

# Access and Lobbying: Looking Beyond the Corruption Paradigm<sup>1</sup>

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## Introduction

Political reform often means election reform, and for good reason. Democracies derive their legitimacy from elections. Electoral rules determine voter and candidate eligibility, the amount and type of resources that candidates use, the way votes are counted, and, of course, ultimately how a winner is determined. The direction of modern American electoral reform has been towards increasing citizen participation and procedural fairness, aided to a considerable degree by the U.S. Supreme Court's interpretation of the Fourteenth Amendment and the Voting Rights Act.

Still, many OECD<sup>2</sup> democracies like the United States have evolved in ways that blur the distinction between electoral and post-electoral phases, and that diminish to some degree the significance of elections in determining policy. Electoral tactics, polling information, and the guidance of campaign consultants are now more systematically incorporated into governance than ever before, creating the so-called "permanent campaign."<sup>3</sup> Even more importantly, the battle over policy is often not

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2. For more information on the Organisation for Economic Co-operation & Development, see <http://www.oecd.org>.

3. See, e.g., Joe Klein, *The Perils of the Permanent Campaign*, TIME, Oct. 30, 2005, available at <http://www.time.com/time/columnist/klein/article/0,9565,1124237,00.html>.

finally determined by an election even when one party dominates at the polls, and there are now more post-election opportunities to influence decision making at many levels of government than ever before. Trends towards more administrative decentralization, open meeting laws and transparency keep policy debates alive at much later stages of the policymaking process than before. The term for this phenomenon is “advocacy democracy.”<sup>4</sup>

As part of this trend, lobbying in the United States has expanded dramatically.<sup>5</sup> The electoral mandate for most legislators is very limited, especially in an era characterized by thirty-second sound bites and consultant crafted messages. Issues that are covered in modern campaigns are but a small fraction of the issues that legislators have to decide between elections.<sup>6</sup> Moreover, the range and complexity of bills has increased over time. Washington continues to attract bright and well-educated young people to take low-paying, demanding staff jobs, but constant turnover is a resultant fact of life. Lobbyists, many of them former staff and Members of Congress who move into the private sector for higher pay, provide valued expertise and perspective on the issues and regulatory matters that come before Congress and executive agencies.<sup>7</sup>

For all the justifiable attention given to the rising costs of elections, it pales in comparison to the amount of money invested in lobbying. If money reveals preferences, then lobbying is apparently thought to be an extremely important means of influence for the corporations, organizations and individuals who retain lobbyists. As the number of lobbyists and organizations that hire them continues to grow, questions about their activities and influence have also mounted. And then, as is so often the case, scandal opened the door to more regulation.<sup>8</sup>

The audacious actions of a Republican lobbyist, Jack Abramoff, brought attention to prevailing lobbying practices.<sup>9</sup> Many Washington lobbyists complain that Abramoff was an outlier, certainly not

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4. *See generally* DEMOCRACY TRANSFORMED?: EXPANDING POLITICAL OPPORTUNITIES IN ADVANCED INDUSTRIAL DEMOCRACIES (Bruce E. Cain et al. eds., 2003).

5. *See, e.g.*, Jeffrey H. Bimbaum, *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.

6. Compare, for example, speeches at the 2008 Democratic National Convention, <http://www.demconvention.com/speeches/> (the limited number of issues addressed in speeches) and speeches at the Republican National Convention, <http://www.gopconvention2008.com/>, with the variety of issues debated and reported in the Congressional Record, a searchable form of which is available at <http://thomas.loc.gov/home/r110query.html>.

7. *See* Bimbaum, *supra* note 5.

8. *Id.*

9. *See infra* Part I.

representative of the profession as a whole, and that the excesses of a few led to restrictions on the many. The new lobbying rules enacted in 2007 tried to fix what the Abramoff scandal revealed was broken.<sup>10</sup> Whereas the earlier wave of lobbying reforms focused primarily on registration and disclosure, the new restrictions limit actions (gifts, trips, meals, and campaign finance activities) that abet or give the appearance of abetting lobbying efforts.<sup>11</sup>

How should we think about lobbying regulation? Is it merely derivative of bribery or campaign finance regulation, or is it unique in any important ways? What are the goals to be achieved? What approaches to lobbying reform by the courts and political reformers make the most sense given constitutional limitations? In the sections that follow, we will first review the new regulations and their goals, showing how they relate to the Abramoff scandal and what is missing from them. Then we will consider the fundraising question in some detail, looking at whether there is a case for further regulation. Third, we will consider a question not addressed in the new regulations—i.e., whether the unequal balance of lobbying activity in the direction of corporations and others with direct economic interests produces a systemic policy bias. And finally, we will consider what approach might be taken to address this problem.

## I. Abramoff, Cunningham, and the Impetus for Reform

Reforms are often prompted by scandals because such events shed light on unsavory political practices and regulatory gaps and open up windows of opportunity for reformers to overcome the forces of inertia and self interest that preserve the status quo. This is the case with the Senate and the House versions of ethics reforms passed in the wake of the Abramoff and Cunningham scandals.<sup>12</sup>

Randall Duke Cunningham pled guilty in 2005 to taking \$2.4 million in bribes, fraud, and tax evasion.<sup>13</sup> The Cunningham case was mostly

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10. Memorandum from Hogan & Hartson, LLP, *House and Senate Ethics Rules Change* (Mar. 2007) [hereinafter Hogan Memo], available at <http://www.acenet.edu/AM/Template.cfm?Section=Home&CONTENTID=26388&TEMPLATE=/CM/ContentDisplay.cfm>.

11. Sheryl Gay Stolberg, *Senate Approves Lobbying Limits by Wide Margin*, N.Y. TIMES, available at Mar. 30, 2006, <http://www.nytimes.com/2006/03/30/politics/30lobby.html#>.

12. The Senate and House of Representatives both attempted to pass legislation to enforce more rigorous regulation of lobbying laws. H.R. 6, 110th Cong. (as passed by House of Representatives, Jan. 4, 2007); S. 1, 110th Cong. (as passed by Senate, Jan. 18, 2007); H.R. 2316, 110th Cong. (as passed by House of Representatives, May 24, 2007). Congress eventually passed the Senate's version of the Honest Leadership and Open Government Act of 2007. See Pub. L. No. 110-81, 121 Stat. 735 (codified as amended in scattered sections of 2 U.S.C.).

13. See, e.g., Tony Perry, *Rep. Cunningham Pleads Guilty to Bribery, Resigns*, L.A. TIMES, Nov. 29, 2005, at A1, available at <http://articles.latimes.com/2005/nov/29/local/me-duke29>.

about bribery.<sup>14</sup> He helped a defense contractor, Mitchell Wade, secure defense and intelligence contracts in exchange for gifts, including payments for his San Diego house, the use of a Washington yacht, jewelry, furniture, and cash.<sup>15</sup> It brought to light the ability of an individual congressman to pressure the military into accepting contracts of dubious merit and the creative, covert ways that gifts could be arranged for Members of Congress by those who wanted favors.<sup>16</sup>

Jack Abramoff, a Republican lobbyist with the firms of Preston Gates and Ellis and then Greenberg Traurig, was convicted of conspiracy to bribe public officials, tax evasion, and fraud.<sup>17</sup> But because his web of connections was much more extensive, his illicit dealings bought down a number of others, including a member of Congress (Bob Ney, R-Ohio), former Hill staff (Tony Rudy, Michael Scanlon, William Heaton, Neil Volz, and Mark Zachares) and several Bush Administration officials (James Steven Griles, David Safavian, and Roger Stillwell).<sup>18</sup>

By comparison to the Cunningham case, Abramoff's exposed many more flaws in Washington's lobbying system. While important aspects of the case involved bribery (e.g., Representative Bob Ney placing statements in the Congressional record and introducing legislation on behalf of Abramoff's clients in exchange for gifts and trips), Abramoff's highly successful lobbying techniques—bestowing lavish gifts on Members, administration officials and high-level staff (e.g., free golfing trips to Scotland and meals at his expensive downtown restaurant, Signatures) in order to achieve influence over both legislative and executive decisions, hiring staff off the Hill (e.g., former staff to Bob Ney, Tom Delay, John Doolittle, and Harry Reid), hiding lobbying funds through seemingly non-political non-profits (ranging from the Capitol Athletic Club to fiscal conservative and religious organizations), and perpetrating fraud on his clients (double charging, padding, and lying to clients such as the Indian tribes)—raised serious concerns about the corrupting influence lobbyists seemed to have over Congress and White House.<sup>19</sup> Many lobbyists were quick to characterize Abramoff as a rogue outlier, but friends like Representative Dana Rohrabacher (R-Calif.) suggested otherwise, saying,

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14. *See id.*

15. *See id.*

16. *See id.*

17. *See, e.g.,* Schmidt & James V. Grimaldi, *The Fast Rise and Steep Fall of James Abramoff*, WASH. POST, Dec. 29, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/28/AR2005122801588.html>.

18. *See id.*

19. *See id.*

“Words like bribery are being used to describe things that happened every day in Washington and are not bribes.”<sup>20</sup>

The initial reforms stalled under the Republican leadership, but when the Democrats took control of the House and Senate after the 2006 mid-term elections, the leadership was finally able to get lobbying reforms passed.<sup>21</sup> As we review the bills, which differ somewhat in the two Houses of Congress, we will point how they relate to issues raised by the scandals, but also what is missing from the reforms.

The new Senate and House rules vary in some details, but cover the same general areas: bans and restrictions of gifts and travel; more limitations on the revolving door in and out of office; enhanced disclosure; regulations around earmarks; and, new campaign finance regulations.<sup>22</sup> Neither house opted for an independent agency to monitor and enforce lobbying and ethics regulations, relying instead on ethics training (mandatory in the Senate but not in the House of Representatives) and their Ethics Committees.<sup>23</sup> However, the Senate provides for annual audits of the lobbyist reports by the Comptroller General.<sup>24</sup>

There were already enough provisions in the existing law to prosecute those who blatantly violated the bribery laws (e.g., Abramoff, Cunningham, Ney).<sup>25</sup> The new rules went further down the regulatory path in the sense that they applied a conflict-of-interest framework to lobbying related activities by prohibiting or limiting actions that might induce corrupt actions or that might have the appearance of doing so.<sup>26</sup> This is especially true of the gift bans, travel restrictions, and revolving door provisions.<sup>27</sup>

Even though it is possible that many gifts were given to Members without the intent to corrupt and were of insufficient value to truly persuade a Member to trade official action for a gift, both Houses, reacting to the public reaction to Abramoff's gifting practices, chose to ban all gifts to members and staff from lobbyists and “entities that retain lobbyists.”<sup>28</sup> Similarly both the Senate and House regulations now treat travel as something of private value that might influence or appear to influence

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20. *See id.*

21. *See* Hogan Memo, *supra* note 10.

22. *See generally id.*

23. *See generally id.*

24. *Id.* at 7–9.

25. *See* Perry, *supra* note 13; Schmidt, *supra* note 17.

26. *See generally* Hogan Memo, *supra* note 10.

27. *See generally id.*

28. *See id.* at 10.

Members and their staff: hence, the ban on privately funded trips, organized or attended by lobbyists, the change to charter reimbursement rates for corporate jets, and the requirement that members certify with the Ethics Committee in advance that their proposed trips adhere to the rules.<sup>29</sup>

Also borrowed from the conflict-of-interest framework are the new restrictions on revolving door arrangements between private entities and Congressional Members and staff.<sup>30</sup> The previous law allowed for a one year cooling-off period for former Members before they could lobby the legislative branch and prohibited senior staff from lobbying their former office or committee.<sup>31</sup> The Senate extended the lobbying moratorium to two years for both Members and senior staff, and prohibited family members from lobbying the Member's staff (with the exception of those who were lobbyists prior to the Member's election).<sup>32</sup> The Senate rules also prohibit members from negotiating jobs as lobbyists until their successors are elected, and eliminated floor, gym, and parking privileges for former Senators.<sup>33</sup> Both the House and Senate prohibit Members from influencing the hiring decisions of private entities, and require that Members and senior staff disclose any negotiations for future private-sector employment.<sup>34</sup> The House rules also cover so called reverse revolving door situations (i.e., lobbyists coming into government), prohibiting staff who had been lobbyists from contacting their previous employers or clients for one year after leaving those positions.<sup>35</sup>

Following in the path of earlier lobby reforms, the new regulations rely very heavily on disclosure.<sup>36</sup> They increase the financial penalties for non-compliance to six-figures, and the number of reports (which have to be available on the internet) from semi-annual to quarterly.<sup>37</sup> Both Houses also require that lobbyists disclose any previous legislative or executive experience.<sup>38</sup> The Senate now demands disclosure of any organizations other than the client that participates in any way in the planning, supervising and control of lobbying activities.<sup>39</sup> Earmarks must now be

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29. *See id.* at 2–9.

30. *See id.*

31. *See id.* at 7–10.

32. *See id.*

33. *See id.*

34. *See id.* at 2–9.

35. *See id.* at 2–7.

36. *See generally id.*

37. *See generally id.*

38. *See generally id.*

39. *See id.* at 7–10.

disclosed.<sup>40</sup> There are new disclosure rules with respect to contributions: they must report individual and bundled contributions to Members, federal candidates, leadership Political Action Committees (“PACs”) or political parties that exceed specified dollar amounts (\$200 in the Senate and \$5000 in the House) on a quarterly basis.<sup>41</sup> Similarly, they must disclose contributions and reimbursements to Members for events in their honor.<sup>42</sup>

Characterizing the new lobbying rules more generally, it is fair to say that they mostly address conflict-of-interest and corruption concerns that arise with the non-speech aspects of lobbying such as trips, gifts and jobs. They are clearly aimed at the most traditionally defined corrupt aspects the Abramoff and Cunningham scandals. But can lobbying reforms go any further, and, if so, on what basis?

## II. The Corruption Paradigm

As a regulatory problem, there are important similarities between campaign finance and lobbying reform. Partly, this is because lobbying often involves campaign finance issues such as bundling, disclosure, and contribution limits. But there are more fundamental similarities between the two, independent of their intersection. First, both involve constitutionally protected fundamental rights. However unpopular lobbying may be to the American public, it cannot be prohibited. Secondly, as with campaign finance, there are pure and impure speech components to lobbying. Buying lunch or hosting a reception for a Member does not directly communicate a message. But, lobbyists will argue, it can create a setting in which messages are conveyed and perhaps are more favorably received. Thirdly, as with campaign contributions and expenditures, the strongest rationale for restricting the fundamental right to petition the government is reducing corruption.

Bribery and conflict-of-interest are the dominant corruption frameworks. Both treat the non-speech aspects of lobbying—gifts, reimbursements, meals, and so on—as items of potential personal value that might be given with the intent or appearance of influencing the performance of official duties. Bribery statutes are aimed at intentional quid pro quo exchanges of items of personal value for official action. Conflict-of-interest restrictions are prophylactic measures meant to prevent situations that enable bribery and personal enrichment. The application of both to campaign finance, when the money can only be used for legitimate campaign expenses, equates office-holding with personal value, a

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40. *See id.*

41. *See id.*

42. *See id.*

viewpoint that is controversial for some scholars. The application to lobbying is more straightforward in the sense that gifts, honoraria, reimbursements, golfing outings, and the like are more clearly items of personal consumption.

Even so, as with contribution limits, it is not easy to define when a contribution or a gift is large enough to influence a Member's actions. Does a reception with finger food and white wine rise to a level of value that might corrupt as compared to a sit-down dinner at an expensive restaurant like Signatures, Jack Abramoff's establishment? Does a two-year ban on lobbying diminish a Member's value enough to prevent corrupting motives as opposed to a one year ban? It is problematic to reasonably define what is or is not corrupt behavior with regard to lobbying. If it is defined broadly to include almost anything that might give pleasure or have positive utility for a Member, the definition runs of the risk of being overinclusive (i.e., infringing on the right to petition and the effectiveness of Members). Whereas, if corrupt behavior is defined too narrowly, it would be easily evaded by those it was designed to ensnare.

The conundrum arises at both ends of the bribery equation: not only is it hard to say what is of sufficient value to influence a Member, but it is also hard to pin down what kinds of official action need to be prohibited. The easiest cases are specific pieces of particularized legislation, earmarked money, and regulatory interventions that confer benefits on an individual, company, or organization, particularly in close temporal proximity to a documented gift. This was what landed Representatives Cunningham and Ney in prison in the recent wave of scandals.<sup>43</sup> But few gifts come with such an indisputably related payoff. And few, if any, lobbyists rely on gifts to sway lawmakers.<sup>44</sup> Rather, groups and institutions seeking to influence policymakers rely on a broad range of tactics, some of which they must disclose and many more of which they do not have to disclose, some of which may strike a reasonable man as corrupt (most notably, campaign contributions and others which may seem perfectly reasonable; for example, simply providing information).<sup>45</sup>

For the purposes of this discussion, we will focus on three main sources of purported influence: money, relationships, and information. Reformers have devoted the most attention to Money and Relationships. Political scientists have devoted the most attention to Money and

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43. See Perry, *supra* note 13.

44. See generally Nick Allard, *Lobbying Is an Honorable Profession: The Right to Petition and the Competition to be Right*, 19 STAN. L. & POL'Y. REV. 23 (2008).

45. See *infra* Parts II & III.



Information.<sup>46</sup> Most lobbyists rely on all three sources of influence. Used effectively, all three sources of influence work in tandem.

### A. Money: What Does it Buy?

Campaign money comes in several forms. Most money is in the form of individual donations, which are capped at \$2,300 per candidate per election (the primary and general count as separate elections).<sup>47</sup> But a significant amount of money also comes in the form of PAC contributions, which are capped at \$5,000 per candidate per election.<sup>48</sup> Prior to the McCain-Feingold Act, individuals and organizations were able to donate unlimited “soft money” to political parties.<sup>49</sup> Now individuals and organizations use so-called 527s to devote unlimited sums of money to “independent expenditures” in support of campaigns.<sup>50</sup>

Many lobbyists and company executives give individually to campaigns.<sup>51</sup> They also may organize fundraising events or help to “bundle” donations to help candidates.<sup>52</sup> This is one possible source of influence. Most companies, associations, and unions active in politics also maintain PACs, to which employees and members make individual

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46. For information regarding Money, see generally Steven Ansolabehere et al., *Why is There so Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105 (2003); Richard A. Smith, *Interest Group Influence in the U.S. Congress*, 89 LEGIS. STUD. Q. 20 (1995); FRANK R. BAUMGARTNER & BETH L. LEECH, BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE 130–33 (1998). And for sources regarding information, see generally JOHN R. WRIGHT, INTEREST GROUPS AND CONGRESS: LOBBYING, CONTRIBUTIONS, AND INFLUENCE (1995); KEVIN ESTERLING, THE POLITICAL ECONOMY OF EXPERTISE (2004); Scott Ainsworth, *Regulating Lobbyists and Interest Group Influence* 55 J. POL. 41 (1993).

47. Contributions Limits Chart 2007–2008, <http://www.fec.gov/pages/brochures/contriblimits.shtml> (last visited Sept. 30, 2008); 2 U.S.C. § 441a(a)(1)(A) (2007); 11 C.F.R. § 110.1 (2007). Contribution limits are increased every odd year to reflect inflation. 2 U.S.C. § 441a(c) (2007).

48. 2 U.S.C. § 441a(a)(2)(A) (2002).

49. See, e.g., WASHINGTONPOST.COM, CAMPAIGN FINANCE SPECIAL REPORT, SOFT MONEY—A LOOK AT THE LOOPHOLE (1998), <http://www.washingtonpost.com/wp-srv/politics/special/campfin/intro4.htm> (last visited Sept. 30, 2008).

50. See Silent Partners – The Center for Public Integrity, *527s in 2004 Shatter Previous Records for Political Fundraising*, Dec. 16, 2004, <http://projects.publicintegrity.org/527/report.aspx?aid=435> (last visited Sept. 30, 2008).

51. PUBLIC CITIZEN, THE BANKROLLERS: LOBBYISTS’ PAYMENTS TO THE LAWMAKERS THEY COURT 1998–2006 (2006), available at <http://www.citizen.org/documents/BankrollersFinal.pdf>.

52. See, e.g., PUBLIC CITIZEN, NUMBER OF LOBBYIST-FUNDRAISERS FOR PRESIDENTIAL CANDIDATES ALREADY EXCEEDS 2004 TOTALS (2008), available at <http://www.citizen.org/documents/LobbyistsFinal.pdf>.

donations. The manager of the PAC then decides which campaigns to contribute to.<sup>53</sup>

A good deal of political science research has focused on the effects of PAC contributions on Member behavior.<sup>54</sup> The general consensus seems to be that while there is no neat one-to-one correlation between contribution and votes, money does seem to help with gaining access.<sup>55</sup> But we can go into a little more detail.

### 1. *Votes for Sale?*

It is not uncommon to come across claims, such as this one from the reform group, Public Campaign, that “[t]he role of big money in American politics should make the most cynical lawmaker blush and the average citizen furious. . . . Our democracy is sinking in a cauldron of systematic influence peddling, flagrant abuse of loopholes and political favors granted to wealthy special interests.”<sup>56</sup>

Because campaigns are privately financed, candidates who want to be reelected must constantly raise money. Critics of electoral fundraising point out that the expense of running a competitive electoral campaign results in a pool of candidates biased toward wealthy interests by the exigencies of fundraising, regardless of whether legislators are willing to sell their votes or lobbyists wish to buy them. The ability to acquire access in this way fuels the widespread belief that campaign contributions buy votes.<sup>57</sup>

Certainly, there is plenty of anecdotal evidence that legislators do sometimes tailor policies to respond to the demands of contributors,<sup>58</sup> and that lobbyists believe that campaign contributions influence policy.<sup>59</sup> But

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53. See generally LARRY J. SABATO, *PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES* (1984).

54. See generally Steven Ansolabehere et al., *supra* note 46.

55. *Id.*

56. PUBLIC CAMPAIGN, *CLEAN MONEY CAMPAIGN REFORM 6* (2002), available at <http://library.publiccampaign.org/sites/default/files/CleanMoneyCampaignReform.pdf>.

57. Jeffrey Milyo, *Money Walks: Why Campaign Contributions Aren't as Corrupting as You Think*, REASON, July 1997, available at [www.reason.com/news/show/30323.html](http://www.reason.com/news/show/30323.html).

58. See generally Burdett A. Loomis, *Does K Street Run Through Capitol Hill? Lobbying Congress in the Republican Era*, in *INTEREST GROUP POLITICS* 412 (Allan J. Cigler & Burdett A. Loomis eds., 7th ed. 2006). See also *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1093 (9th Cir. 2003).

59. One example is the internal tobacco industry memo analyzing congressional votes on the 1987 airline smoking ban, noting that legislative recipients of PAC contributions who had not supported the industry on the bill were “targets of opportunity for issues of greater importance” because they had “violated a trust” by failing to vote for the industry’s interests. Memorandum from S.B. Bull of Phillip Morris on Durbin Amendment (July 15, 1987) (on file with the University of California, San Francisco, Legacy Tobacco Documents Library). See generally

quantitative political science studies linking PAC contributions and voting behavior are more mixed. And a substantial number conclude that legislators are unlikely to change their votes because of campaign contributions.<sup>60</sup>

Such studies, however, are bedeviled by econometric problems. One reason why it is hard to show an effect is because interest groups most often make contributions to legislators who already support their interests, either because these groups are part of the legislator's constituency or because they share ideological goals.<sup>61</sup> As a consequence, we should expect a strong correlation between the two even if contributions do not drive voting behavior.

Another confounding factor is that lobbyists are often seeking something other than votes. For example, such actions as getting Members or staff to persuade colleagues, altering the wording of potential legislation, or keeping bills out of committee hearings or off the floor may be far more valuable, even if they are harder to measure.<sup>62</sup>

Paul R. Brewer & Christopher J. Deering, *Musical Chairs: Interest Groups, Campaign Fundraising and Selection of House Committee Chairs*, in THE INTEREST GROUP CONNECTION: ELECTIONEERING, LOBBYING, AND POLICYMAKING IN WASHINGTON 141, 141 (Paul S. Herrnson et al. eds., 2d ed. 2005) [hereinafter INTEREST GROUP CONNECTION].

60. A variety of popular economic theories view politics as a market where lawmakers sell policy outcomes in exchange for campaign contributions. Though there are various models in the literature, the basic assumptions predict something like quid quo pro bribery. See generally GENE M. GROSSMAN & ELHANAN HELPMAN, SPECIAL INTEREST POLITICS (2001); Gene M. Grossman & Elhanan Helpman, *Protection for Sale*, 84 AM. ECON. REV. 833 (1994). Empirical studies, however, have not been able to establish any consistent correlation between campaign contributions and political outcomes. See generally BAUMGARTNER & LEECH, *supra* note 46; Smith, *supra* note 46, at 139.

After examining almost forty scholarly articles attempting to find the correlation between money and politics between 1976 and 2002, Ansolabehere et al. conclude that “[o]verall, PAC contributions show relatively few effects on voting behavior. In three out of four instances, campaign contributions had no statistically significant effects on legislation or had the ‘wrong’ sign—suggesting that more contributions lead to less support.” Ansolabehere et al., *supra* note 46, at 130. Similarly, Baumgartner and Leech note that “[t]he unavoidable conclusion is that PACs and direct lobbying sometimes strongly influence Congressional voting, sometimes have marginal influence, and sometimes fail to exert influence.” BAUMGARTNER & LEECH, *supra* note 46, at 134.

61. See generally David Austen-Smith & John R. Wright, *Counteractive Lobbying*, 38 AM. J. POL. SCI. 25 (1994) [hereinafter *Counteractive Lobbying*]; David Austen-Smith & John R. Wright, *Theory and Evidence for Counteractive Lobbying*, 40 AM. J. POL. SCI. 543 (1996) [hereinafter *Theory and Evidence*]; John R. Wright, *PAC Contributions, Lobbying, and Representation*, 51 J. POL. SCI. 713 (1989); Frank R. Baumgartner & Beth L. Leech, *The Multiple Ambiguities of “Counteractive Lobbying,”* 40 AM. J. POL. SCI. 521 (1996).

62. See generally Marie Hojnacki & David C. Kimball, *Organized Interests and the Decision of Whom to Lobby in Congress*, 92 AM. POL. SCI. REV. 775 (1998); John R. Wright, *PACs, Contributions, and Roll Calls: An Organizational Perspective*, 79 AM. POL. SCI. REV. 400 (1985); Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency is Complex*, 33 AM. J. POL. SCI. 1 (1989); Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed*

In sum, the evidence for a consistent one-to-one relationship between PAC contributions and vote outcomes is mixed at best. However, even if the relationship is not consistently statistically significant, that does not mean it is inconsequential. Money may not always make a difference, or even make a difference in the majority of the cases. But the fact that there are certain times where it appears to make a difference should still give us pause.

## 2. *Access for Sale?*

There is much more consensus both among political scientists and Washingtonians that money buys access. Nearly all research that relies on interviews with interest groups and lobbyists finds that contributors use money in the hope of gaining or maintaining access to legislators.<sup>63</sup> In general both legislators and interest groups accept the idea that money buys access,<sup>64</sup> and find the exchange unremarkable and relatively inoffensive.<sup>65</sup> One lobbyist described his company's PAC as follows: "It's incredibly important. It gives you credibility and lets people know you're serious about what Washington is and about the political process and it gets you phone calls from people who would not necessarily ever care about who you are or what you did."<sup>66</sup>

Some researchers have found that lobbyists and PAC staff work together closely, and that contribution decisions are centralized under the

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*Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797 (1990).

63. See generally Laura I. Langbein, *Money and Access: Some Empirical Evidence*, 48 J. POL. 1052 (1986); James F. Herndon, *Access, Record, and Competition as Influences on Interest Group Contributions to Congressional Campaigns*, 44 J. POL. 996 (1982).

64. See generally Randall S. Kroszner & Thomas Stratmann, *Interest Group Competition and the Organization of Congress: Theory and Evidence from Financial Services' Political Action Committees*, 88 AM. ECON. REV. 1163 (1998); Nolan McCarty & Lawrence S. Rothenburg, *The Time to Give: PAC Motivations and Electoral Timing*, 16 POL. ANALYSIS 239 (2000); John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591 (2005); Hall & Wayman, *supra* note 62; Jeffrey Milyo et al., *Corporate PAC Contributions in Perspective*, 2 BUS. & POL. 75 (2000).

65. See generally David Austen-Smith, *Campaign Contributions and Access*, 89 AM. POL. SCI. REV. 566 (1995); ALAN ROSENTHAL ET AL., *REPUBLIC ON TRIAL: THE CASE FOR REPRESENTATIVE DEMOCRACY* (Karl T. Kurtz ed., 2002); Arthur T. Denzau & Michael C. Munger, *Legislators and Interest Groups: How Unorganized Interests Get Represented*, 80 AM. POL. SCI. REV. 89 (1986); *Theory and Evidence*, *supra* note 61; Kevin B. Grier & Michael C. Munger, *Comparing Interest Group PAC Contributions to House and Senate Incumbents, 1980-1986*, 55 J. POL. 625 (1993); Micky Tripathi et al., *Are PAC Contributions and Lobbying Linked? New Evidence from the 1995 Lobby Disclosure Act*, 4 BUS. & POL. 1 (2002).

66. Confidential Interview by author Lee Drutman.

control of interest group lobbyists.<sup>67</sup> These studies find that lobbyists' favorite way to gain the access to is by making campaign contributions,<sup>68</sup> that the majority of campaign contributions are given at lobbyist fundraising events,<sup>69</sup> and that lobbyists are viewed as effective when they are good fundraisers.<sup>70</sup>

These researchers note that lobbyists have become major campaign fundraisers, in some cases actually directing candidate fundraising,<sup>71</sup> and that when former staffers become lobbyists, they openly offer to sell access to legislators in return for contributions.<sup>72</sup> One lobbyist summarized his role in the political process by saying, "I raise money and I give money."<sup>73</sup>

Members of Congress solicit lobbyists for campaign money often,<sup>74</sup> knowing that lobbyists will respond to these solicitations rather than risk losing access to legislators.<sup>75</sup> Business PACs, in particular, direct their campaign contributions to incumbents in order to gain access for their lobbyists.<sup>76</sup>

Watchdog groups have also documented and lamented the role of lobbyists as fundraisers and contributors. According to Public Citizen, "Lobbyists and the political action committees of their firms have contributed at least \$103.1 million to members of Congress since 1998 . . . Lobbyists play a far more significant role in funding lawmakers' campaigns by coordinating fundraisers and arranging for contributions

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67. MARK J. ROZELL ET AL., *INTEREST GROUPS IN AMERICAN CAMPAIGNS: THE NEW FACE OF ELECTIONEERING* 196 (2d ed. 2006); Charles W. Hucker, *Organized Labor Takes a Hard Look at Whom It Will Support This Fall*, 1978 CONG. Q. WKLY. REP. 193, 193-98; Michael J. Malbin, *Campaign Financing and the "Special Interests,"* 56 PUB. INT. 21, 21-42 (1979); RICHARD M. SKINNER, *MORE THAN MONEY: INTEREST GROUP ACTION IN CONGRESSIONAL ELECTIONS* 207 (2007).

68. WILLIAM P. BROWNE, *GROUPS, INTERESTS, AND U.S. PUBLIC POLICY* 276 (1998).

69. See generally Richard J. Semiatin & Mark J. Rozell, *Interest Groups in Congressional Elections*, in *INTEREST GROUP CONNECTION*, *supra* note 59.

70. WILLIAM P. BROWNE, *PRIVATE INTERESTS, PUBLIC POLICY, AND AMERICAN AGRICULTURE* 294 (1988).

71. See generally Marian Currinder et al., *Interest Group Money in Elections*, in *INTEREST GROUP POLITICS* 182 (Allan J. Cigler & Burdett A. Loomis eds., 7th ed. 2006).

72. See Loomis, *supra* note 58.

73. Joseph White, *Making Connections to the Appropriations Process*, in *INTEREST GROUP CONNECTION*, *supra* note 59.

74. See Currinder et al., *supra* note 71.

75. BROWNE, *supra* note 70; White, *supra* note 73.

76. See generally Janet M. Grenzke, *supra* note 62; Langbein, *supra* note 63; LARRY SABATO, *PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES* (1984); FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* (1992); John R. Wright, *Contributions, Lobbying, and Committee Voting in the U.S. House of Representatives*, 84 AM. POL. SCI. REV. 417 (1990).

from others.”<sup>77</sup> And according to the Center for Public Integrity, “Lobbyists have served as treasurers for at least 800 political action committees and 68 campaign committees in the past six years, according to the Center’s study. In that time these committees have spent more than \$525 million to influence the political process.”<sup>78</sup>

Critics of this widespread practice characterize it as buying the time and votes of legislators, or even sometimes as “paying to play.” They worry that the consequence is that non-contributors will have less access, and that this may result in lopsided discussions of alternatives. Even the Court has expressed some concern about the idea that large contributions buy preferential access.<sup>79</sup>

Shortly, we will examine the case for bias and the potential consequences of this bias. But for now, let us temporarily conclude, along with most political scientists and Washingtonians, that if money buys anything, it is access. And while access is not a guarantee of anything, it is not entirely a neutral commodity.

It is easy to see the possibilities with regard to the new lobbying regulations. While the new regulations ban gifts, lavish receptions and trips, the effect will likely be to shift more lobbying activities into fundraising dinners and receptions. Donations, fundraising events, and bundling could become even more important, substituting for the now prohibited gifts and trips as the items of value that earn access and consideration.

It might be possible to plug this hole by lessening the lobbyists’ role in fundraising, relying perhaps on the type of targeted regulations the court has permitted in the past for corporations and trade unions. By this logic, because the state has given corporations advantages with respect to aggregating wealth and because the consent of economic investors might not extend to political contributions, future reforms might seek to separate registered lobbyists from running campaigns, being in charge of PACs, or even bundling money. However, even if these actions were constitutionally permissible, it will not likely diminish the influence that contributions have in acquiring access. The Member would likely still link the lobbyist for Citibank with its PAC activities even if the lobbyist did not control the PAC him or herself. This is analogous to the rise of

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77. PUBLIC CITIZEN, *THE BANKROLLERS: LOBBYISTS’ PAYMENTS TO THE LAWMAKERS THEY COURT, 1998–2006* (2006), available at <http://www.citizen.org/documents/BankrollersFinal.pdf> (last visited Sept. 4, 2008).

78. Elizabeth Brown & Shaylyn Cochran, *PAC-Men Lobbyists: Almost 80 Members of Congress Used Corporate Lobbyists to Head Their Fund-raising Committees*, THE CENTER FOR PUBLIC INTEGRITY, Oct. 3, 2005, <http://projects.publicintegrity.org/lobby/report.aspx?aid=750>.

79. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 156 (2003).

“independent” nonprofit organizations circumventing the limits and bans on PACs, individuals, and the parties.

However, even if private money were banned entirely from campaigns, lobbyists would have other sources of access and potential influence. We now turn to two of those.

## **B. Relationships: Do Personal Connections Matter?**

When Trent Lott announced his sudden retirement in December 2007, it caused a mini-stir.<sup>80</sup> Editorialists and opinion leaders fulminated at the fact that Lott would go cash in on his public service and become a lobbyist, right before the ban on lobbying after leaving the Senate was to increase from one to two years. But the fact that everyone knew that Lott would make millions as a private lobbyist highlights a simple point: relationships matter in politics. And somebody who has both served as a former Senator majority leader and who is known for bipartisanship has relationships that many outside groups would find very valuable.

Lott is far from the only individual to make the transition from government to lobbying. According to the Center for Public Integrity, “More than 2,200 former federal government employees registered as federal lobbyists between 1998 and 2004, according to a study of federal records by the Center for Public Integrity. Altogether, records show, more than 12 percent of current lobbyists are former executive and legislative branch employees. This includes more than 200 former members of Congress (175 from the House, 34 from the Senate) and 42 former agency heads.”<sup>81</sup>

Anecdotal evidence suggests that more and more members of Congress are becoming lobbyists upon retirement, but there have been no quantitative historical studies of the phenomenon. Anecdotal evidence also suggests the transition from Hill staffer to lobbyist is happening faster,<sup>82</sup> but again, there have been no good quantitative studies to document this. Of course, a background in the government has always been valuable for lobbyists. Schlozman and Tierney’s survey found that 86 percent of organizations in Washington had at least one professional with federal government experience, though that percentage was slightly higher for

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80. See, e.g., Adam Nossiter & David M. Herszenhorn, *Mississippi’s Lott to Leave Senate Seat*, N.Y. TIMES, Nov. 27, 2007, available at <http://www.nytimes.com/2007/11/27/washington/27lott.html>.

81. Brown & Cochran, *supra* note 78.

82. One experienced lobbyist said, “Now you have people coming off the Hill with 1 or 2 years of experience asking for six-figure salaries. It’s just mind-boggling.” Another said, “Ten years ago, You had folks who stayed in gov’t longer. Now you have a situation where anybody can go to capitol hill for 2 years, 3 years, come out, and make a decent living. That’s one thing you’re seeing, compared to ten years ago, people have less experience.” Confidential Interview by author Lee Drutman.

corporations and trade associations (90 percent and 97 percent, respectively) than for unions and citizens groups (65 percent and 82 percent, respectively).<sup>83</sup>

But it is also worth noting there are plenty of successful lobbyists who did not work for the government prior to becoming lobbyists. Does this make their relationships any less valuable? Many lobbyists have been working in Washington for years and are quite skilled at building personal relationships. Many of them also have acted as fundraisers, as described above, which is also a good way to solidify relationships.

In general, it may be worth stating the obvious: people are more likely to take phone calls from people they know and trust than from strangers. Pick the website of any lobbying firm, and you will find the firm advertising an extensive network of connections and relationships. In a town in which lawmakers and staffers are besieged by requests, it always helps to know somebody, or know somebody who knows somebody.

Political science, unfortunately, does not have much to say about the role of relationships in politics. At best, one large-scale network analysis of lobbying communities in four different sectors has shown that there are different patterns of communication. But network analysis does not offer easy ways of delineating influence.<sup>84</sup>

Reformers have devoted more attention than political scientists to the so-called “revolving door.”<sup>85</sup> A recent report by The Revolving Door Working Group listed several reasons why the constant flow of individuals from government to the private sector and then sometimes back might be seen as troubling.<sup>86</sup> Among them: “It can provide a vehicle for public servants to use their office for personal or private gain;” “[t]he revolving door casts grave doubts on the integrity of official actions and legislation;” and “[t]he appearance of impropriety exacerbates public distrust in government.”<sup>87</sup>

In sum, it seems reasonable to conclude that personal relationships matter as a way of gaining access, though how much they matter is unclear. Reformers care about the revolving door, in part because they think it gives

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83. KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 448 (1986).

84. JOHN P. HEINZ ET AL., THE HOLLOW CORE: PRIVATE INTERESTS IN NATIONAL POLICY MAKING 450 (1993).

85. See REVOLVING DOOR WORKING GROUP, A MATTER OF TRUST: HOW THE REVOLVING DOOR UNDERMINES PUBLIC CONFIDENCE IN GOVERNMENT—AND WHAT TO DO ABOUT IT (2005), [http://www.revolvingdoor.info/docs/matter-of-trust\\_final-executive\\_summary.pdf](http://www.revolvingdoor.info/docs/matter-of-trust_final-executive_summary.pdf) (last visited Oct. 4, 2008).

86. See *id.*

87. See *id.*



unfair advantages to certain groups as opposed to others in gaining an audience, in part because it may encourage key decision makers to look favorably upon future employees, and in part because allowing public servants to cash out on their experience and connections looks unseemly.

### C. Information: Is Knowledge Power?

In contrast to relationships, the role of information is a subject that political scientists have devoted significant attention to, while reformers have largely ignored the subject. Many studies have concluded that information is lobbyists' most important asset<sup>88</sup> and perhaps their most important function.<sup>89</sup>

The importance of information springs from the fact the members of Congress are generalists and so, generally, are their staffs.<sup>90</sup> When it comes to working on specific issues, they often need to get up to speed quickly on particular subject matters; most lobbyists are only too happy to help.<sup>91</sup> Indeed, many lobbyists describe their primary role as educators. As one lobbyist for a high-tech company explained, "Congress, they want to make things better. But they don't understand how the things work, and so you spend a lot of time educating them on how actual technology works."<sup>92</sup>

Part of the information that lobbyists may be able to provide is technical in nature. For example, if a member of Congress is looking to write legislation to deal with cybercrime, he or she may find it helpful to consult with software and internet companies that have specialized knowledge into what may or may not be effective in combating cybercrime. Lobbyists also may have particular knowledge about the electoral consequences of taking a particular position by being in touch with certain constituents, and may be able to derive a certain amount of influence from being able to communicate the electoral consequences of various actions to members.<sup>93</sup> Additionally, because lobbyists are often

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88. Lester W. Milbrath, *Lobbyists Approach Government*, in *INTEREST GROUP POLITICS IN AMERICA* 374 (Robert H. Salisbury ed. 1970); Rogan Kersh, *The Well-Informed Lobbyist: Information and Interest Group Lobbying*, in *INTEREST GROUP POLITICS* 389 (Allan J. Cigler & Burdett A. Loomis eds. 2007); JOHN R. WRIGHT, *INTEREST GROUPS AND CONGRESS: LOBBYING, CONTRIBUTIONS, AND INFLUENCE* 214 (1995).

89. See generally JOHN MARK HANSEN, *GAINING ACCESS: CONGRESS AND THE FARM LOBBY 1919-1981* (1991); Milbrath, *supra* note 87; Wright, *supra* note 87; SCHLOZMAN & TIERNEY, *supra* note 83; DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* (1951); JEFFREY M. BERRY, *THE INTEREST GROUP SOCIETY* (1989). See also KEVIN M. ESTERLING, *THE POLITICAL ECONOMY OF EXPERTISE* 286 (2004).

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93. See generally HANSEN, *supra* note 89.

communicating with both branches of the government and both Houses of Congress, they can also sometimes provide information to lawmakers about what is going on in other parts of government.<sup>94</sup>

In general, political scientists who study the role of information in lobbying seem mostly sanguine about the consequences. They find that lobbyists cannot afford to misrepresent evidence because they know that their reputation for honesty is their most precious asset.<sup>95</sup> As a result, lobbyists often act as “information service bureaus” for policymakers, serving in effect as an extension of research staff.<sup>96</sup> And even if lobbyists do at times exaggerate their claims, policymakers and staff are generally capable of filtering attempts to deceive them.<sup>97</sup>

Yet, there is a difference between accurate and impartial information. While reputational risks may keep lobbyists from out and out fibbing, it would be surprising to find lobbyists who do not present the facts in such a way that helps them to advocate for a particular position above others. They may emphasize certain facts over other, or they may encourage lawmakers to think about particular issues using particular frames and metaphors that favor their position. Some would even suggest that there are no such things as neutral facts in the first place.<sup>98</sup>

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94. One lobbyist puts it this way: “Different parts of the government don’t talk to each other. The House and Senate don’t talk. They don’t know what’s going on in agencies. They don’t know the inner workings. We tell them what’s going on in the agency, in the Senate. That’s the one thing they ask us for the most.” Confidential Interview by author Lee Drutman.

95. See generally SCHLOZMAN & TIERNEY, *supra* note 83; BERRY, *supra* note 89; INTEREST GROUP POLITICS IN THE SOUTHERN STATES (Ronald J. Hrebener & Clive S. Thomas eds., 1992); Hojnacki & Kimball, *supra* note 62; KEN KOLLMAN, *OUTSIDE LOBBYING: PUBLIC OPINION AND INTEREST GROUP STRATEGIES* 215 (1998); DAVID WHITEMAN, *COMMUNICATION IN CONGRESS: MEMBERS, STAFF, AND THE SEARCH FOR INFORMATION* (1995).

96. See generally RAYMOND BAUER ET AL., *AMERICAN BUSINESS AND PUBLIC POLICY: THE POLITICS OF FOREIGN TRADE* (Atherton 1963); SCHLOZMAN & TIERNEY, *supra* note 83; BERRY, *supra* note 89; DAVID WHITEMAN, *supra* note 95; HEDRICK SMITH, *THE POWER GAME: HOW WASHINGTON WORKS* (Random House 1988); Jan Potters & Frans Van Winden, *Lobbying and Asymmetric Information*, 74 *PUB. CHOICE* 269 (1992); LEWIS ANTHONY DEXTER, *HOW ORGANIZATIONS ARE REPRESENTED IN WASHINGTON* (Bobbs Merrill Co., Inc. 1969).

97. See generally Carol Bodensteiner, *Special Interest Group Coalitions: Ethical Standards for Broad-Based Support Efforts*, 23 *PUB. REL. REV.* 31 (1997); Randall L. Calvert, *The Value of Biased Information: A Rational Choice Model of Political Advice*, 47 *J. POL.* 530 (1985); Susanne Lohmann, *A Signaling Model of Informative and Manipulative Political Action*, 87 *AM. POL. SCI. REV.* 319 (1993).

98. Deborah Stone argues that

[t]he rational ideal presupposes the existence of neutral facts—neutral in the sense that they only describe the world, but do not serve anybody’s interest, promote any value judgments, or exert persuasive force beyond the weight of their correctness. Yet facts do not exist independent of interpretive lenses, and they come clothed in words and numbers. Even the simple act of naming an object places it in a class and suggests it is like some things and unlike others. Naming, like counting and rule-making, is classification, and thus a political act.

Moreover, it may not always be the case that legislators get to hear from both sides of an issue and thus can triangulate between two competing views. As Schlozman and Tierney suggest, “A policymaker who hears from only one side—or who hears much more from one side than the other—is likely to be persuaded by the arguments and information to which he or she is exposed. Hence if access is unequal, it would not be surprising if it were to have consequences for influence.”<sup>99</sup>

Consider the case of the Investment Company Institute, which maintains a seventy-person research staff and is ready to assist Congress at the drop of a hat.<sup>100</sup> As one of their lobbyists, a former congressional staffer, puts it,

I think our research capability is something people on the hill know about it. when I go up there, I'd say if you want to do something, call us, we've got decades of information that I can help with . . . . I think a good congressional staffer doesn't need to know everything, but he needs to know who to call to get answers quickly.<sup>101</sup>

The Investment Company Institute has the resources to maintain a seventy-person research staff, which includes several Ph.D. economists.<sup>102</sup> The Investment Company Institute represents the mutual fund industry.<sup>103</sup> But who represents mutual fund investors? The Consumer Federation has a small Investor Protection department. If the Investment Company Institute becomes the go-to resource for information for lawmakers interested in working on legislation related to the fund industry, that is significant.

In sum, while political scientists have been able to document that information is a source of access for lobbyists, the general consensus seems to be that it does not do much to unduly influence lawmakers because the importance of maintaining a reputation for honesty does not leave lobbyists much room to dissemble. But the conclusion that this information-based access does not distort policymaking implicitly assumes that (1) information is neutral; (2) lawmakers are able to get good information on multiple sides of an issue; and (3) access itself is mostly a neutral commodity.

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DEBORAH A. STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 309 (3d ed. 2001).

99. SCHLOZMAN & TIERNEY, *supra* note 83, at 165.

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101. †

102. †

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#### D. The Corruption Paradigm: A Mini-Summary

To what extent is lobbying “corrupt”? In part, this depends both on how appropriate and how effective we can determine various sources of influence to be. At one extreme, we might consider expensive personal gifts to be corrupting. But what about providing policy or constituent-level information? Should that in any way be seen as corrupting? What if it actually proves to be a better means of achieving access to key decision makers? Should potential sources of influence and access be judged based upon how effective they are at achieving their intended goals? Or do we think that there is something more inherently corrupting about campaign contributions than information? If so, what is it?

Of these areas discussed, the case for limiting money certainly seems the strongest and most feasible. How, exactly, would one go about limiting friendships? And what possible constitutional or normative justification could there be for limiting information?

The bigger question here, however, is whether these various sources privilege certain groups over others. Democratic norms place the highest value on discussions in which all sides have an equal chance to participate.<sup>104</sup> If certain groups are able to better take advantage of these various sources of access and influence, it will be far from our ideals of democratic participation. Even if the processes by which access and influence achieved are not “corrupt” per se, they still may favor certain groups over others, and may lead to unjust and unequal outcomes.

Let us now turn to the evidence that certain types of groups are indeed advantaged, and consider what, if anything, we should do about it.

### III. Systematic Bias

While the corruption problem is important, it does not address what many political scientists have identified as a systemic corporate bias in the lobbying system, which is not traditional corruption but an equity issue.<sup>105</sup> Every count of groups in the Washington lobbying community ever done has confirmed a lobbying landscape dominated by businesses and business trade associations. In their review of the literature, Baumgartner and Leech conclude: “A consistent finding that business and profit-sector organizations have an advantage in the process of mobilization is one of the

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105. See generally ELMER ERIC SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 20 (Holt, Rinehart and Winston 1960); Schlozman & Tierney, *supra* note 83.

most important elements of the nature of bias in the Washington interest-group community.”<sup>106</sup>

In saying that the pressure system is “biased,” we do recognize that is difficult to make any claims about what an unbiased pressure system would look like.<sup>107</sup> But, at the very least, we have a basic notion of diffuse versus concentrated interests. Generally, we assume that so-called public interest groups represent diffuse interests, though we may sometimes quibble with their approaches.<sup>108</sup> Other groups, like unions and groups that represent particular races and ethnicities, women, or the elderly, might fall somewhere in between, though they claim to speak for a broad swath of the population.<sup>109</sup> But businesses are primarily concerned about their own profitability, even though they may couch their arguments in terms of public goods.<sup>110</sup> Trade associations and professional associations are also looking out for their particular members, who are concerned about themselves.<sup>111</sup> So when we talk about a pressure system dominated by businesses, trade associations, and professional associations, we are also talking about a pressure system dominated by concentrated interests.

There are, of course, different ways to measure this bias. One way to is simply to take counts of organizations who are listed as being active. The most thorough approach to this has been conducted by Kay Schlozman and various colleagues over the years, who have coded every organization in the *Washington Representatives Directory* for the years 1981, 1991, 2001, and 2006.<sup>112</sup> The results confirm Schattschneider’s claim.<sup>113</sup> At all times, roughly one-half of all the organizations listed in the directory are businesses or business-trade associations. No other group comes close. And the natural opponents of business—unions and public interest groups, a term which Schlozman and colleagues defined very broadly that includes conservative as well as liberal groups—are largely overmatched.<sup>114</sup> For every one public interest group or union, there are ten groups representing business.

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106. BAUMGARTNER & LEECH, *supra* note 46, at 111.

107. See, e.g., David Gray & Virginia Gray, *Bias in the Heavenly Choir: Interests in Society and before Government*, 16 J. OF THEORETICAL POL. 5–30 (2004).

108. †

109. †

110. †

111. †

112. Kay Schlozman et al., *Who Sings in the Heavenly Chorus? The Shape of the Organized Interest System*, paper presented at the American Political Science Association Conference, (Aug. 2008), [http://www.allacademic.com/meta/p279447\\_index.html](http://www.allacademic.com/meta/p279447_index.html) (last visited Oct. 4, 2008).

113. See generally SCHATTSCHNEIDER, *supra* note 105; SCHLOZMAN & TIERNEY, *supra* note 83.

114. Kay Schlozman et al., *supra* note 112.

Comparing the *Congressional Quarterly Almanac 1960* with the *Washington Representatives Directory 1981*:

	1960: Organizations listed in CQ Almanac	1980: Organizations with their own DC offices	1980: Organizations having DC representation
Corporations	16%	21%	52%
Trade/Business Associations	41%	32%	20%
Professional Associations	5%	15%	8%
Unions	11%	3%	2%
Citizens Groups	9%	9%	5%

Source: Schlozman & Tierney, *supra* note 82, at 77.

	1981 Wash. Reps	1991 Wash. Reps	2001 Wash. Reps
Corporations	45.2%	33.2%	33.5%
Trade/Business Associations	14.7%	15.0%	13.2%
Professional Associations	4.4%	4.7%	3.8%
Unions	1.6%	1.5%	1.0%
Public Interest	3.8%	4.9%	4.7%
Health	1.3%	3.6%	4.9%
State/Local Gov't	5.1%	6.9%	10.3%
Colleges/Universities	0.5%	1.3%	2.7%

Source: Scholzman et al., *supra* note 111, 43.

Another measurement would be lobbying disclosure forms. Baumgartner and Leech use this measure for 1996 and found that the business bias is even more pronounced under this measure.<sup>115</sup>

Yet another way to think about bias is to evaluate it by policy domain.<sup>116</sup> This thinking informs the *Hollow Core*, surely the most comprehensive study of lobbying and lobbyists ever undertaken.<sup>117</sup> Heinz, Laumann, Nelson, and Salisbury examined four policy domains and found a different breakdown of organizational representation in each domain. The business advantage shows through, but it definitely varies by sector. All this highlights the fact that to discuss bias generally is only part of the story. We also need to discuss bias in relation to specific policy domains.

115. Frank R. Baumgartner & Beth L. Leech, *Interest Niches and Policy Bandwagons: Patterns of Interest Group Involvement in National Politics*, 63 J. OF POL. 1119-213 (2001).

116. EDWARD O. LAUMANN & DAVID KNOKE, *THE ORGANIZATIONAL STATE: SOCIAL CHOICE IN NATIONAL POLICY DOMAINS* † (Univ. of Wis. Press 1987).

117. HEINZ ET AL., *supra* note 84, at †.

	<b>Agriculture</b>	<b>Energy</b>	<b>Health</b>	<b>Labor</b>	<b>Total</b>
Business	20	54	15	8	<b>24</b>
Citizen Issue Group	14	11	7	4	<b>9</b>
State/Local Gov't	3	5	6	1	<b>4</b>
Labor Union	5	1	3	34	<b>10</b>
Minority Group	3	0	14	11	<b>7</b>
Nonprofit	1	4	21	7	<b>8</b>
Professional	1	3	17	4	<b>6</b>
Trade Association	51	22	16	26	<b>29</b>

Source: JOHN P. HEINZ ET AL., *supra* note 83, at 63.

Breaking policy into specific issues, Baumgartner and Leech examined one hundred and thirty-seven issues at random mentioned in lobby disclosure forms.<sup>118</sup> What they found was that most lobbying takes place on a handful of bills (most of the heavily lobbied bills were appropriations bills). But it was in the bills that attracted the least attention where business was the most dominant. The paper does not detail the passage rate success of the different bills.<sup>119</sup> But it does give us another way to think about bias. Perhaps businesses can afford to work on a wide portfolio of issues, including many low-profile issues on which they are the only ones who are lobbying, whereas other resource-poor groups are only able to work on a few high-profile, big fight issues on which they will have less impact.

The fact that a lot of the “issues” with the most lobbying reports are appropriations bills suggests that Baumgartner and Leech may overstate their findings a little bit about there being a few big conflict issues, because groups lobbying on these bills likely are only concerned with specific provisions. So this may mask the fact that there is a lot of “niche” lobbying. In his study of lobbying in the agricultural sector, Browne finds that much of the lobbying is non-conflictual and oriented around particular “niche” issues.<sup>120</sup> There is little evidence for this kind of politics outside the agricultural sector, however.<sup>121</sup> The agricultural sector has a remarkable diversity of specialized commodity associations that one does not find anywhere else.<sup>122</sup> The business bias is even more pronounced

118. Baumgartner, *supra* note 61, at 1191–213.

119. *Id.*

120. William P. Browne, *Organized Interests and their Issue Niches: A Search for Pluralism in a Policy Domain*, 52 J. OF POL. (1990).

121. †

122. The 2006 Washington Representatives Directory (Columbia Books, ed. Valerie Sheridan), lists sixty-eight different specialty agricultural commodity trade associations ranging

when the metric is expenditures.<sup>123</sup> Consider, of the twenty most active lobbying organizations, eleven are private corporations, and eight are business trade groups.<sup>124</sup> The only other group is AARP.<sup>125</sup>

More broadly, Baumgartner and Leech after looking at lobbying data from 1996, found that businesses alone accounted for \$461 million on lobbying expenditures—more than half (56 percent) of the \$823 million spent on lobbying that year.<sup>126</sup> Together, businesses, trade associations, and professional groups account for 85 percent of the total spending reported.<sup>127</sup> Just on their own, corporations accounted for 43 percent of registrations, 46 percent of reports filed, and 43 percent of issues mentioned.<sup>128</sup> Business trade associations, meanwhile, accounted for 16 percent of registrations, 17 percent of reports filed, and 20 percent of issues mentioned.<sup>129</sup> No matter how they sliced the data, citizen groups and non-profits never accounted for more than 10 percent of the lobbying environment, leading the authors to conclude that “the extent of business predominance in the group system is greater than previously reported. . . . Not only do businesses constitute the largest category of lobbying organizations in Washington . . . but they are by far the best endowed and most active.”<sup>130</sup>

Certainly, the Washington pressure community is not a static entity. There was a wave of public interest group mobilization in the 1960s, followed by a wave of business mobilization in the 1970s.<sup>131</sup> Since 1981, the number of groups with Washington representation has roughly doubled, with particularly rapid growth in areas of health, education, and local government.<sup>132</sup> But, as described above, the fact that most groups represent business has remained remarkably consistent.

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from the American Peanut Product Manufacturers Inc to the American Butter Institute, from the National Institute of Oilseed Products to the National Yogurt Association. For a discussion of the agricultural subsidies, see GUY MUCCIARIONI, *REVERSALS OF FORTUNE*, 107–44 (Brookings Institution Press 1995).

123. See Baumgartner, *supra* note 61.

124. See <http://www.opensecrets.org/lobby> (last visited Oct. 4, 2008).

125. See *infra* Appendix, Table 1.

126. See Baumgartner, *supra* note 61.

127. See *id.*

128. See *id.*

129. See *id.*

130. *Id.* at 1195.

131. See, e.g., DAVID VOGEL, *FLUCTUATING FORTUNES* 148–239 (Basic Books 1989).

132. Schlozman, *supra* note 112, at 43 (based on the work of Loomis and Cigler describing 10 of the “most substantial” developments as follows: “[a] great proliferation of interest groups since the early 1960s”; “[a] centralization of group headquarters in Washington, DC, rather than New York City or elsewhere”; “[m]ajor technological developments in information processing



## A. Campaign Money, Relationships and Information

In discussing the corruption paradigm, we identified three sources of potential influence: campaign money, relationships, and information. Is there evidence that these sources of influence are biased in one way or another?

There is good evidence that most PAC money comes from corporations. Consider the following macro-breakdown of PAC contributions from the 2006 elections. More than 70 percent of the money comes from business PACs. And business PACs outspend labor PACs by a 17-to-1 ratio. Another way to think about campaign contributions is to break it down by sector.<sup>133</sup> Again, most of the sectors are mostly business.<sup>134</sup> Labor comes in eighth.<sup>135</sup> Lawyers and lobbyists come in fourth.<sup>136</sup>

It is also worth noting that under existing tax laws, advocacy groups that want to maintain their tax-exempt status for charitable giving are prohibited from participating in partisan politics, though some do set up separate organizations in order to achieve their electoral goals.

Again, as we noted earlier, campaign contributions do not necessarily buy policy, but they do tend to help with access. As one lobbyist put it, "It's all about having prior relationships, which is why fundraisers are important. . . . It's a lot easier working on an agenda with somebody you helped get into office."<sup>137</sup> At the very least, fundraisers are also an opportunity to check in, to get "face time," and to build relationships.

As we discussed above, these relationships are another source of influence.<sup>138</sup> If fundraisers help to establish and build relationships, and

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that promote more sophisticated, more timely, and more specialized communications strategies, such as grassroots lobbying"; "[t]he rise of single-issue groups"; "[c]hanges in campaign finance laws (1971,1974) and the ensuing growth of political action committees (PACs), and more recently, the growth of independent campaign expenditures by some interests"; "[t]he increased formal penetration of political and economic interests within the bureaucracy (advisory committees), the presidency (White House group representatives), and the Congress (caucuses of members)"; "[t]he continuing decline of political parties' ability to perform key electoral and policy-related activities."; "[t]he increased number, activity, and visibility of public-interest groups, such as Common Cause and the Ralph Nader inspired public interest research organizations."; "[t]he growth of activity and impact by institutions, including corporations, universities, state, and local governments, and foreign interests."; "[a] continuing rise in the amount and sophistication of group activity in state capitals, especially given the devolution of some federal programs and substantial increases in state budgets.")

133. See *infra* Appendix, Table 3.

134. See <http://www.opensecrets.org>, (last visited Dec. 10, 2007).

135. See *id.*

136. See *id.*

137. Confidential interview by author Lee Drutman.

138. See *supra* notes 44–104 and accompanying text.

different groups do not participate equally in fundraising, it stands to reason that certain groups may have particular relationship advantages that spring from their more active participation in fundraising activities.

As we discussed, lobbyists do play an active role in fundraising.<sup>139</sup> But Public Citizen's report on lobbyist contributions note that there are a few lobbyists who dominate the fundraising world:

Just over 6 percent of lobbyists account for more than four-fifths of the money lobbyists have contributed to members of Congress since 1998." And "Just 27.1 percent (7,350) of the 27,121 people who registered as lobbyists since 1998 have contributed at least \$200 to a single congressional candidate or PAC."<sup>140</sup>

Additionally, "the contributions of the top 50 lobbyists are particularly striking. Since 1998, these lobbyists have given an average of more than \$207,000 to members of Congress, or \$25,890 per year."<sup>141</sup> The *National Journal* has called these the "super donors."<sup>142</sup>

Given what we know, we can reasonably guess that these "super donors" are among the most well-connected lobbyists in Washington. We do not know what they charge for their services, but we can reasonably guess they do not come cheap. This means that only those groups with the most money could afford to hire them. Surely, all lobbyists are not all equal. Some are former members of Congress or chiefs of staff who have lots of connections, who both really understand the political process and

139. *See id.*

140. *See The Bankrollers*, PUBLIC CITIZEN CONGRESS WATCH (2006), <http://www.citizen.org/documents/BankrollersFinal.pdf> (last visited Oct. 4, 2008).

141. *See id.*

142. The reason the top fifty lobbyists have been designated "super donors" is as follows:

What sets . . . super-donors apart is that they routinely hit the maximum aggregate limit on what an individual may donate to candidates—and political parties and political action committees. That limit, indexed for inflation, is \$108,200 in this election cycle. Only a small slice of the K Street community can afford to give that much money, and it is an elite and often-overlooked group. Political scientists have exhaustively studied special-interest PAC money, and much has been made lately of so-called bundlers, fundraisers who round up millions of dollars in donations from friends, business associates, clients, and others to help their favorite candidates. But lobbyists who dip generously into their personal bank accounts play a quiet yet powerful role on Capitol Hill. An analysis done for *National Journal* by the Center for Responsive Politics identified a select group of perhaps a dozen lobbyists who each double up with their spouses to give, as a couple, a staggering \$150,000 to \$200,000 to candidates and political parties per election cycle. By pairing with their spouses—some of whom are fellow lobbyists—these top donors magnify their political giving and clout.

*See* Eliza Newlin Carney, *Super Donors*, NAT'L J., (Dec. 2007) (center's analysis encompassed three election cycles: the current 2008 race along with the 2006 and 2004 cycles).

know how to make things happen.<sup>143</sup> They generally come at a high price, which only those with the most money can afford.<sup>144</sup> But these most clever and well-connected of lobbyists may amplify the already existing bias even more than has been documented. As one pharmaceutical lobbyist put it bluntly, “We can generally hire the best people from capitol Hill.”<sup>145</sup>

The third area we discussed is information.<sup>146</sup> One way to evaluate the possible bias is to examine participation in an area where information is probably most important and where money and relationships are not: agency rule-making.<sup>147</sup> The evidence is that business participation in this domain is remarkably commensurate with its general share of the interest group community.<sup>148</sup> In a comprehensive survey of agency rule-making, Susan and Jason Webb Yackee culled through all the comments for forty rules promulgated at four agencies over a seven-year period and find that 57 percent represent business interests, 19 percent represent government interests, and only 6 percent represent public interest group.<sup>149</sup> They also show that businesses tend to get what they want generally in agency rule-making.<sup>150</sup> They argue that

business influence stems from “strength in numbers” and that business comments contain higher quality information than comments from other kinds of rule-making participants.<sup>151</sup> Our analysis demonstrates that a greater proportion of business interests within the public comments allow business commentators to better pursue their preferred level of government involvement in agency rules.<sup>152</sup> This finding suggests that if other types of participants become more active in their submission of comments, business influence over agency policy outputs may decrease during the notice and comment period.<sup>153</sup>

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143. See REVOLVING DOOR WORKING GROUP, *A MATTER OF TRUST: HOW THE REVOLVING DOOR UNDERMINES PUBLIC CONFIDENCE IN GOVERNMENT—AND WHAT TO DO ABOUT IT*, *supra* note 85.

144. See *id.*

145. Confidential interview by author Lee Drutman.

146. See *supra* notes 88–103 and accompanying text.

147. Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. OF POL. 128–39 (2006).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. See *infra* Part III.

153. Webb & Yackee, *supra* note 147.

Similarly, Scott Furlong argues,

Most often the issues that attract interest groups to the executive branch are highly technical in nature and involve some form of regulation of society, in particular the economic sector. As a result, those attentive to the permanent government and its decisions in implement public policies tend to be skewed toward those economic interests directly affected by such decisions.<sup>154</sup>

He concludes that “groups not dependent on large memberships and more likely to have legal and administrative expertise lobby the executive branch more than the public interest groups.”<sup>155</sup>

Possibly, diffuse interest groups spend more time communicating information at the legislative level.<sup>156</sup> But at the very least, it seems clear that businesses have extensive information resources. Given the common understanding that information is an important part of the lobbying process and the resources that businesses spend on lobbying, it would be surprising if they didn’t spend extensively on their capacity to provide information.

To sum up, the evidence suggests that not only do businesses mobilize at a greater rate than unions and diffuse interest groups that might countervail their power.<sup>157</sup> They also spend more money on campaigns, are able to hire the most connected lobbyists, and are able to provide plenty of information.<sup>158</sup> All these capacities further help them to gain access to key decision makers.<sup>159</sup> And access, of course, is a necessary condition for influence.

## B. Why Does the Bias Exist?

Given the fact that the groups representing business have always predominated in the pressure system, we might want to know why this is the case, and what is it about the nature of group politics that leads to such unequal representation. Understanding the forces that shape the balance of

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154. Scott R. Furlong, *Exploring Interest Group Participation in Executive Policymaking*, in INTEREST GROUP CONNECTION, *supra* note 59, at †.

155. *Id.* at 239.

156. Anecdotally, one experienced lobbyist had this to say:

One thing that amuses me is the number of organizations who don’t spend any time with executive agencies—now there is more and more activity, but still much less activity than there should be. Typically people at the higher grades of understanding are more active, but the legislative is easier to understand, though even that is complicated.

Confidential Interview by author Lee Drutman.

157. *See supra* notes 131–56 and accompanying text.

158. *See id.*

159. *See id.*

the pressure system should better be able to help us to consider what, if anything, can be done to make it more equitable.

The most widely accepted explanation for the bias comes from an economist, Mancur Olson.<sup>160</sup> Working from the starting point that people are basically self interested, Olson elegantly demonstrated that bias would inevitably creep into the pluralist world because those groups who would mobilize behalf on so-called diffuse interests faced what he called a free-rider problem.<sup>161</sup> Everybody wants clean air, for instance, but because clear air is a public good and hence non-divisible, everybody would get to breath cleaner air regardless of whether they contributed to efforts to make the air cleaner. This creates an incentive to free ride on the efforts of others, and ultimately undercuts the collective incentive to act.

Countering this to some degree are diffuse interest groups that form in spite of the free-rider problem.<sup>162</sup> These groups exist because entrepreneurs start them;<sup>163</sup> patrons fund them and governments sustain them;<sup>164</sup> and, members overestimate the impact of their contributions<sup>165</sup> and get psychological benefits of solidarity from being a part of them.<sup>166</sup> But few of these groups are thriving to same degree as the concentrated groups, and as the data clearly show, they certainly do not mobilize with the same resources that concentrated interests do.

Under Olson's framework, the predominance of business and trade associations makes perfect sense.<sup>167</sup> Because these interests are narrow and a lot is at stake for them, there are no real problems of free riding. Olson also noted that many associations offered other selective material benefits (such as discounted insurance or professional development), and that politics was simply a "by-product" of the money raised in exchange for these selective benefits.<sup>168</sup> As Salisbury later noted, institutions have a particularly easy time of mobilizing, given that they already exist.<sup>169</sup> If

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160. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (Harvard Univ. Press 1965).

161. See generally *id.*

162. See *infra* Appendix, Tables 1 & 2.

163. Robert H. Salisbury, *An Exchange Theory of Interest Groups*, 13 *MIDWEST J. OF POL. SCI.* 1-32 (1969).

164. JACK L. WALKER, *MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS* 75-102 (Univ. of Mich. Press 1991).

165. See generally TERRY M. MOE, *THE ORGANIZATION OF INTERESTS: INCENTIVES AND THE INTERNAL DYNAMICS OF POLITICAL INTEREST GROUPS* (Univ. of Chi, Press 1980).

166. See generally JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* (Basic Books 1974).

167. See generally OLSON, *supra* note 159.

168. See generally *id.*

169. Robert H. Salisbury, *Interest Representation: The Dominance of Institutions*, 78 *AM. POL. SCI. REV.* 64-76 (1984).

Wal-Mart executives decide they want to mobilize politically on behalf of the company, they already have the resources to divert into operating a Washington office.<sup>170</sup>

A number of scholars have argued that the nature of political conflict exacerbates the bias.<sup>171</sup> This is because a good deal of political conflict tends involve issues in which a lot is at stake for a particular industry or a set of companies, but the benefit or cost to the average citizen is small, barely noticeable, and unlikely to provoke political interest. James Q. Wilson has argued that a good deal of political conflict involves the combination either of diffuse costs and concentrated benefits or diffuse benefits and concentrated costs.<sup>172</sup> Either way, it is extremely rare for a diffuse interest to triumph over a concentrated interest.

A large amount of literature suggests that in policymaking, only those directly affected by the policy (typically a regulated industry or profession) will participate and as a result most of the public will be uninvolved.<sup>173</sup> This complexion goes by various names—sub-governments, iron triangles, and policy whirlpools.<sup>174</sup>

While such diagnoses were common prior to the 1970s, the extent to which this is still true remains a point of debate.<sup>175</sup> Heclø argued that the more diffuse “issue networks” were rapidly replacing the “iron triangles” of old, but worried that this, too, made things less democratic because it raised the hurdles of expertise to participate in these debates.<sup>176</sup> Baumgartner and Jones argue that policy communities have a tendency towards long-term stability, but every now and then a major controversy or

170. *Id.*

171. See generally JAMES Q. WILSON, *THE POLITICS OF REGULATION* (Basic Books 1980); THEODORE LOWI, *THE END OF LIBERALISM* (Norton 1979); GRANT MCCONNELL, *PRIVATE POWER & AMERICAN DEMOCRACY* (Knopf 1966); DOUGLASS CATER, *POWER IN WASHINGTON: A CRITICAL LOOK AT TODAY'S STRUGGLE TO GOVERN IN THE NATION'S CAPITAL* (Random House 1964); MARVER H BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (Princeton Univ. Press 1955); ERNEST STACEY GRIFFITH, *THE IMPASSE OF DEMOCRACY: A STUDY OF THE MODERN GOVERNMENT IN ACTION* (Harrison-Hilton Books, Inc. 1939).

172. See generally WILSON, *supra* note 170.

173. See generally LOWI, *supra* note 170; GRANT MCCONNELL, *PRIVATE POWER & AMERICAN DEMOCRACY* (Knopf 1966); DOUGLASS CATER, *POWER IN WASHINGTON: A CRITICAL LOOK AT TODAY'S STRUGGLE TO GOVERN IN THE NATION'S CAPITAL* (Random House 1964); MARVER H BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (Princeton University Press 1955); ERNEST STACEY GRIFFITH, *THE IMPASSE OF DEMOCRACY: A STUDY OF THE MODERN GOVERNMENT IN ACTION* (Harrison-Hilton Books, Inc. 1939).

174. See generally *id.*

175. See, e.g., Jeffrey M. Berry, *Subgovernments, Issue Networks, and Political Conflict in REMAKING OF AMERICAN POLITICS* 236–60 (Richard E. Harris and Sidney M. Milkis, eds. 1989).

176. See generally Hugh Heclø, *Issue Networks and the Executive Establishment*, in *THE NEW AMERICAN POLITICAL SYSTEM* 282 (American Enter. Inst. 1978).

issue re-framing shuffles the deck.<sup>177</sup> Browne shows that at least in agriculture, there are an awful lot of non-conflictual niche issues.<sup>178</sup> Baumgartner and Leech show that on most bills, only a few organizations are active, but on a handful of bills, hundreds are active.<sup>179</sup>

In sum, we can conclude that there are systemic reasons why the bias exists.<sup>180</sup> For one, businesses tend to have fewer obstacles to mobilization than diffuse interest groups.<sup>181</sup> And for another, most political conflict is structured so that the consequences of policy are highly salient to particular concentrated interests, but not the general public.<sup>182</sup> Taken together, this suggests that the imbalances in the pressure system are endemic and not likely to change anytime soon.

### C. Countering the Bias

It is worth pondering for a moment whether, even if bias exists, we should be troubled by it. A couple of possibilities exist that might mitigate the perceived negative consequences. One is that, as some scholars have concluded, lobbyists are not particularly influential.<sup>183</sup> Another is the Madisonian view of factions counteracting factions, which idealizes a policy process in which groups mobilize as their interests are threatened and hash out agreements and compromises in some roughly democratic way.<sup>184</sup> The fact that businesses mobilize more may simply be a sign that

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177. See generally FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (Univ. of Chi. Press 1993).

178. William P. Browne, *Organized Interests and their Issue Niches: A Search for Pluralism in a Policy Domain*, 52 J. OF POL. 477–509 (1990).

179. WILSON, *supra* note 171, probably offers the most useful framework for thinking about conflict. This framework suggests that both costs and benefits can be of two types: concentrated or diffused, which sets up a two-by-two matrix of possible combinations. When concentrated groups go up against diffuse groups, concentrated groups usually win, so it is worth paying attention to the structure of politics. Most regulatory politics fall pretty clearly into the realm of concentrated costs, diffuse benefits, which is why regulated interests tend to triumph. Similarly, many specific entitlement programs fall into the realm of concentrated benefits, diffuse costs, which is why they tend to thrive. Only when concentrated interests battle each other or diffuse interests battle each other should we expect to see any real political conflict. And if most political battles fall into the realm of concentrated vs. diffuse interests, there is usually not going to be much of a fight. The concentrated interest will always have more at stake, and hence be much more likely to mobilize effectively. Schlozman, *supra* note 112, at †.

180. See *infra* Parts II & III.

181. See generally OLSON, *supra* note 160.

182. See generally WILSON, *supra* note 171.

183. See generally RAYMOND BAUER, ITHIEL DE SOLA POOL & LEWIS ANTHONY DEXTER, *AMERICAN BUSINESS AND PUBLIC POLICY: THE POLITICS OF FOREIGN TRADE* (Atherton Press 1963); Lester W. Milbrath, *Lobbyists Approach Government*, in *INTEREST GROUP POLITICS IN AMERICA* 347–403 (Harper & Row 1970).

184. THE FEDERALIST NO. 51 (James Madison).

they are more under threat and hence weaker. It is also possible that businesses mostly wind up battling each other and in the end fight each other to a standstill.

At least at mid-century, the Madisonian view prevailed in political science.<sup>185</sup> But after two decades of arguing about the nature of influence and power, scholars ultimately agreed to disagree, leaving the discipline with nothing close to a conclusion on whether a balanced pluralism was alive and well or whether Washington was suffering a corporate takeover.<sup>186</sup> In the years since, scholars have turned their attentions away from grander theories and instead to trying to measure and quantify specific cases of influence, producing the mixed findings described above.<sup>187</sup>

So is the bias troublesome for democratic norms? We argue that it is. Specific examples of influence may be hard to show and the results may be mixed, but even if groups who try to influence policy are successful only half of the time (a result that would fall far short of the 95 percent confidence that scholars would need to confirm the hypothesis that some tactic is successful).<sup>188</sup> That is a pretty good record, given that some groups are involved in an awful lot of attempts to influence policy outcomes.<sup>189</sup> As Heinz et al. conclude, “The general pattern is that doing more of anything produces greater success than doing less, regardless of the strategy.”<sup>190</sup>

We agree with Schattschneider that

[t]he size of the constituencies being mobilized, the inclusiveness or exclusiveness of the conflicts people expect to develop have a bearing on all theories of how politics is or should be organized. In other words, nearly all theories of politics have something to do with the question of who can get into the fight and who is to be excluded.<sup>191</sup>

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185. See generally DAVID BICKELL TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* (Knopf 1951); ROBERT ALAN DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (Yale Univ. Press 1967); NELSON W. POLSBY, *COMMUNITY POWER AND POLITICAL THEORY* (Yale Univ. Press 1963).

186. See generally ANDREW S. MCFARLAND, *NEOPLURALISM: THE EVOLUTION OF POLITICAL PROCESS THEORY* (Kansas Univ. Press 2004).

187. See generally *id.*

188. See, e.g., ERIK A. HANUSHEK & JOHN E. JACKSON, *STATISTICAL METHODS FOR SOCIAL SCIENTISTS (QUANTITATIVE STUDIES IN SOCIAL RELATIONS)* 45–69 (Academic Press 1977).

189. For examples of attempts to influence policy outcomes, see the database provided at <http://soprweb.senate.gov/index.cfm?event=choosefields>, browse the lobby disclosure forms at Senate Office of Public Disclosure website and you will see multiple organizations who report lobbying on dozens of issues in a given year.

190. HEINZ ET AL., *supra* note 84, at 348.

191. See SCHATTSCHNEIDER, *supra* note 105, at 20.



If, as political scientists widely believe, systemic bias favoring concentrated, well-funded interests is a problem, what can be done to restore something closer to the pluralist ideal of a rough balance of power with at best only temporary winners or losers and generous helping of compromise? Pluralists believe that stable politics are built on fluid coalitions across issue areas, in which winners in some realms become losers in others, and vice versa.<sup>192</sup> A system in which some groups are dominant and others permanently subordinate creates festering tensions and the potential for more serious civil strife.<sup>193</sup>

The challenge then is how to counter monopoly or dominance without interfering with fundamental rights. Most regulatory approaches level down: that is, they constrain fundamental freedoms for the sake of preserving systemic integrity.<sup>194</sup> In the area of campaign finance and political speech, the Court has been skeptical of attempts to level down in the interests of equity.<sup>195</sup> The one exception has been targeted regulations aimed at the corporate form of organization, citing the advantages of the corporate form as a reason to allow compensatory burdens.<sup>196</sup>

For example, in upholding a federal statute prohibits corporations from using treasury funds to make an expenditure in connection with any federal election, the Court has concluded that

[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.<sup>197</sup>

And in upholding a Michigan state law limiting independent political expenditures by corporations, the Court majority wrote that

. . . the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We

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192. See generally TRUMAN, *supra* note 89.

193. †

194. †

195. †

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197. Fed. Election Comm'n v. Mass. Citizens For Life, Inc., 479 U.S. 238 (1986).

therefore hold that the State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations.<sup>198</sup>

One strategy, therefore, might be to separate the roles of the corporate/associational lobbyist from the running and direction of the corporate PACs. The current law allows some corporate money to establish PACs, but, in theory, one might argue that allowing the lobbyist to direct and organize the PAC is excessive, and that there is an important state purpose in preventing the appearance of the quid pro quo exchange of access and favor for campaign money.<sup>199</sup> To be sure, this separation would not end the influence of the client and its PAC when the lobbyist contacts a Member, but it does lessen the potentially corrupt appearance and weaken the personal dependence on the lobbyists. It would also put lobbyists on a more formally equal footing, even if not eliminating the advantages completely.

The other half of the strategy is to level up as opposed to level down. The original pluralist notion was that faction was inevitable, and, therefore, faction should be used to counter faction.<sup>200</sup> By this logic, the goal should not be to eliminate lobbying but to increase lobbying, particular for underrepresented and disadvantaged groups. This might mean adopting a public defender model, with publicly-funded lobbyists for groups that can demonstrate a sufficiently broad membership base and non-corporate funding. The funding could be matching or complete subsidy. As we noted, lobbyists for non-diffuse interests are very much outnumbered.<sup>201</sup> The incentive of having the expense underwritten for them might encourage the formation of more membership-based, diffuse interest groups.

The larger point is that systemic bias should not be ignored and corrections should conform to pluralist ideals. There is room for election law in this reform if targeted regulations of lobbyists' campaign activities can survive constitutional scrutiny. But there should also be an institutional component that proactively proliferates the number of lobbyists for diffuse, membership groups.

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198. *Austin v. Mich. Chamber of Comm.*, 494 U.S. 652 (1990).

199. *See generally* *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000). *See* *Fed. Elections Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2000) (acknowledging that corruption extends beyond explicit cash-for-votes agreements to undue influence on an officeholder's judgment).

200. *See* THE FEDERALIST NO. 51 (James Madison).

201. *See supra* notes 131–97 and accompanying text.

## Conclusion

The new lobbying regulations extend the disclosure and conflict-of-interest principles to lobbying activities, and as such, are a welcome regulatory addition.<sup>202</sup> However, there are limits to how far the corruption model can extend further without labeling much political activity as corrupt and infringing on the effective running of government.<sup>203</sup> Lobbyists serve a legitimate constitutional function and provide valuable information and expertise.<sup>204</sup> Moreover, the new regulations will likely encourage a closer connection between fundraising and lobbying.<sup>205</sup> This needs to be addressed in the next wave of reforms.

There is bias in the pressure system.<sup>206</sup> There always has been.<sup>207</sup> Whether we measure it by organizations represented, by money spent, by issues acted on, or participation in rule-making, we see that businesses and trade associations consistently mobilize at roughly ten times the rate that those forces that might countervail them do.<sup>208</sup> Though public interest groups may grab more positive media coverage and get to testify in hearings more often, it is not clear how much difference this makes, especially given the extent to which so much politics (particularly the politics that concentrated interests mostly care about) happens without the public paying attention.<sup>209</sup> Certainly, the pressure system has become much larger and open over the last four decades.<sup>210</sup> But the business advantage has remained remarkably consistent.<sup>211</sup>

And there probably always will be bias. Given the nature of politics and policy conflict, concentrated interests have generally more reasons to mobilize than diffuse interests.<sup>212</sup> They also have far fewer collective-action problems to overcome and do not face the free-rider problem nearly as acutely as groups that would mobilize on behalf of the “public interest.”<sup>213</sup> Moreover, businesses and other institutions have the especial advantage that if they want to mobilize, they do not need to go out and

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202. †

203. †

204. See generally Allard, *supra* note 44.

205. †

206. See *supra* notes 105–201 and accompanying text.

207. See *id.*

208. This is based on calculations of campaign spending and lobbying spending, tallied at <http://www.opensecrets.org>.

209. See, e.g., LOWI, *supra* note 171.

210. See Schlozman et al., *supra* note 112.

211. See *id.*

212. See *supra* notes 105–201 and accompanying text.

213. See generally OLSON, *supra* note 160.

form a group.<sup>214</sup> They simply hire Washington representation out of their general treasury.<sup>215</sup>

As to the extent to which this bias is troublesome, it depends in part on one's normative framework. Certainly, it is difficult to say what an unbiased pressure system looks like. And certainly, influence is a difficult thing to measure conclusively. But it strains credulity to argue that these groups have no influence on politics. True, as political scientists are fond of noting, there may not be a neat one-to-one ratio between campaign contributions and political votes.<sup>216</sup> But that does not mean that money has no influence. And even if money had no influence, lobbyists have many other sources of influence. They have long-standing relationships and friendships with key policymakers.<sup>217</sup> They provide valuable expertise to lawmakers.<sup>218</sup> They enable lawmakers to work on certain priorities that they share above others they do not.<sup>219</sup> They are "in the know" in a town where up-to-the-minute information is power.<sup>220</sup> And when they represent businesses, they come to the bargaining table from a position of strength.<sup>221</sup>

We have put forth some modest proposals for correcting the bias. The first step is separating the roles of lobbyists and organizational fundraising. PACs should be run by separate individuals and not by lobbyists, and lobbyists should not be running campaigns. Secondly, we recommend the adoption of a public defender model, establishing public funding for lobbyists that represent diffuse, non-corporate interests. Neither measure will eliminate the advantages concentrated interests have, but they can certainly help to pull us closer to a system of more equal participation.

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214. See generally Salisbury, *supra* note 168.

215. See generally *id.*

216. See generally Ansolabehere et al., *supra* note 46.

217. REVOLVING DOOR WORKING GROUP, A MATTER OF TRUST: HOW THE REVOLVING DOOR UNDERMINES PUBLIC CONFIDENCE IN GOVERNMENT—AND WHAT TO DO ABOUT IT, *supra* note 85.

218. See generally THE POLITICAL ECONOMY OF EXPERTISE, *supra* note 46.

219. Richard Hall & Alan Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV., † (2006).

220. †

221. Charles E. Lindblom, *The Market as Prison*, 44 J. OF POL., †, 324–36 (1982).

## APPENDIX

**Table 1: Top Spenders on Federal Lobbying by Client, 1998–2007**

Client	Total
US Chamber of Commerce	\$338,324,680
American Medical Ass'n	\$157,247,500
General Electric	\$149,990,000
American Hospital Ass'n	\$138,084,144
Pharmaceutical Rsrch & Mfrs. of America	\$115,008,600
AARP	\$112,732,064
Edison Electric Institute	\$107,132,628
National Ass'n of Realtors	\$103,890,000
Business Roundtable	\$101,660,000
Northrop Grumman	\$101,350,474
Blue Cross/Blue Shield	\$90,163,317
Lockheed Martin	\$87,797,702
Freddie Mac	\$86,164,048
Verizon Communications	\$83,407,022
Boeing Co.	\$82,038,310
General Motors	\$77,620,483
Philip Morris	\$75,500,000
Roche Group	\$74,888,942
Fannie Mae	\$73,857,000
Ford Motor Co.	\$71,312,808

Source: Senate Office of Public Records, via Center for Responsive Politics

**Table 2: Lobby Distribution**

	<i>Grand Total</i>	<i>Democrats</i>	<i>Republicans</i>	<i>Dem %</i>	<i>Repub %</i>
Business (71.7%)	\$1,133,433,773	\$491,114,294	\$625,787,189	43%	55%
Labor (4.2%)	\$66,670,698	\$57,905,193	\$8,208,109	87%	12%
Ideological (8.3%)	\$131,735,468	\$69,643,797	\$59,630,058	53%	45%
Other (10.5%)	\$165,959,918	\$85,343,365	\$77,826,633	51%	47%
Unknown (5.2%)	\$82,310,396	\$33,480,968	\$47,147,128	41%	57%

Source: Center for Responsive Politics

**Table 3: Top Spenders on Federal Lobbying by Sector, 2006**

Rank	Sector	Amount	Dems	Repubs
1	Finance/Insur/RealEst	\$258,962,164	44%	54%
2	Ideology/Single-Issue	\$226,594,357	55%	44%
3	Other	\$166,179,223	51%	47%
4	Lawyers & Lobbyists	\$145,015,740	66%	33%
5	Misc Business	\$141,401,918	40%	59%
6	Health	\$99,976,485	37%	62%
7	Communication/Electronics	\$70,298,704	55%	44%
8	Labor	\$66,672,098	87%	12%
9	Construction	\$54,836,904	30%	70%
10	Energy/Nat Resource	\$47,627,102	25%	74%
11	Agribusiness	\$44,702,079	31%	68%
12	Transportation	\$39,232,847	28%	72%
13	Defense	\$17,923,552	38%	60%

Source: Center for Responsive Politics