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Lobbying and Campaign Finance: Separate and Together

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INTRODUCTION

The relationship between lobbying and campaign finance is complex, contested, and changing. Lobbying and campaign finance are two important forms of political activity that combine money and communication in ways that have significant implications for democratic self-government. The two practices frequently interact and reinforce each other, with individuals, organizations, and interest groups deploying both lobbyists and campaign money to advance their goals. Congress, in 2007, for the first time explicitly recognized the intersection of campaign finance and lobbying when it adopted legislation specifically regulating the campaign finance activities of lobbyists.[1] At roughly the same time, several of the leading candidates for the Democratic presidential nomination clashed over the propriety of accepting campaign contributions from lobbyists.[2]

Yet, lobbying and campaign finance also present different issues, and they are generally governed by different statutory regimes. The importance of the campaign finance/lobbying distinction was underscored in 2007 by the Supreme Court in *FEC v. Wisconsin Right to Life, Inc.* (*WRTL*),[3] which carved out an enormous as-applied exception to Congress's limitations on corporate and union campaign spending to assure that campaign finance law does not constrain the ability of corporations and unions to undertake grassroots lobbying expenditures. As *WRTL* indicates, lobbying is often subject to less restrictive controls than campaign finance, suggesting further that the two practices

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1. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 [hereinafter Honest Leadership Act]; *id.* § 204 (regulating the disclosure of bundled contributions); *id.* § 305 (prohibiting Members of the House of Representatives from participating in lobbyist-sponsored events during political conventions); *id.* § 542 (same prohibition for Senators).

2. *See* Ruth Marcus, *Democrats' Purity Primary*, WASH. POST, Aug. 22, 2007, at A17 (reporting that John Edwards and Barack Obama refuse to take lobbyists' contributions while Hillary Clinton defends her acceptance of such contributions).

3. 127 S. Ct. 2652 (2007).

implicate different concerns.

Although both lobbying and campaign finance have each been the subject of extensive scholarly treatment, relatively little attention has been paid to the relationship between these two closely related, yet different activities, and the regulatory regimes that deal with them. This Article constitutes a first effort at probing the relationship between lobbying and campaign finance. The next Part provides a brief overview of the commonalities, differences, and interactions of campaign finance and lobbying. Part II compares the techniques that mark the regulation of these two modes of political expenditure, and contends that these differences reflect distinct goals. It suggests that transparency, enforced by reporting and disclosure requirements, plays and ought to play a bigger role in the regulation of lobbying than in campaign finance. By contrast, egalitarian goals, implemented by a mix of limits and subsidies, are more significant in the campaign finance setting. A third goal—the control of improper or undue influence—is central for the regulation of both lobbying and campaign finance.

Part III addresses an area where these two fields are increasingly coming together: the regulation of the campaign finance activities of lobbyists. In the 2007 Honest Leadership and Open Government Act, Congress required campaign committees to disclose substantial bundled contributions provided by lobbyists.[4] Many states have enacted direct restrictions on lobbyists' campaign contributions, bundling, and other forms of support for candidates' campaigns.[5] And former Senator John Edwards won significant attention in the summer of 2007 with his refusal to accept lobbyists' donations and his criticism of Senator

4. "Bundling" refers to the practice wherein an individual solicits, collects and aggregates campaign contributions from multiple donors and then presents the resulting "bundle" to a candidate. The Honest Leadership and Open Government Act of 2007 specifically defines "bundled contribution" as a contribution "forwarded" from a contributor or contributors by a "person" to a candidate or political committee but "credited" by the recipient candidate or committee "to the person through records, designations, or other means of recognizing that a certain amount of money has been raised by the person." Pub. L. No. 110-81, § 204(a)(8)(A). "Bundling" causes concern because it can be a source of political influence for the bundler. Although campaign finance laws typically require the disclosure of donations above a threshold level, and may set a dollar limitation on the size of the contribution a donor can make, such laws generally do not require the disclosure of the identity of bundlers or cap the total amount of contributions that any one bundler may bundle.

5. *See, e.g.*, ALASKA STAT. §§ 15.13.072(a)(4), 15.13.074(g) (2008) (prohibiting a lobbyist from making a campaign contribution to any candidate for the state legislature other than a candidate seeking election from the district where the lobbyist is eligible to vote); ARIZ. REV. STAT. ANN. § 41-1234.01 (2007) (prohibiting contributions by lobbyists to legislators or the governor while the legislature is in session); CAL. GOV'T CODE § 85702 (2007) (prohibiting lobbyist from making a contribution to any candidate for state office that the lobbyist has registered to lobby); MD. CODE ANN., STATE GOV'T § 15-714(d) (West 2008) (prohibiting lobbyists from serving as treasurer for a candidate for state-wide or legislative office, serving on the fund-raising committee for such a candidate, or soliciting contributions for such a candidate); MINN. STAT. § 10A.27 (2007) (limiting the percentage of total contributions a candidate may accept from lobbyists); N.C. GEN. STAT. § 120C-302 (2007) (prohibiting lobbyists from making or bundling contributions).

Hillary Clinton over her failure to follow suit. When they occur together, lobbying and campaign contributions can compound the dangers of undue influence that each practice presents separately. But it is not clear that singling out lobbyists' campaign contributions for special regulation makes sense. Lobbying and campaign contributions can both be instruments for seeking influence. Although some lobbyists are powerbrokers in their own right, for the most part that influence is deployed on behalf of the lobbyists' clients, not the lobbyists themselves. Senator Clinton's position that the real problem is not the lobbyists but the interest groups they represent seems right. Campaign finance practices like bundling that can be sources of influence over candidates and officeholders should be regulated generally and not just when engaged in by lobbyists. On the other hand, there may be some situations where the campaign activities of lobbyists provide special influence for lobbyists above and beyond the benefits to their clients; in those cases, regulations aimed at lobbyists may be appropriate.

I. COMMONALITIES, DIFFERENCES, AND LINKAGES

A. *Similarities*

Both lobbying and campaign finance are vital to representative democracy. Lobbying helps elected officials obtain the information they need to develop legislative or regulatory initiatives; to assess how proposals for government action will affect specific interests, industries, constituencies, or society at large; to determine how different groups view particular policy alternatives; and to decide how they will vote on the measures that come before them. By the same token, individuals, organizations or groups affected by government action or seeking government assistance to deal with a political, economic, or social problem engage in lobbying in order to present public officials with the facts and arguments they believe support their positions.

Like lobbying, campaign finance also involves information and communication. Campaign expenditures supply the voters the information they need to select among competing candidates or to make a decision concerning a ballot proposition. Campaign expenditures enable candidates, parties, political committees and interest groups to present their views to the voters to influence the electorate's decisions with respect to the election of public officials or the approval or rejection of ballot measures. Campaign contributions enable candidates, parties, committees, and groups to pay for those campaign expenditures. Given their critical roles in enabling democratic self-government, it is not surprising that both lobbying and campaign expenditures are protected by the Constitution—specifically, the First Amendment guarantees of the right to petition, the freedom of speech, and the freedom of association.[6]

6. *See, e.g.*, United States v. Harriss, 347 U.S. 612, 625 (1954) ("[T]he freedoms guar-

Lobbying and campaign finance, however, also raise common concerns about unequal wealth and improper influence over the political process. Both lobbying and campaigning depend on the use of money, and money is radically unequally distributed in our society. Individuals, organizations, and interest groups with greater financial resources have an advantage in gathering information, undertaking analyses, and presenting facts and arguments to government officials, much as the well-funded can more easily engage in direct communications with the voters or provide candidates with the financial support they need to campaign. And, of course, candidates with more resources—either their personal funds, or funds provided by donors—have an advantage in campaigning. To be sure, inequalities in wealth do not fully determine either lobbying or election results. Numbers of supporters, organizational ability, intensity of effort, and substantive positions on issues all affect electoral and legislative outcomes. But money can matter to a degree that is in tension with the formal political equality of citizens.

Campaign finance and lobbying also raise concerns about improper influence, or corruption, that is, the danger that government officials will make decisions based on their own private benefit—whether to aid their reelection efforts or to add to their personal wealth—rather than the public interest. As the Supreme Court recognized in upholding the contribution restrictions of the Federal Election Campaign Act, "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."[7] The Court has emphasized that improper influence is not limited to outright bribery but also extends "to the broader threat from politicians too compliant with the wishes of large contributors."[8] So, too, in cases dating back to the nineteenth century, the Court has expressed concern about the corrupting effects of "the influence and exertions of the lobby agent to bring about the passage of a law."[9] Both campaign finance and lobbying are also regulated not simply because of the possibility of actual corruption but because of the potentially demoralizing effects on public confidence in government of the "appearance of corruption" attributable to unrestricted contributions[10] or the "direct access to elected representatives" enjoyed by lobbyists.[11]

As a response to these common concerns, lobbying and campaign finance regulation are subject to some similar regulations. At the federal level, and in

anteed by the First Amendment—freedom to speak, publish, and petition the Government" are involved in the assessment of lobbying regulation.); Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (Campaign finance regulation implicates "the most fundamental First Amendment activities" of freedom of speech and association.).

7. *Buckley*, 424 U.S. at 26-27.

8. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000).

9. Trist v. Child, 88 U.S. 441, 451 (1874).

10. *Buckley*, 424 U.S. at 27.

11. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 356 n.20 (1995).

many states, both lobbyists and political committees may be required to register, and to report, for public disclosure, information about their finances and expenditures. Federal and state laws may forbid activities particularly associated with improper influence, such as cash contributions above a de minimus level in the campaign finance setting,[12] or the giving of gifts to public officials in the lobbying context.[13] Regulations may also target certain actors deemed especially problematic. Congress prohibits corporations and unions from making campaign contributions and expenditures.[14] So, too, because of the danger that they may be able to trade on inside knowledge and close social ties, Congress imposes "revolving door" restrictions on the ability of former members of Congress and former congressional staffers to lobby Congress.[15]

B. *Differences*

Despite these similarities, lobbying and campaign finance present many differences, reflected in regulatory structures and techniques. Lobbying and campaign finance are subject to different statutory regimes with different rules and different enforcement bodies. At the federal level, for example, campaign finance is regulated primarily by the Federal Election Campaign Act, as amended,[16] while lobbying is subject to the Lobbying Disclosure Act, as amended,[17] most recently by the Honest Leadership and Open Government Act of 2007.[18]

Campaign finance practices are generally more tightly regulated than lobbying. Although both campaigns and lobbying are subject to disclosure requirements, campaign finance disclosure is generally more penetrating. At the federal level, the threshold for reporting is lower for campaigns than for lobbying,[19] more information is required about campaign donations and expenditures than about lobbying expenses, and campaign reports are required more frequently.[20]

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12. 2 U.S.C. § 441g (2008) (prohibiting cash contributions of more than $100).

13. *See* Honest Leadership Act § 204, 2 U.S.C. § 434 (2008) (ban on gifts to Senators from registered lobbyists and entities that hire registered lobbyists).

14. 2 U.S.C. § 441b (2008).

15. Honest Leadership Act § 101, 18 U.S.C. § 207 (2008).

16. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. § 431 *et seq.* (2008)).

17. Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (codified as amended at 2 U.S.C. § 1601 *et seq.* (2008)).

18. Honest Leadership Act, Pub. L. No. 110-81, 121 Stat. 735 (2007).

19. *Compare* 2 U.S.C. § 434 (b) (2008) (requiring disclosure of certain information concerning donors of $200 or more), *with* 2 U.S.C. § 1603 (2008) (setting reporting threshold for lobbying activities at $2500, and setting threshold for disclosure of information concerning clients at $5000).

20. *Compare* 2 U.S.C. § 434(a) (2008) (requiring pre-election and post-election reports in addition to quarterly reports for the campaign committees of candidates for the House and

More importantly, campaign finance laws generally go well beyond disclosure, and impose direct restrictions on the provision and use of campaign money. Federal law, for example, sets dollar limitations on donations by individuals to candidates, political parties, and political committees, and on contributions by parties and political committees to candidates.[21] As already noted, federal law prohibits campaign contributions and expenditures by significant classes of actors—corporations and unions.[22] Campaign finance laws may also provide for direct financial support to candidates and parties through programs that give flat grants or matching funds to candidates or parties who qualify for public support. Federal law offers public funding to candidates for the presidency; many states and local governments make public funding available for state and local legislative candidates as well.[23] Overall, campaign finance laws seek to shape, structure, and limit campaign finance practices to a considerable degree.

Lobbying regulation has traditionally been much less ambitious. With the very limited exception of "revolving door" restrictions[24] and rules limiting lobbying by the close relatives of elected officials,[25] lobbying laws do not limit *lobbying*—that is, the communication of information and arguments by lobbyists to public officials concerning subjects of legislative or administrative action—at all. Lobbying laws may limit or forbid ancillary activities, such as gifts to public officials, or payments for their meals, entertainment, or travel costs—which provide private benefits to public officials and, thus, can constitute a source of improper influence. But they do not restrict either the amount of money that can be spent on the research, informational and communications activities at the heart of lobbying, nor do they seek to limit the amounts or sources of funds used to pay for lobbying expenditures. Moreover, there are no public funds for lobbying; lobbying is financed entirely out of private resources.[26]

Senate and monthly reports during an election year by the committees of presidential candidates), *with* 2 U.S.C. § 1604 (2008) (just amended to require quarterly instead of semiannual reports by lobbyists).

21. *See* 2 U.S.C. § 441a (2008).

22. *See* 2 U.S.C. § 441b (2008).

23. *See* Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563 (1999).

24. "Revolving door" rules impose temporal restrictions on the ability of former executive officials, legislative officials, or legislative staff members to lobby the agency or legislative chamber in which they worked. *See, e.g.*, Honest Leadership Act, Pub. L. No. 110-81, §§ 101-105 (2007).

25. *See, e.g.*, *id.* §§ 302, 552 (restrictions on lobbying by spouses and immediate family members of members of Congress).

26. Indeed, federal law is careful to deny tax subsidies to lobbyists. Lobbying expenditures do not qualify for tax deductibility as business expenses. *See generally* Timothy W. Jenkins & A.L. (Lorry) Spitzer, *Internal Revenue Code Limitations on Deductibility of Lobbying Expenses by Businesses and Trade Associations*, *in* THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LAW GOVERNING LAWYERS AND LOBBYISTS 227 (William V.

C. *Linkages*

Lobbying and campaign finance are often closely linked. Campaign contributions can be used to advance lobbying goals. Lobbying is intended to influence governmental action. One of the most effective lobbying techniques is personally meeting with the government officials who have the power to decide whether government will take the action desired.[27] Lobbyists believe that campaign contributions "open doors" and enable them to obtain the "access" to elected officials and their staffs necessary to personally present the information and arguments that support their positions on legislative issues.[28] Indeed, in *McConnell v. FEC*,[29] the Supreme Court expressly tied the constitutionality of the limitations on soft money donations to political parties imposed by the Bipartisan Campaign Reform Act of 2002 to evidence that such contributions were given to enable the donors to obtain access to members of Congress.[30]

To be sure, most lobbyists do not make campaign contributions.[31] But the most active lobbyists are frequent and significant donors. In a recent survey Public Citizen found that in the period from 1998 through 2005, only about one-quarter of federally registered lobbyists made campaign contributions in excess of $200—the federal campaign contribution reporting threshold—to a single congressional candidate or a political action committee (PAC).[32] But in that same period, six percent of all lobbyists accounted for eighty-three percent of all lobbyists' campaign contributions.[33] Moreover, lobbyists' contributions of personal funds represent only a small portion of lobbyists' support for candidates' campaigns. Lobbyists sponsor fundraisers and they solicit and collect contributions from others and deliver them to candidates—the practice known as bundling.[34] According to Public Citizen, Jack Abramoff's $180,000 in personal campaign contributions over a seven-year period was just seven percent of the $2.6 million that he helped direct to congressional candidates during roughly the same time.[35]

More generally, politically active individuals, organizations, and interest

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Luneburg & Thomas M. Susman eds., 3d ed. 2005). Charitable organizations will forfeit their tax-exempt status if more than an "insubstantial part" of their activities is devoted to lobbying. *Id.* at 243-49.

27. *See* ANTHONY J. NOWNES, TOTAL LOBBYING: WHAT LOBBYISTS WANT (AND HOW THEY TRY TO GET IT) 200 (2006).

28. *Id.* at 80-81.

29. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

30. *Id.* at 146-54.

31. NOWNES, *supra* note 27, at 80.

32. PUB. CITIZEN, THE BANKROLLERS: LOBBYISTS' PAYMENTS TO THE LAWMAKERS THEY COURT, 1998-2006, at 7 (2006), *available at* http://www.citizen.org/documents/BankrollersFinal.pdf.

33. *Id.* at 14.

34. *Id.* at 24-26.

35. *Id.* at 8-9.

groups use lobbying and campaign contributions together to advance their goals. Both lobbying and campaign finance are means to the end of influence over government action. Lobbying involves individuals and interests making their cases for specific bills, amendments, tax breaks, or other measures. Campaign money—both contributions and independent expenditures—works with lobbying by promoting the election of officials more amenable or sympathetic to the donors' and spenders' goals, and by facilitating access to elected officials. Although most campaign spenders and donors do not lobby, and most organizations that engage in lobbying do not engage in campaign finance activities,[36] the individuals and groups that both lobby and make campaign contributions account for most political expenditures and for an even higher share of PAC contributions.[37] The individuals and groups that engage in both lobbying and giving campaign money are particularly interested in obtaining specific benefits from the political process, whereas individuals and groups that make campaign contributions without also engaging in lobbying are typically less interested in securing specific measures and more focused on influencing the ideology of elected officials.[38]

II. REGULATORY TECHNIQUES AND POLICY GOALS

As previously indicated, the principal mode of lobbying regulation, particularly at the federal level, is disclosure—the formal name of the federal lobbying law is the Lobbying Disclosure Act, and the 2007 law is billed as the "Honest Leadership and Open Government Act"—while most federal and state campaign finance laws limit key activities, and some provide subsidies. This has two implications worth considering. First, campaign finance law is far more concerned about equality than is lobbying law. Second, a primary regulatory emphasis on disclosure makes far more sense in the lobbying setting than in campaign finance given what exactly disclosure can—and cannot—accomplish. These differences are linked to the differences between the goals of lobbying and campaign finance—influencing legislative decision-making concerning individual measures for the former, and affecting the election of government officials with broad powers over a wide range of areas in the latter.

A. *Equality*

A concern about political equality, or at least about constraining the impact of inequalities of wealth on the electoral process, is one of the driving forces

36. *See, e.g.*, Micky Tripathi, Stephen Ansolabehere & James M. Snyder, Jr., *Are PAC Contributions and Lobbying Linked? New Evidence from the 1995 Lobby Disclosure Act*, 4 BUS. & POL. 131, 133 (2002) (noting that only one-fifth of groups studied that employ a lobbyist also have a political action committee).

37. *Id.*

38. *Id.* at 133-34.

behind campaign finance law. Indeed, much of campaign finance law can be seen as ameliorating the conflict between an electoral structure built on "one person, one vote," that is, on the equal voice of each adult resident citizen in the electoral process, and a campaign finance system which, if left unregulated, would enable the wealthy to play a far greater role in attempting to influence electoral outcomes. Contribution restrictions cap the ability of the wealthy to give more to the candidates they support, thus limiting the campaign advantages that the candidates backed by the wealthy might otherwise enjoy. The prohibition on corporate expenditures prevents firms from using "'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"[39] By providing an alternative source of campaign funds, public subsidies "reduce the deleterious influence of large contributions on our political process."[40] Admittedly, the Supreme Court in *Buckley v. Valeo* famously rejected equality as a justification for limiting campaign expenditures,[41] but the Court's validations of contribution limits, of prohibitions on corporate expenditures, and of the provision of public funding to qualifying candidates explicitly or implicitly rely at least in part on egalitarian concerns.[42]

Political equality plays a far smaller role in lobbying regulation. There are both operational and conceptual reasons for this. Operationally, it is difficult to imagine a set of rules that could give each adult resident citizen an equal say on every issue subject to lobbying without choking off lobbying itself. Capping the amounts an individual or group could spend either on hiring a lobbyist or on lobbying personally would cut directly into the amount of lobbying the individual or group could undertake. The Supreme Court has upheld caps on campaign contributions, notwithstanding the resulting potential to limit resources available to candidates and parties, because donors may still spend money on independent expenditures that promote or oppose a candidate, and because the law does not limit the ability of candidates and parties to replace the funds lost from the capping of large donations by widening the pool and raising more funds in smaller amounts from additional donors.[43] In the lobbying setting, the equivalent of independent expenditures is, of course, lobbying itself. As most issues subject to lobbying affect a relatively small number of people, organizations or groups, there is unlikely to be a pool of additional donors to offset any cap on

39. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 659 (1990) (citing FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986)).

40. Buckley v. Valeo, 424 U.S. 1, 91 (1976).

41. *Id.* at 48-49; *see also* Randall v. Sorrell, 584 U.S. 230 (2006).

42. *See Austin*, 494 U.S. at 660 (citing the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" in upholding state prohibition of corporate campaign expenditures); *Buckley*, 424 U.S. at 27 (invoking the "opportunities for abuse inherent in a regime of large individual contributions" in sustaining contribution limits); *id.* at 91 (citing the benefit of "reduc[ing] the deleterious influence of large contributions on our political process" to support public funding).

43. *Buckley*, 424 U.S. at 21-22, 28-29.

contributions to pay for lobbying. As a result, lobbying contribution restrictions would most likely produce a limitation on informational and communicative activities rather than cause those engaged in them to develop a broader base of financial support, as occurs in the campaign finance setting. So, too, with thousands upon thousands of bills, amendments, appropriations, regulations, and other measures subject to lobbying each year, it is difficult to imagine exactly how subsidies would be provided, how their amounts would be calculated, or who would receive them.

As the operational difficulties indicate, given the sharp differences in interests in particular legislative measures, there is no reason to believe that all citizens ought to have an equal voice in the lobbying of each specific bill or amendment. To be sure, all citizens are equally interested in the aggregate consequences of lobbying, which is the overall output of government, but that concern is addressed by giving each citizen an equal voice in elections, and, to some extent, by campaign finance regulations. Political equality does not require a "one person, one lobbying voice" for each legislative matter. A closer question is whether equality concerns are triggered when individuals or interest groups clash over specific lobbyable legislative measures. Should lobbying law try to equalize the funds spent by competing forces or require that lobbying expenditures reflect the extent of underlying political support for the lobbied position? The short answer, as Dean Kathleen Sullivan has explained, is that outside of elections "conventional First Amendment principles generally preclude a norm of equality of influence" that would justify limits on political speech in order to equalize the communicative impact of political competitors.[44]

Of course, egalitarian concerns do play some role in lobbying regulation. All citizens have a formal equal right to seek to lobby their legislature, and all individuals, organizations, or interest groups affected by a legislative proposal should have an equal opportunity to present their case to the legislature. The provisions of the Internal Revenue Code precluding the deductibility of lobbying costs as business expenses and limiting the ability of tax-exempt charities to lobby may be seen as intended to maintain a level playing field among competing lobbyists.[45] On the other hand, the tax code's restrictions on the lobbying activities of not-for-profit organizations may also have the effect of limiting the ability of non-business groups to counter the lobbying influence of for-profit actors. This, however, is not a matter of the political equality of individuals *per se*, but of structuring fair competition among contending interest groups. Fair competition is further addressed by the disclosure requirements and restrictions on improper influence that are the principal techniques of lobbying regulation.

44. Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 673 (1997).

45. *See* Honest Leadership Act, Pub. L. No. 110-81, §§ 302, 552 (2007) (restrictions on lobbying by spouses and immediate family members of members of Congress).

B. Disclosure

Both campaign finance law and lobbying regulation rely heavily on disclosure. Campaign finance laws require candidates to disclose their expenditures above a certain amount and the contributions they have received above a threshold level, including the reporting of identifying information about donors. Political parties and political committees that make contributions to or expenditures in support of or opposition to candidates are subject to comparable disclosure requirements. Disclosure is even more central to lobbying. Lobbyists who expend above a threshold sum of money on lobbying are required to disclose their expenditures, provide identifying information about clients who pay them above a threshold amount, and indicate the subjects of their lobbying activity. The contents of lobbying disclosure have been sharply criticized—for failure to require more precise information concerning the bills or other measures that are the subject of lobbying or the elected officials lobbied—but there is no doubt that disclosure is the critical weapon in the lobbying regulation arsenal. Indeed, disclosure looms much larger in the lobbying setting—where there are no contribution or expenditure limits and no public subsidies—than in campaign finance.

This makes a great deal of sense, not only because of the lack of fit between contribution and expenditure limits and lobbying, as already discussed, but because disclosure can actually accomplish more in the lobbying setting. Although disclosure has been a centerpiece of campaign finance regulation at least since the federal Publicity Act of 1910,[46] it has never been precisely clear what campaign finance disclosure accomplishes. According to the Supreme Court, the primary purpose of disclosure is voter information:

> [Disclosure] allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.[47]

The Court also found that the prospect of disclosure discourages potentially corrupting contributions.[48] However, given that federal law prohibits contributions over a statutory ceiling—currently $2300—the contribution limit probably takes care of the corruption danger in federal elections. As a result, the chief justification for campaign finance disclosure is voter information.[49]

The voter information benefit of disclosure, however, is almost surely overstated. Full disclosure of campaign contributions produces mountains of

46. 36 Stat. 822, ch. 392

47. *Buckley*, 424 U.S. at 67.

48. *Id.*

49. *Buckley* provided a third "and not least significant" justification for disclosure—that it is "an essential means of gathering the data necessary to detect violations of the contribution limits." *Id.* at 67-68.

data that must be exhaustively mined and analyzed to reveal significant patterns of giving and spending. The effectiveness of disclosure relies, in significant part, on the media's interest in examining the available information and presenting it to the public in useful form before the election. More importantly, even if key campaign finance information is available to the voters in an understandable form and a timely manner, the voters may be unable to use it. On Election Day, voters are presented with a highly constrained choice of a limited number—often just two—candidates for each office. Many large donors give to more than one candidate in the same race, or to the national committees of both major parties. Voters can do little to punish the candidates or parties that receive donations the voters find troubling if both major party opponents have received funds from those sources. Moreover, even if only one candidate has received funds from a "tainted" source, the voter may be unable to act on that information. Each voter has just one vote per election. She must make up her mind based on multiple, potentially competing issues—national security, taxation, the economy, social and cultural concerns, and the candidates' personalities and histories. For most voters, it is doubtful that campaign contributions are at the top, or even in the middle, of this list of concerns. The vote is simply too blunt an instrument for the voter to make her views about the candidates' contributors known.

A recent study of disclosure policy found that "the linchpin of effective transparency was the connection between information and action."[50] Disclosure requirements were effective "only when they provided facts that people wanted in times, places, and ways that enabled them to act."[51] Disclosure was least likely to succeed in changing the behavior of either disclosers or the users of disclosed information when "many users faced a limited set of choices and so could not act on new information" or the "new information was not compatible with the preexisting decision processes of would be information users."[52] That pretty much sums up the dilemma of voters who are presented with campaign contribution information but are unable to use the data to choose between candidates. Given the likely priority of the candidates' positions on substantive political issues, campaign finance data simply may not be part of most voters' decision-making processes. Indeed, disclosure without voter response could have the perverse effect of disguising from elected officials the voters' views about their campaign finance sources: "Political candidates may have no way of perceiving and reacting to voter dissatisfaction with their disclosed sources of financing because no feedback process exists."[53]

Lobbying is quite different. Disclosure of the amount of money spent on

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50. ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY, at xiv (2007).

51. *Id.*

52. *Id.* at 88.

53. *Id.* at 67.

lobbying, the sources of a lobbyist's funds, and the issues lobbied can inform three groups: the legislators lobbied, competing interest groups, and the general public. The Supreme Court cited the first informational benefit—disclosure to legislators—when it upheld the LDA's predecessor, the Federal Regulation of Lobbying Act, in *United States v. Harriss*.[54] As the Court explained, "[p]resent-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected."[55] Disclosure enables the members of Congress "to know who is being hired, who is putting up the money, and how much."[56] While it seems implausible that in many cases elected officials would not know which interests a lobbyist is representing when she makes arguments for or against a particular bill or amendment, disclosure can give legislators a better sense of the scope of the interests implicated by a particular measure, the positions of the contending groups, and the extent and intensity of the lobbying effort.[57]

The second consequence—informing competing interest groups—is perhaps even more important. As Professor Krishnakumar has recently pointed out, one great benefit of lobbying disclosure is that it "enables interest groups to discover which lobbyists their competitors have hired, how much their competitors have spent on lobbying, the general issues on which their competitors' lobbying activities have focused, and even, to some extent, the federal departments or congressional committees that have been lobbied on their competitors' behalves."[58] And whereas there is little that most voters realistically can do with disclosed campaign finance information, lobbying disclosure can effectively be put to use by competing interest groups who can "step-up their own lobbying efforts to match those of their competitors."[59] Indeed, as Professor Krishnakumar suggests, lobbying disclosure can promote the goal of fair competition among interest groups in the "familiar Madisonian fashion of allowing factions to check factions in the service of the public good."[60]

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54. United States v. Harriss, 347 U.S. 612 (1954).

55. *Id.* at 625.

56. *Id.*

57. Disclosure would provide useful information about the sources of funds behind lobbying efforts if it were extended to grassroots lobbying campaigns. Indeed, *Harriss* indicated that Congress had a legitimate interest in learning the identities of those responsible for "an artificially stimulated letter campaign." *Id.* at 620. The federal Lobbying Disclosure Act of 1995, however, does not include grassroots lobbying in its definitions of either "lobbying contact" or "lobbying activity" and the legislative history of the LDA suggests that it was not intended to cover grassroots lobbying. *See* William V. Luneburg & A.L. (Lorry) Spitzer, *The Lobbying Disclosure Act of 1995: Scope of Coverage, in* THE LOBBYING MANUAL, *supra* note 26, at 33, 45-47; *accord* Elizabeth Garrett, Ronald M. Levin & Theodore Ruger, *Constitutional Issues Raised by the 1995 Lobbying Disclosure Act, in* THE LOBBYING MANUAL, *supra* note 26, at 143, 149-50.

58. Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group Based Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 542 (2007).

59. *Id.*

60. *Id.* at 543.

Finally, lobbying disclosure informs the general public about the extent of lobbying expenditures, the identities—including business, ideological, ethnic group or other affiliations—of the key players, and the subjects of lobbying activities. This can enhance public understanding of how government works and what factors affect government decisions in general, as well as provide an awareness of which groups are engaged in influencing particular policies and which policies are being pushed. Lobbying disclosure is potentially more useful in influencing public action than election finance disclosure since in the legislative setting, unlike the electoral context, the public has a far greater array of options than the binary choice of "vote for candidate *A*," or "vote for candidate *B*." Moreover, lobbying disclosure could have long-term consequences for political activity, with implications far beyond the lobbying topic subject to disclosure. Disclosure could even be an impetus for the organization of new "public interest"-type lobbies to counter existing lobbying groups and for public agitation for reform.[61]

The different roles of equality concerns and disclosure in campaign finance and lobbying are, thus, closely linked to the differences between elections and legislation. Elections occur at fixed and regular moments; pit a sharply limited number of opposing candidates against each other; and determine which individuals will hold power and have the opportunity to make decisions that govern the entire polity for the period until the next election. The broad impact of elections on the polity as a whole militates in favor of widespread suffrage, equally weighted votes, and an electoral system in which all have an equal voice. "One person, one vote" may not literally require "one person, one dollar of campaign money," but campaign finance laws promote political equality by constraining the impact of wealth inequalities on the campaign finance system. Disclosure is less valuable because the restricted set of choices available in most elections limits the ability of voters to use disclosed campaign finance information when voting.

Lobbying, by contrast, deals with the communication by individuals, organizations, and interest groups with government officials. This can occur at any time and with respect to a limitless number of subjects, with an equally limitless number of proposals and permutations of proposals concerning those subjects. These issues will typically affect the citizenry quite differently. The vast majority of people have vastly different degrees of interest in each potential lobbying subject. Hence, although all people must be free to lobby concerning matters that are of interest to or that affect them, political equality is difficult both to conceptualize and to operationalize in the lobbying context. There is a "Madisonian"[62] value in assuring that conflicting interest groups have

61. Indeed, this impact on overall public understanding of the political process, with the potential for agitation for change, could be the best argument for *campaign finance* disclosure, rather than the Supreme Court's argument, *see* Buckley v. Valeo, 424 U.S. 1, 67 (1976), that disclosure will inform how voters cast their ballots in a particular election.

62. *See* Krishnakumar, *supra* note 58.

equal access to the process so that they may compete with and counter each other, but equality does not require that every one in the polity have an equal voice with respect to every legislative matter. By contrast, disclosure is particularly valuable in the lobbying context because it gives legislators a greater understanding of the pressures to which they are subject; informs individuals and interest groups of the activities of their competitors; and has the potential to improve the public's understanding of its government.

C. *Prevention of Improper Influence*

Prevention of improper influence over government decision-making is a primary concern for both campaign finance and lobbying regulation. Prevention of corruption—particularly "quid pro quo arrangements" and the broader concern that "politicians" will be "too compliant with the wishes of large contributors"[63]—is the primary justification recognized by the Supreme Court for limiting contributions to candidates, political parties, and political committees. The prevention of improper influence is also a central focus of lobbying regulation. The host of restrictions on gifts to public officials;[64] on the payment or provision of meals, entertainment, or travel expenses;[65] the restrictions on "revolving door" employment of former legislators and legislative staffs as lobbyists;[66] and even rules governing the lobbying activities to legislators' family members[67] are all aimed at curbing the ability of private interests to influence public action through the provision of private benefits.

Indeed, campaign finance law and lobbying regulation are increasingly converging in their focus on the control of improper influence. As BCRA and *McConnell* demonstrate, campaign finance law now reflects a greater understanding of how campaign contributions and expenditures are used to open the door for and enhance lobbying efforts.[68] By the same token, a growing focus of lobbying law is campaign finance. The next Part examines lobbying regulation's new attention to the campaign finance activities of lobbyists.

III. THE INTERSECTION OF LOBBYING AND CAMPAIGN FINANCE

A signal feature of the 2007 federal lobbying law is the requirement that federal candidate campaign committees, political party committees, and leadership PACs[69] disclose the bundled[70] contributions they receive from federally

63. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000).

64. *See* Honest Leadership Act, Pub. L. No. 110-81, § 541 (2007).

65. *See id.* §§ 543, 544.

66. *See id.* §§ 101, 531-35.

67. *See id.* § 552.

68. *See supra* text accompanying notes 29-30.

69. A leadership PAC is a committee organized and controlled by a federal officeholder or federal candidate that receives and makes contributions to other federal candidates

registered lobbyists that are in excess of $15,000 in a six-month period. The provision is doubly unusual—and nicely exemplifies the interpenetration of lobbying and campaign finance concerns—in adding a special restriction on lobbyists to campaign finance law, and including an amendment to the campaign law within an omnibus law generally focused on regulating lobbying.

The 2007 law however, may be only the tip of the iceberg. More than a dozen states impose a variety of campaign finance restrictions aimed specifically at lobbyists. These include prohibiting lobbyists from making—and legislators, state elected officials, and candidates for state or legislative office from accepting—campaign contributions while the legislature is in session;[71] requiring lobbyists to disclose their campaign contributions in their lobbying reports;[72] requiring lobbyists to disclose their bundled contributions in their lobbying reports;[73] banning bundling by lobbyists;[74] banning contributions by lobbyists to legislators and other elected officials,[75] or, more narrowly, to the elected officials they are registered to lobby;[76] and prohibiting lobbyists from organizing fundraisers or serving as campaign treasurers for candidates.[77]

Moreover, during the summer of 2007, several of the leading contenders for the Democratic nomination for president dueled over the role of lobbyists in financing election campaigns. Speaking at the YearlyKos Presidential Leadership Forum in August, former Senator John Edwards called on all Democratic candidates to refuse to take any campaign contributions from federally registered lobbyists,[78] and Senator Barack Obama, who, like Edwards, did not ac-

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but does not directly support the campaign of its controlling federal officeholder or candidate. *See* Honest Leadership Act, Pub. L. No. 110-81, § 204(8)(B).

70. Under the Act, a bundled contribution is a contribution collected by an individual and forwarded, along with similar contributions, to a candidate, party committee or leadership PAC in such a way that the person collecting and forwarding the contributions and presenting them to the candidate, party, or PAC is "credited by the committee or candidate involved" for raising the money. *See id.*; *see also supra* note 4.

71. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1234.01 (2007) (restriction applies only to incumbent officials not to nonofficeholder candidates); COLO. REV. STAT. § 1-45-105.5 (2008) (restriction applies to both incumbents and candidates); UTAH CODE ANN. § 36-11-305 (2007) (incumbents only); WISC. STAT. ANN. § 13.625 (West 2007) (incumbents and candidates).

72. *See, e.g.*, R.I. GEN. LAWS § 22-10-9 (2007); WASH. REV. CODE § 42.17.170 (2007); *see also* CONN. GEN. STAT. § 9-610(g) (2007) (requiring special campaign finance disclosure of campaign contributions and expenditures by lobbyists).

73. *See, e.g.*, WASH. REV. CODE § 42.17.170 (2007).

74. *See, e.g.*, MD. CODE ANN., STATE GOV'T § 15-714(d)(1)(i) (West 2007); N.C. GEN. STAT. § 163-278.13C(b) (2007).

75. *See* N.C. GEN. STAT. § 163-278.13C(a) (2007).

76. *See, e.g.*, ALASKA STAT. §15.13.074(g) (2007); CAL. GOV'T CODE § 85702 (2007); S.C. CODE § 8-13-1314(A)(3) (2007).

77. *See, e.g.*, MD. CODE ANN., STATE GOV'T § 15-714(d)(1)(ii), (iii) (2007).

78. Press Release, John Edwards '08, Edwards Calls on All Candidates for Federal Office to Join Him in Rejecting Donations From Federal Lobbyists (Aug. 4, 2007), *available at* http://www.johnedwards.com/news/press-releases/20070804-lobbyist-donations/; John Ed-

cept lobbyists' contributions, joined Edwards in criticizing Hillary Clinton for accepting campaign donations from lobbyists.[79] Senator Clinton, in turn, defended the representational role of lobbyists and criticized her critics for making what she called an "artificial distinction" between lobbyists and "the people who employ and hire lobbyists and give them their marching orders."[80] Although Senators Edwards and Obama were calling for a self-denying practice rather than a legal restriction, the question of limiting the campaign finance activities of lobbyists is clearly on the regulatory agenda.

The new federal disclosure requirement, the state-level restrictions, and the implicit suggestion that further federal limitations would be appropriate raise both constitutional and policy concerns. In particular, as Senator Clinton contends, they conflate the intersection of campaign finance and lobbying with the campaign finance activities of lobbyists. It is the way in which individuals, organizations, and interest groups can use campaign finance and lobbying together to advance their private goals at potential cost to the public interest, and not the campaign finance activities of lobbyists per se, that ought to be the primary focus of regulatory efforts.

The most common state provision restricting lobbyists' contributions, and the one most frequently subject to constitutional challenge, is a ban on lobbyist contributions while the legislature is in session. These have been struck down by state courts or federal district courts in Alaska,[81] Arkansas,[82] Florida,[83] and Missouri.[84] In addition, a federal district court in Tennessee invalidated the application of that state's ban on lobbyist contributions during the legislative session to non-incumbent candidates for office, without addressing whether the ban could constitutionally be applied to incumbents.[85]

These courts concluded that the session contribution bans were flawed in several ways. On the one hand they were overinclusive in applying to minimal contributions that present no corruption danger, to elected statewide officials "who are not part of the process of legislating,"[86] and to nonincumbents.[87] By

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wards, *In His Own Words*, N.Y. TIMES, Aug. 24, 2007, at A15.

79. Jeff Zeleny, *Democratic Rivals Spar at 'Netroots' Forum*, N.Y. TIMES, Aug. 5, 2007, at A21.

80. Ruth Marcus, *Democrats' Purity Primary*, WASH. POST, Aug. 22, 2007, at A17.

81. State v. Alaska Civil Liberties Union, 978 P.2d 597, 630-31 (Alaska 1999).

82. Ark. Right to Life State PAC v. Butler, 29 F. Supp. 2d 540, 550-53 (W.D. Ark. 1998).

83. State v. Dodd, 561 So. 2d 263 (Fla. 1990).

84. Trout v. State, 231 S.W.3d 140 (Mo. 2007); Shrink Mo. Gov't PAC v. Maupin, 922 F. Supp. 1413 (E.D. Mo. 1996).

85. Emison v. Catalano, 951 F. Supp. 714 (E.D. Tenn. 1996).

86. *Butler*, 29 F. Supp. 2d at 552; *accord Dodd*, 561 So. 2d at 265.

87. State v. Alaska Civil Liberties Union, 978 P.2d 597, 631 (Alaska 1999); *Emison*, 951 F. Supp. at 723; *Maupin*, 922 F. Supp. at 1422. The Alaska court determined that it would be unconstitutional to apply the ban to nonincumbents and that limiting the ban to incumbents "would fundamentally unbalance a restriction which the legislature clearly in-

the same token, the bans were seen as underinclusive because they target contributions only during the legislative session or shortly thereafter, thus failing "to recognize the reality that corruption can occur anytime, even outside the banned time period."[88] By taking a potentially large chunk of the year out of the fund-raising process, the bans were said to help incumbents, as challengers would have less time to overcome the built-in advantages incumbents enjoy.[89] Moreover, given the possibility of "unusually long" or extra legislative sessions, they placed a burden on all fund-raising activity.[90]

Two courts upheld bans on lobbyists' contributions during the legislative session—the Vermont Supreme Court[91] and the United States Court of Appeals for the Fourth Circuit.[92] The Fourth Circuit decision, in *North Carolina Right to Life, Inc. v. Bartlett*[93] provided the more substantial treatment of the constitutional question. *Bartlett* minimized the burden of the North Carolina restriction by pointing out that the legislature had been in session just one to two months in election years over the prior two decades,[94] and it dismissed the claim of incumbent advantage as no different from any other campaign finance restriction that applies with formal neutrality to "incumbents and challengers alike."[95] But the heart of *Bartlett*'s reasoning, which is directly relevant to any campaign finance restriction targeted at lobbyists, is that lobbyists present a special threat to the integrity of the political process, a threat which is compounded while the legislature is in session.

Chief Justice Wilkinson stressed that "lobbyists are paid to effectuate particular political outcomes. . . . While lobbyists do much to inform the legislative process, and their participation is in the main both constructive and honest, there remain powerful hydraulic pressures at play which can cause both legislators and lobbyists to cross the line."[96] Moreover, the "pressure on [lobbyists] to perform mounts as legislation winds its way through the system."[97] The legislative session is "that period during which the risk of an actual quid pro quo or

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tended to apply to incumbents and challengers alike," *Alaska Civil Liberties Union*, 978 P.2d at 631, so that it struck down the ban in its entirety. The Tennessee federal district court, which considered only an as-applied challenge by a non-officeholder, limited its holding to non-officeholders and did not consider the constitutionality of the application of the ban to incumbents. *Emison*, 951 F. Supp. at 723. The Missouri federal district court relied on multiple concerns, in addition to the overbroad application to nonincumbents, and so did not discuss the possibility of limiting its holding to nonincumbents. *Maupin*, 922 F. Supp. at 1422.

88. *Maupin*, 922 F. Supp. at 1422; *accord Butler*, 29 F. Supp. 2d at 552; *Dodd*, 561 So. 2d at 265-66.

89. *Emison*, 951 F. Supp. at 723; *Dodd*, 561 So. 2d at 565-66.

90. *Dodd*, 561 So. 2d at 264.

91. Kimbell v. Hooper, 665 A.2d 44, 50-51 (Vt. 1995).

92. N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999).

93. *Id.*

94. *Id.* at 714.

95. *Id.* at 717.

96. *Id.* at 715-16.

97. *Id.*

the appearance of one runs highest."[98]

Chief Judge Wilkinson's reasoning appears to confuse the interests of the lobbyist with the interest of her principal, that is the client who hired her to lobby. While the lobbyist may be under "pressure . . . to perform" and will surely benefit if the legislature takes the action the lobbyist is seeking, the primary beneficiary of the legislature's action is the individual, interest, or organization on whose behalf the lobbyist is lobbying. Sometimes, the lobbyist may be lobbying for herself, for the organization to which she belongs, or for her employer. But in many cases the lobbyist is an independent contractor hired by a client or clients to represent the clients' interests. In those cases, and this appears to be the primary circumstance in which lobbyists make large campaign contributions,[99] the threat to the public interest comes from the danger that the lobbyist may be able to use the contribution, and the gratitude it elicits, to sway the legislator to vote the client's interest rather than the general public's. Lobbyists, like the campaign contribution itself, are a means to the client's end. The lobbyist will be compensated for her actions,[100] but the moving force behind both the lobbying and the campaign donation, and the real beneficiary of both, will be the client.

Moreover, if the stakes for the client concerning a matter before the legislature are great enough, presumably the lobbyist will get the client to make a contribution from the client's funds, or from the client's PAC, if the lobbyist is unable to make one herself. In other words, not only are lobbyists per se not the problem, but limiting the contributions of lobbyists, without also limiting the contributions of their clients, is not the solution. The bans on lobbyists' contributions during the legislative session appear to be largely about symbolism, not the substance of special interest dangers to the political process.

That does not mean these bans are unconstitutional. As Chief Judge Wilkinson pointed out in *Bartlett*, the Supreme Court has taken a relatively deferential approach to contribution restrictions, finding that they place "'only a marginal restriction upon the contributor's ability to engage in free communication.'"[101] A putative donor is still free to engage in independent expenditures in

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98. *Id.* at 716. The Vermont court similarly minimized the impact of the session contribution ban as "less burdensome" than the dollar contribution ceilings upheld by the United States Supreme Court in *Buckley v. Valeo*, 424 U.S 1 (1976). As the ban was limited to "a narrow period during which legislators could be, or could appear to be, pressured, coerced, or tempted to voting on the basis of cash contributions rather than on consideration of the public weal," it was constitutional. Kimbell v. Hooper, 665 A.2d 44, 51 (Vt. 1995).

99. *See* PUB. CITIZEN, *supra* note 32, at 8-9.

100. Of course, in a state which permits contingent fee lobbying, the lobbyist's success also affects her compensation. Moreover, even without a contingent fee, a success on one lobbying matter may increase the lobbyist's future business. Nonetheless, unless the client is acting irrationally and paying the lobbyist more than the benefit to the client is worth, the bulk of the benefit for any lobbying success must run to the client.

101. N.C. Right to Life, Inc. v. Bartlett, 168 F.3d at 715 (quoting *Buckley v. Valeo*, 424 U.S. at 20-21); *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386-89 (2000).

support of or opposition to a candidate or otherwise become involved in political campaigns. Depending on the length of the legislative session, a temporal restriction could be less burdensome to both lobbyist-donors and the candidates they would support than the monetary ceilings on contributions that the Supreme Court has upheld.[102] Moreover, the Supreme Court has held that the prevention of the appearance of corruption is, in addition to corruption itself, a justification for restricting contributions,[103] and contributions by lobbyists directly involved in the legislative process to legislators while the legislature is actively considering legislation may create a particularly acute appearance problem. Certainly, there is much to Chief Judge Wilkinson's argument that when a legislature makes an "effort . . . to protect itself from the damaging effects of corruption . . . the proper judicial posture should be one of restraint."[104] The real objection to the bans on lobbyists' contributions during the legislative session is that they are mistargeted and too narrow, not that they are necessarily unconstitutional.

The same policy concerns recur, while the constitutional objections grow stronger, with respect to the broader bans on lobbyists' campaign contributions. In 1979, the California Supreme Court struck down a complete prohibition on lobbyists' campaign contributions, adopted by voter initiative in 1974. The California Supreme Court found the ban, which applied to donations "to any and all candidates even though the lobbyist may never have occasion to lobby the candidate," fatally overbroad.[105] The court also noted that the proscription "does not discriminate between small and large but prohibits all contributions. Thus, it is not narrowly directed to the aspects of political association where potential corruption might be identified."[106] Two decades later a federal district court upheld a somewhat more tightly focused ban, adopted by California voters in 2001, which prohibits lobbyists from making contributions only to those candidates running for offices the lobbyist has registered to lobby.[107] The Alaska Supreme Court sustained a somewhat broader ban—albeit less than a complete prohibition—on contributions by lobbyists to candidates in legislative districts outside the district in which the lobbyist is eligible to vote.[108]

Both the Alaska and California courts minimized the burden on lobbyists'

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102. *Kimbell*, 665 A.2d at 51.

103. *Buckley*, 424 U.S. at 27.

104. *Bartlett*, 168 F.3d at 717-18.

105. Fair Political Practices Comm. v. Super. Ct., 599 P.2d 46, 52 (Cal. 1979).

106. *Id.* at 53.

107. Inst. of Governmental Advocates v. Fair Political Practices Comm., 164 F. Supp. 2d 1183, 1190 (E.D. Cal. 2001). In addition, the 2001 law was adopted after the definition of lobbyist had been narrowed to exclude individuals for whom lobbying constitutes less than one-third of their compensated time, and lobbying was redefined to exclude the giving of administrative testimony. *Id.* The inclusion of administrative testimony in the definition of lobbying had particularly troubled the California Supreme Court in 1979. *See Fair Political Practices v. Super. Ct.*, 599 P.2d at 52-53.

108. State v. Alaska Civil Liberties Union, 978 P.2d 597, 617-20 (Alaska 1999).

rights posed by the restrictions, noting that lobbyists remained free to undertake independent expenditures,[109] contribute to political parties,[110] and volunteer on behalf of any legislative candidate.[111] More significantly, the courts upheld the states' decisions to subject lobbyists, and not their clients, to special restrictions. The California federal district court acknowledged that the California restriction did not preclude lobbyists' clients from making contributions, but concluded that the state was "not required to address all evils at once"[112] and could limit its restriction to the lobbyists. The court also briefly contended that lobbyists' contributions presented a distinct danger of corruption and of the appearance of corruption because lobbyists' "continued employment depends on their success in influencing legislative action."[113] The Alaska court made a stronger case that lobbyists' contributions "create special risks of actual or apparent corruption," unlike the risks posed by ordinary donors, because "of the lobbyist's special role in the legislative system."[114] In particular, the lobbyist's incentive to make contributions to large numbers of legislators who are "in position to introduce or thwart legislation and to vote in committees or on the floor on matters of professional interest to the lobbyist . . . creates a very real perception of influence-buying."[115]

Again, as with the Fourth Circuit's appraisal of the legislative session contribution ban, these courts appear to mistake the agent for the principal. The real sources of potentially improper influence are not the lobbyists but the clients whom they represent. While the lobbyists may have special strategic knowledge about the state of legislative developments and special incentives to get contributions to particular members at particular times to gain the access necessary for them to make the case for a particular legislative measure, it is generally a client's case they are making. It is not clear, then, why lobbyists' contributions present a "special risk" of corruption compared with the risk of corruption generated by the contribution of any individual, organization, or interest group that has retained a lobbyist to represent its interests concerning a bill pending before the legislature. The handful of other cases in which courts have upheld contribution prohibitions have involved industries like casino gambling, liquor sales, or municipal securities that are particularly closely regulated by government, and thus raise a special danger of improper influence. Moreover, those cases involved rules or statutes that focused on the principals—that is, the industries that were the source of the potential undue influ-

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109. *Inst. of Governmental Advocates*, 164 F. Supp. 2d at 1193; *Alaska Civil Liberties Union*, 978 P.2d at 619.

110. *Inst. of Governmental Advocates*, 164 F. Supp. 2d at 1192-93; *Alaska Civil Liberties Union*, 978 P.2d at 619.

111. *Inst. of Governmental Advocates*, 164 F.Supp.2d at 1193.

112. *Id* at 1194.

113. *Id.* at 1193-94.

114. *Alaska Civil Liberties Union*, 978 P.2d at 619.

115. *Id.*

ence problem—not their legislative advocates.[116]

To be sure, a state need not address all aspects of the undue influence problem at once, and it may be that lobbyists, with their more intimate knowledge of the legislative process, are in a position to use their campaign contributions more effectively than are their clients—although presumably they would be busily advising those clients about when and to whom to make contributions. But the more burdensome the restriction, the more narrowly tailored the restriction ought to be to the corruption danger, and a general ban is certainly more restrictive than a temporal prohibition tied to the legislative session. Certainly, the Alaska court's concern that a lobbyist might be able to spread cash throughout the legislature could be met by something less restrictive than a ban, such as a ceiling on aggregate contributions by lobbyists, or even by a lower monetary ceiling for lobbyist donations.

The California and Alaska restrictions might still pass constitutional muster. The California law, in particular, is tightly focused on donations by a lobbyist to candidates for the elective office lobbied, suggesting some nexus to the danger of corruption, while the Alaska law preserves the lobbyist's right to participate financially in elections directly affecting her representation. By targeting only lobbyists, both laws surely avoid the argument that they impair the ability of candidates to raise enough money for effective advocacy—a consideration which has been the increasing focus of the Supreme Court in assessing the constitutionality of contribution limits.[117] These laws also leave lobbyists other opportunities to participate in election campaigns.[118] And they are certainly responsive to concerns about the "appearance of corruption."

But even if constitutional, such laws appear unwise. They rely on the exercise of one constitutional right—lobbying—to impose a very tight restriction on another right—making contributions. Although large contributions may be a source of undue influence, contributions are a constitutionally protected form of political participation, so that a complete ban is troubling. Moreover, by separating lobbyists from the interests they represent, these laws provide only

116. *See, e.g.*, Blount v. SEC, 61 F.3d 938 (D.C. Cir. 1995) (upholding regulation restricting the ability of municipal securities professionals to contribute to the political campaigns of state officials from whom they solicit or obtain business); *In re* Soto, 565 A.2d 1088 (N.J. Super. 1989) (upholding ban on political contributions by key casino gambling employees); Schiller Park Colonial Inn, Inc. v. Berz, 349 N.E.2d 61 (Ill. 1976) (upholding ban on contributions by liquor licensees, and their affiliates, to political parties or candidates).

117. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230 (2006); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 397 (2000).

118. Absolute prohibitions, like the California law invalidated in *Fair Political Practices Commission v. Superior Court*, 599 P.2d 46, 52 (Cal. 1979), or the ban on lobbyist contributions to legislators and "public servants" (other than the lobbyist's contribution to his or her own campaign) recently adopted by North Carolina, 2007 N.C. Sess. Laws 347, and the similar prohibition on "communicator lobbyists" recently adopted by Connecticut, *see* CONN. GEN. STAT. § 9-610(g), (h) (2008), are far more problematic.

the illusion of addressing the impact of interested donations on the legislative process. Underinclusiveness may not be constitutionally fatal, but it supports an inference that such laws are likely to be ineffective. The better approach would be to look beyond the campaign finance activities of lobbyists to the linkages between campaign finance and lobbying more generally.

Such an approach makes sense even for laws that raise little or no constitutional difficulty, such as disclosure. The disclosure of bundled contributions is an important step towards a better understanding of the nature and scope of interest group efforts to influence the legislative process. But it is not clear why campaign committees should have to report only those contributions bundled by lobbyists, as the new federal law requires, or why only lobbyists should have to report their bundling activities, as some states have begun to require.[119] Bundling is a problem because it creates the danger that an officeholder will feel a sense of gratitude and a concomitant obligation to the bundler who has managed to solicit, collect, and transmit a large number of contributions to the officeholder's campaign. The possibility of gratitude and obligation derives from all bundling, or, at least, the bundling of substantial sums, regardless of whether the bundler is a registered lobbyist, or is, instead, the client who retains the lobbyist. The public information value of bundling disclosure would be greater when the principals as well as the agents are revealed.

Indeed, some state laws recognize that it is the interaction of lobbying and campaign finance, not the campaign activities of lobbyists per se, that should be the primary focus of regulation. Michigan, for example, requires the reporting and disclosure of bundled contributions generally, without specifically targeting lobbyists.[120] Minnesota caps the fraction of total contributions a candidate can receive from a category of donors that consists of lobbyists, political action committees, political funds, and large contributors;[121] this recognizes that lobbyists are just a piece of the special interest problem, not a distinctive problem in their own right.[122] Nor is there any difficulty in requiring lobbyists to disclose their campaign contributions[123] or their bundled contributions in their lobbying reports,[124] at least as long as campaign committees and other political committees are required to report all contributions and all bundled contributions, above a certain threshold. Such double reporting can make it easier to trace the interactions of influence without presuming that lobbyists are uniquely influential.

Treating lobbyists as essentially agents of clients is the best general ap-

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119. *See, e.g.*, WASH. REV. CODE § 42.17.170 (2007).

120. MICH. COMP. LAWS § 169.226 (2007).

121. MINN. STAT. § 10A.27 (2007).

122. The Eighth Circuit upheld the aggregate contribution limit as a matter closely drawn to limit special interest influence. Minn. Citizens Concerned for Life, Inc. v. Kelley, 427 F.3d 1106 (8th Cir. 2005).

123. *See, e.g.*, R.I. GEN. LAWS § 22-10-9 (2007).

124. *See, e.g.*, WASH. REV. CODE § 42.17.170 (2007).

proach to the intersection of lobbying and campaign finance.[125] But there may be some exceptional cases in which restrictions aimed at lobbyists per se are appropriate. Maryland, for example, prohibits a lobbyist from serving as a campaign treasurer for a candidate or elected official, serving on a candidate's fundraising committee, or organizing or establishing a political committee for the purpose of soliciting or transmitting contributions.[126] The Maryland federal district court upheld these restrictions with little discussion, noting simply that these relationships posed a danger of corruption and that, in fact, the Maryland legislature had acted after "an actual influence peddling scandal" involving a lobbyist.[127] Although lobbyists' campaign contributions may not present unique risks, other activities—such as serving as a campaign treasurer, establishing a committee, or sitting on a fundraising committee—raise different concerns. Such actions represent a far greater commitment to the candidate's campaign, and thus are a potentially far greater source of candidate gratitude and lobbyist influence than merely making a donation. People active in the legislative process regularly make contributions for "access," not because they particularly support the candidates to whom they are donating. Indeed, making a campaign contribution is a cost of doing legislative business, and it is a common practice for donors to give to both parties and to competing candidates.[128] But a direct involvement in the candidate's campaign indicates personal support and is likely to be recognized, and potentially rewarded, as such. So, too, campaign contributions, particularly if bundled with contributions from clients, may be seen as aimed at obtaining access or actions for particular clients and thus primarily benefit them, but the lobbyist's personal involvement in the campaign is unlikely to be connected to any particular client and so will benefit the lobbyist personally, and, perhaps, ultimately benefit future clients generally.

Although lobbyists generally are instruments for advancing the interests of employers or clients, there may be instances in which they become power brokers and sources of influence in their own right, which carry beyond the representation of specific clients.[129] Campaign activities which involve a distinct personal role for the lobbyist and forge particularly strong links between the lobbyist and the candidate can do that. These give the lobbyist opportunities for undue influence which the lobbyist can then use for his personal benefit and for the benefit of future clients later. These might reasonably be subject to limita-

125. *Cf.* Honest Leadership Act, Pub. L. No. 110-81, § 541 (2007) (applying the gift ban to "a private entity that retains or employs a registered lobbyist" as well as to lobbyists themselves).

126. MD. CODE ANN., STATE GOV'T § 15-714(d)(1)(ii),(iii) (West 2007).

127. Md. Right to Life State Political Action Comm. v. Weathersbee, 975 F. Supp. 791, 796-98 (D. Md. 1997).

128. *See* PUB. CITIZEN, *supra* note 32, at 8 (noting that of the "nearly 1000 lobbyists who have contributed at least $20,000 to members of Congress since 1998, more than thirteen percent (132) have given at least two-fifths of their contributions to each major party").

129. *See id.* (noting the role of leading lobbyists in organizing fundraisers for members of Congress).

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CONCLUSION

This Article provides a brief, preliminary inquiry into the relationship between campaign finance and lobbying. It addresses only the most basic questions concerning the purposes and scope of the different regimes addressing campaign finance and lobbying. Many important issues, such as the specific questions posed by the regulation of grassroots lobbying or the possibility of public efforts to support lobbying by underrepresented groups, are beyond its scope. The article will have accomplished its purpose, however, if it has gotten readers to think about campaign finance regulation and lobbying law as addressing different facets of a common concern with the structure of the political process. Comparing and contrasting the campaign finance and lobbying regimes will help us to better understand the particular issues raised by each practice. Looking at campaign finance and lobbying together may improve our appreciation of the connections between the two activities, and to take those connections into account in drafting the laws that deal with each activity.