

## HOW TO SURVIVE THE NEXT SCANDAL: REPLACE OBSOLETE CAMPAIGN FINANCE REFORM WITH POLITICAL LAW REFORM?

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*The inevitable political corruption scandal that will soon arrive in Washington, D.C. will be followed by long-awaited reform. To be prepared for the aftermath, usual methods of reform should be supplemented with new considerations. Specifically, academics and reformers frequently debate various methods of campaign finance reform to resolve concerns about the influence of money in politics, but fail to consider other forms of influence. Political law practitioners routinely advise corporate clients on how to legally influence government, through not only campaign contributions, but also lobbyists and gifts. This Article argues that due to the inherent relationship of these three instruments of influence, discussions of reform should address all three areas of law as one, i.e., political law reform. One advantage of this holistic approach is that rules governing gifts can apply to certain campaign and lobbying activities while withstanding First Amendment challenges. As an example, this Article proposes an option for political law reform that is similar to many successful “pay-to-play” laws.*

### INTRODUCTION

It is coming; the big one usually comes at least once every ten years, and it has been ten years since the last one.<sup>1</sup> We are officially on high alert for the next significant political corruption scandal. The public is only one disgruntled co-conspirator or jilted lover away from learning details about lawmaking that only serve to further erode our trust in government. When, not if, the scandal arrives, the first responders to repair the damage—including reformers, academics, practitioners, and politicians—will come with proposals of how the political system can be changed to rebuild the public trust. This call for reform will capture even those who are currently suffering from reform fatigue and those who have abandoned the dream of laws that promote political equality.

If the past is any indicator, many of the reform proposals will focus solely on campaign finance reform. The limits of any future campaign finance reform efforts, however, were revealed when *Citizens United* refined the definition of corruption.<sup>2</sup> Although recent reform proposals have

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<sup>1</sup> The last significant corruption scandal was the Jack Abramoff scandal that first surfaced in 2004. See Susan Schmidt, *A Jackpot From Indian Gaming Tribes*, WASH. POST, Feb 22, 2004, [www.washingtonpost.com/wp-dyn/content/article/2006/03/06/AR2006030600702\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/03/06/AR2006030600702_pf.html). Prior corruption scandals include those involving Newt Gingrich (1997), the House Banking Scandal (1992), Wedtech (1986), Abscam (1980), and Watergate (1972).

<sup>2</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 314 (2010) (“[I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of

expanded to include lobbying reform,<sup>3</sup> very little attention is given to the need to reform the rules that regulate gifts to elected officials. Moreover, there are no extensive discussions about the need to reform all three areas of law together, despite the nature of the close relationships they share.

The purpose of this Article is to prepare for the scandal that will lead to the next generation of reform. Specifically, this Article seeks to nudge the ongoing debate of campaign finance and lobbying reform to a new place that encompasses the three tools commonly used to influence legislation. This Article argues that political law reform—which applies to laws governing lobbying, campaign finance, and government ethics<sup>4</sup>—provides significant promise for changing the political system because it relies on gift rules as a linchpin for reforming campaign finance and lobbying. Gift rules are uniquely equipped to serve in this capacity because, unlike campaign finance and lobbying laws, gift rules are not subject to First Amendment challenges. This Article is divided into four Parts. Part I explains how the three instruments of influence (lobbyists, campaign contributions, and gifts) are used separately and together to affect legislation. Part II examines the law that regulates the three instruments of influence, *i.e.*, political law, and highlights the most prominent loopholes in the law. Part III discusses the limits that campaign finance reform and lobbying law reform have with closing loopholes in political law. Part IV offers a political law reform option to encourage discussions of other effective ways to improve the political system.

The importance of discussing new ideas beyond the scope of election law or campaign finance is beginning to be recognized. Recently, many of the most influential voices in the effort to improve our democracy joined to think of fresh and innovative ideas beyond campaign finance.<sup>5</sup> As Spencer Overton has noted, “[e]lection law has matured. We should democratize the law of democracy by recognizing that political law includes the study of both judicial and nonjudicial actors. We should also advance the field by consciously building political law communities that facilitate interaction between leading scholars, policymakers, regulators, practitioners, judges, and advocates.”<sup>6</sup> This Article presents the case for political law reform in that spirit of a political law community.

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influence or access will not cause the electorate to lose faith in this democracy.”)

<sup>3</sup> See, e.g., Heather Gerken, *Keynote Address: Lobbying is the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155 (2011); Michael Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012); Michael Kang, *The Campaign Finance Debate After Citizens United*, 27 GA. ST. U. L. REV. 1147 (2011); see also REPORT OF THE TASK FORCE ON FEDERAL LOBBYING LAWS, SECTION OF ADMIN. LAW & REGULATORY PRACTICE, AM. BAR ASS’N (January 3, 2011).

<sup>4</sup> Law firms frequently describe their political law practices as providing advice for compliance with campaign finance, lobbying, and government ethics. Although there seems to be a consensus that these three laws are political law, there is disagreement about whether election law is separate and distinct. Political law primarily concerns influencing government decisions, while election law concerns influencing election. Apparently because of the occasional overlap, certain practice groups consider election law separate and distinct from political law while others do not. See, e.g., the descriptions of Allen & Overy Political Law Group ([www.allenoverly.com/expertise/practices/public-law/Pages/Political-Law.aspx](http://www.allenoverly.com/expertise/practices/public-law/Pages/Political-Law.aspx)); McGuireWoods LLP Political Law Group ([www.mcguirewoods.com/Services/Industries/Political-Law.aspx](http://www.mcguirewoods.com/Services/Industries/Political-Law.aspx)); Patton Boggs LLP Political and Election Law Group ([www.pattonboggs.com/practice/political-and-election-law](http://www.pattonboggs.com/practice/political-and-election-law)); Skadden, Arps, Slate Meagher, and Flom LLP Political Law Group ([www.skadden.com/practice/regulatory-legislative/political-law](http://www.skadden.com/practice/regulatory-legislative/political-law)); and Venable LLP Political Law Group ([www.venable.com/political-law-practices/](http://www.venable.com/political-law-practices/)).

<sup>5</sup> See, e.g., Spencer Overton, *Political Law*, 81 GEO. WASH. L. REV. 1783 (2013).

<sup>6</sup> *Id.* at 1798.

## I. POLITICAL LAW TOOLS: LOBBYISTS, CAMPAIGN CONTRIBUTIONS, AND GIFTS<sup>7</sup>

To understand why effective reform efforts must include simultaneous changes to lobbying, campaign finance, and government ethics laws, it is necessary to first understand the following three instruments of influence: lobbyists, campaign contributions, and gifts. In particular, it is necessary to understand how each tool is used individually and how all three are used together.

### A. Lobbyists

Professional lobbyists are a tool used to express the concerns and desires of a client to the lawmaker. The job of the lobbyist is to educate. The lobbyist provides information to the lawmaker in an effort to have the lawmaker view the legislative issue from the client's perspective. This information may assist the lawmaker with establishing legislative priorities, anticipating potential problems with proposed legislation, or developing policy alternatives that are acceptable by all stakeholders.<sup>8</sup> The information may also alert the lawmaker to political consequences of the vote or the likelihood that the legislation will pass.<sup>9</sup> Ultimately, lobbyists are typically used by those who have the resources to hire professionals and believe the familiar Washington, D.C. adage that "if you're not at the table, you're on the menu."<sup>10</sup>

The effectiveness of this tool varies because not all lobbyists are created equal.<sup>11</sup> Lobbyists are generally at an advantage if they have better access to resources and relationships. In turn, this better access affects the quality of information that the lobbyist can provide to the lawmaker. For example, those lobbyists with better staff, including researchers and writers, can create reports and presentations supporting their argument that are more comprehensive, useful, and persuasive.<sup>12</sup> The lobbyists' relationships with lawmakers and the lawmakers' staff, meanwhile, directly affect whether the lobbyist is able to provide the information and in what fashion. Better relationships provide better access to relevant lawmakers, and trust developed through those relationships affects the lawmaker's reliance on any information the lobbyist presents.<sup>13</sup> Overall, those who seek to influence legislation pay lobbyists for their access and ability to persuasively inform relevant lawmakers.

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<sup>7</sup> Richard Briffault is generally considered to have written the preeminent article on the connection between campaign finance and lobbying. See Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL'Y REV. 105 (2008). This section of the Article includes the small but significant addition of gifts to his thought provoking work.

<sup>8</sup> Briffault, *supra* note 7, at 107.

<sup>9</sup> Gerken, *supra* note 3, at 1166.

<sup>10</sup> Eric Lichtblau, *Lobbyists Line Up to Sway the Special Committee*, N.Y. TIMES, Sep 22, 2011, at A21; see also Brendan Sasso, *A Seat at the Table*, THE HILL, June 18, 2013, <http://thehill.com/business-a-lobbying/lobbyist-profiles/306029-a-seat-at-the-table->.

<sup>11</sup> Dorie Apollonio et al., *Access and Lobbying: Looking Beyond the Corruption Paradigm*, 36 HASTINGS CONST. L.Q. 13, 38 (2008).

<sup>12</sup> *Id.* at 40.

<sup>13</sup> *Id.*

### B. Campaign Contributions

Campaign contributions are a tool used to support the lawmaker's incessant thirst and search for more campaign funds. Many campaign donors may contribute without any intention of ever lobbying the official on any particular issue. However, the person or entity interested in shaping specific legislation generally uses campaign contributions for access to the lawmaker.<sup>14</sup> Such access may come in the form of a campaign fundraiser event, where the donor can briefly meet and speak with the lawmaker after making a contribution. Alternatively, access may come in the form of a phone call being returned by the lawmakers' office, or a donor's request for a meeting with the lawmaker being granted, when it is recognized that the donor is a serious supporter of the campaign. In broader terms, the donor's access also extends beyond the present: supporting the campaign means the lawmaker is more likely to stay in office and be available in the future.

Because campaign contributions routinely translate into access, it is a critical asset for anyone attempting to influence legislation. However, the effectiveness of this tool varies based on whether the purpose of the campaign contribution is understood. Those who contribute with an expectation that it will automatically result in a lawmaker agreeing with the donor's viewpoint may find it less than effective.<sup>15</sup> Meanwhile, campaign donors who contribute with the expectation that they may receive more private or semi-private time with the lawmaker will generally find that the higher the cost of admission for the campaign fundraising event, the more time donors will be able to share with the legislator. Those who seek to influence legislation use campaign contributions to alert the elected official that they financially support them and expect that such a financial commitment will provide more opportunities to be heard on issues that concern the donor.

### C. Gifts

Gifts are the third tool and are used to develop better social and personal relationships with lawmakers and their staff. The gift donor hopes to be trusted and thought of fondly. Gifts establish goodwill between the donor of the gift and the recipient. The gift provides a personal benefit to the recipient as distinguished from a campaign contribution that benefits the campaign committee.<sup>16</sup> A gift may be anything of value ranging from small to large. As in any context, the thought behind the gift may establish goodwill, regardless of the actual gift. Gifts may include discounts, meals, beverages, travel, and entertainment. Gifts are typically used by those who have the resources to provide the types of gifts that are exempt from the Senate and House gift rules.

The effectiveness of gifts as a tool of influence is usually dependent on the ability of the donor to provide a gift that complies with the Senate and House gift rules, such that the lawmaker

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<sup>14</sup> Marion Read, *Between a Rock and Hard Place: Looking Beyond Statutes and the First Amendment to Address Ethical Concerns in Federal Lobbying*, 24 GEO. J. LEGAL ETHICS 783, 787 (2011); Briffault, *supra* note 7, at 111; Apollonio et al., *supra* note 11, at 24.

<sup>15</sup> See Apollonio et al., *supra* note 11, at 24. Undoubtedly, there are the few who give campaign contributions with an explicit understanding that the lawmaker will do an official act in exchange for the contribution or the contribution is given because of an official act. Such campaign contributions are bribes or illegal gratuities, and are not relevant to this discussion because they are prohibited.

<sup>16</sup> This is assuming that the lawmaker does not use the campaign committee or leadership PAC for personal purposes, which is prohibited.

or staff person does not experience any negative consequences for accepting the gift. Gifts can successfully establish goodwill when used appropriately, but can quickly damage the credibility of the donor if a gift fails to comply with the gift rules. As explained in Part II.A, *infra*, the gift rules limit or ban many gifts, but there are various exceptions to the rules. In general, many inexpensive gifts may be banned by the gift rules, while more expensive gifts are not. For example, the lobbyist gift ban prohibits a lobbyist from meeting with a lawmaker and buying him a \$2.00 slice of pizza. However, the lobbyist can host a reception for multiple lawmakers and staff, offering unlimited appetizers and beverages. Through acceptable gifts that comply with the rules, those who seek to influence legislation are able to open doors and develop long-standing connections with lawmakers.

#### D. Lobbyists, Campaign Contributions, and Gifts

Now that each tool has been described individually, a review of the qualities that make each tool effective reveals that all three are inextricably linked. An effective lobbyist must have the right resources and relationships to educate the relevant lawmaker, which means they will need to build these relationships through access provided by campaign contributions and goodwill established with gifts. One tool simply does not work as effectively without the others.

For example, if a person makes campaign contributions and has access to an official at a fundraiser, but lacks the resources of a lobbyist to effectively and persuasively educate the lawmaker, the access is in vain. Similarly, if a well-resourced lobbyist is able to schedule a meeting with a lawmaker partly because he is a campaign donor, but the lawmaker does not trust the lobbyist or find him credible because there is no established goodwill, the lobbying resources and campaign contributions are ineffective.

Moreover, the three tools are tied together because lawmakers have come to crave information, campaign contributions, and entertainment, all three of which a seasoned lobbyist can provide.<sup>17</sup> Lawmakers must have accurate and complete information about proposed legislation because of the consequences if they misjudge the social, political and practical implications of their actions.<sup>18</sup> As Heather Gerken has explained,

Think of it this way: if you are a member of Congress trying to determine what bills to pass in the limited time that you have, you will probably pass the bills for which you have all of the information that you need to pass—where you don't have to figure out what to do to get the legislation drafted.<sup>19</sup>

Lobbyists are an obvious and prevalent source of this type of much-needed information.

The need for lawmakers to raise campaign contributions daily is well known. The campaign contributions not only ensure that lawmakers will have funds necessary for their own campaign, but also discourage would-be challengers; pay dues to political party committees; and help build clout within the party by funding contributions to other legislators.<sup>20</sup> Current estimates conclude that a Member of the House must fundraise \$2,400 per day, while a Senator must

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<sup>17</sup> Gerken, *supra* note 3, at 1166.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 94-95 (2011).

fundraise \$4,700 per day.<sup>21</sup> Again, lobbyists are an obvious and prevalent source for these much needed campaign contributions. Although lobbyists have individual limits, a seasoned lobbyist can become adept at soliciting campaign contributions for a lawmaker from other lobbyists and political action committees (PACs) through a process known as bundling.

While lawmakers are still men and women, who understandably desire to spend some time socializing away from work, lobbyists are routinely the gatekeepers for this social scene of the Washington, D.C. elite. Over twenty years ago, *The New York Times* noted,

[m]uch of Washington's official entertaining is now corporate-driven and organized by "guns for hire" rather than the grande dame hostess of yesteryear . . . . The hired guns produce the right guests, the right ambiance, the right media. For corporate figures, lobbyists and diplomats, the Washington social scene provides an opportunity to mingle with the power brokers one has been trying to reach, often unsuccessfully, by phone.<sup>22</sup>

The role of the lobbyist in the social scene has not waned since that time. Lobbyists are the source of access to sold-out concerts, sporting events, expensive restaurants, and various social events. Lawmakers rely on the savvy lobbyist who provides this access in a manner compliant with the congressional gift rules. In addition, the value of such social events for congressional staff cannot be overstated, especially considering that this activity provides an important avenue of access and campaign contributions are practically irrelevant for staff.

Sophisticated individuals and organizations seeking to influence legislation master political law and use all three tools of influence effectively and legally. The effective use of political law includes exploitation of obvious loopholes. Understanding these political law loopholes clarifies the areas where reform may be helpful. Therefore, if there are any efforts to reform the laws governing any one tool, the laws governing the remaining tools must also be reformed.

## II. POLITICAL LAW LOOPHOLES

The three instruments of influence are governed by political law. Below, the relevant laws comprising political law are summarized in the context of intended purpose and perceived problems. Common loopholes are explained and examples are provided to illustrate the prevalence of their use.

### A. Political Law

Lobbyist activities are regulated by the Lobbying Disclosure Act of 1995, as amended ("LDA").<sup>23</sup> This regulatory regime for lobbying is based in disclosure. The LDA does not restrict the activities of lobbyists,<sup>24</sup> but requires that entities employing or retaining lobbyists disclose

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<sup>21</sup> Andy Sullivan, *Insight: In Washington, lawmakers' routines shaped by fundraising*, REUTERS, Jun 12, 2013, [www.reuters.com/article/2013/06/12/us-usa-congress-fundraising-insight-idUSBRE95B05520130612](http://www.reuters.com/article/2013/06/12/us-usa-congress-fundraising-insight-idUSBRE95B05520130612).

<sup>22</sup> RICHARD PAINTER, *GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE* 186-87 (2009).

<sup>23</sup> See 2 U.S.C. § 1601 et seq. (2014).

<sup>24</sup> Briffault, *supra* note 7, at 109-10.

various information concerning lobbying activities, including the names of individual lobbyists, expenses for lobbying activities, the issues that were lobbied, and certain campaign contributions.<sup>25</sup> Although lobbying is protected under the First Amendment, the courts have upheld the LDA because the purpose of the disclosure requirements is to achieve the governmental interest of “increasing public awareness of the efforts of paid lobbyists to influence the public decisionmaking process.”<sup>26</sup>

One criticism of the LDA is that it does not always make the public aware of the efforts of paid lobbyists due to (1) the narrow definition of lobbyist; and (2) vague disclosures. Based on the definition of lobbyist, the only lobbyists who must register are those who spend *twenty percent or more* of their compensated time performing lobbying activities for a client.<sup>27</sup> This twenty percent threshold results in the non-registration of many individuals who conduct extensive lobbying activities but have *self-determined* that they spend 19.9% or less of their time lobbying.<sup>28</sup> And for those who are registered lobbyists, and thus required to report their lobbying activities, the vague disclosures do not include the information necessary for constituents to know the efforts of paid lobbyists in influencing their representatives. For example, disclosures do not include: the identity of the specific lawmaker or staff person lobbied; the specific date of the lobbying; the number of lobbying contacts; the amount of expenses for lobbying a specific issue; or the lobbyist’s position on the legislation (opposition or support).<sup>29</sup>

Campaign contributions, meanwhile, are regulated by the Federal Election Campaign Act of 1971, as amended (“FECA”).<sup>30</sup> The regulatory regime governing campaign contributions is more restrictive than the LDA, and includes disclosure, contribution limits, and contribution bans.<sup>31</sup> The disclosure requirements for campaign committees include detailed reporting of all funds received and all disbursements. The limits on contributions vary based on the nature of the entity donating the contribution and the nature of the recipient. There is a ban on direct contributions to campaign committees from certain entities, including national banks, corporations, and foreign nationals.<sup>32</sup> Although campaign contributions are protected under the First Amendment, the Supreme Court has upheld the disclosure rules, limits, and bans based on the governmental interest of “prevention of actual and apparent corruption of the political process.”<sup>33</sup>

Among other things, FECA is criticized for not preventing corruption because the limits and bans do not stop the large number of contributions solicited and received from special interests. One’s definition of corruption determines if this is an appropriate criticism. Some reformers argue that the excessive access that results from large campaign contributions drowns out the public voice and corrupts the system.<sup>34</sup> However, according to the Supreme Court, “[t]hat

<sup>25</sup> See 2 U.S.C. § 1604 (2014).

<sup>26</sup> Nat’l Ass’n of Mfrs. v. Taylor, 582 F.3d 1, 6 (D.C. Cir. 2009).

<sup>27</sup> See 2 U.S.C. § 1602 (2014).

<sup>28</sup> See Rebecca Adams, *Health Care: The Unlobbyist’s Clinical Trial*, ROLL CALL, June 7, 2012, available at [www.rollcall.com/features/Outlook\\_June/outlook/-215181-1.html](http://www.rollcall.com/features/Outlook_June/outlook/-215181-1.html); David Kirkpatrick, *Law to Curb Lobbying Sends It Underground*, N.Y. TIMES, Jan 17, 2010, at A1.

<sup>29</sup> See 2 U.S.C. § 1604 (2014).

<sup>30</sup> See 2 U.S.C. § 431 et seq. (2014).

<sup>31</sup> Briffault, *supra* note 7, at 109-10.

<sup>32</sup> See 2 U.S.C. §§ 441b, 441e (2014).

<sup>33</sup> Buckley v. Valeo, 424 U.S. 1, 53 (1976).

<sup>34</sup> LESSIG, *supra* note 20, at 145-47, 245-47, 313-16.

speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy.”<sup>35</sup>

Finally, gifts are regulated by the House Rules and Senate Rules.<sup>36</sup> Similar to campaign contributions, the regulatory regime governing gifts requires disclosure, gift limits, and gift bans. The disclosure provisions require the reporting of certain gifts from a source aggregating over \$350.<sup>37</sup> Gifts from non-lobbyists are limited to less than \$50 per occasion and less than \$100 in the aggregate per year.<sup>38</sup> Gifts from lobbyists and lobbyist employers are banned.<sup>39</sup> However, more than twenty exceptions apply to the gift limit and the lobbyist gift ban.<sup>40</sup> While the First Amendment does not protect the giving or receiving of gifts, the House and Senate created the gift rules to prevent impropriety and the appearance of impropriety.<sup>41</sup>

One perceived problem with gift rules is that the appearance of impropriety continues to exist as a result of exceptions to the gift limits and gift ban. The lobbyist gift ban has over twenty exceptions that essentially swallow the rule. Commonly used exceptions are food and beverages other than as part of a meal (*e.g.*, receptions), widely attended events, and campaign fundraisers. In essence, the gift limit and gift ban have the effect of creating a permissible “gift threshold,” where inexpensive gifts are restricted (*e.g.*, lunch) but expensive gifts (*e.g.*, weekend ski trip) are permitted.<sup>42</sup> Thus, an entity with adequate financial resources can provide gifts, but those entities without the resources to surpass the gift threshold are prohibited. Further, excepted gifts are not required to be disclosed, which hampers enforcement by making it difficult to determine if a gift a person deemed permissible is, in fact, permissible.

The problems perceived with the three elements of political law can also be characterized as loopholes. The use of loopholes is perfectly legal, but the next scandal will likely result from their use and will certainly result in efforts to close them. The use of loopholes is described in more detail below.

### B. Loopholes

The close relationship of lobbyists, campaign contributions, and gifts is evident in political law loopholes. Exploiting a loophole affecting the use of one tool can allow special interests to use a loophole affecting another tool. For example, special interests that use the twenty percent threshold loophole to avoid lobbyist registration also avoid the lobbyist gift ban. Similarly, registered lobbyists who use bundling to avoid campaign contribution limits also avoid the lobbyist gift ban by using campaign fundraisers to provide entertainment to lawmakers.<sup>43</sup> The

<sup>35</sup> Citizens United, 558 U.S. at 314.

<sup>36</sup> See U.S. House Rules, of the 113<sup>th</sup> Congress, Rule XXV; U.S. Senate Rules, of the 113<sup>th</sup> Congress, Rule XXXV.

<sup>37</sup> House Rule XXVI (incorporating the Ethics in Government Act, which requires the disclosure of gifts over \$350); Senate Rule XXXIV.

<sup>38</sup> House Rule XXV, clause 5; Senate Rule XXXV, clause 1.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See House Ethics Manual 23-24 (describing discussions in the House and Senate concerning the creation of gift rules); Senate Ethics Manual 21.

<sup>42</sup> Eric Lipton, *(Legal) Sprees with Lobbyists*, N.Y. TIMES, Jan 20, 2014, at A1.

<sup>43</sup> *Id.*; see also Kate Ackley, *Partying within the Rules*, ROLL CALL, December 4, 2013, available at <http://>

result is that special interests obtain more access and influence with lawmakers using the interconnected loopholes.

### 1. Campaign Fundraisers

Pursuant to the Senate and House bans on gifts from lobbyists, campaign contributions are not gifts.<sup>44</sup> Thus, lobbyists may provide lawmakers with meals, event tickets, entertainment, and other seemingly prohibited gifts if the gift is considered a campaign contribution. For example, a lobbyist may host or attend a campaign fundraiser for a lawmaker at a music concert, where the admission, food, and beverages are considered in-kind contributions to the lawmaker's campaign committee and not a gift. Lawmakers have recently increased their use of this loophole by hosting destination fundraisers.<sup>45</sup> At these events, lawmakers invite lobbyists and other campaign donors to resorts for a day or weekend of events. Destinations include "the Napa Valley wine country, famed golf courses and hunting preserves, as well as five-star hotels in Puerto Rico, Las Vegas, South Florida and even Bermuda."<sup>46</sup> Lawmakers say "holding such fund-raisers made business sense, as the successful ones, while more expensive to stage than at a restaurant in Washington, raise much more than they cost."<sup>47</sup> Lobbyists say, "[a]n informal setting is an effective way to build a better relationship."<sup>48</sup> Thus, the use of this loophole for destination fundraisers appears pleasing to both lobbyists and lawmakers, and is likely to become more extravagant.

A recent example is a Representative who hosted a campaign fundraiser in Vail, Colorado at the Four Seasons Resort from January 3 to 5, 2014.<sup>49</sup> The Chairman of a House Subcommittee that regulates energy utilities also attended.<sup>50</sup> PPL Corporation is a utility company that pays lobbyists to advocate on its behalf concerning various legislative issues. In 2013, the company paid over \$900,000 for lobbying activities.<sup>51</sup> The company also has a PAC that contributed more than \$125,000 to federal candidates in 2013<sup>52</sup> and is one of the largest contributors to the House Subcommittee Chairman.<sup>53</sup> A PPL lobbyist also attended the weekend in Vail.<sup>54</sup> Mere days after the Vail campaign fundraise, the House Subcommittee Chairman "introduced legislation that would allow utilities like PPL to build new coal-burning power plants,

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blogs.rollcall.com/beltway-insiders/partying-within-the-rules-k-street-files/; Adams, *supra* note 28; Kirkpatrick, *supra* note 28; Richard Simon, *Gator Hunt? Dog Sledding? Campaign Fundraisers Get Creative*, L.A. TIMES, January 4, 2014, <http://articles.latimes.com/2014/jan/04/nation/la-na-fundraisers-20140105>.

<sup>44</sup> House Rule XXV, clause 5(a)(3)(B); Senate Rule XXXV, clause 1(c)(2).

<sup>45</sup> See Lipton, *supra* note 42; Simon, *supra* note 43.

<sup>46</sup> Lipton, *supra* note 42.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> INFLUENCE & LOBBYING REPORT, PPL CORP.: SUMMARY, ANNUAL LOBBYING REPORT (2013), OPENSECRETS.ORG, available at [www.opensecrets.org/lobby/clientsum.php?id=D000022195&year=2013](http://www.opensecrets.org/lobby/clientsum.php?id=D000022195&year=2013).

<sup>52</sup> INFLUENCE & LOBBYING REPORT, PPL CORP.: RECIPIENTS (2014 CYCLE), OPENSECRETS.ORG, available at [www.opensecrets.org/pacs/pacgot.php?cycle=2014&cmt=C00228106](http://www.opensecrets.org/pacs/pacgot.php?cycle=2014&cmt=C00228106).

<sup>53</sup> POLITICIANS & ELECTIONS REPORT, REP. ED WHITFIELD, TOP 20 CONTRIBUTORS (2013-2014), OPENSECRETS.ORG, available at [www.opensecrets.org/politicians/contrib.php?cycle=2014&cid=N00003467&type=I](http://www.opensecrets.org/politicians/contrib.php?cycle=2014&cid=N00003467&type=I).

<sup>54</sup> Lipton, *supra* note 42.

overriding environmental restrictions recently imposed by the Obama administration.”<sup>55</sup>

Similarly, in 2013, a defense contractor, Raytheon Co., paid lobbyists to advocate on various appropriations bills, including appropriations for the Department of Defense, Department of State, and Department of Homeland Security. Raytheon spent over \$5 million for lobbying activities during that time period, and its PAC contributed \$800,000 to federal candidates.<sup>56</sup> On December 18, 2013, the company hosted an event at the sold-out Beyoncé concert in Washington, D.C. for a member of the Appropriations Committee.<sup>57</sup>

## 2. Receptions and Widely Attended Events

As discussed in Part II.A, *supra*, receptions and widely-attended events are also exempt from the lobbyist gift ban. From 2008 to 2013, more than 4,036 receptions, 2,603 events, 212 golf outings, and 155 concerts were held with lawmakers and lobbyists under these gift ban exceptions.<sup>58</sup> Use of this loophole for access to lawmakers is only continuing to increase.

In January 2013, following the fifteenth mass shooting in one year, a Senator introduced legislation that, if passed, would direct the National Academy of Sciences to study the impact of violent video games on children through what was called the Violent Content Research Act.<sup>59</sup> Many makers of video games contribute to a trade association, Entertainment Software Association (“ESA”), to lobby on their behalf. ESA lobbied against similar legislation that was proposed in several states, and it lobbied against the Violent Content Research Act as well. ESA spent over \$5 million lobbying in 2013,<sup>60</sup> and its PAC contributed approximately \$40,000 to various congressional campaigns and political committees the same year.<sup>61</sup> In December 2013, ESA hosted its annual holiday party for hundreds of lobbyists and congressional staff.<sup>62</sup> Descriptions of the event are telling:

[V]ideo games served as the evening’s primary source of entertainment with gaming stations scattered throughout the building featuring the hottest releases

<sup>55</sup> *Id.*

<sup>56</sup> INFLUENCE & LOBBYING REPORT, RAYTHEON CO.: SUMMARY, SPENDING BY CYCLE REPORT (2014), OPENSECRETS.ORG, available at [www.opensecrets.org/pacs/lookup2.php?strID=C00097568](http://www.opensecrets.org/pacs/lookup2.php?strID=C00097568).

<sup>57</sup> Nikki Schwab, *Congressmen Holding Fundraisers Could See a Beyonce Bump*, U.S. NEWS & WORLD REPORT, Dec 16, 2013, [www.usnews.com/news/blogs/washington-whispers/2013/12/16/congressmen-holding-concert-fundraisers-could-see-a-beyonce-bump](http://www.usnews.com/news/blogs/washington-whispers/2013/12/16/congressmen-holding-concert-fundraisers-could-see-a-beyonce-bump).

<sup>58</sup> Kathy Kiely et al., *Five Years of Political Party Time*, SUNLIGHT FOUNDATION, September 17, 2013, <https://sunlightfoundation.com/blog/2013/09/17/five-years-of-political-party-time/>.

<sup>59</sup> Brendan Sasso, *Sen. Rockefeller introduces bill to study effect of video-game violence on children*, THE HILL, Dec 19, 2012, <http://thehill.com/blogs/hillicon-valley/technology/273711-rockefeller-introduces-bill-to-study-video-game-violence>.

<sup>60</sup> INFLUENCE & LOBBYING REPORT, ENTERTAINMENT SOFTWARE ASS’N: SUMMARY, ANNUAL LOBBYING REPORT (2013), OPENSECRETS.ORG, available at [www.opensecrets.org/lobby/clientsum.php?id=D000025695&year=2013](http://www.opensecrets.org/lobby/clientsum.php?id=D000025695&year=2013).

<sup>61</sup> INFLUENCE & LOBBYING REPORT, ENTERTAINMENT SOFTWARE ASS’N: SUMMARY, SPENDING BY CYCLE REPORT (2014), OPENSECRETS.ORG, available at [www.opensecrets.org/pacs/lookup2.php?cycle=2014&strID=C00439216](http://www.opensecrets.org/pacs/lookup2.php?cycle=2014&strID=C00439216).

<sup>62</sup> See *Inside the Entertainment Software Association Holiday Party*, K STREET MAGAZINE, December 11, 2013, <http://kstreetmagazine.com/inside-the-entertainment-software-association-holiday-party/>; Ackley, *supra* note 43.

from the likes of Ubisoft and other member companies. . . . [G]uests managed to mix a little bit of work with all of the fun, as they chatted about intellectual property protection, job creation, and education – all issues near and dear to ESA members and Washington insiders alike – while sipping on colorful cocktails and savoring rich Belgian Godiva chocolates.<sup>63</sup>

One prominently featured game at the event was “Assassin’s Creed IV: Black Flag,”<sup>64</sup> which is rated “Mature” due to its “blood, sexual themes, strong language, use of alcohol, violence.”<sup>65</sup> As of spring 2014, the bill has not been voted on in the Senate nor introduced in the House.

In October 2013, meanwhile, a Representative introduced the Innovation Act in the House to reform patent law, limiting the growing number of patent infringement suits.<sup>66</sup> Five large technology companies who wanted to support the legislation paid a lobbying firm, TwinLogic Strategies, to lobby on their behalf.<sup>67</sup> The companies paid the lobbying firm a total of \$270,000 for lobbying efforts from October to December.<sup>68</sup> Employees of the lobbying firm contributed over \$12,000 to congressional campaigns in 2013.<sup>69</sup> In December 2013, the lobbying firm hosted a holiday party for lawmakers and staff.<sup>70</sup> As one lobbyist described the event, “[i]t’s a time to celebrate the holidays and hopefully the passage of a patent bill that we’ve been working on . . . . We just want to have our friends around and have fun and be able to relax without having to make an ask.”<sup>71</sup> The bill passed the House the day of the party, and the Representative who sponsored the bill was applauded when he entered.<sup>72</sup>

### 3. Lobbyist-Funded Travel

The lobbyist gift ban prohibits gifts, including travel that lobbyist and lobbyist employers provide to lawmakers and staff.<sup>73</sup> However, one clear way to avoid the lobbyist travel ban is to deregister as a lobbyist or never register as a lobbyist initially.<sup>74</sup> The twenty percent

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<sup>63</sup> Daniel Swartz, *Washingtonian’s Think They Can Dance at Entertainment Software Association’s 2013 Holiday Reception*, REVAMP.COM, December 6, 2013, [www.revamp.com/story.php?StoryID=2766](http://www.revamp.com/story.php?StoryID=2766).

<sup>64</sup> *Id.*

<sup>65</sup> ESRB RATING FOR ASSASSIN’S CREED IV, available at [www.esrb.org/ratings/search.jsp?searchType=title&titleOrPublisher=Assassin’s+Creed](http://www.esrb.org/ratings/search.jsp?searchType=title&titleOrPublisher=Assassin’s+Creed).

<sup>66</sup> See H.R. 3309 of the 113<sup>th</sup> Congress, available at <http://beta.congress.gov/113/bills/hr3309/BILLS-113hr3309ih.pdf>.

<sup>67</sup> See INFLUENCE & LOBBYING REPORT, TWINLOGIC STRATEGIES, FIRM PROFILE: REPORT IMAGES (2013) OPENSECRETS.ORG, available at [www.opensecrets.org/lobby/firm\\_reports.php?id=D000063803&year=2013](http://www.opensecrets.org/lobby/firm_reports.php?id=D000063803&year=2013).

<sup>68</sup> *Id.* (Motorola (\$80K), Yahoo (\$40K), Consumer Electronics Association (\$60K), Amazon (\$40K), and Competitive Carriers Association (\$50K)).

<sup>69</sup> CAMPAIGN FINANCE REPORT, TWINLOGIC STRATEGIES (2013-2014), INFLUENCE EXPLORER, available at <http://influenceexplorer.com/organization/twinlogic-strategies/71aa4d4dafc34f888e5e7fb2e2559ba5?cycle=2014>.

<sup>70</sup> Ackley, *supra* note 43.

<sup>71</sup> *Id.*

<sup>72</sup> Bryan Tau, *Herrick Feinstein inks two — Cheney’s pro-capand-trade benefactor — Twinlogic decks the halls — ESA gets in the holiday spirit — Innovation Act passes: Now what?*, POLITICO, December 6, 2013, [www.politico.com/politicoinfluence/1213/politicoinfluence12424.html](http://www.politico.com/politicoinfluence/1213/politicoinfluence12424.html).

<sup>73</sup> See House Rule XXV, cl. 5; Senate Rule XXXV, cl. 1.

<sup>74</sup> Adams, *supra* note 28; Kirkpatrick, *supra* note 28.

registration threshold allows individuals to do this and thus provide privately sponsored trips to lawmakers. In 2013, there were approximately 1,900 privately sponsored trips provided to lawmakers and staff.<sup>75</sup> This was a 60% increase in privately sponsored trips since the lobbyist gift ban was established in 2007.<sup>76</sup> Organizations that employ lobbyists are not allowed to sponsor such trips, and frequently form relationships with organizations that do not employ registered lobbyists in order to avoid the ban. The affiliated organizations can thus sponsor the congressional travel. Although these organizations do not have registered lobbyists, it is expected that many have employees who are paid to conduct lobbying activities and make lobbying contacts, but self-determined that they do not reach the twenty percent lobbyist registration threshold. Consequently, lawmakers continue to receive travel from entities that pay employees to influence legislation.

In 2012, Coca-Cola Company paid lobbyists to advocate on several tax-related bills.<sup>77</sup> During the year, the company spent approximately \$5.2 million on lobbying activities<sup>78</sup> and its PAC contributed approximately \$585,000 to federal candidates during the two-year election cycle.<sup>79</sup> Coca-Cola also partnered with the International Conservation Caucus Foundation (“ICCF”) to “educate U.S. policymakers on environmental challenges and . . . solutions.”<sup>80</sup> In June 2012, ICCF sponsored travel to Brazil for two Representatives, one of whom was a member of the House Ways and Means Committee.<sup>81</sup> As part of the trip, the Representatives toured a Coca-Cola recycling site.<sup>82</sup> As a result, the ICCF provided travel to the lawmaker that was, at least, indirectly funded by a registered lobbyist.

These examples are not intended to show shocking or illegal conduct. To the contrary, they show common and uneventful occurrences for those familiar with Washington, D.C. Political law loopholes allow broad use of lobbyists, campaign contributions, and gifts to influence legislation. Political law practitioners routinely advise corporate clients on how to interact with elected officials within the bounds of the law (*i.e.*, through loopholes). But how will the public living outside of the Beltway perceive similar examples when the next scandal arrives? Will these legal activities seem to align with one of the purposes of political law, which is to prevent the appearance of corruption and impropriety? The public’s reaction will likely lead to stronger calls

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<sup>75</sup> CONGRESSIONAL TRIP STATISTICS BY YEAR, PRIVATELY SPONSORED TRIPS (2013), LEGISTORM, available at [www.legistorm.com/trip/stats.html](http://www.legistorm.com/trip/stats.html); see also Amanda Becker, *Members of Congress Travel Far on Private Groups’ Dime*, ROLL CALL, Jan 18, 2012, available at [www.rollcall.com/issues/57\\_80/Members-of-Congress-Travel-Far-on-Private-Groups-Dime-211538-1.html](http://www.rollcall.com/issues/57_80/Members-of-Congress-Travel-Far-on-Private-Groups-Dime-211538-1.html).

<sup>76</sup> Stephanie Condon, *Free Trips for Congressman Up 60% Since 2008*, CBS NEWS, February 4, 2014, [www.cbsnews.com/news/free-trips-for-congressmen-up-60-since-2008](http://www.cbsnews.com/news/free-trips-for-congressmen-up-60-since-2008).

<sup>77</sup> See INFLUENCE & LOBBYING REPORT, COCA-COLA CO.: ISSUES, BILLS LOBBIED (2012), OPENSECRETS.ORG, available at [www.opensecrets.org/lobby/clientbills.php?id=D000000212&year=2012](http://www.opensecrets.org/lobby/clientbills.php?id=D000000212&year=2012).

<sup>78</sup> INFLUENCE & LOBBYING REPORT, COCA-COLA CO.: SUMMARY, ANNUAL LOBBYING REPORT (2012), OPENSECRETS.ORG, available at [www.opensecrets.org/lobby/clientsum.php?id=D000000212&year=2012](http://www.opensecrets.org/lobby/clientsum.php?id=D000000212&year=2012).

<sup>79</sup> INFLUENCE & LOBBYING REPORT, COCA-COLA CO.: SUMMARY, SPENDING BY CYCLE REPORT (2012), OPENSECRETS.ORG, available at [www.opensecrets.org/pacs/lookup2.php?strID=C00012468&cycle=2012](http://www.opensecrets.org/pacs/lookup2.php?strID=C00012468&cycle=2012).

<sup>80</sup> Shane Goldmacher, *How Lobbyists Still Fly Through Loopholes*, NAT’L J., January 10, 2014, [www.nationaljournal.com/magazine/how-lobbyists-still-fly-through-loopholes-20140110](http://www.nationaljournal.com/magazine/how-lobbyists-still-fly-through-loopholes-20140110).

<sup>81</sup> POST-TRAVEL DISCLOSURE FORM: REP. JOHN GARAMENDI (filed June 29, 2012), available at <http://clerk.house.gov/GTImages/MT/2012/500008040.pdf>; POST-TRAVEL DISCLOSURE FORM: REP. ALLYSON SCHWARTZ (filed June 29, 2012), available at <http://clerk.house.gov/GTImages/MT/2012/500008041.pdf>.

<sup>82</sup> Goldmacher, *supra* note 80.

to close the loopholes, and standard campaign finance reform will not provide an adequate solution.

### III. POLITICAL LAW VERSUS CAMPAIGN FINANCE

The examples in Part II.B, *supra*, illustrate the common concern of reformers that wealthy special interests have undue influence on lawmakers under current political law. Although the examples may not include actual corruption, similar activity is often viewed as having the appearance of corruption, which decreases the public's approval of government and is ultimately a threat to the integrity of democracy.

Reformers agree that laws must change to resolve these problems, but the consensus is usually that campaign finance reform is the answer. *Citizens United* ended most hope of an immediate campaign finance reform effort, but innovative ideas have surfaced, including lobbying reform. This Article argues that the true reform needed is to reform the reform debate. Any reform proposals should include strategies to reform the problems with campaign finance, lobbying, and gifts both directly and jointly.

The limit of campaign finance reform, beyond the resistance of the Supreme Court, is the significant risk that other tools of influence will simply fill the void once campaign finance is resolved. For example, if the Holy Grail of public financing were achieved and campaign contributions were no longer an issue, would special interests continue to have disproportionate influence over legislation because the lawmakers would rely on them for the better information of their lobbyists and the gifts they provide? Or if more lawmakers became dependent on small donors as more donors began to participate in financing elections, would the corporate interest continue to have undue influence because the small donors failed to organize and lobby and establish goodwill with the lawmakers?

Gifts, arguably, have the most potential for increased influence if campaign finance is miraculously improved. As suggested by the Emoluments Clause of the Constitution, gifts were an obvious concern: "Imagine a young democracy, its legislators passionate and eager to serve their new republic. A neighboring king begins to send the legislators gifts. Wine. Women. Or Wealth. Soon the legislators have a life that depends, in part at least, upon those gifts."<sup>83</sup> According to Lawrence Lessig, this may have been the rationale of the Founding Fathers when they included the Emoluments Clause.<sup>84</sup> Unlike campaign finance, political law accounts for the role of gifts.

The reform debate can benefit from a discussion of political law and the role of gifts, especially if the gift rules are used to reform campaign finance and lobbying. The role of gifts may be overlooked because it is believed that the lobbyist gift ban of 2007 resolved the issue. Maybe it is not as interesting to discuss because there is no First Amendment right to receive or give gifts, and thus no Supreme Court precedent of interest to debate. Or maybe it is simply that the extensive use of gifts is virtually unknown to the reformers and the public because there is no required disclosure for excepted gifts. Despite the reason why the influence of gifts is ignored, political law reform can compensate for the limits of campaign finance reform with a holistic approach to resolving issues with money in politics.

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<sup>83</sup> See LESSIG, *supra* note 20, at 18-19.

<sup>84</sup> *Id.* Lessig uses this point to support his argument concerning dependence corruption, which is beyond the scope of this Article.

#### IV. POLITICAL LAW REFORM

This Article is not intended to provide the elusive panacea for the problem of money in politics, but it is intended to encourage ideas of reform from a political law perspective. To provide an example of an idea for political law reform, the pay-to-play proposal below focuses on one perceived problem of money in politics. The problem is that a significant number of lawmakers are pre-occupied with soliciting campaign contributions and their reliance on large contributions from lobbyists results in legislative decisions that disproportionately favor the will of the donors instead of their constituents. As shown in the examples in Part II.B, *supra*, the problem is primarily based on an appearance of corruption and impropriety, rather than explicit evidence of legislative decisions being made because of lobbyists' campaign contributions.

This "appearance problem" results from the excessive access lobbyists and campaign donors have with lawmakers. The access is "excessive" insofar as it extends beyond the lobbyist's role as advocate for clients in meetings and hearings on Capitol Hill or other public events. Such excessive access regularly includes private events that are intimate and social in nature. In a post *Citizens United* world, proposals for campaign finance reform cannot lean heavily on attacking the excessive access problem. The Court has firmly rejected the anti-distortion rationale as a basis for restricting the First Amendment right to contribute to campaigns.<sup>85</sup> The purpose of the pay-to-play proposal below is to limit this excessive access using gift laws that do not have the same First Amendment implications.

##### A. Pay-to-Play Proposal

The "pay-to-play" model has been used by various states and regulatory agencies to combat the problem of campaign contributions given in connection with the awarding of government contracts. A common quality of pay-to-play laws is that the laws restrict certain activity for a specified period of time *after* a campaign contribution has been given. For example, if a company that provides investment advisory services gives a campaign contribution to an elected official, the company is prohibited from providing its services to the government entity on which the elected official serves for two years.<sup>86</sup>

A similar approach can be used with political law after identifying: (1) the activity that should be restricted; and (2) the relevant campaign donors who should be restricted from conducting the activity. As a recap of Parts I and II, lobbyists are used to persuade those lawmakers with whom they have access. Lobbyists use campaign contributions for access. Lobbyists also use campaign contributions to avoid the gift ban and the gifts establish goodwill, which improves the lobbyists' ability to persuade. Accordingly, the activity that should be restricted is the excessive access and goodwill that the lobbyists seek. The relevant campaign donors are lobbyists, who are using the campaign contributions to gain the excessive access and goodwill. Thus, the proposed pay-to-play restriction is:

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<sup>85</sup> See *Citizens United*, 558 U.S. at 348.

<sup>86</sup> This is a simplified description of the SEC pay-to-play law provided to show how the contribution triggers the desired prohibition. Pursuant to 17 CFR 275.206(4)-5, an investment advisor is prohibited from providing

investment advisory services for compensation to a government entity within two years after a contribution to an official of the government entity is made by the investment advisor or any covered associate of the investment advisor (including a person who becomes a covered associate within two years after the contribution is made) . . . .

*A Member of Congress is prohibited from receiving otherwise excepted gifts (i.e., campaign contributions, attendance at a reception, fundraiser, or widely attended event, travel expenses) from a Covered Lobbyist within two years after receiving a Covered Contribution from the Covered Lobbyist.*

A Covered Lobbyist includes registered individual lobbyists and the lobbyist employer, as well as any PAC established or controlled by the lobbyist or lobbyist employer. A Covered Contribution is a contribution to the Member of Congress' campaign committee or leadership PAC.

The pay-to-play proposal would require two changes to political law. First, amending the LDA to remove the lobbying registration constraint that requires twenty percent or more of a person's compensated time be spent on lobbying activities for a client. As a result of this change, lobbying registration will be triggered when a person has two or more lobbying contacts and a certain amount is spent or received for lobbying activities.<sup>87</sup> Individuals and organizations would no longer be able to avoid registration by self-determining that their lobbying activities have not exceeded twenty percent of their compensated time.<sup>88</sup>

Second, amending the House and Senate lobbyist-gift bans to prohibit the application of certain exceptions to the gift rules for gifts from lobbyists who have made campaign contributions to the gift recipient. Specifically, the following gift exceptions would not apply to a lawmaker accepting a gift from a Covered Lobbyist: (1) food and beverage of nominal value other than as part of a meal (e.g., receptions); (2) attendance at widely attended events; and (3) campaign contributions. The gift exceptions would not apply for two years after the Covered Donor made the campaign contribution. Lawmakers and staff<sup>89</sup> would be required to disclose the acceptance of the following from any lobbyist, lobbyist employer, or PAC established or controlled by them: food and beverage other than a meal; attendance at widely attended event, campaign contributions, attendance at fundraisers. The purpose is to restrict the excessive access and goodwill lobbyists currently receive through political law loopholes.

As a result of these changes, lobbyists could only contribute to a Member of Congress once every 2 years. Applying the proposal to the examples in Part II.B, the lawmakers could not attend the destination fundraisers, holiday parties, concerts, or foreign travel if they had received a campaign contribution from the lobbyist within the prior two years. The use of the gift to build goodwill and the use of campaign contributions for access would thus be diminished.

### *B. First Amendment and Other Concerns*

Critics of the pay-to-play proposal may argue that the law restricts the ability of lobbyists to exercise their First Amendment right to lobby or contribute to the campaigns of Members of Congress. On its face, the proposed law restricts gifts, not campaign contributions or lobbying, and the First Amendment does not protect the right to give or receive gifts. Further, even if critics

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<sup>87</sup> See 2 U.S.C. § 1603(a)(3) (2014).

<sup>88</sup> In 2011, the American Bar Association proposed amendments to the LDA that included narrowing the twenty percent threshold, instead of eliminating it, to avoid imposing undue financial burdens on small entities. See ABA 104B Resolution Revised. Despite opposition for eliminating the twenty percent threshold for federal lobbying, numerous state and local lobbying laws, including those in California and New York, require lobbying registration based on lobbying expenditures and income without considering the percentage of time spent lobbying.

<sup>89</sup> The acceptance of gifts for House and Senate staff would be based on whether the employing lawmaker could accept the gift under the amended rules.

argue that the practical effect of the proposed law is a restriction on First Amendment rights, the proposed law has significant potential for withstanding such a challenge because lobbyists are not (1) banned from making campaign contributions or lobbying; (2) limited in the amount that they can contribute beyond the limits that apply to all contributors; or (3) limited in their ability to lobby Members of Congress. Additionally, Federal courts have upheld or suggested that they would uphold more restrictive limits on lobbyists' campaign contributions. For example, the Fourth Circuit upheld a ban on lobbyist contributions to state legislators<sup>90</sup> and the Second Circuit noted that a limit on lobbyists' campaign contributions could be upheld.<sup>91</sup> While every possible First Amendment issue cannot be anticipated or addressed in this Article, the point is to show the potential political law reform has for surviving these attacks.

Another concern with the pay-to-play proposal is that lobbyists will bundle contributions (*i.e.*, solicit contributions for the lawmaker from others) without making contributions themselves to avoid triggering the excepted gift ban. The lobbyist bundler disclosure requirement of the Honest Leadership and Open Government Act may have had the desired effect of decreasing the amount of lobbyist bundling. Based on the small number of lobbyist bundling disclosure reports, either lobbyist bundling has not kept pace with the amount of fundraising that has occurred in recent years or bundling is not disclosed due to loopholes in the law.<sup>92</sup> Lawmakers may rely more on their hired, professional fundraisers instead of lobbyists to bundle campaign contributions. Alternatively, lobbyists may be taking advantage of Super PACs instead of bundling. Regardless, even if lobbyist bundling is more prevalent than the disclosure reports suggest, any significant lobbyist bundling activities (*e.g.*, facilitating a fundraiser) will likely involve in-kind contributions from the lobbyist, the lobbyist employer, or their PAC, thereby triggering the excepted gift ban.

Finally, there may be concern that this would restrict the fundraising and entertainment of lawmaker's so dramatically that they could never be expected to vote for the change. To the contrary, lawmakers may find this type of proposal more beneficial than other options of reform. First, it is worth noting that no reform will take place until the inevitable political scandal that is on the horizon forces change. At that point, lawmakers will likely be inundated with the various reform proposals that are on the shelf and choose one that can gain the most support. This proposal requires small changes to federal law and a more significant change to House and Senate rules. Because House and Senate rules can be changed with each Congress and interpreted and enforced by Congress, it may be more appealing to adopt such a change, which can be seen as a trial or experiment that can be quickly abandoned. For example, in 2009, President Barack Obama changed gift rules for political appointees by removing the application of gift exemptions, including the widely-attended event exemption and gifts in connection with political activities.

Second, lawmakers may recognize that it is beneficial for them to receive the same dollar amount of campaign contributions from a lobbyist without having to do multiple solicitations, as the lobbyist has only one shot in the election cycle to contribute. In essence, lawmakers may appreciate the possibility that they have to spend less time soliciting if they are receiving the maximum contribution.

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<sup>90</sup> See *Preston v. Leake*, 660 F.3d 726, 737 (4th Cir. 2011).

<sup>91</sup> See *Green Party of Conn. v. Garfield*, 616 F.3d 189, 207 (2d Cir. 2010).

<sup>92</sup> Josh Israel, *Lobbyists Circumvent Disclosure Rules While Bundling for GOP Politicians*, THINK PROGRESS, December 10, 2013, <http://thinkprogress.org/justice/2013/12/10/3042221/lobbyist-bundlers-disclosure/>.

## V. CONCLUSION

The clouds of political scandal are not hard to see, as the perfect storm of lobbyists, campaign contributions, and gifts continue to swirl. When the inevitable scandal bursts and washes away more of the trust the public has in its government, rebuilding that trust will become a priority and various proposals for reform will be debated. During those debates, reformers, academics, practitioners, politicians, and the public should consider the need for more than just changes to campaign finance. Political law reform is an option that may result in restoring public confidence a little longer until the next scandal comes.