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Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures Note

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Note

ARTIFICIAL GRASSROOTS ADVOCACY AND THE CONSTITUTIONALITY OF LEGISLATIVE IDENTIFICATION AND CONTROL MEASURES

JONATHAN C. ZELLNER

Modern lobbying is rife with campaigns that claim to be the fruit of spur-of-the-moment grassroots activity. Despite their outward appearance, these campaigns mask the fact that their sponsors include special interest groups, large corporations, and affluent individuals. They likewise strive to further the objectives of these entities and individuals while purporting to promote the public interest. Because the parties behind these pseudo-grassroots efforts enjoy vast financial and political resources, their activities have exerted a significant effect on public opinion and on the decisions of elected officials. In recent years, Congress has sought to rein in the architects of so-called "Astroturf" lobbying through proposed registration, reporting, and disclosure requirements. Nevertheless, concerns over the First Amendment ramifications of such legislation have thwarted its passage.

This Note begins by considering the First Amendment-based arguments of those who oppose legislative efforts to address Astroturf lobbying. It thereafter examines case law on lobbying disclosure rules, and on similar rules in the area of election-related speech, and finds that, despite the above arguments, the government has a compelling interest in the disclosure of Astroturf lobbying activities. Finally, this Note analyzes the components of the Senate's most recent disclosure proposal and discusses ways by which Congress could strengthen subsequent proposals.

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ARTIFICIAL GRASSROOTS ADVOCACY AND THE CONSTITUTIONALITY
OF LEGISLATIVE IDENTIFICATION AND CONTROL MEASURES

JONATHAN C. ZELLNER*

I. INTRODUCTION

For many United States citizens and citizen-groups, grassroots advocacy represents an essential medium through which they may exercise their First Amendment freedoms of speech, petition, association, and the press. Grassroots efforts inform elected leaders of where constituents stand on proposed government action, or lack thereof, thus enabling individuals and coalitions to contribute to the public discourse on issues of importance.¹ But while a common notion of grassroots advocacy may be of small community rallies or demonstrations, in reality, many advocates are persons and alliances with the ability to raise or spend prodigious sums to convey their message—in effect, parties more appropriately described as “grassroots lobbyists.” This may in part explain the recent observation that “grassroots advocacy . . . is booming.”²

With expensive grassroots lobbying campaigns, however, comes the issue of authenticity. Many examples of such campaigns from recent years illustrate that they often are not the kind of genuine spontaneous activity indicative of grassroots advocacy. In 2002, with revenue of over \$25 million, the United Seniors Association (USA) ran a multi-million-dollar advertising campaign to influence the outcomes of congressional races in favor of candidates who backed Medicare prescription drug legislation that the Pharmaceutical Research Manufacturers of America (PhRMA) similarly supported.³ USA claimed it had a nationwide activist network of

* Hamilton College, B.A. 2008; University of Connecticut School of Law, J.D. Candidate 2011. I would like to thank Professor Leslie Levin for her suggestions and guidance throughout the writing process. I would also like to thank the staffs of Volumes 42 and 43 of the *Connecticut Law Review* for their hard work and encouragement. This Note is dedicated to my parents, brother, and grandparents for their everlasting love, wisdom, and support. Any and all errors herein are mine and mine alone.

¹ See Jay Alan Sekulow & Erik M. Zimmerman, *Weeding Them Out by the Roots: The Unconstitutionality of Regulating Grassroots Issue Advocacy*, 19 STAN. L. & POL’Y REV. 164, 197 (2008) (“Through grassroots issue advocacy, average citizens—and the organizations that they support—are able to inform public officials of their support for government action that they believe will be beneficial and of their opposition to government action that they believe will be detrimental.”).

² Jim Snyder, *Town Halls Underscore Grassroots Secrecy, Critics Say*, THE HILL, Aug. 10, 2009, available at <http://thehill.com/business-a-lobbying/54149-town-halls-underscore-grassroots-secrecy-critics-say>. While it is difficult to estimate how much grassroots lobbyists spend—since there is no federal requirement for them to divulge their expenses—some think it may be greater than the \$3 billion spent on direct lobbying. *Id.*

³ PUB. CITIZEN, ORGANIZING ASTROTURF: EVIDENCE SHOWS BOGUS GRASSROOTS GROUPS HIJACK THE POLITICAL DEBATE; NEED FOR GRASSROOTS LOBBYING DISCLOSURE REQUIREMENTS 7 (2007), available at <http://www.cleanupwashington.org/documents/astroturf.pdf>.

1.5 million, but copies of its tax filings showed that it received more than \$20 million from one donor in 2002.⁴ Moreover, PhRMA itself rendered monetary assistance to USA that same year; a spokesman for the trade association stated that it had given USA an “unrestricted educational grant.”⁵ Three years earlier, the company Century Strategies had run a grassroots campaign—with “call-to-action phone calls,” targeted mail, rallies, and petitions—to arouse public opposition to pro-gambling measures in Mississippi.⁶ It received its \$4 million in funding, though, from a group of Mississippi Choctaw who operated a casino and wanted to suppress competition.⁷

More recent advocacy events have likewise shown an apparent lack of spontaneous organization, most notably some of the early “Tea Party” protests. Following CNBC pundit Rick Santelli’s call, in February 2009, for a “Chicago Tea Party” to oppose President Obama’s mortgage bailout plan, numerous websites dedicated to the cause sprang to life, each supposedly part of a national grassroots Internet protest and each tied to the Sam Adams Alliance advocacy group.⁸ This group in turn enjoyed substantial financial support from the Koch family, multibillionaire owners of one of the largest privately-held corporations in the United States, and FreedomWorks, a public relations firm with former House Majority leader Dick Armey as its chairman, and which the Kochs have funded.⁹ Additionally, certain backers of President Obama’s healthcare plan may themselves have engaged in similar behavior. Organizing for America, the Service Employees International Union, and Health Care for America Now, staunch promoters of the plan, allegedly urged hordes of their

⁴ *Id.*

⁵ *Id.*

⁶ S. COMM. ON INDIAN AFFAIRS, 109TH CONG., “GIMME FIVE”—INVESTIGATION OF TRIBAL LOBBYING MATTERS 24–26 [hereinafter “GIMME FIVE”], available at http://www.indian.senate.gov/public/_files/Report.pdf.

⁷ PUB. CITIZEN, *supra* note 3, at 5. The Choctaw tribe was a client of now-convicted lobbyist Jack Abramoff, who, in addition to coordinating the anti-gambling campaign, ultimately received a large percentage of the Choctaws’ funds for use in entities he controlled as well as pet projects. “GIMME FIVE,” *supra* note 6, at 34–38.

⁸ Mark Ames & Yasha Levine, *The Rick Santelli “Tea Party” Controversy: Article Kicks Up a Media Dust Storm*, ALTERNET (Mar. 3, 2009), <http://www.alternet.org/module/printversion/129656>.

⁹ See Paul Krugman, Op-Ed., *Tea Parties Forever*, N.Y. TIMES, Apr. 12, 2009, at A21 (“In particular, a key role is being played by FreedomWorks, an organization run by Richard Armey, the former House majority leader”); Ames & Levine, *supra* note 8 (arguing that the Tea Parties were mostly a “sophisticated PR campaign” for the Koch family, and that the Sam Adams Alliance “took pains to scrub . . . deep links to . . . Koch family money”). One of the Kochs later appeared to take credit for helping to kick-start the protests. See David Weigel, *Tea Party Patrons Point New Recruits Toward 2010*, WASH. INDEP. (Oct. 5, 2009, 12:27 AM), <http://washingtonindependent.com/62318/tea-party-patrons-point-new-recruits-toward-2010> (noting that, at an Americans for Prosperity-sponsored summit, David Koch “took credit for launching [Americans for Prosperity],” which, like FreedomWorks, played a major role in “shepherding the Tea Parties”).

supporters to rally against the Parties,¹⁰ suggesting that some of the counterprotests were not organic grassroots activity either.

The above examples highlight a phenomenon more widely known as “Astroturfing,” or fake grassroots advocacy, a practice that has become popular among particular groups and individuals. In short, Astroturfing refers to the efforts of paid lobbyists to conduct a political or public relations campaign on behalf of a client, typically an interest group, designed in such a way as to mask its origins and create the impression that it is spur-of-the-moment grassroots behavior.¹¹ Despite its apparent popularity, however, Astroturfing retains questionable characteristics. As the illustrations suggest, it relies heavily on misrepresentation, and in many cases does not advance the interests of the general public. Distinguishing this form of advocacy from the more traditional bottom-up form, though, can be challenging where the law essentially allows Astroturfers to conduct their activities alongside genuine issue advocates, as it presently does, without requiring at least some degree of accountability.¹²

This Note contends that Congress needs to act to expose and control Astroturf lobbying, and that it can without stifling the First Amendment rights of everyday issue advocates. Part II describes the tactics of Astroturfing at greater length, expanding on the above-mentioned problematic aspects of the practice. From there, it lays out the primary First Amendment-based arguments against legislative efforts to expose and control Astroturfing. Part III introduces *United States v. Harriss*,¹³ in which the Supreme Court upheld grassroots lobbying disclosure laws as a means of addressing fake grassroots lobbying, and argues that the government has a compelling interest in combating Astroturfing through such laws. In doing so, Part III finds that such laws do not, or will not, substantially encroach on or eviscerate the First Amendment rights of true grassroots issue advocates, as critics of reform claim. Part III likewise asserts that employing disclosure laws to address Astroturfing is consistent with the aims of the “marketplace of ideas” concept—chiefly that of open, transparent public discourse—as illustrated by analogous disclosure provisions in the realm of election-related speech. Finally, Part IV analyzes potential registration, reporting, and disclosure solutions, observing that requirements of the kind Congress proposed in 2007 serve as a practical starting place for the laws that should take effect.

¹⁰ Dan Eggen & Philip Rucker, *Loose Network of Activists Drives Reform Opposition*, WASH. POST, Aug. 16, 2009, at A01; Ryan Sager, Op-Ed., *Keep Off the Astroturf*, N.Y. TIMES, Aug. 19, 2009, at A27.

¹¹ See Part II.A.1 *infra*, for a fuller discussion of the term “Astroturfing.”

¹² As Part II.A.2 *infra* argues, current federal lobbying laws do little to capture the activities of Astroturf lobbyists.

¹³ 347 U.S. 612 (1954).

II. ASTROTURF LOBBYING AND FIRST AMENDMENT CONCERNS OVER LEGISLATIVE EFFORTS TO EXPOSE AND CONTROL IT

Artificial grassroots advocacy is not novel. Courts and elected leaders alike have been aware of it for some time. Part A expands on the description of Astroturfing, tracing the origin of its name and discussing the tactics of the practice. Part B then sets forth critical objections to legislative efforts to address Astroturfing, including the contention that such efforts will ultimately chill the activity of true grassroots advocates and thus interfere considerably with their First Amendment liberties.

A. *Origins, Characteristics, and Treatment of “Astroturfing”*

1. *Term Origins and Practice Techniques*

The forerunners to present-day Astroturfing existed in the United States at least as early as World War I.¹⁴ By the time the Supreme Court decided *United States v. Harriss*¹⁵ in the middle of the twentieth century, it understood the activity which constitutes Astroturfing. The use of the term “Astroturfing” to describe this type of activity, however, would not come into existence until the mid-1980s. Former Texas Senator Lloyd Bentsen appears responsible for first uttering the term. In 1985, describing a “mountain of cards and letters” he received promoting what looked like positions reflecting the interests of insurance companies, the Senator remarked, “A fellow from Texas can tell the difference between grass roots and Astroturf. . . . [T]his is generated mail.”¹⁶ Senator Bentsen was referring to AstroTurf, the synthetic grass-like substance used as surface material for playing fields.

Parties that engage in Astroturfing attempt to give officials the impression that significant public support for or opposition to a stance on a political issue exists when, in actuality, such concern may be lacking altogether.¹⁷ Because Astroturf efforts seek to pose as spontaneous grassroots movements, though, they do not necessarily depend on whether citizen activists have already spoken out in favor of or against proposed

¹⁴ See Kathy R. Fitzpatrick & Michael J. Palenchar, *Disclosing Special Interests: Constitutional Restrictions on Front Groups*, 18 J. PUB. REL. RES. 203, 206 (2006) (noting that the “modern history of front groups”—entities commonly employed in Astroturf lobbying—traces to approximately 1913).

¹⁵ 347 U.S. 612 (1954).

¹⁶ Sager, *supra* note 10.

¹⁷ See, e.g., Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 565 n.205 (2007) (“The term ‘astroturf’ lobbying was coined to describe lobbyist efforts to orchestrate a fake, or less than completely accurate, showing of citizen support for a particular policy position, at the grassroots level”); Gary Weiss, *Astroturfing Congress*, FORBES.COM (Feb. 13, 2007, 6:00 AM), http://www.forbes.com/2007/02/12/muckraker-astroturf-congress-opinion-cx_gw_0213muckraker_print.html (“The aim [of Astroturfing] is simple: to deceive Congress and regulatory agencies into believing that there is a groundswell of public concern about their pet issues.”).

government action.¹⁸ In other words, Astroturf lobbying seeks to “manufacture” support for the views it expresses, regardless of whether citizens already support those positions.¹⁹ This generally involves mimicking the characteristics of grassroots advocacy by adopting the strategies that smaller, constituent-led grassroots campaigns employ, including letters to elected leaders, phone calls, and mass e-mails.²⁰

For the most part, the persons and coalitions behind Astroturf movements are not everyday citizens or entities with modest financial resources and limited political connections. Rather, the architects of these campaigns, and their clients, include powerful individuals and special interest groups with the ability to raise or contribute copious amounts of money, and who enjoy strong ties with influential political figures.²¹ In addition, to disguise their identities, the persons and entities who engage in Astroturfing create separate coalitions and front groups that conduct the actual lobbying.²² This lobbying frequently consists of advertising the client’s positions and persuading constituents to telephone or write their representatives in support of these positions.²³ Astroturf lobbying may also consist of an organization or a special interest group dispatching paid agents to publicly pose as “concerned citizens.”²⁴

Because of these tendencies, Astroturf lobbying strives to encourage constituents and politicians to support positions which reflect the interests of large corporations, trade organizations, and affluent individuals—interests which the public at large may not necessarily share.²⁵ The United

¹⁸ See, e.g., Ramón Castellblanch, *Challenging Pharmaceutical Industry Political Power in Maine and Vermont*, 28 J. HEALTH POL., POL’Y & L. 109, 126 (2003) (explaining that Astroturf operations “mimic grassroots lobbying” and that Astroturf lobbyists “[do not use] public opinion . . . as they find it”).

¹⁹ See Lloyd Hitoshi Mayer, *What Is This “Lobbying” That We Are So Worried About?*, 26 YALE L. & POL’Y REV. 485, 559 (2008) (noting that Astroturf lobbying involves “[the generation of] fake or at least short-lived and shallow public support for its position”).

²⁰ See, e.g., Castellblanch, *supra* note 18, at 126 (“Astroturf lobbying is the top-down fabrication of the outpourings of letters, faxes, e-mails, phone calls, and personal visits characteristic of bottom-up grassroots campaigns.”); Weiss, *supra* note 17 (“Like genuine grass-roots groups, Astroturf organizations bring forth a blizzard of letters, phone calls and e-mails.”).

²¹ PUB. CITIZEN, *supra* note 3, at 1–2; see also Gary D. Bass, *Citizens Have a Right To Know About Lobbying Efforts*, ROLL CALL, May 16, 2007, available at <http://www.ombwatch.org/files/npadv/gbassopedrollcall05162007.pdf> (noting that “phony ‘grass-roots’ organizations . . . are really front groups for private, wealthy interests”).

²² Press Release, OMB Watch, Distortions and Misinformation Continue to Abound in Grassroots Lobbying Disclosure Debate (Mar. 7, 2007), <http://www.ombwatch.org/print/3203>.

²³ Krishnakumar, *supra* note 17, at 565 n.205.

²⁴ Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2659 n.341 (2008) (citing JOHN C. STAUBER & SHELDON RAMPTON, TOXIC SLUDGE IS GOOD FOR YOU 79 (1995)).

²⁵ See PUB. CITIZEN, *supra* note 3, at 1 (arguing that the parties behind Astroturf movements have little in common with the ordinary citizens they claim to represent); see also Ann Bartow, Book Review, 5 J. TELECOMM. & HIGH TECH. L. 449, 459–60 (2007) (reviewing YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006)).

Seniors Association and Century Strategies, for instance, sought to (and did) build support for positions that advanced the goals of the pharmaceutical industry and a casino operator.²⁶ On some occasions, though, even nonprofit organizations—such as Planned Parenthood—resort to Astroturfing to accomplish certain aims. The *New York Times* reported in 2003 that one branch of Planned Parenthood disseminated form letters to editors at publications throughout the country “that look[ed] like authentic grass-roots responses from readers but [were] not.”²⁷ The organization’s Web site featured pre-made letters and urged visitors to combine segments of the letters and to send the newly-created documents to publications.²⁸

To build support for their messages, Astroturfers must instill in citizens the belief that their activities represent genuine grassroots efforts. To facilitate trust, they sometimes give the front groups and affiliated alliances they create innocuous-sounding names which do not seem to reflect any particular position. The lobbyists for PhRMA did this in creating the United Seniors Association. In other instances, however, Astroturf lobbyists resort to more overt misrepresentation, operating under names that suggest the opposite of the group’s intended goals. One such group, the Save Our Species Alliance (SOSA), campaigned in 2005 in favor of a House bill that, if adopted, would have removed provisions of the Endangered Species Act mandating preservation of habitat areas for endangered species.²⁹ SOSA’s executive director and head lobbyist had longstanding connections with the timber industry.³⁰ Similarly, Project Protect, a group which lobbied in support of the Healthy Forests Restoration Act of 2003—a law calling for the thinning of fire-prone forests in Western states to combat conflagrations, and which authorizes the removal of larger, commercially valuable trees instead of just vulnerable brush and undergrowth³¹—served as a front group for loggers.³²

As a result, many costly Astroturf campaigns have proven effective in

(“[Astroturfing] is a corrupting influence on open and honest debate.”); Weiss, *supra* note 17 (“Astroturf groups have a corrosive effect on public opinion.”).

²⁶ See *supra* notes 3–7 and accompanying text; “GIMME FIVE,” *supra* note 6, at 10; Barbara T. Dreyfuss, *Poison Pill: How Abramoff’s Cronies Sold the Medicare Drug Bill*, WASH. MONTHLY, Nov. 2006, at 23, 26–29.

²⁷ Jennifer 8. Lee, *Editors and Lobbyists Wage High-Tech War over Letters*, N.Y. TIMES, Jan. 27, 2003, at C10.

²⁸ *Id.*

²⁹ PUB. CITIZEN, *supra* note 3, at 7.

³⁰ Weiss, *supra* note 17.

³¹ See *Wildfires in Western Forests*, NAT. RES. DEF. COUNCIL, <http://www.nrdc.org/land/forests/pfires.asp> (last visited Sept. 30, 2010) (observing that the legislation was “a codeword for commercial exploitation”).

³² See PUB. CITIZEN, *supra* note 3, at 6–7 (noting that, in 2004, Project Protect listed an address that matched that of the American Forest Resource Council, a lobbying group for pro-industry land management policies, and that Project Protect’s organizer later participated in the SOSA campaign).

influencing public opinion. In the 1990s, health insurance companies spent \$17 million on televised advertisements opposing President Clinton's plan for national healthcare reform, which they filtered through front groups.³³ The advertisements marshaled opposition to the plan and ultimately helped defeat it.³⁴ Similarly, during the 2000 election cycle, Citizens for Better Medicare, a pharmaceutical-industry front group, spent \$65 million on issue advertisements in a successful attempt to prevent Congress from enacting Medicare drug benefit reform.³⁵ The advertisements suggested that legislation could amount to "big government in [your] medicine cabinet" and urged the public to "[l]et Congress know you support the right Medicare reforms."³⁶ Furthermore, in the early 1990s, a large public relations firm, with funding from the Kuwaiti government, created a front group that drummed up considerable support for U.S. military intervention in the Persian Gulf following the Iraqi invasion of Kuwait.³⁷

2. Organizational and Legislative Treatment of Astroturf Lobbying

Public relations organizations view Astroturfing as a practice in which their members should not participate. The Public Relations Society of America (PRSA) states in its code of ethics that its members must "[b]e honest and accurate in all communications," "[r]eveal the sponsors for causes and interests represented," and "[a]void deceptive practices."³⁸ PRSA's code also lists as improper conduct instances where a member "implements 'grass roots' campaigns or letter-writing campaigns to legislators on behalf of undisclosed interest groups" or "deceives the public by employing people to pose as volunteers to speak at public hearings and participate in 'grass roots' campaigns."³⁹ The International Public Relations Association (IPRA) likewise states in its code of ethics that its members "[shall n]ot create any organization to serve an announced cause but which actually serves an undisclosed [special or private] interest."⁴⁰ And although the Public Affairs Council has no official codified position

³³ Weiss, *supra* note 17.

³⁴ STAUBER & RAMPTON, *supra* note 24, at 97–98; Fitzpatrick & Palenchar, *supra* note 14, at 209; Weiss, *supra* note 17.

³⁵ Vicky Lankarge, *Denying Coverage Before the Fact*, MARKET WATCH (July 26, 2001, 1:52 PM), <http://www.Marketwatch.com/story/story/print?guid=0AA2F523-0CE2-4EED-8477-0B0F6A2E3366>; PUB. CITIZEN, *supra* note 3, at 6.

³⁶ Robert Pear, *Drug Company Ads Attack Medicare Coverage of Drugs*, N.Y. TIMES, July 29, 1999, at A18.

³⁷ STAUBER & RAMPTON, *supra* note 24, at 167–71. Kuwait's government allegedly funded as many as twenty public relations firms and lobbying groups to generate support for the use of force against Iraq. *Id.* at 169.

³⁸ *Code of Ethics*, PUB. RELATIONS SOC'Y AM. (2000), <http://www.prsa.org/AboutPRSA/Ethics/CodeEnglish/>.

³⁹ *Id.*

⁴⁰ *Code of Venice*, INT'L PUB. RELATIONS ASS'N (2009), <http://www.ipra.org/detail.asp?articleid=21>. IPRA's code also states that members must give "a faithful representation" of the organizations they serve. *Id.*

on Astroturfing, it has discouraged the use of the practice, noting that the grassroots community frowns upon it.⁴¹ In addition, some states and municipalities have formally prohibited lobbyists from creating the false appearance of public support for (or opposition to) particular government action.⁴²

But while certain organizations, states, and cities have taken steps to dissuade lobbyists from employing pseudo-grassroots techniques in their advocacy efforts, the federal government has not approached the matter as proactively. Federal lobbying laws, in particular the amended Lobbying Disclosure Act of 1995,⁴³ govern the registration of lobbyists, the reporting of direct lobbying activities, and the disclosure of contributors. Yet, they do not mandate that grassroots lobbyists register with the government, disclose who contributes to their campaigns and in what amounts, or report how much they spend and on what activities⁴⁴—thus availing Astroturfers of the benefits of exemption. Those who strictly engage in efforts to stimulate grassroots advocacy can hence avoid disclosure regardless of the extent of their “grassroots lobbying” activities and regardless of the amount of funding or compensation they obtain to carry out their activities.⁴⁵ Although drafts of the Lobbying Disclosure Act featured provisions requiring registration of Astroturf lobbyists and reports on their actions and contributors, the drafting committee did not include them in the final bill.⁴⁶ In 2007, Congress again considered implementing registration and reporting standards for grassroots lobbyists—as part of the Senate’s proposed Lobbying Transparency and Accountability Act of 2007.⁴⁷ Again, however, the bill enacted into law contained no sections on

⁴¹ Fitzpatrick & Palenchar, *supra* note 14, at 221. The Public Affairs Council official in charge of grassroots efforts adds that lobbyists who resort to Astroturfing hurt their ability to forge working relationships with lawmakers. *Id.*

⁴² Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J.L. & PUB. POL’Y 1, 21 (2006).

⁴³ Pub. L. No. 104-65, 109 Stat. 691 (1995) (codified as amended at 2 U.S.C. §§ 1601–12 (2006) (amended 2007)).

⁴⁴ Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1602–04 (2006); *see also* Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1564 (2005) (observing that existing laws do not require the disclosure of efforts to generate grassroots lobbying activity); Jim Drinkard, *Lawmakers Move To Cut Lobbyists’ Influence*, USA TODAY, Jan. 12, 2006, at 6A (same); *see also* Meredith McGehee, *Lobby Reform as Window Dressing*, 31 ADMIN. & REG. L. NEWS 4, 4 (2006) (citing the Jack Abramoff lobbying scandal for the observation that, if certain advocacy conduct qualifies as grassroots lobbying, the possibility exists for “expenditures in the millions [to go] undisclosed to the American people”).

⁴⁵ JACK MASKELL, CONG. RESEARCH SERV., RL 33794, GRASSROOTS LOBBYING: CONSTITUTIONALITY OF DISCLOSURE REQUIREMENTS 1–2 (2007).

⁴⁶ Senator Carl Levin (D-Mich.) testified before a House committee that, by the time of the bill’s passage, “[e]very reference to grass roots lobbying—and even to paid efforts to stimulate artificial grass roots lobbying—[had] been deleted.” *Overhauling the Lobbying Disclosure Laws: Hearing Before the H. Comm. on the Judiciary on the Lobbying Disclosure Act of 1995*, 104th Cong. (1995) (testimony of Sen. Levin).

⁴⁷ S. 1, 110th Cong. § 220 (2007).

grassroots lobbying; a floor amendment, introduced due to concerns over the potential reach of the grassroots lobbying provisions, resulted in their excision.⁴⁸

Without registration, reporting, and disclosure requirements, persons and entities to whom current lobbying laws would otherwise apply can continue to evade them by posing as issue advocates, limiting what the public may learn about them and their activities. For those who oppose attempts to address Astroturfing through grassroots lobbying legislation, however, the above results protect grassroots activists from governmental intrusions into their First Amendment liberties and their ability to freely advocate. As the following text shows, critics of grassroots lobbying laws have presented a host of reasons relating to speech, petition, association, and press concerns for why, from their perspective, such laws are unconstitutional.

B. *Arguments Against Legislative Efforts To Identify and Control Astroturf Lobbying*

1. *Statutory Overbreadth and the Chilling Effect of Legislation on First Amendment Rights*

Critics of legislative efforts to shine light on Astroturf lobbying have argued that grassroots lobbying laws are, or will be, overbroad. While federal statutes designed to address Astroturfing may achieve the desired goal of exposing sham grassroots campaigns, opponents believe that they will also draw within their scope genuine issue advocates. After the Senate removed the grassroots lobbying sections of the Lobbying Transparency and Accountability Act, former Representatives Christopher Shays and Marty Meehan introduced a House bill providing for the reporting of Astroturfing.⁴⁹ The bill mandated that lobbyists who engaged in “paid communications campaigns to influence the general public to lobby Congress” were to report lobbying expenditures in excess of \$100,000 over a three-month interval and income from clients exceeding \$50,000 during the same period.⁵⁰ Critics have opined that, under a scheme such as this, grassroots activists could trigger disclosure simply by spending the requisite amount of money within the specified timeframe.⁵¹ Some have claimed that this could occur without engagement in substantial lobbying

⁴⁸ William V. Luneburg & A.L. Spitzer, *The Lobbying Disclosure Act of 1995: Scope of Coverage*, in THE LOBBYING MANUAL 43, 59 (William V. Luneburg et al. eds., 4th ed. 2009); Thomas M. Susman & William V. Luneburg, *History of Lobbying Disclosure Reform Proposals Since 1955*, in THE LOBBYING MANUAL, *supra*, at 23, 36.

⁴⁹ H.R. 2093, 110th Cong. (2007).

⁵⁰ *Id.* § 1(b)(2)(A)(iii), (d)(1)(C); Tory Newmyer, *Grass-Roots Lobby Disclosure Draws Fire*, ROLL CALL, May 2, 2007, available at http://www.rollcall.com/issues/52_118/lobbying/18273-1.html.

⁵¹ Sekulow & Zimmerman, *supra* note 1, at 174.

activities, such as through an issue advertisement campaign designed to alert citizens to prospective government action.⁵²

Of greater concern regarding possibly overbroad legislation, though, is the potential consequence of provisions stipulating that parties who engage in grassroots lobbying report the sources from which they derive financial or logistical support. Legislation opponents have maintained that the disclosure aspects of the House-proposed Honest Leadership and Open Government Act of 2006, which were identical to those of the Lobbying Transparency and Accountability Act, contained language sufficiently broad to sweep everyday issue advocates within the bill's reach.⁵³ Allegedly, any person or group that "'voluntarily' communicates [its] views on any 'issue' to any '[f]ederal official,'" or "'encourages other members of the general public to do the same'" would have needed to register with the government and to disclose the identities of its contributors.⁵⁴ Accordingly, critics assert, these kinds of statutory provisions could result in a chilling effect on the First Amendment rights of issue advocates in one of two ways. For groups that espouse unpopular or inflammatory opinions, revealing their identities to the public could ostracize them from their fellow constituents.⁵⁵ It could also result in reprisal from powerful officials who take offense to these views.⁵⁶ But even if their ideologies are not especially divisive, grassroots campaigners may incur criminal sanctions for failure to report funding—if such penalties attach for noncompliance.⁵⁷ In either case, opponents of grassroots lobbying legislation attest that issue advocates may find it best to refrain from advocacy entirely.⁵⁸

⁵² See Caroline Fredrickson & Douglas Johnson, *Citizens Don't Need "Protection" from Lobbying*, ROLL CALL, May 10, 2007, available at <http://www.nrlc.org/freespeech/RollCallFredricksonJohnson.html> (arguing that grassroots advocates could spend more than \$100,000 in less than three months via several full-page newspaper advertisements or a small campaign aimed at arousing public awareness, in even a small number of districts, of an upcoming congressional vote).

⁵³ FREE SPEECH COAL., INC., *THE UNCONSTITUTIONALITY OF CONGRESSIONAL REGULATION OF GRASSROOTS LOBBYING* 1, 4 (2007), available at <http://www.freespeechcoalition.org/pdfs/FSCGrassrootsLobbying2.pdf>.

⁵⁴ See *id.* at 3–4 (quoting a bill that the House of Representatives introduced to identify paid efforts to encourage grassroots activity).

⁵⁵ Abraham Lincoln Found. et al., *Coalition Letter to Members of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties Urging the Opposition to Efforts To Regulate Grassroots Lobbying* (Feb. 28, 2007) [hereinafter *Coalition Letter*], <http://www.aclu.org/print/free-speech/coalition-letter-members-subcommittee-constitution-civil-rights-and-civil-liberties-urgi>.

⁵⁶ Fredrickson & Johnson, *supra* note 52.

⁵⁷ See ACLU, *ACLU Letter to the Senate Urging Support of the Bennett Amendment to Senate Bill 1* (Jan. 17, 2007) [hereinafter *ACLU Letter*], <http://www.aclu.org/print/free-speech/aclu-letter-senate-urging-support-bennett-amendment-senate-bill-1>.

⁵⁸ *E.g.*, *Coalition Letter*, *supra* note 55; *ACLU Letter*, *supra* note 57; see also Ron Smith, *Compelled Cost Disclosure of Grass Roots Lobbying Expenses: Necessary Government Voyeurism or Chilled Political Speech?*, 6 KAN. J.L. & PUB. POL'Y 115, 117 (1996) (arguing that grassroots disclosure laws may render it difficult for citizens "to discuss government issues with public officials without fear of being hauled into court . . . or fined for attempts to otherwise peacefully and lawfully influence [government] officials").

Because of this supposed capacity for silencing issue advocates, critics argue that grassroots lobbying legislation cannot withstand the close scrutiny with which courts review laws that infringe on, or may infringe on, the exercise of political expression.⁵⁹ The Supreme Court has noted that, “[w]hen a law burdens core political speech,” it must be “narrowly tailored to serve an overriding [governmental] interest” to survive.⁶⁰ In this respect, the Court has suggested that laws that significantly burden issue advocacy may not stand in the absence of a compelling governmental interest, because such activities are inherently political and implicate the First Amendment speech, association, press, and petition rights of advocates.⁶¹

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Supreme Court considered a claim that the advocacy actions of several railroad companies breached the Sherman Antitrust Act’s anti-trade-monopolization provisions,⁶² violations of which were punishable by fine, imprisonment, or both.⁶³ The activity at issue in *Noerr* involved a publicity campaign that railroad companies initiated to stifle competition from the motor freight industry, the contents of which “[were] made to appear as spontaneously expressed views of independent persons and civic groups.”⁶⁴ The Court did not find the statute unconstitutional with respect to the defendants’ actions, but it did hold that “no violation of the Act [could] be predicated upon mere attempts to influence the passage or enforcement of laws.”⁶⁵ While the defendants’ campaign may have hurt the business of the plaintiff truckers, the Court noted that efforts to influence legislation may inevitably inflict some injury on the interests of the party against whom they are directed.⁶⁶ Thus the Court found that, under “close scrutiny,” it could not apply the Sherman Act to the

⁵⁹ See *Meyer v. Grant*, 486 U.S. 414, 420 (1988) (observing that “a limitation on political expression [is] subject to exacting scrutiny”).

⁶⁰ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 786 (1978)).

⁶¹ See *id.* at 346–47 (noting that discussion of public issues, the qualifications of political candidates, and issue-based elections, among other examples of political expression, receive the broadest First Amendment defense); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–38 (1961) (suggesting that activities which comprise “mere solicitation of governmental action with respect to the passage and enforcement of laws” involve the right of petition); *Talley v. California*, 362 U.S. 60, 64–65 (1960) (finding that laws restricting the ability of “groups engaged in the dissemination of ideas” to publish and circulate their ideas would thereby restrict freedom of expression); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958) (observing that group association promotes effective issue advocacy and that “state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny”); see also *Sekulow & Zimmerman, supra* note 1, at 165 (“Legislation that regulates or prohibits grassroots issue advocacy violates the First Amendment because it is not narrowly tailored to achieve a compelling governmental interest.”).

⁶² *Noerr*, 365 U.S. at 129.

⁶³ Sherman Antitrust Act, 15 U.S.C. §§ 1–2 (1958).

⁶⁴ *Noerr*, 365 U.S. at 129–30.

⁶⁵ *Id.* at 135.

⁶⁶ *Id.* at 142–44.

defendants' activities, for doing so, and rendering the activities illegal, would be equivalent to outlawing them.⁶⁷

The same standard of review may apply to laws which indirectly affect grassroots activity, such as expenditure-reporting rules. In *Buckley v. Valeo*,⁶⁸ the Supreme Court upheld federal restrictions on the size of campaign contributions as well as requirements that candidates running for office and individual donors who contributed above a certain dollar-threshold file reports of contributions and expenditures.⁶⁹ In doing so, the Court applied strict scrutiny, or what it referred to as "exacting scrutiny."⁷⁰ The Court noted that it had never before suggested that the dependence of a communication on the spending of money reduced the exacting scrutiny with which the Court analyzed laws burdening First Amendment rights.⁷¹ It also noted that this standard of review is necessary even where the risk of First Amendment encroachment is indirect in nature.⁷²

Courts have previously ruled against disclosure laws where advocates could demonstrate that revelation of certain information would substantially deter them from participation in advocacy and other political activities, and where this deterrent effect appeared to outweigh the aims of disclosure. In *NAACP v. Alabama ex rel. Patterson*, the Supreme Court overturned an Alabama state court contempt citation against the NAACP for the organization's failure to disclose membership lists for its Alabama branch in order "to do business" in the state.⁷³ The state's reason for seeking disclosure of the membership lists was to determine whether the NAACP was conducting intrastate business in Alabama in violation of the state's foreign corporation registration statute.⁷⁴ The Court found that the NAACP had persuasively shown that, on past occasions, disclosure of the identities of its members had subjected these individuals to antagonistic treatment, including reprisals, loss of employment, threats of violence, and "other manifestations of public hostility."⁷⁵ From the Court's perspective, compelled disclosure was likely to convince existing members to leave the NAACP and to discourage others from joining. The Court held that Alabama's asserted interest in disclosure did not justify "the deterrent

⁶⁷ *Id.* at 142–45.

⁶⁸ 424 U.S. 1 (1976).

⁶⁹ *Id.* at 23, 35, 74–75, 82.

⁷⁰ *Id.* at 16, 64–65.

⁷¹ *Id.* at 16.

⁷² *See id.* at 65 ("This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises . . . indirectly as an unintended . . . result of the government's conduct in requiring disclosure.").

⁷³ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 452–54, 467 (1958). The petitioners did not object to divulging the identities of NAACP employees and persons who held official positions within the organization, or to Alabama's interest in acquiring this information, but refused to disclose the identities of the organization's ordinary rank-and-file members. *Id.* at 463–64.

⁷⁴ *Id.* at 464.

⁷⁵ *Id.* at 462.

effect on the free enjoyment of the right to associate” that would likely result from the NAACP having to divulge its membership lists.⁷⁶ The Court reached a similar conclusion two years later in *Bates v. City of Little Rock*,⁷⁷ another case involving the NAACP.

At the state level, the Supreme Court of Montana in *Montana Automobile Ass’n v. Greely*⁷⁸ invalidated sections of a ballot initiative broadening the coverage of Montana’s lobbying act. The measure added to the act’s definition of “unprofessional conduct” . . . “[efforts] to influence the action of any public official on any measure” through “the promise of support or opposition at any future election.”⁷⁹ It also required that organizations that made annual payments in excess of \$1,000 “to solicit, directly, indirectly or by an advertising campaign, the lobbying efforts of another person,” disclose the amounts spent on lobbying activities.⁸⁰ The measure further required the disclosure of payments for the printing and distribution of specific publications.⁸¹ The petitioners hinted that disclosure would influence some of them to abstain from issue advocacy, such as ceasing publication of newsletters.⁸² The court held that this consequence, as well as the court’s finding that the lobbying-activities-disclosure section was overly vague,⁸³ justified the conclusion that the provisions were unconstitutional.⁸⁴

2. Violation of the First Amendment Principle of Anonymity

An additional, and somewhat related, argument against the use of legislative efforts to identify and control Astroturfing implicates the alleged constitutional right to speak and publish anonymously. Anonymous speech and writing has a long history in the United States; the authors of the Constitution “were favorably disposed toward pseudonymous authorship,” and anonymous speech and literature were

⁷⁶ *Id.* at 462–63, 466.

⁷⁷ 361 U.S. 516 (1960). The Court found that “the municipalities . . . failed to demonstrate a controlling justification for the deterrence of free association which compulsory disclosure of the membership lists would cause.” *Id.* at 527. The petitioners had cited “the anti-NAACP climate in [Arkansas]” as the reason for their refusal to disclose the names of the organization’s members and contributors, maintaining that such revelation might lead to harassment, economic reprisals, and even bodily harm. *Id.* at 520.

⁷⁸ 632 P.2d 300 (Mont. 1981).

⁷⁹ *Id.* at 304.

⁸⁰ *Id.* at 306, 310.

⁸¹ *Id.* at 309.

⁸² *Id.* One example of an organizational action that the initiative indicated would trigger disclosure was the “[m]ailing of newsletters by an organized church to members and nonmembers encouraging the reader to contact a public official on an abortion law.” *Id.* at 306.

⁸³ Compare *id.* at 304–05, 307–08 (holding that lobbying statutes may be void for vagueness, and that the lobbying-activities-disclosure section was impermissibly vague), with *Kimbell v. Hooper*, 665 A.2d 44, 47 (Vt. 1995) (finding that “[l]aws regulating . . . political activities [such as lobbying] in a neutral, noncensorial manner will be stricken as overbroad only as a last resort”).

⁸⁴ *Greely*, 632 P.2d at 307–09.

common during the Revolutionary War and in the early days of the Republic.⁸⁵ Opponents of grassroots lobbying legislation therefore maintain that the Constitution secures for citizens the freedom to speak, publish, and advocate anonymously, and that the Supreme Court has endorsed this principle by recognizing the interest of citizens in safeguarding themselves from ridicule, embarrassment, and retaliation.⁸⁶ Opponents likewise contend that the registration and reporting provisions of grassroots lobbying legislation, like the suggested amendments to the Lobbying Disclosure Act, would hamper the ability of issue advocates “to anonymously organize and gather citizen support for a cause.”⁸⁷

Decisions such as *Patterson* and *Bates* underscore a willingness on the part of the Supreme Court to protect anonymity in public fora where a legitimate threat of harassment and violence exists.⁸⁸ This notion of protection may also apply to cases where the risk of hostility toward parties who wish to remain anonymous is not as evident. For instance, *Talley v. California*⁸⁹ involved a Los Angeles city ordinance that required persons who publicly circulated handbills within the city to include on the handbill their name and address and the names and addresses of the parties who sponsored the document.⁹⁰ The petitioner had disseminated flyers urging readers to boycott businesses that carried products from companies that would not offer equal employment opportunities to minorities.⁹¹ He did this without including his name and address on the documents, and received a fine as a result. In reviewing the ordinance, the Court found that the identification requirement “would tend to restrict freedom to distribute information and thereby freedom of expression,” and cited *Patterson* and *Bates* for the observation that “identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance.”⁹² While the petitioner did not argue that revelation of his identity would cause him to worry about his personal safety, and withdraw from his activities, the Court nonetheless declared the ordinance void, suggesting that such a circumstance was not out of the question.⁹³

⁸⁵ Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right To Lobby*, 16 HARV. J.L. & PUB. POL’Y 149, 187–88 (1993).

⁸⁶ E.g., FREE SPEECH COAL., INC., *supra* note 53, at 7.

⁸⁷ Sekulow & Zimmerman, *supra* note 1, at 178.

⁸⁸ See William V. Luneburg, *Anonymity and Its Dubious Relevance to the Constitutionality of Lobbying Disclosure Legislation*, 19 STAN. L. & POL’Y REV. 69, 80–81 (2008) (observing that the petitioners in *Patterson* and *Bates* had clearly shown that harassment and other adverse consequences would result if they were to disclose membership lists, and that the Court committed itself to protecting the anonymity of advocates in cases such as these).

⁸⁹ 362 U.S. 60 (1960).

⁹⁰ *Id.* at 60–61.

⁹¹ *Id.* at 61–62.

⁹² *Id.* at 64–65.

⁹³ See *id.* at 65 (noting that, given the aforesaid concerns that contributed to the decisions in *Patterson* and *Bates*, the Los Angeles ordinance “[was] subject to the same infirmity”).

Thirty-five years after *Talley*, the Supreme Court again held an identification provision unconstitutional as applied to an individual pamphleteer. *McIntyre v. Ohio Elections Commission*⁹⁴ involved an Ohio statute that prohibited the circulation of anonymous campaign literature.⁹⁵ The plaintiff's decedent had distributed leaflets urging parents to vote against a proposed school tax levy without including her name on many of the documents, and incurred a fee for doing so.⁹⁶ The Court, echoing its sentiment in *Talley*, explained that a pamphleteer's decision to publish anonymously may stem from fear of retaliation or chastisement, or "a desire to preserve as much of [his or her] privacy as possible."⁹⁷ The Court also noted that anonymity may ensure that an audience does not prejudge or disregard an author's message out of dislike for the author.⁹⁸ As in *Talley*, the Court did not opine as to whether a risk of physical or reputational harm had caused the decedent to distribute her leaflets anonymously. It instead observed that an author's choice to remain anonymous is a constitutionally-protected aspect of freedom of speech.⁹⁹ The Court recognized that Ohio's interest in exposing fraudulent conduct and its sources had special significance.¹⁰⁰ Nevertheless, the Court found that this did not justify what it saw as a broad prohibition on the use of anonymous speech.¹⁰¹

3. Mistaken Presumptions About Constituent Decision-Making

A final reason for not using grassroots lobbying laws to combat Astroturfing focuses on constituent audiences. Opponents of legislation assert that grassroots lobbying bills falsely assume that citizens are naïve and impressionable, and that the government must strive to weed out Astroturfers to prevent constituents from making ill-informed choices that do not promote the general welfare.¹⁰² As opponents observe, citizens do not need the presence of grassroots efforts in order to make educated choices as to where they stand on political matters; they have the level-headedness to form independent judgments, judgments based on personal

⁹⁴ 514 U.S. 334 (1995).

⁹⁵ *Id.* at 336.

⁹⁶ *Id.* at 337–38.

⁹⁷ *Id.* at 341–42.

⁹⁸ *Id.* at 342.

⁹⁹ *Id.*

¹⁰⁰ *See id.* at 349 ("We agree with Ohio's submission that this interest [in preventing fraud] carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large.").

¹⁰¹ *See id.* at 357 ("Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech.").

¹⁰² *See* Sekulow & Zimmerman, *supra* note 1, at 175 ("Grassroots lobbying bills are based upon the paternalistic notion that the government needs to regulate grassroots organizations because citizens are naïve, gullible, and incapable of making well-informed decisions about public policy on their own.").

beliefs of the importance of these issues.¹⁰³

The *McIntyre* decision supported the notion that citizens do not need disclosure laws to effectively evaluate the messages of political advocates. The Court maintained that the identity of the author of a handbill or flier is “no different” from other features of the document’s content that the author may include or exclude at will.¹⁰⁴ Because the recipients of handbills and fliers may have no prior acquaintance with the person who distributed them, the Court reasoned that disclosure laws such as those which Ohio enacted would not improve the reader’s ability to judge the author’s message.¹⁰⁵ Furthermore, disclosure might, as the Court suggested (and as noted previously), dissuade the author from exercising his or her First Amendment right of political expression out of fear for his or her personal wellbeing. Similarly, in a New York State case involving an allegedly overbroad election-related speech law, a New York trial court warned that to require political activists to disclose their identities is to underestimate the ability of average citizens to assess the sources of anonymous speech and the ideas the speech conveys.¹⁰⁶

III. THE GOVERNMENT’S COMPELLING INTEREST IN IDENTIFYING AND CONTROLLING ASTROTURF LOBBYING

Despite First Amendment concerns, the Supreme Court and other courts have maintained that the government has a compelling interest in addressing fake grassroots lobbying through registration, reporting, and disclosure requirements. Even courts that have ruled against certain legislative efforts to address Astroturfing have not disagreed with this presupposition. Part A discusses *United States v. Harriss*,¹⁰⁷ a Supreme Court case upholding a federal lobbying disclosure law which the Court construed to apply to artificial grassroots advocacy. Part B discusses subsequent case law at the state and federal level, showing that the governmental interest in exposing and controlling sham grassroots advocacy withstands the arguments of critics that legislative efforts to address Astroturfing are overbroad, silence grassroots advocates, and violate the anonymity principle. Part B also shows that these arguments are inaccurate or exaggerated. Lastly, Part C provides insight into

¹⁰³ ACLU, ACLU Letter to the Senate Opposing Expansions of Post-Employment Bans and Regulations on Grassroots Lobbying (Mar. 7, 2006), <http://www.aclu.org/print/free-speech/aclu-letter-senate-opposing-expansions-post-employment-bans-and-regulations-grassroots-l>.

¹⁰⁴ *McIntyre*, 514 U.S. at 348.

¹⁰⁵ *Id.* at 348–49.

¹⁰⁶ See *New York v. Duryea*, 351 N.Y.S.2d 978, 996 (Sup. Ct. 1974) (“People are intelligent enough to evaluate the source of an anonymous writing. . . . They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message.”), *aff’d*, 354 N.Y.S.2d 129 (App. Div. 1974).

¹⁰⁷ 347 U.S. 612 (1954).

campaign-finance reporting and disclosure requirements to illustrate that, just as these rules foster open and vibrant political discourse with respect to election-based speech, so too would similar standards in the area of grassroots lobbying.

A. *United States v. Harriss: Early Approval of Grassroots Lobbying Legislation*

In 1946, Congress enacted the Federal Regulation of Lobbying Act (FRLA).¹⁰⁸ The Act stated that persons compensated “to influence the passage or defeat of any [federal] legislation” were to register with the government and to disclose certain information, including who employed them, the amount of compensation they received, and the nature of their expenses.¹⁰⁹ The Act further stipulated that failure to abide by these requirements could result in a penalty of up to \$5,000 or imprisonment for upwards of one year, as well as a three-year ban on attempts to influence, “directly or indirectly, the passage or defeat of any proposed legislation.”¹¹⁰

Eight years later, in *United States v. Harriss*, the Government charged a corporate lobbying body with failure to report the solicitation and receipt of contributions to influence the passage of legislation that would increase the price of certain agricultural goods and to defeat legislation that would cause a decrease in those prices.¹¹¹ It also charged several individual lobbyists with failure to report expenditures directed at the accomplishment of these goals and failure to register with Congress.¹¹² These persons reportedly “were hired to express certain views to Congress as to agricultural prices or to cause others to do so,” and “arranged to have members of Congress contacted on behalf of these views” directly or via “an artificially stimulated letter campaign.”¹¹³ The defendants claimed that FRLA was unlawfully vague and that it violated their First Amendment rights of free speech, the press, and petition.¹¹⁴

On the topic of vagueness, the Court narrowed the possible construction of FRLA in order to avoid doubts as to the Act’s validity.¹¹⁵ The Government had argued that, under FRLA, all persons who incurred expenses for the purposes of influencing legislation were to report these expenses, regardless of whether they solicited or received contributions for

¹⁰⁸ Ch. 753, 60 Stat. 839 (1946) (codified as amended at 2 U.S.C. §§ 261–70 (1994)) (repealed in 1995).

¹⁰⁹ Federal Regulation of Lobbying Act, 2 U.S.C. § 267(a) (1952).

¹¹⁰ *Id.* § 269(a)–(b).

¹¹¹ *Harriss*, 347 U.S. at 614–15.

¹¹² *Id.* at 615–17.

¹¹³ *Id.*

¹¹⁴ *Id.* at 617.

¹¹⁵ *Id.* at 620–21, 623.

doing so.¹¹⁶ The Court, however, disagreed, finding that the language of the provisions made clear that those required to file expense reports were strictly persons paid to encourage the passage or defeat of federal legislation.¹¹⁷ Nevertheless, the Court suggested that Congress could pass separate legislation covering persons who did not receive compensation for their advocacy activities.¹¹⁸

The Court also observed that FRLA required expenditure reports and disclosures where the method of influencing the passage or defeat of legislation was through “direct communication” with or “direct pressure[.]” on members of Congress.¹¹⁹ In listing conduct and activities which constituted “direct pressure,” the Court mentioned as one such example what it termed an “artificially stimulated letter campaign.”¹²⁰ While the Court did not clarify what this phrase meant, the context in which it used the phrase and the Court’s discussion as to whether FRLA violated the defendants’ First Amendment liberties suggested that the phrase referred to Astroturf lobbying and that the prime objective of FRLA was to identify this conduct.

In a footnote, the Court cited the legislative history of FRLA to show that direct pressure on members of Congress, to which FRLA applied, included an artificially stimulated letter campaign. According to the text, persons and entities who “initiate[d] propaganda from all over the country in the form of letters and telegrams” were to disclose the sources of their “collections,” or information, and the methods by which they disbursed collections.¹²¹ This was because many such letters, telegrams, and related items were, or had the potential to be, “based entirely upon misinformation as to facts.”¹²² The Court also found that, based on the manner in which it interpreted FRLA, the Act did not violate the defendants’ freedoms of speech, the press, and petition.¹²³ The Court then concluded that the ultimate aim of the Act was to identify lobbyists and front groups that posed as everyday public advocates:

[L]egislative complexities are such that . . . 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

¹¹⁶ *Id.* at 619–20.

¹¹⁷ *Id.* at 623.

¹¹⁸ *See id.* at 619–20 (suggesting that Congress could introduce “further legislation” applying FRLA’s reporting requirements to persons who did not solicit or receive compensation for their lobbying activities).

¹¹⁹ *Id.* at 620, 623–24.

¹²⁰ *Id.* at 620.

¹²¹ *Id.* at 620–21 & n.10 (quotation marks omitted).

¹²² *Id.*

¹²³ *Id.* at 625.

depends . . . 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. This is the evil which the Lobbying Act was designed to help prevent.*¹²⁴

Activity of the kind highlighted in FRLA's legislative history correlates with some characteristics of Astroturfing, including the sending of letters to elected leaders and the tendency of Astroturf lobbyists to misrepresent what their campaigns seek to achieve.¹²⁵ Moreover, given that Astroturfing involves creating the impression that citizens have spoken out about specific government action, the Court's phrasing evinces a belief that a primary goal of FRLA was to expose artificial grassroots activity and, through exposure, control it. Further, the Court appeared to classify the prevention of special interests from "masquerading" as public interest proponents as a "vital national interest," one that Congress could lawfully pursue through legislation like FRLA.¹²⁶

B. *Subsequent Case Law: Furthering the Harriss Precedent*

1. *Judicial Disagreement with the Alleged Reach and Possible Chilling Effect of Grassroots Lobbying Legislation*

Perhaps the greatest concern of opponents of legislative efforts to address Astroturf lobbying, as discussed earlier, is the conviction that such laws will extend to genuine grassroots advocacy and effectively silence real activists. On the one hand, this is a legitimate concern, especially with respect to parties who express controversial views or who advocate in volatile locations, and for whom exemption from disclosure may be necessary. On the other hand, opponents have either exaggerated the alleged reach of grassroots lobbying legislation and its capacity to chill the political expression of grassroots activists, or have made inaccurate claims about these issues.¹²⁷

Regarding statutory overbreadth in the area of the First Amendment, the Supreme Court has declared statutes unconstitutionally overbroad "sparingly and only as a last resort."¹²⁸ In *Broadrick v. Oklahoma*, the Court observed that it has sustained claims of facial overbreadth where

¹²⁴ *Id.* (emphasis added).

¹²⁵ See MASKELL, *supra* note 45, at 11 (observing that artificially stimulated letter campaigns "are now often called 'astroturf' lobbying").

¹²⁶ *Harriss*, 347 U.S. at 625–26; see also MASKELL, *supra* note 45, at 5 (suggesting that the Government's asserted interest in protecting government processes from practices like Astroturfing "has been long recognized as a significant, important and compelling governmental interest").

¹²⁷ See *supra* notes 49–58 and accompanying text.

¹²⁸ *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

statutes seek to regulate pure speech and “the time, place, and manner of expressive or communicative conduct.”¹²⁹ At the same time, however, the Court explained that overbreadth scrutiny is less rigid with respect to statutes which, in regulating specific conduct (and not merely speech), exert an incidental effect on First Amendment rights “in a neutral, noncensorial manner.”¹³⁰ As to whether legislation which risks silencing grassroots activists represents an impermissible abridgment of their First Amendment liberties, opponents have not fully recognized that a possible deterrent effect may not be enough for a court to deem this kind of legislation unconstitutional. Indeed, *Harriss* suggests that legislation like FRLA may stand even where the potential exists for activists to feel discouraged from engaging in advocacy.¹³¹

In the wake of *Harriss*, federal and state courts have upheld registration, reporting, and disclosure laws against challenges regarding alleged statutory overbreadth and chilling effects. One such case, *Commission on Independent Colleges & Universities v. New York Temporary State Commission on Regulation of Lobbying*,¹³² involved a challenge to the New York Regulation of Lobbying Act. The Act required registration of and reporting of expenditures above \$1,000 from anyone employed for the purpose of conducting “lobbying activities.”¹³³ Lobbying activities were defined as “attempts to influence the passage or defeat of legislation by . . . the legislature, approval or disapproval of any legislation by the Governor, or the adoption or rejection of any rule or regulation having the force and effect of law.”¹³⁴ The statute also included both civil and criminal penalties for noncompliance.¹³⁵ The plaintiffs contested the statute, arguing vagueness and that it was an overbroad restriction of their First Amendment freedoms of speech, petition, and association.¹³⁶

Concerning vagueness, the court found no evidence that the statute required disclosure of indirect lobbying activities that went beyond the direct pressures the Supreme Court mentioned in *Harriss*, observing that the New York State Legislature could lawfully tailor a disclosure law to cover indirect grassroots lobbying.¹³⁷ As to the asserted chilling effect of

¹²⁹ *Id.* at 612–13.

¹³⁰ *Id.* at 614.

¹³¹ See *Harriss*, 347 U.S. at 626 (“The hazard of [First Amendment] 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.”).

¹³² 534 F. Supp. 489 (N.D.N.Y. 1982).

¹³³ *Id.* at 491.

¹³⁴ *Id.* at 491–92 (quoting N.Y. LEG. LAW §§ 3(a)–(b), 8(a)(1) (1982) (repealed 1987)).

¹³⁵ *Id.* at 492.

¹³⁶ *Id.*

¹³⁷ See *id.* at 496–97 (citing *Harriss*, 347 U.S. at 621 n.10) (observing that “[*Harriss*] held that indirect lobbying, in the form of campaigns to exhort the public to send letters and telegrams to government officials, could be included within the definition of lobbying activities”).

the statute, the court disagreed with the plaintiffs' argument that the law deprived them of the ability to discuss the merits of proposed government action. As the *Harriss* Court emphasized, the deterrent effect of a statute like FRLA emanates more from self-censorship by the party that abstains from advocacy than it does from the statute itself.¹³⁸ Legislation critics charge that deterrence is directly attributable to the statute.¹³⁹ In *Commission on Independent Colleges*, the court suggested that no chilling effect existed with regard to the plaintiffs, or that the plaintiffs, through self-censorship, had inflated the effect, if it did, in fact, exist.¹⁴⁰ As the court noted, the plaintiffs offered no record of economic reprisals, loss of employment or other manifestations of hostility,¹⁴¹ conduct which influenced the Supreme Court in *NAACP v. Alabama ex rel. Patterson*¹⁴² and *Bates v. City of Little Rock*¹⁴³ to void similar disclosure laws. The court held that New York's interest in disclosure was compelling enough to outweigh the alleged deterrent effect of the statute.¹⁴⁴

Another case, *Minnesota State Ethical Practices Board v. National Rifle Ass'n of America*,¹⁴⁵ centered on an NRA allegation that the Minnesota Ethics in Government Act violated NRA members' freedom of association.¹⁴⁶ The Act required lobbyists to register and to regularly report their lobbying activities, defining "lobbyist[s]" as individuals who received compensation and who spent more than a certain amount of time and money "for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials."¹⁴⁷ The executive director for the NRA's lobbying division had, in one year, sent several letters and a mailgram to the organization's 54,000 members in Minnesota, encouraging them to contact their state legislators in support of pending legislation.¹⁴⁸ In another year, the director mailed a letter, bumper sticker, and brochure to those same members, urging the defeat of a particular candidate in an upcoming election.¹⁴⁹

The Eighth Circuit Court of Appeals found that, in light of *Harriss*,

¹³⁸ See *Harriss*, 347 U.S. at 626 (noting that, even if FRLA had a deterrent effect, "the restraint [was] at most an indirect one resulting from self-censorship").

¹³⁹ See discussion *supra* Part II.B.1.

¹⁴⁰ See *Comm'n on Indep. Colls. & Univs.*, 534 F. Supp. at 498 ("The Court believes that the plaintiffs [sic] arguments . . . fall largely into the category of self-censorship as outlined in *Harriss v. United States*.").

¹⁴¹ *Id.* at 498–99 (citations omitted).

¹⁴² 357 U.S. 449 (1958).

¹⁴³ 361 U.S. 516 (1960).

¹⁴⁴ *Comm'n on Indep. Colls. & Univs.*, 534 F. Supp. at 499.

¹⁴⁵ 761 F.2d 509 (8th Cir. 1985) (per curiam).

¹⁴⁶ *Id.* at 510.

¹⁴⁷ *Id.* at 510–11 (citing MINN. STAT. §§ 10A.01–11(a), 10A.03–04 (1984)).

¹⁴⁸ *Id.* at 511.

¹⁴⁹ *Id.*

identifying parties behind artificially stimulated letter campaigns was a compelling governmental interest justifying the Act's registration provisions.¹⁵⁰ The court also suggested that the actions of the NRA's executive director amounted to an artificially stimulated letter campaign, even if they only involved contact between members within an organization instead of contact between separate entities.¹⁵¹ As to disclosure, the court made no finding that the statute was so broad as to impermissibly infringe on the plaintiffs' ability to freely associate. While the plaintiffs may have experienced some infringement, the court noted that they failed to apply for an exemption from the Act, which would take effect if the applicant could show that disclosure would expose it to reprisals, loss of employment, or threats of physical harm.¹⁵²

Similarly, the Eleventh Circuit in *Florida League of Professional Lobbyists, Inc. v. Meggs*¹⁵³ rejected claims that Florida's lobbying disclosure act was overbroad and thus invalid. The contested sections required that lobbyists report indirect lobbying activities, including "media advertising [campaigns]" and associated expenses.¹⁵⁴ The plaintiff suggested that, to the extent the law required reporting of indirect expenses when there was no direct contact with elected officials, it was not narrowly tailored to meet Florida's interest in "maintain[ing] the integrity of a basic governmental process."¹⁵⁵ The court, rejecting this assertion, found that not only was Florida's interest compelling, but that, in light of the rulings in *Harriss* and *Minnesota State Ethical Practices Board*, the First Amendment allowed compelled reporting of "considerably more than face-to-face contact with government officials."¹⁵⁶ The court added that a legislative interest in disclosure may be stronger with respect to indirect pressure on officials because of the possible difficulty involved in evaluating such pressure.¹⁵⁷

¹⁵⁰ See *id.* at 512 (noting that the *Harriss* Court concluded that "the Lobbying Act applied to the form of lobbying used in this case, namely, communication with lawmakers through an artificially stimulated letter campaign," and finding that, as a result, Minnesota had "a compelling interest in requiring lobbyists to register their activities").

¹⁵¹ See *id.* at 513 ("When persons engage in an extensive letterwriting campaign for the purpose of influencing specific legislation, the State's interest is the same whether or not those persons are members of an association."); see also William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGIS. 32, 45 (2006) (finding that current case law does not militate in favor of exemption from grassroots lobbying disclosure laws where contacts for action are interorganizational).

¹⁵² *Minn. State Ethical Practices Bd.*, 761 F.2d at 512 (citing MINN. STAT. § 10A.20-8 (1984)).

¹⁵³ 87 F.3d 457 (11th Cir. 1996).

¹⁵⁴ *Id.* at 458-60 (citing FLA. STAT. § 11.045(3)(a) (1996)).

¹⁵⁵ *Id.* at 460 (alteration in original) (quoting *United States v. Harriss*, 347 U.S. 612, 625 (1954)).

¹⁵⁶ *Id.* at 461.

¹⁵⁷ See *id.* ("[T]he government interest in providing the means to evaluate . . . pressures [on officials] may in some ways be stronger when the pressures are indirect, because then they are harder to identify without the aid of disclosure requirements.").

The Vermont Supreme Court in *Kimbell v. Hooper*¹⁵⁸ likewise upheld challenged provisions of Vermont's lobbying disclosure law, which required persons who received compensation above a certain amount for purposes of influencing legislators to report their indirect contacts to influence legislative or administrative action.¹⁵⁹ The court noted that statutes such as Vermont's are not subject to the same strict scrutiny as laws which burden pure speech, because lobbying activities entail conduct in addition to speech.¹⁶⁰ Moreover, the court reasoned that the statute furthered the vital governmental interest of preventing paid lobbyists from posing as advocates of the public welfare.¹⁶¹ Accordingly, the court neither regarded the statute as overbroad nor found reason to declare the law unconstitutional because of the mere possibility that it could have a chilling effect on activists.¹⁶²

The above cases show that, based on the findings of numerous courts, grassroots lobbying statutes do not present a uniform risk of silencing grassroots advocates, and that an alleged risk to certain parties does not justify a complete prohibition on the use of such laws to address fake grassroots advocacy. Opponents are right that *Patterson* and *Bates* stand for the notion that laws which will substantially curtail the ability of specific grassroots advocates to express themselves politically cannot stand. But the cases discussed above show that plaintiffs who seek to overturn such laws must provide evidence that disclosure would expose them to hostility, and not speculate as to the threat.¹⁶³ *Talley v. California*¹⁶⁴ and *McIntyre v. Ohio Elections Commission*¹⁶⁵ may not have required factual demonstrations, but, as the next subsection argues, there seems to be another reason why the Supreme Court ruled as it did in those cases. *Montana Automobile Ass'n v. Greely*¹⁶⁶ likewise may be an exception to the rule, as a state court case, but it appears to be alone in this regard,¹⁶⁷ and the court in *Greely* still perceived a compelling governmental interest in disclosure for purposes of identifying Astroturf

¹⁵⁸ 665 A.2d 44 (Vt. 1995).

¹⁵⁹ *Id.* at 46 & n.1 (citing VT. STAT. ANN. tit. 2 §§ 261(5), (9)–(10) (1993)).

¹⁶⁰ *See id.* at 47 (suggesting that, in regard to lobbying, “conduct and not merely speech [are] involved,” signifying that alleged statutory overbreadth “must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep,” before a court may find the statute unconstitutionally overbroad (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973))).

¹⁶¹ *Id.* at 48.

¹⁶² *Id.* at 48–49 (citations omitted).

¹⁶³ *Buckley v. Valeo*, 424 U.S. 1, 69–70 (1976), similarly supports this point.

¹⁶⁴ 362 U.S. 60 (1960).

¹⁶⁵ 514 U.S. 334 (1995).

¹⁶⁶ 632 P.2d 300 (Mont. 1981).

¹⁶⁷ *See* MASKELL, *supra* note 45, at 15 & n.59 (citing *Greely* but mentioning no other state court decision holding that disclosure of “indirect” grassroots lobbying goes beyond the allowable bounds of governmental regulation).

lobbying.¹⁶⁸ Finally, the statutes at issue in *Patterson* and *Bates* (particularly the former) did not concern revealing and deterring Astroturfing so much as enabling the respective jurisdictions to learn more about certain organizations with which they were at odds.¹⁶⁹

2. Clarification of the Scope of the Right To Speak and Publish Anonymously

While *Talley* and *McIntyre* suggest that an activist's interest in anonymity trumps the mandates of grassroots lobbying disclosure laws even where the risk of a chilling effect on advocacy efforts is speculative, it is not apparent that the activity in those cases constitutes issue advocacy in its commonly-understood sense. The main conception of issue advocacy, touched upon in Part I, is that it encompasses efforts of ordinary constituents to communicate their viewpoints to elected officials, usually their representatives, and to convince other citizens to follow suit.¹⁷⁰ Although *Talley* and *McIntyre* involved the expression of particular viewpoints, it does not appear that the speakers in those cases directed their statements toward elected representatives or that they attempted to persuade fellow constituents to share similar outlooks with officials. The plaintiff in *Talley* had espoused a belief in equal-opportunity hiring practices and encouraged others to not buy from certain retailers,¹⁷¹ while the speaker in *McIntyre* had criticized a prospective school tax and requested that residents vote against it.¹⁷² Activity of this kind—perhaps best described as “speech on the street” or “anonymous speech in the public sphere”¹⁷³—seems to garner greater protection of the asserted right to speak and publish anonymously than does the petitioning of governmental bodies,¹⁷⁴ under which grassroots lobbying would appear to

¹⁶⁸ The *Greely* court inferred from the purpose of the ballot initiative “a compelling need for disclosure,” even if some components of the measure were unlawful. *Greely*, 632 P.2d at 302–03.

¹⁶⁹ Professor Luneburg observes that, with respect to the law in question in *Patterson*, “[w]hatever lobbying the NAACP may have undertaken in Alabama, that was clearly not the main concern of the state.” Luneburg, *supra* note 88, at 80. Instead, “the activity of the organization in trying to assist the admission of blacks to state universities and in supporting a boycott by blacks of a bus line in Montgomery allegedly violated [the requirement that] foreign corporations . . . ‘qualify’ before doing business in Alabama.” *Id.*

¹⁷⁰ See, e.g., Sekulow & Zimmerman, *supra* note 1, at 173–74 (“Grassroots [advocacy] is simply the efforts of average Americans to share their viewpoints with their elected representatives and [to] encourage other Americans to do the same.”).

¹⁷¹ *Talley v. California*, 362 U.S. 60, 61 (1960).

¹⁷² *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 337 & n.2 (1995).

¹⁷³ Luneburg, *supra* note 88, at 82, 85.

¹⁷⁴ Professor Luneburg makes the following distinction:

[The] public tradition for petitioning governmental bodies should be contrasted with the long and contemporaneous practice of anonymous speech in the public sphere relied upon in cases like *Talley* and *McIntyre*. . . . [In] fashioning the contours of freedom of speech in the public sphere the Supreme Court has appropriately considered the need for anonymity to improve the quality and quantity of public debate, [but] history decidedly does not [suggest] that anonymity should attach to

primarily fall. Furthermore, the Supreme Court in *McIntyre* recognized limitations to its decision, suggesting that, in “larger circumstances,” there may be a more substantial interest in identity disclosure.¹⁷⁵

Even assuming that the right to speak and publish anonymously applies to grassroots lobbyists, critics exaggerate the scope of coverage this right affords. The principle of anonymity may, for instance, permit advocacy groups to refrain from divulging member identities where a genuine risk of hostility exists. But courts have found that disclosure of other information, such as the identities of contributors and the financial support they supply to advocacy groups, which may indirectly illuminate the identities of parties that belong to these groups, is acceptable.¹⁷⁶

The Supreme Court of Washington in *Young Americans for Freedom, Inc. v. Gorton*¹⁷⁷ upheld a detailed lobbying disclosure statute against a claim that the law required disclosure of the respondent organization’s entire membership list and the identities of contributors to a specific campaign, and thereby violated the organization’s First Amendment rights of association and privacy.¹⁷⁸ The controversial provision required reporting of “grass roots campaign activity” designed, directly or indirectly, to influence legislation, and if campaign expenses exceeded a specified threshold, the party sponsoring the campaign had to additionally report contributions and the names and addresses of contributors.¹⁷⁹ The court narrowly construed the act so that groups engaged in grassroots campaigns would not need to reveal their membership lists, yet observed that the statute could still require the disclosure of contributors without unduly impinging on the association and privacy rights of these groups.¹⁸⁰ It also refused to strike down the section of the statute mandating disclosure of indirect lobbying activities, finding that doing so “would leave a loophole for indirect lobbying” and render the public uninformed as to the sponsorship of activities such as “artificially stimulated letter campaign[s].”¹⁸¹ This concern, according to the court, was “paramount” to the respondent’s interest in avoiding the inconvenience of reporting its

petitions for governmental action.

Id. at 85. In addition, the Supreme Court in *McDonald v. Smith*, 472 U.S. 479, 482 (1985), found that the right of petition merits no more defense than that afforded freedom of speech (or, for that matter, other First Amendment liberties), because the former is in essence “cut from the same cloth” as the latter.

¹⁷⁵ *McIntyre*, 514 U.S. at 358 (Ginsburg, J., concurring). More on this point appears in Part IV.A.3 *infra*.

¹⁷⁶ See *infra* notes 177–90 and accompanying text.

¹⁷⁷ 522 P.2d 189 (Wash. 1974) (en banc).

¹⁷⁸ *Id.* at 191. The right of privacy to which the respondent alluded and which the court mentioned seems to refer to “privacy in one’s associations.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

¹⁷⁹ *Gorton*, 522 P.2d at 191.

¹⁸⁰ *Id.* at 191–92.

¹⁸¹ *Id.* at 192 (italics omitted) (quoting *United States v. Harriss*, 347 U.S. 612, 620 (1954)).

indirect advocacy activities.¹⁸²

More recently, the court in *ProtectMarriage.com v. Bowen*¹⁸³ upheld provisions of California's Political Reform Act (PRA) against similar attacks.¹⁸⁴ These sections required that ballot committees disclose the names and other personal information of parties who contributed at least one hundred dollars, which the plaintiff committees attacked as not narrowly tailored to serve a compelling state interest and thus violative of the First Amendment.¹⁸⁵ The court conceded that these provisions affected the ability of the committees to privately associate.¹⁸⁶ Nonetheless, it found that California had a compelling interest in unmasking phony grassroots advocacy by providing citizens with details about contributors and expenditures targeted at the passage or defeat of ballot initiatives.¹⁸⁷ The court also found no evidence that any of the plaintiffs' contributors would cease providing support to the plaintiffs if faced with identity disclosure.¹⁸⁸ Moreover, the threats and harassment the plaintiffs claimed would befall them if forced to divulge information regarding their contributors were not, as the court reasoned, so great as to justify affording the plaintiffs the benefit of anonymity.¹⁸⁹ Lastly, the court found that the PRA's one hundred-dollar disclosure threshold was not overly burdensome to the plaintiffs, noting that it did not restrict how much contributors could give to committees or how much committees could spend on advocacy.¹⁹⁰

C. Election-Based Speech Laws, the Marketplace of Ideas, and Its Application to Grassroots Lobbying

The Supreme Court has offered greater direct insight into the validity of election-related speech disclosure laws than it has similar laws regarding grassroots lobbying. Yet the Court's findings in the area of election-based speech—in particular, that disclosure is generally constitutional—have relevance to legislative efforts to address Astroturfing, suggesting that disclosure of artificial grassroots advocacy would support the free flow of

¹⁸² *Id.*

¹⁸³ 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

¹⁸⁴ *Id.* at 1204, 1223–24, 1226.

¹⁸⁵ *Id.* at 1199, 1204.

¹⁸⁶ *See id.* at 1205–06 (noting that the ability to freely associate enhances the efficacy of advocacy efforts, and that compelled disclosure of contributors to committees such as the plaintiffs “indisputably impinges on those vital freedoms of belief and assembly”).

¹⁸⁷ *See id.* at 1209 (“[D]isclosure . . . prevents the wolf from masquerading in sheep’s clothing.” (quoting *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 n.24 (9th Cir. 2003))); *see also id.* at 1211 (“[T]he Government’s interest is not only compelling, but critical to the proper functioning of the State’s system of direct democracy.”).

¹⁸⁸ *See id.* at 1215 (“Finally, there is no evidence that any of Plaintiffs’ contributors intend to retreat from the marketplace of ideas such that available discourse will be materially diminished.”).

¹⁸⁹ *Id.* at 1216–17, 1219–20.

¹⁹⁰ *Id.* at 1221–24. Moreover, fewer than ten states had higher threshold requirements for disclosure at the time. *Id.* at 1221–22 & n.10.

ideas in political discourse. Moreover, these findings weaken the notion that grassroots lobbying laws treat citizens as incapable of informed and independent decision-making, showing that such laws instead provide constituents with access to information that may otherwise be inaccessible and which may be of interest to them.

1. *Buckley v. Valeo and the Federal Election Campaign Act*

In 1974, Congress amended the Federal Election Campaign Act of 1971 (FECA).¹⁹¹ The new statutory scheme provided that political action committees, candidates running for election to federal offices and donors who spent or gave more than one hundred dollars in a calendar year were to file statements of receipts and expenses.¹⁹² The provisions required disclosure of substantial information, including the names, mailing addresses, occupations, and principal places of business of campaign contributors.¹⁹³ In *Buckley v. Valeo*, the Supreme Court found the mandates constitutional. The Court noted that forced disclosure could lead to substantial encroachments on First Amendment rights, and so, as discussed earlier, subjected the provisions to exacting scrutiny analysis.¹⁹⁴ Yet it found that the governmental interests Congress sought to advance through the FECA amendments were “sufficiently important to outweigh the possibility of [First Amendment] infringement.”¹⁹⁵ In construing the disclosure amendments as applying only to groups who contributed funds to “expressly advocate the election or defeat of a clearly identified candidate,” and not to groups whose contributions were simply part of “issue discussion,” the court upheld the provisions, finding that they not only operated to deter corruption or its appearance, but illuminated campaign-related expenditures that would otherwise go unreported.¹⁹⁶

The *Buckley* Court also suggested that the disclosure provisions were consistent with the concept of the marketplace of ideas. Under this concept, freedom of expression must have minimal restraints in order to promote robust exchange and discussion. The more points-of-view circulating among citizens, the better able citizens are to ascertain ideas or

¹⁹¹ Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–56 (1976)).

¹⁹² 2 U.S.C. § 434(a), (e).

¹⁹³ *Buckley v. Valeo*, 424 U.S. 1, 63 (1976) (citing 2 U.S.C. § 434(b)).

¹⁹⁴ *Id.* at 64, 66.

¹⁹⁵ *Id.* at 66. The Court noted three categories of interests that Congress sought to vindicate:

First, disclosure provides the electorate with information [about sources and uses of campaign money] in order to aid the voters in evaluating those who seek federal office. . . . Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . . Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

Id. at 66–68.

¹⁹⁶ *Id.* at 79–82.

policies with which they agree (or disagree) most.¹⁹⁷ In the *Buckley* Court's opinion, the disclosure provisions did not muzzle the ability of donors to espouse their views in the form of monetary contributions. Instead, the provisions were a "minimally restrictive" means of promoting First Amendment values "by opening the basic processes of [the country's] federal election system to public view."¹⁹⁸ The Court seemed to find that, rather than treating citizens as naïve or incapable of informed evaluation of speech, the provisions sought to make available information of political importance,¹⁹⁹ with no indication that disclosure would reduce the vivaciousness of political discourse.

2. *McConnell v. FEC, FEC v. Wisconsin Right to Life, Inc., Citizens United v. FEC, and the Bipartisan Campaign Reform Act*

Following *Buckley*, other courts have agreed that election-based speech disclosure provisions promote open and active discourse.²⁰⁰ The Supreme Court expanded on *Buckley* in 2003 in deciding *McConnell v. FEC*.²⁰¹ The Bipartisan Campaign Reform Act of 2002 (BCRA)²⁰² amended FECA to mandate the disclosure of "electioneering communications." It defined this activity as broadcast, cable, or satellite communications that clearly identified candidates for federal office, and which ran either sixty days before a general election for the office sought or thirty days before a primary election for the same office.²⁰³ Congress had promulgated the revisions in part because it had observed that, post-*Buckley*, parties could circumvent FECA's demands for disclosure of express advocacy contributions by asking donors to give money to interest groups that ran supportive issue advertisements.²⁰⁴ The *McConnell* Court found BCRA's definition of "electioneering communications" acceptable, even as applied

¹⁹⁷ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[Citizens] may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

¹⁹⁸ *Buckley*, 424 U.S. at 82.

¹⁹⁹ See *id.* at 81 (suggesting that disclosure of expenditures that would otherwise go unreported would help voters better define the "constituencies" of political candidates).

²⁰⁰ See, e.g., *FEC v. Furgatch*, 807 F.2d 857, 862 (9th Cir. 1987) ("The vision of a free and open marketplace of ideas is based on the assumption that the people should be exposed to speech on all sides, so that they may freely evaluate and choose from among competing points of view."). The court found that the First Amendment aims to ensure that citizens have available to them all the information necessary to evaluate speech. *Id.* Thus the court observed that disclosure requirements "are indispensable to the proper and effective exercise of First Amendment rights." *Id.*

²⁰¹ 540 U.S. 93 (2003), *overruled in part by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

²⁰² Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified primarily in scattered sections of 2 and 47 U.S.C.).

²⁰³ 2 U.S.C. § 434(f)(3)(A)(i) (2006).

²⁰⁴ See *McConnell*, 540 U.S. at 129 ("[P]olitical parties and candidates used the availability of so-called issue ads to circumvent FECA's limitations, asking donors who contributed their permitted quota of hard money to give money to nonprofit corporations to spend on 'issue' advocacy." (citing *McConnell v. FEC*, 251 F. Supp. 2d 176, 518–19 (D.D.C. 2003))).

to issue advocacy, noting that the express advocacy limitation in *Buckley* stemmed from statutory interpretation, not constitutional orders.²⁰⁵ The Court also rejected the notion that the First Amendment “erects a rigid barrier between express advocacy and so-called issue advocacy,” for while electioneering communications may not explicitly urge their audience to vote for or against a candidate, they still intend to influence the election.²⁰⁶

In addition to the above requirements, BCRA stipulated that persons disbursing more than \$10,000 in a calendar year for the direct costs of producing and airing electioneering communications were to disclose the identities or principal places of business of all parties sharing the costs of the expenditures and the elections to which the communications pertained.²⁰⁷ The Court determined that Congress had important interests in mind when it enacted BCRA, namely, providing the electorate with information and deterring actual or apparent corruption in election-related speech.²⁰⁸ The Court thus appeared to agree that the BCRA disclosure requirements—like the FECA provisions before them—fostered transparent discussion and provided essential details for constituents seeking to make informed political decisions.²⁰⁹ This was especially true because the provisions barred no party from speaking and required no party to reveal the specific contents of electioneering communications.²¹⁰ Consequently, the Court found BCRA’s disclosure requirements constitutional.²¹¹

The Supreme Court’s more recent decisions in *FEC v. Wisconsin Right to Life, Inc.*²¹² and *Citizens United v. FEC*²¹³ have invalidated sections of BCRA, but have not disturbed *McConnell* as it concerns disclosure. Prior to *Wisconsin Right to Life*, BCRA criminalized all organizational sponsorship of electioneering communications.²¹⁴ In asserting that the Constitution does not compel a distinction between issue advocacy and express advocacy, the Court in *McConnell* found the penalty lawful as

²⁰⁵ *Id.* at 190–94.

²⁰⁶ *Id.* at 193.

²⁰⁷ 2 U.S.C. § 434(f)(1), (2)(A)–(B), (D) (2006). The *McConnell* Court referred to these provisions as components of “amended FECA § [304].” *McConnell*, 540 U.S. at 194.

²⁰⁸ *McConnell*, 540 U.S. at 196.

²⁰⁹ *See id.* at 196–97 (restating the District Court’s opinion that the plaintiffs failed to show how vibrant speech can occur when entities can shield themselves from disclosure, and that the plaintiffs’ argument for invalidating BCRA’s disclosure orders failed to reinforce the First Amendment values the plaintiffs argued BCRA burdened, yet ignored the competing First Amendment interests of citizens seeking to make informed political decisions).

²¹⁰ *Id.* at 201 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 241 (D.D.C. 2003)).

²¹¹ *Id.* at 201–02.

²¹² 551 U.S. 449 (2007).

²¹³ 130 S. Ct. 876 (2010).

²¹⁴ Bipartisan Campaign Reform Act of 2002 §§ 203(a), 214(d), 312(a), 2 U.S.C. §§ 437g(d)(1)(A), 441b(a), (b)(2) (2006).

applied to issue advocacy.²¹⁵ Yet it also noted that the interests that justified the regulation of express advocacy (or “campaign speech”)—such as those emphasized in *Buckley*—might not apply to the regulation of issue advocacy (or “genuine issue ads”).²¹⁶

The Court in *Wisconsin Right to Life* used this observation to find that the plaintiff’s advertisements were not functionally equivalent to express advocacy.²¹⁷ The advertisements encouraged viewers to contact Wisconsin’s Senators and tell them to oppose filibusters of judicial nominees, and the plaintiff intended to continue broadcasting them throughout the month of the state’s 2004 primary.²¹⁸ The Court determined that the advertisements would be functionally equivalent to express advocacy, and thus regulable only if “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”²¹⁹ In applying this analysis, the Court concluded that the advertisements were not the functional equivalent of express advocacy; the Court observed that the advertisements displayed the hallmarks of a “genuine issue ad”—in that they focused and took a position on a legislative issue, exhorted the public to do the same, and urged constituent contacts with elected officials—and that they failed to mention a particular election or candidate or take a stance on a candidate’s character or qualifications.²²⁰ The Court hence found BCRA’s criminalization of electioneering communications, in the context of issue advocacy, unconstitutional.²²¹

In *Citizens United*, the plaintiff sought to run television commercials promoting a documentary it had produced about then-Senator Hillary Clinton and to make the film available through video-on-demand.²²² At the time, Senator Clinton was a candidate in the Democratic Party’s 2008 Presidential primary elections, and the film mentioned her by name and contained commentary critical of her.²²³ The plaintiff planned to pay for the commercials, which would run within thirty days of the primaries, but BCRA prohibited corporations from using general treasury funds to

²¹⁵ *McCConnell*, 540 U.S. at 204–05, 209. More recently, though, a Colorado court found that a similar state law only covered communications that contained “‘magic words’” expressly advocating the election or defeat of candidates—such as “‘vote for,’ ‘elect,’ . . . ‘vote against,’ [and] ‘defeat.’” *Colo. Ethics Watch v. Senate Majority Fund, LLC*, Nos. 08CA2689 & 09CA0384, 2010 Colo. App. LEXIS 368, at *1, *6–7, *24, *32–33 (Colo. App. Mar. 18, 2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976)).

²¹⁶ *McCConnell*, 540 U.S. at 206–07 n.88.

²¹⁷ *Wis. Right to Life*, 551 U.S. at 478–79.

²¹⁸ *Id.* at 458–60.

²¹⁹ *Id.* at 469–70.

²²⁰ *Id.* at 470.

²²¹ *See id.* at 481 (holding the aforesaid provision unconstitutional as applied to the plaintiff’s advertisements).

²²² *Citizens United v. FEC*, 130 S. Ct. 876, 887 (2010).

²²³ *Id.*

independently finance electioneering communications expressly advocating the election or defeat of a candidate for office.²²⁴

Observing that speakers from all areas of society use money to fund their speech, and that the First Amendment protects this activity, the Court found no support for the idea that the First Amendment “would permit the suppression of [corporate] political speech.”²²⁵ The Court reasoned that the purpose and effect of the expenditure prohibition was to prevent corporate ideas from reaching the public.²²⁶ It further reasoned that the potential for unrestricted spending to greatly influence elections would not cause citizens “to lose faith in our democracy,” noting that the willingness of corporations to spend money in an attempt to persuade voters “presupposes that the people have the ultimate influence over elected officials.”²²⁷ Hence, in finding that the BCRA provision amounted to a command as to where the electorate could get its information, the Court held it unlawful.²²⁸

Despite these decisions, *McConnell* still stands as good law as it pertains to disclosure under BCRA. Nowhere in *Wisconsin Right to Life* did the Court take issue with BCRA’s disclosure demands, which raise fewer First Amendment concerns than do outright prohibitions on certain forms of advocacy.²²⁹ Had the Court sought to overturn *McConnell*’s ruling that BCRA could mandate disclosure of issue-advocate-sponsored electioneering communications, or had it sought to equate “regulation” with disclosure, it could have explicitly done so. But while this lack of explicit language in *Wisconsin Right to Life* about disclosure may suggest only tacit accord with *McConnell*, the *Citizens United* Court directly agreed that disclosure furthers important governmental interests and fosters informed political discussion.²³⁰

²²⁴ See *id.* at 887–88 (citing Bipartisan Campaign Reform Act of 2002 § 203, 2 U.S.C. § 441b(b)(2) (2006)) (“Corporations and unions are barred from using their general treasury funds for express advocacy or electioneering communications.”).

²²⁵ *Id.* at 905–06.

²²⁶ *Id.* at 907.

²²⁷ *Id.* at 910.

²²⁸ See *id.* at 908, 911 (comparing the effect of the provision to unconstitutional censorship and an impermissible outright ban on corporate political speech during preelection periods).

²²⁹ See *Lunenburg*, *supra* note 88, at 103 (noting that *Wisconsin Right to Life* may have signaled a departure from the notion that disclosure of at least some grassroots advocacy is constitutional, but that the case involved the criminalization of the activity in question instead of simply disclosure, which does not risk burdening First Amendment rights to the same degree); see also Krishnakumar, *supra* note 17, at 534 (“[D]isclosure . . . may be the only method of lobbying regulation permissible under the First Amendment.”); Steven A. Browne, Note, *The Constitutionality of Lobby Reform: Implicating Associational Privacy and the Right To Petition the Government*, 4 WM. & MARY BILL RTS. J. 717, 736–37 (1995) (“Mere registration and reporting requirements do not interfere substantially with any First Amendment rights.”).

²³⁰ See *Citizens United*, 130 S. Ct. at 915–16 (observing that the electorate’s interest in knowing the identities of those speaking about candidates justified BCRA’s disclosure provisions, and that disclosure enables citizens to make informed political decisions and to properly evaluate different speakers and messages).

3. *Application to Grassroots Lobbying Laws and the Control of Astroturfing*

The decisions in *Buckley*, *McConnell*, and *Citizens United*—and, to a lesser extent, *Wisconsin Right to Life*—apply for several reasons to efforts to address Astroturfing through grassroots lobbying legislation. First, the cases show that speech in the framework of elections is a form of political advocacy. The Supreme Court intimated that a campaign contribution or an advertisement indirectly urging citizens to contact their representatives, depending on its source, constitutes issue advocacy. Indeed, both involve conveying certain views to elected officials or encouraging others to do the same. Given the finding in *McConnell* that BCRA’s disclosure requirements could lawfully apply to electioneering communications of both the express and the genuine-issue variety and promote an open exchange of ideas, it would appear that disclosure laws directed at grassroots lobbying outside the elections context are similarly constitutional and—by ensuring citizen exposure to information—would likewise promote the sort of active discourse that the First Amendment seeks to cultivate.²³¹ The above cases would also seem to suggest that grassroots lobbying disclosure laws simply seek to make available information that may be of political significance to curious citizens, but that is not readily accessible in the absence of such requirements.

Additionally, just as statutes like FECA and BCRA strive to deter corruption, or its appearance, in election-based speech, so too does grassroots lobbying legislation aim to dissuade powerful individuals and special interest groups from engaging in artificial grassroots advocacy. The Court has on numerous occasions found that the government has a sufficiently important interest in deterring real or apparent corruption in election-based speech via disclosure laws,²³² and *McConnell* extends the reach of such laws to the electioneering communications of issue advocates. Just as an electorate with knowledge of a candidate’s most generous supporters could better discern special favors given in return for

²³¹ See *Lunenburg & Susman*, *supra* note 151, at 39 (arguing that “[m]andatory disclosure of lobbying pressures” comports with the marketplace of ideas concept in that it ensures the availability of relevant information to the public and to politicians for their consideration in developing public policy).

²³² See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 241, 243–44 (2006) (citing *Buckley v. Valeo*, 424 U.S. 1, 25, 55 (1976)) (noting the *Buckley* Court’s conclusion that the Government’s interest in preventing corruption and its appearance provided ample justification for limits on campaign contributions and finding no basis for overruling *Buckley*); *McConnell v. FEC*, 540 U.S. 93, 196 (2003) (concluding that the governmental interest in deterring corruption, which justified FECA’s disclosure requirements, likewise justified those of BCRA); *Buckley*, 424 U.S. at 67 (arguing that disclosure checks the improper use of money in politics by placing large contributions and expenditures in the public light); *Burroughs v. United States*, 290 U.S. 534, 547–48 (1934) (stating that Congress retains the power to protect presidential elections from corruption and declining to question Congress’s determination that disclosure of political contributions, the names of contributors and other details “would tend to prevent the corrupt use of money to affect elections”).

contributions,²³³ so too could informed citizens and government officials better detect the presence of Astroturfing by those with deep pockets and an issue to advance or defeat.

IV. DEVISING WORKABLE LEGISLATION TO ADDRESS ASTROTURF LOBBYING

Congress has precedent upon which it may, and should, draw in crafting legislation to expose and control Astroturfing. This Part considers how to construct laws which will effectively address artificial grassroots advocacy without significantly encroaching on the ability of ordinary citizens to communicate with elected officials and fellow citizens about possible government action. Part A examines some of the aspects of the Senate's most recent foray into grassroots lobbying legislation, in conjunction with current lobbying laws, finding that, for the most part, the proposed statute was a step in the right direction toward meaningful lobbying reform.²³⁴ Part B considers other features that future grassroots lobbying legislation could account for to strengthen the proposals.

A. *The Lobbying Transparency and Accountability Act: Proposed Grassroots Lobbying Provisions in the Context of Current Lobbying Laws*

1. *Distinction Between Grassroots Advocacy and Astroturf Lobbying*

As explained in Part II, the Lobbying Transparency and Accountability Act of 2007, parts of which became components of the Honest Leadership and Open Government Act of 2007,²³⁵ initially contained a section dedicated to the disclosure of Astroturfing.²³⁶ The section distinguished “grassroots lobbying” from “paid efforts to stimulate grassroots lobbying.” “Grassroots lobbying” referred to voluntary efforts of members of the public to convey their views on a given matter to federal officials or to persuade other citizens to do the same.²³⁷ “Paid efforts to stimulate grassroots lobbying,” on the other hand, referred to paid attempts on behalf of a client to encourage the general public, or certain segments thereof, to contact elected leaders and urge them to take a certain stance on a certain

²³³ *Buckley*, 424 U.S. at 67. The *Buckley* Court noted that “informed public opinion is the most potent of all restraints upon misgovernment.” *Id.* at 67 n.79 (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)).

²³⁴ Part A will only analyze the 2007 Senate proposal; the Shays-Meehan bill mostly contained the same provisions as its Senate counterpart.

²³⁵ Pub. L. No. 110-81, §§ 201–15, 2007 U.S.C.C.A.N. (121 Stat.) 735 (2007) (to be codified in scattered sections of 2 U.S.C.).

²³⁶ S. 1, 110th Cong. § 220 (2007).

²³⁷ *Id.* § 220(a)(2).

issue.²³⁸ The definition of the former thus comported with the general conception of activity that constitutes issue advocacy, while the definition of the latter paralleled the Supreme Court's notion of conduct representing an artificially-stimulated letter campaign in *United States v. Harriss*.²³⁹

To ease potential concerns of citizen activists, the proposal specified that lobbying activities, for purposes of the amended Lobbying Disclosure Act of 1995, would include "paid efforts to stimulate grassroots lobbying" but not "grassroots lobbying."²⁴⁰ Moreover, to protect associations such as nonprofits, the proposal stated that "paid efforts to stimulate grassroots lobbying" would not include internal communications between an entity and its members, employees, or officers.²⁴¹ Thus the Lobbying Transparency and Accountability Act made explicit that its registration, reporting, and disclosure provisions were not to apply to the spontaneous efforts of individual citizen advocates.

2. *Thresholds for Disclosure*

The Act also indicated that it was not to apply to grassroots advocacy in a more indirect manner. Additional provisions took into consideration the restricted size of many grassroots movements and the limited resources upon which advocates may draw, and thus sought to protect advocates that may fall within the "paid efforts" category. For example, one section indicated that paid attempts to stimulate grassroots lobbying did not include instances where lobbyists direct their efforts to encourage citizen contacts of elected officials at fewer than 500 persons.²⁴² Although this provision would have risked exempting smaller cases of Astroturfing, it nevertheless would have addressed larger and more influential campaigns.

The Act further specified that parties that engage in paid efforts to stimulate grassroots lobbying would not need to register with the government or report or disclose the activities toward which their expenditures or income go unless spending or funding exceeds \$25,000 quarterly.²⁴³ The \$25,000 threshold would protect grassroots advocates, since many, if not most, would lack the financial resources to exceed or consistently exceed this amount. It would also identify the sponsors of costly Astroturf campaigns that have succeeded in shaping public

²³⁸ *Id.*

²³⁹ 347 U.S. 612, 620 (1954).

²⁴⁰ S. 1, § 220(a)(1) (internal quotation marks omitted).

²⁴¹ *Id.* § 220(a)(2). *But cf.* *Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n of Am.*, 761 F.2d 509, 512–13 (8th Cir. 1985) (per curiam) (suggesting that the internal communications of an entity directed at its members could fall within the ambit of an "artificially stimulated letter campaign" and thus be subject to lobbying disclosure requirements).

²⁴² S. 1, § 220(a)(2).

²⁴³ *Id.* § 220(a)(2), (b), (c)(1).

opinion—though a lower threshold might suffice.²⁴⁴ Having four reporting periods, which the Honest Leadership and Open Government Act adopted,²⁴⁵ would ensure more frequent reporting and allow for closer observations as to trends in the financing and expenses of supposed grassroots-level campaigns. In addition, the Lobbying Transparency and Accountability Act stated that the \$25,000 threshold would apply specifically to parties whom clients pay to engage in artificial issue advocacy on their behalf, not parties who advocate on their own volition.²⁴⁶

3. *Disclosure of Income, Expenses, and Identities*

Under the Lobbying Transparency and Accountability Act, “lobbying activities,” for purposes of determining whether a lobbyist would be exempt from registration, would not include paid attempts to stimulate grassroots lobbying.²⁴⁷ Considering the requirements of the Act alongside the demands of active lobbying laws, lobbyists who engage in Astroturfing would need to register in the event they receive more than \$2,500 of income or spend more than \$10,000 in connection with direct lobbying activities on behalf of a client.²⁴⁸ The registration would need to include details such as the registrant’s name, address, contact information, principal place of business, and a general description of his or her activities, as well as similar information for the registrant’s clients.²⁴⁹ The registrant would also need to include the name, address, and principal place of business of any entity that contributes over \$5,000 toward his or her lobbying activities in a three-month period and that actively participates in the planning, oversight, or control of these activities.²⁵⁰ Further, the registrant would need to file quarterly reports containing, among other things, the registrant’s and client’s names,²⁵¹ a list of specific

²⁴⁴ Professors Luneburg and Susman, writing in 2006, suggested that a threshold of between \$25,000 and \$50,000 in income earned or amounts spent would account for the most substantial Astroturfing. Luneburg & Susman, *supra* note 151, at 45. Since the federal lobbying laws in effect in 2006 required semiannual instead of quarterly reporting, Lobbying Disclosure Act of 1995 § 5(a), 2 U.S.C. § 1604(a) (2006), their suggestion would imply (potentially) that paid lobbyists receiving or spending more than \$50,000 total in a calendar year could trigger disclosure. The Shays-Meehan proposal, on the other hand, called for disclosure only where income or expenditures surpass \$100,000 quarterly. H.R. 2093, 110th Cong. § 1(b)(2)(A)(iii) (2007). Such a threshold might be too generous, as lobbyists orchestrating Astroturf activities could theoretically raise or spend \$400,000 annually and still evade disclosure under this scheme.

²⁴⁵ Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 201(a)(1)(A), 2007 U.S.C.C.A.N. (121 Stat.) 735, 741 (to be codified at 2 U.S.C. § 1604(a)).

²⁴⁶ S. 1, § 220(a)(2).

²⁴⁷ *Id.* § 220(b)(1) (internal quotation marks omitted).

²⁴⁸ § 201(b)(5)(A)–(B), 2007 U.S.C.C.A.N. (121 Stat.) at 742 (to be codified at 2 U.S.C. § 1603(a)(3)(A)).

²⁴⁹ 2 U.S.C. § 1603(b)(1)–(2).

²⁵⁰ § 207(a)(1)(A)–(B), 2007 U.S.C.C.A.N. (121 Stat.) at 747 (to be codified at 2 U.S.C. §§ 1603(b)(3)(A)–(B)).

²⁵¹ *Id.* § 201(a)(1)(A) (to be codified at 2 U.S.C. § 1604(a)).

issues and bills on which the registrant encouraged citizens to lobby,²⁵² and good faith estimates of income or expenses relating to paid efforts to stimulate grassroots lobbying where such amounts surpass \$25,000.²⁵³ The contents of the registration and reports would thereafter be made publicly available.²⁵⁴

Most individual citizens would probably not meet the disclosure thresholds, and few, if any, would meet the aforementioned direct lobbying income or expenditures floors. The provisions would thus apply primarily to organizations and wealthy individuals, but the information sought would appear to withstand constitutional muster. As *McIntyre v. Ohio Elections Commission*²⁵⁵ suggests, disclosure of financial information would not be especially burdensome to registrants because it would not directly reveal substantial information about their identities.²⁵⁶ Nor would it serve, as *McConnell v. FEC*²⁵⁷ would suggest, as an outright prohibition on the ability to lobby and advocate.²⁵⁸

This is not to say, however, that revelation of the identities of parties amenable to the above provisions is unlawful. Granted, *McIntyre* suggests that divulging the identity of a private citizen acting alone, where the citizen's activity is more or less pure speech, would ultimately provide information that would be of little use in political discourse.²⁵⁹ Yet, without going into much detail, the Court noted that "larger circumstances" may require disclosure of the speaker's identity.²⁶⁰ Applying this rationale to the lobbying context, where a compelling interest exists as to the exposure and control of Astroturfing, Congress appeared to have acted within its powers in requiring disclosure of the identities of parties who orchestrate or support artificial grassroots efforts. *Harriss* intimates that Congress has the right, with regard to lobbying activities, to ask "who is being hired, who is putting up the money, and how much."²⁶¹ *McConnell* furthers this notion and suggests that Congress can require identity disclosure because it will provide the public with meaningful information

²⁵² 2 U.S.C. § 1604(b)(2).

²⁵³ *Id.* § 1604(c); S. 1, 110th Cong. § 220(d)(1) (2007).

²⁵⁴ *See* 2 U.S.C. § 1605(4) (stating that registrations and reports will be "[made] available for public inspection and copying").

²⁵⁵ 514 U.S. 334 (1995).

²⁵⁶ *See id.* at 355 (concluding that disclosure of expenditures and their uses reveals far less information than does disclosure of a name or identity).

²⁵⁷ 540 U.S. 93 (2003).

²⁵⁸ *See id.* at 201 (agreeing with the District Court that BCRA's disclosure requirements did not prevent any persons or groups from speaking).

²⁵⁹ *See McIntyre*, 514 U.S. at 348-49 ("[I]n the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message.").

²⁶⁰ *Id.* at 358 (Ginsburg, J., concurring); *see also* Fitzpatrick & Palenchar, *supra* note 14, at 219 (suggesting that "corporate participation in an alleged grassroots effort to sway public policy" would be a circumstance for which the interest in identity disclosure is greater).

²⁶¹ *United States v. Harriss*, 347 U.S. 612, 625 (1954).

with which to evaluate Astroturf campaigns.

4. Penalties for Noncompliance

The amended Lobbying Disclosure Act increased the penalties for failure to comply with lobbying disclosure requirements. Under the former system, lobbyists who knowingly failed to abide by the federal disclosure provisions would be subject to a fine of upwards of \$50,000.²⁶² The amended statute, however, raises the potential fine to \$200,000 and stipulates that anyone who “knowingly and corruptly” fails to meet disclosure demands will incur a prison sentence of as much as five years.²⁶³ Had the Senate bill become law, the new sanctions for noncompliance would have applied to direct lobbying activities and to paid attempts to stimulate grassroots lobbying.

Criminalizing deliberate failure to comply with disclosure orders, in regard to the proposed grassroots lobbying laws, could pose constitutional problems. Since *FEC v. Wisconsin Right to Life*²⁶⁴ invalidated BCRA’s criminal treatment of issue-advocate-sponsored electioneering communications, the argument follows that similar rules in the context of grassroots lobbying would amount to regulation of issue advocacy, which would not be the least restrictive means of addressing Astroturfing.²⁶⁵ Thus, if the suggested thresholds for disclosure of paid efforts to stimulate grassroots lobbying were to capture true issue advocates, then the criminal sanctions provision for failure to comply with these demands may not be lawful—indeed, *Broadrick v. Oklahoma*²⁶⁶ may suggest that the statute would fail to regulate in a “noncensorial” manner.²⁶⁷ But this would depend on whether the proposed legislation would have treated issue advocates as parties retained to engage in Astroturfing. When combined with the other criteria for disclosure, it appears that the “retained by clients” requirement would have sufficiently distinguished parties who partake in genuine issue advocacy from those who imitate it.²⁶⁸ This point aside, the Supreme Court in *Harriss* upheld FRLA as applied to artificial

²⁶² Lobbying Disclosure Act of 1995 § 7, 2 U.S.C. § 1606 (2006).

²⁶³ Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 211(a), 2007 U.S.C.C.A.N. (121 Stat.) 735, 749 (to be codified at 2 U.S.C. § 1606).

²⁶⁴ 551 U.S. 449 (2007).

²⁶⁵ See Sekulow & Zimmerman, *supra* note 1, at 176 (arguing that *Wisconsin Right to Life* establishes that the regulation of grassroots issue advocacy is not a narrowly-tailored means of attaining a compelling governmental interest).

²⁶⁶ 413 U.S. 601 (1973).

²⁶⁷ *Id.* at 614–15 (“[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.” (citations omitted)).

²⁶⁸ See Press Release, OMB Watch, Opponents of Grassroots Lobbying Disclosure Are Wrong About Impact on Nonprofits (Jan. 12, 2007), <http://www.ombwatch.org/print/3138> (arguing that the disclosure provisions of the Lobbying Transparency and Accountability Act would strictly apply to “lobby firms, advertisers and lobbyists that exceed significant dollar thresholds”).

issue advocacy without voiding the Act's criminal sanctions for failure to comply with disclosure orders.²⁶⁹ Furthermore, the court in *Commission on Independent Colleges & Universities v. New York Temporary State Commission on Regulation of Lobbying*²⁷⁰ a similar statute criminalizing "wilful" failure to disclose certain indirect lobbying activities, finding that the law's definition of "lobbying" did not extend mandatory disclosure to "any remote indirect activity to influence legislation."²⁷¹

B. *Additional Matters for Consideration*

1. *Role of Ethics*

With no federal grassroots lobbying laws in place, the primary responsibility for addressing the influence of special interests in the lobbying process resides with the public relations industry and lobbyists themselves.²⁷² Accomplishment of this task hence depends on the ability of lobbyists and lobbying firms to check the actions of one another. Even though public relations societies and lobbying leagues have incorporated into their codes of ethics provisions discouraging their members from adopting the tactics of issue advocates, such codes do not proscribe Astroturfing, and any adherence to them is voluntary. The lack of power to compel organization members to abstain from artificial grassroots advocacy thus makes achieving compliance virtually impossible.²⁷³

Neither house of Congress gave much consideration to the ethical dimension of grassroots lobbying legislation. A possible addition to the Senate proposal would have been a section outlining the expected conduct of professional lobbyists—which would more or less borrow from present codes of lobbying and public relations ethics—advising lobbyists that they should not resort to Astroturf lobbying in order to further the interests of clients. The Senate could then have specified that failure to abide by these guidelines will result in expulsion from any organized lobbying groups of which violators are members, as well as a ban on joining any such associations. A provision like this would make the lobbying industry's task of identifying and dealing with parties that participate in deceptive activities more efficient, as the industry would now have a statutory backstop for assistance, and would encourage greater self-auditing by

²⁶⁹ The Court specifically stated that, if the criminal prohibition in FRLA were to be found unconstitutional, the statute's civil penalties could still stand, but it did not declare the prohibition unlawful. *United States v. Harriss*, 347 U.S. 612, 627 (1954).

²⁷⁰ 534 F. Supp. 489 (N.D.N.Y. 1982).

²⁷¹ *Id.* at 492, 502.

²⁷² Fitzpatrick & Palenchar, *supra* note 14, at 220.

²⁷³ See RICHARD W. PAINTER, *GETTING THE GOVERNMENT AMERICA DESERVES* 196 (2009) ("[I]t is probable that for lobbyists . . . self-regulation without any government supervision will not work.").

lobbyists whose activities may represent pseudo-grassroots lobbying.²⁷⁴ Such a provision may, however, arouse overbreadth concerns, making it necessary to incorporate into future grassroots lobbying legislation a concise definition of “professional lobbyist.”

A more severe measure than the above suggestion would be criminal punishment. This option would essentially do away with much of the Senate’s proposed disclosure requirements. Yet, since criminalization would operate as a total prohibition on the ability of certain parties to lobby the government, there is a reasonable probability that it would not be constitutional. The Supreme Court has not formally recognized a constitutional right to lobby, but it has suggested that lobbying activities involve, to some degree, freedom of petition.²⁷⁵ And while the Court has not specifically extended this finding to Astroturfing, the right of petition for lobbyists, at present, would most likely cover Astroturfing because such activity nevertheless is a form of lobbying.²⁷⁶ It would seem that a provision prohibiting artificial grassroots advocacy altogether, even if steeped in ethical considerations, would violate the First Amendment as it pertains to lobbyists,²⁷⁷ despite the government’s compelling interest in addressing the practice.

A monetary fine for creating false grassroots campaigns, on the other hand, would not operate as a criminal bar against lobbying activities, and lobbyists would still have the right to lobby directly on behalf of clients. To foster cooperation with the guidelines on the ethical conduct recommended above, the Senate could have devised a system of fines corresponding percentage-wise with the amount a lobbyist spends on or receives for Astroturf lobbying, set at a level sufficient to cause lobbyists to reconsider plans to deceive the public and elected officials. In fact, to

²⁷⁴ Even without a provision like this, lobbyists should scrutinize their activities to ensure that they are not engaging in conduct that may constitute Astroturfing. Fitzpatrick & Palenchar, *supra* note 14, at 222.

²⁷⁵ See *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) (“The right of petition is one of the freedoms protected by the Bill of Rights [T]he Sherman Act does not apply to the activities of the railroads . . . insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws.”). The decision in *Noerr* may stand for the proposition that Congress cannot address Astroturfing by treating it as a felony or misdemeanor, but the case deals with the reach of an antitrust statute, not the scope of a lobbying law. Moreover, *Noerr* does not suggest that *Harriss* was wrong as to Congress’s right to seek disclosure of artificially stimulated letter campaigns.

²⁷⁶ See *Lunenburg & Spitzer*, *supra* note 48, at 57 (finding that an “artificially stimulated letter campaign,” being a “direct” communication with elected officials, is a type of lobbying (quoting *United States v. Harriss*, 347 U.S. 612, 620 (1954))); Thomas, *supra* note 85, at 185 (arguing that lobbying, “even in its most distasteful forms, has always been a popular means of petitioning American government officials,” and that the Founders likely deemed lobbying worthy of First Amendment, right of petition defense).

²⁷⁷ See Thomas, *supra* note 85, at 186–87 (“Any court applying an original intent analysis of the right of petition would be forced to declare . . . statutes [prohibiting lobbying activities] unconstitutional, as violative of the First Amendment right of petition . . .”).

account for resource inequalities, the Senate should have used a similar method in setting the current civil penalty for failure to comply with the revised Lobbying Disclosure Act instead of a fixed quantity of \$200,000.²⁷⁸

2. “Size-of-Contribution-Only” Requirement for Disclosure of Contributors

Another matter involves simplification of the standards for disclosure of contributors to Astroturf campaigns. Had the provisions regarding paid efforts to stimulate grassroots lobbying become law, parties that engage in Astroturfing would have needed to divulge the names and contact information of organizations that, in addition to contributing at least \$5,000 to these causes, “actively [participate] in [their] planning, supervision or control.”²⁷⁹ Yet the Senate included no standard in the proposal, and no standard presently exists, for deducing whether a contributor to Astroturf efforts qualifies as an active participant. One way to address this matter would be to classify as active participants parties whose time and money devoted to an Astroturf campaign exceed a certain proportion of the total time and money they contribute to lobbying efforts in general in a calendar year.²⁸⁰ But difficulties in accurately quantifying the amount of time and money a party spends on each lobbying activity it undertakes would complicate this idea.

A better approach would have been to eliminate the requirement that the contributing party substantially involve itself in formulating, overseeing or managing an Astroturf movement—and thus institute a “size-of-contribution-only” standard, where parties would only need to contribute above a certain quantity to trigger disclosure. The \$5,000 contribution threshold carries with it the implied notion that persons and groups that direct substantial funds toward artificial grassroots activities probably play, or would like to play, an active role in seeing that these activities accomplish their objectives. *McConnell* may support a “size-of-contribution-only” standard for contributors to Astroturf lobbying. While the disclosure mandate that *McConnell* upheld involved electioneering communications and not grassroots lobbying, that provision nevertheless

²⁷⁸ As Professor Krishnakumar observes, a set penalty represents a mere “drop in the bucket” for numerous lobbyists and special interests, and would be “far less effective than . . . fines based on a percentage of lobbying income or lobbying expenditures.” Krishnakumar, *supra* note 17, at 556–57.

²⁷⁹ Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 207(a)(1), 2007 U.S.C.C.A.N. (121 Stat.) 735, 747 (to be codified at 2 U.S.C. § 1603(b)(3)). Despite the absence of the grassroots lobbying provisions in the final version of the Lobbying Transparency and Accountability Act, the \$5,000 contributor-disclosure threshold remained in place and currently applies to lobbying in general. *Id.*

²⁸⁰ Current lobbying laws seem to employ a similar method in defining “lobbyist,” classifying as not a lobbyist an individual “whose lobbying activities constitute less than [twenty] percent of the time engaged in the services provided by such individual to [a given client] over a [three]-month period.” § 201(b)(1), 2007 U.S.C.C.A.N. (121 Stat.) at 742 (to be codified at 2 U.S.C. § 1602(10)).

required disclosure only after contributions exceeded a specified amount; it did not further require that the contributor actively partake in planning or directing the communication.²⁸¹

Congress should also consider several other matters with respect to the disclosure of individuals and organizations that contribute to Astroturfing. First, regardless of whether Congress were to employ a “size-of-contribution-only” standard in drafting grassroots lobbying legislation, it should at least clarify that the \$5,000 threshold refers to total, not individual, contributions—or else certain parties could avoid disclosure by repeatedly contributing less than \$5,000. Further, the statute could require disclosure of each individual contribution once a party exceeds \$5,000 in net donated funds so that citizens may gauge which parties contribute most substantially to Astroturf campaigns.

3. *Extending Accountability to Clients*

Finally, grassroots lobbying legislation should hold clients accountable for Astroturfing, an area on which the Honest Leadership and Open Government Act and the grassroots lobbying proposals placed little to no emphasis. This may be attributable to the fact that, oftentimes, lobbyists have discretion over which forms of lobbying they will employ and the intensity of their lobbying efforts.²⁸² Nevertheless, in many cases individuals and organizations contact lobbyists or public relations firms with the aim of having an Astroturf campaign initiated on their behalf.²⁸³ Such clients authorize lobbyists to engage in activity which the government has a compelling interest in addressing. Because lobbyists compensated to generate Astroturf campaigns act as agents for their clients, grassroots lobbying legislation should contain provisions outlining the consequences of this conduct for those clients who express interest in such campaigns.

The best means of holding clients accountable for the actions of hired lobbyists appears to be through an extension of the suggested fine on lobbyists to clients. For clients who intentionally seek lobbyists for Astroturf campaigns, the same recommended fine—a percentage of total income from or expenses for lobbying services large enough to deter artificial grassroots advocacy—could apply. For clients who do not intend for hired lobbyists to pursue efforts to stimulate grassroots activity, a smaller percentage fine could apply. A sizable fine would discourage clients from offering to pay lobbyists to generate inauthentic issue

²⁸¹ Bipartisan Campaign Reform Act of 2002 § 201(a), 2 U.S.C. § 434(f)(1) (2006).

²⁸² Jonathan S. Masur & Jonathan Remy Nash, *The Institutional Dynamics of Transition Relief*, 85 N.Y.U. L. REV. 391, 413–14 n.81 (2010).

²⁸³ See Krishnakumar, *supra* note 17, at 565 (describing astroturf lobbyists as “hired guns”); Bass, *supra* note 21 (suggesting that Astroturfing amounts to “hired-gun grass-roots lobbying”).

advocacy. Furthermore, it may persuade lobbyists to employ traditional direct lobbying practices rather than grassroots strategies to fulfill the goals of their clients, if they want to retain the business of these entities and prevent possible damage to their reputations and those of their clients. Again, a criminal penalty does not appear workable because it may function as an outright prohibition of lobbying activities (albeit in a more indirect fashion in this case), possibly raising fears about the ability of lobbyists to adequately exercise their right of petition. Similarly, given this concern, it would be inequitable to criminally punish clients but not the parties that perform the actual Astroturfing.

V. CONCLUSION

Astroturf lobbying has grown in popularity over the years and has proven effective at swaying public opinion on matters of political significance. Despite its questionable features, special interest groups, corporations, affluent individuals, and lobbyists will not be quick to abandon the practice anytime soon. Perhaps the most obvious reason for this is congressional failure to implement legislation which will bring artificial grassroots advocacy to light, even though the Supreme Court and lower courts have noted that there is a compelling governmental interest in the exposure and control of this activity. Legislation critics understandably fear that statutory efforts to identify fake grassroots activities will constrain the ability of genuine issue advocates to fully exercise their First Amendment rights. Yet case law on state-level efforts to address Astroturf lobbying, as well as Supreme Court findings in the context of election-based speech, demonstrate that these fears are inflated or unfounded, and that federal legislation would promote diverse and fully-informed public discourse on the issues of the day.

That Congress has introduced grassroots lobbying bills in recent years, even if these proposals have not resulted in binding laws, is encouraging. But whether it will consider potential legislation again in the near future is unclear. If and when it does, it may look to some of the standards from and mandates of the 2007 proposals for guidance. It should also give serious thought to ethical guidelines for lobbyist conduct, percentage-based fines for engagement in Astroturfing, and means of holding parties that request Astroturf campaigns accountable for their decisions. In any event, the continuing prevalence of Astroturfing in modern lobbying shows that the time is right for Congress to not only grapple with the matter again, but to approach it with a greater commitment to meaningful reform.