# Interest Group Mediation: A Process-Based Mechanism for Controlling and Improving Congressional Lobbying Practices

NATHAN WITKIN[1a]

## I. INTRODUCTION

The complexities of modern society increase the amount of necessary government actions and decrease the amount of deliberation that goes into them. The resulting strain on our policymaking system leads government officials to rely on lobbyists and leads lobbyists to fight viciously for influence over government officials. Symptoms of this problem surface with scandals such as the Abramoff[1] affair and trends such as the recent lobbying boom. These instances of corruption and inefficiency in congressional practices have renewed interest in lobbying reform. While lobbyists provide legislatures with benefits such as information and representation of special interests, lobbying often becomes a spending war between conflicting interests that consume the efforts of both legislators and advocacy groups. Currently, the only limitations over lobbying practices are disclosure laws that require lobbyists to reveal their lobbying activities after spending a certain amount influencing officials.

Mediation may offer an adaptable and widely-beneficial mechanism in congressional lobbying practices. If Congress had the power to push opposing interest groups to enter mediation after spending a certain amount in lobbying on an issue, they may be able to preclude costly, indirect fighting by reaching consensus over policy action. Opening and facilitating communication among interests may help to improve legislation and reduce corruption that is associated with interest group pressure. This process would combine existing, established

[1a] J.D. Candidate, 2008, The Ohio State Moritz College of Law. I would like to thank Maggie Lewis, Mike Toman, and Sean Dunn for each taking the time to give me an interview. I would also like to thank my Note Editors, Kate Reichert and Jeff Mead, for their support and for allowing me to pursue this topic. Finally, I want to thank my friends and family

[1] Meredith McGehee, *Lobby Reform as Window Dressing*, 31-SUM ADMIN. & REG. L. NEWS 4, 4 (2006).

lobbying practices with two simple legislative mechanisms to decrease malignant lobbyist activity and improve the quality of public policy. Aside from solving problems, this proposal offers a model for the optimal use of lobbyists in congressional practice and broader implications of increasing the democratic value of government institutions to better fit modern conditions.

Part II of this Note describes the lobbying boom and its negative consequences. Part III presents the basic idea of interest group mediation as the solution to the inefficiency and corruption involved with current lobbying practices. Part IV describes existing governmental structures that use mediation in creating consensual public policy such as negotiated rulemaking and public dispute resolution. Part V explains the mechanisms Congress will need to create in order to implement this process. Finally, Part VI draws broader implications on optimal lobbying practices and on using interest group mediation to improve the democratic value of legislative enactments.

## II. THE PROBLEM: CORRUPTION AND INEFFICIENCY IN CURRENT LOBBYING PRACTICES

### A. *The Lobbying Boom*

The uncontrollable growth of the lobbying industry is the most important recent development in how the federal government is run. These practices "exploded"[2] and the resulting lobbying pressure on U.S. policymakers is at an all-time high.[3] The number of

[2] Ken Silverstein & Jess Taylor, *Profiting through Influence: The Pharmaceutical and Lobbying Industries*, *in* IT'S LEGAL BUT IT AIN'T RIGHT 266 (Nikos Passa & Neva Goodwin eds., 2007) (to elaborate, there are an estimated 40,000-80,000 lobbyists in Washington, D.C., which is "a minimum of seventy-five for every member of Congress.").

[3] Brody Mullins, *U.S. Lobbying Tabs Hits a Record*, WALL ST. J., *available at* http://users2.wsj.com/lmda/do/checkLogin?mg=wsj-users2&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB113988289379073090.html%3Fmod%3Dtodays_us_page_one (stating that "U.S. corporations and interest groups spent a total of $1.16 billion to lobby Washington in the first half of 2005, setting a record").

registered lobbyists in Washington more than doubled between 2000 and 2005,[4] and through these agents, interest groups and corporations[5] spend $2 billion every year influencing Congress.[6] These groups consider indirect influence to be a necessary and even beneficial cost.[7] In fact, many consider lobbying to be a better investment than campaign contributions,[8] and one Washington firm disclosed that its clients can expect to receive $100 in tangible benefits for every dollar spent on lobbying.[9]

The main reason that this industry is so profitable is that government is expanding.[10] A growth in government creates incentives to use lobbyists to seek opportunities as they arise, monitor legislative activity, and protect acquired benefits. First, expansion causes active rent-seeking[11] because the proliferation of newly-created structures and policies are "government goodies" that offer influence and control to corporations and interests. [12] Because there are increased opportunities in doing business with Washington,[13] businesses become more aggressive, creating a feeding frenzy for influence.[14] Next, the increased activity in Congress

---

[4] Jeffrey H. Birnbaum, *The Road to Riches Is Called K Street: Lobbying Firms Hire More, Pay More, Charge More to Influence Government*, WASH. POST, June 22, 2005, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/06/21/AR2005062101632.html.
[5] Mullins, *supra* note 3.
[6] Peter Katel, *Lobbying Boom*, CQ RESEARCHER v. 15-26, July 2005, *available at* http://www.cqpress.com/product/Researcher-Lobbying-Boom-v15-26.html.
[7] Birnbaum, *supra* note 4 (stating that such lobbying expenditures are the "cost of doing business in the federal environment"); *see also* Don Feder, *Lobbying Is a Cost of Doing Business in Washington - report on money spent lobbying members of Congress*, INSIGHT ON THE NEWS, Dec 18, 2000, *available at* http://www.findarticles.com/p/articles/mi_m1571/is_47_16/ai_72275396.
[8] Silverstein & Taylor, *supra* note 2, at 264.
[9] Radnor Inc., http://www.radnor-inc.com/lobbying.htm (last visited Feb. 13, 2007) (Radnor Inc. is a "legislative relations and political consulting firm based in Washington, D.C.").
[10] *See* Birnbaum, *supra* note 4 (attributing the "lobbying boom" initially to "rapid growth in government"); *see also* Don Feder, *In the age of big government, lobbyists meet a pressing need*, JEWISH WORLD REVIEW, *available at* http://www.jewishworldreview.com/cols/feder112000.asp ("[a]n increase in government creates more of a demand for defensive lobbying and PAC contributions").
[11] Kenneth G. Elzinga, *Antitrust Policy and Trade Policy: An Economist's Perspective*, 56 ANTITRUST L.J. 439, (1987) (stating that a "crude definition of rent-seeking is using the power of the state to increase one person's wealth at the expense of another's").
[12] Birnbaum, *supra* note 4.
[13] *Id.* (adding that "Washington has become a profit center").
[14] Silverstein & Taylor, *supra* note 2, at 266.

creates a need for lobbyists to merely monitor the legislature.[15] Though lobbying implies cajoling and bribing, most of the practice currently involves information-gathering[16] to apprise clients of what regulators are doing.[17] Finally, this growth creates an incentive for lobbying as a protectionist measure—benefits that are obtained by one interest are quickly overwhelmed and negated by advantages given to others.[18] Many players in Washington advise continued lobbying protection after obtaining benefits, warning that "[a]s government grows, unless you're right there to limit it, it can intrude in just about any industry."[19] As a result, when they need benefits, protection, or just information, organizations that deal with Congress have no choice but to hire lobbyists.[20] Furthermore, this growth in government may not be a temporary phenomenon, but rather the natural effect of an increasingly complicated society.[21] Therefore, as America continues to become more complex, lobbying pressure may further intensify.

B. *Negative Effects of Unrestricting Lobbying*

Though extensive lobbying practices create benefits for some,[22] this influence-peddling has substantial negative externalities.[23] The permanent presence of lobbyists in Washington that use cultivated relationships with officials to sway public policy is unfair and highly suspect.[24]

---

[15] Birnbaum, *supra* note 4.
[16] EDWARD V. SCHNEIER & BERTRAM GROSS, CONGRESS TODAY 149 (1993) (citing studies that show that business lobbyists "spend more time communicating with their own members thatn they do lobbying," showing that gathering information is a greater focus that is influencing policy).
[17] Birnbaum, *supra* note 4.
[18] Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Prefered Scope of Judicial Review*, 88 NW. U. L. REV. 296, 316 (1993).
[19] Birnbaum, *supra* note 4 (quoting Robert L. Livingston, a Republican former chairman of the House Appropriations Committee, currently president of a lobbying firm).
[20] *Id.* (stating that "whether it is to protect themselves against harm or to win more benefits, executives and insiders say they have no choice but to hire lobbyists").
[21] Congressman Gerald B.H. Solomon & Donald R. Wolfensberger, *The Decline of Deliberative Democracy in the House and Proposals for Reform*, 31 HARV. J. ON LEGIS. 321, 326 (1994) (stating that "[a]s America grew, the problems facing it became more complex, and the House's workload increased.").
[22] See *infra* Part VI.A. (discussing the key benefits of lobbying and how interest group mediation preserved them).
[23] Silverstein & Taylor, *supra* note 2, at 255.
[24] LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES 37-38, 56-57 (1987).

Furthermore, interest groups that attempt to outspend each other on indirect influence are engaging in a risky and inefficient practice.[25]

Though our representative system values direct citizen input,[26] the use of permanent, organized lobbying was not part of the intended design[27] and is a cause of distrust of congressional practices.[28] Because lobbyists often advocate policy choices to public officials with preexisting relationships instead of merit and substance,[29] the results may be unfair[30] and the appearance of undue influence creates cynicism and friction from potential losers.[31] Further exacerbating this problem, the recent "gold rush"[32] to create and protect benefits through lobbying intensifies the corruption between Congressmen and lobbyists. With incentives leading lobbying interests to fight viciously for influence, legislators are tempted with lavish gifts and contributions that lobbyists are willing to provide.[33] Pressures on competing interests, therefore, lead to lobbying pressure on officials, through relationships that are so cozy that they are potentially illegal.[34] Under these close relationships, legislators distribute government benefits

[25] Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159, n.53 (2006) (stating "that in negotiations between legislators and lobbyists, long-term legislation or 'deals' between the parties hold higher value because they reduce transaction costs and risks").
[26] *Id.* at 56 (stating that "[l]obbying is a means for voters to supplement their electoral intentions and to express the intensity of their concerns in a manner not presented for a yes-or-no vote").
[27] SUSSKIND & CRUIKSHANK, *supra* note 24, at 37 (stating that the "founding fathers never anticipated a permanent cadre of lobbyists").
[28] *Id.* at 38 (noting that "[w]hile we promote private citizens expressing concerns to their representatives, we distrust permanent, highly-organized legislative lobbyists of special interests").
[29] *Id.* at 57.
[30] *Id.* at 56.
[31] *Id.* at 57.
[32] Birnbaum, *supra* note 4.
[33] For example, Rep. Randy "Duke" Cunningham (R-Calif.) received a "Rolls-Royce, a yacht and a 19th-century Louis-Philippe commode." Charles R. Babcock & Jonathan Weisman, *Congressman Admits Taking Bribes, Resigns*, WASH. POST, November 29, 2005, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/11/28/AR2005112801827.html. In another example, Ohio Republican Robert W. Ney admitted to receiving "'a stream of things of value,' including the golf trip, from [Jack] Abramoff in exchange for political favors." Norman Ornstein, Argument, *A Watchdog that Didn't Bark: Jack Abramoff's guilty plea has made corrupt lobbying a very big story. Where were the media when coverage might have curbed the sleaze?*, 2006-APR LEGAL AFF. 18, 19 (2006).
[34] Babcock & Weisman, *supra* note 33, at A01.

through unethical "backstage dealings" and earmark appropriations.[35] These practices are growing out of control[36] and distracting lawmakers from their core duties.[37] Thus, the unrestrained lobbying practices in Congress have led to corrupt dealings that distract legislators from acting in the best interests of the country.

Another problem with the lobbying boom is the inefficient practice of defensive lobbying. Defensive lobbying is "lobbying aimed at avoiding the harm that other peoples' lobbying and other rent seeking actions are likely to cause."[38] As explained above, to secure benefits and prevent harm, industries spend millions of dollars[39] and much of their lobbying efforts[40] engaging in protectionist lobbying activities.[41] While lobbying is arguably positive as a source of information for lawmakers[42] and voice for affected interests,[43] money spent on defensive lobbying is "non-economic"[44] because it is spent to counteract lobbying expenditures from

---

[35] Jonathan Weisman & Charles R. Babcock, *K Street's New Ways Spawn More Pork: As Barriers With Lawmakers Fall, 'Earmarks' Grow*, WASH. POST, January 27, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/26/AR2006012602221.html (adding that "[t]hese relationships have coincided with the rapid growth in the volume of home-state pork-barrel projects, commonly called earmarks").
[36] *Id.* (quoting Sen. John McCain).
[37] *Id.* (quoting Scott Lilly, who recently retired as chief Democratic aide on the House Appropriations Committee).
[38] J. PATRICK GUNNING, UNDERSTANDING DEMOCRACY: AN INTRODUCTION TO PUBLIC CHOICE 349 (2003), *available at* http://nomadpress.com/public_choice/ud-16.pdf.
[39] Roger S. Ballentine, President, Green Strategies, Inc., Keynote Address, Building a Brighter Future for Coal by Building a Better Politics of Coal (Aug. 6, 2003), *available at* http://www.greenstrategies.com/vision/CLEAN%20COAL/COAL-GEN%20SPEECH.htm (noting that the industry was "forced to spend millions of dollars on defensive lobbying efforts in Washington and at the state level").
[40] Posting of Ilya Somin to The Volokh Conspiracy, http://volokh.com/posts/1160258785.shtml#148466 (Oct. 7, 2006, 22:02 EST).
[41] One lobbying firm lists such activities as "defeating harmful proposals, amending them to your favor, exempting the industry out of the proposal, [and] preempting efforts." http://www.capitol-solutions.com/cs/services.php#defensive.
[42] Christopher J.S. Termini, Note, *Return on Political Investment: The Puzzle of Ex Ante Investment in Articles 3 and 4 of the U.C.C.*, 92 VA. L. REV. 1023, 1038 (2006) (adding that "[l]obbyists facilitate this information processing by providing pertinent facts, rather than persuasive threats. In this light, lobbying as an information transmission process may be a necessary lubricant to effective lawmaking").
[43] SCHNEIER & GROSS, *supra* note 16, at 291.
[44] Ballentine, *supra* note 39.

opposing interests.[45] When two groups aim their lobbying efforts at undermining each others' influence, the net effect is the same as if neither was spending money on lobbying at all, and the only thing that is created is obstruction of productivity in Washington. Defensive lobbying, therefore, expands the lobbying industry[46] and consumes efforts of legislators and petitioning interests in what is basically a spending race over indirect influence. Though businesses nevertheless engage in defensive lobbying because of the profitable return, this practice is inefficient and problematic.

C. *Current Regulations*

Regulating the corrupt and inefficient aspects of lobbying is not easy because of the constitutional difficulty of regulating political speech,[47] and because it is difficult to regulate these aspects without hindering positive lobbying practices.[48] Because lobbying efforts provide lawmakers with citizens' viewpoints,[49] any attempt to reform these practices implicates the First Amendment right to petition the government.[50] The regulation of lobbying is therefore a balance between the constitutional right to petition with the practical need to fight undue influence from special interests.[51] As a result, lobbying reform uses non-intrusive mechanisms such as registration for lobbyists and public disclosure of their lobbying expenditures.[52]

---

[45] Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1106 (2002) (stating that "the redistributive lobbying by corporations as a class for the most part victimized other corporations").
[46] GUNNING, *supra* note 38 (stating that "[t]he lobbying industry is even larger than otherwise because of what we might call defensive lobbying").
[47] WILLIAM V. LUNEBURG AND THOMAS M. SUSMAN, THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LAW GOVERNING LAWYERS AND LOBBYISTS 11 (2005).
[48] *See infra* Part VI.A. (discussing the positive aspects of lobbying that must be preserved and unhindered by regulation).
[49] SUSSKIND & CRUIKSHANK, *supra* note 24, at 56 (stating that "[l]obbying is a means for voters to supplement their electoral intentions and to express the intensity of their concerns in a manner not presented for a yes-or-no vote").
[50] 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, 717 (1995).
[51] *Id.* (discussing the search for the "most desirable method of balancing individual liberties with the need for lobbying regulation").
[52] WILLIAM V. LUNEBURG AND THOMAS M. SUSMAN, *supra* note 47, at 7.

Disclosure laws are based on the idea that the effect of public opinion would harness the interaction of interest groups and the government.[53] However, the public has not filled this role,[54] leaving disclosure laws ineffective.[55] As a result, the current mechanisms for monitoring and enforcing the nation's lobbying and ethics laws are dismissed as "sheer folly."[56] Recent reform efforts offer little hope because they rely on continued use of these inherently weak methods.[57] Thus, "[d]isclosure is not enough"[58]—the only way to affect current lobbying practices is to change the process.[59]

Because the Constitution protects lobbyist activity and disclosure laws are ineffective, new approaches are necessary in lobbying reform.[60] Currently, lobbying is so crucial to the inner workings of Congress[61] and so critical to the fortunes of businesses and special interests[62] that

---

[53] William P. Fuller, *Congressional Lobbying Disclosure Laws: Much Needed Reforms on the Horizon*, 17 SETON HALL LEGIS. J. 419, 420 (1993).

[54] *Id.* (discussing the use of public oversight of lobbying activities and concluding that "these ideals have never been realized through the use of disclosure laws"); Craig Holman, *Disclosure is Fine, but Genuine Lobbying Reform Must Focus on Behavior*, 31-SUM ADMIN. & REG. L. NEWS 5, 7 (2006). (arguing that "[n]o matter how good the lobbying and ethics law may be -- and not much is expected to emerge from this Congress -- the law doesn't mean a thing if *no one is watching*") (emphasis added).

[55] Fuller, *supra* note 53, at 420 (concluding that "[i]ndeed, these enactments have been largely irrelevant and ineffectual").

[56] Holman, *supra* note 54, at 6.

[57] McGehee, *supra* note 1, at 4 (describing current reform efforts in which "[i]ncreased disclosure of lobbyists' activities is a primary feature of both the House and Senate bills," describing these reforms as "weak legislation," and concluding that "[n]either bill sufficiently addresses the problems with the current system"); James M. Demarco, *Lobbying the Legislature in the Republic: Why Lobby Reform is Unimportant*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 599, 627 (1994) (stating that "[l]aws increasing the amount of disclosure a lobbying group must offer border on the superfluous.").

[58] Holman, *supra* note 54, at 7.

[59] McGehee, *supra* note 1, at 5 (2006) (adding that "[t]he American public will know for sure when meaningful reform has taken place because they will see a change in the process").

[60] Demarco, *supra* note 57, at 627 (stating that "[l]aws restricting the amount of lobbying activities are unconstitutional. Laws increasing the amount of disclosure a lobbying group must offer border on the superfluous.").

[61] SCHNEIER AND GROSS, *supra* note 16, at 292 (stating that Congress relies on the advice and information of others) and at 300-301 (describing the place of lobbyists in the internal structure of Congress).

[62] Holman, *supra* note 54, at 5 (stating that the the "business of lobbying has become so lucrative, and so critical to the fortunes of businesses and special interests, that genuine lobbying reform today must venture into the regulation of the conduct of lobbyists and the ethical behavior of members of Congress and their staff.").

genuine reform must venture beyond the behavior of only lobbyists.[63] In order to preserve the necessary lobbyist functions while regulating corrupt and suspect practices in Congress, the focus is shifting to the interest groups and politicians that interact with the lobbyists.[64] The key would be structuring the interaction among these actors so that, in pursuing their own self-interest, they further public goals.[65] And because of First Amendment implications, the improved process must use a soft mechanism that controls corruption and inefficiency without hindering political speech.

## III. THE SOLUTION: USING MEDIATION AS A PROCESS-BASED ENFORCEMENT MECHANISM

As a forum for facilitated negotiation, mediation has the potential to serve as a soft, process-based mechanism for guiding lobbying activities in productive directions. To add some substance to registration and disclosure laws,[66] Congress can compel interest groups and corporations that spend a certain amount in lobbying efforts to mediate with opposing interests. Mediation may therefore serve as an enforcement mechanism[67] that can limit lobbying practices while facilitating political speech and productive action. This mechanism will empower interest groups, create collaborative public policies, and most importantly, reduce lobbying pressures[68]—

---

[63] *Id.*; *see also* Anita S. Krishnakumar, *Toward a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 517 (2007) (suggesting an "interest-group-based approach to lobbying regulation").

[64] Krishnakumar, *supra* note 63, at 517 (stating that "the key to accomplishing such public-regarding reform is to focus not on lobbyists, as Congress has done for the past two centuries, but on the two entities between which lobbyists mediate: elected officials and interest groups").

[65] *Id.* (stating that "it is most efficient to structure lobbying regulations in a way that makes it likely that, as these interests act to maximize their own best interests, they also will further public goals").

[66] Lauren Eber, *Waiting for Watergate: The Long Road to FEC Reform*, 79 S. CAL. L. REV. 1155, 1158 n.18 (2006) (quoting Senator John McCain, "[w]e can pass all of the Rules changes we want in this body, but they are useless unless we back it up with a tough enforcement mechanism")

[67] Martha Weinstein, *Mediation: Fulfilling the Promise of Democracy*, 74-JAN FLA. B.J. 35, 35 (2000) (stating that mediation creates "structure without bureaucracy").

[68] SUSSKIND & CRUIKSHANK, *supra* note 24, at 11 (stating that, as a supplement to conventional decisionmaking procedures, "negotiated approaches to consensus building . . . have worked effectively in many situations" to facilitate cooperation among various interests) (emphasis in original), and at 55 (describing face-to-face negotiations as a method to getting commitment from stakeholders to remedy the problem of non-commitment from political institutions); *see also* Laura L. Wright, Note, *Trade Promotion Authority: Fast Track for the Twenty-First Century?*, 12 WM. & MARY BILL RTS. J. 979, 996 (2004) (noting that, where the legislature is given the choice of voting for or

once the interest groups reach negotiated consensus on a course of action, there is no need for conflicting lobbying between them. Because the consensus-building only involves the direct interests, this mechanism would create parallel adversarial and cooperative efforts—lobbyists and members of Congress addressing issues under conventional methods while the affected interests attempt negotiated consensus. Thus, the congressional power to compel mediation among competing interests that are tangled in a lobbying war may serve to improve the legislative process.

A. *Current Practice and the Call for Mediation*

Traditional legislative practices are becoming increasingly ineffective in addressing public disputes.[69] Public officials have difficulty in managing the divisive influence of conflicting interests[70] that hinder movement in policymaking.[71] These interest groups make it easier to block policy than to create it[72] because they fragment the process by building a complicated web of shifting alliances.[73] Unresponsive to these interests, elections and traditional political activities do not resolve the disputes.[74] Though the legislative process provides for input from interest groups, it acts on bare majorities and has problems with long term commitment to policies.[75] Because the affected parties do not have direct control in the representative system, any legislative action may provoke stakeholders to use indirect methods

---

against pre-negotiated solutions, this "'all or nothing' methodology . . . reduces the pressure on representatives by special-interest groups."). Thus, facilitating negotiation among interests and then presenting these policies to Congress for approval will reduce lobbying pressures.

[69] Robert Zeinemann, *The Characterization of Public Sector Mediation*, 24 ENVIRONS ENVTL. L. & POL'Y J. 49, 53 (2001); *see also* Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 347-48 (2004-2005).

[70] Zeinemann, *supra* note 69, at 53.

[71] SUSSKIND & CRUIKSHANK, *supra* note 24, at 3 (arguing that, as a result of the adversarial system of policymaking, "[p]ublic officials are unable to take action, even when everyone agrees that something needs to be done").

[72] Telephone Interview with Sean P. Dunn, President, Sean Dunn LLC (March 5, 2007); *see also* SUSSKIND & CRUIKSHANK, *supra* note 24, at 3-8.

[73] Zeinemann, *supra* note 69, at 53.

[74] SUSSKIND & CRUIKSHANK, *supra* note 24, at 9.

[75] *Id.* at 39, 48.

such as lobbying, tough media campaigns, and other means to assert leverage over the process, mainly by blocking governmental action.[76] These interest groups compete with one another to persuade and pressure elected representatives[77] under a winner-takes-all mindset.[78]

Such a system, in promoting tough public posturing[79] and adversarial politics,[80] tends to discourage the affected parties from direct communication and negotiation.[81] Less negotiation creates greater risk for affected interests and involves higher transaction costs in policymaking.[82] Also, the adversarial process often ignores the reality that public disputes are not zero-sum situations[83] and can, therefore, overlook consensual solutions[84] that would better satisfy petitioning groups' interests.[85] These adversarial processes are ripe for the introduction of institutionalized mediation as a tool to facilitate agreement among affected interest groups.[86]

Disputes among conflicting interest groups[87] can be handled under mediation,[88] where affected interests control the process while a neutral third party facilitates communication and

---

[76] *Id.* at 4.
[77] Brett A. Williams, Comment, *Consensual Approaches to Resolving Public Policy Disputes*, 2000 J. DISP. RESOL. 135, 147 (2000).
[78] SUSSKIND & CRUIKSHANK, *supra* note 24, at 70-73.
[79] *Id.* at 137.
[80] Christa Daryl Slaton, *An Overview of the Emerging Political Paradigm: A Web of Transformational Theories*, *in* TRANSFORMATIONAL POLITICS: THEORY, STUDY, AND PRACTICE 13 (Stephen Woolpert et al. eds., 1998) (describing the modern, liberal theory of politics as "adversarial").
[81] PL 101-648, 1990 S 303.
[82] McCaffery & Cohen, *supra* note 25, at n.53 (stating that "in negotiations between legislators and lobbyists, long-term legislation or 'deals' between the parties hold higher value because they reduce transaction costs and risks").
[83] Williams, *supra* note 77, at 136.
[84] KENNETH CLOKE, MEDIATION: REVENGE AND THE MAGIC OF FORGIVENESS 274 (1990) (stating that mediation "allows conflicting parties to reach settlements that are satisfactory to each of them")
[85] Williams, *supra* note 77, at 147 (stating that, because of a focus on adversarial mechanisms, "[o]ften, the political process will not provide adequate solutions to the concerns of many interested individuals").
[86] Aric J. Garza, *Resolving Public Policy Disputes in Texas without Litigation: The Case for Use of Alternative Dispute Resolution by Governmental Entities*, 31 ST. MARY'S L.J. 987, 989 (2000).
[87] Linda L. Putnam, *Formal Negotiations: The Product Side of Organizational Conflict*, *in* CONFLICT AND ORGANIZATIONS: COMMUNICATIVE PROCESSES 184 (Anne Maydan Nicotera ed., 1995) (describing "'intergroup disputes' which 'often arise from coalitions or interest groups that unify under a common set of issues, beliefs, or values' (Putnam and Polle, 1987)").
[88] CLOKE, *supra* note 84, at 275 (stating that "[m]ediation can be used by individuals, groups, institutions or entire societies")

encourages collaborative problem solving.[89] Mediation is a useful tool[90] for handling public conflicts because it is a democratic method of bringing interacting interests to consensus.[91] This method of facilitating direct negotiations is therefore a flexible, rational means for addressing various interests that creates an open, hostile-free environment where parties maintain control and confidentiality.[92] Under this process, "[j]ustice is created rather than dictated."[93]

B. *Benefits of Mediation among Lobbying Interests*

As applied to lobbying activity, mediation may lead to faster results, lower costs, more adaptable policies,[94] and other benefits[95] because it involves direct participation from the affected interest groups.[96] The nature of conflict in legislative action always involves two sides.[97] While mediation would not apply to a dispute where a specific interest works against unilateral government action, lobbyists would contend that there is always an opposing interest to negotiate against.[98] Under the current system, conflicting interests hire lobbyists to influence legislative decisionmaking.[99] As a result, lobbyists filter communication[100] from constituents to legislators, who then create uncommitted, inflexible policies.[101] However, facilitating direct discussions between conflicting interests to create consensual policies would eliminate the

---

[89] Weinstein, *supra* note 67, at 35 (quoting KENNETH CLOKE, MEDIATION: REVENGE AND THE MAGIC OF FORGIVENESS 382 (1994).).
[90] Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 3 (1998) (stating that "mediation is a tool").
[91] CLOKE, *supra* note 84, at 274.
[92] Cassandra G. Mott, Note & Comment, *Macy's Miracle on 34th Street: Employing Mediation to Develop the Reorganization Plan in a Mega-Chapter 11 Case*, 14 OHIO ST. J. ON DISP. RESOL. 193, 207 (1998).
[93] Weinstein, *supra* note 68, at 36.
[94] Zeinemann, *supra* note 69, at 53.
[95] SUSSKIND & CRUIKSHANK, *supra* note 24 (identifying other benefits including fairness, 21-25, efficiency, 26-28, wisdom, 28-30, and stability, 31-33).
[96] Zeinemann, *supra* note 69, at 53.
[97] Interview with Mike Toman, President, Ohio Lobbying Association, in Columbus, Ohio (July 26, 2007).
[98] *Id.*
[99] SCHNEIER AND GROSS, *supra* note 16, at 300-301.
[100] *Id.* at 300.
[101] SUSSKIND & CRUIKSHANK, *supra* note 22, at 48.

filters[102] and avoid unnecessary bureaucracy.[103] This mechanism can, furthermore, free issues from being held "hostage" for unrelated items in political compromises and create coherent, consistent packages of legislative action.[104] Also, because the outcome is not forced on any party, policies produced by consensus are more sustainable and easier to implement, creating efficiency in other branches of the government.[105] Thus, mediation among conflicting interest groups would increase efficiency in handling differences[106] and thereby free up costs and efforts of both members of Congress and competing interest groups.

Another outcome of direct communication among interest groups is more responsive policy.[107] Because it provides affected parties with direct control over proposals, the use of mediation in creating public policy empowers the interest groups.[108] Also, by addressing all interests through direct stakeholder participation,[109] mediation creates policies in consideration of as many different interests as possible.[110] Thus, interests that are dissatisfied with narrow decision-making majorities[111] may eagerly welcome mediation as a process that aims at broad agreement in policymaking.[112]

---

[102] Stephen P. Younger, *Effective Representation of Corporate Clients in Mediation*, 59 ALB. L. REV. 951, 958 (1996) (discussing the benefits of direct communication in that "[m]ediation allows a lawyer to speak directly to the client on the other side without having each communication filtered by another lawyer. This process should be used to its optimal benefit").
[103] DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 3 (1998).
[104] Zeinemann, *supra* note 58, at 54.
[105] Nancy D. Erbe, *Appreciating Mediation's Global Role in Promoting Good Governance*, 11 HARV. NEGOT. L. REV. 355, 372 (2006).
[106] Weinstein, *supra* note 77, at 35 (promoting the use of mediation to resolve "organizational conflicts through consensus allowing a maximum of unity and a minimum loss in energy, time, and money").
[107] SUSSKIND & CRUIKSHANK *supra* note 24, at 13; *see also* Robert Zeinemann, *supra* note 58, at 53-54.
[108] CLOKE, supra note 84, at 274 (stating that mediation "encourages empowerment").
[109] SUSSKIND & CRUIKSHANK *supra* note 24, at 11 (advocating "face-to-face interaction among specially chosen representatives of all 'stakeholding' groups").
[110] Nancy D. Erbe, *Appreciating Mediation's Global Role in Promoting Good Governance*, 11 HARV. NEGOT. L. REV. 355, 415 (2006) (stating that mediation "creates outcomes truly responsive to diverse needs at all levels of society through consensus-building").
[111] Mark A. Graber, *The Law Professor as Populist*, 34 U. RICH. L. REV. 373, 408 (2000); *see also* SUSSKIND & CRUIKSHANK, *supra* note 24, at 39.
[112] Graber, *supra* note 111, at 408.

Some may argue that this direct involvement takes power away from the legislators[113] and takes policymaking away from public scrutiny.[113a] It is true that interest group mediation would involve the drafting of public policy by interest groups in private confidential meetings. However, legislators will retain power over what disputes are mediated and whether the proposals are adopted.[114] Because the confidential meetings involve interest groups and not elected/appointed officials, action under this scheme conforms to the purposes and requirements of sunshine laws by keeping official decisionmaking open and public.[114a] This scheme allows non-official action to remain appropriately private and keeps official action appropriately public.[114b] Thus, legislators would support interest group mediation and would retain the power and the duty to protect the public good in the public eye. In fact, legislators prefer that parties work out the dispute themselves, rather than having to choose one group over another,[115] and almost always accept consensual proposals.[116]

Another criticism may be that forcing issues through consensus-based processes hinders development and promotes the status quo.[117] Because interest group mediation provides the means to hinge lobbying ability on participation in mediations, Congress will be able to force groups to negotiate over an issue. The method for doing this may involve a ceiling or a

---

[113] Zeinemann, *supra* note 69, at 53.

[113a] H.R. REP. NO. 94-880, pt.1, at 2 (1976) (stating that "[t]he basic premise of the Sunshine legislation is that, in the words of Federalist No. 49, 'the people are the only legitimate fountain of power, and it is from them that the constitutional charter . . . is derived.' Government is and should be the servant of the people, and it should be fully accountable to them for the actions which it supposedly takes on their behalf.").

[114] *Id.*

[114a] Kathy Bradley, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You*, 49 FED. COMM. L.J. 473, 476 (1997) (stating that "[t]he Act requires every portion of every meeting of an agency . . . to be open to public observation. A 'meeting' is defined as deliberations which *include the number of individuals required to make decisions on behalf of an agency*, and result in disposition of agency business.") (emphasis added).

[114b] S. REP. NO. 94-354, at 1 (1975) (stating that "government should conduct the public's business in public").

[115] Dunn, *supra* note 72; see also SUSSKIND & CRUIKSHANK, *supra* note 24, at 136.

[116] Zeinemann, *supra* note 69, at 53.

[117] BERNARD S. MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION 63 (2004); *see also* Toman *supra* note 97, and Dunn *supra* note 72.

reduction in lobbying expenditures that takes effect when the interest groups are not participating in good faith, productive negotiations. This dynamic will create incentive for the groups to participate in the mediation while simultaneously controlling lobbying expenditures. However, the reason that this system does not hinder valid action with burdensome consensus-building is that the proposed mechanism is imposed only on the interest groups and can be applied evenly. By consuming only the efforts of the direct interests, the lobbyists remain able to address the issue with traditional methods. Though this procedure constrains lobbying action by imposing spending controls on interests, Congress will be able to apply these limitations to both sides of an issue evenly, meaning that neither side gets an advantage in the adversarial forum while participating in mediation. Thus, by synthesizing a forum for antagonistic political debate with a forum for effective stakeholder negotiation, this process may combine the beneficial qualities of both adversarial and cooperative approaches while mitigating the disadvantages of each.[118] Interest group mediation would therefore promote collaboration and efficiency without disrupting or threatening Congress's proper role in policymaking.

The proposed mediation mechanism therefore creates a rational and coherent process without hindering current legislative practices. Recognizing the potential benefits of cooperation among interests in creating policy, many argue that "federal, state, and local governments must resolve to increase their use of consensual processes when confronted with public disputes."[119]

C. *Mediation in Interest Group and Corporate Lobbying Disputes*

Aside from being more efficient and responsive, mediation has much promise when specifically used with the corporations and political groups that regularly lobby Congress.

[118] Karl E. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39, 77 (1988) (discussing the possibility of "abandoning the notion of a choice between adversarial and cooperative models and developing instead institutional structures that combine the virtues and mitigate the disadvantages of each").
[119] Williams, supra note 77, at 151.

Though groups that represent opposing political values put forth seemingly irreconcilable public positions,[120] they are indeed capable of calmly discussing and clarifying positions on fundamental political disagreements[121] even when they involve divisive issues.[122] Such a process may uncover common ground and alternative solutions which recognize diverse interests while acknowledging and legitimizing areas of disagreement.[123] Therefore, mediation may be an effective method for dealing with interest groups that have a political dispute.

Corporations are also a major player in congressional lobbying[124] because, in competing with each other for market privilege,[125] they become involved in difficult conflicts[126] on a regular basis.[127] In competing in the lobbying arena, these businesses victimize each other[128] through expensive, escalating offensive and defensive lobbying campaigns.[129] Corporations often end up spending much of their lobbying efforts solely on counteracting their competitions' lobbying expenditures.[130] This "collective action problem"[131] could be handled more efficiently through a government-enforced opportunity for concerted action[132] by compelling the parties to negotiate under mediation and thereby jointly roll back defensive lobbying efforts. Besides creating the opportunity for corporations to cooperate in reducing inefficient lobbying practices, mediation

[120] SUSSKIND & CRUIKSHANK, *supra* note 24, at 137.
[121] CLOKE, *supra* note 84, at 274.
[122] Carrie Menkel-Meadow, *Deliberative Democracy and Conflict Resolution: Two Theories and Practices of Participation in the Polity*, 12 NO. 2 DISP. RESOL. MAG. 18 (2006) (stating that consensual public policymaking methods "have also been applied in addressing divisive political issues such as affirmative action and abortion").
[123] *Id.*
[124] Silverstein & Taylor, *supra* note 2, at 266 (describing lobbyists, the "great majority whom work for business interests").
[125] GUNNING, *supra* note 38, at 349 (stating that "[m]any large companies today in the more developed democracies employ resources to seek market privilege. The result is a large lobbying industry").
[126] McEwen, *supra* note 90, at 9 (1998) (stating that, among corporations, "[c]ontentious and competitive corporate cultures could both encourage disputes in the first place and get in the way of their efficient resolution").
[127] *Id.* at 8 (stating that "big businesses regularly find themselves embroiled in conflicts").
[128] Sitkoff, *supra* note 45, at 1125 (2002) (stating that, through "redistributive lobbying," "corporations as a class, for the most part, victimized other corporations").
[129] Silverstein & Taylor, *supra* note 2, at 265 (stating that "[c]orporate lobbyists do not win every battle, but when they lose, it is often because a competing corporate faction bought up even more lobbying firepower").
[130] *See supra* Part II.B. (section on defensive lobbying).
[131] Sitkoff, *supra* note 45, at 1125 (2002).
[132] *Id.* at 1106, 1125.

provides a new perspective that "has the potential to promote effective management that makes resolution faster, less expensive, and of higher quality."[133] Thus, mediation is particularly suited for corporate conflicts that are conducted through legislative lobbying practices.

Because mediation would benefit both political interest groups (by empowering them and causing them to reach out to a greater number of people) and corporations (by facilitating more cooperative business and reducing lobbying costs) this program would be fully acceptable to lobbying interests. As demonstrated above, by pushing competing interests into direct communication under the productive guidance of mediation, Congress can avoid superfluous lobbying battles that consume the attention of legislators and the money of competing interests. Mediation is ideal because it is a soft, process-based mechanism that conducts political speech instead of limiting it and provides "structure without bureaucracy."[134] Thus, compulsory mediation can be a lobbying reform mechanism that would use facilitated negotiations to resolve legislative disputes and serve as a model for coercion-free, community empowering conflict resolution.[135]

Thus, interest group mediation seems to be a logical solution to problems in lobbying reform. The only problem is that, because such structured methods are untested in Congress, this idea is presently partly speculation. However, practices of structured mediation in creating public policy exist in other areas of American government and would serve as guidance for the proposed process.

## IV. EXAMPLES OF CONSENSUS-BASED PUBLIC POLICYMAKING

[133] McEwen, *supra* note 90, at 6 (1998) (adding that, under corporate "management of disputing," "[w]here the management of disputing is weak or inconsistent, costs appear higher, disputes longer, and relationships in greater jeopardy, but where that management is coherent, strong, and oriented to reasonable settlement, costs are likely to be lower, disputes shorter, and relationships more often preserved").
[134] Weinstein, *supra* note 67, at 35.
[135] CLOKE, *supra* note 84, at 276.

While there is no evidence of structured mediation in congressional practices, such consensual methods are not uncommon to public policymaking. The established practices of negotiated administrative rulemaking and public dispute resolution will serve as guiding examples. Because of similarities in the parties involved and the methods used, successful use of mediation by these political institutions in creating public policy would herald similar results in mediation among interest groups as proposed in this Note.

A. *Negotiated Rulemaking*

The use of mediation among interested parties in direct negotiation is already an established policymaking process in the federal government. Under the Negotiated Rulemaking Act,[136] federal administrative agencies convene[137] a committee composed of interested parties[138] that informally negotiate under the guidance of a facilitator[139] in order to reach consensus[140] on the substance of a proposed rule.[141] This mediation mechanism allows agencies to involve affected interests in the process of drafting a rule[142] as a way to supplement normal procedure.[143]

---

[136] Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969.

[137] 5 U.S.C. § 583(a) (2000) (stating that "[a]n agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule").

[138] 5 U.S.C. § 583(b)(2)(b) (stating that the committee can contain "[p]ersons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented"); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 1256-1257 (1997) (stating that "[t]he agency establishes a committee comprised of representatives from regulated firms, trade associations, citizen groups, and other affected organizations, as well as members of the agency staff").

[139] 5 U.S.C. § 586(d)(2) (2000) (stating that the facilitator has the duty to "impartially assist the members of the committee in conducting discussions and negotiations").

[140] 5 USCA § 582(7) (2000) (stating that the committees are to "discuss issues for the purpose of reaching a consensus in the development of a proposed rule").

[141] Williams, *supra* note 77, at 149 (summarizing the process—"representatives of the agency and other interested parties engage in face-to-face negotiations concerning the text of the proposed rule. The parties work toward achieving a consensus on the rule, at which point the APA notice and comment provisions take over").

[142] Scott F. Johnson, *Administrative Agencies: A Comparison of New Hampshire and Federal Agencies' History, Structure and Rulemaking Requirements*, 4 PIERCE L. REV. 435, 446 (2006).

[143] Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1256 (1997) (stating that "[n]egotiated rulemaking supplements the notice-and-comment procedures of the Administrative Procedure Act (APA) with a negotiation process that takes place before an agency issues a proposed regulation").

When used on appropriate disputes,[144] this process promises to increase the acceptability and improve the substance of rules.[145]

Congress created this mechanism to improve the process of administrative rulemaking. Rulemaking is legislative, policymaking power delegated to administrative agencies[146] to implement broad Congressional mandates.[147] In order to ensure that agencies remained in the bounds of the legislature's will in using this power, Congress set up mechanisms to structure agency discretion[148] and the courts apply judicial review over agency decisions.[149] One method of guiding administrative rulemaking is to open the proceedings to public input[150] through "notice-and-comment" procedures[151] and have interested lobbyists monitor agency action.[152] However, listening to both sides of a problem and liberal judicial review are major sources of delay and inefficiency.[153] More importantly, critics argue that notice-and-comment and litigation rights do not create adequate citizen responsiveness.[154] These forms of public participation do

[144] Williams, *supra* note 77, at 149 (stating that "negotiated rulemaking is more appropriate in certain circumstances than in others").
[145] 5 U.S.C. § 581 NOTE, Section 2 Findings (5) (2000).
[146] WILLIAM F. WEST, ADMINISTRATIVE RULEMAKING: POLITICS AND PROCESSES 36 (1985).
[147] 5 U.S.C. § 551(4) (2000) (defining a rule as an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy").
[148] WEST, *supra* note 146, at 3-4, 7.
[149] David H. Becker, *Changing Direction in Administrative Agency Rulemaking: "Reasoned Analysis," the Roadless Rule Repeal, and the 2006 National Park Service Management Policies*, 30-FALL ENVIRONS ENVTL. L. & POL'Y J. 65, 67 (2006) (stating that "courts have continued to engage in, and commentators to advocate, meaningful judicial review of agency changes of direction in rulemaking").
[150] Robin McCall, Note, *Dogs vs. Birds: Negotiated Rulemaking at Fort Funston*, 13 HASTINGS W.-N.W. J. ENV. L. & POL'Y 187 (2007) (explaining that "when an agency makes a rule, it accepts public input and then makes the rule under its own discretion").
[151] 5 U.S.C. § 553 (2000); *see also* WEST, *supra* note 146, at 78.
[152] *See* David Epstein & Sharyn O'Halloran, *A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy*, 11 J.L. ECON. & ORG. 227 (1995).
[153] SUSSKIND & CRUIKSHANK, *supra* note 24, at 35-37.
[154] Adam N. Bram, Note & Comment, *Public Participation Provisions Need Not Contribute to Environmental Injustice*, 5 TEMP. POL. & CIV. RTS. L. REV. 145, 159 (1996) (asserting that processes "that provide little more than notice, opportunities for comment, or a right to litigate frequently fail to accomplish the goals of citizen involvement").

not usually involve real consensus-building[155] and the interaction rarely goes beyond one-way transfers of information.[156] As a result, most of the resulting rules must undergo judicial review because of challenges by unsatisfied groups.[157]

Noting the inherent defects of adversarial procedures[158] and the widespread use of consensus-based mechanisms in the private sector and the courts,[159] Congress supplemented conventional rulemaking with opportunity for more proactive stakeholder involvement[160] under structured, nonadversarial structures.[161] This mechanism therefore promotes[162] the established[163] practice of involving citizens in drafting proposals.[164] Under this structure, the stakeholders create the proposed rule through negotiation and the officials retain the ultimate decision on whether to implement it.[165] Because mediation is a proven method of avoiding litigation[166] and effectively addressing multiple concerns,[167] its use in negotiated rulemaking is a logical solution

---

[155] Robin McCall, *supra* note 150, at 203 (describing the "hands off" approach taken in rulemaking where "[t]he agency does not sit down and hammer out a consensus with members of the public, regardless of the importance of their interests" and where the agency only needs to aim for reasonableness).
[156] Adam N. Bram, *supra* note 154, at 164 (asserting that "the information often passes only one way. The agency is either giving information or taking information. Seldom does the information exchange as dialogue").
[157] *Id.* at 3 (stating that "[m]ost regulations issued by agencies such as the EPA lead to adjudication from competing concerns as being too tough or not tough enough").
[158] 5 U.S.C. § 581 NOTE, Section 2 Findings (3) (2000) (stating that "[a]dversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and co-operation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties").
[159] Charles Pou, Jr., *Federal ADR and Negotiated Rulemaking Acts Receive Permanent Reauthorization*, 22-WTR ADMIN. & REG. L. NEWS 4, 4 (1997).
[160] Bram, *supra* note 154, at 163.
[161] Williams, *supra* note 77, at 149.
[162] 5 U.S.C. § 581 NOTE, Section 2 Findings (6) (stating of the emergence of this method that "[t]he process has not been widely used by other agencies, however, in part because such agencies are unfamiliar with the process or uncertain as to the authority for such rulemaking").
[163] *Id.* (stating that, by the time the Negotiated Rulemaking Act came into force, "[s]everal agencies [had] successfully used negotiated rulemaking").
[164] Johnson, *supra* note 142, at 446 (describing the established practice of "informal rulemaking" wherein "an agency generally drafts a proposed regulation internally based on staff recommendations, or recommendations of committees or groups formed to research an issue within the jurisdiction of the agency").
[165] McCall, *supra* note 150, at 203.
[166] Richard M. Cartier, *Mediating Local Intergovernmental Disputes—Reflections on the Process*, 13 SANJALR 1, 2 (2003) (stating that "A successful MEDIATION can help parties avoid the acrimony associated with litigation").
[167] Mott, *supra* note 92, at 205.

to the inefficiencies that face the rulemaking process.[168] Thus, mediation among interested parties is applied to public policy decisions under negotiated rulemaking in order to increase the efficiency and effectiveness of agency decisionmaking.

The benefits of negotiated rulemaking are manifold. First, the regulations developed by this process are of a higher quality than those developed by strictly adversarial means. When employed in the appropriate disputes, negotiated rulemaking can bring polarized interests to a consensus over policy issues[169] and therefore often creates more acceptable policies.[170] This process presents a "golden opportunity" for interest groups to have direct control over public policy.[171] Also, negotiated rulemaking expands the potential for creativity in creating widely-acceptable regulations.[172] Finally, negotiated rulemaking also has the potential to make the rulemaking process more efficient by smoothing out difficulties and preventing unnecessary adjudication.[173] So far, many potential participants continue to have an ingrained adversarial mindset[174] and exhibit discomfort with cooperative processes,[175] limiting the application of this beneficial process.[176] Despite some initial reservation, Congress now fully accepts these

[168] From notice-and-comment procedures and liberal judicial review that overwhelm the system. *See* WEST, *supra* note 146, at 51 (stating that "notice-and-comment provisions…guarantee that interested parties will have the right to submit written or oral comments on the merits of proposed rules."), and at 48 (explaining that that "affected persons could hold officials accountable through challenge by judicial review").
[169] Williams, *supra* note 77, at 150.
[170] *Id.* at 149.
[171] McCall, *supra* note 150, at 204.
[172] Williams, *supra* note 77, at 151 (stating that "[b]y increasing the use of consensual processes to resolve public disputes, 'parties can find solutions to problems that cannot be addressed by judicial remedies' and 'can achieve results . . . that would be difficult or impossible to obtain through adjudicatory processes'").
[173] Johnson, *supra* note 142, at 447 (stating that "[t]he rationale behind negotiated rulemaking is that the negotiation process will make the remaining parts of the notice and comment process run smoother, and there will be less objection to the proposed rule because the key stakeholders affected by the rule helped draft it").
[174] Pou, *supra* note 159, at 14 (noting that "in many enforcement agencies and in others…adversarial relations with regulated parties, contractors, grant recipients, advocacy groups, or even employee unions are still ingrained").
[175] *Id.* (adding that "[m]any steps remain to be taken if these consensus methods of decisionmaking are to gain the kind of broad-based acceptance and use throughout the government that they merit").
[176] Williams, *supra* note 77, at 150 (stating that "the overall use of these procedures has been somewhat limited").

consensual methods as beneficial tools in policymaking,[177] and rulemakers use negotiated rulemaking in creating many successful policies.[178] Thus, while mediation is no panacea,[179] "in appropriate circumstances, consensual settlement processes may resolve public disputes with greater effectiveness than traditional judicial and administrative adjudication."[180]

The success experienced by the administrative branch with negotiated rulemaking predicts similar results in the legislative branch with interest group mediation. Interest groups must lobby executive agencies to make sure that bills that they pushed through the legislature are correctly implemented. [181] As a result, the stakeholders that create regulations in negotiated rulemaking are largely the same interest groups that lobby Congress.[182] The participants of this proposed process are therefore familiar with, or at least aware of, consensual policymaking. The parallel between the rulemaking and legislation processes[183] and the use of the same groups that comprise the mediated committees under negotiated rulemaking, [184] lead to the logical inference that a similar process to negotiated rulemaking will work in Congress. Thus, negotiated rulemaking serves as an example of the success of mediation among interest groups in creating policy and promises similar results for congressional lobbying.

B. *Public Dispute Resolution*

---

[177] McCall, *supra* note 150, at 203 (stating that "Congress prefers agencies to use reg-neg when it 'enhances the informal rulemaking process'); *see also* Pou, *supra* note 159, at 4 (noting that "Congress, along with many federal agencies, have moved beyond an initial skepticism and concern over potential abuses to a point where they have begun to view ADR methods as safe and effective").

[178] See case studies summarized in McCall, *supra* note 150, at 204-206 (2007); *see also* Williams, *supra* note 77, at 149 (citing, for example, that "[t]he EPA has used [these consensual methods] in rulemaking under the Clean Air Act, the Federal Insecticide, Fungicide, and Rodenticide Act, and various other environmental regulations to great success").

[179] Williams, *supra* note 77, at 150 (quoting something "While clearly not a panacea, environmental mediation should play an increasingly important role in resolving . . . environmental disputes").

[180] *Id.*

[181] BRUCE C. WOLPE & BERTRAM J. LEVINE, LOBBYING CONGRESS: HOW THE SYSTEM WORKS 69 (2d ed. 1996); *see also* Epstein & O'Halloran, *supra* note 152.

[182] Williams, *supra* note 77, at 148 (stating that "interest groups that lobbied hard during the bill-drafting stage are very likely to remain involved in the administrative rulemaking process.").

[183] WEST, *supra* note 146, at 36.

[184] Coglianese, *supra* note 143, at 1257.

State and local legislatures commonly use mediation through the general practice of public dispute resolution. Public disputes can be complicated matters that affect a variety of interests[185] beyond legal rights[186] and that require high levels of technical expertise.[187] Affected interests bring these battles to legislatures because litigation is an ineffective forum for complicated, interest-focused disputes.[188] Faced with such a problem, the legislature may feel in over its head and decide to abandon traditional deliberative filters for an opportunity to structure cooperation among the petitioning interests.[189] Though a variety of collaborative mechanisms are available,[190] public dispute resolution often involves mediated negotiation among stakeholder representatives to create agreements that the government then adopts as public policy.[191]

Under this process, a neutral mediator gathers affected parties and facilitates consensus on public policy.[192] The mediator is crucial because, without their assistance, the parties would not be able to work out an agreement.[193] Typically, public disputes divide the community, halt communication, and lead to distorted perceptions.[194] However, by enlisting the active involvement and support of local interests, this process creates policies that fully satisfy the community and elected officials.[195] Common disputes that are handled under public dispute

[185] Center for the Resolution of Disputes, http://www.cfrdmediation.com/public-policy.aspx (last visited Feb. 14, 2007) (stating that "Public Policy disputes can involve many parties with differing points of view"); *see also* SUSAN L. CARPENTER & W.J.D. KENNEDY, MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE TO HANDLING CONFLICT AND REACHING AGREEMENTS 5 (1988).
[186] Williams, *supra* note 77, at 136 (stating that these issues "involve much more than legal rights").
[187] CARPENTER & KENNEDY, *supra* note 185, at 5-6.
[188] Williams, *supra* note 77, at 135 (stating that a "comparison of the typical public policy disputes within the general private civil suit reveals the shortcomings of litigation as a tool for resolving public conflict.").
[189] *See Case Study: Legislature Uses Mediation to Craft Illinois Telecommunications Act*, Dispute Resolution Magazine 1 (Winter 2002), *available at* http://www.policyconsensus.org/casestudies/docs/IL_telecom.pdf.
[190] *See* case studies cited *infra* Part IV.B.
[191] Carri Hulet, *A Glossary of Deliberative Democracy Terms*, 12 NO. 2 DISP. RESOL. MAG. 27, 27 (2006).
[192] Center for the Resolution of Disputes, *supra* note 185.
[193] SUSSKIND & CRUIKSHANK, *supra* note 24, at 137-38.
[194] CARPENTER & KENNEDY, *supra* note 185, at 12-15.
[195] Stephen R. Marsh, *Public Policy Mediation* (2000), *available at* http://adrr.com/adr3/public.htm.

resolution include environmental issues,[196] zoning,[197] public nuisances,[198] and other conflicts that involve the allocation of resources[199] and complex, multilateral negotiations.[200]

Though mediated, face-to-face negotiations among interest groups are untested in Congress, various state legislature have used these practices to notable success. The three examples below illustrate how and why mediation leads to improved results in public policymaking. The first example concerns public policy over the telecommunications industry in Illinois.[201] In 2001, the Illinois General Assembly faced the task of crafting a new telecommunications policy that addressed competing interests in the field.[202] With input coming in from corporations, citizens, and experts, the House Speaker decided to depart from the traditional committee model and use a third-party neutral to mediate a multiparty joint session of stakeholders.[203] This neutral addressed this conflict with "traditional mediation, alternating between joint sessions and private caucuses" in order to facilitate discussion between the legal decisionmakers and the technical experts and support them as they jointly drafted the legislation.[204] The product of these efforts was a bill that creatively addressed various interests and received overwhelming support in passing both houses. In retrospect, "months of mediation and negotiation helped to expedite the legislative process and produce a fair, well-balanced bill that sets the foundation for a new telecommunication policy throughout Illinois."[205] Thus,

[196] Zeinemann, *supra* note 69, at 54-59.
[197] Center for the Resolution of Disputes, *supra* note 185 (citing examples including an "agreement on a comprehensive revision of the Hamilton County, Ohio Zoning Code" and an "agreement on revisions to the hospital zoning restrictions").
[198] *Id.* (citing, for example, an "agreement on regulations to govern the disposal of construction and demolition debris in Ohio").
[199] SUSSKIND & CRUIKSHANK, *supra* note 24, at 17.
[200] Erbe, *supra* note 110, at 379 (stating that "[m]ediation's facilitated consensus-building benefits more complex conflicts involving diverse stakeholders and long-term relationships").
[201] *Case Study: Legislature Uses Mediation to Craft Illinois Telecommunications Act*, *supra* note 174, at 1.
[202] *Id.*
[203] *Id.*
[204] *Id.* at 2.
[205] *Id.*

mediation among affected interests proved to be an effective, efficient process in addressing this public dispute.

The second example involves a zoning dispute between the city of Draper, Utah and the Metropolitan Water District of Salt Lake City over the creation of a water treatment facility.[206] After the parties reached deadlock on acceptable use of the land, the dissatisfied side sought an exemption from the zoning requirements in the state legislature.[207] This action brought protective action from parties satisfied with the status quo, leading the legislature to become the battleground for this issue. The result was a "lobbying blitz" from the affected parties and hours of time spent on floor debates as the bill crawled through traditional legislative processes.[208] Throughout this conflict, the disputants became emotional and frustrated, while the legislators "felt trapped in a fight that all acknowledged they were poorly equipped to address."[209]

In response to this dire situation, House Committee Chair Kory Holdaway suggested that the problem be addressed by a working group composed of representatives of various affected groups that would seek to bring conflicting interests to voluntary consensus.[210] Under this collaborative process, the discussion evolved to a focus on the broader question of how best to address the conflict.[211] The groups identified issues, explored options, revised approaches, and reached consensus with ideas from all participants.[212] Though the conflict was complicated and involved many affected interests, the working group was able to generate consensus among the interests that was translated into an effective and wide-reaching policy.[213]

---

[206] *Case Study: Utah Legislature Builds Consensus*, Policy Consensus E-News 1 (April, 2004) *available at* http://www.policyconsensus.org/casestudies/docs/UT_Legislature.pdf.
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.* at 1-2.
[211] *Id.* at 2.
[212] *Case Study: Utah Legislature Builds Consensus*, *supra* note 191, at 2.
[213] *Id.* at 3.

Another example involved a bipartisan, bicameral task force created to address the impending boom in the need for long term care for seniors.[214] In order to organize stakeholder participation within this structure, the task force retained a neutral third party with expertise in health care who facilitated discussions and created an essential link between task force members and the stakeholder group.[215] The task force heard from experts, members of the public, and organized focus groups and then effectively conveyed the information to the legislature as a whole.[216] Through the collaborative participation of stakeholders, the legislature was able to create an innovative, effective policy. In commenting on her experiences as a member of the task force, Minnesota State Senator Shelia Kiscaden, claimed that they "had a great deal of success using work groups, joint task forces, and facilitated discussions to arrive at decisions on tough issues" and that "these approaches have enabled us to find common ground, and at the same time, streamline our decision-making process."[217]

C. *How Consensus-Based Approaches Arise*

The above mechanisms reveal conclusions as to why governments adopt consensus-based approaches to policymaking. Negotiated rulemaking arose out of the inefficiency of giving weight to individual interests through open, multiparty participation and liberal judicial review. Public dispute resolution is a natural development in state legislatures that are overburdened with petitioning interests and technical information. The similarity between these programs is that they both arise from the stresses of dealing with diverse interests. In order to address individual concerns in complicated disputes, these new processes abandon traditional, adversarial approaches in favor of innovative, consensual methods. The lobbying crisis is a parallel situation

[214] *Case Study: Minnesota Legislature Collaborates to Reform Long Term Care* 1, *available at* http://www.policyconsensus.org/casestudies/docs/MN_Healthcare.pdf.
[215] *Id.* at 1-2.
[216] *Id.* at 2.
[217] *Id.*

of government structures being overburdened with petitioning interests and facing the negative consequences of this pressure. The lobbying issue, therefore, is reason and incentive for Congress to adopt greater use of consensus-based mechanisms.

## V. POLICY RECOMMENDATIONS

While existing practices of public policy mediation[218] and literature on conducting such processes[219] provide guidance for interest group mediation, the policy must be tailored to fit congressional structures. In order to implement the beneficial process described above, Congress must decide how it will bring parties to the negotiating table and then adopt the resulting agreements.

### A. *Initiating the Mediation*

There are two possible methods for initiating interest group mediation that are not mutually exclusive. First, the parties, on their own accord, may initiate the process under a jointly hired, private mediator. Second, Congress may organize the process and compel interest groups to participate in lieu of lobbying.

Interest groups that are competing over a policy may realize that their adversarial tactics are costly and inefficient,[220] especially in the case of mutual defensive lobbying,[221] and that cooperation and self-determination may better serve their interests.[222] These interests may want to spend less on lobbying, which cannot guarantee beneficial outcomes,[223] and hire a private lobbyist-mediator that is familiar in Congressional practices, experienced in policy dispute

---

[218] *See supra* Part IV.
[219] *See* SUSSKIND & CRUIKSHANK, *supra* note 24.
[220] CARPENTER & KENNEDY, *supra* note 185, at 26.
[221] *See supra* Part II.B.
[222] James R. Coben, *Gollum Meet Sméagol: A Schizophrenic Rumination on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65, 76 (2004) (noting that nothing "could honor the free market more efficiently than corporate players freeing themselves of legislative and court mandates" by reaching private agreement).
[223] SCHNEIER & GROSS, *supra* note 16, at 301 (stating that "[w]hether or not they have the political clout to pass a bill," the lobbyist can guarantee information. Thus, they can guarantee information but not outcome).

resolution, and neutral as to the issue at hand.[224] If the parties reconcile their differing interests and reach agreement on a proposal, Congress will likely adopt it and further conflicting lobbying will be precluded.[225] Thus, the parties may act on their own initiative to save costs and create deals with the guidance of a mediator. However, because parties to these disputes are conditioned to think adversarially[226] and feel the need to maintain tough, non-cooperative public postures,[227] this voluntary cooperation is currently unlikely.[228] The remainder of this Note will therefore expand on the second option—mandatory mediation among the interest groups—and the procedures necessary to effect this structure.

Congress may effectively compel lobbying interests into mediation without hindering lobbyist activity. Once a group spends a certain amount on lobbying, as revealed under disclosure laws,[229] it may be compelled to mediate with opposing interests under congressional discretion.[230] Congress may effectively convene multiparty mediations under the power of the House Rules Committee.[231] Doing so requires identifying key players, making sure the power relationships are adequately balanced, designating a legitimate spokesperson for each group, setting deadlines, and framing the dispute.[232] The participants in these discussions should be the

[224] SUSSKIND & CRUIKSHANK, *supra* note 24, at 139.
[225] Zeinemann, *supra* note 69, at 53 (stating that "decision-makers almost always accept consensus accords"); *see also* Dunn, *supra* note 72 (noting that legislatures prefer it when parties work out the problems themselves).
[226] CARPENTER & KENNEDY, *supra* note 185, at 26.
[227] SUSSKIND & CRUIKSHANK, *supra* note 24, at 137, 140.
[228] *Id.* at 138 (asserting that "the overriding reality is that these parties are unlikely to resolve their dispute without help").
[229] LUNEBURG & SUSMAN, *supra* note 47, at 7.
[230] In common mandatory mediation programs, the "legislatures authorized courts to mandate mediation and the courts are exercising that power" as applied to legal disputes. Lisa B. Bingham, *Why Suppose? Let's Find Out: A Pulbic Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 104 (2002). However, here the legislature is authorizing itself the power to mandate mediation of legislative disputes.
[231] Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 220 (1984) (describing the power of the House Rules Committee as an "array of agenda control devices"); give a source on why not work in Senate
[232] SUSSKIND & CRUIKSHANK, *supra* note 24, at 189-192

leaders[233] or direct representatives of the affected groups and not the lobbyists.[234] The stakeholders are more knowledgeable as to their particular interests[235] and lobbyists would object to a mandatory procedure that would disrupt their normal activities.[236] The mediator should be qualified, [237] familiar with congressional practices,[238] neutral as to the dispute,[239] and may be chosen by the parties.[240] Thus, interest group mediation would require a new congressional subcommittee on mediation under the House Rules Committee that would chose appropriate disputes for mediation[241] and convene representatives of all affected interests[242] for negotiations under the guidance of a competent, respected mediator.

Congress would apply this duty to mediate under a statute or a congressional rule that subjects any interest group or corporation that spends more than a certain amount to possible mediation under the subcommittee's discretion. [243] This mechanism would have the advantage of a contractual mediation clause by creating a degree of consent in conditioning the mechanism on voluntary lobbying activity. Also, in directing attention to disputes that are serious enough to

---

[233] WOLPE & LEVINE, *supra* note 181, at 33 (advocating participation of .senior executive of businesses because they are "knowledgeable about their business, influential in industry, and respected in community").
[234] SUSSKIND & CRUIKSHANK, *supra* note 24, at 11 (advocating "face-to-face interaction among specially chosen representatives of all 'stakeholding' groups").
[235] WOLPE & LEVINE, *supra* note 181, at 32 (advising lobbyists to involve their clients in the actual process because "no one understands the client's business better than the client").
[236] Dunn, *supra* note 72 (disagreeing with the idea of mediation as the only avenue, arguing that this would obstruct lobbyist activities in a way that would work to preserve the status quo).
[237] Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 881 (2002) (stating that "mediators must have qualifications necessary to satisfy the reasonable expectations of the parties").
[238] SUSSKIND & CRUIKSHANK, *supra* note 24, at 150 (stating that the mediators chosen "usually need to be quite conversant with the ways in which the public sector operates").
[239] *Id.* at 138-39.
[240] *Id.* at 197.
[241] Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 OHIO ST. J. ON DISP. RESOL. 287, 288 (1992) (asserting that "[l]egislatures, courts and parties mandating mediation for certain controversies must confront two questions: first, whether the controversy is suitable for mediation; and second, whether it is appropriate to mandate mediation of the controversy"). For an example of typical criteria, *see* Zeinemann, supra note 69, at 61.
[242] Bram, *supra* note 154, at 159 (1996) (stating, about public participation provisions that "Congress must enact statutory provisions that spare rhetoric and actually guarantee all affected citizens opportunities for meaningful public participation").
[243] Nelle, *supra* note 241, at 300 (noting that there are "[a]t least three different ways to establish a duty to mediate exist: by a general rule (statute or court rule), by individual referral (by a court), or by a contractual mediation clause").

enter the lobbying-expenditure threshold, the program would be tailored to address situations where it would be most beneficial.[244]

In light of the irrational barriers to consensual negotiation, this coercive mechanism may be helpful in initiating mediation of legislative disputes.[245] First, mandatory mediation is the best way to overcome the non-cooperative public posturing[246] that commonly prevents cooperation among interest groups.[247] In fact, this procedure helps the parties by allowing them to maintain a tough appearance to their constituents while fully participating in cooperative discussions.[248] Compelling mediation is also an effective way to address non-communication among parties.[249] Because the affected interests often do not communicate with opposing interest groups[250] or opposing Congressmen,[251] mandatory mediation may be necessary in replacing indirect communication through lobbyists[252] with more beneficial direct communication.[253] Mandatory mediation may also overcome the "agency problem" of lobbyists potentially opposing cooperation as a threat to their highly lucrative market on indirect influence.[254] Just as lawyers may oppose time-efficient mediation practices as a threat to their monetary interests, so may

[244] *Id.* at 301 ("can adjust the duty to the circumstances of the case…The screening can at the same time be used to screen out cases in which even voluntary mediation may be undesirable").
[245] *Id.* at 294 (asserting that "[m]andating mediation is justified only if there are barriers preventing the use of mediation in cases that would benefit from it, and if mandating mediation is the least intrusive measure of overcoming these barriers").
[246] *Id.* at 296 (stating that "mandatory mediation may be the best way to break the impasse" in this situation)
[247] SUSSKIND & CRUIKSHANK, *supra* note 24, at 137.
[248] *Id.* at 140.
[249] Nelle, *supra* note 241, at 295 (stating that "[d]eficient communication can be both a substantive and a procedural obstacle to agreement" and that "a duty to mediate can overcome this obstacle").
[250] CARPENTER & KENNEDY, *supra* note 185, at 13.
[251] WOLPE & LEVINE, *supra* note 181, at 44.
[252] SCHNEIER & GROSS, *supra* note 16, at 300.
[253] Bram, *supra* note 154 (asserting that "Congress' move…toward proactive involvement techniques is a positive sign").
[254] *See supra* Part II.

lobbyists oppose interest group mediation.[255] Thus, compulsory mediation can serve as an effective tool for bringing parties together.

Though potentially coercive in initiating the mediation, this mechanism is not problematic to the stakeholders, lobbyists, or the system. The stakeholders may be compelled to enter the mediation, but this in no way creates coercion in coming to an agreement.[256] Mandatory mediation creates an illusion of loss of control, but parties retain their veto power over the proposals and their ability to walk away from an unacceptable situation.[257] Also, because a subcommittee will chose disputes that are appropriate for mediation, the stakeholders will not be forced into a process that works against their interests.[258] The best argument against standard mandatory mediation programs is that they deny weaker parties the formal protection of litigation[259] and the legal vindication of their rights.[260] However, congressional mediation does not remove protections of formal litigation, inherently involves interests rather than legal rights,[261] and may lessen the effects of power imbalances.[262] Finally, this process will not

---

[255] Nelle, *supra* note 241, at 295-96 (describing the danger that "attorneys will eschew mediation not just because of skepticism, but because of their self-interest, even where it conflicts with the client's interests. This conflict of interest or 'agency problem' may be quite pervasive. The flipside of mediation's potential for reducing legal costs is a threat to lawyers' revenues." A similar danger is posed by lobbyists that are agents to stakeholders as lawyers are agents of disputants).

[256] Timothy Hedeen, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but some are More Voluntary than Others*, 26 JUST. SYS. J. 273, 278 (2005) (quoting that "I believe there is a clear distinction between coercion into mediation and coercion in mediation) (quoting Frank Sander); *see also* Bingham, *supra* note 222, at 882-83 (stating that "scholars distinguish between self-determination as to process and as to the outcome of that process").

[257] SUSSKIND & CRUIKSHANK, *supra* note 24, at 138.

[258] Hedeen, *supra* note 256, at 278 (quoting that "'You have to try this process because in our judgment'—the legislature's or judge's judgment—'this may be a good case for attempted settlement") (quoting Frank Sander).

[259] Timothy K. Kuhner, *Court-Connected Mediation Compared: The Cases of Argentina and the United States*, 11 ILSA J. INT'L & COMP. L. 519 (2005) (advocating "legislatures considering mandatory mediation laws to contemplate the unintended effects of diverting cases from litigation to mediation").

[260] Nelle, *supra* note 241, at 293 (describing rights-based disputes and that"[t]he reason mediation is ineffective in these circumstances is that mediation does not emphasize rights (which might empower the weaker party) and has a tendency to preserve power imbalances").

[261] Mediation is "particularly well-suited for dealing with interest-centered controversies or for reorienting disputes towards reconciling interests." Nelle, *supra* note 241, at 292.

[262] By removing stakeholders from a system controlled by various sources of power (information, money, access) and focusing on interests. Also, public policy mediation can lessen the effects of power disparities by ensuring

obstruct the normal activities of lobbyists because the participants will be stakeholders.[263] These stakeholders will retain the services of their lobbyists, who remain entirely necessary for their ability to gather and facilitate information,[264] but will not need the lobbyists to cajole legislators once agreement is reached among the affected interests in mediation.[265] Therefore, mandatory mediation would not coerce stakeholders or interfere with standard lobbying activity.

To enforce the duty to mediate on the chosen interest groups, Congress must use visible, effective, yet proportionate sanctions for noncompliance.[266] Groups that refuse to participate may have their lobbying expenditures restricted or suspended. The mediator may also report groups that act in bad faith to the Rules Committee, which has the power to delay or expedite congressional consideration of proposals against the wishes of the bad faith participants.[267] However, these sanctions may be largely unnecessary because initiation is the easier phase of the process[268] and organizers can convince the stakeholders to participate voluntarily.[269] Thus, a subcommittee under the House Rules Committee can designate appropriate disputes for mediation and can effectively bring the stakeholders to the mediation without burdening affected interests.

B. *Enacting Agreements*

---

protective rules to the weaker parties and convincing more powerful parties of the disadvantages of nonparticipation. *See* SUSSKIND & CRUIKSHANK, *supra* note 24, at 144.

[263] Dunn, *supra* note 72 (voicing concern that mediation among interests would interfere with lobbyists' normal functions by creating a distracting, burdensome procedural requirement).

[264] *See* WOLPE & LEVINE, *supra* note 181, at 44; see also SCHNEIER & GROSS, *supra* note 16, at 149.

[265] See *infra* Part V.B. (discussing the effects of the yes-or-no vote).

[266] Nelle, *supra* note 241, at 305.

[267] Bruff, *supra* note 231, at 220.

[268] SUSSKIND & CRUIKSHANK, *supra* note 24, at 137.

[269] *Id.* at 140 (stating that a convener can "spend a substantial amount of time meeting with potential stakeholders to convince them that a negotiated approach can work").

A mechanism must also be in place to enact the agreement into law. If the accord is directly enacted, Congress loses its "legislative sovereignty" [270] to the special interests and cannot protect the public good.[271] However, if Congress retains the right to amend the mediated agreement, then adversarial lobbying among the interest groups would reemerge,[272] and parties would therefore have no reason to negotiate a consensus in the first place.[273] The adoption procedure must ensure that the outcome that the parties decide remains intact without denying Congress the right to exercise discretion.

To balance these interests, the stakeholders will present their mediated agreements to Congress for a yes-or-no vote without amendment. The first benefit of this mechanism is that it preserves the credibility of the mediation process. Negotiating parties will not commit their consent to agreements that may become less favorable with congressional tampering.[274] Preserving the agreement therefore creates credibility[275] and is indispensable to bringing the parties together[276] and conducting the negotiation process.[277] Furthermore, this mechanism preserves appropriate congressional oversight and discretion. As long as it retains the power to

---

[270] David E. Skaggs, *How Can Parliamentary Participation in WTO Rule-Making and Democratic Control be made more Effective in the WTO?: A United States Congressional Perspective*, 7 J. INT'L ECON. L. 655, 656 (2004).
[271] Cristin Kent, *Condemned if they Do, Condemned if they Don't: Eminent Domain, Public Use Abandonment, and the Need for Condemnee Protections*, 30 SEATTLE U. L. REV. 503, 507 (2007).
[272] William J. Davey, *The WTO: Looking Forwards*, 9 J. INT'L ECON. L. 3, 7 n.17 (2006) (stating that, unless it limits its powers, "Congress will be unable to restrain itself from amending key parts of the agreement").
[273] Natalie R. Minter, Student Article, *Fast Track Procedures: Do They Infringe Upon Congressional Constitutional Rights?*, 1 SYRACUSE J. LEGIS. & POL'Y 107, 109 (1995) (stating that parties whose agreements must be enacted by Congress "could not credibly negotiate in a situation where Congress could unravel a completed agreement by rejecting or amending any specific provision of it").
[274] Wright, *supra* note 68, at 994 (stating that negotiating parties "must have credibility when negotiating" because conflicting interests will not commit to a process that "does not have the authority to enact the agreements").
[275] *Id.* (describing the prohibition of amendments to agreements in fast track authority and how this mechanism "empower[s] the President to negotiate bilateral and multilateral trade agreements" because it "gives the President credibility at the international negotiating table").
[276] *Id.* at 997 (describing the effectiveness of similar fast track authority and how "countries that had previously indicated an interest in negotiating…with the United States abandoned those plans after fast track expired" and how, once fast track was brought back, "those countries have again expressed a willingness to begin negotiations").
[277] Clete D. Johnson, Note, *A Barren Harvest for the Developing World? Presidential "Trade Promotion Authority" and the Unfulfilled Promise of Agriculture Negotiations in the Doha Round*, 32 GA. J. INT'L & COMP. L. 437, 439 (2004) (stating that, in order to present an agreement for Congressional approval, "a yes-or-no vote, without the possibility of amendment…is indispensable for the completion of complex [negotiations]").

vote on the proposal, Congress may delegate the power to create the substance of legislation[278] and still preserve its proper role.[279] For example, denying amendments on negotiated agreements and seeking simple yes-or-no approval is a beneficial congressional practice under "fast tack authority."[280] This mechanism gives credibility to U.S. negotiators in making trade deals[281] and provides for efficient, expedient adoption of the agreement in the parties' interests[282] within constitutional boundaries.[283]

Of crucial importance to this Note, this mechanism will reduce lobbying pressure. Because Congress has limited discretion in fast-track diplomacy, these proposals generate significantly less lobbying pressure.[284] The lobbying pressure would be further reduced because both sides of the debate naturally support their agreement. Furthermore, this mechanism may have a moderating influence on the negotiated solution. Because the stakeholders know that the agreements they produce must pass congressional approval, they may create moderate, acceptable proposals to save their hard work from rejection.[285] This means that opposing groups will avoid compromises that appease both extremes but repulse the general public. Requiring

[278] Wright, *supra* note 68, at 998 (considering fast track trade authority, "the courts have recognized that Congress must be permitted to delegate some of its powers in order to be able to function").
[279] Minter, *supra* note 273, at 114 (stating that, under the tested practice of fast track trade promotion authority, "Congress maintains its authority to work its will on legislation and its role in trade negotiations is safeguarded").
[280] Johnson**,** *supra* note 277, at 439 (describing this mechanism as "an innovative constitutional device that allows the president to present to Congress a completed trade agreement for a yes-or-no vote, without the possibility of amendment").
[281] Davey, *supra* note 272, at 7 (stating that "US negotiators will not be able to make credible commitments in the absence of trade promotion authority ('fast-track')").
[282] Minter, *supra* note 273, 108 (1995) (stating that "[f]ast track is a legislative procedure designed to ensure expedient and efficient consideration of trade agreements")
[283] *Id.* at 111 (stating that "if we look to the sections of the Constitution that define the powers of the legislative and the executive branches of government, we find that fast track procedures preserve Congress' role")
[284] Wright, *supra* note 68, at 996 (stating that "[t]he 'all or nothing' methodology of fast-track procedures reduces the pressure on representatives by special-interest groups.").
[285] John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 193 (1993) (identifying one "advantage of the representation filter is its moderating effect. In theory, at least, elected representatives have a duty to govern on behalf of all their constituents.").

congressional approval while precluding amendments will therefore create acceptable policy and diminish lobbying pressure.

Thus, in adopting the outcomes of the stakeholder mediations, Congress should consider these agreements without amendment. Presenting unchanged mediated agreements for simple yes-or-no congressional approval, provides credibility for negotiating participants, preserves the appropriate role and powers of Congress, creates a moderating influence on the discussions. In conclusion, interest group mediation is an operationally feasible proposal. Implementing it would require a Mediation Subcommittee under the House Rules Committee and a voting mechanism that prohibits amendments on proposals negotiated by interest groups. These structures are not burdensome and therefore entirely worth the potential benefits of this process.

## VI. BROADER IMPLICATIONS

Apart from the specific problem of lobbying reform, the above proposal may have implications for the optimal use of lobbyists in Congress and even broader implications for the practice of democracy under modern conditions. Perhaps the lobbying boom is a symptom of a greater problem. And maybe consensus-based policymaking can create benefits outside of efficient lobbying practices.

### A. *Optimal Lobbying Practices in Congress*

Though public attention focuses on corruption, lobbying has many positive aspects that include facilitation that is necessary to the functioning of the congressional system and consensus-building among conflicting interests. Lobbying reform has failed to promote these because it uses broad disclosure laws instead of targeting the problematic elements of lobbying.[286] However, interest group mediation allows for and promotes productive aspects of lobbying while decreasing corruption and inefficiency. Therefore, this proposal offers an

[286] See *supra* Part II.C.

organizational structure that is currently missing from the field of lobbying and may lead to optimal lobbying efforts.

Through their interaction with a diverse range of people in Washington, lobbyists have much to offer the system and its players in facilitating communication.[287] Despite evidence of corruption and inefficiency in the influence industry,[288] proponents of current lobbying practice argue that lobbying is a source of information rather than problems.[289] Clients benefit from lobbying activities such as monitoring congressional activity[290] and providing members of Congress with information that supports their positions.[291] However, the system as a whole also benefits because members of Congress receive digestible amounts of information from their supporters[292] and reliable reconnaissance on the actions of opposing politicians and interest groups.[293] Though they seem to benefit the system alone, these actions directly serve the clients that fund them because of the following dynamic. Members of Congress are faced with an insurmountable amount of data and have little contact with fellow members.[294] They therefore require updates on the actions of other players in order to give informed consent in voting for a proposal.[295] Thus, by gathering and distributing helpful information for members of Congress,

[287] WOLPE & LEVINE, *supra* note 181, at 44 (stating that, unlike the legislators who have little contact outside their party and committees, the lobbyist "has a more complete overview of the political landscape" and can see these things developing.).
[288] *See supra* Part II.B.
[289] Termini, *supra* note 42, at 1038 (stating that "[l]obbyists facilitate this information processing by providing pertinent facts, rather than persuasive threats. In this light, lobbying as an information transmission process may be a necessary lubricant to effective lawmaking").
[290] SCHNEIER & GROSS, *supra* note 16, at 149; *see also* Birnbaum, *supra* note 4.
[291] Michael T. Heaney, *Brokering Health Policy: Coalitions, Parties, and Interest Group Influence*, 31 J. HEALTH POL. POL'Y & L. 887, 898 (2006) (citing "[f]or example, the Planned Parenthood Federation of America lobbies Congress by providing information about the health benefits and risks of contraceptive technologies").
[292] SCHNEIER & GROSS, *supra* note 16, at 300.
[293] WOLPE & LEVINE, *supra* note 181, at 35-36; see also SCHNEIER & GROSS, *supra* note 16, at 310 (describing lobbyists as "'communications links among members of Congress'").
[294] WOLPE & LEVINE, *supra* note 181, at 44 (describing how members of Congress have very limited contact outside "their committees and particularly their party's colleagues on that committee).
[295] *Id.* at 35-36; *see also* SCHNEIER & GROSS, *supra* note 16, at 292 (explaining how members of Congress rely on the advice of others in making most of their decisions and why this is a valid practice)

the lobbyist serves the interests of the client. Furthermore, by gathering this information, lobbyists obtain a superior overview of the political landscape[296] and use this advantage to serve as congressional go-betweens that organize the agenda[297] and conduct political trades.[298] As a result, the role of lobbyists has expanded from being only informational links between legislators and their constituents[299] to being the internal conduits by which Congress conducts its business.[300] Therefore, lobbyists are privately-provided agents that serve a necessary public function.

But what of the valid criticisms of lobbying as a corrupt, inefficient means of indirect influence? The reality is that both assertions are correct: lobbying is problematic as a means of indirect influence, but remains useful as a facilitator of information. The good news is that these functions are detachable under the proposed mechanism of interest group mediation. Lobbyists fully provide their normal information services, to the benefit of their clients and the system, but delegate advocacy in appropriate circumstances to the stakeholders through a congressional mechanism of facilitated negotiation. Thus, clients and Congress receive the quality and efficiency of consensual solutions without losing the facilitative function of lobbyists.

The next positive element in lobbying that interest group mediation preserves is negotiated agreements among conflicting interests. Though it does not receive much attention compared to corruption in the practice, lobbyists assert that a substantial amount of their work involves consensus-building.[301] However the lack of cooperative structures promoting these

[296] WOLPE & LEVINE, *supra* note 181, at 44.
[297] SCHNEIER & GROSS, *supra* note 16, at 301.
[298] *Id.* at 310.
[299] *Id.* at 300.
[300] *Id.* at 310.
[301] Toman, *supra* note 97. Interview with Maggie Lewis, Associate Director, Ohio Commission on Dispute Resolution and Conflict Management, in Columbus, Ohio (July 17, 2007). Charles F. Abernathy, *When Civil Rights Go Wrong: Agenda and Process in Civil Rights Reform*, 2 TEMP. POL. & CIV. RTS. L. REV. 177, 194 (1993)

actions leaves the resulting deals hindered and vulnerable when they are introduced into the adversarial, congressional system. For example, after a lobbyist facilitates a compromise, their client often reneges on the agreement.[302] Or once a deal is pushed through one house, a politician in the other house will undercut or amend the bill.[303] The influence of the adversarial deliberative system therefore works against the unstructured collaboration that lobbyists conduct. Interest group mediation seeks to fix this disorganized system by attaining commitment from interest groups and officially sanctioning and preserving the agreements that they produce. With this mechanism, lobbyists would delegate their consensus-building efforts to the parties to directly negotiate under a mediator. This practice may be more effective because the parties are directly involved in the negotiation and the agreements are better protected.

This proposal may therefore serve as an optimal structure for lobbying practices. The service that lobbyists offer centers on expertise in working through the government and relationships with these officials.[304] Optimal use of their services would focus on the savvy that lobbyists have within the government.[305] Lobbying becomes overextended and inefficient when the client could do the same work without government-specialized advocates. By offering a secured structure for consensus-building, interest group mediation empowers the affected interests to perform their own negotiation and advocacy while retaining lobbyists to conduct the necessary facilitation with the government actors. Thus, using the particular expertise of lobbyists to supplement interest group interaction may encourage more efficient use of these

---

(describing the seriousness of one "issue for civil rights lobbyists because a great deal of their work involves education and consensus building.").

[302] Toman *supra* note 97.

[303] *Id.*

[304] WOLPE & LEVINE, *supra* note 181, at 32 (stating that lobbyists are experts on the people and processes of lawmaking.); Toman supra.

[305] Christopher E. Austin, *Due Process, Court Access Fees, and the Right to Litigate*, 57 N.Y.U. L. REV. 768, 783 (1982) (discussing an example of creating "functional efficiency by making the best use of expertise").

services. This structure promises to transform lobbying from a practice of secret deals and political compromises[306] to a that accompanies interest

B. *Increasing Deliberative Democracy in Congress*

The analysis of consensus-based approaches to current problems in creating public policy touches upon more than the narrow issue of the lobbying boom. Increased lobbying pressures and the difficulty that legislatures currently experience with processing information may be symptomatic of a more inherent defect in the system. And the solution offered by collaborative policymaking may promise more than better lobbying practices. In fact, these methods may affect the very concept of democracy in modern congressional practice.

A growing number of legal scholars are challenging the traditional model of democratically elected government as outdated and unfit for dealing with the complex, multiparty nature of modern public disputes.[307] Our forefathers designed our democratic structure under a mindset of dualism and binary patterns that therefore relies on adversarial mechanisms such as courts, political parties, and two-sided debates.[308] This simple structure fit a legislature composed of 26 Senators and 65 Representatives,[309] all of whom were white landowning males.[310] Such a system was able to effectively address the less complex issues of the past with adversarial deliberations.[311] However, modern problems are becoming increasingly

[306] Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, at 470 (1999) (stating that "secret deals between interest group lobbyists, particular legislators, and agency decisionmakers seem not to qualify as legitimate means of political influence").
[307] Menkel-Meadow, *supra* note 69, at 347-48 (2004-2005); see also MAYER, *supra* note 117, at 167-68.
[308] *Id.*
[309] Dennis J. Tuchler, *Has Congress Abdicated its Legislative Authority to its Staff?*, 19 ST. LOUIS U. PUB. L. REV. 107, 114 n.23 (2000) (adding that "That is, both houses were small enough for one to imagine general thoughtful discussion of issues before them").
[310] Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1228 n.145 (1984).
[311] Solomon & Wolfensberger, *supra* note 21, at 326 (explaining that "the earlier Congresses had the luxury of discussing fewer and less complex issues than those facing Congress in the modern era").

complicated,[312] involving many diverse parties and issues.[313] As congressional processes address more complicated issues from a wider range of voices, the debate and deliberation upon which the system depends lessens.[314] Under these constraints of time and information,[315] actual floor debate is useful only as a method to enter the speaker's opinion into the record, rather than a means to conduct a productive conversation or debate.[316] Basically, the U.S. Congress was not designed to deal with issues or parties that are as complicated as they are today.[317] By continuing to use adversarial, two-sided forums, modern democratic policymakers respond to an overload of citizen input with inadequate processes and insufficient outcomes.[318] Efforts to adapt through changes in rules and procedures[319] are problematic because the traditional, adversarial structures cannot be bent to fit modern needs.[320] The resulting problem is that, under the traditional structures, elected officials have difficulty representing diverse interests in complicated disputes[321] and citizens have difficulty taking legislative action other than blocking

[312] *Id.* at 326 (stating that "[a]s America grew, the problems facing it became more complex, and the House's workload increased.").
[313] Menkel-Meadow, *supra* note 69, at 347-48.
[314] Solomon & Wolfensberger, *supra* note 21, at 321.
[315] Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1290 (2001) (stating that "[d]espite the enormous growth of congressional staff and the refined specialization of its internal structure, Congress faces tight deliberative constraints of time and information.").
[316] Id. (stating that "[B]oth houses are large, making the process of engaging in complex arguments during a floor debate difficult. For the most part, the speeches made on the floor are designed to get a member's position on the record rather than to initiate a dialogue.").
[317] Solomon & Wolfensberger, *supra* note 21, at 326 (1994) (stating that "[t]he deliberative process in the twentieth century House is a far cry from what it was in Jefferson's day"); Menkel-Meadow, *supra* note 69, at 347 (the empirical world has changed greatly from the times in which most of our legal and political institutions were conceptualized and created)
[318] Menkel-Meadow, *supra* note 122, at 19 (section on "Institutional gridlock")
[319] Solomon & Wolfensberger, *supra* note 21, at 326 (stating that, as the disputes became more complex and workload increased, "[t]he membership and structure of the House were forced to change accordingly").
[320] *Id.* at 321-22 (1994) (discussing problems with the House of Representatives).
[321] Menkel-Meadow, *supra* note 69, at 347-48 (arguing that b
inary, adversarial may not be able to handle modern, complicated disputes); *see also* Solomon & Wolfensberger, *supra* note 21, at 324 (discussing the decline in democratic deliberation and how "the diminution of this scrutiny has contributed to the erosion of public confidence in Congress").

proposals.[322] This problem leads to a perception of democracy as a cumbersome, inefficient process.[323]

The solution to this problem is structured empowerment of constituents[324] such as mediated public policymaking.[325] This idea is the product of the vision of political theory and the tools of conflict resolution.[326] The political theory of deliberative democracy attempts to address the above problems with representative democratic structures by considering ways to directly involve and enhance input from the polity.[327] Conflict resolution then provides the tools that are necessary to empower the parties to work through complex disputes and create consensual policy.[328] In particular, mediation presents a necessary tool in creating this level of democracy.[329] With its ability to bring opposing groups together and produce consensual policy, mediation demonstrates an "internal democracy" that has unbridled potential.[330] The use of mediation may therefore improve the political process and restore faith in the government.[331] In addressing the flaws of our representational system, conflict resolution can fix problems

[322] See SUSSKIND & CRUIKSHANK, *supra* note 24, at 3-8.
[323] MAYER, *supra* note 117, at 167.
[324] Menkel-Meadow, *supra* note 69, at 348 (stating that "[t]hese problems may require input from a multiplicity of constituencies and coordinated action by a multiplicity of legal and political institutions"); *see also* MAYER, *supra* note 117, at 167-168 (stating that "[e]ffective conflict resolution and collaborative problem-solving procedures can help this critical participatory element of democracy work.").
[325] *See supra* Part V.
[326] *See* Menkel-Meadow, *supra* note 122.
[327] Hulet, *supra* note 191, at 27 (defining deliberative democracy "[i]n contrast to traditional political theories that emphasize voting for elected representatives, deliberative democrats claim that, to produce democratic outcomes, citizens should be involved directly in formulating public policy and even in lawmaking"); Menkel-Meadow, *supra* note 122, at 18 (2006) (describing the focus of deliberative democracy as "how to enhance reasoned argument and deliberation among members of the polity, principally in political decision-making").
[328] Menkel-Meadow, *supra* note 122, at 18 (stating that conflict resolution "consists of applied social science of both theory and practice, drawing from planning, law, sociology, psychology, communications and decision sciences to develop models of decision-making, dialogue and dispute settlement. Its process embodiments include the primary ADR processes of negotiation, mediation, arbitration and adjudication").
[329] Weinstein, *supra* note 67, at 35 (stating that "[o]ne of the skills needed to interact in a democracy is mediation that assists parties in resolving conflict while being respectful of each person's interests").
[330] Erbe, *supra* note 110, at 415 (adding that mediation "creates outcomes truly responsive to diverse needs at all levels of society through consensus-building" and Mediation has potential to transform broader society, encouraging democracy through training citizens, impartially guiding power sharing, effectively bridging cultural difference, building durable relationships and sustainable solutions, and otherwise enhancing the parties' ability to work together efficiently and effectively through, for example, ensuring requisite transparency and accountability).
[331] SUSSKIND & CRUIKSHANK, *supra* note 24, at 13.

identified by theories of deliberative democracy. However, government actors must see these consensus processes as part of the system, working in tandem with adversarial mechanisms, instead of as independent and unofficial measures that are used only as alternatives to traditional measures.[332]

The proposed system of interest group mediation synthesizes the conflict resolution tool of mediated policymaking in combination with the established structure of lobbying to create a process for better deliberative democracy in Congress. Interest group mediation creates issue-specific deliberative democracy by directly involving the interests that form around certain issues. Though the entire polity is not involved, the citizens that are affected by the policy are represented by the diverse interest groups that lobby Congress. And while some scholars attack consensus-based policymaking as forcing compromise and obstructing the normal functioning of the government,[333] interest group mediation leaves legislatures and lobbyists unaffected by focusing on the stakeholder interests upstream. The result is a coherent system where affected stakeholders complement the efforts of Congressmen and lobbyists under an established mechanism for cooperation. While consensus-based policymaking processes exist, they either obstruct normal operations or, more frequently, receive marginal and infrequent use.[334] This proposal allows the consensus-based processes to complement the adversarial approaches used by legislatures and lobbyists.[335] Interest group mediation therefore has the potential to enhance the democratic value of the system by combining the benefits of adversarial and cooperative

[332] MAYER, *supra* note 117, at 62 (stating that consensus-based approaches "can play a useful role in promoting dialogue . . . [b]ut they need to be viewed as part of more traditional policymaking procedures, not as independent from them."); see also SUSSKIND & CRUIKSHANK, *supra* note 24, at 11 (stating that consensus-building "approaches must be treated as supplements—and not alternatives—to conventional decision making.").
[333] MAYER, *supra* note 1117, at 63.
[334] *Id.* at 62 (stating that, while valued by participants, consensus building processes are time-consuming and "are seldom the core component of how public policy disputes are resolved.").
[335] Eloise Pasachoff, *Block Grants, Early Childhood Education, and the Reauthorization of Head Start: From Positional Conflict to Interest-Based Agreement*, 111 PENN ST. L. REV. 349, 400 (2006) (stating that "[c]onsensus building avoids the adversarial process associated with traditional legislating and lobbying.").

modalities without the disadvantages associated with each.[336] Thus, the proposed process has the potential to improve the democratic value of congressional policy through direct involvement of interest groups under a mediated framework.

Outside of the democratic value in our own system, Americans must also be aware of the effectiveness of these institutions as we attempt to export them internationally.[337] Instead of only relying on adversarial deliberation and voting in the legislature, it might be possible to create permanent consensus-based structures within the legislature. Such a mechanism would bring conflict resolution into the fold of normal government functions[338] and allow for different modalities of expression[339] on the way to creating widely-acceptable solutions.[340] One possibility is a bicameral legislature with a large, adversarial lower house with majority-based decisions and a smaller, consensus-based upper house. The upper house would hold mediated discussions among representatives of specific interests.[341] Checks and balances between these two houses may create harmony between majority control and minority accommodation.[342] Also, the deliberation that is absent from the lower house, because of constraints created by the

---

[336] Klare, *supra* note 118, at 77.
[337] *See* Anne Stephens, Book Note, 43 STAN. J. INT'L L. 332 (reviewing PAUL D. CARRINGTON, SPREADING AMERICA'S WORD: STORIES OF ITS LAWYER-MASSIONARIES (2005)).
[338] MAYER, *supra* note 117, at 62 (stating that conflict resolution methods "need to be viewed as part of more traditional policymaking procedures, not as independent from them."); *see also* SUSSKIND & CRUIKSHANK, *supra* note 24, at 11.
[339] Lecture, Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 571 (2006) (summarizing the work of Jon Elster on different motivations behind decisionmaking and how government structures cater to them, and then concluding that "we can choose to use different modalities of expression in different stages of decisionmaking to achieve different ends.").
[340] *Id.* at 573-74 (quoting Susskind that "consensus building allows a group to reach the best agreement it can find, not just one that is barely acceptable to a majority").
[341] Pub. Int'l Law & Policy Group and The Century Found., *Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations*, 39 NEW ENG. L. REV. 53, 83 (2004) (stating that "[s]econd chambers may be allocated a wide variety of responsibilities and rights in order to protect the diverse interests of a state" and that "the second chamber could be designed to represent the interests of the constituent units").
[342] Menkel-Meadow, *supra* note 339, at 569 (citing to James Madison in the Federalist Papers that discuss the "need for 'checks and balances' of different kinds of processes and different sources of power, argument, and modalities of decisionmaking to prevent the control and domination of either a dominant majority or the unruliness of factions").

complexities of modern society,[343] is fully possible among the fewer, upper house legislators that are each clearly affiliated with certain interests. This system may therefore fit modern conditions and make full use of conflict resolution policymaking tools. One candidate for this system, and a good example of how this structure may be helpful, is the emerging Iraqi democracy. The Iraqi government is torn by sharply-divided, combative factions[344] and, therefore, needs government structures that effectively address a diverse array of interests.[345] A mediated, consensus-based upper house may better bring factions to the table and ameliorate the power struggle that is at the heart of Iraqi instability.[346] In fact, Iraq may be able to implement this structure under its current constitution, which establishes an adversarial lower house, but allows for the creation of an upper house that will operate under an unspecified process that will be determined by law.[347] Thus, opportunities exist for consensus-based approaches to be better institutionalized in order to develop legislative systems that fit modern society, especially in emerging democracies.

C. *Transformational Politics and the Societal Effects of Consensus-Based Public Policymaking*

While interest group mediation may improve democratic values in Congress, greater use of consensual methods of government may have broader implications for society. The

---

[343] Garrett & Vermeule, *supra* note 315, at 1290 (stating that "Congress faces tight deliberative constraints of time and information."); *see also* Solomon & Wolfensberger, *supra* note 21, at 326 (explaining that "the earlier Congresses had the luxury of discussing fewer and less complex issues than those facing Congress in the modern era")

[344] David Little, *Religion, Conflict and Peace*, 38 CASE W. RES. J. INT'L L. 95, 101-102 (2006) (stating that "[a]mong other problems are the existence of high-energy politics, a weak central government, sharply-divided, combative, and well-organized political parties, and the absence of stable national and civic institutions").

[345] Pub. Int'l Law & Policy Group, *supra* note 341, at 61 (2004) (stating that "stability must be ensured through the integrity of the institutions" and therefore that "the need to design institutions that can adequately represent the varied Iraqi interests without leading to political gridlock will be paramount").

[346] Noah Feldman, Vali Nasr, James Fearon, & Juan Cole, *Power Struggle, Tribal Conflict or Religious War?*, TIME, Feb. 26, 2006, *available at* http://www.time.com/time/magazine/article/0,9171,1167736,00.html (stating that "the only way out of the violence is for Iraqis to realize that they have more to gain by negotiating a settlement between their groups than they do by allowing a full-blown brothers' war to break out," and "[w]hat lies at the heart of the sectarian violence in Iraq is not so much religious dispute as it is a very secular competition for power and prominence in the new Iraq.").

[347] IRAQ CONST. § 3, chapter 1, art. 59, 64 *available at* http://www.iraqigovernment.org/Content/Biography/English/consitution.htm.

Transformational Politics movement envisions the widespread use of consensual methods in governmental structures and the effects this may have on society. Transformational Politics is a slightly amorphous,[348] multifaceted umbrella-concept[349] for many new, innovative ideas on changing[350] the basic structures and goals of government.[351] This school of thought cuts against traditional, adversarial[352] structures of governmental dispute resolution as a problematic "battle for leverage"[353] that caters exclusively to the side that exerts the most pressure.[354] Transformational Politics focuses on conflict resolution[355] and acknowledges that collaboration is a superior method of human interaction.[356]

Transformational Political thinkers would advocate that consensus-building methods become ingrained in the practices and norms of existing government institutions.[357] In practicing a politics based on participation[358] and healing,[359] conflicting groups would learn to acknowledge differences and avoid oversimplifications such as "us against them" and "right versus wrong."[360] This change in governmental practices even has the potential to create tolerance and

---

[348] Christa Daryl Slaton, Stephen Woolpert, & Edward W. Schwerin**,** *Introduction: What Is Transformational Politics?*, *in* TRANSFORMATIONAL POLITICS: THEORY, STUDY, AND PRACTICE xx (Stephen Woolpert et al. eds., 1998) (stating that "[i]n defining transformational politics, however, it is easier to reach consensus on what is wrong or outdated with the old paradigm than to clearly present the new paradigm").
[349] Slaton, *supra* note 80, at 5 (stating that "transformational politics is a web of theories").
[350] EDWARD W SCHWERIN, MEDIATION, CITIZEN EMPOWERMENT, AND TRANSFORMATIONAL POLITICS 3 (1995) (describing Transformational Politics as "committed to examining alternatives").
[351] Slaton, Woolpert, & Schwerin**,** *supra* note 348, at xx (stating that Transformational Politics aims to "transform ourselves and our political institutions").
[352] Slaton, *supra* note 80, at 13.
[353] Tom Atlee, *Transformational Politics* (1991, revised Sept. 1999), *available at* http://www.co-intelligence.org/CIPol_TransformPol2.html.
[354] *Id.* (adding that "[b]its of cooperative activity creep in - like alliances, compromises, political deals, protocols - if only to prevent the whole thing from tearing itself apart").
[355] SCHWERIN, *supra* note 350, at 6.
[356] *Id.* at 5 (quoting Becker and Slaton).
[357] Michael S. Cummings, *Transforming Public Policy: Beyond Affirmative Action*, *in* TRANSFORMATIONAL POLITICS: THEORY, STUDY, AND PRACTICE 229 (Stephen Woolpert et al. eds., 1998).
[358] SCHWERIN, *supra* note 305, at 3.
[359] *Id.* at 4.
[360] *Id.*

collaboration across the entire country[361] because the current centralization of government and the media makes a top-down transformation of values more possible.[362] Consensual conduct among leaders may result in amicable conduct among constituents. Therefore, as a method of dealing with national issues and as a model of behavior for supporters of these interests, institutional mediation may effectuate broad social change.[363]

Thus, beyond creating more creative, widely-acceptable policy, cooperative behavior among conflicting interests may lead the constituents of these interest groups to accept the differences in basic values of constituents of opposing interests and view society as more cooperative and peaceful. Transformational Politics predicts that the greater use of consensual methods of governance, such as interest group mediation, will create widespread civility and social change.

## VII. CONCLUSION

This paper traces two themes. First, the theme of the problem involves governmental structures dealing with an increasingly complex society. This leads to overburdening pressure from petitioning interests, policies that have difficulty adapting to various and changing situations, processes that do not address different interests adequately or sufficiently, and groups seeking any means of power over the process including obstruction. The second theme is that of the solution and it searches for methods to improve governmental processes in tackling the above problem. Lobbyists would seem to argue that lobbying has developed as the mechanism that aids Congress in dealing with overwhelming amounts of information from interest groups and fellow politicians. Conflict resolution theorists would counter that lobbying is inefficient and that the better solution is direct citizen participation under mediation.

---

[361] Slaton, Woolpert, & Schwerin**,** *supra* note 348, at xx.
[362] Cummings, *supra* note 357, at 229.
[363] CLOKE, *supra* note 84, at 276.

The process of interest group mediation draws upon both lobbying and conflict resolution mechanisms. It uses the established organization provided by the interest group structure in order to represent interests. It then applies innovative techniques in conflict resolution to facilitate the optimal use of these groups. By allowing consensus-building efforts to supplement conventional policymaking, this mechanism has the potential to make the legislature become more efficient, responsive, and productive. Mediation's value in public policymaking shows that it can be more that just an alternative to the court system,[364] but also an "alternative model of power"[365] to traditional, adversarial governance. A system that uses a consensus-based model of power alongside traditional power structures will address a wide range of interests to better serve modern conditions.

[364] Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 879 (1997) (stating that "[t]here are features of mediation that make it particularly attractive beyond simply being an informal alternative to the formal courts").
[365] GEORGE C. PAVLICH, JUSTICE FRAGMENTED: MEDIATING COMMUNITY DISPUTES UNDER POSTMODERN CONDITIONS 150 (1996).