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## "Gouging the Government": Why a Federal Contingency Fee Lobbying Prohibition is Consistent With First Amendment Freedoms

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# NOTES

## **“Gouging the Government”: Why a Federal Contingency Fee Lobbying Prohibition is Consistent With First Amendment Freedoms**

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## I. INTRODUCTION

*Washington Post* writer David Segal once observed, “[f]or most Americans the words ‘Washington lobbyist’ have roughly the same cachet as, say, ‘deadbeat dad.’”<sup>1</sup> Both lawmakers and the public regard lobbying as an unsavory part of the political process.<sup>2</sup> Much of this perception stems from the vast sums of money spent each year on lobbying activity. For example, in the first half of 2004 alone, mortgage funding companies Fannie Mae and Freddie Mac reported spending over \$11 million on lobbying activities, General Electric spent \$8.5 million, and the U.S. Chamber of Commerce spent \$20.1 million—and these were only three of the 600 groups that spent more than a quarter of a million dollars in that six-month period.<sup>3</sup> The amount spent just on direct lobbying, where a lobbyist communicates directly with officials rather than pursuing other persuasive tactics, is estimated at almost \$2 billion a year.<sup>4</sup>

The belief that lobbying is more about connections and favors than sound policymaking is also not without support and further contributes to the lobbying industry’s poor reputation. Although the “legislator-turned-lobbyist” was not viewed favorably thirty years ago, members of Congress now frequently move into the lobbying arena when they retire or lose re-election bids.<sup>5</sup> Even little-known members are able to earn over \$300,000 as lobbyists in their first year out of Congress.<sup>6</sup> Critics claim that the flood of legislators into lobbying heightens the perception that lobbyists use personal contacts to take home big paychecks,<sup>7</sup> and that taxpayers pay the price in the end.

These are not the only unsavory aspects of the lobbying profession in Washington today. Corporations and interest groups seeking access to government officials at all levels have found an

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1. David Segal, *Main Street America Has Advocates Aplenty: On the Hill, Lobbyists for All*, WASH. POST, July 10, 1995, at A1.

2. For evidence that this perception has not gone unnoticed by the judiciary and has existed for a number of years, see *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967) (noting that “the term ‘lobbyist’ has become encrusted with invidious connotations”).

3. David S. Hilzenrath, *Mortgage Giants Are Near Top in Lobby Cost*, WASH. POST, Oct. 25, 2004, at E1.

4. Jeffrey H. Birnbaum, *Many Lobbyists Work the Hill with Kith and Kin*, WASH. POST, June 14, 2004, at E1.

5. *Id.*

6. Jeffrey H. Birnbaum, *Lawmaker-Turned-Lobbyist a Growing Trend on the Hill*, WASH. POST, June 20, 2004, at A1; see also Jeffrey H. Birnbaum, *Capitol Hill Increasingly a Steppingstone to K Street*, WASH. POST, July 27, 2005.

7. Birnbaum, *Capitol Hill Increasingly a Steppingstone*, *supra* note 6. (noting that critics “abhor the trend” and quoting Larry Noble, director of the Center for Responsive Politics, as saying that the practice “plays into the public’s worst perceptions”).

interesting way to make high-powered lobbyists work even harder for their money: the contingency fee. Contingency fee lobbying contracts have become surprisingly common, particularly in situations where corporations seek government contract work or appropriations for a particular program that would put money in their pockets.<sup>8</sup> Savvy clients are increasingly deciding that they do not want to pay full price when they do not get a desired result, and contingency fees force lobbyists to risk failure or success along with them.

While contingency fee arrangements are not widely reported,<sup>9</sup> the media has uncovered various examples at the state and local levels. A recent contract dispute in Florida revealed that the city of Tallahassee's official lobbyists accepted a \$50,000 contingency fee, or "success fee" as they are sometimes called, for securing approval to build a luxury resort on public land for their entertainment mogul client.<sup>10</sup> The 2000 presidential election in Florida led to a contingency fee lobbying controversy when it was revealed that lobbyists in Broward County received \$500,000 to help a Nebraska corporation procure a multi-million dollar contract to supply the touch screen voting machines used in the election fiasco.<sup>11</sup> Broward County Commissioner Ben Graber said that he heard officials discussing their desire to pass certain measures only to help lobbyist friends who were in financial trouble and who would directly benefit from the initiatives because of a contingency fee contract.<sup>12</sup> According to Miami-Dade County Commissioner Katy Sorenson, the problem with these contracts is that "[w]henver you have somebody who's going to get a real jackpot in exchange for winning a vote, the ethics might slide."<sup>13</sup>

State and local laws that prohibit contingency fee lobbying sometimes result in sanctions for prominent lobbyists who influence state legislatures and push for government contracts on behalf of their clients in exchange for a contingency fee.<sup>14</sup> While the federal government has regulated these arrangements for lobbyists trying to

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8. See *infra* notes 9–13 and 76–79 and accompanying text for discussions of contingency fee lobbying at the local and federal levels.

9. See *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 492 (D.C. Cir. 1967) (Wright, J., concurring) (noting the "clandestine character which some lobbying tends to assume").

10. Tony Doris, *The Suspicious Smell of Success*, BROWARD DAILY BUS. REV., July 21, 2003, available at 7/21/2003 BROWARDDBR 7 (Westlaw).

11. *Id.*

12. *Id.*

13. *Id.*

14. See, e.g., *Md. Ethics Commission Suspends Annapolis Lobbyist*, THE DAILY RECORD (Balt.), July 1, 2003 (reporting that a Maryland lobbyist was suspended from lobbying activities for ten months for entering into a contingency fee arrangement with a client).

influence the executive branch in awards for government contracts,<sup>15</sup> lobbyists are still free to receive contingency fees for lobbying members of Congress. Some members of Congress have tried to regulate this behavior, but thus far none of the proposed legislation has passed.

Part II of this Note discusses the legal treatment of contingency fee lobbying and the current legal restraints on lobbying activity in the United States. It examines precedent in the federal courts, both state statutory and common law, federal regulation of lobbying generally, and proposals in Congress to prohibit contingency fee lobbying. Part III discusses the potential First Amendment challenges to a prohibition on contingency fee lobbying, specifically those based on the right to petition and freedom of speech. It examines several pertinent First Amendment doctrines, their application to the regulation of lobbying, and the concept of money as speech. Part IV analyzes these doctrines and applies them to a proposed ban on contingency fee lobbying, finding that while the most serious constitutional threat to such a ban is its potential overbreadth, it would likely survive scrutiny under current First Amendment doctrine.

## II. BACKGROUND

### A. *A Brief History of Contingent Fee Lobbying Contracts*

Although the desirability of contingency fees has long been debated<sup>16</sup>—the United States is one of the only nations in the world to allow contingency fees for attorneys<sup>17</sup>—contingency fee arrangements

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15. 41 U.S.C. § 254 (2005); 10 U.S.C. § 2306(b) (2005).

16. See, e.g., Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 30-35, 65-74 (1989) (arguing that attorneys do not charge contingency fees based on the actual risk involved in bringing the case, thereby charging unethically high fees where there is, in fact, no “contingency”); Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 457-58 (1998) (describing arguments of critics of the contingency fee who believe its use spurs meritless litigation and “overzealous representation” and provides windfalls for attorneys); Allison F. Aranson, Note, *The United States Percentage Contingent Fee System: Ridicule and Reform from an International Perspective*, 27 TEX. INT’L L.J. 755, 761-73 (1992) (describing the problems of frivolous litigation, attorneys who wish to achieve recovery in the shortest possible time, and the possibility for excessive fees associated with contingency fees).

17. See MODEL RULES OF PROF’L CONDUCT R. 1.5 (2003) (“(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited . . . . A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined . . . . (d) A lawyer shall not enter into

between attorneys and their clients in civil litigation are accepted in the legal community.<sup>18</sup> While contingency fees in the litigation context are familiar, many are not aware that lobbyists also accept fees contingent upon the passage of legislation. Despite their prevalence, courts disfavor such arrangements and have invalidated them on public policy grounds for years.<sup>19</sup> The Supreme Court has consistently criticized contingency fee lobbying contracts ever since it first examined the issue in *Marshall v. Baltimore & Ohio Railroad Co.*, in 1853.<sup>20</sup> In this case, the Court invalidated a contingency fee contract between a railroad company and a lobbyist who did not reveal that he was acting on the corporation's behalf while he was lobbying the Virginia state legislature.<sup>21</sup> The Court explained that contingent compensation tends to encourage lobbyists to act amorally, leading them to believe that any means of securing legislation for their clients are proper and possibly even tempting them to bribe officials.<sup>22</sup>

In *Providence Tool Co. v. Norris*, the Court addressed lobbying at the federal level and found that a contingency fee arrangement for lobbying the War Department for a supply contract was unenforceable.<sup>23</sup> Justice Field said that such contracts tend to "introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds."<sup>24</sup> Although the lobbying in the case was directed towards the executive branch, the opinion in dicta also addressed attempts to influence the legislative branch, finding no reason to distinguish between lobbying the executive and the legislative branches when invalidating these agreements.<sup>25</sup> Discussing the legislative process, the Court stated:

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an arrangement for, charge, or collect . . . (2) a contingent fee for representing a defendant in a criminal case.").

18. Stewart Jay, *The Dilemmas of Attorney Contingency Fees*, 2 GEO. J. LEGAL ETHICS 813, 813 (1989).

19. See, e.g., *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. 314, 334 (1853) (invalidating a contingency fee lobbying contract).

It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions.

*Id.*

20. 57 U.S. 314 (1853).

21. *Id.* at 336-37.

22. *Id.* at 335.

23. *Providence Tool Co. v. Norris*, 69 U.S. 45, 54 (1864).

24. *Id.*

25. *Id.* at 55.

Whatever tends to divert the attention of legislators from their high duties, to mislead their judgments, or to substitute other motives for their conduct than the advancement of the public interests, must necessarily and directly tend to impair the integrity of our political institutions. Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.<sup>26</sup>

In *Hazelton v. Sheckels*, the Court dealt directly with an attempt to influence legislative, rather than executive, action when it considered a land sale contract based in part on the plaintiff's ability to convince Congress that the land was an appropriate site for a government hall of records.<sup>27</sup> The terms of the contract stipulated that the plaintiff was to receive all money above the sum named in the contract that he was able to convince Congress to appropriate for the project.<sup>28</sup> The Court invalidated the arrangement on public policy grounds, rejecting the defenses that the parties had good intentions and that no improper solicitations in fact occurred.<sup>29</sup>

The issue of contingency fee contracts for legislative lobbying came before the District of Columbia Circuit in 1934. In *Noonan v. Gilbert*, a lobbyist sued for the balance due on a contingency fee contract.<sup>30</sup> The contract provided for a \$500 payment to the plaintiff to lobby on the defendant's behalf before the Public Utilities Commission and congressional committees, with a contingent payment of another \$500 if the defendant's desired fare decrease passed.<sup>31</sup> The court recognized that lobbying contracts are lawful when they do not implicate "improper means";<sup>32</sup> but it held that contingency fee contracts for lobbying suggest the use of inappropriate influence from the moment of their inception, and are void even when the services actually performed are legitimate.<sup>33</sup>

Although there are no modern federal cases dealing with contingency fee lobbying, these cases remain good law and demonstrate that the federal judiciary disfavors these contracts and is even willing to strike them down in the absence of legislation prohibiting them.

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26. *Id.*

27. *Hazelton v. Sheckels*, 202 U.S. 71, 77 (1906).

28. *Id.* at 78.

29. *Id.* at 78-79.

30. *Noonan v. Gilbert*, 68 F.2d 775, 775 (D.C. Cir. 1934).

31. *Id.*

32. *Id.*

33. *Id.* (stating that "[w]here the compensation for procuring legislation is contingent, the contract is void as against public policy, regardless of whether corrupt practices are resorted to or contemplated").

Bans on contingency fee lobbying contracts are currently on the books in thirty-two states<sup>34</sup> and have generally withstood constitutional challenge in the courts. One of the most common contentions is that these laws restrict freedom of petition and speech under the First Amendment.<sup>35</sup> This issue was considered in an advisory opinion by the Supreme Court of Michigan, which examined a pending state bill that included a number of campaign finance provisions, lobbying disclosure regulations, and a ban on contingency fee lobbying.<sup>36</sup> While recognizing as fundamental the "right of freedom of speech, of association, the right to consult for the common good, to instruct representatives, [and] to petition government," the justices found no constitutional problems with the prohibition on contingency fee lobbying.<sup>37</sup>

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34. ALA. CODE § 36-25-23(c) (LexisNexis 2003); ARIZ. REV. STAT. ANN. § 41-1233 (2004); CAL. GOV'T CODE § 86205(f) (West 2005); COLO. REV. STAT. § 24-6-308 (2004); CONN. GEN. STAT. ANN. § 1-97(b) (West 2000); FLA. STAT. ANN. § 11.047 (West 2004); GA. CODE ANN. § 28-7-3 (2003); HAW. REV. STAT. ANN. § 97-5 (LexisNexis 2003); IDAHO CODE ANN. § 67-6621(b)(6) (2001); 25 ILL. COMP. STAT. ANN. 170/8 (West 2001 & Supp. 2005); IND. CODE ANN. § 2-7-5-5 (LexisNexis 2002); KAN. STAT. ANN. § 46-267 (2001); ME. REV. STAT. ANN. tit. 3, § 318 (1989); MD. CODE ANN., STATE GOV'T § 15-713 (LexisNexis 2004); MASS. GEN. LAWS ANN. ch. 3, § 42 (West 1996 & 2005 Supp.); MICH. COMP. LAWS ANN. § 4.421 (West 2004); MINN. STAT. ANN. § 10A.06 (West 2005); MISS. CODE ANN. § 5-8-13 (2002); NEB. REV. STAT. § 49-1492(1) (2004); NEV. REV. STAT. ANN. § 218.942.4 (LexisNexis 2005); N.J. STAT. ANN. § 52:13C-21.5 (West Supp. 2005); N.M. STAT. ANN. § 2-11-8 (West 2002); N.Y. LEGIS. LAW § 1-k (McKinney Supp. 2005); N.C. GEN. STAT. § 120-47.5(a) (2003); N.D. CENT. CODE § 54-05.1-06 (2001); OHIO REV. CODE ANN. § 101.77 (West 2002 & Supp. 2005); OR. REV. STAT. § 171.756(3) (2003); 18 PA. CONS. STAT. ANN. § 7515 (West 2005); S.D. CODIFIED LAWS § 2-12-6 (2004); TEX. GOV'T CODE ANN. § 305-022 (Vernon 2005); UTAH CODE ANN. § 36-11-301 (2001); VA. CODE ANN. § 2.2-432 (2001); *see also* ARK. CODE ANN. § 19-11-708 (1998) (prohibiting contingency fee lobbying to secure a state contract); DEL. CODE ANN. tit. 29, § 6903 (2003) (prohibiting contingency fee lobbying for contracts for professional services with government agencies); FLA. STAT. ANN. § 112.3217 (West 2002 & Supp. 2005) (prohibiting lobbying contracts contingent on executive branch action); MONT. CODE ANN. § 5-7-208(5)(v) (2003) (requiring disclosure of contingency fee lobbying contracts); TENN. CODE ANN. § 3-6-111 (2003) (requiring contingency fee lobbying contracts to be in writing).

35. *See, e.g.*, *Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 952-53 (Ky. 1995) (finding that a Kentucky statute banning contingency fee lobbying contracts did not violate plaintiff's First Amendment rights of petition and association because of the state's "compelling interest in insuring the proper operation of a democratic government and deterring corruption, as well as the appearance of corruption. This, we hold, is demonstrative of the most important of interests and employs means, closely drawn, to avoid unnecessary abridgement of associational freedom."); *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996) (acknowledging the defendant's argument that the evolution of First Amendment jurisprudence since the time of *Hazelton v. Sheckels*, 202 U.S. 71 (1906), may indicate that a modern Supreme Court would strike down a ban on contingency lobbying contracts, but declining to overrule cases so closely analogous unless they were overruled by the United States Supreme Court).

36. Advisory Opinion on Constitutionality of 1975 PA 227, 242 N.W.2d 3, 6 (Mich. 1976).

37. *Id.* at 23. The court also suggested that potential "overbreadth" concerns would have to be addressed in the context of an actual case or controversy. *Id.* at 24.



Some state courts are willing to strike down contingency fee lobbying contracts even when it is unclear that the statutes in effect cover the behavior at issue. An Illinois court broadly interpreted that state's ban, finding that it covered contracts made for lobbying a local city council.<sup>38</sup> The court held that although the statute only addressed lobbying for "legislation," the legislature intended to cover *all* action to influence legislation, be it federal, state, or local.<sup>39</sup> In *Hialeah Gardens v. John L. Adams & Co.*, a Florida court even held that contingency fee arrangements may be invalidated even when no state statute is in place at all.<sup>40</sup> Although the court dismissed the complaint because the contingency was never met, the opinion expressed the court's desire that the issue be addressed by Florida officials<sup>41</sup> and directed that "when the contingent contract is with a public entity and involves a raid on the public treasury, it should be the duty of a court at any level to raise the invalidity of the contract on its own motion to protect the interest of the public."<sup>42</sup> Localities have also expressed concern over contingent fee lobbying and have considered or passed prohibitions of their own.<sup>43</sup>

The Supreme Court of Montana departed from this state trend disfavoring contingency fee lobbying contracts, as it actually invalidated a Montana statute prohibiting contingency fee lobbying.<sup>44</sup> The court found that the Montana state law at issue was too broad as it proposed to reach all contingency fee arrangements and did not distinguish between those that were legitimate and those that were "improperly motivated."<sup>45</sup>

We find that section [nine] unduly infringes the rights of those who, while contemplating neither illegal nor unethical conduct, need or desire to employ a lobbyist on a contingent fee basis in order to advance their interests before a public official. The State may not impose so broad a limitation on the right to petition. The objectionable quality of overbreadth depends upon the danger of tolerating, in the area of First

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38. See *Rome v. Upton*, 648 N.E.2d 1085, 1088 (Ill. App. Ct. 1995).

39. See *id.* (citing *In re Browning*, 179 N.E.2d 14, 19 (Ill. 1961)).

40. *Hialeah Gardens v. John L. Adams & Co.*, 599 So. 2d 1322, 1325 (Fla. Dist. Ct. App. 1992).

41. *Id.* at 1325-26.

42. *Id.* at 1325.

43. Doris, *supra* note 10 (discussing a Miami-Dade County ordinance that imposes fines, criminal penalties, and suspensions on offending lobbyists, and a Miami-Dade School Board proposal to prohibit lobbyists from receiving fees based on attainment of school contracts).

44. *Mont. Auto. Ass'n v. Greely*, 632 P.2d 300, 308 (Mont. 1981). Montana has since repealed its contingent fee lobbying prohibition and replaced it with the following language: "No lobbyist or principal shall engage in or directly or indirectly authorize any unprofessional conduct." MONT. CODE ANN. § 5-7-302 (2003).

45. *Mont. Auto. Ass'n*, 632 P.2d at 308.

Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.<sup>46</sup>

Although the Montana court remains the only court to overturn a statute prohibiting contingency fee lobbying, several other courts applying state statutes have expressed concern regarding the constitutionality of such bans. The Eleventh Circuit in *Florida League of Professional Lobbyists v. Meggs* applied Florida state law to find a contingency fee contract unlawful; however, it acknowledged that in light of developments in First Amendment law since the early cases dealing with contingency fee lobbying, the U.S. Supreme Court could strike down a ban on such activity.<sup>47</sup> The Chief Justice of the Kentucky Supreme Court dissented in part from a decision upholding Kentucky's state law, arguing that a ban on contingency fee lobbying contracts is inappropriate because it "automatically infers unethical behavior" and cannot be justified by reasonable necessity.<sup>48</sup> These opinions indicate that although states generally find these bans to be constitutional, the sentiment favoring the bans is not universal.

### B. Brief History of Federal Regulation of Lobbying Activity

Although thus far much of the action regarding contingency fee lobbying contracts has occurred at the state and local levels, the federal government has become increasingly active in regulating lobbying in other respects. In 1946, Congress made its first foray into the field of lobbying with the passage of the Federal Regulation of Lobbying Act.<sup>49</sup> The Act required lobbyists to keep detailed records of the money they received and the amounts they billed and to file periodic disclosures of these amounts with Congress.<sup>50</sup> The Act also made these reports public and forced all those engaging in lobbying activity to register as lobbyists.<sup>51</sup> In *United States v. Harriss*, the Supreme Court held that these disclosure provisions were not inconsistent with the protections of the First Amendment.<sup>52</sup> Chief Justice Warren wrote for the majority, finding that the government had an interest in evaluating the source of pressures placed upon legislators in order to prevent special interests groups from

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46. *Id.*

47. *Fla. League of Prof'l Lobbyists v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996).

48. *Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 958 (Ky. 1995) (Stephens, C.J., concurring in part and dissenting in part).

49. Federal Regulation of Lobbying Act, Pub. L. No. 79-601, §§ 301-11, 60 Stat. 812, 839-42 (codified at 2 U.S.C. §§ 261-70 (1994)) (repealed 1995).

50. 2 U.S.C. §§ 262, 264 (1994) (repealed 1995).

51. *Id.* §§ 265, 267.

52. *United States v. Harriss*, 347 U.S. 612, 626 (1954).

overcoming the voice of the public.<sup>53</sup> The Court rejected the argument that the statute would have a chilling effect on speech, stating that “[t]he hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest.”<sup>54</sup> Accordingly, *Harriss* provides legislatures that wish to regulate lobbying activities with significant protection from constitutional challenges.

Although the Court upheld the Act, it read the Act’s provisions narrowly to avoid a constitutional defect on vagueness grounds.<sup>55</sup> Under this reading, the Act only applied to lobbyists who fit the narrow statutory definition,<sup>56</sup> which included only “individuals,” and included only direct communications with individual members of Congress.<sup>57</sup> Prior to 1995, the Act was supplemented by various other statutes that touched on lobbying, such as a statute requiring the registration of those lobbying on behalf of foreign businesses or governments<sup>58</sup> and a statute prohibiting the use of appropriated funds in lobbying.<sup>59</sup> However, the statutory system created by these laws and the Federal Regulation of Lobbying Act were not as effective as Congress might have hoped. They excluded a great deal of lobbying activity, despite the fact that in some cases certain lobbyists were required to register under multiple provisions.<sup>60</sup> Studies show that

53. *Id.* at 625.

54. *Id.* at 626 (also saying that the Court’s narrow construction of the Act would protect against prosecution in many cases and that any chilling effect would be an indirect result of self-censorship, similar to that which results from libel laws that are considered constitutional).

55. *Id.* at 618–20.

56. *Id.* at 623.

(1) the “person” must have solicited, collected, or received contributions; (2) one of the main purposes of such “person,” or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress; (3) the intended method of accomplishing this purpose must have been through direct communications with members of Congress.

*Id.* (quoting § 307 of the Act).

57. *Id.*

58. Foreign Agents Registration Act, 22 U.S.C. § 612(a) (2005) (“No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement. . .”).

59. Byrd Amendment, 31 U.S.C. § 1352(a)(1) (2005).

None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any Federal action . . . .

*Id.*

60. H.R. REP. NO. 104-339(I), at 2 (1995), *reprinted in* 1996 U.S.C.C.A.N. 644, 1995 WL 683826.

many professional lobbyists dodged reporting and disclosure requirements under the Lobbying Act. A 1990 *Legal Times* study found that ten high profile lobbying firms in Washington reported low levels of both lobbying income and expenses.<sup>61</sup> A 1991 study by the General Accounting Office found that almost 10,000 of the 13,500 individuals and organizations listed in the book "Washington Representatives" were not registered as lobbyists, despite the fact that many of them were often in contact with those on Capitol Hill, attempting to exert influence.<sup>62</sup>

Concerned about the growing practice of unregulated lobbying at the federal level, Congress replaced the Federal Regulation of Lobbying Act with the more detailed and far reaching Lobbying Disclosure Act of 1995 ("LDA").<sup>63</sup> This Act requires lobbyists to register with the federal government within forty-five days of making a "lobbying contact,"<sup>64</sup> to provide separate registrations for each of their clients, and to include all contacts made on behalf of each client in their disclosures.<sup>65</sup> Lobbyists must give semi-annual estimates of the income earned from each client<sup>66</sup> and semi-annual reports of expenses incurred due to lobbying activities.<sup>67</sup> The new Act covers not just lobbying directed towards members of Congress, but also lobbying directed at congressional staff and many employees in the executive branch as well.<sup>68</sup> It covers any communication made to officials regarding the "formulation, modification, or adoption" of both federal regulations and statutes, "the administration or execution of a federal program or policy," and Senate nomination and confirmation proceedings.<sup>69</sup> Under the new Act, lobbyists who fail to make the proper disclosures could face fines of up to \$50,000.<sup>70</sup> These reforms have not been challenged on constitutional grounds, and thus far there have been few cases interpreting the LDA's provisions.<sup>71</sup>

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61. *Id.* at 4 (citing Judy Sarasohn, *Survey Finds a Lucrative Cottage Industry*, *LEGAL TIMES*, Feb. 5, 1990, at S6).

62. *Id.* at 3 (citing U.S. GEN ACCOUNTING OFFICE, *FEDERAL LOBBYING: FEDERAL REGULATION OF LOBBYING ACT OF 1946 IS INEFFECTIVE* (1991)).

63. 2 U.S.C. §§ 1601–12 (2005).

64. *Id.* § 1603(a)(1).

65. *Id.* § 1603(c).

66. *Id.* § 1604(b)(3).

67. *Id.* § 1604(b)(4).

68. *Id.* § 1602(3)-(4).

69. *Id.* § 1602(8)(A).

70. *Id.* § 1606.

71. See Kathryn L. Plemmons, "Lobbying Activities" and Presidential Pardons: Will Legislators' Efforts to Amend the LDA Lead to Increasingly Hard-Lined Jurisprudence?, 18 *BYU J. PUB. L.* 131, 144, 147 (2003) (trying to predict the judicial outlook for amendments that would impose reporting requirements for individuals lobbying for presidential pardons and require

*C. Recent Debate Regarding a Federal Ban on Contingency Fee  
Lobbying Contracts*

Congress has already banned contingency fee lobbying contracts when the lobbying is directed at the executive branch for the purpose of procuring government contracts.<sup>72</sup> Recognizing that contingency fee lobbying directed at Congress continues unregulated, there has been a push in recent years to enact a law prohibiting these arrangements as well.<sup>73</sup> Under the language of one recently proposed bill, it would be unlawful

for any person to make, with intent to influence, any oral or written communication on behalf of any other person other than the United States to any department, agency, court, House of Congress, or commission of the United States, for compensation if such compensation has knowingly been made dependent – ‘A) upon any action of Congress, including but not limited to actions of either the House of Representatives or the Senate, or any committee or member thereof, or the passage or defeat of any proposed legislation; (B) upon the securing of an award, or upon the denial of an award, of a contract or grant by establishment of the Federal Government; or (C) upon the securing,

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disclosure of presidential library contributions, referring to judicial interpretation of the LDA as “surprisingly scarce,” and predicting that if attacked on constitutional grounds the LDA as enacted would be upheld).

72. 10 U.S.C. § 2306(b) (2000).

Each contract awarded under this chapter after using procedures other than sealed-bid procedures shall contain a warranty, determined to be suitable by the head of the agency, that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a . . . contingent fee . . . . If a contractor breaks such a warranty the United States may annul the contract without liability or may deduct the . . . contingent fee from the contract price or consideration.

*Id.*

Every contract awarded after using procedures other than sealed-bid procedures shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a . . . contingent fee . . . for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such . . . contingent fee.

41 U.S.C. § 254 (2000); *see also* *Bradley v. Am. Radiator & Standard Sanitary Corp.*, 159 F.2d 39, 40 (2d Cir. 1947) (invalidating a contingency fee arrangement that involved lobbying the Army for a contract to supply weapons components based on executive order requiring those awarded government contracts to guarantee that they did not hire lobbyists on a contingency fee basis to secure the contract); *Eglin Manor, Inc. v. United States*, 279 F.2d 268, 273 (Ct. Cl. 1960) (holding that award of stock in contractor’s corporation contingent upon its certification as a sponsor of a military housing project was an illegal contingent fee in violation of a federal statute).

73. For proposals “[t]o amend title 18, United States Code, to prohibit any person who is being compensated for lobbying the Federal Government from being paid on a contingency fee basis,” *see* S. 53, 104th Cong. (1995); S. 44, 103d Cong. (1993); S. 170, 102d Cong. (1991); 136 CONG. REC. S12055, S12063–66 (1990) (daily ed. Aug. 3, 1990) (statement of Sen. Thurmond); 134 CONG. REC. S11639, S11639–40 (1988) (daily ed. Aug. 11, 1988) (statement of Sen. Thurmond).

or upon the denial, of any Federal financial assistance or any other Federal contract or grant.<sup>74</sup>

This bill gave the Attorney General the authority to bring a civil action against violators for damages up to double the amount due under the contract, and provided for criminal sanctions of up to \$50,000 in fines or two years imprisonment.<sup>75</sup>

Members of Congress found evidence that lobbyists currently approach institutions that desire federal funding and offer to seek more money than the institution requires on the condition that the institution pay the lobbyist from the leftover amount (or not at all should the measure fail).<sup>76</sup> For example, testimony regarding the passage of the Equitable Escheatment Act of 1993 indicated that attorneys in a large Washington law firm had lobbied aggressively against the bill in order to collect a contingency award, speculated to be nearly \$16 million.<sup>77</sup> Rep. Charles Schumer responded to this situation, calling it "outrageous . . . chilling and undemocratic," a "bottom-feeding practice," and a "gun-for-hire mentality" that allows lawyers to "successfully twist the legislative process."<sup>78</sup> While acknowledging the important role played by paid lobbyists in educating government officials, the late Sen. Strom Thurmond said,

the law has long recognized that contingency fees are appropriate in some areas and not in others. . . . [C]ontingency fees in tort actions provide the poor with access to the courts and are viewed favorably. In other areas such as criminal and domestic law, such fees are inappropriate because they introduce improper incentives into the system. Similar principles apply to contingency fees for lobbying.<sup>79</sup>

Legislators in favor of proposals prohibiting contingency fee lobbying contracts argue that they protect the integrity of the process whereby the government appropriates funds. This is particularly

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74. S. 53 104th Cong. (1995).

75. *Id.*

76. 136 CONG. REC. S12055 (1990) (daily ed. Aug. 3, 1990) (statement of Sen. Levin) ("We saw it in the Wedtech deal where a lobbyist was going to receive a \$200,000 payment if he obtained a Navy contract of one type, and a fee twice that amount if he obtained a different kind of a Navy contract."); 134 CONG. REC. S11639 (1988) (daily ed. Aug. 11, 1988) (statement of Sen. Thurmond) (describing reports he had heard of lobbyists offering to secure \$14 million for a \$12 million project and be paid the extra \$2 million).

77. *The Equitable Escheatment Act of 1993: Hearing on H.R. 2443 Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the H. Comm. on Banking, Finance and Urban Affairs*, 103d Cong. 12 (1994) (testimony of Rep. Charles E. Schumer, Member, Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance).

78. *Id.* Rep. Schumer also testified: "You can be absolutely certain I will attach my Retroactive Lobbying Contingency bill as an amendment to HR 2443. Whatever happens to this ill-conceived escheatment bill . . . your law firm is not going to get a contingency out of Congress." *Id.*

79. 134 CONG. REC. S11640 (1988) (daily ed. Aug. 11, 1988) (statement of Sen. Thurmond).

important in an era of massive budget deficits because it eliminates incentives for lobbyists to “gouge the government” in order to earn higher fees.<sup>80</sup> Opponents claim that contingency fee lobbying contracts create at least an appearance of corruption, regardless of whether corruption is actually present, and that the costs of these fees are borne by taxpayers.<sup>81</sup> They distinguish such arrangements, made by clients who can typically afford to pay lobbyists in advance, from contingency fees paid by parties to civil suits who might not otherwise be able to afford quality representation.<sup>82</sup>

Some claim, however, that there is no reason to distinguish between contingency fees for lobbying and contingency fees in tort cases. Some lawyers argue that lobbyists may be more entitled to higher fees for lobbying success than attorneys are for victories in civil litigation because the economic benefits of such lobbying successes can be quite high for clients.<sup>83</sup> They contend that if contingency fees are not considered corrupting in the area of personal injury cases, there is no reason they should be seen as such in lobbying.<sup>84</sup> Supporters of these proposals note that while lobbyist-lawyers are bound to some degree by rules of professional conduct that prohibit excessive fees, lobbyists, who are not lawyers, are not subject to such ethical constraints.<sup>85</sup>

Arguments over a ban on contingency fee lobbying focus not just on the merits of such a ban, but also on the ban's constitutionality. Some legislators have expressed concerns that such a prohibition would inhibit private parties' freedom to contract,<sup>86</sup> while others counter that because the arrangement involves a payout using government funds, it is not analogous to a private contract.<sup>87</sup> A study by the Congressional Research Service examined whether or not a prohibition on contingency fee lobbying would inhibit freedom of contract or result in an unconstitutional taking of property (in the

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80. 136 CONG. REC. S12065 (1990) (daily ed. Aug. 3, 1990) (statement of Sen. Thurmond).

81. Doris, *supra* note 10.

82. *See supra* note 80 (statement of Sen. Specter) (“The substance of the amendment . . . is fundamentally different from a contingent fee arrangement for a lawyer because that contract is entered into where the client can't afford to pay a fee and can secure a lawyer only if the lawyer gets a share of the recovery.”).

83. Doris, *supra* note 10 (discussion of the effects that lobbying outcomes can have on things such as the client's property value by attorney who heads a Miami law firm's government law practice).

84. *Id.* at 4-5.

85. *Id.*

86. *See supra* note 80 (statement of Sen. McClure).

87. *Id.* (statement of Sen. Levin).

form of income).<sup>88</sup> The study made strong arguments that a ban would inhibit neither freedom of contract nor property rights.<sup>89</sup> This study, however, did not resolve any First Amendment questions.

### III. THE FIRST AMENDMENT DOCTRINES RELATED TO THE RIGHT TO PETITION AND FREEDOM OF SPEECH

One of the most compelling questions raised by a prohibition on contingency fee lobbying contracts is whether such a measure would place an unconstitutional restriction on the First Amendment rights of petition and speech.<sup>90</sup> The early Supreme Court cases invalidating contingency fee lobbying contracts<sup>91</sup> create a presumption that these contracts are against public policy and unlawful. Thus, if the judiciary may strike down such contracts on public policy grounds, then it seems reasonable that Congress may make such arrangements unlawful based on similar considerations. Nearly a century has passed, however, since the Court last considered this issue,<sup>92</sup> and the Court has never considered First Amendment burdens resulting from restrictions on these contracts. The fact that members of Congress,<sup>93</sup> judges applying similar state laws,<sup>94</sup> and judges looking at other limitations on lobbying<sup>95</sup> have all raised First Amendment concerns

88. See *supra* note 79, at 11640, 11640-41. The study noted that challenges to provisions regarding rates, prices, and fees have generally been upheld in spite of due process concerns regarding unconstitutional takings of property. It also discussed how freedom of contract is a limited freedom that is rarely successful as a means of invalidating government restrictions.

89. *Id.*

90. See *supra* note 80 (statement of Sen. McClure) ("I am not certain at all that it is constitutional for us to restrict the way in which people contract between themselves with respect to the way they exercise their right either to approach [g]overnment or in the freedom of speech between themselves or between themselves and their [g]overnment."); see also Stacie L. Fatka & Jason Miles Levien, Note, *Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution*, 35 HARV. J. ON LEGIS. 559, 559-61, 584-87 (1998) (arguing that a prohibition on contingency fee lobbying contracts would be excessive and would impinge on the right to petition).

91. *Hazelton v. Sheckels*, 202 U.S. 71, 79 (1906); *Providence Tool Co. v. Norris*, 69 U.S. 45, 56 (1864).

92. For a case asking whether time and legal developments may warrant a re-examination of an earlier holding, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855-57 (1992) (saying that when the Court re-examines a prior holding, one consideration is "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," and finding that no "evolution of legal principles" existed to justify overturning *Roe v. Wade*, 410 U.S. 113 (1973)).

93. See *supra* note 80 (statement of Sen. McClure) ("I am not certain at all that it is constitutional for us to restrict . . . their right either to approach [g]overnment or in the freedom of speech between themselves [lobbyists and clients] or between themselves and their [g]overnment.").

94. See *supra* text accompanying notes 36-37, 44-48.

95. See *infra* note 118 and accompanying text.



suggests that a First Amendment challenge to such a prohibition is plausible. Therefore, any potential challenges must be analyzed in light of modern First Amendment jurisprudence to determine whether a prohibition would hold up under constitutional scrutiny.<sup>96</sup>

### A. *Right to Petition*

Since lobbyists are in many cases directly petitioning the government in support of or in opposition to policy decisions, the right of petition seems most directly implicated by lobbying restrictions. The First Amendment provides that Congress shall make no law abridging the right of the people "to petition the Government for a redress of grievances."<sup>97</sup> Early congressional debates show that James Madison, in proposing the Petition Clause, hoped to protect people who "may communicate their will' through direct petitions to the legislature and government officials."<sup>98</sup> The Supreme Court has declared that "[t]he very idea of government, republican in form, implies a right on the part of its citizens to . . . petition for a redress of grievances."<sup>99</sup> This right "is not limited to goals that are deemed worthy, and the citizen's right to speak freely is not limited to fair comments."<sup>100</sup>

Because the right to petition holds a special position in American jurisprudence,<sup>101</sup> courts are reluctant to find that an act of Congress infringes this right and will attempt to construe a statute consistently with the right to petition.<sup>102</sup> While in some cases, the Petition Clause may actually immunize individuals petitioning the

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96. See Fla. League of Prof'l Lobbyists, Inc. v. Meggs, 87 F.3d 457, 462 (11th Cir. 1996) (acknowledging that developments in First Amendment law since *Norris* and *Hazelton* may indicate that the modern Supreme Court would strike down a ban on contingency fee lobbying contracts but declining to overrule this precedent).

97. U.S. CONST. amend. I; see also *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (noting that the idea of a right to petition predates the Constitution, appearing in the Bill of Rights enacted by William and Mary of England in 1689 and the Declaration of Rights and Grievances drafted by the colonial Stamp Act Congress of 1765).

98. *McDonald*, 472 U.S. at 482.

99. *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

100. *Eaton v. Newport Bd. of Educ.*, 975 F.2d 292, 298 (6th Cir. 1992) (finding that comments made in lobbying a school board calling for the dismissal of a school principal were protected by the right to petition).

101. See, e.g., *Associated Indus. of Ky.*, 912 S.W.2d 947, 952 (1995) ("Assuredly, freedom of speech, being closely related to freedom of association and the right to petition the government, remains the highest of the liberties safeguarded by the Bill of Rights.").

102. See *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) (finding that railroads did not violate the Sherman Act by launching a publicity campaign that involved lobbying against a measure that would have increased business for the trucking industry).

government from liability they might otherwise incur as a result of such speech,<sup>103</sup> a defendant may not defend his own criminal activity by later claiming the protection of the Petition Clause when he lobbies to change the law that he has violated.<sup>104</sup>

In contrast to other First Amendment rights, there has not been much judicial analysis devoted to the right to petition. Nonetheless, courts have determined on a number of occasions that despite being an essential right, the right to petition is a limited one. The Petition Clause provides no absolute right to speak in person with public officials, no right to a hearing based on grievances communicated to officials, and imposes no corresponding duty on officials to act on such grievances.<sup>105</sup> Protection of the right to petition only extends to situations where other First Amendment rights, such as speech or association, are also implicated.<sup>106</sup> Statements made in petitioning the government do not enjoy greater protection than other expression protected by the First Amendment.<sup>107</sup>

Cases discussing the right to petition as it relates to lobbying activity demonstrate that subject to some limitations, lobbying falls easily within the category of activity protected by the Petition Clause.<sup>108</sup> In *Liberty Lobby, Inc. v. Pearson*, the Court of Appeals for

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103. *Sims v. Tinney*, 482 F. Supp. 794, 800 (D.S.C. 1977) (holding that since defendant's statements were part of a campaign favoring proposed legislation, they were protected by the First Amendment and immune from an action under the Sherman Act).

104. *United States v. Conley*, 859 F. Supp. 909, 938 (W.D. Pa. 1994) (rejecting defendant's defense to a charge of illegally operating video poker machines that he was engaged in lobbying to try and change the definition of gambling devices, saying that "First Amendment rights are not a means of immunizing oneself from prosecution. Convictions would be few indeed if during or after a course of crime a defendant could absolve himself by expressing his view that his conduct should be legal.").

105. *Cronin v. Town of Amesbury*, 895 F. Supp. 375, 390 (D. Mass. 1995).

106. See, e.g., *WMX Techs., Inc. v. Miller*, 197 F.3d 367, 372 (9th Cir. 1999).

The protections afforded by the Petition Clause have been limited by the Supreme Court to situations where an individual's associational or speech interests are also implicated. See *McDonald v. Smith*, 472 U.S. 479, 482-85 (1985) (describing the right to petition as "cut from the same cloth" as other expressive rights embodied in the First Amendment and holding that a petition clause claim must implicate some [F]irst [A]mendment right).

*Id.*

107. *McDonald*, 472 U.S. at 485 (determining that statements made in petitioning the government do not enjoy absolute privilege in determining immunity from libel actions).

108. See, e.g., *Moffett v. Killian*, 360 F. Supp. 228, 231 (D. Conn. 1973) (saying that the fact that a lobbyist earns his living exercising his First Amendment rights does not change the fact that these rights are protected by it; nor does the fact that a client hires someone to exercise those rights change the nature of the client's protection under the First Amendment); *Fritz v. Gorton*, 517 P.2d 911, 929 (Wash. 1974) (upholding Washington's lobbying disclosure laws). The *Fritz* court also made clear that the

right to petition, of course, is not limited to mass demonstrations, highly publicized in newspaper headlines and in television news reports. In sharp contrast, lobbying can

the D.C. Circuit found that individuals and groups trying to effect congressional action by engaging in lobbying activities were exercising their right to petition.<sup>109</sup> Courts recognize that there are a number of skills that are essential in the modern political process for the effective exercise of the right to petition through lobbying. These skills include an understanding of the subject matter, the details of the legislative process, the players in the process and their personalities, and the role of the media and third parties.<sup>110</sup> However, since the right to petition in general is limited, judges are reluctant to allow lobbyists to invoke the Petition Clause whenever their activities are restrained. In his *Liberty Lobby* concurrence, Judge Wright counseled such caution:

Lobbying often strikes at the roots of the democratic process. Though protected by the First Amendment's right to petition clause, lobbying is not always in the public interest. Indeed the special interest, represented by the lobbyist as he tries to influence elected representatives of the people, and the public interest may be, and often are, in direct conflict . . . [I]t is really too late in the day to suggest that a lobbyist operates other than in a goldfish bowl as far as the law is concerned.<sup>111</sup>

Seventeen years prior to *Liberty Lobby*, the D.C. Circuit found that the registration requirements for lobbyists under the Federal Regulation of Lobbying Act did not abridge a lobbyist's right to petition because it left him "free to exercise those rights, calling upon him only to say for whom he is speaking, who pays him, how much, and the scope in general of his activity with regard to legislation."<sup>112</sup> In *Harriss*, the Supreme Court supported this view when it upheld the Federal Regulation of Lobbying Act<sup>113</sup> despite several dissents, such as that of Justice Jackson who felt that the Act did not fully protect the

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be a far more subtle, unpublicized, and we surmise a more effective method of petitioning the government. The profound effect that lobbying may have upon the legislative processes is tacitly recognized in common references to lobbyist activities as the "third house" or the "fifth estate." We take special and emphatic notice of the fact that lobbyists perform important and constructive functions in communicating the wishes of the interests they represent to the appropriate organs of government. In our opinion, the role of the lobbyist in openly and appropriately communicating with government in regard to legislation and other related functions of government is clearly assured and protected by the First Amendment right to petition government.

*Id.*

109. *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967).

110. *Kimbell v. Hooper*, 665 A.2d 44, 48 (Vt. 1995).

111. *Liberty Lobby*, 390 F.2d at 492 (Wright, J., concurring) (saying that freedom of the press must also be ensured while the right to petition is being exercised, since lobbying activity often occurs in private).

112. *United States v. Slaughter*, 89 F. Supp. 205, 206 (D.D.C. 1950).

113. *United States v. Harriss*, 347 U.S. 612, 625 (1954) (holding that registration and disclosure requirements of the Federal Regulation of Lobbying Act, narrowly construed, did not violate the right to petition).

speech directed at lawmakers.<sup>114</sup> In Justice Jackson's *Harriss* dissent, he recognized the difficulty in regulating lobbying without violating the right to petition and criticized the vague standard that the courts had thus far announced on the issue. According to Jackson, "to reach the real evils of lobbying without cutting into the constitutional right of petition is a difficult and delicate task for which the Court's action today gives little guidance."<sup>115</sup>

Courts applying state laws have also found that restrictions on lobbyists do not violate the Petition Clause. In 1999, the Fourth Circuit upheld a North Carolina law that prohibited lobbyists from making political contributions while the state legislature was in session.<sup>116</sup> In this case, the court rejected the argument that the law impeded the lobbyists' right to petition, finding the burden on lobbyists minimal next to the state's interest in preventing corruption and maintaining public confidence in the legislative process.<sup>117</sup> Additionally, the Supreme Court of Kentucky found that reporting and disclosure requirements did not violate the right to petition under the federal or state constitution.<sup>118</sup>

Courts have not given the government unrestricted power to regulate lobbyists, however, and a state must still be able to justify restrictions on lobbying. A court examining a Connecticut law, for example, found that while in theory the imposition of a registration fee for lobbyists did not violate the Petition Clause, Connecticut's fee of \$35 was unconstitutional because it exceeded the administrative costs of filing and distributing information.<sup>119</sup> In *Citizens Energy Coalition of Indiana, Inc. v. Sendak*, a court addressing an Indiana

114. *See id.* at 636 (Jackson, J., dissenting).

115. *Id.* at 635 (1954) (Jackson, J. dissenting) (stating his belief that the Federal Regulation of Lobbying Act was unconstitutional). Justice Jackson went on to say:

If this right [to petition] is to have an interpretation consistent with that given to other First Amendment rights, it confers large immunity upon activities of persons, organizations, groups and classes to obtain what they think is due them from the government. Of course, their conflicting claims and propaganda are confusing, annoying and at times, no doubt, deceiving and corrupting. But we may not forget that our constitutional system is to allow the greatest freedom of access to Congress, so that the people may press for their selfish interests, with Congress acting as arbiter of their demands and conflicts.

*Id.*

116. *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 717-18 (4th Cir. 1999).

117. *Id.*

118. *Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 952 (Ky. 1995); *see also* *Moffett v. Killian*, 360 F. Supp. 228, 232 (D. Conn. 1973) (upholding Connecticut's reporting and disclosure requirements for lobbyists).

119. *Moffett*, 360 F. Supp. at 232 (holding that although the state constitutionally may charge a "nominal sum" to cover the costs of administering a regulation, to the extent that that fee exceeds such a sum it is an unconstitutional tax on the exercise of First Amendment rights).

lobbying regulation held that “[s]ubstantial infringements of the right to lobby must be justified by a compelling state interest, and said interest must be effectuated in that manner which least restricts lobbying.”<sup>120</sup>

This type of balancing test, which looks at the government interests involved and the manner in which the regulation achieves those interests, mirrors the Supreme Court’s free speech analysis.<sup>121</sup> Since a lobbyist’s right to petition is only protected to the extent that his activities implicate free speech rights, it is not surprising that freedom of speech and petition are closely related.<sup>122</sup> The right to petition and freedom of speech are separate guarantees but are subject to the same constitutional analysis.<sup>123</sup> Consequently, a ban on contingency fee lobbying contracts should be evaluated with both the right to petition and freedom of speech in mind. The following discussion examines cases involving freedom of speech doctrines.

### B. Free Speech

Although some forms of speech enjoy less than full First Amendment protection,<sup>124</sup> the First Amendment is “at its zenith” when “core political speech” is involved.<sup>125</sup> Expression regarding issues of public concern is at the core of the First Amendment,

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120. *Citizens Energy Coal. of Ind., Inc. v. Sendak*, 459 F. Supp. 248, 258 (S.D. Ind. 1978) (finding that a policy of refusing to grant contracts or subgrants to groups that lobby or employ lobbyists was not related to the government’s interest in ensuring efficient lawmaking, and suggesting that even if it was, the interest was not sufficient to justify the corresponding infringement of the right to petition).

121. *See infra* Part III.B.

122. *See, e.g., McDonald v. Smith*, 472 U.S. 479, 489–90 (1985) (Brennan, J., concurring) (“The Framers envisioned the rights of speech, press, assembly, and petitioning as interrelated components of the public’s exercise of its sovereign authority. . . . [W]e have recurrently treated the right to petition similarly to, and frequently as overlapping with, the First Amendment’s other guarantees of free expression.”); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (“It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable.”).

123. *Wayte v. United States*, 470 U.S. 598, 611 n.11 (1985) (treating the plaintiff’s claims of violations of the right to petition and right to free speech the same, since they are typically subject to the same analysis).

124. *See, e.g. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 761–70 (1976) (commercial speech not entitled to the fullest First Amendment protection); *N.Y. Times v. Sullivan*, 376 U.S. 254, 268 (1964) (defamation unprotected); *Miller v. California*, 413 U.S. 15, 24 (1973) (obscenity unprotected); *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (speech that amounts to incitement to lawless action unprotected).

125. *Buckley v. Am. Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186–87 (1999), citing *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

reflecting a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ." <sup>126</sup> However, restrictions on political speech are not treated equally. When the government regulates non-speech behavior and interferes with speech only incidentally, courts apply intermediate scrutiny. When the government regulation directly regulates speech, courts will apply strict scrutiny.

### 1. Strict Scrutiny vs. Intermediate Scrutiny

Courts invoke the most exacting level of scrutiny when regulations "suppress, disadvantage, or impose differential burdens upon speech because of its content" or "compel [individuals] to utter or distribute speech bearing a particular message." <sup>127</sup> According to Professor John Hart Ely, this government objective of suppressing content serves a "switching" function, so that if the government attempts to regulate a particular message the court will move into a more demanding "track" for analysis. <sup>128</sup> In determining whether a regulation is content-neutral, courts will examine whether the government was motivated by disagreement with the message that the speech conveys. <sup>129</sup> If the regulation is content-based, strict scrutiny applies. To survive strict scrutiny, the regulation must be necessary to serve a compelling government interest and narrowly tailored to achieve that interest. <sup>130</sup>

Regulations that are unrelated to the content of the message are typically subject to an intermediate level of scrutiny based on the belief that such regulations are less likely to remove particular

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126. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964); see also *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . ."). The Court in *Buckley* also likened the level of protection afforded to speech advocating candidates for office with that involving the passage of legislation, lending support to the idea that the case may be particularly instructive in determining how lobbying regulations may be analyzed by the courts. *Id.* at 48.

127. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). In *Turner*, the Court held that rules requiring cable operators to carry local commercial and public broadcast stations on their systems are content-neutral. *Id.* at 655.

128. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484 (1975).

129. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

130. See, e.g., *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

viewpoints or ideas from public discourse.<sup>131</sup> In *United States v. O'Brien*, the Supreme Court articulated a balancing test whereby the government may regulate non-speech conduct in ways that incidentally curtail free speech if it can demonstrate (1) that it makes no distinctions based on the content of the speech; (2) that the regulation serves an important or substantial government interest that is unrelated to the suppression of speech; and (3) that the incidental burden on speech is no greater than is essential to further that interest.<sup>132</sup> So, under intermediate scrutiny the government interest need not be as weighty, and narrow tailoring analysis need not be as rigid.<sup>133</sup> In *Clark v. Community for Creative Non-Violence*, the Court likened the *O'Brien* test to the test for "time, place, and manner" restrictions—i.e., restrictions that only regulate the time, place, or manner of the speech but not the content itself. These regulations are valid "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information."<sup>134</sup> A discussion of the government interest and narrow tailoring analysis under these tests follows.

## 2. The Government's Interest in Regulating Lobbying Activities

Courts have found that a number of government interests support restrictions of lobbying activities. Laws that restrict lobbying activities cannot be justified purely "under the guise of prohibiting professional misconduct."<sup>135</sup> However, given the effects of lobbying on democratic governance,<sup>136</sup> courts have found that many lobbying regulations can be justified by a compelling government interest. A

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131. *Turner*, 512 U.S. at 642.

132. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

133. *Broadrick v. Okla.*, 413 U.S. 601, 615 (1973) ("[O]verbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner.").

134. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) The Court held that "[T]he foregoing analysis demonstrates that the Park Service regulation is sustainable under the . . . standard of *United States v. O'Brien*, for validating a regulation of expressive conduct, which, in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." *Id.* at 298 (internal citation omitted).

135. *NAACP v. Button*, 371 U.S. 415, 439 (1963) (rejecting the argument that the state's interest in regulating unethical conduct by attorneys was sufficiently compelling to justify a Virginia statute prohibiting the improper solicitation of legal or professional business).

136. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 920-21 (1970) (discussing the remedial nature of lobbying disclosure laws, given that they generate "information of relevance to a democratic public" that leads courts to apply less stringent analysis to them).

district court examining New Jersey's lobbying disclosure law described three compelling interests that justify administrative requirements regulating lobbyists: (1) providing elected officials with information regarding whose funds are being used to influence them and discovering which of their constituencies is really advocating a particular position; (2) allowing the public to more accurately assess the performance of their lawmakers; and (3) promoting openness in the lawmaking process.<sup>137</sup> In *Harriss*, the Supreme Court also asserted the government's interest in lobbying disclosure laws:

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 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. . . .

Toward that end, Congress has not sought to prohibit these pressures. . . . It [has] acted . . . to maintain the integrity of a basic governmental process.<sup>138</sup>

Courts that have evaluated prohibitions on contingency fee lobbying contracts have also found compelling state interests supporting those laws. The tendency of such contracts to "promote the temptation to use improper means to gain success" is a public policy concern that is often cited as a compelling interest.<sup>139</sup> Since contingency fee awards for lobbying often involve payment from moneys awarded by the government, the government may also have an interest in guarding government funds on behalf of taxpayers.<sup>140</sup> As the court in *Hialeah Gardens* stated, "For our citizens to support our institutions of government, they must have confidence in the integrity of public officials and in their actions, and among other things, they have a right to expect good faith and honest dealings in expenditure of the public treasury."<sup>141</sup> In other contexts, the Supreme Court has recognized that the government has a compelling interest in

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137. *ACLU of N.J. v. N.J. Election Law Enforcement Comm'n*, 509 F. Supp. 1123, 1129 (D.N.J. 1981).

138. *United States v. Harriss*, 347 U.S. 612, 625 (1954).

139. *Hialeah Gardens v. John L. Adams & Co.*, 599 So.2d 1322, 1324 (Fla. Dist. Ct. App. 1992). In this case, the court refused to strike down a contingency fee contract because the contingency was not, in fact, met, but it indicated that the arrangement is against public policy and called the problem of contingency fee lobbying contracts to the attention of the state legislature. *Id.* at 1325-26.

140. *Id.* at 1325 ("As between the innocent tax paying public and those who would gain from contingent contracts with public entities or agencies, we come down on the side of the tax payer.")

141. *Id.*



preventing quid pro quo bribery in government and the appearance of corruption that lowers public confidence.<sup>142</sup>

### 3. Overbreadth

For both accidental and direct interferences with speech, a court may use the overbreadth doctrine to strike down a statute when it determines that the harm to society caused by the speech is outweighed by the concern that the regulation will cause others to refrain from engaging in protected expression.<sup>143</sup> Put another way, the overbreadth doctrine applies to restrictions that are "susceptible of sweeping and improper application."<sup>144</sup> Judges usually prefer to read a statute narrowly and construe it consistently with the First Amendment.<sup>145</sup> The Supreme Court in *Broadrick v. Oklahoma* stated that it is particularly reluctant to resort to an overbreadth analysis when the challenged law regulates political activities in a neutral, non-censorial way (in other words, when it is applying intermediate scrutiny).<sup>146</sup> "[W]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."<sup>147</sup> The Court is even more reluctant to strike down time, place, and manner restrictions on overbreadth grounds, refusing to require that the regulation is the least restrictive alternative to achieve the government's desired end.<sup>148</sup>

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142. *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976). In *Buckley*, the Court found that the actuality and appearance of corruption is a constitutionally sufficient justification for a \$1,000 campaign contribution limit but not adequate to justify limits on independent expenditures, on the ground that independent expenditures do not pose the same danger of corruption, since they can occur with no coordination or prearrangement with the candidate's campaign. *Id.* at 26-27, 47.

143. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

144. *NAACP v. Button*, 371 U.S. 415, 433-35 (1963) (finding a Virginia state statute making it a crime to advise an individual of his legal rights and refer him to a particular attorney or group of attorneys to be overbroad because it "lends itself to selective enforcement against unpopular causes").

145. *Broadrick*, 413 U.S., at 613 ("Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.").

146. *Id.* at 614.

147. *Id.* at 615.

148. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow

Despite the Supreme Court's reluctance to strike down regulations as overbroad, tailoring is relevant to the analysis of contingency fee lobbying prohibitions. For example, the Montana Supreme Court applied the overbreadth doctrine to strike down the state's ban on contingency fee lobbying contracts, finding that the prohibition covered agreements that were properly motivated as well as those that were not.<sup>149</sup> Furthermore, the Supreme Court has announced that statutes limiting "the power of the people to initiate legislation" should be closely scrutinized,<sup>150</sup> and has struck down regulations of fee arrangements in other contexts on the grounds that they were not narrowly tailored. In 1988, the Supreme Court found that a North Carolina law defining reasonable compensation for individuals' fundraising for charities was not narrowly tailored to meet the government's interest in preventing fraud.<sup>151</sup> This was true even though the law allowed the fundraiser to rebut the presumption that fees beyond those set out in the statute were unreasonable.<sup>152</sup>

Thus far, however, courts have still been reluctant to find lobbying regulations, as well as regulations that may restrain other political speech such as campaign contributions, to be overbroad given the "remedial effect" of such laws.<sup>153</sup> In *Harriss*, where the Supreme Court upheld lobbying registration and disclosure laws, the Court dismissed the idea that the Federal Regulation of Lobbying Act's potential to deter some individuals from engaging in lobbying activities was enough to invalidate the statute.<sup>154</sup> Almost thirty years

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tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

*Id.* (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)) (internal citation omitted)).

149. *Mont. Auto. Ass'n v. Greely*, 632 P.2d 300, 308 (Mont. 1981); *see also* *Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 958 (Ky. 1995) (Stephens, C.J., concurring in part and dissenting in part) ("The criminalization of lobbying on a contingent fee basis defies reason . . . [T]he legislature infers that a contingency fee system automatically implies unethical behavior."). *But see* *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996) (acknowledging the *Montana Automobile* decision and Supreme Court decisions discussing current First Amendment doctrine that follow a different line of reasoning than that in the early cases finding contingency fee lobbying contracts against public policy, but refusing to depart from that earlier precedent).

150. *Meyer v. Grant*, 486 U.S. 414, 423 (1988) (quoting *Urewich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983)).

150. *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 789 (1988).

152. *Id.* at 792-93.

153. Note, *supra* note 136, at 920.

154. *United States v. Harriss*, 347 U.S. 612, 626 (1954).

[H]ere Congress has used [the] power [of self-protection] in a manner restricted to its appropriate end. . . .

. . . Hypothetical borderline situations are conjured up in which such persons choose to remain silent because of fear of possible prosecution for failure to comply with the Act.

later, a district court refused to find overbroad a New York law that the plaintiffs claimed was even more expansive than the federal law in *Harriss*.<sup>155</sup>

#### 4. The Idea of Money as Speech

One area of First Amendment law that courts and scholars neglect concerns the notion that the regulation of money may impermissibly affect free speech.<sup>156</sup> Given that a ban on contingency fee lobbying contracts would regulate the fee arrangement, which is non-speech conduct that would indirectly affect the resulting speech, case law discussing the idea of money as speech is particularly instructive. The First Amendment generally prevents the government from requiring individuals to fund speech that they find objectionable.<sup>157</sup> The government is not required to fund protected speech activities; however, it may do so when it chooses<sup>158</sup> in which case, it is not required to fund all such activities equally.<sup>159</sup> For example, the Supreme Court has held that Congress is not required to fund lobbying activities.<sup>160</sup> However, whether the government may prohibit private individuals from spending money in a particular way,

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Our narrow construction of the Act, precluding as it does reasonable fears, is calculated to avoid such restraint. . . . The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest.

*Id.*

155. Comm'n on Indep. Colls. and Univs. v. N.Y. Temp. State Comm'n on Regulation of Lobbying, 534 F. Supp. 489, 497 (N.D.N.Y. 1982). *But see*, ACLU of N.J. v. N.J. Election Law Enforcement Comm'n, 509 F. Supp. 1123, 1132-33 (D.N.J. 1981) (striking down the provision requiring reporting and disclosure by groups engaged in activities not directed at the legislature as overbroad, but upholding the remainder of the disclosure and reporting provision).

156. For an analysis of contingency fee lobbying contracts and the First Amendment that does not treat in detail many of the cases discussed in this Section, such as the campaign finance jurisprudence, see generally Fatka & Levien, *supra* note 90.

157. United States v. United Foods, Inc., 533 U.S. 405, 405 (2001).

158. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 92-93 (1976) (finding that the public financing scheme created under the Federal Election Campaign Act could be sustained under the First Amendment, and that it enhanced public discussion rather than restricting or censoring speech).

159. *See, e.g.*, Stonewall Union v. City of Columbus, 931 F.2d 1130, 1138 (6th Cir. 1991) (finding that summary judgment for the defendants was inappropriate because factual issues existed regarding whether a parade permit ordinance was being applied in a discriminatory fashion, and remanding the case to the district court to resolve issues of unconstitutional enforcement).

160. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546 (1983) (citing *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (*superseded by statute*, current version at 26 U.S.C. § 162(e) (2005))) (finding that a prohibition on substantial lobbying activities for organizations with tax-exempt status is not a violation of the First Amendment, even though Congress chose not to subsidize lobbying generally but created an exception for veterans' organizations).

such as with a ban on contingency fee lobbying contracts, is a more complicated question. Although money is not always equivalent to speech,<sup>161</sup> there are some situations when courts will find that regulations dealing with money impermissibly curtail First Amendment freedoms.

One relevant line of cases deals with campaign finance regulations, since both campaign finance laws and contingency fee lobbying prohibitions regulate funds in the political arena. In *Buckley v. Valeo*, the Supreme Court upheld campaign contribution limits but struck down campaign expenditure limits.<sup>162</sup> The Court announced that the dependence of speech on the expenditure of money does not necessarily introduce a non-speech element to justify lowering the level of scrutiny required.<sup>163</sup> The Court also recognized that almost every means of communication in society now requires some expenditure of money.<sup>164</sup> According to the Court, limits on campaign expenditures in the Federal Election Campaign Act created a substantial restriction on political speech.<sup>165</sup> The Court then contrasted the direct restraint on speech involved in restricting expenditures with the indirect restriction imposed by the Act's limits on campaign contributions.<sup>166</sup> The restraint on campaign contributions was sustained since contributions only result in expression when spent by the candidate, and they can still serve as evidence of the symbolic expression of support for a candidate regardless of their size.<sup>167</sup>

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161. *Buckley*, 424 U.S. at 262-63 (White, J., concurring in part and dissenting in part) ("[T]he argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much.").

162. *Id.* at 143 (majority opinion).

163. *Id.* at 16. The Court went on to state that even if it accepted the argument that the expenditure of money was conduct rather than pure speech, the expenditure limits in FECA would not pass muster under the applicable *O'Brien* analysis. *Id.* at 17.

164. *Id.* at 19.

165. *Id.* (stating that "a restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached").

166. *Id.* at 20-21 (characterizing limits on contributions as a "marginal restriction upon the contributor's ability to engage in free communication").

167. *Id.* at 21. The opinion also noted that the contribution caps might be more suspect if there was evidence that they prevented candidates from acquiring sufficient resources to communicate their message, rather than simply requiring them to seek funding from more sources. *Id.* at 24-29. In his dissent, Chief Justice Burger disagreed with any distinction between the communication involved in political contributions and the communication involved in political expenditures, saying that the constitutional interest in communicating a political interest is no different whether an individual spends money to speak himself or funds another person's speech. *Id.* at 244 (Burger, C.J., dissenting).

The Court also found that the government could make behavior other than bribery unlawful in the interest of preventing corruption:

But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action . . . Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.<sup>168</sup>

The opinion in *Buckley* noted that the government may not, consistent with the First Amendment, “determine that spending to promote one’s political views is wasteful, excessive, or unwise.”<sup>169</sup>

The Court also considered overbreadth arguments in *Buckley*. Appellants argued that campaign contribution ceilings are overbroad because they restrict contributions even when there is no proven or suspected improper influence involved and because the ceiling amount does not take into account the differences in resources required for campaigns at different levels of government.<sup>170</sup> Although the Court acknowledged that bribery and disclosure laws could address some of the clearest abuses, it found that Congress had the power to regulate more stringently through contribution limits because of its interest in eliminating the appearance of corruption and the difficulty of isolating suspect contributions individually.<sup>171</sup> Therefore, the Court refused to determine whether the chosen ceiling was appropriate.<sup>172</sup>

Recently, the Court revisited the idea of money as speech in the campaign finance context in *McConnell v. FEC*, which assessed the constitutionality of the Bipartisan Campaign Reform Act (“BCRA”).<sup>173</sup> Citing the compelling interest in preventing the actuality and appearance of corruption, the Court upheld the part of the BCRA that limited the amount of “soft money” donations that individuals can make to political parties<sup>174</sup> and the manner in which the parties can

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168. *Id.* at 27-28.

169. *Id.* at 57.

170. *Id.* at 29-30.

171. *Id.* at 30.

172. *Id.*; see also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 395-96 (2000) (finding that contribution limits lower than those in *Buckley* under Missouri state law were not significantly different from those in *Buckley* and did not require a different analysis as to whether they were appropriately tailored to serve the government’s interest in preventing actual or perceived corruption).

173. 540 U.S. 93, 132-33 (2003).

174. *Id.* at 143-52. “Soft money” is considered money donated to political parties, not earmarked for a particular candidate or race, used for advocacy advertising, generic party advertising, and “get out the vote” efforts. Prior to the BCRA, soft money contributions often vastly exceeded the legal limit for “hard money” donations under FECA. *Id.* at 122-26.

solicit donations.<sup>175</sup> The Court found this interest compelling in light of evidence that soft money donors are motivated more by attempts to influence legislators than by political ideology.<sup>176</sup> Restrictions on soft money donations to state and local party committees are also permissible under *McConnell* because of the government's interest in preventing corruption from spreading to the states.<sup>177</sup> However, the Court struck down a provision stating that a party wishing to spend more than \$5,000 in coordination with a nominee may not use independent expenditures to support advocacy that directly supports a candidate.<sup>178</sup> According to the Court, even though this provision only burdened a small class of speech, this speech was nonetheless protected and the provision could not be justified by a government interest in preventing parties from engaging in such direct advocacy.<sup>179</sup>

In *McConnell*, the Court rejected a number of arguments that provisions of the BCRA are overbroad. One such argument was that a restriction on "soft money" donations to political parties was impermissibly overbroad because it applied not just to funds spent by parties on federal elections, but also to funds spent on state and local elections.<sup>180</sup> Since the national parties are so closely aligned with the federal officeholders who control them, the Court found that the only way to effectively address the appearance of corruption from soft money at the national level is to prevent such donations to national parties, regardless of how the money is ultimately spent.<sup>181</sup> Similar reasoning led the Court to conclude that a prohibition on soliciting soft money donations was not overbroad.<sup>182</sup> The Court found that provisions limiting donations to state parties were also not overbroad because they were narrowly focused on only the contributions posing the greatest risk of direct influence on federal officeholders. Contributions that can be used to directly influence federal candidates

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175. *Id.* at 157-58.

176. *Id.* at 146-47. The Court cites the fact that over half of the top soft money donors in the 1996 and 2000 elections donated to both major parties. *Id.* at 148.

177. *Id.* at 165-66.

178. *Id.* at 216-19 (finding that there was not a "meaningful government interest" sufficient to justify the provision).

179. *Id.* at 217-18 ("Any claim that a restriction on independent express advocacy serves a strong Government interest is belied by the overwhelming evidence that the line between express advocacy and other types of election-influencing expression is, for Congress' purposes, functionally meaningless.").

180. *Id.* at 154.

181. *Id.* at 155-56.

182. *Id.* at 157-58.

were regulated,<sup>183</sup> while contributions used for activity not related to a federal election were excluded from regulation.<sup>184</sup> Under *McConnell*, Congress could also prevent corporations and unions from funding electioneering communications, including issue advertising (as opposed to advertising that expressly advocates the election of a candidate), out of their general treasuries without raising overbreadth concerns.<sup>185</sup>

A number of cases outside the campaign finance context also address the issue of money as speech. When the government financially burdens speech in any way, whether through imposing a cost such as a fee or tax or prohibiting a private payment, the court will use the *O'Brien* balancing test to ask whether there is a substantial government interest, whether in furthering that interest the regulation unnecessarily burdens speech, and whether the burden is imposed in a way that is content-neutral. A statute is considered content-neutral if its purpose is unrelated to the content of the speech and it only incidentally burdens some speakers.<sup>186</sup> For example, in *Forsyth County v. Nationalist Movement*, the Supreme Court struck down an ordinance that allowed variations in permit fees for assemblies and parades based on the anticipated costs of those gatherings.<sup>187</sup> The Court reasoned that since those costs were associated with public reaction to the speech, the burden was not content-neutral.<sup>188</sup>

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, the Court struck down New York's "Son of Sam" law, which required persons accused or convicted of a crime to donate all money received from works describing the crime to the Crime Victims Board which would hold the money in an escrow account for five years to satisfy potential civil judgments won by victims.<sup>189</sup> The Court found that the statute singled out "income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content."<sup>190</sup> Whether the criminal himself or the publisher was the speaker was irrelevant because the statute only created a disincentive to create or publish one

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183. *Id.* at 166-69.

184. *Id.* at 181.

185. *Id.* at 207-08.

186. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 (1991).

188. 505 U.S. 123, 132-33 (1992).

188. *Id.* at 134.

189. *Simon & Schuster*, 502 U.S. at 108.

190. *Id.* at 116.

type of work, that describing a crime.<sup>191</sup> The Court announced that sometimes differential treatment based on content may be justified where there is a compelling government interest and the statute is narrowly drawn.<sup>192</sup> While the Court considered the interest in compensating victims of crime to be compelling, the statute was not narrowly tailored because it included works on any subject so long as they included some material describing the crime and because it defined persons convicted of a crime to include persons who admit to a crime even if they were never formally accused or convicted.<sup>193</sup>

The Supreme Court also struck down a prohibition on a fee arrangement between private parties in *Meyer v. Grant*.<sup>194</sup> This case involved a Colorado statute that made it unlawful for an individual to receive payment for organizing a petition in support of a ballot initiative.<sup>195</sup> The Court found that provisions such as those making it a crime to forge a signature on a petition or to pay someone to sign a petition were sufficient to meet the government's asserted interest in maintaining the integrity of the initiative procedures.<sup>196</sup> The Court stated, "Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication."<sup>197</sup>

#### IV. ANALYSIS

##### A. *Why First Amendment Concerns Are Implicated*

One way to avoid potential constitutional problems associated with a ban on contingency fee lobbying contracts is to argue that the fee arrangement and the speech involved are entirely distinct and the First Amendment is not implicated at all. This argument, however, is likely to fail. First Amendment concerns are still relevant in many

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191. *Id.*

192. *Id.* at 118.

193. *Id.* at 120-23. In concurring, Justice Kennedy stated his belief that the fact that the regulation was not content-neutral was itself a reason to strike down the statute, and that the Court's analysis of compelling government interest and overinclusiveness was inappropriately drawn from equal protection jurisprudence. *Id.* at 124 (Kennedy, J., concurring).

195. *Meyer v. Grant*, 486 U.S. 414, 426 (1988) (finding that the prohibition could not be justified either by an interest in ensuring that a measure has enough grassroots support to make it onto the ballot or by an interest in ensuring the integrity of the initiative process).

196. *Id.* at 417.

196. *Id.* at 427-28.

197. *Id.* at 424.



cases where non-speech conduct is regulated<sup>198</sup> and hiring a lobbyist certainly has something to do with speech (even if the fee arrangement does not) since it involves hiring someone to speak on another's behalf. It is clear from both the line of cases upholding regulation of lobbying<sup>199</sup> and cases striking down prohibitions on fees paid to those engaged in other types of expression<sup>200</sup> that a federal prohibition on contingency lobbying contracts at least raises some First Amendment concerns.

Alternatively, one might argue that any First Amendment concerns are without merit because a prohibition of contingency fee lobbying contracts would still leave clients free to hire lobbyists, who would be free to speak and petition the government on behalf of their clients. While this argument was offered with some success in cases evaluating the constitutionality of lobbying disclosure laws,<sup>201</sup> disclosure laws likely have less of a deterrent effect than a ban on contingency fee lobbying, which actually prohibits a certain lobbying activity entirely.<sup>202</sup> Since a ban on contingency fee lobbying places a financial burden on speech which may create a disincentive to hire a lobbyist and petition the government,<sup>203</sup> First Amendment analysis is

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198. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (holding that a law prohibiting the mutilation of Selective Service cards does not, on its face, abridge free speech, but where speech and non-speech elements combine in a single course of conduct, a significant government interest must outweigh the incidental burdens on speech).

199. Lobbying disclosure laws traditionally are not subject to the more exacting level of scrutiny applied to laws that infringe upon "pure speech." *United States v. Harriss*, 347 U.S. 612, 625-26 (1954); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 717-18 (4th Cir. 1999); *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967); *Comm'n on Indep. Colls. & Univs. v. N.Y. Temp. State Comm'n on Regulation of Lobbying*, 534 F. Supp. 489, 501-04 (N.D.N.Y. 1982); *Moffett v. Killian*, 360 F. Supp. 228, 231-32 (D. Conn. 1973); *United States v. Slaughter*, 89 F. Supp. 205, 206 (D.D.C. 1950); *Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 952-54 (Ky. 1995); *Kimbell v. Hooper*, 665 A.2d 44, 47-51 (Vt. 1995); *Fritz v. Gorton*, 517 P.2d 911, 929 (Wash. 1974).

200. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991); *Meyer*, 486 U.S. at 428; *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 793, 800-02 (1988).

201. See, e.g., *Slaughter*, 89 F. Supp. at 206 (finding that lobbying registration and disclosure provisions leaves lobbyists free to exercise their right to speak, asking only that they disclose how much they are paid to speak and for whom they are speaking).

202. The dissenting opinions in *Harriss* indicate how lobbying regulations may deter speech. 347 U.S. at 628, 633. Justice Douglas thought that registration requirements could cause "all who might possibly be covered to act at their peril," meaning that the law "would in practical effect be a deterrent to the exercise of First Amendment rights." *Id.* at 632 (Douglas, J., dissenting). Justice Jackson argued that "we may not forget that our constitutional system is to allow the greatest freedom of access to Congress, so that the people may press for their selfish interests, with Congress acting as the arbiter of their demands and conflicts." *Id.* at 635 (Jackson, J., dissenting).

203. See *Simon & Schuster, Inc.*, 502 U.S. at 116-17 (rejecting the argument that New York's "Son of Sam" law is distinguishable from a law taxing a percentage of income earned from speech

still necessary. Since courts apply the First Amendment more or less strictly depending on the nature of the regulation, it is important to determine where a contingency lobbying prohibition falls on the spectrum of this analysis.

### *B. Applying Intermediate Scrutiny*

It is unlikely that the highest level of scrutiny would apply to a ban on contingency fee lobbying since the purpose of the ban would not be to suppress speech, but to target corruption and prevent misuse of public funds. Furthermore, current proposals do not discriminate in any way based on the content of the message the lobbyist seeks to convey.<sup>204</sup> Consequently, *Simon & Schuster* should not apply because in that case, the Court focused on the fact that the "Son of Sam" law escrowed payments made for works with particular content.<sup>205</sup> One might argue that banning contingency fee lobbying contracts does burden speech of a particular content, as it is most likely to restrain only speech related to legislation that could result in an award of government funds. However, on its face a prohibition on contingency fee lobbying does not examine the message that the lobbyists are delivering; it only considers how that message was financed. The prohibition applies equally to those hiring a contingency fee lobbyist in pursuit of government funding and those who hire a lobbyist on a contingent basis to push legislation that would provide no monetary benefits at all. Therefore, a ban on contingency fee lobbying is distinguishable from the "Son of Sam" law in *Simon & Schuster* and would seemingly be exempt from the more exacting scrutiny applied to content-based regulations. The intermediate level of scrutiny applied in many cases involving the right to petition and freedom of speech,<sup>206</sup> which requires that Congress be able to assert a substantial

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activities, saying this reason "can hardly serve as the basis for disparate treatment under the First Amendment. Both forms of financial burden operate as disincentives to speak. . . .").

204. See *Buckley v. Valeo*, 424 U.S. 1, 31 (1976) (refusing to find that contribution limitations discriminated against non-incumbent candidates and thus were invalid on their face on the ground that "the Act applies the same limitations on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations").

205. *Simon & Schuster, Inc.*, 502 U.S. at 116.

206. See *McDonald v. Smith*, 472 U.S. 479, 489 (1985) (Brennan, J., concurring) (arguing that the Framers viewed First Amendment rights as interrelated components of the people's right to exercise their authority); *Wayte v. United States*, 470 U.S. 598, 611 n.11 (1985) (holding that the right to petition and freedom of speech are typically subject to the same analysis); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (holding that First Amendment rights are inseparable).

government interest and tailor the statute to serve that interest,<sup>207</sup> is thus the more appropriate mode of analysis.

### 1. Would a Ban on Contingency Fee Lobbying be Supported by Substantial Government Interests?

Although Congress could not justify a ban on contingency fee lobbying contracts merely as a restriction on misconduct in the lobbying profession,<sup>208</sup> a number of possible interests have been deemed compelling under strict scrutiny in other contexts and thus would also be substantial under intermediate scrutiny. Given that lobbying is related to political and lawmaking processes, the Court's decisions in the campaign finance and lobbying disclosure contexts are probably indicative of how the present Court would view the interests served by a ban on contingency fee lobbying. In *Buckley*, one of the asserted interests in limiting campaign contributions was preventing the influence that contributors hope their money will wield over government officials.<sup>209</sup> Similarly, contingency fee lobbying implicates the possibility of inappropriate influence.<sup>210</sup> The Supreme Court has also found that while Congress has a compelling interest in preventing *actual* corruption, it may also legislate to prevent any *appearance* of corruption which lowers public confidence in government.<sup>211</sup> "To say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence

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207. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973) (saying that the Court has long required that statutes burdening free speech must be narrowly drawn and justified by a compelling interest). *But see Simon & Schuster, Inc.*, 502 U.S. at 124-25 (Kennedy J., concurring) (arguing that the compelling interest and narrow tailoring requirements applied in First Amendment cases, which are in fact borrowed from equal protection doctrine, may not be appropriate in cases involving content-based restrictions on speech). Justice Kennedy's argument that this analysis should be disposed of could be interesting should one challenge the contingency fee lobbying prohibition as content-based. However, as will be argued *infra*, such a prohibition is not likely to be content-based, and either way it is clear that the requirements of compelling government interest and narrow tailoring are well entrenched in First Amendment doctrine.

208. See *NAACP v. Button*, 371 U.S. 415, 439 (1963) (rejecting argument that the interest in regulating unethical conduct by attorneys was sufficiently compelling to justify a Virginia statute prohibiting the improper solicitation of legal or professional business).

209. 424 U.S. 1, 26-27 (1976) ("To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.").

210. See *Hazelton v. Sheckels*, 202 U.S. 71, 79 (1906) (finding that a contingency fee lobbying contract tends to invite the possibility of improper solicitation from the moment of its inception and must be struck down regardless of the intention underlying the agreement).

211. *Buckley*, 424 U.S. at 27 ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

the result is to deny to the nation in a vital particular the power of self-protection."<sup>212</sup>

This rationale translates easily from the election context to the lawmaking context.<sup>213</sup> Congress may be able to justify a ban on contingency fee lobbying contracts on the grounds of ensuring both the actuality *and* appearance of integrity in the legislative process,<sup>214</sup> which is at least as fundamental to the democratic process as the election process protected by campaign finance provisions. Public perceptions of corruption plague lobbying in general,<sup>215</sup> so this interest may be validly asserted here. Cases discussing the regulation of lobbying also indicate that there are compelling interests at stake. Over fifty years ago in *Harriss*, the Court had already recognized the increasing ability of special interest lobbying to taint the legislative process and the difficulty of recognizing and evaluating the many pressures facing legislators absent legal restraints on lobbying.<sup>216</sup>

Though the interests advanced by a contingency fee lobbying ban may be compelling, one concern is that they could be addressed in other ways, such as passing and enforcing laws prohibiting bribery or corruption. In *Buckley*, however, the Court addressed this concern in the campaign finance context, finding that Congress was entitled to impose contribution limits despite the fact that anti-bribery laws and disclosure laws also target similar evils.<sup>217</sup> Thus, Congress can assert that while lobbying disclosure rules encourage openness in the legislative process, these laws are not sufficient to deter lobbyists from working on a contingency fee basis and retaining some of the

212. *Burroughs v. United States*, 290 U.S. 534, 545 (1934).

213. See *Meyer v. Grant*, 486 U.S. 414, 428 (1988) (noting that the Court in *Buckley* equated First Amendment principles involved in expression dealing with the election or defeat of a candidate in an election with those involved in expression dealing with discussion of public policy or the advocacy of passage of legislation).

214. See *United States v. Brewster*, 408 U.S. 501, 507 (1972) (recognizing the importance of maintaining integrity in the legislative process, as this was part of the rationale for the inclusion of the Speech and Debate Clause in the Constitution).

215. See *supra* Part I.

216. *United States v. Harriss*, 347 U.S. 612, 625 (1954).

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 idea of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.

*Id.*

217. *Buckley v. Valeo*, 424 U.S. 1, 28 (holding that Congress could determine that contribution ceilings were necessary to eliminate the actuality and appearance of corruption because bribery laws deal only with the most blatant attempts to influence lawmakers, and it could rationally decide that requiring disclosure of contributions was only a partial measure).

government funds received by their clients. That the Court has gone further recently in *McConnell v. Federal Election Commission* and upheld more sweeping campaign finance regulations suggests that the Court is willing to give Congress leeway to stop the improper influence of money in politics.<sup>218</sup>

Yet another rationale for a prohibition on contingency fee lobbying is the fact that moneys paid on contingency fee lobbying contracts often come out of money awarded to the lobbyist's client from funds awarded by the government.<sup>219</sup> It is thus the taxpayers who ultimately pay these lobbyists.<sup>220</sup> Therefore, it can be argued that there is a substantial interest in protecting public funds.

Since the government can likely demonstrate substantial interests for this legislation, it is necessary that the legislation actually advance those interests. Perhaps the greatest obstacle in this regard is *Meyer v. Grant*, where the Court held that a state law prohibiting payment to individuals organizing petitions for ballot initiatives did not meet the state's interests in ensuring that the organizers actually had sufficient support to get on the ballot and in maintaining the integrity of the initiative process.<sup>221</sup> A ban on contingency fee lobbying contracts, however, may be distinguished from a ban on paid petition circulators. While the state law in *Meyer* prohibited petition circulators from being paid at all,<sup>222</sup> a ban on contingency fee lobbying contracts still permits lobbyists to be paid and in no way limits the amount of compensation. In *Meyer*, the Court also focused on the reduction of total speech on a public issue that would result from prohibiting payment for petition circulators, because relying only on volunteers would reduce the number of persons advocating the message and reaching the public.<sup>223</sup> This concern is not as great in the lobbying context, since the audience for an initiative petition may be large and consist of the general public, but the audience for lobbying activities is limited to lawmakers. Where issues offered up as initiatives easily implicate the public interest, issues handled by lobbyists more often implicate special

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218. *McConnell v. Federal Election Commission*, 540 U.S. 93, 144-45 (2003).

219. See *supra* note 80 (statement of Sen. Thurmond).

220. Doris, *supra* note 10.

221. *Meyer v. Grant*, 486 U.S. 414, 425-28 (1988) (finding that the state's interest in ensuring that a measure has grassroots support is met by laws requiring that a measure cannot be placed on the ballot without a minimum number of signatures, and that its interest in ensuring the integrity of the initiative process could be met with laws making it unlawful to force a signature on a petition, to place false statements on a petition, and to pay someone to sign a petition).

222. *Id.* at 416.

223. *Id.* at 422-23.

interests.<sup>224</sup> Finally, while payments for petition circulators would be made out of entirely private funds, contingency fees for lobbying often come out of public funds, adding a compelling interest for this legislation that was not present in *Meyer*.

## 2. Would a Ban on Contingency Fee Lobbying be Overbroad?

Since a federal prohibition on contingency fee lobbying is supported by a number of substantial interests and would be designed to further these interests, the only problem that such a prohibition may still face is an overbreadth challenge. A prohibition on these contracts, as currently proposed, would reach not just arrangements that led to the use of improper influence and those that involve payment of government funds, but all contingency fee arrangements of any kind in lobbying.<sup>225</sup> A century ago, the Supreme Court specifically rejected the idea that it should accept as a defense the fact that improper means were not actually contemplated or used to influence lawmakers.<sup>226</sup>

If eliminating the appearance of corruption is asserted as an interest supporting the ban, this interest would be furthered by striking down *all* contingency fee contracts without asking what means were actually employed by the lobbyist. Based on this interest and the Court's general reluctance to strike down regulations as overbroad, particularly when it is applying intermediate scrutiny, it is unlikely that a federal prohibition on contingency fee lobbying contracts is unconstitutional. Congress may conclude that prohibiting all contingency fee lobbying contracts is the only way to eliminate the appearance of corruption that the Supreme Court has found inevitably attaches to these contracts.<sup>227</sup> Furthermore, in *Buckley* the Court responded to overbreadth challenges to contribution limits by recognizing the difficulty of isolating suspect contributions individually.<sup>228</sup> It would be similarly difficult for prosecutors to

224. See *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 492 (D.C. Cir. 1967) (Skelly, J., concurring) (observing that lobbyists often represent special interests, which may be directly at odds with the public interest).

225. See *Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 958 (Ky. 1995) (Stephens, C.J., concurring in part and dissenting in part) (rejecting implication that contingency fees necessarily imply unethical behavior); *Mont. Auto. Ass'n v. Greely*, 632 P.2d 300, 308 (Mont. 1981) (striking down a contingency fee lobbying ban on the grounds that it covered both properly and improperly motivated agreements).

226. *Hazelton v. Sheckels*, 202 U.S. 71, 79 (1906).

228. *Providence Tool. Co. v. Norris*, 69 U.S. 45, 55 (1864) (stating that "the introduction of improper elements" are the "direct and inevitable result" of all contingency fee lobbying contracts).

228. *Buckley v. Valeo*, 424 U.S. 1, 30 (1976).

separate the suspect contingency fee contracts from the permissible ones.

Some scholars characterize political money as a “moving target,”<sup>229</sup> noting that those desiring political power or influence over the political process will often react to constraints on spending by simply spending elsewhere or in different ways.<sup>230</sup> If the law did not cover all contracts, lobbyists hoping to avoid prosecution would inevitably resort to more subtle practices, and clients would structure their financial transactions to avoid the appearance that moneys were being paid out of public funds. Given the Court’s recognition in *McConnell* that broad regulations are necessary in the field of campaign finance to combat this kind of avoidance,<sup>231</sup> the Court would likely find that a blanket prohibition on contingency fee lobbying was properly tailored to target this activity. Some have cited overbreadth concerns as a reason that Congress should abandon this legislation entirely, and even believe that the courts should revisit this issue and grant constitutional protection to contingency fee lobbying.<sup>232</sup> However, as the discussion above demonstrates, there is sufficient evidence that a ban on contingency fee lobbying contracts would not be found unconstitutional.

## V. CONCLUSION

In a time when the public’s faith in the political process is at an all-time low, and billions of dollars are spent every year both on electing and influencing lawmakers, it is essential that Congress have the power to regulate corrupt practices. A prohibition on contingency fee lobbying contracts for lobbying Congress is long overdue, as evidenced by measures adopted to prohibit such contracts when targeted towards other branches of the federal government and by

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229. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1707 (1999).

230. *Id.* at 1705.

It doesn’t take an Einstein to discern a First Law of Political Thermodynamics—the desire for political power cannot be destroyed, but at most, channeled into different forms—nor a Newton to identify a Third Law of Political Motion—every reform effort to constrain political actors produces a corresponding series of reactions by those with power to hold onto it.

*Id.*

231. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 165-66 (2003) (discussing how regulations covering the state level were necessary to prevent corruption from merely shifting from national to state parties).

232. Fatka & Levien, *supra* note 90, at 587 (concluding that Congress should not enact a prohibition on contingency fee lobbying contracts and that the Supreme Court should revisit the issue and explicitly grant constitutional protection to contingency fee lobbying arrangements).

numerous state laws banning the practice. This largely unseen practice will only expand as the number of lobbyists in Washington grows and the money spent on these lobbyists continues to increase. The Supreme Court's opinions in the realm of campaign finance indicate that it is willing to give Congress a great deal of leeway in regulating corrupt practices in politics. A ban on contingency fee lobbying is the only effective way to ensure that lobbyists will not be tempted to resort to corrupt behaviors by such fees, to protect public funds, and to eliminate the appearance of corruption with respect to this practice. Congress should pass this measure to ensure that lobbyists can no longer "gouge the government"<sup>233</sup> to achieve personal gain.

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233. See *supra* note 80 (statement of Sen. Thurmond) and accompanying text.

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