the scope of this paper – can certainly be made for that exemption as well. I exclude from this proposal lobbying the small exempt organizations in pursuit of funding or to advance interests outside their missions. Because funding opportunities often arise in circumstances in which those charities may compete with for-profit entities or with larger charities that would not be excused from lobbying disclosure, the appearance of undue preferential treatment is inadvisable.

activity, the inhibiting effect of the uncertain scope of the current law adds to the argument in favor of exemption.[134]

Defining a rational line between "small" organizations that ought to be excused from reporting their indirect lobbying and other organizations that would not enjoy this benefit may be, however, an elusive exercise. The Internal Revenue Code identifies organizations with revenues of less than $100,000 and assets of less than $250,000 as eligible to file Form 990EZ, rather than the Form 990. That level of assets and revenues is quite low, however, when one considers the meager staffing of many exempt organizations with more resources that are required to file the full Form 990.[135] A sliding scale of the sort supplied by the tax code to enable charities that have elected to so under section 501(h) to calculate the extent of permissible lobbying, with the disclosure exemption applying to charities that spent no more than one-half of that amount up to a specific dollar cap, would provide relative ease of calculation for exempt organizations.[136] This approach would also provide information to enforcement authorities to enable them to compare, at least retrospectively, the level of activity reported on Forms 990 to apparent levels of indirect lobbying activity by charities under scrutiny.[137]

In a different context, the impact of state regulatory schemes on the ability of small charitable organizations to disseminate their messages has been recognized to be significant.. In Riley v. National Federation of the Blind of North Carolina, the Supreme Court struck down a charitable solicitation registration statute that placed limits on professional fundraising fees, in part on the ground that the law was "impermissibly insensitive to the realities faced by small or unpopular charities."[138] While the benefits of lobbying disclosure laws have apparently been esteemed by the courts in inverse proportion to the respect accorded state charitable solicitation statutes, the burdens of ever more onerous lobbying disclosure laws like New York's are no different – the cost of compliance has a suppressing effect on their advocacy.[139] Providing an exemption for small charities from reporting indirect lobbying activity would enable those groups to promote their messages, including those with legislative implications, without reporting burdens that are prohibitive.

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[134] This concern abates, however, if the proposed revisions to revise the definition of indirect lobbying to require an explicit exhortation were adopted. *See* Part IV.A, infra.

[135] *See* note 130, infra.

[136] For example, a charity with annual program service expenditures of $500,000 would be permitted under the tax code to spend up to $100,000, of which $25,000 may be expended on grass roots lobbying activity. Under this proposal, one-half of that amount could be expended on indirect lobbying annually before registration and reporting would be required.

[137] Of course, this access to information well after the legislative season has ended is not a substitute for the frequent reporting that is one of the most onerous features of the New York Lobbying Act. Any exemption for small charities, much like the dollar thresholds below which reporting is currently excused, will create enforcement challenges that stem from uncertainty about whether particular lobbying organizations are in fact below those dollar thresholds, as they claim to be.

[138] Riley, et al v. National Federation of the Blind of North Carolina, et al, 487 U.S. 781, 793 (1988). "This chill and uncertainty might well drive professional fundraisers out of North Carolina, or at least encourage them to cease engaging in certain types of fundraising (such as solicitations combined with the advocacy and dissemination of information) or representing certain charities (primarily small or unpopular ones) all of which will ultimately 'reduce the quality of expression.'" 487 U.S. at 794, quoting Buckley v. Valeo, 424 U.S. 1, 19 (1976).

[139] Riley, supra, note 137; Secretary of the State of Maryland v. Joseph H. Munson Co., 467 U.S. 497 (1984); Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

V. Postscript: New York Muddles On

In 2004, the New York temporary State Commission on Lobbying invited comment on proposed revisions to the New York Lobbying Act.[140] The proposed revisions include an increase in the expenditure threshold above which registration and reporting are required.[141] The proposal also includes an expansion of the definition of lobbying to add procurement lobbying before state and municipal government officials, potentially a dramatic expansion because it includes charitable service providers that rely on government funding to provide services but do not otherwise lobby at either the state or local level.[142] What is *not* included in the proposal is a sufficient clarification in the distinction between covered indirect lobbying and protected nonlobbying issue advocacy. The proposed amendments expand the definition of lobbying to include "soliciting directly or soliciting others to communicate" with legislative officials, but do not specify when discussions of legislative policy constitute "soliciting others."[143]

Public attention to the influence of money on the legislative process has not abated, and calls for expansion of the lobbying laws continue in the media.[144] As moths to the flame, enforcement authorities will continue to press for compliance with the broadest interpretation of the scope of lobbying disclosure laws.[145] It is only a matter of time before another public demonstration focused on a current policy issue runs afoul of that enforcement philosophy, and more litigation ensues. In the interim, we will not be able to calculate the charities, particularly the small charities, which are inhibited from participating in that public debate. That ongoing effect is to the detriment of both the nonprofit sector and the legislative process.

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[140] The proposed changes to the New York Lobbying Act can be found at www.nylobby.state.ny.us/newlobbyact.html

[141] Id. While this change would represent a welcome improvement over the $2000 threshold in the current law – and would provide relief to small charities that engage in limited amount of direct and indirect lobbying – it would not resolve the burden on small charities effectively because it is focused on the amount of the lobbying expenditures rather than the size of the lobbying organization. For example, a small charity with a lobbying staff member earning $50,000 annually would remain below that threshold only if the staff member spent fewer than 26 days each year on lobbying activity, with no other lobbying expenditures by the organization. Even in New York's abbreviated legislative calendar, that would permit participation in lobbying activity for only a fraction of the legislative season.

[142] Government grants are especially important for nonprofits that obtain smaller shares of their revenues from endowments and investments. *See* Seley and Wolpert, supra, note 132 at 45.

[143] Note 140, infra.

[144] *See, e.g., Reformers Feud,* New York Times Editorial, March 4, 2004; *Doing Better Not Best*, New York Times Editorial, June 18, 2003.

[145] Note 13, infra.