

Lobbying Regulation in Canada and the United States:

Political Influence, Democratic Norms and Charter Rights

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Abstract

Lobbying should be strictly regulated – that is the major finding of this thesis. The thesis presents many reasons to enact stricter regulations. The principle one being that, as lightly regulated as it is, lobbying is corroding democracy in both Canada and the United States.

The thesis opens with a deep investigation of how lobbying works in both countries. There are examples taken from the literature, as well as original qualitative interviews of Canadian lobbyists, former politicians, and officials. Together, these make it clear that there is an intimate relationship between lobbying and campaign financing. The link between the two is sufficiently tight that lobbying and campaign financing should be considered mirrors of each other for the purposes of regulatory design and constitutional jurisprudence. They both have large impacts on government decision-making. Left lightly regulated, lobbying and campaign financing erode the processes of democracy, damage policy-making, and feed an inequality spiral into plutocracy. These have become major challenges of our time.

The thesis examines the lobbying regulations currently in place. It finds the regulatory systems of both countries wanting. Since stricter regulation is required to protect democracy and equality, the thesis considers what constitutional constraints, if any, would stand in the way. This, primarily, is a study of how proposed stronger lobbying regulations would interact with the *Canadian Charter of Rights and Freedoms*, s. 2 (free expression and association rights) and s. 3 (democratic rights). The principal findings are that legislation which restricted lobbying as proposed would probably be upheld by the Canadian court, but struck down by the American court, due to differences in their constitutional jurisprudence. The thesis contends that robust lobbying regulations would align with Canadian *Charter* values, provide benefits to democracy, improve government decision-making, increase equality, and create more room for citizen voices.

The thesis concludes with a set of proposed principles for lobbying reform and an evaluation of two specific reforms: limits on business lobbying and funding for citizen groups. Although the thesis focuses on Canadian and American lobbying regulations, its lessons are broadly applicable to any jurisdiction that is considering regulating lobbying.

Keywords

Lobbying; lobbyist; pressure groups; interest groups; *Canadian Charter of Rights and Freedoms*; *Charter* rights; section 2; section 3; freedom of expression; free speech; freedom of association; right to vote; democratic rights; structural rights; right to meaningful participation; guarantee of effective representation; *Charter* values; Canada; United States; comparative; comparative constitutional rights; regulations; oversight; lobbying reform; reform ideas, Code of Conduct; citizen groups; business lobbying; corporate lobbying; union lobbying; campaign finance; campaign finance donations; campaign finance regulations; shadow political parties; corruption, appearance of corruption; disclosure; hydraulic pressure of private influence; separation of business and state; political equality; voter equality; mirror principle of lobbying and campaign financing.

Brief Table of Contents

Abstract.....	ii
Brief Table of Contents.....	iii
Detailed Table of Contents	iv
Cases, Figures and Tables	xxvi
Introduction	1
Chapter 1 – Lobbying Regulation in Canada and the U.S.	25
Chapter 2 – Understanding Lobbying in Canada and the U.S.	56
Chapter 3 – The Six Concerns about Lobbying	142
Chapter 4 – Private Campaign Financing and Lobbying	210
Chapter 5 – Interview Results.....	291
Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations	335
Chapter 7 – Canadian Charter Section 2	405
Chapter 8 – Canadian Charter Section 3	441
Chapter 9 – Reform Principles	488
Chapter 10 – Specific Reforms and Conclusion	571
Bibliography	586
Appendix: Glossary / List of Theories	631
Appendix: Astroturf Examples	645
Appendix: Lobbying Examples	648
Appendix: Creative Commons License	696

Detailed Table of Contents

Abstract.....	ii
Keywords.....	ii
Brief Table of Contents.....	iii
Detailed Table of Contents	iv
Cases, Figures and Tables	xxvi
Table of Figures.....	xxviii
Table of Tables	xxviii
Introduction	1
Introduction – Introduction	2
Example: U.S.: House Majority Whip & Lobbyist Approval of Staff.....	4
Inspiration – Climate Change	4
Example: U.S.: Oil Industry & Deepwater Horizon.....	8
Evidence that Lobbying is Holding Back Action on Climate Change	8
Stymying Action on Climate Change in the U.S.	9
Success of Climate-Change Denial Campaigns.....	10
The Fossil Fuel Industry’s Deep Ties to the Canadian Government	11
Example: Canada: Oil Industry & Kinder Morgan Pipeline	13
Argument and Layout of the Thesis.....	14
Example: U.S.: Oil Industry Get Protests of Oil and Gas Infrastructure Criminalized	17
Overview of the Major Headings of Each Chapter	17
Section 1: The State of Lobbying.....	17
Section 2: A Normative Framework for Evaluating Lobbying Regulations	18
Section 3: A Legal Framework for Evaluating Lobbying Law.....	18
Section 4: Lobbying Reform	19
Example: U.S.: 2008 Financial Crisis & Lobbying.....	19
Areas of Further Study	19
Example: Canada: Ontario Ford Government & Liquor Sales.....	22
Dedication and Thank Yous.....	23
Chapter 1 – Lobbying Regulation in Canada and the U.S.	25
Introduction – Chapter 1.....	26
Definition	26
History of Lobbying Regulation in Canada and the U.S.	30

Lobbying Regulations in Canada and the U.S.	32
Disclosure	32
Revolving Door Movement	34
Oversight	35
Canadian <i>Lobbyists' Code of Conduct</i>	36
Investigation.....	40
Comparison Summary.....	40
Regulations in the E.U.	44
Structural Political Difference that Impact the Practice of Lobbying	44
Similarities.....	44
Differences	46
Differences in Size	46
Differences in Lobbying Culture.....	46
Differences in Political Structures.....	47
Vetogates	48
Kludgeocracy.....	50
Adversarial versus Co-operative Lobbying.....	50
The Canadian Senate	53
Conclusion – Chapter 1	55
Chapter 2 – Understanding Lobbying in Canada and the U.S.	56
Introduction – Chapter 2.....	58
Understanding Lobbying.....	58
Lobbying is Increasing	58
Increasing due to: Changes to Governmental Reach.....	59
Increasing due to: Changes in Public Policy Approaches	60
The Policy of Seeking Public Input Increases Lobbying.....	60
The Policy of Seeking Business Input Increases Lobbying.....	60
The Policy of Cost Cutting Increases Lobbying.....	61
The Policy of Good Government Reform Increases Lobbying and Public Distrust	61
Increasing due to: The Increasing Size of the Economy.....	62
Increasing due to: Lobbying Being Self-Perpetuating and Building on Itself Over Time	63
Lobbying Becomes Part of an Organization's Structure	63
Lobbying Brings Returns	64
Lobbying Provides a Sense of Power	65
Lobbying's Uncertainty is Addictive.....	66
The Three Prime Justifications for Lobbying.....	67

Justification 1: Tradition.....	67
Justification 2: The Right to Petition Government.....	67
Justification 3: Information Provision	68
What Do Lobbyists Do.....	69
Lobby Government	70
Neo-pluralist Model	71
Exchange Model.....	71
Comparing the Two Models.....	73
Monitor Government.....	74
Build their Client Base	75
The Clientele are at an Asymmetrical Information Disadvantage	75
The Clientele are Mostly Business Interests	77
Build Relationships with Officials	80
Lobbyists Have Superior Access to Officials.....	81
Lobbyists Have Repeated Contact with the Same Officials	81
Lobbying and Bribery	83
Revolving Door Movement	87
Large Individual Donors and Shadow Political Parties.....	90
Relationship between Lobbyists and Particular Political Parties	93
Officials Benefit from their Relationship with Lobbyists	94
Build Relationships with Other lobbyists	95
Lobbying Groups Form Coalitions.....	95
The Interactions Between Lobbying Groups.....	97
Lobbying Groups and Think Tanks	98
Four Approaches to Understanding Lobbying	100
The Insider-Outsider Approach.....	100
The Outsider Approach	101
Organizations that Use the Outsider Approach.....	101
Organizations that Skip the Outsider Approach	102
Organizations That Remain in the Outsider Approach	103
Astroturf Lobbying	106
Insider Approach.....	108
Insider Approach: Government Seeks Stakeholder Input.....	109
Insider Approach: The Position is Unpopular	110
Insider Approach: The Issues has Low Public Salience	110
The Insider-Outsider Approach: Core and Peripheral Lobbying Groups	110

Regulation Mostly Targets the Insider Approach	111
The Disclosure versus Corruption Approach	111
The Disclosure Heuristic.....	111
The Corruption Heuristic.....	112
The Four Pressures Approach	114
Direct Power and Influence.....	114
Political Context	117
Passion	117
Popularity	118
The Hydraulic Force Approach.....	119
Government Created Lobbying.....	119
Government-Government Lobbying.....	120
Indirect Government Lobbying	121
Foreign Government Lobbying	121
Government Lobbying of Organizations	122
Government Creation of Independent Lobbying Organizations.....	123
Government Suppression of Lobbying Organizations and Influence Peddling.....	124
Canadian Lobbying Statistics.....	125
Transparency and Lobbying.....	129
Four Levels of Transparency	129
Transparency and the Disclosure and Corruption Heuristics	131
Accuracy in Transparency	132
Advantages of Lobbying Transparency	133
Disadvantages of Lobbying Transparency.....	133
The Future of Transparency.....	134
The Effectiveness of Lobbying	134
Why Lobbying Effect on Legislation is Hard to Detect.....	135
Studies Show that Lobbying is Influential	136
Benefits to Business Organizations.....	138
Greater Focus on Low Salience Areas and Regulations	140
Conclusion – Chapter 2	141
Chapter 3 – The Six Concerns about Lobbying	142
Introduction – Chapter 3.....	144
Concern I: Lobbying Disproportionately Advantages Businesses.....	144
Advantage in Organizational Structure.....	145
Advantage in Access to Specialised Informational	145

Resource Advantages.....	145
Generating Reports.....	148
Matching Intensive Lobbying Campaigns	148
Competing in Low Salience Areas	148
The Counter-Case.....	149
Policy Makers Favour Business Lobbying.....	150
Decline in Countervailing Force of Unions.....	150
Concern II: Misalignment with Popular Opinions	153
The Concept of Alignment	153
Misalignment Steps.....	154
A: Lobbying Favours the Opinions of the Wealthy Elites.....	154
Wealthy bias even within the lobbying group itself	155
A2: Lobbying Shuts Out the Marginalized.....	156
Effect of the Collapse of Unions.....	157
B: The Political Priorities of the Wealthy Differ From the General Public	158
C: The Preferences of Lobbyists Do Not Match Those of the Public	161
D: The Gap Between Voter Preferences and Government Decisions in Favour of the Wealthy.....	161
Misalignment in Canada and other OECD Countries	163
E: This Alignment Gap is Partly a Result of Lobbying.....	163
Concern III: Lobbying Creates an Information/Framing Bias.....	166
Agenda Setting	167
Agenda Setting and Think Tanks	167
Agenda Setting and the Canadian Government	168
Officials Do Not Have to Intend the Framing Bias	169
Lobbyists Bias Policies through their Legislative Subsidies.....	169
“Neutral” Information Framing Can Still Create Bias.....	170
Limited Arguments Can Lead to Epistemological Closure	171
Lobbying Effects the Salience of Issues.....	171
Framing Bias Favours the Dominant Special Interest Groups	171
The Information Provided by Lobbyists is Not Impartial	172
The Connection between Framing Bias and Political Polarization	175
Government Capacity Decline Strengthens the Framing Bias	176
Capacity Cutting Makes Government More Receptive to Lobbying.....	177
Capacity Cutting Locks in the Agenda from Future Change.....	179
Concern IV: Lobbying Increases Inequality	180
Inequality is increasing.....	180

Figure 1: U.S. Income Growth Distribution, Poor and Middle Class vs. Top 0.001%, 1980 vs. 2014	181
Inequality in Canada.....	181
Figure 2: Income Inequality in Canada, U.S., U.K. and Australia, 1910–2010	182
Return on Capital Exceeding the Returns on Labour	183
F: The Wealthy Oppose Policies that Would Decrease Inequality.....	184
G: Lobbying Increases Inequality by Advancing the Priorities of the Wealthy	185
Figure 5: Private vs. Public Capital in Rich Countries, 1970–2016	187
G2: Policies That Reward the Wealthy with More Income That Can Be Funnelled Back into Lobbying.....	188
Concern V: Lobbying Favours the Legislative Status Quo	189
Maintaining the Status Quo Directly.....	189
Maintaining the Status Quo Indirectly	190
Grossmann’s Dissent.....	191
The Narrow Status Quo in Low Salience Areas.....	191
Lobbying’s Two Sided Effect	192
Concern VI: Lobbying Corrupts Democracy	194
Lobbying Increases Corruption	195
<i>Quid Pro Quo</i> Corruption and Circumspect Bribery.....	195
The Corrupting Influence of the Social Exchange Gift Economy.....	198
Dependency Corruption.....	199
Regulatory Capture	199
Lobbying Creates the Appearance of Corruption and Unfairness	203
The Practice of Lobbying.....	204
Business Interests Over-Represented Creates an Appearance of Corruption.....	205
A Fence around Decision-Making	205
Lobbying Indirectly Weakens Democracy.....	206
Conclusion – Chapter 3	208
Chapter 4 – Private Campaign Financing and Lobbying	210
Introduction – Chapter 4.....	211
The Mirror Principle of Lobbying and Campaign Financing.....	211
Operating at the Core of Democracy	212
Operational Link Between Lobbying and Campaign Contributions.....	212
(1) Campaign Contributions Grant Access	213
(2) Campaign Contributions Act as a Social Exchange to Earn Lobbying Favours	213
(3) Campaign Contributions Can Be a Reward for Supporting a Lobbyist’s Agenda	214

(4) Campaign Contributions Can Push Friendly Politicians into Power	214
(5) Lobbying is Needed for the Detailed Policy Work	214
(6) Lobbyists and Funneling Campaign Contributions	215
(7) Lobbyists Can Help the Politician with the Demands of the Donors and the Public	215
Similarities – Theoretical	216
Similarities – Regulatory	220
Similarities – The Mirror Principle	221
Regulation of Campaign Financing in Canada	222
The Current Canadian Campaign Finance Law	222
Donation Limit	223
Donations by Candidates Limits	223
Spending Limit	223
Third-Party Limits	224
Public Financing	225
The Limits in the Current Canadian Law	226
The Contrasting Practice of Campaign Contributions in the U.S.	227
<i>Buckley v. Valeo</i>	228
<i>Citizens United v. Federal Election Commission</i>	231
Corporate Free Speech	232
Appearance of Corruption	233
Dissent	234
Disregarded Precedent and the Compelling Interest	234
The Quid Pro Quo Standard is Inadequate	235
Impoverish the Marketplace of Ideas	235
Repercussions	236
Information Provision and Manipulation	237
Corruption	238
Citizens United’s View of the Citizen	240
Signaling	240
U.S. Constitution is Limited by Lacking a Specific Right to Democracy	242
The Influence of Campaign Contributions	243
Increasing Amounts Spent on Campaign Contributions	244
Campaign Contributions Grant Influence	246
Donations Buy Access	247
Donations Buy Influence – The Corruption Heuristic	248
The Curious Case of Dark Money	251

Donations Work with Lobbying.....	254
Campaign Donations Influence Judges	255
Spending on Judicial Elections has Increased Dramatically	255
Increased Involvement of Outside Groups and Dark Money in Judicial Elections	256
Donations Influence Judges	257
Business Spending is Dominant and Likely a Competition for Influence	260
Campaign Finance Limitations	261
Advantages of Private Campaign Funding	262
Disadvantages of Public Campaign Funding	262
Donation Limits	262
Spending Limits	263
The Beneficial Effects of Lower Spending Limits	263
The Six Concerns about Unregulated Campaign Financing	264
Concern 1: Campaign Contributions Favours the Wealthy and Business Organizations.....	264
Wealthy are the Primary Donors	264
The Share of Donations by the top 1% are Growing.....	265
Concern 2: Campaign Contributions Increase Inequality	267
Concern 3: Campaign Contributions Misalign Democratic Representation	269
Direct Misalignment of Representation.....	269
Indirect Misalignment of Representation via Deception	269
Concern 4: Campaign Contributions Favour the Status Quo	270
Concern 5: Campaign Contributions Create Bias.....	271
Campaign Funding Selects Pro-Money Candidate	272
Campaign Contributions Create a Political and Framing Bias.....	274
Pro-Business and Pro-Wealth Bias	274
Bias to the Right	275
Framing Bias	277
Limiting Policy Alternatives.....	279
Bars Non-Wealthy Candidates	280
Concern 6: Campaign Financing Otherwise Damages and Corrupts Democracy	281
Large Contributions Create an Appearance of Corruption	281
The Negative Effects of Electoral Advertising.....	282
Fundraising Takes Time from Governing	284
The Canadian Experience	285
Corporate Donations, Union Donations, and Dark Money in Canada	286
Donation and Spending Limits in Canada	287

Donation Limits	287
Spending Limits	287
Link to Lobbying	288
Conclusion – Chapter 4	288
Chapter 5 – Interview Results	291
Introduction – Chapter 5	294
Chari <i>et al.</i> 's Questions:	295
My Questions	295
Questions About Lobbying	295
Questions Related to Regulations	296
Questions About Lobbyists	296
Questions Related to Campaign Donations	296
Questions Related to Influence	296
Additional Comments	297
Overview of Interviewees	297
Regulations as a Floor of Good Behaviour and Canada's Campaign Finance Laws as a Model ...	297
Informal Discussions and Seminar	298
Informal Discussions	298
Seminar	298
Comparison with the Findings from <i>Regulating Lobbying: a Global Comparison</i>	299
Questions that Also Appeared in <i>Regulating Lobbying: a Global Comparison</i>	300
C. Do you consider yourself knowledgeable about relevant legislation pertaining to the regulation of lobbyists at the federal level?	300
My Findings	300
D. In your view, do the overall regulations help ensure accountability in the political system? .	300
Chari <i>et al.</i> 's Findings	301
My Findings	301
E. In your view, do specific rules surrounding individual spending disclosure help ensure transparency?	302
Chari <i>et al.</i> 's Findings	302
My Findings	302
F. In your view, should details of all political party campaign contributions by lobbyists be available to the public?	303
Chari <i>et al.</i> 's Findings	303
My Findings	304

G. In your view, are there loopholes in the system that allow individual lobbyists to give/receive 'gifts', regardless of the legislation in force?	304
Chari et al.'s Findings	304
My Findings:	305
H. If you have answered Strongly Agree or Agree ... above, please elaborate on what the loopholes are and what the 'gifts' may consist of.	305
I. In your view, does the register of lobbyists make ordinary citizens feel inhibited about approaching their local representative alone?	306
Chari et al.'s Findings	306
My Findings	306
J. In your view, does public access to an official list of lobbyists ensure accountability?	306
Chari et al.'s Findings	307
My Findings	307
K. If you have answered Disagree or Strongly Disagree, please elaborate why you feel that accountability has not been achieved.	307
L. In your view, are reviews or audits by state agencies of lobbyists effective in ensuring accountability?	308
Chari et al.'s Findings	308
My Findings	308
M. If you have answered Disagree or Strongly Disagree, please explain why you feel that is the case.	309
N. In your view, how could the regulation be improved in order to ensure better transparency, accountability and effectiveness?	309
Chari <i>et al.</i> 's Other Findings	310
My Questions	312
Questions About Lobbying	312
1. Which branch of the federal government is lobbied the most?	312
2. Do you think different parties when in power are more or less receptive to lobbying, or lobbying by different industries?	313
3. Are political parties ever lobbied by professional lobbyists?	313
4. How much do you think is spent on lobbying in Canada? Is that money well spent for those spending it?	314
5. What do you believe the balance of power is between the lobbying of different special interests in Canada?	315
6. How effective do you think lobbying is? How much influence do you think lobbyists have on the Canadian government?	315
7. What do you think the average Canadian thinks about lobbying?	316

Questions Related to Regulations.....	317
8. In your view, how accurate are the disclosures recorded in the lobbying database?.....	317
9. In your view, is there a shadow lobbying system that avoids the disclosure rules through loopholes or by failing to register?	317
10. Do you think the government enforces the lobbying regulations fairly and impartially?.....	318
11. What changes would you like to see to Canada's lobbying regulations?	318
12. How would you or your business/government/employer/party react to regulatory efforts to curtail lobbying?	319
13. What do you think of restrictions on the amount of lobbying that special interests could pursue, if the restrictions applied equally to all special interests, including their opponents?	320
14. What do you think of the idea of providing public funding for citizen lobbying groups, so they can afford to bring their concerns to the government?	321
Questions About Lobbyists	322
15. Do you think it is more important for a lobbyist to be an expert in an issue or to have good personal connections?	322
16. What factors do you think make some lobbyists more successful?	322
17. How involved do you think former government officials and politicians are in lobbying?	323
18 a. Do you think the cooling-off period between serving in government and acting as a lobbyist is respected?	323
18 b. What do you think about job offers to sitting politicians and high-level bureaucrats?	323
19. What do you think of lobbyists taking positions in government? Do you think it risks regulatory capture?	324
Questions Related to Campaign Donations	324
20. Do you think lobbying is connected to political campaign donations on the Federal level in Canada?	325
21. Does making a political donation give a lobbyist or his client an advantage in lobbying?	325
If so, what type of advantage and how significant do you think it is?.....	325
22. Do you think Canada's campaign donation laws are effective?	325
What changes would you like to see to Canada's campaign donation laws?	326
Questions Related to Influence.....	327
23. Do you think lobbying has a negative influence? If so, how?	327
If so, how so?	327
24. Do you think lobbying has a positive influence? If so, how so?.....	327
If so, how so?	327
25. Do you think lobbying gives government information it needs? If so, is this information fair and neutral?	327

26. Do you think lobbying makes the government more responsive? Do you think lobbying serves as a sort of fire alarm that warns politicians when government agencies are not fulfilling their assigned policy roles?	328
27. Do you think lobbying helps or hurts Canadian democracy?	329
28. Do you think lobbying helps or hurts the government and societies' ability to tackle large-scale long-term problems, such as climate change?	329
29. Do you think lobbying is linked to inequality?	329
Additional Comments	330
30. Do you have any interesting stories about lobbying, or are there any other comments you wish to make?	330
Conclusion – Chapter 5	331
Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations	335
Introduction – Chapter 6.....	336
Rawls and Dworkin on Political Equality	337
Rawls	337
Dworkin	341
Profit Motivated Corporate and Public Interest Citizen Lobbying.....	342
Classification of Groups	343
Business Lobbying versus Citizen Lobbying	344
The Lobbying of Other Groups.....	345
Government Lobbying	345
The Unique Case of Unions	345
The Problem of Disguised Organizations and Astroturf Lobbying.....	347
Shadow Political Parties	348
Business Interests Pursue Private Goods.....	348
Citizen Organizations Pursue Collective Goods	349
The Overlap between Private Goods and Collective Goods	350
The Nature of the Corporate Lobbying.....	352
Corporate Personality	352
Corporate Personality is Shaped by Profit	353
Externalities	356
Short-Sighted Decisions	356
Corporate Personality and Lobbying.....	358
Corporate Information Provision	358
Corporate Lobbying for Externalities	359
Corporate Partnership with Government.....	360

The Separation of Business and State.....	361
The Test from <i>Lemon v. Kurtzman and Model Amendment</i>	362
Separation of Powers.....	363
Separation of Church and State.....	364
The Interest and Passion in the Separation of Business and State.....	365
Separation in Interest.....	366
Separation in Passion.....	366
Business and State, Democracy and Lobbying.....	366
The Nature of the Unregulated Marketplace – Phishing for Phools.....	367
Humans are Neither Rational nor Irrational.....	368
Psychological and Informational Weakness.....	369
Inaccurate Mental Frames.....	369
Phishing is a Natural Aspect of the Marketplace.....	370
Need for Government Oversight.....	371
Applying the Lessons about Phishing to Lobbying.....	372
Phishing and Encouraging Rational Argument in Lobbying.....	372
Phishing Restrictions in Lobbying and the Right to Freedom of Expression.....	374
Phishing Control Supported by My Interview Results.....	375
Inequality and Lobbying.....	375
Elites Capture Growth – Economic Growth is a Rushing River Not a Tide.....	377
Economic Inequality is a Risk to Democracy.....	379
Economic Repercussion.....	379
Absolute Income Mobility.....	380
Democratic Repercussions.....	381
Economic Power to Political Power.....	383
Economic Inequality is an Outcome of Policy Decisions.....	384
Supply-Side Economics Increase Inequality.....	384
Supply-Side Economics: Anti-Union.....	385
Supply-Side Economics: Financial Deregulation.....	387
Supply-Side Economics: Decline in Taxes on the Wealthy.....	387
Supply-Side Economics: Decline in Business Taxes.....	388
Supply-Side Economics: Decline in Taxes is Driven by the Wealthy.....	390
Supply-Side Economics: The Arguments for Lowering Taxes on the Wealthy.....	391
The Nature of Meritocracy – The Iron Law of Meritocracy.....	394
Meritocracy Requires Active Governmental Intervention.....	395
America as a Winner-Take-All Society.....	396

The Winner-Take-All Society and Lobbying	398
Lobbying Feeds the Inequality Spiral	398
Spiraling into Inequality	399
Inequality, Private Goods, Collective Goods, and Lobbying	402
Conclusion – Chapter 6	403
Chapter 7 – Canadian Charter Section 2	405
Introduction – Chapter 7	406
Canadian Jurisprudence – Lobbying Cases	407
<i>Makhija v. Canada</i>	408
<i>Democracy Watch v. Campbell</i>	408
<i>Democracy Watch v. Canada</i>	409
<i>R. v. Carson 2019 – ONCA</i>	410
<i>R. v. Carson 2018 – SCC</i>	410
American Jurisprudence – <i>United States v. Harriss</i>	413
The Mirror Principle of Lobbying and Campaign Financing	414
S. 2(b) – Freedom of Expression	415
S. 2(d) – Freedom of Association	418
Principles from <i>Harper</i> and <i>Libman</i>	419
S. 1 – Applying Charter Principles	420
Political Equality and Fairness in Healthy Democracy (principles 1 and 2)	420
Affluent Cannot Set Guideposts of Political Choices (principle 3)	421
Limiting Expression of Some to Help Many Others (principle 4)	422
Enhancing Democracy (principle 5)	422
Supporting Electoral Laws and Equality (principle 6)	423
Astroturf Restrictions	423
Spending Limits	423
Hearing all Points of View (principle 7)	423
Perception of Fairness and Confidence in Democracy (principles 8 and 9)	425
Mandatory Disclosure (principle 10)	425
Challenges from Campaign Finance Principles	427
The Principle of Proportional Regulatory Duration	427
S. 1 – Deference to Parliament	428
(i) The Nature of the Harm	429
(ii) The Vulnerability of the Group to that Harm	430
(iii) The Apprehension of Harm	430
(iv) The Nature of the Infringed Activity	431

S. 1 – Skeleton Evaluation Based on <i>Harper</i>	431
Pressing and Substantial – The Three Objectives	432
Means Chosen of the Law Must Be Proportionate to That Goal in a Free and Democratic Society.....	434
Conclusion – Chapter 7	439
Chapter 8 – Canadian Charter Section 3	441
Introduction – Chapter 8.....	442
S. 3.....	443
Interpretation of the Right to Vote.....	444
Deep Democratic Principles.....	445
Constitutional Principles	446
Constitutional Principles: Federalism	448
Constitutional Principles: Substantive Democracy	449
Democracy: Self-Governance.....	449
Democracy: Accommodation of a Wide Variety of Beliefs.....	450
Democracy: Faith in Public Institutions	450
Constitutional Principles: Rule of Law and Legitimacy	451
Constitutional Principles: Respect for Minorities	452
S. 3 Principles	452
S. 3 Principles: Respect Cultural and Group Identities.....	452
S. 3 Principles: Right to Meaningful Participation.....	453
Problem with the Code of Conduct Prohibiting Conflicts of Interest	454
Citizen versus Corporate Political Participation.....	455
The Court’s rulings in Figueroa and Harper	455
S. 3 Principles: Equality and Fairness	456
Equality.....	456
Fairness	458
S. 3 Principles: Anti-Corruption and Appearance of Anti-Corruption.....	460
S. 3 Principles: Governmental Transparency	462
S. 3 Principles: Conclusion.....	464
<i>Haig</i> Precedent on Referendum	465
Economic Welfare as a Justification for Lobbying Law	466
Structural Democratic Rights Paradigm.....	467
Contrasting Individual Rights Paradigm	468
Structural Rights – Pal	470
Four Components of Competition Approach – Pal	470

1: The State is Subject to Capture	471
2: The Real Concerns to Be Addressed Are Systemic Harms	472
3: Electoral Competition Maintains Electoral Accountability	472
4: Minimal Standard is the Peaceful Transfer of Power	475
Three Entrenchment Breakdowns – Pal	475
Partisan Entrenchment Breakdown	476
Incumbent Entrenchment Breakdown	476
Interest Entrenchment Breakdown	477
Structural Approach in <i>Harper, Figueroa</i> and <i>Sauvé</i> – Pal	478
Competition versus Private Power	479
Structural Paradigm and Independent Officers of Parliament	479
Structural Bundles of Rights Approach – Dawood	480
Bundle of Rights – Dawood	481
Pal’s and Dawood’s Approaches	483
Pal’s Approach	483
Dawood’s Approach	485
Conclusion – Chapter 8	486
Chapter 9 – Reform Principles	488
Introduction – Chapter 9	489
OECD Recommendations	490
The Need for Broader Reform	492
Reform is Not Impossible	493
Twelve Principles of Lobbying Reform	494
Principles of Lobbying Reform	495
Tenets of Design of Reform	496
A Loose Hierarchy of Principles	496
Avoid Complexity	496
Campaign Finance Law as a Model	497
A Deliberate Process of Reform	498
Principle 1: Control the Hydraulic Pressure of Influence	500
Cohesiveness is Necessary at the Heart of Democracy	500
Oversight	502
Enforcement	503
Oversight Must be Free to Evolve	505
Principle 2: Enhance Democracy	506
Enhance Democratic Alignment	507

Increase Political Involvement	508
Rebuild Faith in Democratic Institutions.....	508
Regulations Should Set Increasing Standards of Behaviour	509
Deter the Astroturfing of Democracy	510
Principle 3: Prevent Corruption	511
Social Exchange and Phishing	513
Regulatory Capture	514
Cooling-off Period	515
Principle 4: Prevent the Appearance of Corruption	517
A Fence around Corruption.....	519
Principle 5: Improve the Quality of Information.....	520
Remove Undue Influence.....	521
Introduce More Viewpoints and Sources of Information	521
Deter Deceit, Lies and Low Quality Information.....	523
Increase Officials' Access to High Quality Information	525
Principle 6: Maintain Political Neutrality	526
Prevent Incumbent and Interest Entrenchment.....	528
Principle 7: Enhance Political Equality	529
Rawls Principles of Equality: Basic Political Liberties	530
Rawls Principles of Equality: Equality of Opportunity	530
Rawls Principles of Equality: The Difference Principle.....	531
Practical Dangers of Inequality	531
Lobbying Legislation Should Resist Inequality	533
Restoring Political Equality to Lobbying.....	533
Principle 8: Advantage Citizen Groups.....	533
Favour Citizen Groups	534
Standards to Qualify as Citizen Groups.....	535
Restore Social Networks and Countervailing Pressures	536
Unions	537
Other Levels of Government.....	538
Low Salience Areas of Legislation and Regulation	539
Principle 9: Advantage Collective Goods over Private Goods.....	539
The Most Contentious Principle.....	540
Tools to Make Lobbying Work for Collective Goods.....	542
Principle 10: Separate Business and State	542
Loci of Power	544

Break the Connection between Wealth and Political Power	545
The Limitations of Ethical Lobbying	546
Deregulation and Self-Regulation and Involvement in Governmental Decision-Making	549
Businesses Acting in Governance Roles	551
Shareholder and Worker Approval for Corporate Lobbying.....	553
Principle 11: Empower the Disadvantaged	557
Positive Repercussions of Helping the Disadvantaged	557
Lobbying Policies Designed to Help the Disadvantaged	558
Cultural Capture	559
Direct Lobbying Support for the Disadvantaged.....	559
Principle 12: Promote Strong Disclosure and Transparency.....	560
Madisonian Competition of Interests	561
Disclosure Requirements	561
Astroturf and Grassroots Organizations	564
Transparency Should Apply to Interest Groups	565
Disclosure Should Also Apply to Officials.....	566
Open Government	567
Disclosure of Information Sources.....	568
More Ambitious and Radical Transparency	568
Blackout of Confidential Information	570
Conclusion – Chapter 9	570
Chapter 10 – Specific Reforms and Conclusion	571
Introduction – Chapter 10.....	572
Ban Astroturf Organizations	572
Limit Business Lobbying	573
Three Types of Lobbying Limits.....	574
Accounting for Trade Associations and Subsidiaries	575
Enforcing the Limits	576
Impact on Officials	576
Hypothetical Ban on Corporate Lobbying.....	577
Freedom of Association and Expression	578
Publicly Support Citizen Lobbying.....	579
Approaches to Funding Citizen Groups.....	579
Political Control in Canada’s History of Funding Citizen Lobbying	581
The Example of the Court Challenge Program.....	581
Questions for Further Study	583

Conclusion – Conclusion	583
Bibliography	586
Appendix: Glossary / List of Theories	631
Absolute Income Mobility	632
Alignment & Responsiveness	632
Astroturf Lobbying	632
Businesses Pursue Private Goods & Citizen Groups Pursue Collective Goods	632
Corporate Lobbying Advantages	632
Corporations are Loci of Power	633
Corporations' Inherent (Psychopathic) Personality	633
Corruption: Systematic Corruption, Venal Corruption, <i>Quid Pro Quo</i> Corruption, Circumspect Corruption/Bribery, and Dependency Corruption	633
Deliberate Decline in Governmental Capacity (Information Gathering & Oversight)	634
Disclosure vs. Corruption Heuristic	634
Dworkin's Hypothetical Insurance Market	634
Echo chamber approach to advocacy	635
Evidence-Based Think Tanks versus Ideologically-Based Think Tanks	635
Fence Around Decision-Making Related to Lobbying	635
Five Types of Influence	635
Four Levels of Transparency	636
Four Pressures	636
Friction Model of Legislating	637
Hydraulic Force of Political Influence	637
Independent Officers/Agents of Parliament	637
Inequality Spiral (Spiral into Inequality)	638
Insider vs. Outsider Approach	638
Iron Law of Meritocracy	638
Kludgeocracy	638
Lobbying Is Easier in Low Saliency Areas	639
Lobbying as Social Exchange & Gift Economy	639
Mirror Principle of Lobbying & Campaign Financing	639
Neo-Pluralist Model vs. Exchange Model	639
Phishing	640
Policy Drift	640
Porter Hypothesis	640
Proportional Regulatory Duration	640

Rawls' Veil of Ignorance	641
Rawls' Three Principles of Equality	641
Right to Petition as a Non-Transferable Democratic Right	641
Separation of Business & State	642
Shrinking of the Public Sphere & Decline of Civic Virtue	642
Six Concerns about Lobbying	642
Six Concerns about Unregulated Campaign Financing	642
Structural Democratic Rights Paradigm	643
Sockpuppet	643
Three Prime Justifications for Lobbying.....	643
Vetogates	644
Winner Take All Society/Economy	644
Appendix: Astroturf Examples	645
Appendix: Lobbying Examples	648
2008 Financial Crisis & Lobbying.....	650
Abramoff Scandal.....	650
American Petroleum Institute Lobbying	651
Anti-Tesla & Clean Energy Attacks.....	651
Anti-Tort Lobbying by Big Business.....	652
Astroturf Groups Used in Struggle between Sugar & Corn Syrup Industries	652
Billionaire gave \$430,000 to Alberta PC Party	653
Bots (Sockpuppets) Commented on FCC Net Neutrality Rule Change	654
Canada Food Guide Altered After Lobbying by Agro-Business.....	654
Canadian Corporations Donating & Lobbying in the U.S.	655
Canadian Steel Company Lobbies U.S. Government	655
Car Dealers Block Tesla Sales	656
Car Makers Key Opponents of Climate Action.....	656
Chemical Plant Explosion – Occupational Safety & Health Administration.....	657
Clinton Pardon	658
Closure of the National Guideline Clearinghouse.....	658
Companies Hire Actors to Pretend to be Concerned Citizens at Public Meetings	658
Congresswoman Sets Up Lobbying Business While She is Still a Member of Congress	659
Coronavirus Pandemic & Senate Stimulus Package.....	659
Corporations Secretly Lobbying for Kavanaugh's Appointment to the Supreme Court.....	660
Cunningham Scandal.....	661
Defense Contractors & War with Syria	661

Eco-Terrorism Caused No Deaths but Became No. 1 Domestic Terrorism Threat	661
Exploitive Financial Products Aimed at the Poor	662
F-35 Joint Strike Fighter’s Second Unnecessary Engine.....	663
Fed-Ex Pays \$0 in Taxes – Lobbying Success	663
Former Harper aide Bruce Carson Guilty of Influence-Peddling	664
Former Laval Mayor at Heart of Corruption Scandal.....	664
Former Tory aide fined for unregistered lobbying	665
Homeowners Subsidies & Lack of Renter Subsidies & Real Estate Lobby	665
Gun Manufacturer Liability Shield	666
IRS Enforcement.....	666
IRS & H&R Block Lobbying & the EITC.....	667
Lawmakers Opinion Pieces Secretly Written by Lobbyists	667
Low Public Prices for Extracting Resources.....	668
Marijuana Legalizing & Lobbying	668
McConnell Blocks Effort to Stop Russia Investment after Lobbying by Former Staffers.....	669
Michael Cohen – Hotel in Russia & Trump	669
Michael Cohen – Illegal Campaign Contributions.....	670
Michael Flynn – Illegal Lobbying	670
Mississippi Lawmakers Funnel Millions to Pet Vendors	671
Model Bills & Lobbying	671
Non-Negotiated Drug Prices in Medicare Part D	672
Nuclear Plants	673
Ocean Spray	673
Oil Industry & BC Natural Gas Rules Changes	673
Oil Industry & Climate Change Denial.....	674
Oil Industry & Deepwater Horizon.....	674
Oil Industry & Kinder Morgan Pipeline	675
Oil Industry & PR Firm Recommendations on TransCanada Pipeline.....	676
Oil Industry Gets Protests Criminalized	677
Oil Industry Spends \$47 million to Kill Ballot Initiatives that Would Prevent Climate Change	677
Oil Industry Spent \$1 Billion on Anti-Climate Change Lobbying Since the Paris Accord	678
Oil Industry Targets Ontario Provincial Ridings	678
Ontario – Ford Endorses Companies that Have Donated to His Party	678
Ontario – Ford Government & Liquor Sales.....	679
Ontario – Lobbyists Fear Losing Access Unless They Sell Ford Fundraiser Tickets.....	679
Ontario – Parents’ Group is an Astroturf Org. by Developer Lobbying about a Highway	680

Radioactive Waste Disposal Facility	681
Saudi-Funded Lobbyist Paid for 500 Rooms at Trump’s Hotel & Astroturf Lobbying of Veterans.....	681
Savings & Loans Scandal and Lobbying.....	682
SNC-Lavalin Scandal	682
SNC-Lavalin Scandal – Timeline	683
SNC-Lavalin Scandal – Illegal Campaign Finance Donations	685
SNC-Lavalin Scandal – Illegal Campaign Finance Donations Quebec.....	685
SNC-Lavalin Scandal – Quebec Recoups Cash Lost to Corruption	686
Soda Tax, Astroturf Lobbying & Short Term Civic Engagement.....	686
Tech Startups Urge Ottawa Not to Raise Taxes On Stock Options Over \$100,000	687
Trump Administration Appoints Corrupt Lobbyist to EPA.....	687
Trump Administration Appoints Corrupt Lobbyist to Head Interior Department to Replace Lobbyist Appointed to Head Interior Department Removed for Corruption	688
Trump Administration Appoints DeVry Official to Lead College Enforcement Unit.....	691
Trump Administration Following Oil & Gas Industry on Environmental Protections.....	691
TV Industry Prevents Rules Granting Free Advertising for Political Campaigns	692
Under-enforcement of Food Safety Rules Due to Lobbying.....	693
U.S. House Majority Whip & Lobbyist Approval of Staff	693
Volkswagen Threatening to Lave Lobbying Group	693
Wall Street & Dodd-Frank Rules on Future Values of Commodities	694
Appendix: Creative Commons License	696
Creative Commons Attribution-NonCommercial 4.0 International Public License Text	696

Cases, Figures and Tables

Table of Cases

<i>Abbott v. Perez</i>	243
<i>Alberta (Aboriginal Affairs and Northern Development) v. Cunningham</i>	460
<i>Attorney General of British Columbia v. Canada Trust Co et al,</i>	446
<i>Austin v. Michigan Chamber of Commerce</i>	232, 233
<i>Autor et al v. Blank et al</i>	413
<i>Baier v. Alberta</i>	428
<i>BC Freedom of Information and Privacy Association v. British Columbia</i>	426
<i>British Columbia Teachers' Federation v. British Columbia (Attorney General)</i>	407
<i>Buckley v. Valeo</i>	203, 220, 227, 228, 231, 232, 233, 234, 236, 240, 282, 289, 341, 467, 469, 479
<i>Bush v. Gore</i>	243, 469
<i>Canada (Chief Electoral Officer) v. Callaghan</i>	407
<i>Caperton v. A. T. Massey Coal Co.</i>	259
<i>Citizens United v. Federal Election Commission</i>	227, 231, 232, 233, 234, 236, 238, 239, 240, 242, 245, 248, 251, 253, 256, 260, 266, 282, 289, 361, 414, 467, 469, 472, 486
<i>Dagenais v. Canadian Broadcasting Corp.</i>	417, 444
<i>Democracy Watch v. Campbell</i>	408
<i>Democracy Watch v. Canada</i>	409
<i>Everson v. Board of Education</i>	364
<i>Federal Election Commission v. Wisconsin Right to Life, Inc.</i>	231
<i>Figueroa v. Canada</i>	444, 453, 455, 476, 478, 482
<i>Frank v. Canada</i>	417, 443, 444, 446, 453, 458, 508
<i>Haig v. Canada</i>	443, 444, 465, 466
<i>Harper v. Canada</i>	407, 414, 417, 418, 419, 420, 425, 427, 428, 429, 430, 431, 432, 433, 437, 438, 453, 455, 456, 465, 478, 479, 482, 578
<i>Irwin Toy Ltd v. Quebec</i>	416
<i>Lavigne v. Ontario Public Service Employees Union</i>	538
<i>Lemon v. Kurtzman</i>	362
<i>Libman v. Quebec</i>	414, 418, 420, 426, 427, 432, 458, 577
<i>Little Sisters Book and Art Emporium v. Canada</i>	460
<i>Lovelace v. Ontario</i>	460
<i>Makhija v. Canada</i> [2008]	36, 408
<i>Makhija v. Canada</i> [2010]	408
<i>Maritime Travel Inc. v. Go Travel Direct Inc.</i>	525
<i>McConnell v. Federal Election Commission</i>	232, 233
<i>McCutcheon et al. v. Federal Election Commission</i>	228, 233, 234, 241
<i>McDonnell v. United States</i>	87
<i>Mounted Police Association of Ontario v. Canada</i>	538

<i>Opitz v. Wrzesnewskyj</i>	444
<i>Osborne v. Canada</i>	453
<i>R. v. Bryan</i>	424, 425, 428, 432, 479
<i>R. v. Carson</i> [2018]	410, 412
<i>R. v. Carson</i> [2019]	410
<i>R. v. Del Mastro</i>	407
<i>R. v. Duffy</i>	413
<i>R. v. Edwards Books and Art Ltd</i>	421
<i>R. v. Kapp</i>	460
<i>R. v. Keegstra</i>	422
<i>R. v. Morrison</i>	417, 444
<i>R. v. Oakes</i>	374, 417, 418, 420, 432, 433, 439, 443, 447
<i>Reference Re Election Act (BC)</i>	426, 427
<i>Reference re Prov. Electoral Boundaries (Sask)</i>	447, 456, 457, 459
<i>Reference re Same-Sex Marriage</i>	446
<i>Reference re Secession of Quebec</i>	445, 446, 449, 482
<i>Reference re Securities Act</i>	446
<i>Reference re the Final Report of the Electoral Boundaries Commission</i>	407
<i>Sauvé v. Canada</i>	478, 482
<i>Shelby County v. Holder</i>	243
<i>SpeechNow.org v. Federal Election Commission</i>	242
<i>Thomson Newspapers Co v. Canada</i>	428, 442
<i>United States v. Harriss</i>	31, 413, 414, 439, 469

Table of Figures

Figure 1: U.S. Income Growth Distribution, Poor and Middle Class vs. Top 0.001%, 1980 vs. 2014	181
Figure 2: Income Inequality in Canada, U.S., U.K. and Australia, 1910–2010	182
Figure 3: Canadian Income Comparison 2010/2011	183
Figure 4: World Return on Capital vs. Growth Rate, Antiquity–2010	184
Figure 5: Private vs. Public Capital in Rich Countries, 1970–2016	187
Figure 6: U.S. Congress, Legislation Voted On and Enacted Laws Trend	193
Figure 7: U.S. Congress, Legislation Passed and Failed Trend	193
Figure 8: Increasing Share of U.S. Campaign Contributions of the Top 0.01% Exceeds their Increasing Share of Income, 1980–2012	267
Figure 9: Middle Class' Declining Share of Income is Linked to Declining U.S. Union Membership	346
Figure 10: U.S. Workers' Wages Detached from Productivity, 1948–2012	378

Table of Tables

Table 1: Comparison of Elements of the Lobbying Regime in Canada and the U.S.	40
Table 2: Lobbying Regulation Classification Chart	42
Table 3: Percentage of Lobbying Targeting Different Areas of Government in Canada and the U.S.	53
Table 4: Government Institutions Mentioned in Canadian Federal Lobbyist Registrations	126
Table 5: Subject Matters in Canadian Federal Lobbyist Registrations	127
Table 6: Primary Subject Matter of Communication to the Commissioner of Lobbying of Canada	127
Table 7: Administrative Reviews by Outcome	128
Table 8: Priorities Differences ($\geq 25\%$) between the Wealthy and the General Public in the U.S.	158
Table 9: Percent Share of Total Income to the Top in Canada (incl. capital gains), 1982 vs. 2007	182
Table 10: U.S. Wealth Distribution through Financial Crisis to Recovery, 2004–2018	188
Table 11: View on Inequality by the Wealthiest Americans vs. the General Public	393

Introduction

“I would say a few magic words: “When you are done working for the Congressman, you should come work for me at my firm.” With that... I would own him, and consequently, that entire office. No rules had been broken, ... but suddenly, every move that staffer made, he made with his future at my firm in mind... he was already working for me, influencing his office for my clients’ best interests. It was a perfect – and perfectly corrupt – arrangement.”

– Jack Abramoff, *lobbyist convicted for mail fraud, conspiracy to bribe public officials and tax evasion*.¹

Introduction – Introduction	2
Inspiration – Climate Change	4
Evidence that Lobbying is Holding Back Action on Climate Change	8
Argument and Layout of the Thesis.....	14
Overview of the Major Headings of Each Chapter	17
Section 1: The State of Lobbying.....	17
Section 2: A Normative Framework for Evaluating Lobbying Regulations	18
Section 3: A Legal Framework for Evaluating Lobbying Law.....	18
Section 4: Lobbying Reform	19
Areas of Further Study	19
Dedication and Thank Yous.....	23

¹ Jack Abramoff, *Capitol Punishment: The Hard Truth About Washington Corruption from America’s Most Notorious Lobbyist* (WND Books, Incorporated, 2011) c 6.

Introduction – Introduction

Lobbying has become ever-more-pervasive in Canadian and American democracy. Yet, despite the recent expansions of lobbying regulations and several brilliant studies by political scientists, much of lobbying's impact remains shrouded in shadows. Studies of lobbying remain rare in Canada.² Serious considerations of the *Canadian Charter of Rights and Freedoms*³ (Charter) implications of Canadian lobbying legislation are rarer still.⁴ This dissertation seeks to provide a wider framework for understanding the role of lobbying within Canadian democracy, both what it is and what it should be. The central argument of this thesis is that lobbying can and should be more strictly regulated. More robust lobbying legislation would pass *Charter* muster and would improve the quality of Canadian democracy.

I began researching this dissertation leaning towards the view that lobbying regulation might need to be reformed, but open to the possibility that reform would do more harm than good. I thought it possible that the status quo might be better than the alternative, and that those who worried about the corruption of lobbying were misinformed. It could be that only small adjustments to lobbying law

² In Canada this rarity was recognized as far back as 1975. Recently, a number of scholars have begun to use the lobbying database as a source of deeper studies into the influence of lobbyists and Canadian governance. Political science works include: A Paul Pross, "The Lobbyists Registration Act, its Application and Effectiveness" Commission of Inquiry into the Sponsorship Program and Advertising Activities" (2006) 2 *Restoring Account Res Stud* (Ottawa) 163–231; A Paul Pross, *Pressure Group Behaviour in Canadian Politics* (McGraw-Hill Ryerson, 1975); A Paul Pross, "Canadian Pressure Groups: Talking Chameleons" in Jeremy Richardson, ed, *Press Groups* (Toronto: Oxford University Press, 1993); A Paul Pross, *Group Politics and Public Policy, Second Edition*, desLibris Books collection (Toronto, Ont., Toronto [Ont.]: Oxford University Press Canada, Oxford University Press, 1992); Maxime Boucher, "Who you know in the PMO: Lobbying the Prime Minister's Office in Canada" (2018) 61:3 *Can Public Adm* 317–340; Raj Chari, John Hogan & Gary Murphy, *Regulating Lobbying: a Global Comparison* (Manchester University Press, 2010); Paul Malvern, *Persuaders: Influence Peddling, Lobbying, and Political Corruption in Canada* (Methuen, 1985); Colin Campbell, *The Canadian Senate: a Lobby from Within* (Macmillan of Canada, 1978); Hugh Garnet Thorburn & Royal Commission on the Economic Union and Development Prospects for Canada, *Interest Groups in the Canadian Federal System* (University of Toronto Press, 1985); Fred Thompson & W T Stanbury, *The Political Economy of Interest Groups in the Legislative Process in Canada* (Montreal: Institute for Research on Public Policy, 1979); Ludovic Rheault, "Corporate Lobbying and Immigration Policies in Canada" (2013) 46:3 *Can J Polit Sci Can Sci Polit* 691–722; George Post, "Ethics and lobbying: a government perspective" (1991) 34:1 *Can Public Adm* 84–89; *Big Oil's Oily Grasp: The making of Canada as a Petro-State and how oil money is corrupting Canadian politics*, by Daniel Cayley-Daoust & Richard Girard (Ottawa, Ontario: Polaris Institute, 2012); *Big Oil's Political Reach: Mapping Fossil Fuel Lobbying from Harper to Trudeau*, by Nicolas Graham, William K Carroll & David Chen, Open WorldCat (520 – 700 West Pender Street Vancouver, BC: Canadian Centre for Policy Alternatives, 2019); André C Côté, "Lobbying and the Public Interest" (2006) 29:13 *Can Parliam Rev* 29–32; Andrew Stark, "'Political-Discourse' Analysis and the Debate Over Canada's Lobbying Legislation" (1992) 25:03 *Can J Polit Sci Can Sci Polit* 513–534.

³ *Canadian Charter of Rights and Freedoms*, (Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.).

⁴ I am unaware of any academic work on Canadian lobbying law and the *Charter*. There are a number of practical guides to lobbying in Canada, and some touch lightly on the right to freedom of expression in passing. These guides include: Pierre B Meunier et al, *Lobbying in Canada -- Ontario Edition* (Carswell, 2012); Pierre B Meunier et al, *Lobbying in Canada Quebec Edition: Le Lobbyisme Au Canada Edition Quebecoise* (Renouf Publishing Company Limited, 2013); S Sarpkaya, *Lobbying in Canada: Ways and Means* (C C H Canada Limited, 1988); Adam Goldenberg & Jessica Firestone, "Lobbying in Canada after R. v. Carson", (28 March 2018), online: *McCarthy Tétrault* <<https://www.mccarthy.ca/en/insights/articles/lobbying-canada-after-r-v-carson>>.

were advisable. Indeed, arguably Canada already has the world's most comprehensive national regulations of lobbying. Significant reform might starve the government of necessary information. It might result in a closed off government, unresponsive to needs on the ground.

Throughout my study of lobbying in Canada and the U.S., I have come to the conclusion that lobbying is more damaging than I initially suspected. Rather than a source of needed information, the lobbying system appears to have become a means to bring pro-corporate bias and mis-framed information into governmental policy-making. It seems to be a significant factor in governments' declining ability to handle large issues and plan for the long term. Lobbying is pushing us towards inequality and plutocracy. I am convinced that deep reforms are imperative for the future health of democracy.

Internationally, democracy seems to be on the decline, while autocracy is on the rise.⁵ Government ineffectiveness, political instability and xenophobic populism are taking root. President Obama raised serious concerns about the health of America's democratic institutions in his farewell address.⁶ He argued that citizens must take on the task of rebuilding democratic institutions. This included curtailing the influence of money in politics, and upholding ethical standards for public officials. I believe that the influence of lobbying is a key factor in the decline of the U.S.'s democratic governance. This damage is often done out of view, in areas of low salience to the public, but it adds up over time. Curtailing and controlling the influence of lobbying is an essential component of rebuilding democracy. Since Obama left office, the situation has devolved. The influence of money on politics has grown, blatant corruption has become a regular feature of American governance, and the influence of lobbying has increased. Lobbyists are getting their preferred outcomes even in highly visible areas where there is strong public opposition. American democracy is tottering. And where the United States goes, Canada often follows. We will need vigilance and well-crafted legislation to prevent democratic malaise from spreading here.

This dissertation has taken many long years; years in which other dreams had to be put on hold and much of my future remained frozen in amber; in which job opportunities had to be sacrificed, money remained tight and my career remained uncertain; in which I have been married and my father has passed away; in which the Covid pandemic swept the world; and in which climate change has moved from an arriving threat to a daily lived experience. I hope the years spent on this project have not been wasted. I hope this dissertation to be a useful gift to democracy, a worthwhile contribution to Canadian legal literature, and a map for future lobbying reform.

⁵ "Between 2005 and 2018, the share of Not Free countries rose to 26 percent, while the share of Free countries declined to 44 percent." *Freedom in the World 2019: Democracy in Retreat*, by Freedom House (1850 M Street NW, 11th Floor Washington, DC: Freedom House, 2019) at 2, 11 & 15; *Global Satisfaction with Democracy Report 2020*, by R S Foa et al (Cambridge, United Kingdom: The Centre for the Future of Democracy, 2020) at 3.

⁶ President Obama, "President Obama's Farewell Address", (10 January 2017), online: *White House* <<https://obamawhitehouse.archives.gov/node/360231>>.

This work is a description of what lobbying is and a vision of what it could be. I contend that lobbying can be made to fit with the lasting principles of democracy and democratic representation, but it will need to be restructured to do so. Applying the theories established throughout this work, and taking into account the *Charter* values elucidated by the Supreme Court, I propose twelve principles of lobbying reform. I believe applying these principles to the design of new lobbying legislation and regulation would help reform lobbying to be closer to what it should be: a genuine source of new information and public inputs into policy-making. I conclude with two specific reforms to lobbying legislation: to limit business lobbying and publicly support citizen lobbying. These reforms would be a good step towards transforming lobbying from a process that weakens democracy into a process that strengthens it.

In the rest of the introduction, I will discuss my initial motivation for studying lobbying; the main argument of the thesis; the structure of the thesis; and conclude with some questions deserving of further study.

Attached to the thesis are three appendixes that may be of some use. They are a glossary/list of the major theories used throughout the dissertation; a short list of some examples of astroturf organizations; and a list of quotations presenting examples of lobbying issues and scandals.

Example: U.S.: House Majority Whip & Lobbyist Approval of Staff

"House Majority Whip Steve Scalise got some help interviewing potential new hires for his press shop from an unlikely source: a federal lobbyist. Quinn Gillespie & Associates' John Feehery sat in on and participated in multiple official interviews with job candidates last month for the new majority whip's press operation. Scalise has not yet announced who he will name as his communications director. Sometimes lawmakers rely on lobbyists for strategic advice. But inviting a lobbyist into an interview is highly unusual. Several ethics lawyers and current and former leadership aides said they have never heard of a similar arrangement. That's not illegal, and as best as I can tell, it doesn't violate ethics rules, but it does reinforce the impression that corporate lobbyists have a direct role in helping run the place in the Republican-led House. It's an impression obviously rooted in fact. As we talked about a couple of years ago, when Congress worked on a jobs bill in 2010, the House Republican leadership huddled with corporate lobbyists. When work on Wall Street reform got underway, John Boehner and the GOP huddled with industry lobbyists. When Congress worked on health care reform, Boehner and the GOP huddled with insurance lobbyists. When an energy/climate bill started advancing, the GOP huddled with energy lobbyists. In 2012, when the STOCK Act was being considered, the GOP huddled with financial industry lobbyists. Now lobbyists are even sitting in on congressional job interviews."⁷

Inspiration – Climate Change

My original inspiration for studying lobbying was the onrushing threat of climate change, and the government's failure to do anything to effectively counter it. Scientists and experts have repeatedly warned that the consequences of climate change will be dire, and the time for serious action is running

⁷ Steve Benen, "New Majority Whip teams up with corporate lobbyist", (7 August 2014), online: *MSNBC* <<http://www.msnbc.com/rachel-maddow-show/new-majority-whip-teams-corporate-lobbyist>>.

out.⁸ They have pointed out for decades that many of the solutions and viable policy changes are already available, and that it will be vastly more expensive to delay than to make the needed changes now.⁹

Recently Australia and the Amazon have been engulfed in flames, while worldwide greenhouse gas emissions continues to increase.¹⁰ The international goal of staying under 2 degrees Celsius of warming would already result in terrible outcomes, and it seems like we will exceed that number by 2050 and be several degrees above it by the turn of the next century.¹¹ This will be disastrous.

Adding more heat to the earth adds more power to all the earth's destructive systems – wild fires, hurricanes, typhoons, floods, storms, storm surges, tornadoes, drought, and so on.¹² Higher temperatures bring more intensity to disasters and more death.¹³ On top of this are the second order threats of climate change, putting hundreds of millions of lives at stake. These threats include wars and civil wars caused by increased heat, housing loss, and food and water shortages; waves of climate refugees, and the associated social disorder and authoritarian responses; the increased spread of disease and pests; spreading dead zones in the ocean linked to acidification and heat waves; the collapse of other species and mass extinctions; the increase in smoke from wild fires and deaths caused by air pollution; and declines in crop yield.¹⁴

It is difficult to overstate the danger of climate change, since we are sabotaging the very environment we need to survive. Hundreds of cities, containing millions of people, will be lost if there is 4 degrees of temperature rise, and we are currently on track for that level of warming by 2100.¹⁵ These

⁸ It is highly likely we are already too late to keep climate change under 1.5°C, but there is still a small chance. To do so, worldwide carbon output has to decline 45% (from 2010 levels) by 2030, and reach net zero by 2050. Staying under 2°C requires a 25% decline by 2030. *Summary for Policymakers*, by IPCC, *Global Warming of 1.5°C: an IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC, 2018) at 12.

⁹ Postponing action on climate change because it might be “expensive” is akin to preventing the firetruck from stopping in front of your burning house because you’re worried you might need to pay a parking ticket. Future debt is a thousand times easier to solve than the repercussions of climate change.

¹⁰ There has been some decline in emissions since the social distancing due to the Covid-19 coronavirus epidemic began. However, this decline appears to be a short-term blip, not part of a new trend. No policy initiatives have been put in place to maintain this reduction once the epidemic passes.

¹¹ David Wallace-Wells, *The Uninhabitable Earth: Life After Warming* (Crown/Archetype, 2019) at 40.

¹² *Ibid* at 78.

¹³ *Ibid*.

¹⁴ For every half-degree of warming, the chance of conflict increase by 10 to 20%. So 4 degrees could mean about twice as much war, other things being equal. Even keeping to the Paris goal would mean 40 to 80% more war. Climate change has raised Africa’s risk of war by 10% already, and by 2030 will be causing an additional 393,000 war deaths. The warmer the planet, the more ground-level ozone is produced; at the current rate Americans will suffer a 70% increase in days with unhealthy smog levels by the end of the century (unless we have proportionately reduced the use of fossil fuels that create the components of the smog). For every degree of warming crop yields decline by 10%, so the world is on track for a 40% decline in crop yields by the turn of the century. *Ibid* at 7, 49, 96, 97, 98, 101, 125.

¹⁵ *Ibid* at 40.

places will become uninhabitable from a combination of sea level rise, water shortages, and intolerable outdoor temperatures.¹⁶

By the end of the century, the World Bank has estimated, the coolest months in tropical South America, Africa, and the Pacific are likely to be warmer than the warmest months at the end of the twentieth century.¹⁷

Things can get much worse, especially if a feedback effect accelerates climate change beyond our direct greenhouse gas output. Such a tipping point risks sending temperatures climbing out of control.¹⁸ At 5 degrees, “whole parts of the globe would be literally un-survivable for humans.”¹⁹ At 6 degrees New York City would be hotter than present-day Bahrain, and Bahrain would cause hyperthermia even when sleeping.²⁰ At 7 degrees, the human body would cook to death in a few hours in large portions of the equatorial band, especially in the tropics.²¹ At 11 or 12 degrees, a possibility in a hundred years, “more than half of the world’s population, as distributed today, would die of direct heat.”²²

Over the last five years climate change has gone from a serious but publicly neglected issue to a crisis issue widely covered in the media. Yet, despite dire warnings, UN reports and public support for change, movement towards a carbon-free future remains agonizingly slow. Governments acknowledge the problem, but continue to do very little; most continue to increase their carbon and methane output.²³ Climate change is a gruelling problem. It is a problem that requires coordinated action on a local, national and international level. Yet, in many cases experts have found that the necessary policy changes will save money and lives, improve health and increase economic growth.²⁴ Still, few policies

¹⁶ When it is 35° C and humid outside for extended periods, it becomes uninhabitable to humans because sweat no longer transfers heat away from the body effectively. Many cities will experience these conditions by 2100 at 4 degrees of warming. *Ibid.*

¹⁷ *Ibid* at 41.

¹⁸ For example, one possible feedback loop is the release of massive amounts of methane that is currently frozen beneath the permafrost.

¹⁹ David Wallace-Wells, *supra* note 11 at 39.

²⁰ *Ibid* at 40.

²¹ *Ibid* at 39.

²² *Ibid.*

²³ A large number of countries, including Canada, simultaneously claim to want to prevent climate change while also planning to increase their extraction and sale of gas and oil. *The Production Gap: The discrepancy between countries’ planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C*, by SEI, IISD, ODI, Climate Analytics, CICERO, and UNEP, 2019 Report (2019) at 2.

²⁴ In purely economic terms, Channell calculates that climate change is expected to cost the world economy between \$2 and \$72 trillion U.S. by 2060, depending on discount rate and the estimated increase in temperature. Considering the path we are on, and the difficulty of fixing the repercussions of climate change after the fact, a discount rate closer to 0, and a temperature raise closer to 4 degrees is likely. This means the loss will approach \$72 trillion. In contrast, fighting climate change will actually save \$2 trillion (in addition to preventing the \$72 trillion loss). These savings come from increases in efficiency, reductions in spending on fossil fuels, and co-benefits of reducing fossil fuel use, including improvement in health outcomes. *ENERGY DARWINISM II: Why a Low Carbon Future Doesn’t Have to Cost the Earth*, Global Perspectives & Solutions, by Jason Channell et al, Citi GPS Global

are enacted, and those that are tend to be too lax.²⁵ Witnessing this paralysis, I suspected that lobbying was one of the key reasons for the lack of progress. This is what first led me to my interest in the practice and effects of lobbying.

My concern about lobbying and the inability to deal with man-made climate change led me to a linked but slightly different concern. How does lobbying work within our democracy? Does it benefit or harm it? Is it helping or sabotaging our ability as a polity to consistently make good decisions? This line of questioning led to my realization that a deep study of Canadian lobbying needed to be undertaken in

Perspectives & Solutions (Citi, 2015) at 29, 38. The health benefits from reducing Carbon output outweigh the costs of switching to cleaner energy sources. It is estimated that the total abatement health benefits for Canada are \$307 U.S. per tonne of CO₂ reduced by 2050, whereas the cost of the CO₂ reduction is \$22 per tonne. *Multiple benefits from climate change mitigation: assessing the evidence*, by Kirk Hamilton, Milan Brahmbhatt & Jiemei Liu (Grantham Research Institute on Climate Change and the Environment, 2017) at 46; Kenneth Gillingham & James H Stock, “The Cost of Reducing Greenhouse Gas Emissions” (2018) 32:4 J Econ Perspect 53–72 at 7. See also, Joseph E Stiglitz, *The Price of Inequality: How Today’s Divided Society Endangers our Future* (Vatican City: The Pontifical Academy of Sciences and the Pontifical Academy of Social Sciences, 2014) at 17.) Jacobson *et al.*’s comprehensive study on switching the world over to clean energy by 2050, concluded it will reduce energy costs and use, while increasing grid stability. Their study includes the use of clean energy for electricity, transportation, building heating, building cooling, industry, agriculture, forestry, fishing, and the military. “Our studies on grid stability find that the countries, grouped into 24 regions, can match demand exactly from 2050 to 2052 with 100% WWS [wind water solar] supply and storage. ... Worldwide, WWS energy reduces end-use energy by 57.1%, aggregate private energy costs from \$17.7 to \$6.8 trillion/year (61%), and aggregate social (private plus health plus climate) costs from \$76.1 to \$6.8 trillion/year (91%) at a present value capital cost of ~\$73 trillion. WWS energy creates 28.6 million more long-term, full-time jobs than BAU [business-as-usual] energy and needs only ~0.17% and ~0.48% of land for new footprint and spacing, respectively. Thus, WWS [wind water solar] requires less energy, costs less, and creates more jobs than does BAU [business-as-usual].” Mark Z Jacobson *et al.*, “Impacts of Green New Deal Energy Plans on Grid Stability, Costs, Jobs, Health, and Climate in 143 Countries” (2019) 1:4 One Earth 449–463 at 449. Burke *et al.* estimate that the average income in the poorest 40% of countries will be 75% less by 2100, relative to a world without climate change. They predict that average incomes in developed countries will stay relatively flat. This prediction for developed economies seems rosy compared to other estimates, the large costs of climate change and the increase in natural disasters. As we are learning from the Covid-19 coronavirus pandemic, our economies are not as resilient to disasters as we would have hoped. Marshall Burke, Solomon M Hsiang & Edward Miguel, “Global non-linear effect of temperature on economic production” (2015) 527:7577 Nature 235–239 at 238. Businesses consistently argue that fighting pollution is too expensive, but routinely overestimate the costs of compliance while understate the benefits. Pollution controls often offer direct economic benefits, even helping the business that enacts them, as well as huge knock-on social benefits. These benefits include health improvements, an increase to the standard of living, better cognitive and school performance, and reduced crime. For example, the net benefits from EPA regulations in the U.S. are \$195.8 to \$705.7 billion a year, and the costs of compliance only \$54.1 to \$64.8 billion. *2017 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, by Office of Management and Budget (United States of America: Office of Management and Budget, Office of Information and Regulatory Affairs, 2017) at 10; *Overestimating the Costs of Compliance with Environmental Regulation*, Policy Brief, by Pomme Arros & Michelle Brownlee, Policy Brief (Sustainable Prosperity, 2015) at 7; George van Leeuwen & Pierre Mohnen, “Revisiting the Porter hypothesis: an empirical analysis of Green innovation for the Netherlands” (2017) 26:1–2 Econ Innov New Technol 63–77 at 64 & 74.

²⁵ For example Canada’s carbon tax and dividend is set to rise to \$50 per tonne of carbon output. Canada’s Ecofiscal Commission determined it will need to rise to \$210 to meet the 2030 carbon reduction targets. *Bridging the Gap: Real Options for Meeting Canada’s 2030 GHG Target*, by Canada’s Ecofiscal Commission (Canada’s Ecofiscal Commission, 2019) at 18.

its own right. Such a study would help us understand how lobbying does and should fit into our democracy. It would establish a basis for further work on democracy, climate change, and other essential issues in the future. To honour my initial motivation and concern, I have tried to keep a focus on climate change and pollution by using examples from these areas when possible.

Example: U.S.: Oil Industry & Deepwater Horizon

"[T]he national commission appointed to investigate the giant oil spill in the Gulf of Mexico in 2010 found that BP failed to adequately supervise Halliburton Company's installation of the deep-water oil well even though BP knew Halliburton lacked experience in testing cement to prevent blowouts and hadn't performed adequately before on a similar job. In short, neither company had bothered to spend enough to ensure adequate testing of the cement. Meanwhile, the Minerals Management Service of the Department of the Interior (now renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement) had not adequately overseen the oil and oil-service companies under its watch because it had developed cozy relationships with them. The revolving door between the regulator and the companies it was responsible for overseeing was well oiled."²⁶

"While most of the spill's acute effects – oil soaked birds, beaches slick with crude – have dissipated, Boesch says some contamination persists. "Areas in the deep water near the site of the blowout still have some level of contamination of oil in the sediment," he says. "It just takes a long time, once that material is in the sediment, to degrade because of the lack of oxygen." That lingering pollution has consequences near the site of the spill, particularly on the delicate microbiomes that are the building blocks of ocean life. A 2018 study led by a microbial ecologist at the University of Southern Mississippi found that biodiversity had been reduced in areas that had been affected by the spill, compared with areas that had not been exposed to the oil. A relatively small amount of the spilled oil washed onshore. But in fragile coastline areas in Louisiana and Mississippi, oil killed off the plants that had been holding the wetlands together. In 2016, scientists from the US Geological Survey published work showing how petroleum exposure from the BP spill increased the recession of the shoreline as vegetation died at the roots. "There are wetland areas that were oiled and died and they aren't recovering and they just won't recover," Boesch says.

And for long-lived marine animal populations, the oil spill has been deadly. Up to 167,600 turtles from five endangered species were estimated to have been killed as a result of the spill, according to an assessment by the National Oceanic and Atmospheric Administration. The contamination contributed to the Gulf of Mexico's largest and longest dolphin die-off, and research points to lasting reproductive issues among the region's population.

[I]n June 2018, President Donald Trump issued an executive order that undid protections put in place by Obama, handing more control of drilling safety to the states while making enhancing "America's energy security" a top policy goal. Additional changes to federal regulations would roll back protections put in place in the aftermath of the Deepwater Horizon disaster. Revisions to the Well Control Rule, implemented in 2016, would loosen third-party oversight of safety mechanisms like blowout preventers, which automatically seal leaking undersea wells. In the Deepwater Horizon explosion, a design flaw in its blowout preventer prevented it from working as intended."²⁷

Evidence that Lobbying is Holding Back Action on Climate Change

Since the question of climate change has been relegated to examples throughout the dissertation, I will take a moment here to collect and summarize some of the evidence that lobbying is

²⁶ Robert B Reich, *Saving Capitalism: For the Many, Not the Few*, first ed (New York: Knopf, 2015) at 83.

²⁷ Annie Ma, "Nine years later, the BP oil spill's environmental mess isn't gone", (19 April 2019), online: *Mother Jones* <<https://www.motherjones.com/environment/2019/04/deepwater-horizon-bp-oil-spill/>>.

holding back deeper reforms regarding climate change and carbon reduction. This section is not necessary for understanding the thesis. Readers who have no interest in climate change might want to proceed straight to the next major section: Argument and Layout of the Thesis, p. 14.

There is good evidence that lobbying, and the associated structures that support lobbying (covered in chapter 2), are a key factor in blocking anti-climate change regulation and legislation.²⁸ The effectiveness of lobbying is visible in its stymying action on climate change in the U.S.; the success of the climate-change denial campaigns; and the Canadian fossil fuel industry's deep ties to the government.

Stymying Action on Climate Change in the U.S.

There is a clear pattern of industry sabotaging government action against climate change in the U.S.²⁹ Brulle's recent study found that U.S. industry has invested more than \$2 billion on climate lobbying at the federal level since 2000.³⁰ This lobbying spiked when there was a chance that Congress might pass a bill intended to prevent climate change. He found that clean energy and environmental groups were outspent on climate lobbying roughly 10 to 1 by the fossil fuel, utility and transportation industries.³¹ Business has been successfully using lobbying and campaign donations to convince legislators that action on climate change is unpopular, when it is actually popular.³² Lobbying has not

²⁸ Theda Skocpol & Alexander Hertel-Fernandez, *The Koch Network and the Rightward Shift in U.S. Politics* (Chicago, 2016) at 34.

²⁹ In addition to its federal lobbying, the oil industry lobbies heavily on the state level. For example, it spent \$47 million on misleading ads to kill two state initiatives. The initiative in Washington would have imposed a low carbon tax. The one in Colorado would have extended the set-back for oil and gas wells. David Roberts, "Big Oil is using brute financial force to kill 2 state sustainability initiatives", (26 October 2018), online: Vox <<https://www.vox.com/energy-and-environment/2018/10/26/18026074/koch-industries-bp-colorado-washington-fracking-carbon-tax>>.

³⁰ Robert J Brulle, "The climate lobby: a sectoral analysis of lobbying spending on climate change in the USA, 2000 to 2016" (2018) 149(3) *Clim Change* 289–303 at 295. See also, *America Misled: How the fossil fuel industry deliberately misled Americans about climate change*, by John Cook et al (Fairfax, VA: George Mason University Center for Climate Change Communication, 2019) at 4.

³¹ Robert J. Brulle, *supra* note 30 at 297.

³² Fernandez, Mildemberger and Stokes found that Congressional staffers on both sides of the aisle consistently underestimated their constituents' support for climate regulations. The staffer's misperception about the popularity of climate change mitigation policies was increased by greater contact with business lobbying, greater contact with conservative interest groups, and a greater reliance on corporate donations. Democratic staffers underestimate support by 5%, Republican staffers by 31%. Alexander Hertel-Fernandez, Matto Mildemberger & Leah C Stokes, "Legislative Staff and Representation in Congress" (2019) 113:1 *Am Polit Sci Rev* 1–18 at 11.

"In the United States, the oil and gas industry spent an industry record \$175 million in 2009 lobbying the U.S. government in order to influence the country's climate change bill that ultimately failed to pass through Senate. In another case the furious lobbying that took place in Washington D.C. around the ratification of the Kyoto Protocol shows how influencing national governments can impact global climate change policies. ... the Center for Responsive Politics said that the "industry helped to kill implementation of the Kyoto Protocol on climate change, which would have forced the U.S. to reduce its use of fossil fuels."

Corporations, Climate and the United Nations: How Big Business has Seized Control of Global Climate Negotiations, by Sabrina Fernandes & Richard Girard, Zotero (Ottawa, Canada: Polaris Institute, 2011) at 7; *The Climate Deception Dossier Internal Fossil Fuel Industry Memos Reveal Decades of Corporate Disinformation*, by Kathy Mulvey & Seth Shulman (Union of Concerned Scientists, 2015) at 2; Mike De Souza, "Google drops secretive group

only been a factor in the failure of major climate-change prevention initiatives in the U.S; it is also responsible for the rollback of environmental regulations intended to reduce carbon output, the implementation of policies to increase fossil fuel extraction, and the drafting of regulatory changes intended to increase fossil fuel use.³³ Moreover, despite the need to reduce fossil fuel use, fossil fuel companies continue to receive billions in yearly governmental subsidies.³⁴

Success of Climate-Change Denial Campaigns

Exxon and the fossil fuel industry's decades-long campaign to deceive the public and officials about climate change has recently received some publicity, but far less than it deserves.³⁵ Their tactics included using direct lobbying, fake citizen groups, and deceptive studies to manufacture doubt and distrust of the science of climate change.³⁶ Often they pretended to support attempts to regulate greenhouse gases in public while funding lobbying and deceptive publicity activities to sabotage those very efforts. The misinformation campaigns have successfully delayed climate action. The fossil fuel industry has also been successful at lobbying to weaken and undermine international agreements on climate change.³⁷ These efforts are not minor; they were a joint effort costing billions, enacted by a

over climate change stance", *Tor Star* (1 November 2014), online: <<http://torontostar.newspaperdirect.com/epaper/viewer.aspx>>; Robert J. Brulle, *supra* note 30 at 295.

³³ Robert J. Brulle, *supra* note 30 at 290; John Nichols, "For Scott Pruitt's EPA, Climate-Change Denial Is Mission Critical" *The Nation* (30 August 2017), online: <<https://www.thenation.com/article/for-scott-pruitts-epa-climate-change-denial-is-mission-critical/>>; Jimmy Tobias & Jesse Coleman, "Interior Department Is Filled With Ex-Lobbyists Who Are Cozy with Their Former Employers, New Ethics Complaint Shows", (20 February 2019), online: *The Intercept* <<https://theintercept.com/2019/02/20/interior-department-ethics-violations/>>; Jimmy Tobias, "New Documents Reveal the Extent of Industry Influence on Ryan Zinke's DOI", (12 November 2018), online: *Pac Stand* <<https://psmag.com/environment/new-documents-reveal-extent-of-industry-influence-on-ryan-zinke-led-doi>>.

³⁴ For example, in Canada the federal government bought the Kinder Morgan pipeline for \$4.5 billion, which is a nice payout for a project the company was having trouble finishing. The government's subsequent financial offer to outside investors included indemnified for any delays induced by provincial or municipal governments – another significant subsidy. In the U.S., direct oil subsidies range between \$20 billion per year to as high as \$113 billion per year. This does not include the costs of policies and military conflicts that often focus on controlling or stabilizing the global oil supply. "None of the estimates for these subsidies include the transactional costs of climate change, pollution and etc. which have yet to be fully assessed and are currently only paid for via individual human suffering." Bruce A Kibler & Kathleen V Kibler, "Corporate Lobbying – The Tradeoff Between Payback, Accountability/Responsibility, and Democracy" (2016) 13:1 J Leadersh Account Ethics, online: <<https://articlegateway.com/index.php/JLAE/article/view/1928>> at 110.

³⁵ John Cook et al, *supra* note 30 at 4; See also, Naomi Oreskes & Erik M Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (Bloomsbury Publishing USA, 2010); Shannon Hall, "Exxon Knew about Climate Change Almost 40 Years Ago" *Sci Am* (26 October 2015), online: <<http://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/>>; Kevin Grandia, "Exxon's \$2.4 Million Ventriloquist Act", (26 September 2006), online: *DeSmogBlog* <<https://www.desmogblog.com/exxons-3-million-ventriloquist-act>>.

³⁶ Naomi Oreskes & Erik M. Conway, *supra* note 35; Shannon Hall, *supra* note 35; Kevin Grandia, *supra* note 35; John Cook et al, *supra* note 30 at 5.

³⁷ "In the Canadian case, the powerful oil and gas lobby which have numerous links to the government of Stephen Harper, contributes to Canada's abysmal record in the UNFCCC [United Nations Framework Convention on Climate Change] process of blocking any meaningful policies and initiatives." Sabrina Fernandes & Richard Girard, *supra* note 32 at 7; Kathy Mulvey & Seth Shulman, *supra* note 32 at 2; Mike De Souza, *supra* note 32; Robert J. Brulle, *supra* note 30 at 295.

network of some of the world's most powerful corporations with the direct support and funding of a number of billionaires. In their efforts to sabotage pollution regulations, the oil industry's managers and shareholders have profited, while lowering the health and standard of living of everyone else.³⁸ Later generations will look back at this sabotage of climate action and judge us on harshly.

The Fossil Fuel Industry's Deep Ties to the Canadian Government

In Canada, the fossil lobby continues to exercise a great deal of influence.³⁹ For example, lobbyists from the industry groups, primarily oil and gas, met "224 times with the Senate on new environmental assessment law, while environmental groups had just 36 meetings."⁴⁰ The Canadian oil and gas industry includes seven of the top ten largest global companies. "The 2012 annual revenue (\$2.534 trillion) of these 7 companies is greater than the GDPs [sic] of Russia (\$2.38 trillion)"⁴¹. The oil and gas industry lobbies the government more than any other industry, and vastly out-lobbies environmental groups.⁴²

Examining the full seven-year period from January 4, 2011 to January 30, 2018, we found that [t]he fossil fuel industry in Canada recorded 11,452 lobbying contacts with government officials... The fossil fuel industry also lobbied the federal

³⁸ "Because the oil and coal companies that use their money to influence environmental regulation, we live in a world with more air and water pollution, in an environment that is less attractive and less healthy, than would otherwise be the case. The costs show up as lower standards of living for ordinary Americans, the benefits as higher profits for the oil and coal companies." Joseph E Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (500 Fifth Avenue, New York, NY 10110: W. W. Norton & Company, 2012) c 4, s A distorted economy—rent seeking and financialization—and a less well-regulated economy; For some of the many co-benefits from climate change mitigation, see Kirk Hamilton, Milan Brahmbhatt & Jiemei Liu, *supra* note 24 at 57.

³⁹ "For example, over the past four years 17 out of the 36 corporations and industry associations have lobbied the federal government on taxation laws that apply to their projects or the industry. ... 27 have lobbied on climate change policies and regulations as they affect the oil industry. Looking further into the topics and policies that these six corporations have been targeting, connections can be made to recent policy decisions. For example, Bill C-38 sets out to change over 70 laws, including many environmental and regulatory laws which will benefit the petroleum industry." Daniel Cayley-Daoust & Richard Girard, *supra* note 2 at 6.

⁴⁰ Sharon J Riley & Sarah Cox, "Industry responsible for 80 per cent of Senate lobbying linked to Bill C-69", (13 June 2019), online: *The Narwhal* <<https://thenarwhal.ca/industry-responsible-for-80-per-cent-of-senate-lobbying-linked-to-bill-c-69/>>.

⁴¹ "These leading corporate players include Royal Dutch Shell (Parent of Shell Canada, ranked #1), ExxonMobil (Parent of Imperial Oil, ranked #2), BP (ranked #4), Sinopec (ranked #5), China National Petroleum Corporation (Parent of PetroChina ranked #6), Chevron (ranked #8), and ConocoPhillips (ranked #9)." "Together these 27 [oil] companies and 8 [oil] industry associations registered 2,733 communications with DPOHs in the Government of Canada between July 2008 and November 2012. This rapid [121% in a year] increase in officially recorded lobbying by CAPP [Canadian Association of Petroleum Producers] coincides with a major public relations push in print, television and online advertising designed to counter increasing opposition to the tar sands." Daniel Cayley-Daoust & Richard Girard, *supra* note 2.

⁴² "When compared to other resource industry groups, including the forestry, automotive and renewable energy industries, fossil fuel industry associations are far more active in lobbying activity." Nicolas Graham, William K Carroll & David Chen, *supra* note 2 at 6; See also, Maclean's, "The top lobby groups in Ottawa - Canada - Macleans.ca", (5 December 2013), online: *Maclean's* <<https://www.macleans.ca/news/canada/the-top-lobby-groups-in-ottawa/>>; Daniel Cayley-Daoust & Richard Girard, *supra* note 2 at 3.

government at rates five times higher than environmental non-governmental organizations (ENGOS).⁴³

In the provinces that rely heavily on fossil fuel extraction, lobbying by the energy industry seems to get energy companies most of what they want. Even under the Trudeau government, specifically elected on a carbon reduction pledge, the fossil fuel industry wields vast influence through lobbying and established connections to senior bureaucrats.

Once Trudeau was elected, however, the focus of lobbying shifted away from parliamentarians and toward senior public servants or mid-level staff. ... This pattern of shifting focus points toward a “deep state” whereby key government institutions and actors become integrated with private firms and interest groups that together co-produce regulation and policy. This pattern is concerning as it indicates that the influence of industry actors—like those in the fossil fuel sector—are likely to far outlast election cycles and potentially the stated platforms of elected officials and may undermine processes for meaningful consultation with First Nations peoples.⁴⁴

Historically, Canada has shown little will for environmental enforcement, which is likely deeply related to lobbying and industry influence.⁴⁵ It is hard to reconcile reaching the needed reduction in carbon output with the current influence of the oil companies.⁴⁶

There is strong evidence that lobbying is an integral part of the failure to address the climate change crisis. In political decision-making, it is difficult to prove that any individual policy would be significantly different *but for* the lobbying. It is equally difficult to take into account the myriad of political decisions and show that they are consistently the result of lobbying inputs of particular interests, especially when so many factors go into the political calculus and its outcomes. Yet, the pattern is visible. It is hard to imagine that so many of these attempts to do more would have failed

⁴³ Nicolas Graham, William K Carroll & David Chen, *supra* note 2 at 6.

⁴⁴ “Among the top 10 senior government bureaucrats who remained in their positions after the change in government, their annual contacts with the fossil fuel industry rose from an average of 144.5 contacts under Harper to 228.5 under the Trudeau government.” *Ibid*.

⁴⁵ For example, in 2004, Canada fined Petro-Canada only \$290,000 for the Terra Nova 1,000 barrels oil spill. In contrast, in 2011, Brazil fined Chevron \$17,300,000 (U.S.) for a 3,600-barrel oil spill. Ainslie Cruickshank, “Critics slam Canada’s response to Volkswagen emissions scandal, three years after it was discovered”, *thestar.com* (16 September 2018), online: <<https://www.thestar.com/vancouver/2018/09/16/canada-has-failed-to-charge-volkswagen-three-years-after-discovery-of-emission-cheating-vehicles.html>>; For a deep investigation of Canada’s inadequate environmental law and enforcement, see David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (UBC Press, 2011).

⁴⁶ “In this time of climate crisis, transitioning away from fossil fuels in a rapid, democratic and socially just manner is required. If we do not acknowledge and address the influence that the fossil fuel industry holds over government policy, we will not be able to take the steps necessary to adequately address the crisis with the urgency it requires.” Nicolas Graham, William K Carroll & David Chen, *supra* note 2 at 7.

were it not for the billions spent on advertising, think tanks, lobbying, and the other deceptions used to sabotage the efforts of better-meaning people.

I believe that lobbying reform would be a great contribution to handling the climate crisis. The reforms I propose at the end of this dissertation should lead to policies that better match the priorities of Canada's population and civil society, and are less favourable to the preferences of the oil industry and other large business interests. Climate change is an area where the general population shows more concern and moral fortitude than the wealthy corporate elite. The 1% seem to prefer to focus on how much money they can make now, rather than the long-term consequences of their actions. Robust lobbying reform should help bring government policies in line with democratic principles. It will help increase the odds of our long-term survival and flourishing on this planet. To this end, I hope that climate activists and others investing in our future will find some use for this work.

Example: Canada: Oil Industry & Kinder Morgan Pipeline

"From January 4, 2011 to January 30, 2018, 11,452 lobbying contacts (just over six contacts per working day) were recorded between the fossil fuel industry and [Canadian] federal government officials. The level of access to public office holders enjoyed by the industry is unparalleled. Oil and gas industry associations, which are central to the network of lobbyists, are far more active in lobbying federally than other resource and manufacturing associations while the amount of lobbying by environmental non-governmental organizations (ENGOS) pales in comparison. The bulk of these lobbying efforts, moreover, are carried out by a few large corporations (and industry associations representing the major players) that control much of this economic sector and therefore have the resources for permanent campaigns. The concentration in lobbying closely mirrors the ongoing concentration of fossil capital. Likewise, a handful of state organizations and state officials are the target of most lobbying by the fossil fuel industry. Therefore, the network, at its core, amounts to a "small world" of intense interaction among relatively few lobbyists/organizations and the designated public office holders in select centres of state power who are their targets."⁴⁷

"The NEB eventually approved the [Kinder Morgan] pipeline, on May 29, 2016, while Prime Minister Justin Trudeau gave the green light on November 29, 2016. In the lead-up to these 2016 decisions we find comparatively lower, but still extensive, lobbying contacts. In the year prior to Trudeau's announcement, Kinder Morgan Canada initiated 54 lobbying contacts with ministry representatives. ... That the fix was in for the pipeline to proceed in advance of the official public approval was revealed by National Observer investigative journalist Mike De Souza. Documents obtained through freedom of information as well as interviews with public officials allowed De Souza to reveal that at an internal government meeting in Vancouver on October 27 – more than a month before the final decision on the pipeline was announced – Erin O'Gorman, associate deputy minister of natural resources, instructed government bureaucrats to "give cabinet a legally sound basis for saying 'yes'" to the Trans Mountain project. In the meantime, Trudeau's government continued to claim that they had yet to come to a final decision and were consulting in good faith with First Nations. As Gutstein also reports, Kinder Morgan lobbied O'Gorman four times over the year, including one contact two weeks before the meeting in Vancouver, while her boss, deputy minister Bob Hamilton, was lobbied by the oil giant six times."⁴⁸

⁴⁷ *Ibid* at 50.

⁴⁸ *Ibid* at 48.

Argument and Layout of the Thesis

This section discusses the central argument and layout of the thesis. Following that, there is a quick overview that lists the major headings of each chapter.

The central argument of this thesis is that lobbying can and should be more strictly regulated. This would align with *Charter* values, provide many benefits to democracy, increase equality, and open more room for citizen voices.

The thesis is divided into four main sections consisting of a total of 10 chapters. Section 1 covers the state of lobbying, and sets the groundwork for the argument. It consists of chapters 1 to 5. Section 2 presents a normative framework for evaluating lobbying regulations. It consists of chapter 6. Section 3 covers the legal frameworks for evaluating lobbying law. It consists of chapters 7 and 8. Section 4 discusses future lobbying reforms. It consists of chapters 9 and 10.

Chapter 1 begins with a comparative description of lobbying regulations in Canada and the U.S. It discusses the Canadian *Lobbyists' Code of Conduct*, and compares the Canadian regulations to those in the U.S. and the E.U. It outlines the relevant political structural differences relevant to lobbying between Canada and the U.S. This chapter provides an understanding of the current regulatory situation.

Chapter 2 presents several theories and approaches for understanding the practice of lobbying. It draws on the American experience with lobbying to help illuminate the situation in Canada. It analyses the relative roles and participation of businesses and citizen groups in lobbying, and the role lobbying plays in governance. It discusses the disclosure and the corruption heuristics of lobbying regulation. It provides evidence that lobbying has a significant impact on government decision-making. Understanding this phenomenon allows for careful consideration of arguments about lobbying's beneficial and corrosive effects on Canadian democracy. The analysis of these arguments prepares the reader for the inquiry into how lobbying might best be regulated to better promote the public interest.

Lobbying has three key justifications. It (i) is traditionally an important part of democratic governance, (ii) citizens have a right to petition their government, and (iii) it provides vital information to government. These factors carry considerable weight, yet lobbying creates a number of serious problems.

Chapter 3 lays out six fundamental concerns with lobbying: (i) lobbying disproportionately advantages business organizations; (ii) it favours the policy preferences of the wealthy and causes a misalignment of representation; (iii) it creates an information framing bias; (iv) it increases inequality; (v) it favours the status quo; and (vi) it otherwise corrupts democracy. These concerns form the core argument of the dissertation: that lobbying as it is currently practiced is deeply damaging to democracy, and it should be more strictly regulated.

Chapter 4 examines campaign financing. It shows how power and influence flow through a combination of political donations and lobbying. The chapter establishes *the mirror principle of lobbying and campaign finance* (the mirror principle), which states that the fields of lobbying and campaign financing are inherently similar, and share regulatory and jurisprudential links. The mirror principle is an important support of the core argument of the thesis, and underlies the approach taken in the later chapters in evaluating potential *Charter* challenges to lobbying regulations. The chapter also considers the differences between Canada's stringent campaign finance regulations and the looser regulations in the U.S. It covers the influence of campaign finance donations on governmental decision-making, and the six concerns about unregulated campaign finance donations (which mirror the concerns about unregulated lobbying). This illuminates the need for regulations controlling campaign donations, and the chapter lays out how these lessons apply to the regulation of lobbying.

Chapter 5 discusses my findings from qualitative interviews of lobbyists and officials. This chapter compares my findings with the more extensive quantitative interviews conducted in *Regulating Lobbying: A Global Comparison*⁴⁹. My survey includes additional questions related to lobbying, regulation, lobbyists, campaign donations, and influence. The results of the interviews reinforce some of the points raised in earlier chapters, and provide a deeper understanding of how the interviewees view the lobbying process.

Chapter 6 presents a number of political theories, including those of Rawls and Dworkin, which justify the restriction and legal control of lobbying. It considers Bakan's⁵⁰ view of the nature of the corporation's personality; Kuhner's⁵¹ ideal of separating business and state; and Akerlof and Shiller's⁵² view of fraud and deception as inherent aspects of an unregulated marketplace. The theories confirm the importance of citizen equality and of limiting the pull of market forces on political decision-making. The theories provide justification for rules that distinguish between the lobbying of citizen groups and that of businesses. The chapter concludes with an examination of how lobbying is feeding an inequality spiral into plutocracy. These factors all build support for a more robust regulation of lobbying.

In chapter 7 the thesis looks at a number of key court cases related to lobbying regulation. It investigates the Supreme Court jurisprudence on campaign finance law, and applies the mirror principle to show how the Court might treat a s. 2 *Charter* challenge to more robust lobbying regulations. It considers in what circumstances the regulations might be upheld under s. 1. It then performs a skeleton s. 1 evaluation based on *Harper v. Canada (Attorney General)*.⁵³ This evaluation demonstrates that the robust lobbying restrictions recommended in Chapter 10 are likely to survive a freedom of expression or freedom of association *Charter* challenge.

⁴⁹ Raj Chari, John Hogan & Gary Murphy, *supra* note 2.

⁵⁰ Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Place of publication not identified: Robinson Publishing, 2005).

⁵¹ Timothy K Kuhner, "The Separation of Business and State" (2007) 95 Calif Law Rev 2353.

⁵² George A Akerlof & Robert J Shiller, *Phishing for Phools: The Economics of Manipulation and Deception* (Princeton University Press, 2015).

⁵³ *Harper v Canada (Attorney General)*, [2004] 1 SCR 827.

Chapter 8 investigates the deep *Charter* principles related to the s. 3 democratic rights and how they apply to robust lobbying regulations. This chapter argues that robust lobbying regulations would match with these *Charter* values. It maintains that legislation of the type proposed in the thesis are likely to pass a s. 3 *Charter* challenge. The chapter concludes with a look at why the Court should adopt a structural approach to cases involving democratic rights.⁵⁴

Chapter 9 presents twelve proposed principles of lobbying reform that should factor into robust lobbying legislation. The twelve principles set guideposts for lobbying reform, so that it can be designed to channel private political influence into a more democratic process, thereby offering the benefits of lobbying while curbing its deleterious impacts. These principles are supported by the normative framework established in chapter 6, and justified by the problems with the current lobbying practices, as covered in chapter 3. They take into account the success of Canadian campaign regulations and the failings of the U.S. campaign finance system, as covered in chapter 4. They build upon the deep *Charter* principles covered in chapters 8, and should pass *Charter* scrutiny, as covered in Chapter 7.

The twelve principles of lobbying reform are: (1) to control the hydraulic pressure of private influence; (2) enhance democracy; (3) prevent corruption; (4) prevent the appearance of corruption; (5) improve the quality of information; (6) maintain political neutrality; (7) enhance political equality; (8) advantage citizen groups; (9) advantage collective goods; (10) separate business and state; (11) empower the disadvantaged; and (12) promote stronger transparency.

Chapter 10 concludes the thesis with an in-depth look at two specific reforms: limits to business lobbying and support for citizen lobbying.

Lobbying reform will not ensure that Canada makes wise decisions about its environmental health, climate change, inequality, democratic reform, or long-term stability. It would, however, mean that the population would have more say in these decisions. To trust democracy is to trust that the public will come to the right decisions, within the confines of robust *Charter* rights and good democratic processes. Barring the rule of philosopher-saints, we must recognize that democracy is something to aspire to: it is the least-worst system. There are always those who argue for a disproportionate say for the wealthy and connected – that we should let the rich or the large businesses have their way. It seems that in every generation we have to remind ourselves that plutocratic and authoritarian governance is not better, no matter the short-term temptation. Such governments almost always come to show callous disregard for the average citizen, a disdain for human rights, and contempt for the rest of the world we live in. Those who rise to the top in autocracies are generally cruel, selfish, and exploitative. They are often willfully ignorant and woefully misinformed, and eventually push the bureaucracy to be the same.

⁵⁴ The structural approach posits that in cases involving components of democracy, the healthy structure of democracy as a whole must be of concern. It is not just a matter of individual rights; there is an interest in maintaining the mechanisms that make the democratic system function.

We need healthy democracy, as does the planet as a whole. It is our best chance to survive and flourish. It is our only hope for maintaining our rights and dignity as individuals and humans. We need to reinvigorate the health of our democracy, and to do so we need to bring lobbying under better control.

Note: For the sake of clarity, I have generally used “he” when referring to a lobbyist, and “she” when referring to an official throughout this work. This lines up with the fact that the last two Commissioners of Lobbying were women.

Example: U.S.: Oil Industry Get Protests of Oil and Gas Infrastructure Criminalized

“The American Fuel & Petrochemical Manufacturers, a powerful lobbying group that represents major chemical plants and oil refineries, including Valero Energy, Koch Industries, Chevron, ExxonMobil, and Marathon Petroleum, has flexed its muscle over environmental and energy policy for decades. The group is now leveraging its political power to criminalize protests of oil and gas infrastructure. In an audio recording obtained by The Intercept, the group concedes that it has been playing a role behind the scenes in crafting laws recently passed in states across the country to criminalize oil and gas pipeline protests, in response to protests over the Dakota Access pipeline. The laws make it a crime to trespass on public land used for “critical infrastructure,” impose a fine or prison time for violators, and hold protesters responsible for damage incurred during the protest. Many of the laws also carry heavy fines to groups and individuals who support such demonstrations.”⁵⁵

Overview of the Major Headings of Each Chapter

This section presents an overview of the thesis by listing the major topics of each chapter. The major headings of each chapter are capitalized, and the important sub-headings are in brackets in a lighter colour after the related major heading.

Section 1: The State of Lobbying

1. *Canadian Lobbying Laws and Regulations* – History of Lobbying Regulations; Lobbying Regulations in Canada and the U.S. (the *Canadian Lobbyists’ Code of Conduct*, a comparison summary of the lobbying acts of the two countries, and the regulations in the E.U.); Structural Political Difference that Impact the Practice of Lobbying (similarities, differences, and the Canadian Senate).
2. *Understanding Lobbying in Canada and the United States* – Understanding Lobbying (lobbying is increasing, the three prime justifications for lobbying, what lobbyists do) Four Approaches to Understanding Lobbying (the insider-outsider approach, the disclosure versus corruption approach, the four pressures approach, the hydraulic force approach); Government Created Lobbying; Canadian Lobbying Statistics; Transparency and Lobbying (four levels of transparency, disclosure-corruption heuristics and transparency, advantages of lobbying transparency, disadvantages of lobbying transparency); The Effectiveness of Lobbying (why lobbying effect on legislation is hard to detect, studies show that lobbying is influential, benefits to business organizations, greater focus on low salience areas and regulations).

⁵⁵ Lee Fang, “Oil Lobbyist Touts Success in Effort to Criminalize Pipeline Protests, Leaked Recording Shows”, (19 August 2019), online: *The Intercept* <<https://theintercept.com/2019/08/19/oil-lobby-pipeline-protests/>>.

3. *The Six Concerns about Lobbying* – Concern I: Lobbying Disproportionately Advantages Businesses; Concern II: Misalignment with Popular Opinions; Concern III: Lobbying Creates an Information/Framing Bias; Concern IV: Lobbying Increases Inequality; Concern V: Lobbying Favours the Legislative Status Quo; Concern VI: Lobbying Corrupts Democracy.
4. *Private Campaign Financing & Lobbying* – The Mirror Principle of Lobbying and Campaign Financing (operating at the core of democracy, operational link between lobbying and campaign contributions, similarities – theoretical, similarities – regulatory, similarities – the mirror principle); Regulation of Campaign Financing in Canada; The Contrasting Practice of Campaign Contributions in the U.S.; The Influence of Campaign Contributions; The Six Concerns about Unregulated Campaign Financing; The Canadian Experience.
5. *Qualitative Interviews* – Overview of Interviewees; Comparison of Findings from Regulating Lobbying: a Global Comparison; My Questions (questions about lobbying, questions related to regulation, questions about lobbyists, questions related to campaign donations, questions related to influence, additional comments).

Section 2: A Normative Framework for Evaluating Lobbying Regulations

6. *A Democratic Normative Framework for Evaluating Lobbying Regulations* – Rawls and Dworkin on Political Equality; Profit Motivated Corporate and Public Interest Citizen Lobbying (business lobbying versus citizen lobbying, business interests pursue private goods, citizen organizations pursue collective goods, the overlap between private goods and collective goods); The Nature of the Corporate Lobbying (corporate personality, externalities, corporate personality and lobbying); The Separation of Business and State; The Nature of the Unregulated Marketplace – Phishing for Phools (phishing is a natural aspect of the marketplace, need for government to actively regulate, applying the lessons about phishing to lobbying); Inequality and Lobbying (economic inequality is rising, economic inequality is a risk to democracy, economic inequality is an outcome of policy decisions, lobbying feeds the inequality spiral, inequality, private goods, collective goods, and lobbying).

Section 3: A Legal Framework for Evaluating Lobbying Law

7. *Canadian Charter Section 2* – Canadian Lobbying Cases; American Jurisprudence; The Mirror Principle of Lobbying and Campaign Financing; S. 2(b) – Freedom of Expression (s. 2(d) – freedom of association); Principles from *Harper* and *Libman* (s. 1 – applying *Charter* principles, political equality and fairness in healthy democracy (principles 1 & 2), affluent cannot set guideposts of political choices (principle 3), limiting expression of some to help many others (principle 4), enhancing democracy (principle 5), supporting electoral laws and equality (principle 6), hearing all points of view (principle 7), perception of fairness and confidence in democracy (principles 8 & 9), disclosure (principle 10), differences from campaign finance principles); S. 1 – Deference to Parliament; S. 1 – Skeleton Evaluation Based on *Harper*.

8. *Canadian Charter Section 3 – S. 3 (interpretation of the right to vote); Deep Democratic Principles (constitutional principles, federalism, substantive democracy, rule of law and legitimacy, respect for minorities, s. 3 principles, s. 3 principle: respect cultural & group identities, s. 3 principle: right to meaningful participation, s. 3 principle: right to be informed, s. 3 principles: equality & fairness, s. 3 principles: anti-corruption & appearance of anti-corruption, s. 3 principle: governmental transparency); Haig Precedent on Referendum; Economic Welfare as a Justification for Lobbying Law; Structural Democratic Rights Paradigm (contrasting individual rights paradigm, structural rights – Pal, structural rights-bundles of rights approach – Dawood).*

Section 4: Lobbying Reform

9. *Reform Principles – Principles of Lobbying Reform ((1) to control the hydraulic pressure of private influence; (2) enhance democracy; (3) prevent corruption; (4) prevent the appearance of corruption; (5) improve the quality of information; (6) maintain political neutrality; (7) enhance political equality; (8) advantage citizen groups; (9) advantage collective goods; (10) separate business and state; (11) empower the disadvantaged; and (12) promote stronger transparency);*
10. *Specific Reforms and Conclusion – Ban Astroturf Organizations; Limit Business Lobbying (three types of lobbying limits; accounting for trade associations and subsidiaries; enforcing the limits; impact on officials; hypothetical ban on corporate lobbying; freedom of association and expression); Publicly Support Citizen Lobbying (approaches to funding citizen groups; Canada's history of funding citizen lobbying; political control and the example of the court challenge program; questions for further study); Conclusion.*

Example: U.S.: 2008 Financial Crisis & Lobbying

"Good financial regulation helped the United States – and the world – avoid a major crisis for four decades after the Great Depression. Deregulation in the 1980s led to scores of financial crises in the succeeding three decades, of which America's crisis in 2008–09 was only the worst. But those governmental failures were no accident: the financial sector used its political muscle to make sure that the market failures were not corrected, and that the sector's private rewards remained well in excess of their social contributions—one of the factors contributing to the bloated financial sector and to the high levels of inequality at the top."⁵⁶

"[A]fter [the] passage of the Dodd-Frank financial reform law, Wall Street made sure that government agencies charged with implementing it did not have the funds to do the job. As a result, fully six years after the near meltdown of Wall Street, some of Dodd-Frank including much of the so-called Volcker Rule restrictions on the kind of derivatives trading that got the Street into trouble in the first place—was still on the drawing board. When an industry doesn't want a law enacted but fears a public backlash if it openly opposes the proposed law, it quietly makes sure that there aren't enough funds to enforce it."⁵⁷

Areas of Further Study

There are two broad areas that remain underexplored in the literature: questions about the Canadian experience with lobbying, and the relationship between lobbying and governance.

⁵⁶ Joseph E. Stiglitz, *supra* note 38 c 2, s Adam Smith's invisible hand and inequality.

⁵⁷ Robert B. Reich, *supra* note 26 at 85.

There is a shortage of studies on lobbying in Canada⁵⁸, and some questions that have been illuminated in the U.S. remain shrouded in shadows here. Canada is in need of studies equivalent to *Lobbying and Policy Change: Who Wins, Who Loses, and Why*⁵⁹ and *Lobbying & Policymaking*⁶⁰. The list of questions to be answered is long. (1) How much influence do lobbyists have in Canada at the various levels of government? Can we construct empirical studies to show that Canadian government is more insulated from lobbying, as the writings of Pross and Dawson suggest?⁶¹ (2) What is the exact balance of power between the different special interests in Canada, and what factors make each successful?⁶² (3) How closely do Canadian government decisions track to popular preferences? Is the gap consistent across different policy areas, and how much of the gap is accountable to lobbying? (4) How much is spent on lobbying in Canada? (5) How accurate are the disclosures recorded in the lobbying database?⁶³ (6) What is the status of the revolving door in Canadian politics, and are officials being influenced in their decision-making by future job prospects? Is the cooling-down period working? How many former officials are avoiding the cooling-off periods through loopholes or advisory roles? (7) Now that Provinces have their own lobbying regulations, what lessons can be drawn from the experiences at the provincial level? Have some provinces had better results in controlling lobbying? (8) What is the Canadian public's opinion on lobbying, lobbyists and lobbying regulations? Can the public be brought onboard with significant lobbying reforms?

By answering these questions we will be able to gauge exactly how influential lobbying is in Canada, what effects the lobbying regulations are having, and what is the best path forward. Answering these questions will help produce evidence the Court might need to support stricter lobbying regulations against constitutional challenges. Additional surveys (qualitative and quantitative) of lobbyists, officials and the public will be immensely helpful in answering these questions.

There are a number of larger questions related to the connection between lobbying and governance that remain unanswered. There is good evidence regarding a number of these questions, as discussed in the thesis, but more research is needed on the details. (1) How effective are the various different lobbying regulations at controlling private political influence? Are some rules more important

⁵⁸ A. Paul Pross, *supra* note 2 at 4. Recently, some inroads have been made in this area, particularly in studies of the influence of the oil industry. See note 2. See also, the Corporate Mapping Project < <https://www.corporatemapping.ca/>>. Daniel Cayley-Daoust & Richard Girard, *supra* note 2; Nicolas Graham, William K Carroll & David Chen, *supra* note 2; *Mapping Political Influence: Political Donations and Lobbying by the Fossil Fuel Industry in BC*, by Nicolas Graham, Shannon Daub & Bill Carroll, Open WorldCat, Corporate Mapping Project (Vancouver, BC: Canadian Centre for Policy Alternatives, 2017); Maxime Boucher, *supra* note 2; Raj Chari, John Hogan & Gary Murphy, *supra* note 2.

⁵⁹ Frank R Baumgartner et al, *Lobbying and Policy Change: Who Wins, Who Loses, and Why* (University of Chicago Press, 2009).

⁶⁰ R Kenneth Godwin, Scott Ainsworth & Erik K Godwin, *Lobbying and Policymaking* (CQ Press, 2012).

⁶¹ A. Paul Pross, *supra* note 2 at 6 & 40.

⁶² There is evidence that industry dominates lobbying, and that the oil industry dominates other industries, but the details remain elusive and much more could be illuminated. Maclean's, *supra* note 42; Nicolas Graham, William K Carroll & David Chen, *supra* note 2.

⁶³ A. Paul Pross, *supra* note 2 at 187.

than others, or is the entire set of regulations needed as the theory of the hydraulic force⁶⁴ of political influence would indicate? (2) Exactly how much of a role has lobbying played in the rise of inequality and policies that favour the elites over the last 40 years?⁶⁵ (3) How much does lobbying interfere with society's ability to tackle large-scale long-term problems, such as climate change, and which lobbying regulations would most correct this problem? (4) How much does lobbying act as a fire alarm for politicians to warn them when government agencies are not fulfilling their assigned policy role? How can we best ensure that robust lobbying reforms do not interfere with this process?⁶⁶ (5) What is the relationship between levels of corruption in society and their lobbying system? (6) Can we prove lobbying regulations improve government decision-making? How big is the risk that tighter regulations will subtly damage key mechanisms or unwritten norms of governance, leading to worse political outcomes? (8) How much does giving disenfranchised groups and citizen groups a larger seat at the lobbying table result in political decisions that meet their needs? Are there alternative policy reforms that are easier to enact and have the same outcome? (9) How much of the dissatisfaction with democracy is linked to lobbying? How central and effective would robust lobbying reform be in reinvigorating the public's faith in democratic institutions?

Lastly, the Court's actual response to a *Charter* challenge to robust lobbying regulations remains unknown. This thesis relies on past rulings in related areas to predict its future direction, but nothing will be certain until the Court rules on an actual *Charter* challenge to specific lobbying laws.

Answering these questions will be difficult. Some of these questions might only be answerable after different countries and provinces experiment with different approaches to lobbying regulations. What we can glean on these subjects will allow us to further tailor lobbying regulations to minimize negative repercussions, while maximizing positive outcomes and increased democratic representation.

This thesis presents some principles for reform, and a look at two specific reforms, but much work and savvy will be needed to turn those into actual robust lobbying legislation and regulation. Even more work will be needed to push the reforms through Parliament, against the resistance of business lobbyists, who will feel threatened by the loss of power. This reform work will be herculean, but so too were previous democratic reforms. There is always an entrenched interest reluctant to share power, and there is always hope that we can make them share that power to better fulfill the precepts of democracy and justice.

⁶⁴ This theory posits that private political influence acts like water under pressure, and it will try to seep through or around any blocks or rules in the way. See, Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Four Pressures Approach, p. 114.

⁶⁵ Timothy K. Kuhner, *supra* note 51 at 2360.

⁶⁶ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 114.

Example: Canada: Ontario Ford Government & Liquor Sales

"The Progressive Conservatives are working closely with lobbyists and industry associations to promote expanded beer and wine sales – and internal government emails reveal an alliance was in place months ago. As the Tories strive to keep Premier Doug Ford's campaign pledge to sell beer in corner stores, they have been co-ordinating efforts with the Ontario Convenience Stores Association (OSCA), the Retail Council of Canada, and other lobby groups. That has manifested itself in an unusual new website, choiceandfairness.ca, to boost the case for breaking a 10-year deal with the Beer Store signed in 2015 that limits where beer can be sold. Under the terms of that master framework agreement, the province could be forced to compensate the brewers for \$100 million already spent on infrastructure improvements, lost profits during a two-year price freeze in the contract, and other costs. If ultimately the 7,000-employee retailer is forced to wind down, taxpayers could be on the hook for severance payments, pension liabilities, and broken lease penalties, inflating the potential price-tag to \$1 billion."⁶⁷

⁶⁷ Robert Benzie, "Ford government working with lobbyists to promote corner store beer and wine", (22 May 2019), online: *thestar.com* <<https://www.thestar.com/politics/provincial/2019/05/22/ford-government-working-closely-with-lobbyists-and-industry-associations-to-promote-beer-and-wine-in-corner-stores.html>>.

Dedication and Thank Yous

This dissertation is dedicated to my father, Peter Gold, of blessed memory. He did not live to see me finish my work. I suppose we do not always get to see things finished. My father was always there to listen to my frustrations, when the work stretched out long and unconquered before me. He did not know why I was pursuing this, but he was always supportive and proud of me. Everyone loved him, and I was truly lucky to be raised by such a good, honest, spiritual, energetic, welcoming, curious, kind and loving man. The space he left behind will never be filled. It is hard to grasp all the good that he has given me. He made the world better, and we are in sore need of more like him.

There are many other people who I would like to thank.

My mother, Elaine Gold, has supported me throughout, mentally, emotionally, and when it came to my wedding, financially. I could not have started this without her example of going back to university for her own PhD after she had four children. She has always been an inspiration. Her intellect, her ability to create the Canadian Language Museum after she finished teaching, her love of art and her sheer energy are all stunning. She sets an unreasonable standard for the rest of us more mortal mortals.

My wife, Sonia, has waited patiently for me to finish this work. Since the beginning, our relationship has always involved, me, her and my PhD. When we started dating, she would regularly drive 5 hours from Toronto to visit me in Ottawa. She kept coming back, even after the weekend I left the lights on in her car, killed the battery, and she had to drive home in a car with a broken speedometer that was barely able to make highway speeds. She has gone to uncountable events alone because I was working (or procrastinating), with never a complaint. She married me never knowing what I was like when I was not working on my PhD. I hope she doesn't regret it...

My supervisor, Dr. Joseph Magnet, has been a great help. Advocating on my behalf, keeping me going, putting a critical eye to my work, and pointing me straight when I tangent off. I was extremely lucky he accepted me as his graduate student. His advice has been essential. The Committee members too, for the moments of silence followed by pleas for their input, then silence again, and then sudden requests for input with tight deadlines, I thank you for your forbearance.

I give my ever-lasting thanks to my good friend Laura Sutula, who has voluntarily given up her free time for these meager thanks. Without her help, I'm afraid my learning disability would leave a thesis plagued with typos, mistakes and incomplete. The typos still here are my fault, and the typos no longer here are her fault. I would like to thank Sharoni Sibony and Clare Walker for stepping in when Laura moved to Australia, to escape Canadian cold for clear water and hot weather.

I must thank my siblings and good friends, who have been there for me, and listened patiently when I slip into a diatribe about the implications of this theory, or an interpretation of that political-decision. Aaron, Leah, Naomi, my sibs-in-law Jeff and Karen, thank you. My friends, Noah, Samy, Patrick,

Graydon, Eugene, Julia, Laura, Ari, Ben, Yoam, Matt, Tanhum, Ariel, Vanita, Rob L, Kate, Caroline, Simone, Ora, Robin, Rob D, Amanda, Ilan, Arthur, Nir, Maya, and Noah Z. Thank you too. My place is always open to you, and I can promise you dinner, but it's going to have vegetables – so many vegetables.

Lastly, I give my love to my niece-phews. I cannot say they helped me. If anything, they actively worked to distract me with their special events and noisy cuteness. It is my hope that by sneaking their names in here, one day, when they are much older, they will be motivated to read this dedication, and then continue to read the rest of the work. Adina, Tziporah, Meira, Asher, Ayala, Sammy-Ray, Penny, and whoever arrives later, you have my love.

Chapter 1 – Lobbying Regulation in Canada and the U.S.

“Don’t tell me that you’re a lawyer.”

“I used to practice law, but I got out of it.”

“Oh God Bless you. Wait a minute. Don’t tell me that you’re a lobbyist!”

– Tom & Ray Magliozzi, *Car Talk* hosts, *speaking to caller* ⁶⁸

Introduction – Chapter 1.....	26
Definition	26
History of Lobbying Regulation in Canada and the U.S.	30
Lobbying Regulations in Canada and the U.S.	32
Regulations in the E.U.....	44
Structural Political Difference that Impact the Practice of Lobbying	44
Similarities.....	44
Differences	46
The Canadian Senate	53
Conclusion – Chapter 1	55

⁶⁸ Car Talk episode 1746, 4:15.

Introduction – Chapter 1

This chapter investigates the current Canadian lobbying regulations. It compares these regulations to those in the U.S. and the E.U. It then considers the key structural political differences between Canada and the United States that relate to lobbying and our understanding of it. These differences help us better grasp the structure of lobbying practices in Canada, and provide a basis for understanding how lobbying affects governmental decision-making, which we will discuss in Chapter 2 – Understanding Lobbying in Canada and the U.S.⁶⁹

Definition

The terms “lobbyist”, “interest group” and “pressure group” are generally used interchangeably. The term “lobbyists” is used throughout, because it is more common in day to day speech, it is used in the legislative language of the regulatory acts and it better reflects the legalistic and government angle of this work.⁷⁰

In the broadest sense, a lobbyist is someone who tries to persuade a politician or official group to do, or refrain from doing, something. This might include the use of direct or indirect influence. The goal might be to encourage, promote or retard legislation, government oversight, regulation, management, or appointments. The lobbying process might involve communicating with politicians, their support staff, bureaucrats, or, occasionally, the non-elected high-level staff members of a political party.⁷¹

There are a number of important caveats to this definition. First, the means cannot include seeking public office through election, which differentiates lobbyists from politicians and lobbying organizations from political parties.⁷² Second, traditionally lobbying normally excludes actions directly aimed at influencing public opinion, even though this opinion might in turn result in pressuring the government to change policy. However, modern lobbying campaigns often include publicity components. If a lobbyist exercises enough control over a publicity campaign, the use of public opinion can be considered part of the lobbying campaign. Protests, educational campaigns, and the use of mass media are not, on their own, considered lobbying; such activities can be lobbying when used in close conjunction with more direct actions aimed at government officials. Some attempts to alter public opinion can be a component of lobbying. Third, the group in question needs to be organized, as opposed

⁶⁹ Chapter 2 – Understanding Lobbying in Canada and the U.S.: The Effectiveness of Lobbying, p. 134.

⁷⁰ There are various accounts of the origin of the term “lobbyist”. Some say it is named after those petitioners who waited outside the British Parliament in its lobby room in the 1700s or 1800s. Other claim it comes from the petitioners waiting in the lobby of the White House or the Congress building. The best story is that Ulysses S. Grant would regularly slip out of the White House and visit the lounge at the nearby Willard Hotel, because his wife disapproved of his drinking. His presence became common knowledge, and petitioners would corner him in the hotel lobby as he came and went. Frustrated, Grant frequently complained of these “lobbyists” getting in his way.

⁷¹ Most lobbying regulations do not apply to the lobbying of political parties, probably because the parties are usually private organizations, and because it is usually more effective to lobby officials directly.

⁷² Joost Berkhout, “Why interest organizations do what they do: Assessing the explanatory potential of ‘exchange’ approaches” (2013) 2:2 Interest Groups Advocacy 227–250 at 229.

to individuals or the loose networks of actors common in social movements.⁷³ Fourth, the use of the courts, regulatory appeals, tax appeals, and other regular procedures set down by government are not normally considered lobbying.⁷⁴ Yet again, particularly in regards to legal cases, these procedures can be used in conjunction with lobbying as part of a broader strategy to change regulations or legislation.⁷⁵ Fifth, participating in public committees is generally not considered lobbying, nor is submitting requests for government funds, public support or government contracts/bids through the normal government managed process. Sixth, communications to ask basic questions about government processes, regulatory interpretations, and access to information are also not considered lobbying. In some cases, repeated use of these requests can start to bleed into actual lobbying. Seventh, although different levels and branches of government in the same country lobby each other all the time, such lobbying is generally considered part of governance and outside the scope of lobbying regulations, provided they do not hire outside lobbying organizations. Eighth, the use of official diplomats and state meetings to influence officials of another country is normally not considered lobbying. Countries often run external parallel lobbying campaigns to match their diplomatic efforts on issues of importance. These are considered lobbying.

Lastly, it is imperative to distinguish between lobbying and simply reaching out to one's representative to express concern or support. It can be difficult to nail down the precise dividing line between these two activities, but reasonable sections can be carved out. Generally, once the person is paid or does it as part of a job, it counts as lobbying. In the Canadian *Lobbying Act*⁷⁶, the activity of reaching out to government becomes in-house lobbying if it is a significant portion of a job within a three-month period. Significant means over 20% of totaled working hours for the equivalent of one

⁷³ *Ibid* at 228.

⁷⁴ Several American lower court gerrymander cases demonstrate an interesting form of lobbying within the Court. These cases will be appealed straight to the Supreme Court, which has delayed ruling on the constitutionality of partisan gerrymandering. The lower courts have been writing unusually long and detailed judgements. These judgements have disregarded precedent that the courts cannot rule against gerrymandering, and have attempted to provide tests and standards to adjudicate the subject. This is likely an attempt to pressure the Supreme Court into ruling that partisan gerrymandering is unconstitutional. Mark Joseph Stern, "Lower Courts Are Lobbying SCOTUS to Rein In Partisan Gerrymandering", (6 May 2019), online: *Slate Mag* <<https://slate.com/news-and-politics/2019/05/ohio-michigan-partisan-gerrymandering-supreme-court.html>>.

⁷⁵ Courts are often conservative institutions that are not always friendly to citizen groups. They are reluctant to give standing, particularly to broader non-pecuniary concerns, and it is expensive to litigate. Despite public perception, overall their structure favours powerful business interests. The government often lets the Court decide as a form of dismissing an issue. "The first response of government is often to tell a group... with a rights concern: 'We'll let the courts decide.' Most governments are well aware of the limited resources of groups seeking to challenge laws or administrative action and are well aware of the high costs of litigation. The assumption made by government ... is that many of these claims will never be pursued." A. Paul Pross, *supra* note 2 at 182. In his earlier work, in passing, Pross covered court cases as a form of lobbying taking place within the judicial branch. This view is interesting, but it is not the norm; nor does it fall within the purview of any lobbying regulations currently in use, which do not consider participating in such formal government processes as a form of lobbying. See A. Paul Pross, *supra* note 2.

⁷⁶ *Lobbying Act* (last amended on 2008-07-02), R.S.C. 1985, c. 44 (4th Supp.) 1985.

employee (~90 hours over 3 months)⁷⁷. The threshold cannot be avoided by dividing the work up among multiple employees. If the organization contracts a third party to influence the government, it immediately qualifies as lobbying. With the use of an external lobbyist, there is no minimum threshold.

With these caveats in mind, the *Lobbying Act* defines a lobbyist as someone who, on behalf of a client, organization or business, undertakes to,

(a) communicate with a public office holder in respect of (i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons, (ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament, (iii) the making or amendment of any regulation as defined in subsection 2(1) of the Statutory Instruments Act, (iv) the development or amendment of any policy or program of the Government of Canada, (v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada, or (vi) the awarding of any contract by or on behalf of Her Majesty in right of Canada; or (b) arrange a meeting between a public office holder and any other person.⁷⁸

The Canadian legislation distinguishes between “in-house lobbyists” and “consultant lobbyists”, the former representing their own organization, the latter being lobbyists for hire working for a third party. Almost all of the discussion and analysis that follows will apply to both groups, but it is a useful distinction to keep in mind moving forward.

Throughout the work we will often be referring to “*officials*” or “*public office holders*” in government. These terms are intended to be a broad umbrella to include politicians, elected office holders, political aides, regulators, bureaucrats and sometimes even private contractors if they are operating in a governmental role. These are both the people being lobbied, as well as the people who might become lobbyists when they leave office and have greater influence due to their former positions. The exact cut-off point below which bureaucrats and political aides might no longer qualify as *public office holders* is debateable. Many of those who work for the government do not have any influence over political decision-making, and after leaving their employment they are unlikely to have any influence over the higher level decision-makers still in office. A loose rule might be when they have the ability to significantly impact the issue in question for lobbyist, they qualify as an *official*. The

⁷⁷ The threshold is controversial, because people can use it to skirt the law. Many reformers have suggested lowering the threshold or using a different method to distinguish lobbying from speaking to one’s representative.

⁷⁸ *Lobbying Act*, *supra* note 76.

Commissioner of Lobbying's list of designated office holders provides a reasonable starting point for determining who can be considered an official.⁷⁹

This work can be understood as an extended discussion of democracy, both as an ideal and as a system of governance that has tangible consequences on its population's lives and well-being. We shall define democracy as a form of elected government based on the consent of the governed, and on legitimacy, justice, public trust and the governing in the public's interest. Democratic governance accords with the rule of law, responsibilities and limitations on power, protection of human rights, freedom of personal and political choice, and public input into the government's decision-making.⁸⁰

Throughout this work reference will be made to popular preferences. Popular opinion plays a vital but tricky role in government. One of the fundamental aspects of representational government is that an elected politician is responsible for funneling and interpreting popular preferences, interpreting them through her own priorities, election platform, and the preferences of her party and supporters. Moreover, it can be difficult to determine the population's preferences, which can fluctuate depending on how questions are asked, the public is sometimes genuinely split on issues, and can express unclear or contradictory priorities. On the other hand, democracy rests on self-government and the input of its population into political decision-making. A representative that ignores popular sentiment, or sees herself as solely the representative of her most ardent supporters, is acting undemocratically. Although popular preferences can be difficult to pin down, there are true preferences.⁸¹ On the whole policy outcomes should reflect popular preferences, if they consistently do not, it is difficult to say that democracy is fulfilling its role of self-governance.⁸²

⁷⁹ Designated office holders and equivalents include: Ministers, Ministers of State, ministerial staff, senior public officials such as Deputy Ministers, and Associate and Assistant Deputy Ministers (including those of comparable rank), Members of Parliament, Senators, any position on the staff of the Leader of the Opposition in the House of Commons or on the staff of the Leader of the Opposition in the Senate, Chief and Vice Chief of the Defence Staff, Chief of Maritime Land or Air Staff, Chief of Military Personnel, Judge Advocate General, any position of Senior Advisor to the Privy Council to which the office holder is appointed by the Governor in Council, Deputy Minister (Intergovernmental Affairs) Privy Council Office, Comptroller General of Canada, any position to which the office holder is appointed pursuant to paragraph 127.1(1)(a) or (b) of the Public Service Employment Act, and anyone acting in a designated office holder for more than four consecutive months. Office of the Commissioner of Lobbying, *Interpretation of "Comparable Rank" for Designated Public Offices* (2010).

⁸⁰ Gregory Tardi, *Legality, discretion and power in democratic governing: A comprehensive theory of political law* (D.Jur., York University (Canada), 2010) [unpublished] at 6. Dworkin holds a similar definition of democracy, that it "a partnership in collective government in which all citizens are given the opportunity to be active and equal partners. Democracy is better conceived as "a partnership in collective government in which all citizens are given the opportunity to be active and equal partners". Ronald Dworkin, *Sovereign Virtue* (Cambridge, Massachusetts: Harvard University Press, 2000) at 354. For more discussion of Dworkin's view of democracy and self-governance, see Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: Rawls and Dworkin on Political Equality: Dworkin, p. 341.

⁸¹ For example, despite the success of the NRA in often preventing all gun control legislation, most of the public and most of its members do support some gun control measures, such as background checks on all gun sales. *Gun Owners Overwhelmingly Support Background Checks, See NRA as Out of Touch, New Poll Finds*, Poll, by Benton Strong, Public Policy Polling Poll (Raleigh, NC: Center for American Progress, 2015) at 2.

⁸² See the discussion of alignment in Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern II: Misalignment with Popular Opinions: The Concept of Alignment, p. 153.

History of Lobbying Regulation in Canada and the U.S.

Before discussing lobbying in depth, it behooves us to touch on the history and current regulation of lobbyists in North America. The regulation of lobbyists is a fairly recent phenomenon in Canada. The first *Lobbyists Registration Act* did not come into force until 1989. It has been updated and altered several times since then. In 2008, in the wake of the Sponsorship Scandal, the Act was transformed into the *Lobbying Act*⁸³, which established the Commissioner of Lobbying as a fully independent agent of Parliament, increased the minimum time until senior politicians could lobby and restricted (but did not ban) gifts from lobbyists. The *Lobbying Act* was updated again in 2010. The provinces have all enacted their own lobbying regulations, modeled on the federal act, starting with Ontario in 1999.⁸⁴ Toronto and Ottawa also have municipal lobbying regulations, as well as all the cities in Quebec, which are covered by the provincial registry. It appears likely that all major cities will have lobbying regulations within the next decade.⁸⁵

It is worth considering the American history of lobbying regulations, both because it undoubtedly influenced the drafters of the Canadian regulations, and because it is a useful example of how regulations can succeed or fail. The United States has a longer history of attempting to regulate lobbying. The first attempt was the *Federal Regulation of Lobbying Act of 1946*. It was a minimal piece of legislation, and is said to have been drafted as an afterthought to the *Legislative Reorganisation Act of 1946*. The *Federal Regulation of Lobbying Act* required the registration of any person “who by himself, or through an agent, or employee or other persons in any manner ... solicits, collects, or receives money or anything of value to be used principally to aid ... the passage or defeat of any legislation by the Congress.” The Act also required the submission of financial reports of lobbying. The Act was inadequate to the task. It has been estimated that the registration only accounted for 15% to 33% of the lobbyists active in Washington DC, and reported only 1% of the money actually being spent on lobbying.⁸⁶ The Act had numerous loopholes. For instance, it lacked enforcement and it only required lobbyists to register if they determined that lobbying was their principal purpose, something many of them conveniently decided it was not. The Act only covered Congress, so lobbying of the White House, executive departments, regulatory agencies, and other governmental organisations was not covered or reported. It also lacked guidelines of what financial reporting was required, and there were virtually no investigation or enforcement provisions.⁸⁷ The Supreme Court released its single judgement on lobbying

⁸³ *Lobbying Act*, *supra* note 76.

⁸⁴ *Appearance before the House of Commons Standing Committee on Procedure and House Affairs, Question of Privilege Relating to the Premature Disclosure of a Draft Report*, by Karen E Shepherd, Appearance before the House of Commons Standing Committee on Procedure and House Affairs (Ottawa, Ontario: Commissioner of Lobbying, 2011). Yukon has also enacted a lobbying registry. So far, the Northwest Territories and Nunavut have not.

⁸⁵ Every province except PEI (and Yukon) have lobbying laws.

⁸⁶ *Regulation of Lobbyists in Developed Countries Current Rules and Practices*, by Dr Margaret Mary Malone (Institute of Public Administration, 2003) at 21, referring to Clive S Thomas, “Interest Group Regulation Across the United States: Rationale, Development and Consequences in Parliamentary Affairs”, 1998, Vol 51 at 509.

⁸⁷ William V Luneburg, “The Evolution of Federal Lobbying Regulation: Where We are Now and Where We Should Be Going” (2009) 41 *McGeorge Law Rev* 85 at 103.

regulation, *United States v. Harriss*⁸⁸, in 1954. This ruling weakened the already problematic law. This case is discussed in Chapter 7.⁸⁹

The Act was not replaced with a more functional lobbying regulation system until the *Lobby Disclosure Act of 1995*. Enacted in the wake of the Wedtech scandal⁹⁰, the new law widened the definition of lobbyists to include all those who seek to influence Congress, the executive, their staff and administrators.⁹¹ The definition and minimum payment threshold for registration by lobbyists was established and clarified.⁹² It also required semi-annual reports.⁹³ These regulations were substantially expanded by the *Honest Leadership and Open Government Act of 2007*⁹⁴, which was passed in the wake of the Abramoff lobbying scandal and the resignation of Representative Tom DeLay. The *Honest Leadership and Open Government Act* added a number of restrictions, banned lobbyists participating in legislating or becoming staff, increased penalties, set new ethics standards, and set tougher disclosure rules. It increased the minimum time period before legislators could work as lobbyists, prohibited gifts or reimbursed travel expenses from lobbyists, outlawed political pressure that would force lobbying organizations to hire particular individuals or maintain party affiliations, and required the Government Accountability Office to audit lobbyists' compliance with the rules.

It is worth noting that despite the relatively recent effective regulation of lobbying in North America, Canada and the United States are the two countries with the most extensive lobbying rules and most experience with regulating lobbyists.⁹⁵ The regulation of lobbying is a new phenomenon, and democracies are only starting to feel their way around this issue.

⁸⁸ *United States v. Harriss*, [1954] 347 US 612.

⁸⁹ Chapter 7 – Canadian *Charter* Section 2:: American Jurisprudence – *United States v. Harriss*, p. 413. See also Chapter 4 – Private Campaign Financing and Lobbying: The Contrasting Practice of Campaign Contributions in the U.S., p. 227.

⁹⁰ The scandal involved bribes and campaign donations paid by a small business to get \$300 million worth of no-bid military contracts from the Reagan administration. The company was unequipped to handle the business, the top executives stole millions from the company, and it eventually went bankrupt. U.S. Attorney General Edwin Meese was probably being bribed, as well as Congressman Mario Biaggi and Bronx borough President Stanley Simon. More than 20 government officials were convicted of crimes in connection to the scandal. Andrew Feinberg, "The Looting of Wedtech", *N Y Times* (29 July 1990) 9; OWEN MORITZ, "The Wedtech scandal: The fraudulent 'success story' in the South Bronx", online: *nydailynews.com* <<https://www.nydailynews.com/new-york/wedtech-scandal-south-bronx-fraudulent-success-story-article-1.805390>>; For a complete recounting, see Marilyn W Thompson, *Feeding the Beast: How Wedtech Became the Most Corrupt Little Company in America*, 1st edition ed (New York: Scribner, 1990).

⁹¹ *Origins, Evolution and Structure of the Lobbying Disclosure Act*, by Dr Craig Holman (Washington, DC: Public Citizen, 2006) at 8.

⁹² A lobbyist must register if the lobbyist is expect to receive more than \$5,000 or spend more than \$20,000 within six months on lobbying activities.

⁹³ Dr Margaret Mary Malone, *supra* note 86 at 17.

⁹⁴ *Honest Leadership and Open Government Act*, H.R.2316 2007.

⁹⁵ Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 109.

Lobbying Regulations in Canada and the U.S.

The Canadian *Lobbying Act* and the American *Lobbying Disclosure Act* share a similar set of regulations. Both countries have a long history of experimenting with lobbying reform before their systems began to be effective and a majority of lobbyists were actually registered.⁹⁶ As a result, Canada and the United States are generally considered to be at the world-wide forefront of lobbying regulation, paving the way in the field.⁹⁷ Both nations enacted their lobbying regulations as a means of increasing transparency, public accountability and reducing corruption.⁹⁸ Their regulations are premised on the legitimacy of lobbying and the lobbyists' petitioning of government as a constitutionally protected right. Both Acts define lobbying in similar terms, and apply to both the legislature and the executive branches of government.⁹⁹ The American Act specifically exempts lower-level bureaucrats in the executive branch who do not have policy-making positions. The Canadian Act is more extensive. The Canadian Act includes a broad list of policy setting public office holders, but the language implies that the Act could apply to other office holders (including lower-level bureaucrats).¹⁰⁰

Disclosure

Both countries place similar restrictions and obligations on lobbyists. Both Acts are focused primarily on disclosure, requiring lobbyists to report which official they contacted, what matter was discussed and when. This information is kept in a publicly accessible database. In Canada, lobbyists are

⁹⁶ "It was only in the late 1980s and early 1990s that Canada and the United States learned from mistakes made in the past and finally began to institute effective transparency regimes." Craig Holman & William Luneburg, "Lobbying and Transparency: A Comparative Analysis of Regulatory Reform" (2012) 1:1 Interest Groups Advocacy 75–104 at 76; Pierre B. Meunier et al, *supra* note 4 at 44. More than 20 private member bills were introduced in Canada between 1965 and 1985 before the Mulroney government formally proposed regulations.

⁹⁷ See, for example, *Lobbying: Access and influence in Whitehall-First Report of Session 2008-09.*, by House of Commons Public Administration Select Committee (2009); Raj Chari, John Hogan & Gary Murphy, *supra* note 2; Gary Murphy, John Hogan & Raj Chari, "Lobbying Regulation in Ireland: Some Thoughts from the International Evidence" (2011) 11:2 J Public Aff 111–119.

⁹⁸ Craig Holman & William Luneburg, "Lobbying and transparency", *supra* note 96 at 77.

⁹⁹ *Ibid* at 80.

¹⁰⁰ The Canadian Act includes high level decision makers as designated public office holders. It also includes lower-level officials as "public office holders". The definition includes a number of specific positions, but does not exclude other lower-level officials, although in practice it has been read that way by the Commissioner. This is evident in the French, where it states "La présente définition s'applique notamment:", meaning "This definition applies in particular/especially:". In English the Act states,

Public office holder means any officer or employee of Her Majesty in right of Canada and includes

- (a) a member of the Senate or the House of Commons and any person on the staff of such a member,
- (b) a person who is appointed to any office or body by or with the approval of the Governor in Council or a minister of the Crown, other than a judge receiving salary under the Judges Act or the lieutenant governor of a province,
- (c) an officer, director or employee of any federal board, commission or other tribunal as defined in the Federal Courts Act,
- (d) a member of the Canadian Armed Forces, and
- (e) a member of the Royal Canadian Mounted Police;

Lobbying Act, *supra* note 76 s Interpretation 2 (1) public office holder.

required to disclose grassroots and astroturf lobbying campaigns¹⁰¹, whereas they are not required to in the United States.¹⁰² Both Acts exempt employees of corporations or nonprofits from reporting their activities if they lobby less than 20% of one employee's time (although this is calculated slightly differently in each country).¹⁰³ For-hire lobbyists, referred to as consultant lobbyists in the Canadian *Lobbying Act*, must always register their activities (in the U.S. they must register if they are paid over \$3,000 in a three month period). The Canadian Act bans the payment of contingency fees to consultant lobbyists, on the basis that it may encourage unethical behaviour, whereas the American Act allows it, but requires that lobbyists register when they are being paid on a contingency basis. The two Acts have notably different disclosure rules. The Canadian regulations do not attempt to track the amount spent on lobbying, whereas the American regulations require that lobbyists track and disclose the amounts spent on lobbying.

Both Acts require lobbyists to register their activities. Judging by reports from the Commissioner of Lobbying and my interviews with lobbyists, former politicians and officials, Canadian lobbyists appear to abide by this requirement. Yet, it is likely that many in-house lobbyists that should register because they are (at least a little) above the minimum threshold, do not.¹⁰⁴ In the American context, there is good evidence that a significant percentage of lobbyists at the federal level fail to register or report their lobbying accurately, operating in a shadow lobbying system.¹⁰⁵ Some estimate that almost 90% of those lobbying at the federal level fail to register.¹⁰⁶

Both Acts restrict lobbyists from giving officials gifts or other benefits. The American Act has stricter gift limitations, banning gifts, meals and free travel by private airplanes.¹⁰⁷ The Canadian Act

¹⁰¹ An astroturf campaign is a manufactured pressure campaign designed to imitate the appearance of a genuine grassroots movement. See Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Insider-Outsider Approach: Astroturf Examples, p. 106.

¹⁰² Craig Holman & William Luneburg, "Lobbying and transparency", *supra* note 96 at 81; Office of the Commissioner of Lobbying, *Applicability of the Lobbying Act to Grass-roots Communications* (2017).

¹⁰³ Craig Holman & William Luneburg, "Lobbying and transparency", *supra* note 96 at 81. In addition, in the U.S. there is a requirement to register for in-house lobbyists who spend over \$12,500 in a quarter (note: some sources say \$11,500).

¹⁰⁴ Gen McGregor, "Loopholes in Canada's lobbying rules leave plenty off the books – canada.com", (17 August 2013), online: *o.canada.com* <<http://o.canada.com/news/pamela-wallin-audit-lobbying-loopholes>>.

¹⁰⁵ For example, in 2014, the National Restaurant Association, moved into new office space on L Street in Washington to accommodate a 20% increase in its staff. Yet despite the increase in staff and spending, the trade and lobbying organization's forms reported its lobbying had decreased to its lowest point since 2007. Lee Fang, "Where Have All the Lobbyists Gone?" *The Nation* (19 February 2014), online: <<https://www.thenation.com/article/shadow-lobbying-complex/>>. See also Timothy M LaPira & Herschel F Thomas, "Revolving door lobbyists and interest representation" (2014) 3:1 *Interest Groups Advocacy*, online: <<http://www.palgrave-journals.com/iga/journal/vaop/ncurrent/full/iga201316a.html>> at 10.

¹⁰⁶ There are 12,000 registered lobbyists at the federal level in the U.S. Thurber estimates that there are actually 100,000 total lobbyists active at that level in the U.S. Lee Fang, *supra* note 105. See also *Ibid*.

¹⁰⁷ There are loopholes in the restrictions. Additionally campaign donations are allowed, which are a type of gift, and trips can be allowed as gifts with approval of the ethics committee. The travel ban does not apply to nonprofits, countries, and front groups. For example, former senator Al D'Amato's Park Strategies lobbying firm used a Taiwanese university to mount a \$20,000 first-class trip for Representative Bill Owens William V. Luneburg, "Evolution of Federal Lobbying Regulation", *supra* note 87 at 105; Isaac Arnsdorf, "The lobbying reform that

only prohibits gifts or other benefits to an official that are meant to influence the performance of her duties, or appears to be intended to do so. The Canadian Act does not exclude sponsored travel, according to the Commissioner's 2019 report on the subject.¹⁰⁸

Revolving Door Movement

The Acts also place limits on how soon after leaving office former public officials, bureaucrats or their staff can become lobbyists. The Canadian Act is much stricter, setting a 5 year minimum for designated office holders¹⁰⁹ before they can participate in lobbying. The minimum is 2 years for politicians and senior office holders in the United States.¹¹⁰ In addition, both countries allow former office holders to avoid the time restriction if they work for a corporation or organization whose business is not lobbying, and less than 20% of their time is spent on lobbying.¹¹¹

There is evidence that former officials work around these restrictions.¹¹² In the United States, it is evident that politicians are often, or even usually, hired by lobbying organizations before they leave office, and often begin to lobby before the 2 year restriction has ended. Some politicians have even passed legislation on behalf of their future employers while still in office.¹¹³ House of Commons political

enriched Congress", (3 July 2016), online: *POLITICO* <<https://www.politico.com/story/2016/06/the-lobbying-reform-that-enriched-congress-224849>>.

¹⁰⁸ *Sponsored Travel Provided by Lobbyists*, report, by Office of the Commissioner of Lobbying, lobbycanada.gc.ca, Report on Investigations report (Office of the Commissioner of Lobbying, 2019) at 12.

¹⁰⁹ The Commissioner of Lobbying has released an interpretative bulletin with the formula to determine designated public office holders. See note 79. Office of the Commissioner of Lobbying, *supra* note 79; *Lobbying Act*, *supra* note 76 pt Schedule (Section 1).

¹¹⁰ This minimum waiting time can be reduced for less senior officials. Designated office holders are also responsible for more frequent disclosure reports once they do engage in lobbying.

¹¹¹ The law bans former designated public office holders employed by nonprofit associations from lobbying, but allows them to lobby up to 20% of the time if they are employed by a for-profit business. This restriction is nonsensical. The Harper government had announced its intention to change it, allowing former designated public office holders to lobby up to 20% of the time for nonprofit organizations, but it never did so.

¹¹² In the U.S. the loopholes were deliberate. The tenuous nature of the 2-year election cycle doubtlessly plays into the desire to seek employment possibilities for after leaving office. Those in the House of Commons were particularly reluctant to have revolving door restrictions, and Congress as a whole removed a clause from the legislation that required all job offers to politicians and aides be made public. Between 2008, when the law took effect, and 2016, 352 people left Congress alive. Of those, 47% joined the influence industry in some fashion. Of those 164 people, only 51% formally registered as lobbyists. The other 80 worked in the influence industry without registering. They worked as "policy advisers, strategic consultants, trade association chiefs, corporate government relations executives, affiliates of agenda-driven research institutes and leaders of political action committees or pressure groups." Isaac Arnsdorf, *supra* note 107; See also Tim LaPira & Herschel Thomas, *Just How Many Newt Gingrich's Are There On K Street? Estimating the True Size and Shape of Washington's Revolving Door* (Chicago, IL, 2013).

¹¹³ Congresswoman Lynn Jenkins launched and began advertising a new lobbying firm before she left Congress. Bryan Lowry & Jonathan Shorman, "Lynn Jenkins sets up lobbying business — but she's still a Kansas congresswoman", (7 December 2018), online: *McClatchy* <<https://www.mcclatchydc.com/news/politics-government/congress/article222791425.html>>. This second example event predates the revolving door restrictions in the 2008 Act. Billy Tauzin, the former chairman of the House Committee on Energy and Commerce, had a key role in drafting the *Medicare Act* of 2003. The Act included provisions providing prescription drug coverage, generating \$2 billion in windfall profits for drug makers in its first year. Just as the bill became law, in

aides are often hired just as (and probably before) they leave public service. The Act does not restrict them from lobbying right away if they have the foresight to keep their salary below the cut-off, or if a lawmaker paid them and they go on to lobby former committee colleagues.¹¹⁴ In Canada, fewer former officials go on to become lobbyists. However, my interviews have revealed that while former office holders might not lobby directly during the proscribed five year period, they often consult with clients, instructing those clients on how to lobby the government. The clients are advised throughout by the former politicians, and the officials being lobbied often know which former politicians are advising which clients. It is not technically in violation of the Act, but it is infringing on the spirit of the regulations – there is a wink and nudge going on between the current office holders and the former office holders. The former officials are still able to profit from their connections with current officials and possibly exercise undue influence over them.

The American *Lobbying Disclosure Act* also includes restrictions on government officials pressuring lobbying organizations to employ certain individuals. This is a direct response to the Republicans' initially successful K Street Project, which pressured lobbying firms to hire Republicans in top positions, and to reward loyal GOP lobbyists with access to officials. Unsurprisingly, this project became linked to corruption and various lobbying scandals.

Both countries also regulate lobbying, to some extent, through the tax code, by restricting charities and certain nonprofits' ability to lobby, and by not recognizing lobbying as a tax-deductible business expense.¹¹⁵

Oversight

The design of the oversight is one of the most significant differences between the Acts. Both Acts share the weakness that registrars must rely on another branch of government to bring the penalties forward, be they fines or criminal charges. In Canada the Lobbying Commissioner must bring

December 2003, the Pharmaceutical Research and Manufacturers of America – a lobbying group representing the largest American drug and biotech companies – offered Tauzin a job as its president. Two months later, he announced he would not seek re-election. Ten months after that, he announced he would accepted the position. He started the day after his he left Congress. His new salary was reportedly \$2 million a year. He made over \$11 million in his final year at the trade group. Mike Stuckey, "Tauzin aided drug firms, then they hired him", (2013), online: *msnbc.com* <<http://www.nbcnews.com/id/11714763/t/tauzin-aided-drug-firms-then-they-hired-him/>>; Lee Fang, "ANALYSIS: When a Congressman Becomes a Lobbyist, He Gets a 1,452% Raise (on Average)", (14 March 2012), online: *Repub Rep* <<https://www.republicreport.org/2012/make-it-rain-revolving-door/>>.

¹¹⁴ For example, a top aide to a Republican congressman worked to promote a plan overhauling the nation's home mortgage finance system. Weeks after leaving his position, he returned as a lobbyist for a company intending to capitalize on the new plan. A former counsel to the Democrats on the House Financial Services Committee returned just months after leaving his job to lobbying the committee aides on behalf of the large Wall Street firms the committee was overseeing. Eric Lipton & Ben Protess, "Law Doesn't End Revolving Door on Capitol Hill", *N Y Times* (1 February 2014), online: <<https://dealbook.nytimes.com/2014/02/01/law-doesnt-end-revolving-door-on-capitol-hill/>>.

¹¹⁵ For example, the U.S. places a \$2,000 cap on the deductibility of lobbying expense, which cannot be paid to an outside lobbyist.

the case to the RCMP. In the U.S. the Secretary of the Senate or Clerk of the House must bring the case to the D.C. U.S. Attorney's Office.¹¹⁶

Overall, the Canadian *Lobbying Act* has more robust oversight. The Canadian Act is overseen by the Commissioner of Lobbying who is a fully independent officer of Parliament with investigative powers and a seven year appointment. This appointment is deliberately longer than the parliamentary term in office, to shelter the Commissioner. In addition, being an independent officer of Parliament depoliticizes the Commissioner, separating the role from the political fray and the direct reach of the Prime Minister's Office and investing it with a power to counter politicians' temptation to pursue self-dealing.

Canadian Lobbyists' Code of Conduct

The Canadian *Lobbying Act* also has an associated *Lobbyists' Code of Conduct*¹¹⁷ (*Code of Conduct*). This code appears to have been originally modeled on the Rules of Professional Conduct for lawyers. It acted as a hybrid ethical code – partly setting out an ethical guide for how lobbyists should lobby government, but mostly setting out rules to ensure lobbyists represent their clients with fidelity. This odd instrument was amended by the Commissioner of Lobbying on Dec 1, 2015 into a more rational document focused on providing a proper *Code of Conduct* for the process of lobbying. The Code essentially requires lobbyists to communicate honestly with officials, to refrain from exercising undue influence, to refrain from creating or exploiting a sense of obligation, and to refrain from creating a conflict of interest for the official.¹¹⁸ Initially, it was unclear whether the Code was legally binding or merely a proposed ethical framework. The Commissioner held that it was legally binding, and the Court upheld this position in *Makhija v. Canada (Attorney General)* [2008]¹¹⁹.

The Code states:

Identity & Purpose

1. A lobbyist shall, when communicating with a public office holder, disclose the identity of the person, organization or corporation on whose behalf the communication is made and the nature of their relationship with that person, organization or corporation, as well as the reasons for the approach.

Accurate Information

¹¹⁶ William V. Luneburg, "Evolution of Federal Lobbying Regulation", *supra* note 87 at 123.

¹¹⁷ Office of the Commissioner of Lobbying Government of Canada, *The Lobbyists' Code of Conduct* (2015).

¹¹⁸ The Court upheld the binding nature of the restriction against creating a conflict of interests in the earlier version of the *Code of Conduct*. The Court held that it did not require evidence of actual interference with actions or decisions of a public office holder, creating the conflict of interest was enough to violate the *Code of Conduct*. "While the specific facts giving rise to a conflict of interest will vary from one profession to another, that which leads to the conclusion that a person is subject to a conflict of interest is the presence of a tension between the person's duty and some other interest or obligation." *Democracy Watch v Campbell*, [2009] 2009 FCA 79 [Democracy Watch v Campbell].

¹¹⁹ *Makhija v Canada (Attorney General)*, [2008] 2008 FCA 402 at para 9.

2. Lobbyist shall avoid misleading public office holders by taking all reasonable measures to provide them with information that is accurate and factual.

Duty to Disclose

3. A consultant lobbyist shall inform each client of their obligations as a lobbyist under the *Lobbying Act* and the *Lobbyists' Code of Conduct*.
4. The responsible officer (the most senior paid employee) of an organization or corporation shall ensure that employees who lobby on the organization's or corporation's behalf are informed of their obligations under the *Lobbying Act* and the *Lobbyists' Code of Conduct*.

Use of Information

5. A lobbyist shall use and disclose information received from a public office holder only in the manner consistent with the purpose for which it was shared. If a lobbyist obtains a government document they should not have, they shall neither use nor disclose it.

Conflict of Interest

6. A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest.

Preferential Access

7. A lobbyist shall not arrange for another person a meeting with a public office holder when the lobbyist and public office holder share a relationship that could reasonably be seen to create a sense of obligation.
8. A lobbyist shall not lobby a public office holder with whom they share a relationship that could reasonably be seen to create a sense of obligation.¹²⁰

Political Activities

¹²⁰ The Commissioner has released guidance on the interpretation of this rule.

If you share a relationship with a public office holder that can reasonably be seen to provide you with preferential access to them, then they can be perceived to be in a conflict of interest if you lobby or arrange meetings with them. If you have such a relationship with a public office holder, you should not lobby or arrange meetings with them.

High risk relationships include:

Your family by blood or by marriage – including parents, siblings, your children and those of your spouse or partner, grandparents, grandchildren, first cousins, aunts, uncles, nieces, and nephews who may be public office holders; Your friends – meaning relationships with a public office holder where you share a close bond of friendship, a feeling of affection, or a special kinship that extends beyond simple association. This excludes casual acquaintances or members of your broad social or business circles; or Your business partnerships with a public office holder where you share an ownership, fiduciary or monetary interest in a business.

Office of the Commissioner of Lobbying, *Guidance to mitigate conflicts of interest resulting from preferential access* (2019).

9. When a lobbyist undertakes political activities on behalf of a person which could reasonably be seen to create a sense of obligation, they may not lobby that person for a specified period if that person is or becomes a public office holder. If that person is an elected official, the lobbyist shall also not lobby staff in their office(s).¹²¹

Gifts

10. To avoid the creation of a sense of obligation, a lobbyist shall not provide or promise a gift, favour, or other benefit to a public office holder, whom they are lobbying or will lobby, which the public office holder is not allowed to accept.¹²²

¹²¹ The Commissioner has released new guidance on the interpretation of this rule. It divides political activities into higher, lower, and no-risk activities in terms of triggering the restriction. Notably, and unfortunately, donating money is considered a no-risk activity.

“Political activities that are strategic in nature or involve significant interaction with candidates pose a higher risk of creating a sense of obligation on the part of a person benefiting from them who is or becomes a public office holder. The sense of obligation towards you decreases over time. If you engage in higher-risk political activities then you should not lobby any public office holder who benefited from them, nor their staff, for a period equivalent to a full election cycle.

Political activities that are not strategic in nature and do not involve significant interaction with candidates pose a lower risk or no risk of creating a sense of obligation on the part of a person benefiting from them who is or becomes a public office holder. Occasional involvement in the lower-risk political activities below does not restrict your lobbying of a public office holder who benefits from them. However, frequent involvement or involvement in multiple such activities increases the risk of creating a sense of obligation on the part of a public office holder who benefits from them. If so, you should exercise caution if you are considering lobbying that public office holder or their staff.”

Higher risk includes:

“Serving as a campaign chair or in another strategic role on a campaign team; Serving in a named position on behalf of a registered party as set out in the Canada Elections Act; Serving as an electoral district association officer within the meaning of the Canada Elections Act, such as chief executive officer, financial agent, appointed auditor, or any other officer; Organizing a political fundraising event; Gathering or soliciting donations that you then provide to a registered party or electoral district association; Working in a war room for a registered party in a strategic role; Preparing candidates for debates; or Acting as a designated spokesperson for a political candidate, campaign, registered party, electoral district association, or other organization.”

Lower risk activities include:

“Volunteering, canvassing, or scrutineering for a registered party or electoral riding association without significantly interacting with candidates; Attending fundraising events; or Expressing personal political views strictly in an individual capacity.”

Office of the Commissioner of Lobbying, *Guidance to mitigate conflicts of interest resulting from political activities* (2019).

¹²² Government of Canada, *supra* note 117. The Commissioner has ruled that gifts that express courtesy or customary status are allowed. This ruling does not pay adequate attention to the processes of the gift economy, as discussed in Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Disclosure versus Corruption Approach, p. 111.

“Gifts provided as a normal expression of courtesy or within the customary standards that normally accompany the public office holder's position would not typically create a sense of obligation. Gifts that may be provided under this exception are limited to the examples below. Although a single gift may be provided under this exception, repeated or multiple gifts risk creating a sense of obligation. You must exercise caution if you offer more than one gift to a public office holder or if that public office holder has received gifts from your client or employer, or their affiliates.”

It is notable that the *Code of Conduct* prohibits lobbying a politician if the lobbyist aided in the political campaign or donated money. This prohibition has been upheld by the Federal Court of Appeal.¹²³ Yet, in a recent guidance bulletin the Commissioner ruled that a lobbyist could give a personal donation to a politician and still lobby her.¹²⁴ The American *Lobbying Disclosure Act* has no equivalent prohibition at the federal level, although some states do have similar prohibitions. It is likely that these prohibitions would not pass constitutional muster on the federal level. This issue is discussed in Chapter 7.¹²⁵ The American *Act* has no equivalent to the *Code of Conduct*.

“Tickets, passes or access to events, including any meals or refreshments provided during these events, where the public office holder serves as a speaker, moderator or in a ceremonial role. For employees of the Public Service of Canada this also includes acting as an official representative of their department or organization; Gifts of minimal value provided to a public office holder as a token of thanks or appreciation when they serve as a speaker, moderator or in a ceremonial role; Promotional items of minimal value; or Meals or refreshments offered during a meeting. The total cost of the working meal and refreshments provided to a public office holder must be of minimal value.”

Office of the Commissioner of Lobbying, *Guidance to mitigate conflicts of interest with respect to gifts* (2019).

¹²³ No *Charter* issues were raised in the case. The key issue was whether the Code should be interpreted to allow a lobbyist to put the office holder in an acceptable level of conflict of interest. The Federal Court of Appeal concluded this interpretation was mistaken, and there was no allowable level of conflict of interest.

“The Rule prohibits lobbyists from placing public office holders in a conflict of interest. The words “by proposing or undertaking any action that would constitute an improper influence on a public office holder” are properly read as an attempt to elaborate on the meaning of “conflict of interest” in the context of the regulation of lobbyists, and not as a limitation on the scope of the prohibition. It can hardly advance public confidence in the integrity and transparency of government decision-making to condone certain conflicts of interest, while prohibiting others. Any conflict of interest impairs public confidence in government decision-making. Beyond that, the rule against conflicts of interest is a rule against the possibility that a public office holder may prefer his or her private interests to the public interest. A lobbyist's stock in trade is his or her ability to gain access to decision makers, so as to attempt to influence them directly by persuasion and facts. Where the lobbyist's effectiveness depends upon the decision maker's personal sense of obligation to the lobbyist, or on some other private interest created or facilitated by the lobbyist, the line between legitimate lobbying and illegitimate lobbying has been crossed. The conduct proscribed by Rule 8 [now Rule 6] is the cultivation of such a sense of personal obligation, or the creation of such private interests.” *Democracy Watch v Campbell*, *supra* note 118 at para 48.

¹²⁴ Office of the Commissioner of Lobbying, *supra* note 121. This guidance seems to be rooted in the concern that the restriction on political activity derived from the *Code of Conduct* was too robust, and it might be a *Charter* infringement to prevent a lobbyist from lobbying a politician he has personally donated to in the last election cycle. The fear of infringing the lobbyist's *Charter* rights on this issue is likely unfounded. The problem with the previous guidance on political activities derived from the Code was its overbreadth and vagueness, and this has been corrected. It is unlikely that robust lobbying regulations that barred lobbying those to whom one has donated in the last election cycle would infringe the *Charter*. The risk of corruption from a donation is high, particularly in light of the influence of gifts and social exchanges; it is beneficial for lobbying regulations to break the link between campaign donations and lobbying; and lobbyists can still be involved in politics in many way, they simply would not be able to donate to a politician they intended to lobby. The *Charter* implications of robust lobbying restrictions are discussed in detail in Chapter 7 and Chapter 8.

¹²⁵ Chapter 7 – Canadian *Charter* Section 2: American Jurisprudence – *United States v. Harriss*, p. 413. See also Chapter 4: – Private Campaign Financing and Lobbying: The Contrasting Practice of Campaign Contributions in the U.S., p. 227.

Investigation

The Commissioner of Lobbying can investigate breaches of the Canadian *Lobbying Act* and its associated *Code of Conduct*, but has limited powers of enforcement. The Commissioner must table yearly reports in Parliament and can report in Parliament the names of lobbyists who have breached the Code or *Lobbying Act*, but cannot levy fines or penalties; she must instead hand the investigation over to a peace officer. The penalties for violating the *Lobbying Act* can reach \$200,000 and/or a 2 year imprisonment.¹²⁶ There is no penalty for violating the *Code of Conduct*, except the possibility of a negative report being tabled in Parliament. In discussions with regulators, lobbyists have stated that they believe the negative report in Parliament is a significant, even career-ending, penalty. They argue no official would willingly deal with a lobbyist who had been publicly found to be behaving unethically. So far, this has been the case, but there have only been a small handful of lobbyists listed in the negative reports.¹²⁷ The level of shameless behaviour by officials in the Trump administration should lead to deep reflection on whether public shame is enough to regulate potentially corrupting behaviour.

The American *Lobbying Disclosure Act* is overseen by the Secretary of the Senate and the Clerk of the House of Representatives. It has a maximum penalty of a \$200,000 fine and/or a 5 year imprisonment. The Act also requires the Department of Justice to launch the investigations, and like its Canadian counterpart, the American Department of Justice has a history of reluctance to punish breaches of the lobbying regulations. It had not pursued a single case prior to 2011. However, there were a number of cases in 2012 and 2013, and the first criminal charge and conviction in 2020, which could demarcated a new trend in lobbying law enforcement.¹²⁸

Comparison Summary

Holman and Luneburg produced a chart that provided a useful summary of the similarities and differences between the two Acts.

Table 1: Comparison of Elements of the Lobbying Regime in Canada and the U.S. ¹²⁹

Elements of the Lobbying Regime	Canada	U.S.
<i>Specifies the type of activity that attracts a registration obligation in terms of:</i>		
a. Oral and written communications (subject to certain exceptions for various public and/or closely regulated proceedings and in the case of persons lobbying on their own behalf or as volunteers)	Yes	Yes
b. Directed to both administrative and legislative branch officials	Yes	Yes
c. As long as the communications deal with governmental policymaking or its implementation	Yes	Yes

¹²⁶ The previous government announced on Sept 17, 2012 that it would not grant the Commissioner of Lobbying the power to impose fines.

¹²⁷ See Office of the Commissioner of Lobbying, “Commissioner’s reports: Reports on investigations”, (April 2019), online: *Off Comm Lobbying* <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00018.html>.

¹²⁸ Ironically, Jack Abramoff was the first person convicted of violating the *Lobbying Disclosure Act*, when he pled guilty to taking affirmative steps not to register after returning to lobbying in 2017.

¹²⁹ Table from Craig Holman & William Luneburg, “Lobbying and transparency”, *supra* note 96 at 87.

d. Though the level of official in the governmental hierarchy contacted may be relevant to determining coverage	No	Yes
<i>Entities that must register are divided into two classes: persons or entities that lobby on their own behalf and those that lobby for third parties, where registration turns in part on</i>	Yes	Yes
a. The amount of time spent on lobbying	Yes	Yes
b. The fees earned from or funds expended for lobbying activities	No	Yes
<i>Registration form requires the disclosure of basic information about the registrant (for example, name, address, client) and the expected areas/issues of to be lobbied plus</i>	Yes	Yes
a. The techniques of lobbying to be used (for example, grass-roots)	Yes	No
b. Governmental positions formerly held by lobbyists covered by the registration	Yes	Yes
c. Names of lobbying coalition members	Yes	Yes*
d. Monetary contributions to the lobbying efforts from third parties (for example, where the registrant is a lobbying coalition)	No	Yes
e. The names of the lobbyist employees of the registrant	Yes	Yes
<i>Periodic reports required of lobbying and related activity covering</i>	Yes	Yes
a. The general and specific subject matter(s) of lobbying activities	Yes	Yes
b. The names of active lobbyists	Yes	Yes
c. Amount of money paid for or spent on lobbying activities	No	Yes
d. The names of the specific officials contacted as part of the lobbying efforts and the subject matter(s) discussed	Yes	No
e. The specific content of communications with contacted officials or entities or a summary thereof	No	No
f. Political contributions and other disbursements to or for the benefit of covered officials	No	Yes
<i>Administration of disclosure regime by</i>		
a. An official affiliated with the legislative branch of government	Yes	Yes
b. Who may issue guidance documents clarifying the requirements of the disclosure regime for those who may be subject to it	Yes	Yes
c. With powers of investigation of potential violations	Yes	Yes
d. Powers to sanction violators themselves	No	No
e. Relying on other governmental officials to prosecute violations	Yes	Yes
f. With possible sanctions to include fines and imprisonment	Yes	Yes
Internet-accessible and searchable databases of information provided on registrations and periodic reports (maintained by the administrator of the lobbying regime)	Yes	Yes
A lobbyist code of conduct	Yes	No

* This disclosure applies where the contribution to lobbying activities exceeds \$5,000 in a quarterly period.

Chari *et al.* provide a lobbying regulation classification chart, to help gauge whether a jurisdiction has a low, medium, or high level of lobbying regulation.¹³⁰ This chart focuses mostly on disclosure, the lobbying registry, and the enforcement of registration. It does not account for laws aimed at controlling lobbying. As such, it is a better summary of what the laws are than what they could be. Keeping this in mind, it does provide a good way to gauge where regulations might fall short as compared to the current best jurisdictions.

Table 2: Lobbying Regulation Classification Chart ¹³¹

<i>Low</i> • Rules on individual registration exist, but few details are required • Lobbyist definition only includes those who lobby the legislative branch, not those who lobby the executive • No disclosure of spending requirements for lobbyists or their employer • Weak system of online registration, and requires physical paperwork • Lobbying lists available to the public, but lack detail and spending reports • Little in way of enforcement • No cooling-off period, officials can immediately become lobbyists
<i>Medium</i> • Rules of registration exist and are tighter, must include general information about the subject matter and the department/branch/level of government being lobbied • Those lobbying legislative and executive branch count as lobbyists • There are some limits on gifts and campaign donations by lobbyists (might be loopholes), but free consultation by lobbyists to officials, re-election campaigns and politicians is allowed • There is no regulation for employer spending reports • There is complete, efficient, effective and easy to use online registration • The lobbying register is accessible to the public, online, and frequently updated. • In theory state agencies can conduct mandatory reviews/audits, although actual prosecution for incomplete/inaccurate filings are rare • There is a cooling-off period before former officials can become lobbyists
<i>High</i> • Rules on individual registration are tightest and mandatory. Lobbyist must report subject matter, target of lobbying, name of all employers, include photo of the lobbyist, and immediately update the registration after any changes or new information • Like medium level; both those lobbying legislative and executive branch must register • Unlike low & medium level; tight spending disclosure is required: ○ Must file a spending report ○ Must report salary ○ Must account for and itemize all spending ○ Must identify all people on whom money was spent ○ Must report all spending on household members and direct family members of officials

¹³⁰ Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 105.

¹³¹ *Ibid.*

- Must account for all campaign spending
- Unlike low & medium level; employer spending disclosure is also tight, employer of lobbyist must also file a spending report and account for all salaries
- Lobbying register is online
- Lobbying register is open to public, up to date, and includes spending disclosure
- State agencies can and do conduct mandatory reviews/audits, and there are penalties for late and incomplete filings that have a reasonable chance of being imposed
- There is a cooling-off period of a reasonable length before officials can become lobbyists

Chari *et al.* consider Washington and Kentucky as the two states with the highest level of lobbying regulations.¹³² They conclude that the lobbying regulations in the U.S. and Canada are similar, and that these are the two countries with the highest level of regulation.¹³³ This is not a high bar. They classify the U.S. as having high-level regulations and Canada as having medium-level regulations, because Canada lacks spending disclosure. They classify the EU as having low-level regulations. In light of the holes in the U.S. system, it should be classified as medium-level at best. The more complete and independent oversight in the Canadian system should qualify it as medium-high-level. As a country, Canada has the most complete lobbying regulations.¹³⁴ But it still fails to meet the standard of a high-level jurisdiction, even as that standard is mostly limited to issues of disclosure. This shows how far democracies still need to go in regulating lobbying.

In conclusion, although the regulations between the two countries are quite similar, there are some key differences. The Canadian regulations do not track the amounts expended on lobbying, but they are more encompassing. The Canadian regulations apply to the entire Federal government equally, require the disclosure of grassroots and astroturf lobbying campaigns, are overseen by a completely independent officer of Parliament appointed for 7 years, provides a code of conduct for lobbyists, and prohibit lobbying a politician if the lobbyist aided significantly in the politician's campaign, organized fundraising, or bundled donations.¹³⁵

¹³² *Ibid* at 109.

¹³³ *Ibid*; See also Craig Holman & William Luneburg, "Lobbying and transparency", *supra* note 96 at 78.

¹³⁴ The comparisons of lobbying regulations generally use Canada and the U.S. as the standard, but rarely rank the two. It is implied, however, in the conclusion of Craig Holman & William Luneburg, "Lobbying and transparency", *supra* note 96 at 101.

¹³⁵ As discussed, technically, the language of the *Code of Conduct* appears to prevent lobbying a politician if the lobbyist has donated money to that politician, but the Commissioner has guided that lobbyists can give a personal donation to a politician and still lobby her. This appears to be a reaction to the Commissioner's earlier overly-broad guidance on political activities. The correction did not require allowing the lobbying of a politician the lobbyist has donated money to. The Court has ruled in support of a robust interpretation of the *Code of Conduct's* then Rule 8 (now Rule 6) restriction against placing an official in conflict of interest, which supports a ban on linked donations and lobbying. See *Democracy Watch v Campbell*, *supra* note 118 at para 54. The Court has not ruled on the *Charter* question of restricting lobbying when the lobbyist has made a political donation. See Chapter 7 and Chapter 8 for a discussion of *Charter* rights, lobbying, campaign donations, freedom of expression, and democracy. Office of the Commissioner of Lobbying, *supra* note 121; See also, National Constitutional and Human Rights Law Section, *Opinion Respecting the Constitutionality of Rule 8 of the Lobbyists' Code of Conduct* (Canadian Bar Association, 2010).

Regulations in the E.U.

In comparison to the American and Canadian regulations, the E.U. maintains a much lighter regulatory framework. In the worldwide typology of high, medium and lowly regulated lobbying systems introduced by Chari *et al.*¹³⁶, as of 2010 both Canada and the U.S.'s federal governments' lobbying regulations score as medium regulated, with respective scores of 50 and 62. The E.U. scores as a lowly regulated system with a score of 15 for the Parliament and 24 for the Commission.¹³⁷ The E.U.'s lobbying disclosure requirements only apply to the E.U. Parliament and Commission, and not to other parts of the E.U.'s governance structure, such as the E.U. Council. Since 2008, the lobbying registry has been publicly accessible, and includes who the lobbyists represented, who they contacted, and the overall funding for lobbying purposes, but contains less detailed information than the North American registries do.¹³⁸ The E.U. also has a lobbyist code of conduct.¹³⁹ Yet, the registry remains voluntary, there is no cooling-off period after working in government, the penalties remain weak and enforcement remains lax.¹⁴⁰ As of 2010, only an estimated half of the known E.U. lobby groups who lobbied the E.U. Parliament registered as lobbyists voluntarily.¹⁴¹

Structural Political Difference that Impact the Practice of Lobbying

Since most of the experiences, literature and empirical studies on the topic of lobbying are American, it is vital to understand the relevant political differences between the two countries in order to grasp how the American findings might apply to the Canadian context. There are significant political similarities between Canada and United States. The countries share a similar origin, common law legal system, federalist structure, market economies, pluralistic power structures, dominant language (of course, Canada also has French), multicultural immigrant experiences, shameful histories of treatment of their Indigenous peoples, and a broad overlap of cultural practices. Moreover, Canadians are well aware of and are heavily influenced by American popular culture and political events.

Similarities

Overall, there are more and deeper similarities in lobbying between Canada and the United States than differences. There do not appear to be any specific study of the difference between lobbying

¹³⁶ Raj Chari, John Hogan & Gary Murphy, *supra* note 2. Their scoring system is based on the Center for Public Integrity's original scoring system for the United States at the federal and state level, and they used the same system to score all other lobbying regulation systems worldwide

¹³⁷ Gary Murphy, John Hogan & Raj Chari, "Lobbying regulation in Ireland", *supra* note 97 at 116. I believe that the E.U. Parliament and Commission have now completed standardizing their regulations, and they would both likely score a 24 as of 2013.

¹³⁸ Craig Holman & William Luneburg, "Lobbying and transparency", *supra* note 96 at 92; Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 53.

¹³⁹ House of Commons Public Administration Select Committee, *supra* note 97 at 73.

¹⁴⁰ Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 54; *ALTER-EU Briefing on the Code of Conduct for Lobbyists - Citizens For Europe*, by ALTER-EU (Mundo B, Rue d'Edimbourg 26, B-1050 Brussels: ALTER-EU, 2013) at re. For example, as of April 2013 there had been no enforcement actions taken against any lobbyists, and the sole penalty for violating the code of conduct is to be barred from the voluntary registry.

¹⁴¹ Craig Holman & William Luneburg, "Lobbying and transparency", *supra* note 96 at 92.

in Canada and the United States, but there are a number of general conclusions that arise from the literature. Canadian lobbies have roughly similar structures, and perform a similar, almost identical, role in the political system.¹⁴²

Furthermore, there have been studies comparing lobbying in U.S. and the U.K., and lobbying in the U.S. and the E.U. These studies found that lobbying is fairly similar across all these jurisdictions. Bernhagen finds substantial similarities between lobbying in the U.K. and the United States, despite the different systems of government. He finds that in both countries the majority of policy proposals “are lobbied around by very few organized interests, while only a few proposals enjoy attention from a wide range of actors.”¹⁴³ He concludes that there are “remarkable similarities with analyses of organised interest activities and their effectiveness in the U.S. given the very different systems of government”¹⁴⁴. He theorizes that the common pluralistic nature of the countries, their similar politico-economic systems and the parallel development of the policy communities and lobbying organizations, as well as cross-pollination over time, largely explain this similarity.¹⁴⁵

The Canadian system is a parliamentary system derived from the U.K., with elements similar to the American political system added, in particular federalism and a written constitution. Therefore, it is reasonable to conclude that most findings related to the similarities in lobbying between the U.K. and American system would be equally applicable to the Canadian system, as the Canadian system is more connected to the American system geographically, philosophically, politically and culturally.

Dür and Mateo find significant similarities across the E.U., stating, “our data suggest that the differences across (European) countries in lobbying strategies are relatively minor, compared to the other variables used in this study.”¹⁴⁶ Likewise, Bennedsen and Feldmann found that the practices of lobbying in the U.S. and E.U. are comparable: in both cases lobbyists legitimate their policy positions with their expertise and carefully tailored information.¹⁴⁷ Most likely the same finding would apply to Canadian lobbying. Both Thorburn and Pross in their respective works on lobbying in Canada found that lobbyists rely on information and expertise to support their policy preferences.¹⁴⁸ Malvern has a much more skeptical view of Canadian lobbying, arguing the historical record shows that lobbying was rooted in connections, patronage, bribery, the rewards of railroad concessions and war profiteering.¹⁴⁹

¹⁴² See, for example, Raj Chari, John Hogan & Gary Murphy, *supra* note 2.

¹⁴³ Patrick Bernhagen & Brett Trani, “Interest group mobilization and lobbying patterns in Britain: A newspaper analysis” (2012) 1:1 Interest Groups Advocacy 48–66 at 62.

¹⁴⁴ Patrick Bernhagen, “Who Gets What in British Politics – and How? An Analysis of Media Reports on Lobbying around Government Policies, 2001–7” (2012) 60:3 Polit Stud 557–577 at 572.

¹⁴⁵ *Ibid.*

¹⁴⁶ Andreas Dür & Gemma Mateo, “Gaining access or going public? Interest group strategies in five European countries - Dür - 2013 - European Journal of Political Research - Wiley Online Library” (2013) 52:5 660–686 at 667.

¹⁴⁷ Morten Bennedsen & Sven E Feldmann, “Lobbying Legislatures” (2002) 110:4 J Polit Econ 919–946 at 59.

¹⁴⁸ Hugh Garnet Thorburn & Royal Commission on the Economic Union and Development Prospects for Canada, *supra* note 2; A. Paul Pross, *supra* note 2; A. Paul Pross, *supra* note 2.

¹⁴⁹ Paul Malvern, *supra* note 2.

Differences

Nonetheless, there are significant differences between the two countries that are relevant to understanding lobbying and lobbying regulation in Canada and America. These differences include size, culture, lobbying style and political structure.

Differences in Size

The American population, economy and federal budget are roughly ten times larger than the Canadian ones.¹⁵⁰ Thus we would expect the total lobbying expenditures, the scale of the lobbying organizations and citizen groups, their average sophistication, the size of the contracts involved, and in many cases the losses and rewards available to be significantly smaller in Canada. Correspondingly, it is reasonable to expect that there is less overall lobbying at the federal level in Canada than in the U.S. Indeed the evidence supports this conjecture. There are no figures on the amount expended on lobbying in Canada, but there are far fewer lobbying organizations.¹⁵¹ However, Canada's smaller government and economy also means that large international corporations can exert more lobbying effort using proportionally fewer resources.

There are certain cultural differences between Americans and Canadians that have some bearing on lobbying and lobbying regulation. Canada in general has a more reserved political culture, stronger labour unions, a more urbanized population and, perhaps partially because of Quebec, a history of being friendlier to regulation. Americans have a longer stronger history of political participation in terms of forming citizen organizations, protests and pressure groups. It is difficult to say for sure whether these differences stem from culture or political institutions, but it is likely both overlapping and feeding off each other.

Differences in Lobbying Culture

Although more research is needed in this area, there appears to be a difference in lobbying culture between Canada and the United States. Canadian lobbyists appear to be more reserved and consensus seeking than American lobbyists.¹⁵² Canadian lobbyists also seem to have fewer ties to outside protest groups and citizen movements; they are more likely to seek an internal strategy of direct lobbying, rather than an outside strategy that includes public pressure and publicity.¹⁵³ There are two major reasons to believe that these cultural differences are largely rooted in the differences in the political institutional structures of the two countries.

¹⁵⁰ In 2015 the American GDP was approximately \$18 trillion, and the Canadian GDP was \$1.6 trillion. In 2010, there were 34 million Canadians and 309 million Americans. *Gross domestic product (GDP)*, by OECD, CrossRef (OECD Publishing, 2014); OECD, "Population", (2016), online: *OECDStat* <http://stats.oecd.org/Index.aspx?DatasetCode=POP_FIVE_HIST>.

¹⁵¹ The difference is likely an order of magnitude at the federal level. The Commissioner of Lobbying lists approximately 8,500 lobbyists in Canada in 2016-17. Estimates are that there are 100,000 lobbyists in the U.S. in 2014. *Office of the Commissioner of Lobbying of Canada Annual Report 16/17*, by Office of the Commissioner of Lobbying (Office of the Commissioner of Lobbying of Canada, 2017). Lee Fang, *supra* note 105.

¹⁵² A. Paul Pross, *supra* note 2 at 155.

¹⁵³ *Ibid*; Hugh Garnet Thorburn & Royal Commission on the Economic Union and Development Prospects for Canada, *supra* note 2 at 76.

First, the competition for influence will encourage lobbyists to seek strategies they believe to be effective. Although strong cultural norms might lead to different approaches between the two countries, it seems unlikely that the cultural differences are strong enough to explain the differences in lobbying. Many of the corporations in Canada are American and would naturally engage in American-style lobbying. If that were more effective, it would soon spread throughout the lobbying industry.

Second, similar patterns of lobbying behaviour differences can be found in comparison between the U.S. and other countries, and this appears to be best explained by the differences in political structures.

Differences in Political Structures

There are substantial differences between the Canadian and American political structures, and these lead to substantial differences in the structure, methods and effectiveness of lobbying. The most obvious and significant difference is that Canada is a parliamentary system, whereas the U.S. is a presidential system. Related to this, the American system is also more open, with a more open and public legislative crafting process, and more open and public bargaining between the branches and levels of government. America also has more frequent federal elections and more political appointees within government. In contrast, Canada's federal government goes longer between elections, the legislative bargaining often happens within the ruling party (or ruling and supporting parties if a minority government) behind closed doors, and more legislation arises from within the comparatively empowered and less-politicized bureaucracy.¹⁵⁴ There are some differences in political culture, Canadians seem to express greater political trust. Both systems are subject to hyper-politicization, but it appears to be stronger in the U.S., as there are different restraining mechanisms at play.¹⁵⁵ Lastly, the Canadian government can fall from no-confidence votes, which provides a strong incentive for all members of the majority party to vote in support of key pieces of legislation.

In the more open American system, lobbyists focus a lot of their energy on the legislators.¹⁵⁶ Decision-making in the Canadian system is more centralized in the upper ranks of the bureaucracy, the Cabinet and the Office of the Prime Minister (PMO).¹⁵⁷ Yet lobbyists do not focus only on the PMO. On narrowly tailored issues it pays to focus on the ministry in question, since federal ministries have great responsibility.¹⁵⁸ Boucher finds that lobbying broadly (and repeatedly) is advantageous, because it allows the lobbyists to acquire insider knowledge and support from the rest of the government and Parliament. This shows the upper echelons of the government that the lobbyists are worth taking

¹⁵⁴ Fred Thompson & W. T. Stanbury, *supra* note 2 at 21 & 25; Gerry Kristianson, "Lobbying and Private Interests in British Columbia Politics" in R K Carty, ed, *Polit Policy Gov Br Columbia* (Vancouver B.C: UBC Press, 1996) 381 at 201.

¹⁵⁵ Gregory Tardi, "Law as a counterweight to politicisation in democratic public management" (2012) 38:4 Commonwealth L Bull 591–615 at 593 & 598.

¹⁵⁶ Fred Thompson & W. T. Stanbury, *supra* note 2 at 21.

¹⁵⁷ *Ibid* at 21 & 25; Gerry Kristianson, *supra* note 154 at 201.

¹⁵⁸ Maxime Boucher, *supra* note 2 at 319.

seriously, and increases their odds of successfully lobbying the PMO.¹⁵⁹ Pross points out that Canadian lobbyists concentrate their attention on the areas where bills originate: areas that are not visible to the general public.¹⁶⁰ Dawson argues that the Canadian Cabinet and PMO remain more accessible than the British ones.¹⁶¹ This makes lobbying easier in Canada than in the U.K. and the E.U., but more difficult than in the U.S.

These differences are reflected in the lobbying legislation. The Canadian *Lobbying Act* specifically includes all bureaucrats, and it would be ineffectual if it focused only on the legislature. The American Act began with a focus on the legislature, and only extended gradually to the rest of the government. Holman and Luneburg argue that the American Act still remains weaker in application to the executive branch, due to the co-equal divisions of powers and concerns about over-reach if the legislature regulates lobbying of the executive too strictly.¹⁶² Canada's Commissioner of Lobbying is stronger and more independent than the U.S. of the Secretary of the Senate and the Clerk of the House of Representatives. The Commissioner of Lobbying is an independent officer appointed for 7 years. The American positions are much more political and serve at the whim of the party in power.¹⁶³ Canada has a long history of independent Parliamentary officers and non-political professional bureaucrats to draw upon. The lobbying oversight positions have remained more political and partisan in the U.S., likely because of the balance of power structure of its government.¹⁶⁴

Vetogates

A result of the different political structures is that the American system of checks and balances in government leads to more nexus points at which legislation and political appointments can be stalled. The U.S. has less party unity (due to structural factors) and more political actors who, working individually or in small groups, can veto change. These nexus points, known as "vetogates"¹⁶⁵, exist in every pluralistic democratic political system, but the number of vetogates varies widely. The American system has more vetogates than most other functioning democracies.¹⁶⁶ Eskridge lists nine vetogates in

¹⁵⁹ "It appears that as the number of lobbying contacts with executive and legislative bodies increases, the number of lobbying contacts with the PMO increases as well." *Ibid* at 322 & 333.

¹⁶⁰ A. Paul Pross, *supra* note 2 at 155.

¹⁶¹ A. Paul Pross, *supra* note 2 at 6 & 40.

¹⁶² Craig Holman & William Luneburg, "Lobbying and transparency", *supra* note 96 at 84.

¹⁶³ The Secretary of the Senate and the Clerk of the House of Representatives are essentially appointed by the respective majority caucus or majority leader (in the Senate), and do not have the same protections as the commissioner of Lobbying.

¹⁶⁴ The Secretary of the Senate and the Clerk of the House of Representatives are essentially appointed by the respective majority caucus or majority leader (in the Senate), and do not have the same protections as the commissioner of Lobbying.

¹⁶⁵ The term "vetogates" originates with McNollgast. Mathew D McCubbins, Roger G Noll & Barry R Weingast, "Positive Canons: The Role of Legislative Bargains in Statutory Interpretation" (1992), online: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5953&context=faculty_scholarship>.

¹⁶⁶ These vetogates combined with the influence of business lobbyists accounts for Mahoney's finding (discussed later) that in the U.S. only 11% of proposed policies were enacted, versus 80% in the E.U. Cornelia Woll, "The brash and the soft-spoken: Lobbying styles in a transatlantic comparison" (2012) 1:2 Interest Groups Advocacy 193–214 at 205.

the American system, and three more can reasonably be added to his list, making twelve.¹⁶⁷ In comparison, Canada has between three to seven vetogates, and the risk of non-confidence gives those in the majority party an incentive to avoid using them.¹⁶⁸

Moreover, the vetogates in the American system are more likely to activate and stop legislation, because they are controlled by more independent interests and can be activated by smaller groups of people. In the American system the vetogates are controlled by separate branches of government, each motivated by somewhat different incentives and interests, and often by separate political parties with weaker party unity. For instance, the President might be a left-wing Democrat, the House might be controlled by Republicans, and the Senate might be controlled by centrist Democrats who are not beholden to the President and lack a veto-proof majority. In comparison, in the Canadian system the ruling party controls the executive branch, the House of Commons and often the Senate. The Prime Minister effectively controls the executive directly, and the legislature relatively directly through appointment powers and the strong party unity of the Canadian system. Moreover, the Canadian Senate is not viewed as a fully co-equal branch of government, and only rarely exercises its vetogate powers. Thus the branches of government are only somewhat independent vetogates. In addition, individual American legislators can stop legislation through control over key committees and Senators have vetoes and holds over legislation, judgeships and appointments. Canadian legislative committees are weaker and less independent, and individual Canadian legislators generally lack the ability to exercise vetogates on their own. Thus the American system has approximately double the number of vetogates than the Canadian system, and they are on average significantly more likely to activate. This structural difference has a substantial impact on lobbying.

Eskridge argues that systems with more vetogates will (1) have more difficulty enacting legislation; (2) will tend to enact legislation with compromises, logrolls, and delegations; and, (3) will have more difficulty repealing already enacted legislation.¹⁶⁹ Baumgartner *et al.*'s multi-year study of lobbying in Washington comes to similar conclusions. There is a *status quo bias* in any political system,

¹⁶⁷ William N Eskridge Jr, "Vetogates, Chevron, Preemption" (2007) 83:4 Notre Dame Law Rev 1441–1494. Eskridge lists nine vetogates in the American system, (1) House Committee, (2) House Rules Committee, (3) House Floor Consideration, (4) Senate Committee, (5) Senate Unanimous Consent Agreement, (6) Senate Filibusters & Holds, (7) Conference Committee, (8) Conference Bill Consideration in both the House and Senate, and the (9) Presidential Veto. To this list we could also add three more: (10) the House and Senate Appropriation Committees, both of whose approval is often necessary for legislation to proceed; (11) the shared Senate and Presidential power to appoint executive positions ensures that there are reoccurring vetogates even on established legislation and departments; and (12) the Supreme Court has also acted as a vetogate, becoming involved in many of the large bills and executive actions. On a local level, the partizan nature of judgeships, particularly elected judges, creates a far more active judiciary that is more likely to exercise its vetogate power.

¹⁶⁸ The list would likely include (1) the PMO, (2) House of Commons committee, (3) House vote, (4) Senate Committee and (5) Senate vote. One could reasonably add (6) the deputy minister and (7) Minister of the related branch of the bureaucracy to the list. In theory the Canadian Supreme Court has the same vetogate power as the American Supreme Court, but it has not exercised it in the same political way. This is likely because the makeup and appointment system of the Court is less directly partisan, and because there are fewer power struggles within the branches of the federal government.

¹⁶⁹ William N Eskridge Jr, *supra* note 167.

but it is particularly strong in the American system. The institutional stickiness favours staying still over progressing to a new policy equilibrium.¹⁷⁰ They argue that the American political process is subject to long period of stasis, as forces for change try to overcome the legislative friction of the status quo until there is sudden significant change, followed by another long period of stasis.¹⁷¹ Hacker and Pierson refer to this stasis as *policy drift*, where officials fail to update laws and policies to adapt to new circumstances, often due to the influence of lobbyists.

Kludgeocracy

Baumgartner *et al.* also point out that the high costs in political capital required for change results in a prevalence of omnibus legislation that offers something for a large number of political players all at once. Teles has argued that this is one of the factors that has led to the U.S. becoming a *kludgeocracy*.¹⁷² A kludgeocracy is a governmental system where public policy is excessively convoluted, and increasingly full of rickety self-defeating complexity, because it incorporates so many benefits to private special interest groups.¹⁷³ Kludge legislation is built on layers of patches. It operates poorly and wastefully, and is navigable only by insiders who profit from the complexity.

The result of this political structure in the American system is that lobbyists who defend the status quo have a significant advantage. A secondary result is that the prevalence of omnibus legislation means that when legislation is likely to pass, there will be more payouts and changes, and hence more incentive for a broader collection of lobbying interests to get involved. Thus, due to the reduced kludgeocracy, it is possible that parliamentary systems motivate comparatively fewer lobbyists, and offer them less rewards.

Adversarial versus Co-operative Lobbying

Since the American political system favours the status quo, and since the majority of American lobbying strives to protect the status quo, U.S. lobbyists tend to be more adversarial, knowing they have a good chance of succeeding in preventing change.¹⁷⁴ In contrast, Woll finds that in the more bureaucratic E.U. system it is harder to completely suppress new legislation, and hence European

¹⁷⁰ Frank R. Baumgartner et al, *supra* note 59.

¹⁷¹ *Ibid.*

¹⁷² Lee Drutman, *The Business of America is Lobbying: How Corporations Became Politicized and Politics Became More Corporate* (Oxford University Press, 2015) at 36.

¹⁷³ *Ibid.* The Affordable Care Act (Obamacare) is a good example of this process. It was essentially designed to provide universal insurance through the private insurance market, making it excessively complicated and unstable. It forced citizens to buy private insurance, transferring their wealth to private insurance agencies instead of collecting taxes. The most popular facet of the program was the simple expansion of Medicaid – an older public program.

¹⁷⁴ The vast majority of lobbyists work for business interests in various forms, and the top priority for most corporate lobbyists is preserving the status quo, and they mobilize only when change becomes a real possibility. Frank R. Baumgartner et al, *supra* note 59 at 80; Cornelia Woll, “The brash and the soft-spoken”, *supra* note 166 at 205; Lee Drutman, “What we Get Wrong about Lobbying and Corruption”, *Wash Post* (16 April 2015), online: <<https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/04/16/what-we-get-wrong-about-lobbying-and-corruption/>>.

lobbying is more reserved, consensus-seeking, and discreet.¹⁷⁵ Woll concludes, that the “question for a European lobbyist is therefore just how much they are willing to compromise in order to have a chance to continue influencing a policy proposal.”¹⁷⁶ Mahoney agrees, “EU policymaking leads to more compromise with all parties achieving some level of success while the U.S. policymaking system tends toward winner-take-all outcomes.”¹⁷⁷ The numbers back this up. Woll reports Mahoney’s findings that the passage rate of legislation is very different between the E.U. and the U.S. In the E.U. more than 80% of proposed policies were eventually enacted, whereas in the U.S. only 11% of the proposed policies were enacted.¹⁷⁸

The greater passage rate of legislation in the E.U. system means that the lobbyists are more likely to get partial success by compromising when seeking to influence legislation. If they insist on an adversarial approach of completely opposing the legislation, they are likely to fail and end up with nothing.¹⁷⁹ The net result is that lobbyists are on average are actually more successful in the E.U. than in the U.S., but fewer of them attain exactly what they want.¹⁸⁰

The situation in Canada likely falls between the two jurisdictions. Canada’s political system sits in-between the U.S. and the E.U. on the political continuum. Like the E.U., Canada’s system is relatively closed and bureaucratic. However, there are many other factors that make it more like America when it comes to lobbying. In contrast with Europe, the U.S. and Canada have a long history of civic engagement in lobbying government, as well as a history of visible lobbying scandals. Chari *et al.* argue that it is for these reasons that North America governments have been forced to adopt more extensive lobbying regulations.¹⁸¹ Mahoney points out that the “media used to affect public opinion is integrated in the U.S. and fragmented in Europe”¹⁸². Stiglitz makes a similar argument, that in the U.S. the top 1% who control lobbying are adept at using the media to persuade the public to support the policies they favour.¹⁸³ In all these factors Canada is more like the United States. Thus, we would expect that Canadian lobbyists are more likely to seek compromise than the American ones, but not to the extent seen in the E.U.

In his work on lobbying in Canada, Pross’ conclusions support those stated above. He finds that Canadian lobbyists work in a more opaque environment than American ones, where the bureaucracy is more insulated from pressure, both from lobbyists and the public. He concludes that in order to work with the bureaucracy, Canadian lobbyists generally take a quiet insider approach, avoiding public

¹⁷⁵ Cornelia Woll, “The brash and the soft-spoken”, *supra* note 166 at 202.

¹⁷⁶ *Ibid* at 209.

¹⁷⁷ Christine Mahoney, “Lobbying Success in the United States and the European Union - Cambridge Journals Online” (2007) 27:01 J Public Policy 35–56 at 44.

¹⁷⁸ Cornelia Woll, “The brash and the soft-spoken”, *supra* note 166 at 205.

¹⁷⁹ Christine Mahoney, *supra* note 177 at 39.

¹⁸⁰ Cornelia Woll, “The brash and the soft-spoken”, *supra* note 166 at 206.

¹⁸¹ Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 112.

¹⁸² Timothy M Lapira, Herschel F Thomas & Frank R Baumgartner, “The two worlds of lobbying: Washington lobbyists in the core and on the periphery” (2014) 3:3 Interest Groups Advocacy 219–245 at 204. They contend that transparency about the activities of interest groups is also lower in the E.U.

¹⁸³ Joseph E. Stiglitz, *supra* note 38 c 6, s Shaping perceptions about policies.

confrontation and media attention on their issue.¹⁸⁴ They rely on their established connections with officials to succeed. Pross has observed, “[i]n the U.S. groups have access because they have influence; in Canada groups have influence because they have access.”¹⁸⁵ This difference should not be exaggerated, but the insider connections are proportionally more important to Canadian lobbyists. Although Pross’ work was from the 1970s and the size and scope of lobbying has transformed since then, my interviews have largely supported his conclusion.¹⁸⁶ Graham *et al.*’s recent study of the oil industry lobbying in Canada under the Harper and Trudeau administrations also found the same pattern of insider lobbying and influence of industry groups.

Across both time periods we find a network core of a small world of leading industry associations and targeted offices and individuals within government that are in regular contact with each other.¹⁸⁷

Graham *et al.* did find some differences in the targeting of the lobbying, depending on the receptiveness of the politicians to the preferences of the oil industry.¹⁸⁸ When politicians were less favourable to their point of view, the oil industry lobbyists shifted their attention to the bureaucracy and increased the amount of lobbying.¹⁸⁹

Bennedsen and Feldmann argue that the existence of the non-confidence vote makes parliamentary governments more cohesive, and lobbyists comparatively weaker. Therefore, in parliamentary systems it makes more sense to focus lobbying on the bureaucracy and the implementation of policy.¹⁹⁰ Thompson and Stanbury agree that the cabinet’s monopoly of political power in Canada weakens interest groups and renders lobbying the legislature less effective.¹⁹¹ This monopoly also gives the cabinet lots of latitude in its receptiveness to lobbying, so lobbyists might still have great influence if the cabinet is amenable to it.¹⁹²

¹⁸⁴ In the insider approach the lobbying organization speaks and meets with government officials directly, and keeps a low public profile. In the outsider approach, the lobbying group uses visible stunts, protests, media outlets, and other public methods to pressure officials. See Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Insider-Outsider Approach, p. 100.

¹⁸⁵ Fred Thompson & W. T. Stanbury, *supra* note 2 at 43.

¹⁸⁶ A. Paul Pross, *supra* note 2.

¹⁸⁷ Nicolas Graham, William K Carroll & David Chen, *supra* note 2 at 6.

¹⁸⁸ “In the Harper years, high volume lobbying activity was focused on Natural Resources Canada, the House of Commons and, to a lesser extent, Environment Canada, Foreign Affairs, Aboriginal Affairs and Northern Development, and the Prime Minister’s Office. CAPP, MAC, TransCanada Corporation and several other firms maintained high-volume lobbying relationships with core state organizations during this period. Under Trudeau, high-volume lobbying relations continued to target Natural Resources Canada, the House of Commons and Environment Canada.” *Ibid.*

¹⁸⁹ “Among the top 10 senior government bureaucrats who remained in their positions after the change in government, their annual contacts with the fossil fuel industry rose from an average of 144.5 contacts under Harper to 228.5 under the Trudeau government.” *Ibid.*

¹⁹⁰ Morten Bennedsen & Sven E. Feldmann, *supra* note 147 at 943.

¹⁹¹ Fred Thompson & W. T. Stanbury, *supra* note 2 at 25.

¹⁹² *Ibid* at 26.

The lobbying reflects the differences between the systems in the respective targeting of different areas of the governments in Canada and America. Presthus' survey of nearly one thousand directors of interest groups is from the late 1970s, but it makes this pattern apparent.¹⁹³ Nearly two-thirds of Canadian interest groups focused on the bureaucracy and cabinet, whereas less than a third of the American groups did so.¹⁹⁴

Table 3: Percentage of Lobbying Targeting Different Areas of Government in Canada and the U.S. ¹⁹⁵

Target of the Interest Group	Canada	U.S.
Bureaucracy	40	21
Cabinet and executive assistants	24	7
Legislators and legislative committees	27	59
Judiciary	3	3
Other	6	9
<i>Total percent</i>	<i>100</i>	<i>99</i>
<i>(Respondents)</i>	<i>(393)</i>	<i>(604)</i>

A final key difference between the two countries is that Canada's lower cost of elections, public funding for political parties (through tax deductions and reimbursements), and strict campaign funding regulations reduces the overlap between lobbying and political campaign fundraising. The issue of campaign donations and lobbying is discussed in depth in Chapter 4.

The Canadian Senate

One last area of the Canadian governmental structure needs to be addressed: the unique role of the Canadian Senate. Colin Campbell, in his work *The Canadian Senate: a Lobby from Within*, argues that the Senate often acts as a pro-business lobby within government.¹⁹⁶ His work is from the late '70s, but his analysis is still applicable. Dozens of senators continue to be business owners or sit on corporate boards.¹⁹⁷ He argues that the predominance of senators still involved with business, or with a business

¹⁹³ Survey performed by Presthus. Table from *Ibid* at 34.

¹⁹⁴ "First of all you have to keep a good lookout on what is going on, on how the government is thinking. That means knowing, and keeping in with cabinet ministers and some senior civil servants. But that is only part of the craft. ... Really, most new ideas begin deep in the civil service machine. The man in charge of some special office ... writes a memo suggesting a new policy on this or that. It works its way slowly up. At that stage civil servants are delighted, just delighted, to talk quietly to people like us, people representing this or that corporation or industry directly involved. That is the time to slip in good ideas. Later it oozes up to the politicians and becomes policy. By the time it is a government bill it is the very devil to change it. Then you have real trouble."

Ibid at 36.

¹⁹⁵ Survey performed by Presthus. Table from *Ibid* at 34. The 2017 Office of the Commissioner of Lobbying annual report, contains similar numbers based on the lobbyists' disclosures. 54% of the lobbying is focused on the bureaucracy, 21% is focused on the Cabinet, and 26% is focused on the legislators. The judiciary is not listed as an option. Office of the Commissioner of Lobbying, *supra* note 151 at 8.

¹⁹⁶ Colin Campbell, *supra* note 2.

¹⁹⁷ Joanna Smith, "Many Canadian senators make money outside the Senate | Toronto Star", *Tor Star* (4 July 2013), online:

background, creates a pro-business bias that is disproportionately receptive to the lobbying of business interests. Since senators do not have to face the public in re-election, he argues that there is little to restrain this bias. Senators can also be more effective advocates once enlisted, because their long terms in office give them unparalleled time to gather experience and connections. In theory this could also apply to backbencher MPs, since they are also allowed to have second jobs. Yet fewer MPs appear to have second jobs, and at least they must continue to seek re-election.¹⁹⁸

Campbell argues that the Canadian lobbying process is a series of steps: first lobbyists make their,

views known to the civil servants who draft the legislation. Then they take their case to the House of Commons committee. If they do not get a favourable response there, they then try to convince the Senate's Banking Committee that their view are reasonable and deserve support.¹⁹⁹

If they succeed then the senators consult with the minister and see if they can get the legislation amended. There is logic to Campbell's position; the predominance of legislators with a business background will create a more pro-business environment. There has also been an increase in legislators with a business background since the 1970s and an increase in pro-business government policies.²⁰⁰ Moreover, the fact that legislators must face periodic elections is one of the most important checks on their behaviour, forcing them to support publicly popular positions.

Prime Minister Trudeau's decision to do away with parties in the Senate likely opened it up to more lobbying, since there is less party discipline constraining individual senators. There has been some key legislative activity in the Senate indicative of the impact of lobbying. For example, the Senate sent the 2017 budget implementation bill back to the House of Commons in opposition to an alcohol excise duty that was linked to inflation.²⁰¹ It is unlikely that the Senate's objection was genuine; linking the duty to inflation was eminently reasonable. The objection was more likely a result of a concerted

<https://www.thestar.com/news/canada/2013/07/04/many_canadian_senators_make_money_outside_the_senate.html>.

¹⁹⁸ The Star found that in 2018, 12 MPs have employment or business income from private sources within the last two years, including "law firms, construction and land surveying companies, a management service organization, and a chain of department stores." Alex Ballingall, "Moonlighting MPs: Does your representative in the House of Commons have a second job?", (21 April 2018), online: *The Star* <<https://www.thestar.com/news/canada/2018/04/21/moonlighting-mps-does-your-representative-in-the-house-of-commons-have-a-second-job.html>>.

¹⁹⁹ Colin Campbell, *supra* note 2 at 14.

²⁰⁰ Susan Delacourt, "Politicians now more likely to be businessmen than lawyers", *Tor Star* (1 February 2013), online: <https://www.thestar.com/news/insight/2013/02/01/politicians_now_more_likely_to_be_businessmen_than_lawyers.html>.

²⁰¹ John Paul Tasker, "'They Caved': Senate Passes Budget Bill Despite Opposition to Alcohol Tax Hikes", (22 June 2017), online: *CBC News* <<http://www.cbc.ca/news/politics/senate-backs-down-budget-bill-1.4173090>>.

lobbying campaign by the alcohol industry. Similarly, there was a great deal of lobbying of the Senate in reaction to the recent Bill C-69 on environmental assessment for major projects. This was partly a reaction to the industry unhappiness with the legislation passed by the elected House.²⁰² 80% of the lobbying was by industry groups, primarily oil and gas interests, 13% was by environmental groups, and 4% was by First Nation organizations.²⁰³ The Senate introduced 187 amendments weakening the environmental protections of the assessment laws, indicating that the lobbying of the oil and gas industry was quite successful.²⁰⁴

Still, there are a number of arguments that weigh against Campbell's view. None of the respondents I interviewed discussed the Senate as an important target for lobbyists. Most emphasized the PMO and the Federal bureaucracy. Additionally, the interviews indicated that lobbyists focus their efforts on the particular decision-maker relevant to the issue at hand, rather than pursuing the topic throughout the entire spectrum of government stakeholders. Considering that few bills originate in the Senate, it has no oversight over regulation, and the power of the Senate and its committees has declined over the decades, even with its pro-business slant it seems likely that the Senate will remain a secondary part of the lobbying story.

Conclusion – Chapter 1

In conclusion, Canadian lobbyists are likely less adversarial, more collaborative, more focused on adjusting legislation towards an acceptable compromise, more focused on their own policy domain, and more likely to take a quiet insider approach than their American counterparts. Canada's officials are more likely to pass the legislation they seek to pass, and face less influence from the overlap between campaign financing and lobbying. Canadian lobbyists might not be able to shatter legislation as effectively as their American counterparts, but they have undoubtedly learnt how to quietly cut away the rough edges most likely to injure their clients. In the next chapter, we will discuss the details of the practice of lobbying in Canada and the United States.

²⁰² See, Nicolas Graham, William K Carroll & David Chen, *supra* note 2 at 47.

²⁰³ Sharon J. Riley & Sarah Cox, *supra* note 40.

²⁰⁴ *Ibid.*

Chapter 2 – Understanding Lobbying in Canada and the U.S.

“Torture and Lobbying... two of the world’s most evil things.”

— Trevor Noah, *The Daily Show* host²⁰⁵

Introduction – Chapter 2.....	58
Understanding Lobbying.....	58
Lobbying is Increasing.....	58
Increasing due to: Changes to Governmental Reach.....	59
Increasing due to: Changes in Public Policy Approaches.....	60
Increasing due to: The Increasing Size of the Economy.....	62
Increasing due to: Lobbying Being Self-Perpetuating and Building on Itself Over Time	63
The Three Prime Justifications for Lobbying.....	67
Justification 1: Tradition.....	67
Justification 2: The Right to Petition Government.....	67
Justification 3: Information Provision	68
What Do Lobbyists Do.....	69
Lobby Government	70
Monitor Government.....	74
Build their Client Base.....	75
Build Relationships with Officials.....	80
Build Relationships with Other lobbyists	95
Four Approaches to Understanding Lobbying	100
The Insider-Outsider Approach.....	100
The Outsider Approach	101
Insider Approach.....	108
The Insider-Outsider Approach: Core and Peripheral Lobbying Groups	110
The Disclosure versus Corruption Approach	111
The Disclosure Heuristic.....	111
The Corruption Heuristic.....	112
The Four Pressures Approach	114
Direct Power and Influence.....	114
Political Context	117
Passion	117

²⁰⁵ *The Daily Show with Trevor Noah*, May 1, 2016.

Popularity	118
The Hydraulic Force Approach	119
Government Created Lobbying	119
Government-Government Lobbying	120
Indirect Government Lobbying	121
Foreign Government Lobbying	121
Government Lobbying of Organizations	122
Government Creation of Independent Lobbying Organizations	123
Government Suppression of Lobbying Organizations and Influence Peddling	124
Canadian Lobbying Statistics	125
Transparency and Lobbying	129
Four Levels of Transparency	129
Transparency and the Disclosure and Corruption Heuristics	131
Accuracy in Transparency	132
Advantages of Lobbying Transparency	133
Disadvantages of Lobbying Transparency	133
The Future of Transparency	134
The Effectiveness of Lobbying	134
Why Lobbying Effect on Legislation is Hard to Detect	135
Studies Show that Lobbying is Influential	136
Benefits to Business Organizations	138
Greater Focus on Low Salience Areas and Regulations	140
Conclusion – Chapter 2	141

Introduction – Chapter 2

We discussed lobbying legislation in the previous chapter. This chapter investigates the actual practice of lobbying in Canada and the United States. It examines the role lobbying plays in governance, and what we can discern about the influence lobbyists and special interests exercise over government. It investigates how and why lobbying is increasing. It covers the various interests who practice lobbying: corporations; citizen groups; unions; and other levels of government. The chapter begins with a section intended to help the reader understand the practice of lobbying. It then explores four approaches to understanding lobbying; considers the issue of government created lobbying; discusses a number of Canadian lobbying statistics; investigates transparency and lobbying; and concludes with an examination of the effectiveness of lobbying.

Understanding Lobbying

Certain patterns can be discerned in the practices of lobbying, which will help set a basis for understanding lobbying. This section will cover how lobbying is increasing, and the three pillars that justify lobbying: *tradition*, *the right to petition government*, and *information provision*. Then it will cover what lobbyists do: how they lobby government, monitor government, build their client base, build relationships with officials, and build relationships with other lobbyists.

Lobbying is Increasing

Since the 1970s lobbying has been increasing steadily across the Western developed world.²⁰⁶ Studies have found a measurable increase in Canada²⁰⁷, the U.S.²⁰⁸, the U.K.²⁰⁹ and the E.U. This is an increase in both the amount spent on lobbying, and the number of lobbying organizations. By 1995, the amount spent on lobbying on the federal level in the U.S. declared under the *1995 Lobbying Disclosure Act*²¹⁰ over a 4-year period (containing 2 House elections and 2/3 of the Senate cycle) was \$6.5 billion. This exceeded the \$5.7 billion spent by political campaigns over the same period.²¹¹ This is figure

²⁰⁶ Cornelia Woll, “The brash and the soft-spoken”, *supra* note 166. Jason Fekete, “Number of federal lobbyists up sharply”, *Ott Citiz* (12 June 2014), online: <<http://ottawacitizen.com/news/national/number-of-federal-lobbyists-up-sharply>>.

²⁰⁷ Jason Fekete, *supra* note 206.

²⁰⁸ Lee Drutman, *supra* note 172 at 56. “In 1970, there were five registered lobbyists for every one of the 535 members of Congress. Today there are twenty-two lobbyists for every member.” Chuck Collins, *99 to 1: How Wealth Inequality Is Wrecking the World and What We Can Do about It* (San Francisco: Berrett-Koehler Publishers, 2012) at 36.

²⁰⁹ William Dinan & David Miller, “Sledgehammers, nuts and rotten apples: Reassessing the case for lobbying self-regulation in the United Kingdom” (2012) 1:1 *Interest Groups Advocacy* 105–114 at 108.

²¹⁰ *Lobbying Disclosure Act*, (2 U.S.C. § 1601) 1995.

²¹¹ *Institutional Corruption? The revolving door in American and British politics*, by Mirko Draca, SMF - CAGE Global Perspectives Series 1 (UK: SMF - CAGE, 2014) at 8; in a newspaper article in 2016, Drutman noted that the \$2.6 billion in yearly U.S. reported corporate lobbying spending is now more than the combined budgets of the Senate (\$860 million) and the House (\$1.18 billion). Lee Drutman, *supra* note 174.

represents the amount of declared lobbying, which was likely 10% to 50% of the amount actually spent.²¹²

The growth of lobbying was not a simple process. It took place in multiple jurisdictions and countries, across a wide period of time, involving millions of complex business, economic and political decisions; it is inevitable that there were multiple factors and feedback loops involved. Lux *et al.* find that on the micro level the biggest drivers of corporate political activity are government regulation, politician incumbency and firm size.²¹³ Yet, political incumbency has not changed significantly in the U.S. over the last 50 years²¹⁴, so it is probably not an explanation for the macro trend of increased lobbying. Combining the macro and micro factors, we can break the increase down into four overlapping motivating dynamics: changes to governmental reach; changes in public policy approaches; the increasing size of the economy; and the fact that lobbying is self-perpetuating, increasing over time.

Increasing due to: Changes to Governmental Reach

Most commentators agree that a fundamental reason for the increase in lobbying is a reaction to the growing enormous expansion of governmental reach over the last century. This growth in laws, rules and regulations is not an accident of history or the output of excessive bureaucracy. It is a natural reaction to very real and ongoing challenges. It would be impossible to have a functioning modern nation without a government with the reach we see in the Western world. There are simply too many problems that the government needs to address. These issues include disaster relief, control over modern weaponry, industrial policy, environmental and safety regulations, workplace regulations, managed transportation and communication systems, regulating modern financial systems – all essential to ensuring millions of people continue to live long peaceful lives together. Almost all businesses are affected by the increased scope of modern governmental decisions. In turn, government regulation has been one of main drivers of corporate political activity.²¹⁵ Businesses that can afford it have good reason to seek to influence government decisions – decisions that can dramatically alter the market place, the bottom line, and the business's competitive advantages. Although the expansion in government reach grew rather consistently over the last century, the real explosion in the number of interest groups, which then began to engage in lobbying, began in the 1960s and '70s.²¹⁶ Moreover, lobbying continues to increase even as the expansion of government has levelled off. This has led many political scientists to conclude that it was specific social dynamics and policy changes that are the root explanation for the expansion of lobbying.

²¹² We know that there is a massive unregistered shadow lobbying system in the U.S. The 50% figure is derived from studies that show only half of politicians who go on to be lobbyists properly register their activities. The 10% figure is derived from estimates that 90% of lobbyists do not register (this may or may not represent 90% of spending being unregistered). Lee Fang, *supra* note 105; Isaac Arnsdorf, *supra* note 107; See also Tim LaPira & Herschel Thomas, *supra* note 112.

²¹³ Sean Lux, T Russell Crook & David J Woehr, "Mixing business with politics: A meta-analysis of the antecedents and outcomes of corporate political activity" (2011) 37:1 J Manag 223–247 at 238.

²¹⁴ Center for Responsible Politics, "Reelection Rates Over the Years: US House & US Senate", (August 2017), online: *Open Secrets* <<https://www.opensecrets.org/overview/reelect.php>>.

²¹⁵ Sean Lux, T. Russell Crook & David J. Woehr, "Mixing business with politics", *supra* note 213 at 238.

²¹⁶ Richard A Smith, "Interest Group Influence in the U.S. Congress" (1995) 20:1 Legis Stud Q 89–139 at 112.

Increasing due to: Changes in Public Policy Approaches

The dramatic increase in the number of interest groups in the 1960s and '70s began first with the organization of citizen groups. This was likely a result of many factors: social change, new approaches to politics, the disruption of traditional power structures, the growing complexity of society, and the need to address problems that fell outside the concerns of the established political parties of the time. Many of these new interest groups coalesced into structured organizations that began to lobby government, pushing successfully for significant changes to policy – such as environmental regulations and anti-discrimination legislation – that had a wide impact on society. The standard story is that this further expanded the scope of governmental legislation, and brought additional conflict with business interests, as it increased their short-term compliance costs. These rules might have helped businesses in the long run, by improving society and the available talent pool. Regardless, businesses perceived the changes as hostile, and began to organize in their own right. Thus, it is argued that there was a second wave of growth in interest groups in the late 1970s and '80s, as business groups caught up with and then surpassed the lobbying efforts of citizen interest groups and unions.

Although the expansion of the business organizations is often argued to be a response to the growing reach of government, it is equally convincing that it might have been a response to the visibility of the citizen interest groups and an attempt to imitate their tactics, rather than a reaction to actual policy changes. It could also have been an outgrowth of the same underlying forces that initially motivated the growth of citizen interest groups, but simply delayed by a few years.

The Policy of Seeking Public Input Increases Lobbying

Along with the expansion of interest groups in the 1970s – and perhaps partly because of it – there was a significant underlying policy change in Western governments: increasingly governments began to value consent and consultation in policy-making decisions. The governments of many Western countries, including Canada, the U.K. and the U.S. emphasized a deliberate policy of seeking public input in-between elections – input from both citizens and business interests. Hence the involvement of lobbyists became a matter of public policy.

The Policy of Seeking Business Input Increases Lobbying

Dinan and Miller present a different explanation of the expansion of lobbying, particularly business lobbying. They argue that it was specifically “a direct result of the business-friendly policies pursued by successive governments”²¹⁷. They point out that in the late 1970s and early 80s governments became more actively pro-business, embracing the input and lobbying of business interests. Thus it was a widespread trend towards consent and consultation with business that was the underlying motivating factor. They maintain the input of citizen interest groups and their lobbying was simply a by-product of the government’s true goals. The election of pro-business governments and ongoing pro-business ideology largely accounts for the growth of lobbying. The larger scope of business lobbying is also explainable by this reasoning.

²¹⁷ William Dinan & David Miller, “Sledgehammers, nuts and rotten apples”, *supra* note 209 at 108.

Lux *et al.* provide additional support for this argument. They note that,

Kaiser (2009) observed that the Republican Party gaining control of the Congress in 1994 likely led to increases in CPA [Corporate Political Activity, comprised of political contributions and lobbying] as more business interests perceived a more sympathetic audience in Washington. Sympathetic politicians are more likely to provide business interests access and are more receptive to their policy ideas and positions, providing firms an opportunity for CPA.²¹⁸

If the increased Republican control over Congress is a factor in the growth of corporate lobbying, it is reasonable to conclude that the overall increase in business-friendly politics has led to more corporate lobbying, and the trend might be distinct from the earlier rise of citizen lobbying organizations.

The Policy of Cost Cutting Increases Lobbying

There was at least one other significant policy change that encouraged the growth of lobbying. In the 1980s and '90s many Western governments embraced cost-cutting and deficit reduction as a policy goal. These cost reductions were tied with earlier and ongoing attempts to reduce the size of the government bureaucracy. During this process, departments were cut, scientists and research pruned, and governmental institutional capacity was lost.²¹⁹ Between 1979 and 2005, the number of Congressional staffers declined by about a third.²²⁰ This left Congress less institutionally capable to handle complicated policy issues, and lobbyists stepped in to fill the void.²²¹

“After decades of cutting its own staff and research arms, much of Capitol Hill’s institutional memory and policy expertise now resides in the lobbying industry.”²²² Think tanks and external policy organizations, like the American Legislative Exchange Council (ALEC), have become an external (and often biased) source of policy knowledge. These organizations existed before the 1980s, but grew immensely in scope and influence. They became particularly influential for right-wing politicians, who tended to distrust the government bureaucracy due to its presumed anti-market bias.

The Policy of Good Government Reform Increases Lobbying and Public Distrust

Although it is difficult to prove, it is possible that the increase in lobbying has also been fed, unexpectedly, by the movement towards good governance reforms. The increased barriers against self-

²¹⁸ Sean Lux, T. Russell Crook & David J. Woehr, “Mixing business with politics”, *supra* note 213 at 227.

²¹⁹ *State of the Congress: Staff Perspectives on Institutional Capacity in the House and Senate*, by Kathy Goldschmidt (Washington, D.C.: Congressional Management Foundation, 2017) at 8.

²²⁰ Lee Drutman, *supra* note 172 at 34.

²²¹ Chris Mooney, “Requiem for an office” (2005) 61:5 Bull At Sci, online: <<http://www.princeton.edu/step/seminars/previous/fall-2005/Mooneyreading2005No2Requiemforanoffice.pdf>> at 3.

²²² Nicholas Confessore, “How to Get Rich in Trump’s Washington”, *N Y Times* (30 August 2017), online: <<https://www.nytimes.com/2017/08/30/magazine/how-to-get-rich-in-trumps-washington.html>>.

dealing and bribery, and the push for government openness over the last century, have increased the scope and visibility of lobbying. As the acceptability of trading favours and possibility of direct bribery has declined, those seeking to influence government decisions have increasingly been required to resort to more organized campaigns and pursue widespread lobbying to accomplish their goals. Likewise, the visibility and general acceptability of lobbying, as it becomes more open and the rewards more visible, has encouraged other organizations and businesses to lobby.

Ironically, this increased openness may also lead to greater public distrust. In the modern era, the government's increased scope has led to higher public expectations of its performance. Meanwhile, through the media, the general population witnesses the activities of lobbyists and the scandals of government in a way they would not have been possible in a less open era. The visibility of the lobbying process and scandals drives down the public's faith in their democratic institutions. Sadly, the very good government reforms intended to increase the public's faith in their democratic government may have bred mistrust.

The increase in lobbying was not simultaneous in the Western world. It appears to have begun earlier in the United States, with Canada following suit, and seems to have lagged significantly in the E.U. and the European countries. This hints that the expansion of lobbying is likely followed changes in government policies and business practices that are spreading from country to country. Governments are adopting more lobbying-friendly policies they learn from the practices of other countries, and businesses are learning the lobbying tactics from multi-national corporations and businesses from other countries.

Increasing due to: The Increasing Size of the Economy

Although many commentators are focused on the reach of government and policy changes as an explanation for the increase in lobbying, general economic growth is also a significant factor. Mirroring the increased reach of government regulations, the increased size of the economy and increased tax base have dramatically enlarged government budgets across the Western world. The larger budgets offer more profit opportunities from government contracts and interactions, making lobbying more lucrative and tempting. The larger economy has meant that there is more wealth in the system to spend beyond basic needs, which opens up more opportunity for additional spending on lobbying.²²³

It appears that the proliferation of international trade, larger businesses, and the establishment of trade association over time has increased lobbying. More organizations have the means and wherewithal to lobby; as they grow, they can lobby with a much smaller percentage of their budget. Reich argues that the increased competition, globalization and profits of the modern capitalist era – what he refers to as supercapitalism – drives corporations to increase their lobbying.²²⁴ As business

²²³ This transfer of lobbying practices most likely includes indirect transfers of knowledge from other businesses. For example, the practices might be learned from associated trade-groups, consultants, consultant lobbyists, think tanks, and hires from other companies.

²²⁴ Robert B Reich, *Supercapitalism: The Transformation of Business, Democracy, and Everyday Life*, reprint edition ed (New York, NY: Vintage, 2008) c one.

become increasingly large, and often multi-national, they have to interact with more complex situations and more areas and levels of governance. They face pressure to develop lobbying expertise to help address the issues and policy concerns that invariably arise. Facing the complications of dealing with multiple jurisdictions, larger corporations become standard-bearers for regulatory standardization. The desire to reduce their costs naturally leads them towards lobbying government. Additionally, as businesses and organizations lobby successfully, their competitors are compelled to counter-lobby to prevent legislative and regulatory changes that would create a competitive disadvantage. Citizen groups are also compelled to lobby to prevent pro-business changes they consider harmful.

There seems to have been a decline in market competition in the U.S. over the last thirty years, as Industries have become more concentrated.²²⁵ Canada appears to be undergoing a similar change.²²⁶ It is plausible that the increase in lobbying is linked to the decline in competition. The increased rents from the reduced competition leave the corporations with more profit to spend on lobbying. At the same time, corporations that dominate their industries have strong incentive to lobby the government to limit new competitors from entering the market.

All of the explanations for the increase in lobbying would not account for the dramatic growth recorded, were it not for the fact that lobbying is self-perpetuating, increasing and building on itself over time.

Increasing due to: Lobbying Being Self-Perpetuating and Building on Itself Over Time

The final factor that explains the increase in lobbying is that the practice of lobbying is sticky; it builds up over time – lobbying begets more lobbying.²²⁷ As Holyoke argues, once an organization starts to lobby, it generally continues to do so.²²⁸ Lobbyists continue to convince new clients that lobbying is worth pursuing, while old clients continue to lobby, and competitors are forced to follow. This stickiness has three related causes: lobbying becomes established practice in the organization, lobbying has high rewards, and lobbying has unpredictable rewards that make it difficult to give up.

Lobbying Becomes Part of an Organization's Structure

There is a steep learning curve to lobbying, but once it is overcome lobbying often becomes a permanent part of an organization's practices.²²⁹ Activists, citizen groups, social movements and unions generally need to engage government directly once the group become established, to achieve tangible legislative and administrative outcomes in support of their goals, and to keep their membership happy.

²²⁵ "[T]hree sets of trends ... are broadly suggestive of a decline in competition: increasing industry concentration, increasing rents accruing to a few firms, and lower levels of firm entry and labor market mobility." *Benefits of Competition and Indicators of Market Power*, Issue Brief, by Council of Economic Advisors, Issue Brief (The White House Council of Economic Advisors, 2016) at 4.

²²⁶ *Trends in Firm Entry and New Entrepreneurship in Canada*, Bank of Canada Discussion Paper, by Shutao Cao et al, Bank of Canada Discussion Paper 2015–11 (Ottawa, Ontario, Canada K1A 0G9: Bank of Canada, 2015) at 10.

²²⁷ Lee Drutman, *supra* note 172 at 216.

²²⁸ Thomas T Holyoke, *Interest Groups and Lobbying: Pursuing Political Interests in America* (Boulder, Colorado: Westview Press, 2014).

²²⁹ Lee Drutman, *supra* note 172 at 130.

This requires the group develop the expertise and organizational structure necessary to lobby the government. Once they develop the means to do so, there is little reason to stop lobbying, as it is unlikely the organization will stop pursuing goals that require government action. Meanwhile new citizen groups continue to form and learn to lobby, while established organizations are likely to continue lobbying. A notable exception can be found in the Occupy Wall Street movement, which resisted transitioning to a traditional organizational structure and resisted forming the insider connections necessary for lobbying. The organization punched far below its weight due to these decisions. It eventually fizzled out, while the Tea Party movements of the same period adopted formal organizational structures and persisted.²³⁰

For business the story is slightly different. Lobbying government is outside of their core expertise and not a necessary part of their practices. They lack the expertise to pursue lobbying. However, firm size is one of the main factors associated with corporate political activity.²³¹ As firms grow larger, more issues arise that require they interact with government, and they become subject to more regulations. The businesses gain more capacity to lobby, and more of their large competitors are likely to lobby. Lobbying becomes a tempting solution to vexing political decisions. It is no accident that all the big Silicon Valley firms were initially reluctant to lobby, and they all eventually embraced it. Once they overcome the learning curve, the activity becomes incorporated into the business' practices, and becomes part of the business' repertoire, culture, and structure.²³² At this point there is both momentum and incentive to keep lobbying. This initial lobbying investment often drives future decisions to invest yet more in lobbying. There is also a form of path dependency related in lobbying. The more an organization invests in a certain capacity, the more it tends to drive future strategic investment in that direction.²³³ Even those businesses that do not lobby directly often join trade and professional associations as they become established. The associations become repositories of business information and, eager to prove their value, often go on to lobby for the members in areas of common interest.

Lobbying Brings Returns

The high potential returns of lobbying are the second reason that lobbying is sticky. There are two facets to the returns. The primary and most obvious facet is that lobbying often provides a good financial return on investment.²³⁴ We will return to the evidence for these direct returns in detail later in the chapter. There are also indirect returns. Most businesses lobby to prevent regulatory and legislative

²³⁰ Theda Skocpol, "A guide to rebuilding the Democratic Party, from the ground up", (5 January 2017), online: Vox <<https://www.vox.com/the-big-idea/2017/1/5/14176156/rebuild-democratic-party-dnc-strategy>>.

²³¹ The biggest drivers of corporate political activity appear to be firm size, politician incumbency, and government regulation. It is also associated with increased industry concentration and political competition, especially from unions. Sean Lux, T. Russell Crook & David J. Woehr, "Mixing business with politics", *supra* note 213 at 238 & 227.

²³² Lee Drutman, *supra* note 172 at 130.

²³³ *Ibid.*

²³⁴ *Ibid* at 150; Brad Plumer, "The Outsized Returns from Lobbying", (10 October 2011), online: *Wash Post* <https://www.washingtonpost.com/blogs/ezra-klein/post/the-outsized-returns-from-lobbying/2011/10/10/gIQADSNEaL_blog.html>; Sean Lux, T. Russell Crook & David J. Woehr, "Mixing business with politics", *supra* note 213 at 239.

change that they fear will hurt their bottom line. Since they often over-estimate the cost of change, they over-value the benefits of the lobbying against it.²³⁵

The second facet is that lobbying provides a sense of power.

Lobbying Provides a Sense of Power

It is likely that a second facet to the reason corporations continue to lobby is the sense of power and prestige it provides. Like most people, corporate leaders have a vision of how society should be; but unlike most people, they have the means to enact their vision. Employing lobbyists – like the corporate jet, corner office or limo – is a perk the corporation provides for the top managers to enhance their feelings of importance and power. Their companies pay for the political donations and lobbyists, but it is the executives who get to mingle with the politicians and determine what policies to push. The money also buys them invitations to events and galas where they can meet the political (and often entertainment) elites. The business' lobbying expenditures – and related campaign donations – buys the top management influence, access and prestige.

In the United-States, there are many business magnates who participate in politics so openly that they are well-known to the public. Billionaires including Charles Koch, Sheldon Adelson, George Soros and Tom Steyer, spend vast sums directly and through their corporations and foundations to see their vision enacted. The elites in Canada are a little more circumspect, but where campaign finance law allows, they too have proven willing to get involved in politics. For example, billionaire Edmonton Oilers owner Daryl Katz gave Alberta's Progressive Conservatives \$430,000, over a quarter of their total donations in the 2012 provincial elections.²³⁶

In favour of this argument is the fact that the executives of publicly held corporations have insisted on maintaining the right to make lobbying, political support, and donation decisions on behalf of the corporations they manage. They have actively resisted laws and shareholder resolutions that would disclose the targets of their lobbying expenditures and political donations; they are even more resistant to the idea of giving shareholders or employees say in these decisions.²³⁷ If they viewed these decisions as merely technical, it is unlikely they would fight so hard to maintain them.

²³⁵ For example, businesses regularly over-estimate the cost of environmental regulations. It is likely that some of the over-estimation is a strategy to deter government from instituting new regulation, but this fails to account for the scope of the mis-estimation. Large businesses are often conservative organizations, and most people do not like change forced on them, and all this is probably reflected in the high cost estimates. Pomme Arros & Michelle Brownlee, *supra* note 24 at 19.

²³⁶ David Ebner & Dawn Walton, "Billionaire Oilers owner Katz gave \$430,000 to Alberta PCs", *Globe Mail* (24 October 2012), online: <<https://www.theglobeandmail.com/news/politics/billionaire-oilers-owner-katz-gave-430000-to-alberta-pcs/article4647260/>>.

²³⁷ For example, the Chamber of Commerce has actively lobbied against lobbying and political spending disclosure measures. It has also asked its members to resist shareholders efforts aimed at political spending and lobbying transparency. Bombardier and Comcast both recommended that their shareholders reject resolutions for lobbying disclosure. In 2015, Wal-Mart did reluctantly agree to shareholder disclosure of its lobbying efforts, but it only disclosed the spending on direct lobbying, which was the aggregate of amounts already disclosed in most states' lobbying databases. It refused to disclose the figures on indirect lobbying, including the amount spent on the major

Lobbying's Uncertainty is Addictive

One fundamental truth to lobbying is that the outcome is always uncertain, and the bigger the issue, the more uncertain it is that lobbying will change the political outcome. This uncertainty is the third reason lobbying is so sticky.

Policy and government decision-making is complex, with a myriad of unseen inputs leading to uncertain outputs.²³⁸ Lobbyists promise their clients that they make a difference, but the effects of their contributions are ambiguous. The uncertainty is rooted in the institutional complexity of the policy process; the complexity of the collective actions of all the policy and lobbying organizations involved, and the political, bureaucratic and social context; the complexity of operating in the area of legislative friction²³⁹, where policy changes are rare but significant, with outsized reward; and the complexity of determining if the change (or more often lack of change) would have occurred regardless of the lobbying.²⁴⁰

The lobbyists' clients can never be certain that the lobbying is effective. The lobbyists can use the lobbying registrar and others to prove they met with officials, but it's hard to prove that the policy situation would be different if the lobbyists had never been hired. The lobbyists themselves might not know if their lobbying made a difference. Yet, they have significantly more information than their clients (or employers) and always have the incentive to claim that, even if a campaign appeared to have failed, it prevented an even worse outcome. Political scientists contend that this informational advantage and opaqueness of the process allow the lobbyists to continue to press for new lobbying campaigns.²⁴¹ The estimated cost of unwanted policy change is often high, and the cost of lobbying relatively low in

trade associations, like the Chamber of Commerce. This was the real spending disclosure that the shareholders were seeking. For a sense of scale, in 2014, Wal-Mart spent \$15 million on direct federal lobbying, according to its public disclosures, while the Chamber of Commerce spent over \$124 million. Paul Blumenthal, "Corporate Lobbyists Continue Fight Against Corporate Transparency", (28 October 2015), online: *HuffPost Can* <https://www.huffpost.com/entry/chamber-of-commerce-transparency_n_5630f5b0e4b00aa54a4c21b0>; The Canadian Press, "Bombardier shareholders to vote on lobbying transparency - BNN Bloomberg", (1 May 2018), online: *BNN Bloom* <<https://www.bnnbloomberg.ca/bombardier-shareholders-to-vote-on-lobbying-transparency-1.1069831>>; Blake Dodge, "Comcast shareholders reject lobby disclosure resolution for the fourth straight year", (9 June 2017), online: *Cent Public Integr* <<https://publicintegrity.org/business/comcast-shareholders-reject-lobby-disclosure-resolution-for-the-fourth-straight-year/>>; Nathan Layne, "Exclusive: Wal-Mart improves lobbying disclosure after shareholder...", *Reuters* (13 May 2015), online: <<https://www.reuters.com/article/us-wal-mart-stores-disclosure-lobbying-e-idUSKBN0NY0AH20150513>>; Open Secrets, "Lobbying Spending Database - US Chamber of Commerce, 2014", (2015), online: <<https://www.opensecrets.org/lobby/clientsum.php?id=D000019798&year=2014>>.

²³⁸ David Lowery & Kathleen Marchetti, "You don't know Jack: Principals, agents and lobbying" (2012) 1:2 *Interest Groups Advocacy* 139–170 at 143.

²³⁹ Frank R. Baumgartner et al, *supra* note 59.

²⁴⁰ David Lowery & Kathleen Marchetti, "You don't know Jack", *supra* note 238 at 143. Citing (Baumgartner et al., 2009, p. 110), (Keim and Baysinger, 1988, p. 175, (Baumgartner and Jones, 1993), (Hojnacki, 1997), (Hula, 1999) and (Alchian and Demsetz 1972).

²⁴¹ Lee Drutman, *supra* note 172 at 133.

comparison, so lobbying becomes a form of insurance. The uncertainty encourages the organization to keep lobbying.

Lowery and Marchetti argue that the uncertainty of lobbying replicates many of the traits that make gambling addictive.²⁴² Like gambling, lobbying provides large unpredictable rewards steaming from an opaque random process, with unpredictable ups and downs.²⁴³ The outcome appears to be luck, but luck that can be controlled. This combination of factors is the same as those that make gambling so psychologically addictive. It is always tempting to take one more spin at the slot machine of policy outcomes, and employ the lobbyists one more time for one more bet. When faced with a choice, people prefer a larger gamble to a smaller certain loss.²⁴⁴ On this basis, lobbying will always be more tempting than allowing legislation that threatens to increase a business' cost.

The Three Prime Justifications for Lobbying

The prime justifications for lobbying consists of three pillars: tradition, the right to access government, and the provision of information. Knowing these three pillars provides a basis going forward for understanding what lobbyists do.

Justification 1: Tradition

The first justification for lobbying is simple tradition. Lobbying has been practiced since before the emergence of the democratic nation-state. Effective regulation of lobbying, in any form, is relatively new. There is a Burkean argument that it is a practice acting at the heart of democratic governance, and altering or curtailing it drastically could have unforeseen side-effects. On the other hand, Canadian democracy is always in flux, altered by the still relatively new Constitution, Court interpretation, new laws, practices, and social understandings. Democratic governance cannot be frozen in time, and we are responsible for finding ways to patch, improve and strengthen it, lest it decay.

Justification 2: The Right to Petition Government

The second justification for lobbying is that citizens and residents have the right to approach and petition their government. Lobbying can be seen as the exercise of this right. This is an issue to which we will return in the later chapters on *Charter* rights.

Often the argument is made, without nuance, that lobbying regulations restrict a citizens' ability to petition officials. No one I interviewed believed this was the case. There is a difference between raising a concern with government officials and lobbying. Lobbying is a small subset activity of petitioning the government, involving a particular issue or a particular organization over a substantial amount of time – equivalent to roughly 320 hours of work on the petition a year, according to the Canadian lobbying regulations. Very few petitions and interactions between the citizens and their

²⁴² David Lowery & Kathleen Marchetti, "You don't know Jack", *supra* note 238 at 144.

²⁴³ *Ibid.*

²⁴⁴ Daniel Kahneman, *Thinking, Fast and Slow*, 1st edition ed (New York: Farrar, Straus and Giroux, 2013) pts 4, Prospect Theory.

government fall into this category. Moreover, most lobbying regulations are even more narrowly constructed, and only apply to those who lobby as part of their employment. Some lobbying regulations, like those of the City of Toronto, entirely exempt nonprofits from their lobbying regulations.

Justification 3: Information Provision

The third and most important justification for lobbying is that it provides vital information to government.²⁴⁵ Lobbyists supply information to officials that they cannot otherwise easily acquire. This information includes expertise in specific areas, information about the impact of proposed measures, the filtering of raw data, potential supporters and opposition, the positions of other officials, and outside expertise in legislative procedures and governing. In order to supply the information, lobbyists need three types of expertise: substance, process, and people.²⁴⁶ They must have an understanding of the issue, the governmental processes related to the issue, and the people in charge – their needs and beliefs. The lobbyists provide information about the issue, their clients views, and – often most important to the politicians – the popularity of the position in specific ridings and policy framings that will play well in the media.²⁴⁷ Along with more technical information, lobbyists provide friendly officials with arguments to convince the key swing groups to come on side.²⁴⁸

In my interviews, politicians and lobbyists supported the importance of this activity, maintaining that lobbyists provide information that government officials need. Most political scientists agree that lobbyists provide essential information, especially if other sources of information have been curtailed, or if wave elections or term limits have reduced the number of politicians with experience in governance. Holyoke argues that,

[the] United States is so diverse that no political party, not even lawmaker selected to serve constituents in geographic regions, can effectively articulate the needs of all the groups of citizens sharing common interests whom they are supposed to represent. Interest groups can, and most of them do it well²⁴⁹.

This is true of any modern nation-state.

Berkhout argues that given the choice, lobbyists would prefer to offer political support rather than provide information. Presumably this is because it would provide more influence on the politician. However, lobbying organizations often cannot guarantee political support on central competitive issues because their support base is too fragmented.²⁵⁰ Instead, he argues that “[l]egislative lobbying by

²⁴⁵ Richard Posner, “Should Lobbying and Campaign Spending Be Further Curtailed? Posner”, (9 April 2006), online: *Becker-Posner Blog* Blog Gary Becker Richard Posner <<http://www.becker-posner-blog.com/2006/04/should-lobbying-and-campaign-spending-be-further-curtailed-posner.html>>.

²⁴⁶ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 301.

²⁴⁷ Joost Berkhout, “Why interest organizations do what they do”, *supra* note 72 at 237.

²⁴⁸ Maja K Rasmussen, “Is the European Parliament still a policy champion for environmental interests?” (2012) 1:2 *Interest Groups Advocacy* 239–259 at 247.

²⁴⁹ Thomas T. Holyoke, *supra* note 228 at 10.

²⁵⁰ Joost Berkhout, “Why interest organizations do what they do”, *supra* note 72 at 245.

interest organizations from a competitive environment is likely to focus on policy expertise”.²⁵¹ There is also evidence that politicians are more likely to listen to lobbyists for causes they disagree with when those lobbyists are issue experts, and not simply well-connected.²⁵² Later we will discuss the polarization of lobbying groups, which is likely decreasing the need for issue expertise and increasing the importance of relationships and in-group belonging.

In theory, the lobbying itself is a form of information, indicating the priorities of influential organizations and groups, the political context, citizen’s passion, and legislation’s popularity.²⁵³ A lobbying push can indicate that an interest group cares deeply about an issue, believes there is popular support, and that the moment is ripe for policy change. Some political scientists argue that the lobbying expenditures themselves can increase social welfare by conveying this information.

When those who care more about an issue expend more resources lobbying than those who care less, the policies resulting from interest-group competition will come closer to maximizing net social welfare than would policies that reflected only the number of individuals on either side of the issue.²⁵⁴

However, this argument presupposes that the different interest groups have roughly equal resources to devote to expressing their policy preferences through lobbying. If they do not, the argument falls apart, because the amount spent on lobbying reflects the resources available to the different interest groups, more than how much they care about a particular issue or its broad popularity. Since there are deep differences between the resources available to different interest groups, the amount spent on an issue as a portion of that groups’ lobbying budget expresses how much that group cares about the issue. It does not express much in terms of overall social welfare.

Godwin *et al.* argue that the information lobbyists provide has another key function, it acts as a sort of fire alarm for officials.²⁵⁵ The lobbyists provide an outside source of information that informs high-level government officials and politicians whether a department is fulfilling its directives. It allows officials another way of staying informed to what is happening on the ground, besides relying on the bureaucracy.

What Do Lobbyists Do

In order to properly regulate lobbyists, we must understand what they do. Lobbyists engage in five main activities: they lobby officials; build their client base; monitor what government is doing; build relationships with officials; and build relationships with other lobbyists.²⁵⁶

²⁵¹ *Ibid.*

²⁵² Marianne Bertrand, Matilde Bombardini & Francesco Trebbi, “Is It Whom You Know or What You Know? An Empirical Assessment of the Lobbying Process” (2011) National Bureau of Economic Research, online: <<http://www.nber.org/papers/w16765>> at 26.

²⁵³ Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 2.

²⁵⁴ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 50.

²⁵⁵ *Ibid* at 116.

²⁵⁶ *Ibid* at 20.

As discussed in the previous chapter, there are a few clear differences between lobbying in Canada and America. Canadian political scientists generally believe that the Canadian government and bureaucracy is more insulated from lobbying and public pressure than the American government, providing it more discretion in deciding who it listens to and what approach it takes.²⁵⁷ Moreover, the Canadian political system has fewer vetogates, which means that power and lobbying attention is more centralized in the Canadian system, and more concerned with adapting policy than preventing it.²⁵⁸ It is believed Canadian lobbyists focus less on individual legislators and more on the relevant ministers, bureaucrats and the Office of the Prime Minister (PMO).²⁵⁹ Yet my interviews and the statistics of the lobbying registrar indicate the weight on the PMO is not as extreme as one might think.

The bureaucratic insular nature of Canadian policy-making also encourages lobbyists to take a quieter approach. They know publicity campaigns are likely to annoy officials and unlikely to affect the policy outcome. So, unlike American lobbyists, Canadian groups seldom take part in public policy debates and “see an appeal to public opinion as a last resort.”²⁶⁰

Lobby Government

The first major activity lobbyists pursue is to lobby government, providing information and expressing their opinion to government. We have already covered how lobbyists supply information. We will return to this issue in Chapter 3 when discussing the question of the validity of that information, and how it frames policy debates. Lobbyists also express their preferences to government. This is the classic activity that people envision when they think of lobbying: shadowy figures meeting with government officials in dimly-lit offices.

Lobbying is different than simple contact with government, as it involves a prolonged campaign of regular interactions with government officials to accomplish a policy goal, outside of a limited regulated process like a standard procurement process. Submitting a tender for a construction contract is not lobbying; convincing the government that they need to build a new hospital, and that a particular construction firm should get the construction contract is lobbying. The access lobbyists have to the policy process can go well beyond informal consultation. State officials can grant interest groups all sorts of powers, including legally binding decision powers, market monopolies, the recognized representation of certain groups or businesses, quasi-state powers, the rights to receive or charge certain fees, taxes and levies, and even a formal constitutional role.²⁶¹

²⁵⁷ Hugh Garnet Thorburn & Royal Commission on the Economic Union and Development Prospects for Canada, *supra* note 2; Fred Thompson & W. T. Stanbury, *supra* note 2.

²⁵⁸ Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, “Positive Canons”, *supra* note 165 at 707.

²⁵⁹ A. Paul Pross, *supra* note 2.

²⁶⁰ A. Paul Pross, *supra* note 2 at 152.

²⁶¹ Joost Berkhout, “Why interest organizations do what they do”, *supra* note 72 at 238.

Both lobbying and policy-making are complex multi-stage activities.²⁶² Goodwin *et al.* theorize that lobbyists systematically employ different strategies and tactics depending on the stage of the policy process and “the degree of collectiveness of the desired benefit.”²⁶³ The strategies will also vary depending on the topic, the officials being lobbied, the client, and the perceived popular support for the policy changes. Goodwin *et al.* also hypothesize that things being equal, interest organizations prefer to lobby for benefits that are private rather than collective.²⁶⁴ This is likely true for the majority of lobbying, performed for self-interested economic reasons; on the other hand, often citizen groups argue for policies that have collective benefits, such as democratic reforms, cleaner water or safer communities.²⁶⁵ Baumgartner *et al.* point out that lobbying is a long-term activity, and lobbyists can work for years over multiple administrations to lay the groundwork for a particular policy change.²⁶⁶

There are two main models for how lobbyists lobby government officials: the neo-pluralist model and the exchange model.

Neo-pluralist Model

The neo-pluralist model holds that officials and lobbyists work in a policy environment with different interests pulling in different directions, like an ever-changing tug of war, in which the status quo acts as an anchor opposing change. When the sides are balanced there is stability in policy. The basic model was first proposed by David B. Truman in 1951.²⁶⁷ “Truman predicted that when new groups mobilize and achieve a policy change, that change will disturb other interests, and they will mobilize their own interest groups.”²⁶⁸ We shall see later, that this assumption is far from true, and is highly contextual. Even those who can organize might decide not to do so. Olson argued that a “rational person would do nothing if he could free ride on the efforts of others.”²⁶⁹

Exchange Model

The exchange model holds that those involved in the political process make exchanges that increase their economic, social or political welfare, like a huge bazaar where lobbyists and politicians are both buyers and sellers.

An interest organization comes to the market, decides which policy option it wants to purchase, and bids for it. The bid might include electoral support, campaign contributions, or information that is valuable to the policymaker. As in the case in

²⁶² R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 30.

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ There is also a great deal of citizen lobbying that straddles the line. A community lobbying against the construction of a nearby nuclear power plant is a local collective good, but likely a private benefit when considered from the provincial level. Lobbying against changes to single home zoning laws or against affordable housing in the community is extremely common, and comes much closer to lobbying for private self-interested benefits.

²⁶⁶ Frank R. Baumgartner *et al.*, *supra* note 59.

²⁶⁷ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 49.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid* at 54.

economic markets, competition among interest groups drives up the price of an official's policy support.²⁷⁰

Godwin *et al.* interviewed American lobbyists as to

what factors led them to provide resources to a legislator, the lobbyists stressed five factors: (1) the legislator sits on a committee important to the firm, (2) the legislator is from a state or district where the firm has facilities, (3) the legislator previously assisted the firm in its dealings with regulatory agencies, (4) the legislator holds a leadership position, and (5) the legislator previously had lobbied other legislators on behalf of the firm. All of these factors fit the expectations of the exchange model.²⁷¹

Social Exchange Theory

Lux *et al.* argue, convincingly, that these exchanges are better understood as a subset of social exchange theory, rather than the more traditional economic exchange models.²⁷² Lessig makes a similar argument, describing campaign finance donations as a form of a gift economy.²⁷³ Since the exchanges often involves future unspecified favours, since market value is largely unknown, since there is no attempt to strive for parity in the market value of each side of the bargain²⁷⁴, since there are no third-party-enforced contracts, and since open and direct monetary payment for policy favours is illegal, the exchanges must rely on social trust.²⁷⁵ This might explain some of the importance of using lobbyists who have social connections to the officials (discussed in the next section): they have built a trust relationship. If the exchange model is right, we can conclude that social forces, norms, and influences are as important as economic ones to the lobbying process.²⁷⁶

Lessig argues that the gift-giving is an exercise of a relationship-based economy, that not only relies on trust relationships (rather than a marketplace of goods with comparable prices), but also both expresses and further builds these trust relationships.²⁷⁷ The gifts create social obligations. Retnasaba points out that these gifts are socially influential even if they are of quite minor monetary value.²⁷⁸ The

²⁷⁰ *Ibid* at 39.

²⁷¹ *Ibid* at 231.

²⁷² Sean Lux, T. Russell Crook & David J. Woehr, "Mixing business with politics", *supra* note 213 at 242.

²⁷³ Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress--and a Plan to Stop It* (Hachette Digital, Inc., 2011) at 109.

²⁷⁴ Officials and lobbyists make little attempt to gain equivalent market value from their deals. A policy change might save a corporation \$2 billion in taxes, but no politician would ask for \$1 billion in political campaign donations in return, although in a pure economic exchange that would be entirely reasonable.

²⁷⁵ Sean Lux, T. Russell Crook & David J. Woehr, "Mixing business with politics", *supra* note 213 at 242.

²⁷⁶ *Ibid*.

²⁷⁷ Lawrence Lessig, *supra* note 273 at 110.

²⁷⁸ *Do Campaign Contributions and Lobbying Corrupt? Evidence from Public Finance*, SSRN Scholarly Paper, by Gajan Retnasaba, papers.ssrn.com, SSRN Scholarly Paper ID 1003890 (Rochester, NY: Social Science Research Network, 2006) s 1.2.

politician is socially indebted to the donors and lobbyists that helped her. Lessig argues that those involved do not perfectly equate the gift-given with the gift received, but they also do not maintain that reciprocating is unimportant. He argues the donors, lobbyists and politicians involved try to hide the nature of the gift interaction, which is a form of exchange, by tying so much of the exchange to the personal relationship.²⁷⁹ Thus the gifts are both social but also still an economic exchange of value. The relationship is not emotional; it is utilitarian with an emotional wrapping.

This type of social gift relationship is fundamental to human beings, and likely only the most cold or sociopathic individuals can avoid feeling social debt to those that have provided vital help. Likewise, providing a gift or help ties the giver as well, inclining them to trust the recipient and forming the social bond.

Comparing the Two Models

Despite the prevalence of the two models, political scientists have been unable to establish that either is correct. It is worth briefly covering each theory's advantages and disadvantages before discussing the possibility that there are two sets of behaviours going on in lobbying, and so both models are applicable depending on the context.

Neo-pluralism includes numerous variables, which allow it flexibility in explaining why a policy outcome occurred; but the large set of variables makes it difficult to apply. There is a great deal of naked exchange included in lobbying, and the exchange model seems to be a better explanation for this behaviour. For example, five U.S. senators improperly pressured regulators into ending an investigation into Charles Keating, the owner of Lincoln Savings and Loan, as a partial return on Keating's \$1.4 million of campaign donations. The subsequent bankruptcy of Lincoln Savings and Loan cost the government \$3 billion.²⁸⁰ The senators' actions appear to be better explained by exchange theory than neo-pluralist theory.²⁸¹

Exchange theory is a simpler explanation of behaviour, making testable predictions easier; but it does not account for all the range of activities that comprise lobbying. There is a good faction of lobbying that appears to be group struggles, and does not include economic or even social exchanges. For example, the rise of the Sunrise Movement and the push for a Green New Deal appears to be best

²⁷⁹ Lawrence Lessig, *supra* note 273 at 114.

²⁸⁰ The one of the Keaton Five was formally reprimanded by the ethics committee. George A. Akerlof & Robert J. Shiller, *supra* note 52 at 82.

²⁸¹ Keaton told reporters, after Lincoln Savings and Loan collapsed, "One question, among many raised in recent weeks, had to do with whether my financial support in any way influenced several political figures to take up my cause, ... I want to say in the most forceful way I can: I certainly hope so." Nathaniel C Nash & Philip Shenon, "A Man of Influence: Political Cash and Regulation - a Special Report;; In Savings Debacle, Many Fingers Point Here", *N Y Times* (9 November 1989), online: <<https://www.nytimes.com/1989/11/09/business/man-influence-political-cash-regulation-special-report-savings-debacle-many.html>>.

explained as a neo-pluralist struggle involving climate change and the direction of the Democratic Party.²⁸²

Goodwin *et al.* conclude that, “[r]esearch on the influence of interest organizations refuses to support completely either the pluralist or the exchange model of interest groups in the policy process.”²⁸³

It is reasonable to conclude there are two sets of activities occurring simultaneously under the label of lobbying. One is a policy struggle between competing groups. This struggle is often about large-scale society-wide issues, but can be scaled all the way down a struggle between an individual lobbyist and a particular regulator. It is a struggle about how government should function and what it should be doing. This debate is a combination of high ideals, personalities, interpretations and self-interest. The struggle over the policy responses to climate change fits into this model. The second set of activities is a much more naked exchange where government officials and interest groups trade favours and gifts; a more classic building of obligations and greasing of the wheels. For example, the Trump administration's decision to maintain restrictions on the Pebble Mine in Alaska, which prevent it from opening, appears to have been made in response to a donation of \$250,000 to President Trump's re-election efforts.²⁸⁴

It is likely most lobbying interactions involve a little of both; more policy struggle when the area at stake is more public, and more exchange when the official has weaker policy preferences, or the policy topic is murkier. For example, one bureaucrat might support a new solar farm on the grounds that clean energy is widely beneficial, while a politician might do so because the pro-solar lobbying group agrees to tell its members to donate to her re-election campaign.

Monitor Government

The second main activity that lobbyists engage in is to monitor government, officials and legislation. They track political and government activities within their area of expertise, and alert their clients when an issue of interest arises.²⁸⁵ They also use this monitoring as a basis to approach new clients, who might be interested in hiring them to lobby on the subject matter. Lobbyists spend a great deal of their time monitoring government; it is one of their primary activities.²⁸⁶

²⁸² Osita Nwanevu, “A Decisive Year for the Sunrise Movement and the Green New Deal” (14 May 2019), online: <<https://www.newyorker.com/news/our-columnists/a-decisive-year-for-the-sunrise-movement-and-the-green-new-deal>>.

²⁸³ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 64.

²⁸⁴ In this case, the effects of the donation are particularly obvious, because the Trump administration had previously decided to allow the mine to go ahead, overturning a hold that had been placed under the Obama administration. This was in line with the Trump administration and Scott Pruitt's approach as head of the EPA, which was to act with a general disregard for environmental concerns. Pruitt abruptly reversed this decision, and reinstated the hold. Gillam, who strongly opposed the mine and had lobbied against it, made his \$250,000 donation to the Trump Victory Fund weeks later. Stephani Ebbs, “Rich Alaskan donor gave \$250K to Trump after EPA reversed decision on Pebble Mine”, (16 June 2018), online: *ABC News* <<https://abcnews.go.com/Politics/rich-alaskan-donor-gave-250k-trump-epa-reversed/story?id=55697321>>.

²⁸⁵ Joost Berkhout, “Why interest organizations do what they do”, *supra* note 72 at 237.

²⁸⁶ Frank R. Baumgartner et al, *supra* note 59 at 154; Lee Drutman, *supra* note 172 at 82.

In the U.S., many lobbyists work to sustain the status quo. These lobbyists can focus mostly on monitoring legislation; they do not need to mobilize unless a proposed change makes it quite far into the legislative process.²⁸⁷ They know that legislators have very limited bandwidth, and that forming large enough coalitions in support of a legislative change is difficult. Of the many pushes for legislative change, most die out by themselves. There are no recent similar in-depth study of lobbyists' activities in Canada. Since the policy process is more opaque, and there are fewer vetogates, it is reasonable to conclude that lobbyists are less sanguine about government supported legislation dying on its own. Thus lobbyists would spend proportionally more time actively lobbying on legislative change and pushing for compromise, especially if the bill is supported by the PMO.

Build their Client Base

Established lobbyists have to concern themselves with competitive pressure and their public reputation.²⁸⁸ They want to keep their clients happy. For in-house lobbyists, these clients are essentially the rest of the organization. The connection between lobbyists and their clients can be complicated. Since the results of lobbying are often hazy, lobbyists use other methods to demonstrate that they are putting in the work on behalf of their clients. The proof of their activities can include notes from political meetings, publicly available records from political and bureaucratic calendars, and records from lobbying registries.

Lobbyists have an asymmetrical information advantage over their clients, clients who are mostly business and trade organizations.

The Clientele are at an Asymmetrical Information Disadvantage

Lobbyists have a lot of information that their clients lack. For example, they might have detailed information about politics, the preferences of specific officials, pending legislation, the unwritten customs in an area of the government decision-making, the activities of other lobbyists, the priorities of other interest groups, the chance of success, and whether the lobbying made a difference in the policy outcome.²⁸⁹ This creates an information asymmetry that favours the lobbyists.²⁹⁰

This information asymmetry is similar to the one that lawyers have over their clients, but in some ways even stronger. Unlike legal proceedings, the methods and contacts lobbying relies upon are not recorded or standardized, and the lobbying is rarely public.²⁹¹

²⁸⁷ Frank R. Baumgartner et al, *supra* note 59 at 150.

²⁸⁸ David Lowery & Kathleen Marchetti, "You don't know Jack", *supra* note 238 at 140 In reference to Rosenthal (2001).

²⁸⁹ *Ibid* at 144.

²⁹⁰ "[T]he ambiguities of politics, combined with the relative political ignorance of more managers, plus the distance of managers from Washington, plus the tactical diversity of lobbying, plus the widespread nature of group lobbying – all give lobbyists an informational advantage." Lee Drutman, *supra* note 172 at 143 & 138.

²⁹¹ It appears that the original version of the Canadian *Lobbyist Code of Conduct* was loosely modeled on the lawyers' rules of professional conduct. This might have been both because the lawyers drafting the code had the

It is often assumed that the lobbyists work in the best interests of their clients, fulfilling their goals with fidelity. This is not always true. Lobbyists can be imperfect agents.²⁹² There is always the chance that a lobbyist will use the information asymmetry to manipulate his clients. He will *phish* them, in the parlance of the economists Akerlof and Shiller. Phishing is “about getting people to do things that are in the interest of the phisher but not in the interest of the target.”²⁹³ They argue that phishing is a fundamental part of the market economy.²⁹⁴ The implications of their theory is discussed in depth in Chapter 6.²⁹⁵

The information asymmetry allows lobbyists a lot of leeway in guiding their clients, particularly if a lobbyist already has an established reputation to draw upon. In the similar sphere of American political campaign contributions, a good fraction of the donations appear to go to political consultants and scammers who are fleecing the donors and political campaigns.²⁹⁶ Likewise, the same is likely true of lobbying; considering its opacity and uncertainty, some lobbyists must surely phish their clients, having no intention or ability to lobby effectively on an issue.

In some cases, we know that lobbyists do take advantage of their clients, making sure their clients never achieve a complete victory, or even actively working against their interests. As an example of the former, Rosenthal quotes a lobbyist saying, “[y]ou should never kill a bill so bad that [the opposition] can’t come back next year, or you’ll be out of business.”²⁹⁷ As an example of the latter, in 2002, the established and successful lobbyist Jack Abramoff approached the Tigua tribe and convinced it to pay out over \$4 million to lobby Congress to allow it to reopen its recently prohibited casino.²⁹⁸ The tribe did not know that Abramoff had been a key player in orchestrating Texas’ decision to shut down

rules of professional conduct as an easy template, but also because of the similarities to the information imbalance between lawyers and their clients.

²⁹² David Lowery & Kathleen Marchetti, “You don’t know Jack”, *supra* note 238 at 160.

²⁹³ George A. Akerlof & Robert J. Shiller, *supra* note 52 at xi.

²⁹⁴ The fact that taking advantage of people is an easy and reliable way of making money has a substantial impact on how markets should be understood. George A. Akerlof & Robert J. Shiller, *supra* note 52.

²⁹⁵ Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: The Nature of the Unregulated Marketplace – Phishing for Phools, p. 367

²⁹⁶ There are multiple reports of such scams. Considering the holes in the U.S. campaign finance laws, the lack of restrictions on third parties, and the aggressiveness that these groups have pursued legal remedies against any oversight, it is a very safe space in which to operate a scam. It would be shocking if the amount of fraud and scamming related to political donations did not continue to increase. Matthew S Raymer, “Fraudulent Political Fundraising in the Age of Super PACs Symposium: Campaign Finance and Election Law” (2016) 66 *Syracuse Law Rev* 239–272 at 241; Oliver Friedrichs, Markus Jakobsson & Christopher Soghoian, *The Threat of Political Phishing* (Rochester, NY, 2008) at 131; Megan Janetsky, “Scam PACs line pockets by misleading donors”, (26 April 2018), online: *OpenSecrets News* <<https://www.opensecrets.org/news/2018/04/scam-pacs-misleading-donors/>>; Casey Tolan, “Is this shadowy network of PACs ripping off pro-life voters around the country?”, (12 August 2016), online: *Splinter* <<https://splinternews.com/is-this-shadowy-network-of-pacs-ripping-off-pro-life-vo-1793861132>>; Sabrina Eaton, “Political operative who bilked Ohio donors pleads guilty to fraud”, (21 March 2019), online: *cleveland.com* <<https://www.cleveland.com/open/2019/03/political-operative-who-bilked-ohio-donors-pleads-guilty-to-fraud.html>>.

²⁹⁷ David Lowery & Kathleen Marchetti, “You don’t know Jack”, *supra* note 238 at 148.

²⁹⁸ *Ibid* at 140.

their casino in the first place. He did this on behalf of the Louisiana Coushatta, a tribe that also ran a casino that he had approached in 2001, with the offer of preventing rival competing casinos from opening. It was only after extensive investigation that his double-dealing and manipulation came to light. The Tigua tribe did not get their casino reopened, and the wasted money later harmed the tribe's ability to provide services for its residents.²⁹⁹

The threat of phishing can be curtailed but not eliminated. One method of curtailment is to rely on lobbyists with a good reputation. However there is always the risk that the lobbyists have decided to draw down on their past reputation in order to phish their clients. The second method is to rely on regulation. The lobbying registry allows clientele to check that the lobbyists are indeed meeting with officials, and the *Code of Conduct* provides some assurance that the lobbyists maintain a basic standard of ethics, at least in their contact with the government. The oversight of the lobbying registrar also provides some reassurance that there are standards in the marketplace of hired lobbyists, and that at least some of the most egregiously unscrupulous lobbyists will be flagged. A third method of curtailment is to bring the lobbyists in house. This is one of the reasons that organizations who lobby regularly generally have in house lobbyists.³⁰⁰ The use of in-house lobbyists does not guarantee their fidelity, but it helps by building personal connections, repeated interactions, and limiting the rewards available for misleading the rest of the firm. In-house lobbyists can and do oversee projects that require outside consultant lobbyists with their own specializations and contacts.

The Clientele are Mostly Business Interests

The final aspect to discuss regarding the lobbyists' clientele, is who exactly they are. The vast majority of lobbying is performed by business.³⁰¹ Drutman reports that in the United States, business accounts for over 75% of lobbying expenditures, whereas diffuse interest groups account for less than 1%.³⁰² 1% seems a little low. Apollonio, Cain and Drutman report that in 1996, citizen lobbying groups accounted for less than 10% of lobbying expenditures, so it is possible the amount declined over the subsequent decades.³⁰³ Either way, the dominance of business expenditures is incontrovertible.

²⁹⁹ Sonia Smith, "Jack Abramoff to Tigua Indians: I'm Sorry", *Tex Mon* (12 December 2011), online: <<http://www.texasmonthly.com/articles/jack-abramoff-to-tigua-indians-im-sorry/>>. After serving his 6 year sentence, Abramoff recently returned to lobbying. Ginger Gibson, "Convicted felon Jack Abramoff registers to return to lobbying", *Reuters* (23 June 2017), online: <<https://www.reuters.com/article/us-usa-politics-abramoff-idUSKBN19E2JN>>.

³⁰⁰ David Lowery & Kathleen Marchetti, "You don't know Jack", *supra* note 238 at 141 In reference to (Kersh, 2000, p. 241).

³⁰¹ Boucher lists many studies that come to the conclusion that businesses dominate lobbying: "(Olson 1965; Wilson 1980; Schlozman and Tierney 1986; Baumgartner and Leech 2001; Beyers 2002 & 2004; Yackee and Yackee 2006; McKay 2011a; Boehmke, Gailmard and Patty 2013; Binderkrantz, Christiansen and Pedersen 2014; Schlozman, Verba, and Brady 2012)." Maxime Boucher, *supra* note 2 at 319.

³⁰² Lee Drutman, *supra* note 172.

³⁰³ Dorie Apollonio, Bruce E Cain & Lee Drutman, "Access and Lobbying: Looking beyond the Corruption Paradigm" (2008) 36 *Hastings Const Law Q* 13 at 36.

Business does the vast majority of the lobbying, according to both the amounts spent and number of lobbyists.³⁰⁴ In the U.S., “[c]orporations blow everyone else out of the water.”³⁰⁵ As of 2015, businesses were accounting for approximately 80% of all reported lobbying expenditures, which amounted to \$2.6 billion dollars a year.³⁰⁶ These figures likely under-report the amount spent, since a lot of lobbying expenditures are not reported.³⁰⁷ Businesses employ more lobbyists than other groups; neither citizen groups, nor other nonprofits, nor labor unions can compete.³⁰⁸ “[B]usiness interests also dispatch more lobbyists per issue, lobby on more issues, and spend more money per group than other group types.”³⁰⁹

This pattern is not new. The percentage of business lobbying has been increasing since the early 1980s.

Baumgartner and Leech's (2001) inventory of all federal lobbying disclosure reports filed in 1996 revealed that among in-house lobbyists, businesses and trade and professional associations represented 65 percent of all registered lobbyists, lobbied on 70 percent of issues, and spent 85 percent of all reported expenditures.³¹⁰

The interests that once opposed business interest have fallen woefully behind, and generally need to find a supportive business interest to partner with. In contrast, the most active business organizations are now hiring upwards of 100 lobbyists to represent them.³¹¹

But what's new is just how much the steady and continued expansion of business lobbying over the last several decades has outpaced the traditional forces that once kept it in check. The amount of political activity on behalf of large corporations today is truly unprecedented... Meanwhile, the types of organized interests who we might expect to provide a countervailing force to business — labor unions, groups representing diffuse public like consumers or taxpayers — spend \$1 for every \$34 businesses spend on lobbying, by my count. Of the 100 organizations that spend the most on lobbying annually, consistently 95 represent business.³¹²

Brulle's recent study found that in U.S. climate change lobbying, clean energy and environmental groups have been outspent by the fossil fuel, utility and transportation industries' by a ratio of roughly 10 to

³⁰⁴ Frank R. Baumgartner et al, *supra* note 59 cs 1 & 11.

³⁰⁵ Lee Drutman, *supra* note 174.

³⁰⁶ *Ibid.*

³⁰⁷ Lee Fang, *supra* note 105; Isaac Arnsdorf, *supra* note 107; See also Tim LaPira & Herschel Thomas, *supra* note 112.

³⁰⁸ Amy McKay, “Buying Policy? The Effects of Lobbyists’ Resources on Their Policy Success” (2012) 65:4 Polit Res Q 908–923 at 909.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ Lee Drutman, *supra* note 174.

³¹² *Ibid.*

1.³¹³ He found that industry groups have spent more than \$1.8 billion lobbying against climate-change prevention legislation, in favour of allowing more pollution.³¹⁴

Business interests also do the vast majority of lobbying in Canada, although the statistics are not as parsed by academics as those in the U.S.³¹⁵ A study by Maclean's in 2013 found that there was not a single citizen or union organization among the top ten lobbying groups in the three distinct top areas of Canadian governance: the PMO, the Department of Finance, and on environment and resources.³¹⁶ Of the 30 top spots, 28 were taken by industry and business organizations. The Federation of Canadian Municipalities was the only non-industry group on the list, appearing twice. Since the Canadian government is more insulated from lobbying, it has more leeway in what policies to emphasize and which lobbyists to meet and ally with.³¹⁷ However, according to this study, it is choosing to meet predominately with oil, gas, pipeline, mining, and banking interests.³¹⁸ As discussed in Chapter 1, Graham, Carroll and Chen found a similar pattern in their study. When Justin Trudeau was elected as Prime Minister, since his government was not as committed to the oil and gas industry, the industry shifted its lobbying efforts away from the parliamentarians and towards senior public servants and mid-level staff.³¹⁹ These officials demonstrated a willingness to increase their meetings with the industry. After the election, the contacts of fossil fuel industry lobbyists with the top ten high level bureaucrats still in office increased from an average of 144.5 to 228.5 per year.³²⁰

This pattern of shifting focus points toward a “deep state” whereby key government institutions and actors become integrated with private firms and interest groups that together co-produce regulation and policy. This pattern is concerning as it indicates that the influence of industry actors—like those in the fossil fuel sector—are likely to far outlast election cycles and potentially the stated platforms of elected officials and may undermine processes for meaningful consultation with First Nations peoples.³²¹

Canadian environmental groups are some of the largest and most successful citizen lobbying groups, with large public presence, and a wide base of public support and funding. Yet, the evidence

³¹³ Robert J. Brulle, *supra* note 30 at 297.

³¹⁴ *Ibid* at 296. He calculates that industry spent \$2 billion on climate change lobbying, and that pro-pollution groups outspent clean energy and citizen groups by a ratio of 10 to 1. By this calculation, at least \$1.8 billion was spent on the pro-pollution lobbying intended to undermine climate change prevention efforts.

³¹⁵ Since there is no legal requirement to publish the amounts spent on lobbying, the Canadian studies are forced to rely on the number of contacts reported in the lobbying registry. Maclean's, *supra* note 42.

³¹⁶ The environment and resources list consisted of Environment Canada, Natural Resources Canada, and the Environmental Assessment Agency. *Ibid*; Jason Fekete, *supra* note 206.

³¹⁷ A. Paul Pross, *supra* note 2 at 6 & 40. Although, Dawson argues that the Canadian Cabinet and PMO remain more accessible than the British ones.

³¹⁸ Maclean's, *supra* note 42; Jason Fekete, *supra* note 206.

³¹⁹ Nicolas Graham, William K Carroll & David Chen, *supra* note 2 at 6.

³²⁰ *Ibid*.

³²¹ *Ibid*.

indicates that they are out-lobbied by fossil fuel groups by five to ten times at the federal level. As discussed in Chapter 1, Riley and Cox found that on the highly publicized Bill C-69, regarding environmental assessment for major projects, 80% of the lobbying of the Senate was from industry groups, primarily oil and gas interests, just 13% of the lobbying was by environmental groups, and only 4% was by First Nation organizations.³²² The Senate introduced 187 amendments weakening the environmental protections of the bill.³²³

Cayley-Daoust and Girard's found that over a four-year span the prominent oil industry association, the Canadian Association of Petroleum Producers, communicated with important government officials around 90 times more than the roughly equivalently prominent environmental association, the Climate Action Network (536 vs. 6 communication reports).³²⁴ Beyond this already skewed ratio, Cayley-Daoust and Girard's also found that there is additional industry lobbying targeting bureaucrats who are low-level enough that their contacts do not have to be disclosed to the registry.³²⁵ Graham, Carroll and Chen found that over a seven-year period the "fossil fuel industry also lobbied the federal government at rates five times higher than environmental non-governmental organizations"³²⁶.

This ratio of business to citizen lobbying is likely lower in areas where business has less pecuniary interest but that remain highly salient to citizens, such as language and social issues. Yet, in aggregate, the evidence available shows a heavy ratio in favour of business interests. Boucher's 2018 analysis of 51,527 Canadian federal lobbying reports found that corporations and trade associations dominated over citizen groups and unions by a ratio of about 4.5 to 1.³²⁷

We should not ignore unions and citizen groups, but it is business interests that do the majority of the lobbying.

Build Relationships with Officials

The fourth main activity lobbyists pursue is to build and maintain relationships with officials. According to my interviews, social adeptness and strong relationships with officials are key distinguishing factors between sub-par lobbyists and those that truly excel at the craft.

³²² Sharon J. Riley & Sarah Cox, *supra* note 40.

³²³ *Ibid.*

³²⁴ "The financial realities of these two organizations are in a different league with CAPP's [Canadian Association of Petroleum Producers] membership including the richest companies in the world. It is also clear based on registry communication data that the level of influence and access to politicians and policy makers is also quite asymmetrical and largely favors CAPP." Daniel Cayley-Daoust & Richard Girard, *supra* note 2 at 4.

³²⁵ "In one example consultant lobbyist Dan Seekings has not recorded communications with any DPOHs since 2010 even though as of September 3rd, 2012 he is registered as a consultant lobbyist for 14 companies and organizations from the oil and gas industry and one forestry industry company. This situation means that Seekings could have had multiple communications with public officials not covered by the current Lobbying Act, thereby leaving the general public in the dark about who he has been meeting with." *Ibid* at 9.

³²⁶ Nicolas Graham, William K Carroll & David Chen, *supra* note 2 at 6.

³²⁷ The percentage of total lobbying is 68% for businesses and 15% for citizen groups (8%) and unions (7%). The remainder is public institutions (10%), think tanks (3%), and other associations (4%) Professional associations have been grouped in with business associations. Maxime Boucher, *supra* note 2 at 324.

We will consider how lobbyists have superior access to officials; how lobbyists build their relationships through repeated contact with the same officials; the overlap between lobbying and bribery; the revolving door movement in and out of government; large donors and shadow political parties; lobbyists' relationships with particular political parties; and that officials benefit from their relationship with lobbyists.

Lobbyists Have Superior Access to Officials

One of the prime benefits lobbyists offer their clients is access to key officials. Multiple studies show that lobbyists have better access to officials than normal citizens do, likely both because they have something to offer and the relationships they have built with officials. Brodbeck *et al.* find that U.S. senate offices grant meetings to lobbyists over citizens, by nearly a 4 to 1 ratio.³²⁸ They argue that their finding offers some support to the exchange model of lobbying.

The label 'lobbyist' provides staffers and senators a shortcut in assessing the ability of the caller to offer something in return, whether electoral or policy certainty (likely in the form of money or information).³²⁹

Boucher also argued that access is central to lobbying, quoting former Prime Minister Paul Martin's quip that Canadian politics is about "who you know in the PMO."³³⁰ This access is built on the relationships lobbyists cultivate with government officials.

Lobbyists Have Repeated Contact with the Same Officials

To support their lobbying activities and maintain their credibility, lobbyists build relationships with the officials they contact. To build these relationships, lobbyists tend to work with the same officials repeatedly.

The repeated interactions increase a legislator's effectiveness by reducing his uncertainty about which lobbyists can be trusted and by facilitating the coordination of important policy actors inside and outside of government.³³¹

Lobbyists are generally experts in their field, but the evidence indicates that their relationship with key officials is the most important thing they bring to the table.³³² Studies show that lobbyists are chosen more for their relationships than for their issue expertise, and can charge more for personal connections than for informational expertise.³³³ Lobbyists who worked for a sitting congressman earn more than lobbyists who lack such a connection, and lobbyist with a connection to a particular official will continue

³²⁸ Josh Brodbeck, Matthew T Harrigan & Daniel A Smith, "Citizen and lobbyist access to Members of Congress: Who gets and who gives?" (2013) 2:3 Interest Groups Advocacy 323–342 at 329.

³²⁹ *Ibid.*

³³⁰ Maxime Boucher, *supra* note 2 at 318.

³³¹ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 23.

³³² Timothy M. LaPira & Herschel F. Thomas, *supra* note 105.

³³³ Marianne Bertrand, Matilde Bombardini & Francesco Trebbi, "Is It Whom You Know or What You Know?", *supra* note 252 at 26. Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 19.

to lobby that official even if she moves to a new position outside the lobbyist's area of expertise.³³⁴ Vidal *et al.*'s study calculates that lobbyists with experience with a senator experienced a 24% drop in revenues immediately after that senator retires.³³⁵ Former politicians and aides are most highly prized by lobbying firms, as they bring everything a lobbying organization seeks in an employee: policy expertise, process expertise, and most importantly, relationships to those still in government.

As mentioned, there is also evidence that lobbyists do provide issue expertise, and when an official disagrees with a lobbyist's policy preferences, she is more likely to value his opinion when he is a policy expert.³³⁶ Pross, and Thompson and Stanbury argue that expertise holds more weight with the Canadian bureaucracy than is the case in the U.S., where size and power of the lobbying interest is more important.³³⁷ According to my interviews this is still perceived to be true. Thompson and Stanbury do go on to indicate the lobbying interest's wealth, power and size still matter a great deal in Canada.³³⁸

The relationships between lobbyists and officials are built on trust. Officials will not grant access to lobbyists who have proven untrustworthy. "As the head of one lobbying firm stated, 'If you have to choose between sinning against God or the bureaucracy, choose God. He forgives.'"³³⁹ This is not to say that lobbyists must be honest, but only that the officials must not feel that they have been deceived.

Lobbyists Seek Out Officials Whose Political Views Align with the Lobbying Goals

Lobbyists seek to build connections with politicians and other officials whose political views align with their lobbying goals.³⁴⁰ Lobbyists know that it is far easier to garner support from those who are favourably disposed to a policy, than to convince those who are politically opposed to dramatically change their point of view.³⁴¹ As one lobbyist explained, "You shouldn't try to over-lobby your clear opponents because you are just going to irritate them and wind them up."³⁴² Lobbyists actively work to help those with favourable views get official positions, be it by appointment, promotion, or election.³⁴³ This work in favour of pushing candidates into government is likely curtailed in Canada as compared to what happens in the U.S., because Canadian law now limits campaign donations and bundling, and prohibits lobbyists from lobbying politicians if they worked on their political campaign. However, it is likely that lobbyists continue to work for the advancement of officials with favourable points of view, and continue to recruit them to run for political office.

³³⁴ Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 4.

³³⁵ Lawrence Lessig, *supra* note 273 at 225.

³³⁶ Marianne Bertrand, Matilde Bombardini & Francesco Trebbi, "Is It Whom You Know or What You Know?", *supra* note 252 at 26.

³³⁷ A. Paul Pross, *supra* note 2 at 131; Fred Thompson & W. T. Stanbury, *supra* note 2 at 43.

³³⁸ Fred Thompson & W. T. Stanbury, *supra* note 2 at 48.

³³⁹ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 300.

³⁴⁰ Maja K. Rasmussen, *supra* note 248 at 247.

³⁴¹ *Ibid.*

³⁴² For example, see Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 15.

³⁴³ For example, see *Ibid.*

Lobbyists not only find potential politicians to run for office, they also try to build networks of influence to support new and existing political candidates. The lobbyist seeks to be a reliable partner for politicians, helping the politician take, maintain, and thrive in office. Lobbyists will use funding to help the politician when they can. They know that “concerted and sustained funding efforts are much more likely to have an impact on political parties and governing agendas than one-shot donations to single-issue campaigns or to candidates running in particular elections.”³⁴⁴ Although this role has waned on the federal level in Canada, with the restrictions on donations imposed by the strict campaign finance laws and the *Lobbying Act*, it still exists on the provincial and municipal levels.

Some subsets of private funding remain in Canadian campaign law, such as funded trips, fund-raising events, and other galas. Fund-raising events skirt the restrictions on donations, and politicians continue to attend them. Individuals pay handsomely to attend these events, partly to have access to the politicians and raise policy concerns. This pay for access was regularly featured in the newspapers throughout 2016, but is not technically against the law, as long as those raising the issues with the politicians are not actual lobbyists.

In the United States, the classic role of the lobbyist as a source of bundler of campaign funds appears to be declining in importance on the federal level. On the state level the story is much more complicated, and varies immensely according to the rules and norms of each individual state. However, the decline of lobbyists as a source of campaign funds does not mean that their influence has also declined, among other factors we must consider the transactional influence granted by the possibility of bribery, circumspect bribery and the increased revolving door movement between government and lobbying.

Lobbying and Bribery

Lobbying and bribery can be closely related. Bribery can be categorized into two major categories for the purpose of political decision-making: *outright bribery*, and *circumspect bribery*.³⁴⁵

Studies of lobbying generally do not descend too far into the issue of bribery, presumably because direct bribery has become relatively rare in Western democracies, and because there are legal restraints that curtail this corruption. It is not entirely clear if bribery should be treated as a form of lobbying, or as its own category of corruption. Yet, the nature of bribery is close enough to the exchange model of lobbying, and the exercise of influence over officials, to be worth briefly considering as an offshoot of lobbying. Some bribes purchase a policy decision outright. Often, though, what bribes purchase is access to key decision-makers, or for influential advocates who then take up the lobbying.

For example, in 1976, Lockheed executives admitted to paying millions in bribes over more than a decade to convince officials from numerous countries to buy Lockheed airplanes.³⁴⁶ In Japan, those

³⁴⁴ *Ibid* at 3.

³⁴⁵ DellaVigna *et al.* refer to *circumspect bribery* this as *indirect lobbying*, but that term masks the corrupt nature of the activity. Stefano DellaVigna *et al.*, “Market-Based Lobbying: Evidence from Advertising Spending in Italy” (2016) 8:1 Am Econ J Appl Econ 224–256 at 225.

bribed included Prime Minister Tanaka, other officials related to the finance and the military, and also the right-wing nationalist and crime boss Yoshio Kodama, who was paid to lobby the government on Lockheed's behalf. Lockheed bribed many of the same people it would have otherwise lobbied, and employed an insider-outsider strategy (a strategy discussed below) akin to what it would have pursued had it lobbied more legitimately. In a way, bribery was a lobbying campaign where the exchange model was so prevalent, rational justifications for the airplanes were cut out entirely in favour of direct appeals to naked self-interest.

Outright Bribery

Outright bribery appears to be relatively rare in the established democracies. A sanguine interpretation of its absence is that the rule of law is strong enough, public expectations of honest civil service sturdy enough, enforcement reliable enough, the media independent enough, and the rotation of political leadership frequent enough that outright bribery is not worth it. The risk of being caught is high, the punishments are severe, the threat of lobbyists losing their access to officials is crippling, and the potential scandals so damaging to the political parties, that most people involved have good incentive to avoid outright bribery. Moreover, the frequent turn-over of political leadership in democracy means that bribes to the party that was in power are more likely to be exposed and highlighted when the new party comes in, and decisions made based on those bribes are unlikely to stand up to the scrutiny of the new leaders, instead opening the door to future indictments. Additionally, the established democracies tend to reinforce the good governance in other democracies by enacting rules that make it illegal to bribe foreign governments.

A less sanguine interpretation is that bribery is common, but difficult to detect. It is not the bribery that is rare, but that it is rarely caught.³⁴⁷ Certainly, Abramoff, a famous and famously corrupt lobbyist, engaged in bribery-related activities for quite some time before his fall from power.

Circumspect Bribery

Although outright bribery might be relatively rare in the established democracies, it appears that circumspect bribery is experiencing a renaissance. Circumspect bribery uses an indirect transfer of wealth for supposed legitimate services through an intermediary in order to mask the bribery of the official. It might be prevalent, and it can be difficult to differentiate from legitimate lobbying. This form of bribery is useful because it is safe. The lobbyist can always claim that the payment was for the legitimate service, and the politician has enough distance to claim plausible deniability. The politician need only subtly indicate the bribe is expected.

³⁴⁶ Ben R Rich & Leo Janos, *Skunk Works: A Personal Memoir of My Years of Lockheed* (Little, Brown, 2013) at 10.

³⁴⁷ While rare, bribery does seem to be increasing, at least in the U.S., and some of the scandals reflect enormous long term loss for society. For example, in the Ohio nuclear bribery scandal, FirstEnergy bribed Ohio House Speaker Householder \$61 million for his help in passing an energy bailout of \$1.3 billion to subsidize nuclear and coal plants. The legislation also rescinded the state's clean energy goals. The corruption not only wasted the money, it also did great damage to the state's ability to enact action against climate change and air pollution. Dan Gearino, "Ohio's Bribery Scandal is Bad. The State's Lack of an Energy Plan May Be Worse", (23 July 2020), online: *Inside News* <<https://insideclimatenews.org/news/22072020/inside-clean-energy-ohio-bribery>>.

Three examples of circumspect bribery tied to lobbying will be considered.³⁴⁸ All three show how difficult it can be to prove circumspect bribery, and how payments can be masked as fees for consulting, lobbying, or other legitimate services.

The first example can be found in the life of President Johnson, who entered government poor but left rich. Johnson's wife, Lady Bird, owned and ran radio and TV stations, supposedly independently, but in actuality under his oversight. Johnson used his government influence to ensure that the FCC favoured their stations and outlawed any competition. He also pressured CBS in matters related to the station – despite his supposed distance from the business – by summoning the executives to the White House to “discuss” business disputes. Lobbyists and businesses wanting Johnson's support knew they had to run ads on his wife's stations. Since the station was supposedly run by his wife, and since the lobbyists were spending money on a genuine service – advertising – Johnson remained sheltered.³⁴⁹ Similarly, Italian Prime Minister Berlusconi's TV network saw profits grow by at least €1 billion during his tenure, partly because businesses advertised on it as a way to lobby him.³⁵⁰

The second example is the Airbus Affair. Prime Minister Mulroney was accused of accepting bribes to have Air Canada purchase a large number of Airbus jets. Despite multiple investigations, the truth of the accusation remains murky. The Oliphant Commission determined that Mulroney was paid three cash payments of \$100,000 by Karlheinz Schreiber for lobbying or other services; services that they claimed did not involve the airplanes.³⁵¹ It is likely no one will ever be able to satisfactorily prove that Mulroney took bribes, but the multiple payments of \$100,000 in cash remains suspicious, especially since Mulroney did not declare the income on his taxes, and the two later payments were made even though Mulroney claims not to have rendered any services for the first payment.

A third example of circumspect bribery is likely taking place under President Trump. President Trump has refused to reveal his tax returns or divest himself of his business, and he clearly retains knowledge of what transpires through close family members. Numerous reports have surfaced of foreign interests and lobbyists booking rooms, events, and memberships at his expensive hotels and golf resorts. There have been suspicious profitable land deals and trademark cases going in his family business' direction in foreign countries that likely hope for favours from the U.S. President.³⁵²

³⁴⁸ The prevalence of enormous speaking fees for high-level politicians and their relatives might also represent a form of circumspect bribery.

³⁴⁹ Robert A Caro, *Means of Ascent: The Years of Lyndon Johnson II* (Knopf Doubleday Publishing Group, 2011) at 102.

³⁵⁰ Stefano DellaVigna et al, “Market-Based Lobbying”, *supra* note 345 at 228.

³⁵¹ Jeffrey J Oliphant, *Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney* (Canada: Minister of Public Works and Government Services, 2010) at 24.

³⁵² Amy Brittain & Jonathan O'Connell, “Candy titans plotting lobby strategy are holding events at Trump hotels”, *Tor Star* (8 March 2017), online: <<https://www.thestar.com/news/world/2017/03/08/candy-titans-plotting-lobby-strategy-are-holding-events-at-trump-hotels.html>>; Jeremy Venook, “Trump's Interests vs. America's, Azerbaijan

Throughout his election campaign, President Trump was secretly pursuing a deal in Russia, known as Trump Tower Moscow, which would have made him hundreds of millions of dollars.³⁵³ President Trump appears to have done a number of favours in return, including changing the Republican platform to be more favourable to Russia.³⁵⁴ Those seeking President Trump's ear seem to know that they can lobby him through his self-interest, while the circumspect bribery remains almost impossible to prove in court.

Unfortunately, it is quite possible that President Trump's success at lowering the ethical bar, and Congresses reluctance to enforce standards of good governance and financial transparency, will lower public expectations of government, and that circumspect bribery will become all the more the norm.³⁵⁵ Relatedly, the White House Office of Government Ethics removed a prohibition that banned government employees from accepting contributions to legal funds from unnamed donors.³⁵⁶ This lowering of the ethical bar is all the more troubling as the U.S. Supreme Court appears to have raised

Edition" *The Atlantic* (8 March 2017), online: <<https://www.theatlantic.com/business/archive/2017/03/donald-trump-conflicts-of-interests/508382/>>.

³⁵³ Chase Peterson-Withorn & Dan Alexander, "Mueller: Trump Organization Could Have Made Hundreds Of Millions From Proposed Russia Deal", (7 December 2018), online: *Forbes* <<https://www.forbes.com/sites/chasewithorn/2018/12/07/mueller-trump-organization-could-have-made-hundreds-of-millions-from-proposed-russia-deal/>>; Carol D Leonnig, Tom Hamburger & Rosalind S Helderman, "Trump's business sought deal on a Trump Tower in Moscow while he ran for president", (27 August 2017), online: *Wash Post* <https://www.washingtonpost.com/politics/trumps-business-sought-deal-on-a-trump-tower-in-moscow-while-he-ran-for-president/2017/08/27/d6e95114-8b65-11e7-91d5-ab4e4bb76a3a_story.html>.

³⁵⁴ These publicly known favours and requests include expressing praise and admiration for President Putin, even as Trump regularly insulted other world leaders on twitter; announcing that once elected he would consider easing sanctions placed on Russia for seizing Crimea; changing a plank in the GOP platform regarding U.S. support for Ukraine against the invasion of Russia; publicly requesting that Moscow release the hacked Democratic emails; questioning America's role in NATO; verbally attacking his NATO allies; placing steel tariffs on allied countries; slow rolling additional sanctions against Russia for the electoral interference; refusing to publicly admit that Russia interfered in the U.S. election; refusing to enact policies to prevent future Russian electoral interference; keeping all information about meetings with President Putin secret, even from his own staff; and a number of other international geopolitical moves that tend to favour Russia. "Trump implements Russia's negative agenda by default, undermining the U.S.-led world order, U.S. alliances, U.S. credibility as a partner and an ally." Neil MacFarquhar, "Glee in Russia Over Trump's Foreign Policy Largess", *N Y Times* (22 December 2018), online: <<https://www.nytimes.com/2018/12/21/world/europe/russia-trump-foreign-policy.html>>; Marshall Cohen & Tal Yellin, "How Trump Tower Moscow fits into Russian interference", (1 December 2018), online: *CNN* <<https://www.cnn.com/interactive/2018/politics/trump-tower-moscow-timeline/index.html>>; For much of the favours list, see The Editorial Board, *USA TODAY*, "Trump pursued a deal in Russia and hid it from voters", (22 January 2019), online: *USA TODAY* <<https://www.usatoday.com/story/opinion/2019/01/22/donald-trump-pursued-business-deal-russia-hid-voters-editorials-debates/2642773002/>>.

³⁵⁵ The former director of the Whitehouse Office of Government Ethics, Walter Shaub, stated he feared the Trump White House could be seen as a kleptocracy. "We are truly in an ethics crisis right now, and something has got to be done about it". Chris Baynes, "Trump ethics watchdog quietly scraps policy banning anonymous donations to White House staff legal fees", (14 September 2017), online: *The Independent* <<http://www.independent.co.uk/news/world/americas/us-politics/trump-ethics-watchdog-anonymous-donations-white-house-staff-legal-fees-lobbyists-scraps-ban-a7946441.html>>; See also, Cyra Master, "House Dem Forces GOP to Take Recorded Vote on Trump Tax Returns", (27 February 2017), online: *The Hill* <<http://thehill.com/policy/finance/321476-house-dem-fails-to-force-release-of-trump-tax-returns>>; Dan Merica, *Trump Transition Team Canceled Ethics Training Session* (CNN, 2017); Jeremy Venook, *supra* note 352.

³⁵⁶ Chris Baynes, *supra* note 355.

the bar for the prosecution of corruption and bribery, by setting a restrictive definition of what activities count as an “official act”.³⁵⁷

There is a second type of circumspect bribery which is extremely prevalent. That bribery is found in the revolving door movement between public office and private employment.

Revolving Door Movement

In the American context, there has been a significant increase in *revolving door* movement, the movement between employment in government and related private employment, particularly in the lobbying profession. The story is not as clear in the Canadian context. The revolving door consists of two related sub-types of activities: the movement between industry (or industry lobbying) and regulatory positions that oversee the industry in question, and the movement between officials and work as lobbyists.³⁵⁸

Revolving Door for Regulators

The revolving door movement of lobbyists and industry employees into government positions that oversee their industry can be for the relatively positive goal of providing expertise and insight into the regulated industry. Alternatively, these employees can work to make the regulator more industry friendly, leading to industry capture of the regulator.³⁵⁹ When exercising appointment powers, the personnel chosen express the policy preference.

Factoring into this, the regulatory position can be long-term or short-term. In the case of long-term, the concern is that the regulator will be swayed by framing bias or sympathy to favour the industry. For example, Federal Communications commissioners “who had once worked in the broadcast industry are more likely to side with that industry’s positions on proposed regulations.”³⁶⁰ If the position is short-term, the concern is that the regulator might also be swayed by self-interest concerning future industry job possibilities.

Clearly, with short-term positions the risks of regulatory capture are higher. Both Lessig and Abramoff argue that it is quite difficult, and maybe psychologically impossible, for bureaucrats, politicians and aides to work in the public's interests and regulate businesses dispassionately, when they have an eye on future job prospects working or lobbying for that business.³⁶¹ The American system is

³⁵⁷ *McDonnell v United States*, 2016 Supreme Court of the United States at 21.

³⁵⁸ McGuire argues that there is also a revolving door at play for law clerks of the U.S. Supreme Court. “The justices’ law clerks, upon leaving the Court, appear far more likely to remain in Washington than to disperse across the legal landscape. For those that do remain, they make themselves largely available to serve private interests that have business before the Court.” Kevin T McGuire, “Lobbyists, Revolving Doors and the U.S. Supreme Court” (2000) 16 J Law Polit 113–138 at 136.

³⁵⁹ By summer 2017, President Trump “had appointed more than 100 lobbyists to jobs in the Environmental Protection Agency, the Interior Department, the Federal Communications Commission and elsewhere. Their old clients ... knew exactly whom to call.” Nicholas Confessore, *supra* note 222.

³⁶⁰ Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 3.

³⁶¹ Jack Abramoff, *supra* note 1 c 6; Lawrence Lessig, *supra* note 273 at 123.

particularly susceptible to this risk. The U.S. has an extensive list of key political appointments to regulatory bodies (and cabinet positions) who serve at most only as long as the current President presides and are then likely to return to industry or lobbying positions.³⁶²

It is not entirely clear that this subset of revolving door movement has increased significantly in the Canadian context, rather than simply becoming more apparent due to the more open nature of government. In the American context, it has increased significantly, but its predominance is particularly reactive to the philosophy of the President, and whom she favours appointing.

Revolving Door for Politicians and Aides

The second type of revolving door movement is the transition of politicians, aides and other officials leaving government to become lobbyists. In the American federal context, the terms of office is often short, the work demanding and the compensation low, whereas the pay for lobbyists is quite high. Officials and aides can make multiple times their salary working as lobbyists. One study found that former U.S. Congress members were making an average of 15 times their salary in their work as lobbyists.³⁶³ This movement from government to lobbying has become a torrent in American politics, increasing from 3% to 50% over the last 30 years.³⁶⁴ Lapira and Thomas argue that the high number of revolving door lobbyists listed in disclosure forms actually underrepresents the phenomenon, because it relies on self-reporting.³⁶⁵ In theory, American lobbyists are barred from making job offers to officials who are still working in public office, but it is not clear they abide by these restrictions. Moreover, even without explicit offers, officials know what legislation and decisions will get them more lucrative positions when they leave public service.³⁶⁶ Abramoff recounts,

“I would say a few magic words: “When you are done working for the Congressman, you should come work for me at my firm.” With that ... I would own him, and consequently, that entire office. No rules had been broken, ... but suddenly, every move that staffer made, he made with his future at my firm in mind ... he was

³⁶² An interesting example of the complexity of this appointment process occurred when the head of the Consumer Financial Protection Bureau from the previous administration stepped down. He named Ms. English as his acting deputy director and therefore the presumed acting director. Meanwhile, President Trump appointed Mick Mulvaney, who was also the director of the White House Office of Management and Budget, as temporary head of the agency. The agency ended up with two acting directors, and it was not legally clear who should be in charge. Katie Rogers, “Two ‘Acting Directors,’ and One Skeptical Judge”, *N Y Times* (27 November 2017), online: <<https://www.nytimes.com/2017/11/27/us/politics/cfpb-leandra-english-mulvaney.html>>.

³⁶³ “Republic Report’s investigation found that lawmakers increased their salary by 1452 percent on average from the last year they were in office to the latest publicly available disclosure”. This was a small sample, limited by those whose lobbyist salaries were publicly disclosed. It is possible that these officials are at the higher end of the returns. Still, most people would be very grateful to see their salary to double once they were established; never mind the promise of an increase of 5, 10, or 15 times. Lee Fang, *supra* note 113.

³⁶⁴ Lawrence Lessig, *supra* note 273 at 123.

³⁶⁵ Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 4.

³⁶⁶ Jack Abramoff, *supra* note 1 c 6; Lawrence Lessig, *supra* note 273 at 123.

already working for me, influencing his office for my clients' best interests. It was a perfect – and perfectly corrupt – arrangement.”³⁶⁷

There are certainly those who only go into Washington so they can retire and join the lucrative ranks of employed lobbyists. The salary difference between working as an aide or even top official and working as a lobbyist in the U.S. is enormous. For example, in his first two months as head of a lobbying association, Tim Pawlenty made more than double his previous annual \$120,000 salary as governor.³⁶⁸ Former Congressman Chris Dodd made \$3.3 million in a year as the head of the trade association and movie industry lobby, the Motion Picture Association of America.³⁶⁹

This pattern of revolving door into lobbying positions appears to have spreading the same way lobbying did. In Germany, revolving door movement has increased steadily since the 1980s, although it has not reached the same degree it has in the U.S.³⁷⁰ Dörrenbächer found that a business relevant degree and working in an area with more contact with lobbyists were both factors that increased the chance of a revolving door movement from high-ranking cabinet politician to lobbyist.³⁷¹ Dörrenbächer found that those on the center and left were somewhat more likely to use the revolving door than those on the right of the political spectrum, possibly because of the difference in available opportunities.³⁷²

In Canada this cycle of revolving door appears less common, due to the different structure of government, the lower pay of lobbyists, and the stricter regulations and cool-down period restricting the lobbying of government by those formerly in office. However, it seems to be increasing. For example, many former officials and regulators cycle in and out of the oil industry.³⁷³ Some of the subjects I interviewed believe that many politicians participate in lobbying more indirectly, by providing instructions and contacts for others in the firm that hires them, but not lobbying directly themselves.³⁷⁴

³⁶⁷ Jack Abramoff, *supra* note 1 c 6.

³⁶⁸ Lee Fang, *supra* note 105.

³⁶⁹ *Ibid.*

³⁷⁰ Patrick Bernhagen & Brett Trani, “Interest group mobilization and lobbying patterns in Britain”, *supra* note 143 at 488.

³⁷¹ Nora Dörrenbächer, “Patterns of post-cabinet careers: When one door closes another door opens?” (2016) 51:4 *Acta Polit Lond* 472–491 at 482.

³⁷² *Ibid* at 484.

³⁷³ “The lobbyist registry indicates that forty-five consultant lobbyists hired by the industry have had notable careers within the federal government. In some cases consultant lobbyists have jumped back and forth through the revolving door between jobs with the government and working as consultant lobbyists for the petroleum industry. Several consultant lobbyists that actively lobbied the government on behalf of the industry since July 2008 have links to the current Harper government. In many cases the federal alumni discussed above are now working for the same companies that they were previously being paid to regulate.” Daniel Cayley-Daoust & Richard Girard, *supra* note 2 at 7.

³⁷⁴ It would be surprising if the interview subjects were mistaken about former politicians providing indirect help for the lobbying efforts of the firms that hired them, since we know that in-house lobbyists are taking advantage of loopholes to avoid reporting their lobbying when they can. See, Gen McGregor, *supra* note 104; See also, Daniel Cayley-Daoust & Richard Girard, *supra* note 2 at 9.

The reason lobbying firms are so keen to hire former politicians and officials, is that they are effective. Lobbyists maintain that former officials “are more likely to provide useful information”³⁷⁵. Lazarus and McKay found that universities who hire revolving door lobbyists are more likely to receive earmarked federal funds.³⁷⁶ Baumgartner *et al.* go even further and in their comprehensive multi-year study of lobbying, conclude that “any federal government employment in the proceeding 20 years was the only independent variable (besides having a powerful government officials support) that systematically predicts lobbying success.”³⁷⁷ Former officials have policy-making experience, related expertise; have relationships with those still in office; know who counts in politics, legislatures, and bureaucratic offices; and know the key pressure points. This makes them effective lobbyists. LaPira and Thomas argue that “the advantages that come with having worked inside the halls of power gives the interests they represent undue influence.”³⁷⁸ The increased access also grants a halo effect to the special interest groups, trade associations and other organizations associated with the lobbyists, providing them with an edge when recruiting members and clients.³⁷⁹ The rise of former officials as revolving door lobbyists is an important story in the evolution of lobbying.

Large Individual Donors and Shadow Political Parties

Recently, two new aspects of lobbying have arisen in America. These approaches appear to offer the lobbyists a large increase in influence over political decisions. The first aspect is the role large individual donors now play in political campaigns, often entirely supporting a particular candidate. These billionaire donors are not technically lobbyists, but the influence they wield over their candidate is enormous. These donors will always have individual issues and business concerns. Their candidates are undoubtedly continuously made aware of these interests. This topic is covered in more depth in Chapter 4.³⁸⁰

The second new aspect of lobbying is the development of what can be called *shadow political parties* over the last decade.³⁸¹ Currently, only one such institution exists, operating on the right of the American political spectrum. This shadow political party is the Americans for Prosperity (AFP) organization, which was founded by Charles and David Koch.³⁸² It is funded by a network of extremely

³⁷⁵ Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 2.

³⁷⁶ *Ibid* at 4.

³⁷⁷ Frank R. Baumgartner et al, *supra* note 59 at 208.

³⁷⁸ Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 2.

³⁷⁹ Joost Berkhout, “Why interest organizations do what they do”, *supra* note 72 at 238.

³⁸⁰ The Influence of Campaign Contributions: Campaign Contributions Grant Influence: Donations Work with Lobbying, p. 254.

³⁸¹ This use of the term *shadow political parties* in this thesis is different from the Brennan Center for Justice’s use of the term *shadow parties*. In the center’s use of the term, the shadow parties do not attempt to perform all the functions of a political party. Instead, they are “super PACs and nonprofits that are run by former top staff of party committees or party leaders, and mimic party spending strategy. These groups function as arms of the parties, but unlike official party committees, they can accept unlimited contributions and sometimes keep their donors secret.” *Election Spending 2016: Just Three Interests Dominate, Shadow Parties Continue to Rise | Brennan Center for Justice*, by Ian Vandewalker (New York University Law School: Brennan Center for Justice, 2016) at 3.

³⁸² “More than half of the outside spending in key Senate races comes from just three interests: the Democratic Party, the Republican Party, and the political network founded by the industrialist Koch brothers.” *Ibid* at 1.

wealthy donors. The Koch brothers had a long history of political involvement, but since it began in the early 2000s, AFP has become something entirely new. AFP, in association with some of the other organizations that the Koch brothers created, acts as a parallel political action network to the Republican Party.³⁸³ Skocpol and Hertel-Fernandez performed a thorough investigation of the AFP and came to the conclusion that it,

more closely resembles a European-style political party than any sort of specialized traditional U.S. advocacy group or election campaign organization. Yet AFP is not a separate political party. It is, instead, organized to parallel and leverage the Republican Party, because it overlaps with the party but is not subsumed within it or beholden to GOP officials. With a disciplined focus on its own agenda, AFP leverages Republican candidates and officeholders and pulls them to the far right on political-economic issues.³⁸⁴

The shadow party organization influences and promotes policies and politicians. It is an advocacy group, an election campaign organization, a grass-roots mobilization organization and a lobbying organization combined. It is modelled on the success and structure of unions, but is far more sophisticated, complex, and top-down. “Americans for Prosperity is centrally directed yet federated; it impacts both elections and policymaking; it combines insider lobbying with public campaigns and grassroots activation; and – perhaps most important of all – AFP enforces its own highly disciplined policy agenda but at the same time is thoroughly intertwined with the Republican Party.”³⁸⁵

Part of the effectiveness of AFP is due to its use of a revolving door with the Republican Party and its office holders. Unlike other conservative lobbying organizations, where the employees tend to continue careers in lobbying, many AFP employees pursue careers interwoven with the Republican Party, moving back and forth.³⁸⁶ This allows the AFP to push the Republican Party from the inside and outside. Skocpol and Hertel-Fernandez note that,

“a very high proportion of AFP state directors held earlier positions in GOP election campaigns or on the staffs of Republican legislators and executives; and after their AFP stints many have also moved on in due course to such posts... Often these post-AFP jobs in the Republican Party are very significant jobs such as legislative staff directors or heads of presidential or Senatorial campaigns.”³⁸⁷

³⁸³ Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 15.

³⁸⁴ *Ibid* at 23.

³⁸⁵ *Ibid* at 19.

³⁸⁶ *Ibid* at 27.

³⁸⁷ *Ibid* at 29.

The movement of AFP's employees in and out of government and the Republican Party is a good example of how the revolving door grants lobbyists additional influence and success. Skocpol and Hertel-Fernandez argue that AFP employees,

know who counts in Republican politics, legislatures, and governors' offices, and their savvy makes it easier for AFP to mount well-targeted lobbying efforts and issue campaigns. AFPers who have worked in GOP positions also know the strengths and vulnerabilities of each state's Republican "establishment," which of course greatly helps AFP to gain leverage during legislative battles. In addition, when former AFP state directors later move into Republican posts – by directing election campaigns, working as political consultants, or managing governing staffs – chances are that many of them will further AFP agendas and help drag the Republican Party as a whole further to the right on political-economic issues.³⁸⁸

Although AFP engages in election campaigning and has a genuine grassroots outreach that can mobilize concerned citizens, the organization is a shadow political party, there is no genuine citizen input or grassroots influence. Unlike a political party, AFP is not controlled by its citizen members. They do not elect the AFP leadership, do not provide the bulk of the funding, and do not set the agenda.³⁸⁹ The AFP is a top-down organization that reflects the views of Charles Koch and the large donors they enlist to support it. These views are significantly more right-wing on economic issues than those of most Republican voters.

Skocpol and Hertel-Fernandez argue convincingly that the AFP wields enormous influence over American politics, much more than other lobbying organizations.³⁹⁰ They note that AFP activity is strongly associated with Republican state legislatures enacting economic policies that are significantly more right-wing than what the average Republican voter supports.³⁹¹ For example, Andrew Ogles was a successful campaign operative in Tennessee who led efforts to elect Republicans to super-majority control of the legislature. He then became the state's director at AFP. In 2015, when Governor Haslam attempted to enact his election promise to accept a conservative variant of Medicaid expansion under the Affordable Care Act, AFP led the charge against this federally funded Medicaid expansion.

Ogles went from electing Republicans to full control of the Tennessee legislature to targeting many of those very same legislators with retribution when they showed any openness to expanding Medicaid – not just lobbying them, but also unleashing radio ads and door-to-door canvassers. In a very short time, Governor Haslam's

³⁸⁸ *Ibid* at 28.

³⁸⁹ *Ibid* at 22.

³⁹⁰ *Ibid* at 13.

³⁹¹ *Ibid*.

proposal died in the legislature. Obviously, AFP-Tennessee Director Ogles knew exactly how to leverage the very Tennessee GOP legislature he had helped to elect; and his expertise and leadership allowed AFP, working with other right-wing groups, to re-set the legislature's agenda and undercut the Republican governor's willingness to compromise with the Obama administration.³⁹²

AFP's very nature – separate but integrated with the political party, operating in all areas of the country and requiring massive infrastructure and funding – makes it unlikely a second shadow political party could appear on the right-wing of American politics. A shadow political might still arise on the left side of the spectrum. It is too soon to say if these shadow parties are coming to Canada. The historical, cultural and regulatory differences make Canada a more hostile environment for them. Their growth would also be inhibited by the larger number of political parties and their more unified political structure. However, many American lobbying and political trends do eventually move north.

Relationship between Lobbyists and Particular Political Parties

Although AFP is the only complete shadow political party, there appears to have been a general trend of interest groups aligning with specific political parties, as the American political parties have become more ideologically distinct. Traditionally, there were always specific lobbying and special interest groups that associated only with one political party. However, most lobbying groups, particularly business lobbyists, did not side too much with a given party, so that they could more easily lobby when the other party was elected into power. Over the last two decades, there has been a trend of political ideological alignment in American politics along party lines. For example, the NRA used to endorse both specific Democrats and Republicans, but increasingly it endorses only Republicans.³⁹³ Similarly, the coal industry has moved increasingly into the Republican's camp, as the climate change groups have moved increasingly into the Democrat's camp.

These trends are somewhat self-reinforcing. As the parties take a clearer more distinct position on an issue, the issue becomes a partisan question, further dividing the parties; lobbyists opposed to the position give up on one side and concentrate their efforts on the other side. Likewise, in times of increased polarization, as lobbyists concentrate their efforts on one side, that side aligns more with their political views, politicians who agree with the lobbyist on the other side have less incentive to go against the party line as it becomes a starker divide. Moreover, lobbying organizations are not immune to trends driving partisanship, and can become increasingly extreme in their views, until only the edge of one particular party shares their concerns.

³⁹² *Ibid* at 28.

³⁹³ Analysis by Harry Enten CNN, "The NRA used to be much more bipartisan. Now it's mostly just a wing of the GOP", (24 February 2018), online: CNN <<https://www.cnn.com/2018/02/24/politics/nra-partisan-bipartisan-republican/index.html>>.

This trend should not be overstated. Many consultant lobbyists have always had strong ties to one political party or the other. There is a benefit to being a lobbying firm that has ties to multiple political parties, either by being independent or by hiring political operatives from across the spectrum. But there is also a strong benefit to tying the firm to one political party. Much of lobbying is built on personal relationships, and it is easier to form relationships with those of similar political view and recruit people from the revolving door of government if they share views with the other people at the firm. There is also a reward to this form of specialization. Eggers found that lobbyists who are associated to a particular party gain clients when that party comes into power.³⁹⁴ However, these gains and concerns do not apply to the lobbyists who work in the more esoteric areas, which have little political salience and public visibility.

A similar trend has occurred in Canada, although not to same degree, as there are more political parties. In Canada, the lobbying ties are not always as clear. Still, there are some signs of alignment. For example, there are stronger ties between oil companies and the Conservatives, and the climate change activists and the left-wing political parties.

In Canada, the partisan pressures are always going to be somewhat different due to the difference in political systems. There are more political parties dividing the ideological ground, which decreases the partisan chasm between any two given parties. Unlike the U.S., in Canada the party out of power has virtually no say in governance, so lobbying them on a particular issue is unlikely to accomplish much in the near term. Meanwhile, the unitary party control over government encourages lobbying organizations to maintain ties with leaders in all the major parties, and with the apolitical bureaucracy. There can still be rewards for having a close link to the party in power, and the nature of personal relationships will force some partisanship in the lobbying organization; but there is less incentive to seek the extremes of the party, align with only one of the parties, or lobby for uncompromising positions.

Officials Benefit from their Relationship with Lobbyists

Government officials benefit from their relationship with lobbyists.³⁹⁵ These benefits can include information, as we have discussed, including means to pressure other officials and politicians. It can also include more direct benefits, such as free trips, luxury travel, events in their honour, donations; and indirect means to profit, like future job opportunities, stock tips, or even outright bribery.

These benefits were the motivation behind the K Street project, former Republican Whip Tom DeLay's successful, then scandalous, plan to pressure lobbying firms into hiring Republican partisans into their top positions.³⁹⁶ The motivation appears to have been a combination of crony capitalism, an attempt to extort the lobbying firms into donating to Republican candidates, and an attempt to tilt Washington political environment to the right by moving the lobbying firms to the right. This third factor is noteworthy. The K-Street project treated lobbying as a good the governing party wanted to

³⁹⁴ Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 4.

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

monopolize, and as an external means to influence government policy by replacing Democrats in the top lobbying positions, thereby reframing the political debates. They appeared to have reasonably believed that if one side is no longer represented in lobbying, and then government policies would drift towards the preferences of the other side.

Build Relationships with Other lobbyists

The last major activity lobbyists engage in is to build relationships with other lobbyists and special interest groups. Lobbyists need the contacts and information other lobbyists have. The relationships lobbyists form with other lobbyists and interest groups can be almost as important as their relationships with officials or their own clients. Other lobbyists have important connections, specialities and information that can be relevant to the issue at hand. Lobbyists also work with political organizations that are not fully lobbying groups, but operate in the overall policy and ideological spectrum. For example, AFP works closely with the American Legislative Exchange Council and with free-market think tanks connected to the State Policy Network.³⁹⁷

We will discuss how lobbying groups form coalitions; the interactions between lobbying groups; and their relationship with think tanks.

Lobbying Groups Form Coalitions

Most importantly many issues are simply too big for any individual lobbying group to cover, particularly at the federal level, so lobbyists generally form coalitions to address these issues. They see coalitions as a critical tool for influencing public policy.³⁹⁸ Organizations are especially likely to join coalitions when there is strong opposition to their policy goals.³⁹⁹ In forming these coalitions lobbying groups tend to settle into a simple binary of pro or con sides to any given issue. This is likely because the status quo is hard to overcome and by the time pressure for change has built up, those favouring change have settled on one path forward, knowing they need to work together to accomplish their goal. In forming their side of a policy debate, lobbying groups strategically seek out other groups that fill in for their weaknesses.⁴⁰⁰ For example, organizations with political connections might seek those with policy expertise; new innovative businesses might seek out established businesses with more industry clout; and corporate organizations might seek out friendly citizen grassroots organizations.

Baumgartner *et al.* find that at the American federal level the alliance of corporations and citizen groups is quite common.⁴⁰¹ According to Baumgartner *et al.*, the reason that coalitions form between citizen groups and corporate groups is because they synchronize well. The former provides public sympathy and motivates some measure of government favourability; the latter provides better connections and more resources. Although most lobbying is done by corporate groups, on large high-

³⁹⁷ Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 22.

³⁹⁸ David Nelson & Susan Webb Yackee, "Lobbying Coalitions and Government Policy Change: An Analysis of Federal Agency Rulemaking" (2012) 74:2 J Polit 339–353 at 339.

³⁹⁹ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 258.

⁴⁰⁰ David Nelson & Susan Webb Yackee, *supra* note 398 at 343.

⁴⁰¹ Frank R. Baumgartner *et al.*, *supra* note 59 at 12.

profile issues citizen groups are always involved, generally on both sides. Lobbyists know that politicians have good reason to side with a lobbying coalition that contains both corporate and citizen groups. One would expect this dynamic plays out in Canada as well.

Nelson and Yackee theorize that the formation of coalitions strengthen the lobbyists' position and provide information for policy-making. They argue that by forming coalitions lobbyists send "a more uniform signal to regulators."⁴⁰² This consistency improves the chances of favourable lobbying outcomes. Nelson and Yackee find that coalitions do better at lobbying, particularly at the detailed rule making regulatory stage of the policy process.⁴⁰³ They theorize that one of the reasons businesses are more successful than citizen groups at lobbying at the regulatory level is because it is easier for businesses to form coalitions.⁴⁰⁴ They also theorize that coalitions prove the value of lobbying organizations to government officials, by demonstrating that the lobbyists can bring in groups outside of the normal lobbying process, demonstrating the lobbyists have the reach to generate new actors and new information.⁴⁰⁵ These would be benefits in either lobbying model: new policy forces in the neo-pluralist model, or new goods in the exchange model. "The coalitions' "strategic recruitment provides a pathway for new ideas to enter the policymaking process."⁴⁰⁶

Lobbyists form networks of coalitions, in which different lobbying groups have varying degrees of influence. Heaney and Lorenz find that "interest groups are more influential when they are situated between other groups in the coalition network, not simply when they accumulate memberships in many coalitions or join large coalitions."⁴⁰⁷ The formation of coalitions is not simple. Even if an organization might prefer a particular policy outcome, there is always the temptation to free ride on the work of other groups. For this reason it is vital for lobbyists to maintain good relationships with other lobbyists and interest groups. This way they have the connections for joining the coalition, and the trust to know that the other members of the coalition will genuinely expend their share of the effort and resources on the policy struggle. The coalitions also have to be maintained throughout the policy debate, even though the costs and benefits might not accrue evenly to all the members of the coalition. The lobbyists also have to contend with the fragility of the coalition. It is often a temporary alliance. Godwin *et al.* argue that for the coalition, "almost all policymaking includes a phase where collective goods dominate the policy debate and a later phase during which the focus is on securing private goods."⁴⁰⁸

⁴⁰² David Nelson & Susan Webb Yackee, *supra* note 398 at 352.

⁴⁰³ *Ibid* at 351.

⁴⁰⁴ *Ibid* at 352.

⁴⁰⁵ *Ibid* at 343.

⁴⁰⁶ *Ibid*.

⁴⁰⁷ Michael T Heaney & Geoffrey M Lorenz, "Coalition portfolios and interest group influence over the policy process" (2013) 2:3 Interest Groups Advocacy 251–277 at 274.

⁴⁰⁸ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 104.

The Interactions Between Lobbying Groups

Interest groups make different use of trade associations and consultant lobbyists, depending on the situation. They also share many ties to think tanks, which often act in support of lobbying campaigns.

Trade Associations and Consultant Lobbyists

Interest groups, particularly businesses, make use of trade associations to lobby, as well as using their own in-house lobbyists and hiring consultant lobbyists. Small and large businesses make different uses of these tools.

Small Businesses

Smaller businesses rarely have the means, needs, and wherewithal to maintain in-house lobbyists. Instead they tend to be members of trade associations who lobby on their behalf, loosely representing the industry as a whole. For example, the Canadian Dental Association or the Ontario Bar Association represent their membership to government, lobby on their behalf, and report back on policy changes that might affect them.

Large Businesses

Larger corporations with in-house lobbyists also maintain links to trade-associations and other organizations that lobby on their behalf. Trade-association are used to lobby on larger issue that affect the whole industry, to co-ordinate with the individual companies, and to lobby on issues where the individual corporations do not want to be visibly tied to the issue.

An organization might also outsource its lobbying to an association when the area in question is outside the original organization's expertise, the scope of its in-house lobbying, or the outside organization has better contact with the relevant officials. As discussed, often the in-house lobbyists will coordinate with external lobbyists, particularly on large campaigns, where they might employ large numbers of consultant lobbyists. This is akin to how big corporations with hundreds of lawyers will hire external law firms for large cases.

Consultant Lobbyists

Retnasaba proposes that external consultant lobbyists are so prevalent because they are a way to mask and diffuse responsibility for potentially corrupt actions. He argues that external lobbyists face fewer social constraints, are less heavily regulated, and are less policed than the primary industry.⁴⁰⁹ Thus the external lobbyists can engage in borderline and outright corrupt behaviour, utilize economics of scale by representing multiple corporations in an industry, while shielding them from any repercussions of the corrupt activities.⁴¹⁰ Essentially, the corruption is diffused across the industry, so

⁴⁰⁹ Gajan Retnasaba, *supra* note 278 s III.1.

⁴¹⁰ *Ibid.*

each corporation can keep their hands clean. This reduces the cost of scandal and corruption, as consultant lobbyists can always be fired if the corruption is exposed.

Even with access to external lobbyists, a company might opt to do the lobbying itself, particularly when the issue at hand is not large enough in scope to motivate the trade association, when the possible advantages are specific to that business, or the lobbying requires specialized information from the organization. This is all the more true when the policy in question will benefit some members of an association, but harm others. For example, a regulation might propose to limit a chemical pollutant and one company might have a process that limits the pollutant to 8 parts per million, whereas another might offer a more expensive process that goes down to 2 parts per million. Having different policy goals they will likely opt to lobby individually.

Lobbying Groups and Think Tanks

Lobbying organizations often work in concert with think tanks. As with lobbying, there has been a huge expansion in the number of think tanks in the U.S. since 1980.⁴¹¹ Think tanks often provide the books, articles, policy papers, and pre-crafted legislation to support a particular policy position. The materials prepare the political landscape to be receptive to the lobbyists' point of view, and lobbyists use these materials to support their arguments. Essentially, think tanks have become key components and extensions of lobbying campaigns.⁴¹²

Political think tanks can be loosely grouped into two categories: those that pursue evidence-based research and those that are "narrowly ideological and consistently generate predictable findings ... despite evidence to the contrary."⁴¹³ The evidence-based think tanks might have a general broad ideology (i.e. pro-market, poverty alleviation, etc.), but they follow the standards of good academic work, laying out arguments that are honestly supported by the evidence and literature. They are generally conceived of as universities without studies, or private entities that pursue commissioned research projects. Well known examples of these think tanks include the Brookings Institution, the Carnegie Endowment for International Peace, the Council on Foreign Relations and the RAND Corporation.⁴¹⁴

Unfortunately, ideologically-based think tanks, which support specific policy goals regardless of the intellectual veracity of the evidence, are coming to dominate the marketplace.⁴¹⁵ The U.S. Congress has been quite willing to treat these think-tanks as valid sources of information.⁴¹⁶ Examples of this type

⁴¹¹ *Think Tanks in the United States: Activities, Agendas and Influence*, by Alek Chance (Institute for China-America Studies, 2016) at 5.

⁴¹² *Ibid.*

⁴¹³ *What Are Think Tanks Good for?*, by John de Boer (United Nations University Centre for Policy Research, 2015).

⁴¹⁴ Alek Chance, *supra* note 411 at 2.

⁴¹⁵ *Ibid* at 4.

⁴¹⁶ Ideological think tanks are highly represented in the major American think tanks that appeared before Congressional Committees between 1999-2008. American Enterprise Institute 21%; Center for Strategic and International Studies 17%; Heritage Foundation 15%; Cato Institute 13%; RAND 11%; Urban Institute 10%; Other 13%. *Ibid* at 25.

of think tank include the Heritage Foundation and the Heartland Institute.⁴¹⁷ A good example of this evidence-free output is climate change denialism, which runs in contradiction to all scientific knowledge. “[M]ore than 90% of skeptical or denialist climate change papers in the United States originate from right-wing (neoliberal, conservative) think tanks registered in a database of the U.S. Heritage Foundation”⁴¹⁸. Chance points out that many “of the 1800 U.S. “think tanks” are in truth thinly disguised lobbying groups of one kind or another.”⁴¹⁹ This can usually be seen in their funding sources. For instance, the Consumer Alert public health research institute received major funding from alcohol, chemical, and tobacco companies.⁴²⁰

Think tanks are a strategic investment; a tool to support long-term ongoing lobbying campaigns. They provide an apparently neutral source of information and broader justifications that can be disseminated to political supporters and the media. Unlike a more targeted lobbying campaign, the materials they produce can help alter public and elite opinion over time. In addition, in the U.S. and Canada, most think tanks are structured nonprofits, making the donations tax deductible, keeping the donors anonymous, and allowing the think tank to operate tax free.⁴²¹ This provides the donors with a level of protection and deniability. In theory, the government is supposed to prevent think tanks registered as nonprofits from lobbying, but the lobbyists can still use their materials as part of a lobbying campaign – so the restriction is mostly moot. In order to avoid even these limitations, some organizations in the U.S., like Heritage and the Center for American Progress, have established parallel 501(c)4 structures that allows limited (under 50%) direct engagement in politics and lobbying.⁴²² There is very little enforcement of these limits.

“Regulators of think tanks, such as the IRS, are mostly interested in monitoring compliance with laws prohibiting influence in electoral processes. Outside of this domain, there is considerable room for various agendas to influence policy if their efforts are presented as research products.”⁴²³

Think tanks remain significantly more prevalent in the American political landscape. In 2007, capital gains from donated shares to think tanks became fully tax exempt in Canada; it would not be surprising if we see a corresponding increase in Canadian political think tanks in the wake of this stimulus.⁴²⁴

⁴¹⁷ *Ibid* at 2.

⁴¹⁸ Jordi Xifra, “Climate Change Deniers and Advocacy: A Situational Theory of Publics Approach” (2015) 60:3 Am Behav Scien 276–287 at 284.

⁴¹⁹ Alek Chance, *supra* note 411 at 24.

⁴²⁰ *Ibid*.

⁴²¹ *Ibid* at 11. 501(c)3 and 501(c)4 refer to the section of the American Internal Revenue Code that define the type and acceptable activities of the nonprofit organizations.

⁴²² *Ibid*.

⁴²³ *Ibid* at 24.

⁴²⁴ Edward Elgar, “Book Review: Comparative Think Tanks, Politics and Public Policy By James McGaan with Eric C Johnson” (2008) 51:2 Can Public Adm 368–379 at 368.

In theory, the use of ideological think tank research with no academic validity could infringe the Canadian *Lobbyists' Code of Conduct*. "A lobbyist shall avoid misleading public office holders by taking all reasonable measures to provide them with information that is accurate and factual."⁴²⁵ In reality though, there has been a general reluctance in politics and the media to hold research materials to any level of scrutiny.

Interest groups make use of trade associations, in-house lobbyists, consultant lobbyists, and think tanks depending on their particular needs. The ideologically-based think tanks often operate as part of a broad lobbying campaign.

In summation so far, lobbying has been increasing since the 1970s. Lobbying is sticky. Once an organization starts to lobby, it tends to continue doing so. There are three main justifications for lobbying: tradition, the right to petition government, and the provision of information the government needs. Lobbyists engage in five main activities: lobbying government, monitoring government, building their client base, building relationships with officials, and building relationships with other lobbyists. There is debate about whether the neo-pluralist model or the exchange model better describes lobbying. It might be that both apply because two activities fit under the rubric of lobbying – a more complex struggle over policy goals, and a more naked exchange of favours. We will now look at four approaches to understanding the process of lobbying:

Four Approaches to Understanding Lobbying

The process of lobbying is fluid, complicated, often hidden, and highly reactive to the particular social-political contexts. Political scientists have tried to bring an ordered understanding of this chaos by establishing various classifications.⁴²⁶ The effort is complicated by the personal nature of the interactions and power struggles. Despite these complexities, four approaches are useful to understand lobbying: *the insider-outsider approach*, *the disclosure versus corruption approach*, *the four sides of power approach*, and *the hydraulic force approach*.

The Insider-Outsider Approach

There are two general ways interest groups can approach officials, the outsider and the insider approaches. The outsider approach is to pressure government decision-making from the outside. The outsider techniques include protests, marches, media publications, letters to the editors, social media campaigns, and other methods to engage and rally the public. The lobbyist hopes that the outsider campaign will create a sense that the issue is important to the public, or a key constituency, and that they want government action on it.⁴²⁷ It seeks to motivate a supportive portion of the population, often

⁴²⁵ Government of Canada, *supra* note 117.

⁴²⁶ Amy McKay, "Buying Policy?", *supra* note 308 at 920.

⁴²⁷ Ken Kollman, *Outside Lobbying: Public Opinion and Interest Group Strategies* (Princeton, N.J.: Princeton University Press, 1998) at 8.

by building on what they consider a key part of their social identity.⁴²⁸ The approach aims to convince undecided officials to side with the lobbyist, and favourably disposed officials that it is a high priority issue, which should not be left unaddressed. Ideally, officials who disagree with the lobbyist will conclude that it is not worth the political capital and risk of unpopularity to fight the issue. This approach is generally more adversarial than the insider approach.⁴²⁹ This tactic is an important means to exert popular pressure on officials between elections, and open up insular decision-making processes.⁴³⁰ Citizen groups tend to be better endowed to take advantage of outsider tactics, due their access to volunteers and their strong communal ties.⁴³¹

The insider approach is closer to what most people consider lobbying. It involves direct conversation with government decision-makers. Insider lobbying often encompasses meetings with bureaucrats and officials who work behind the scenes and have no public profile. Businesses and trade associations rely more on an inside strategy than citizen groups do.⁴³² This difference in tactics is most apparent in larger more public policy areas. In low salience areas, like detailed regulation, both businesses and citizen groups are most likely to converge on insider lobbying.⁴³³

The Outsider Approach

There are four facets of the outsider approach that bear a more detailed investigation: which organizations use the outsider approach, which organizations skip the outside approach, which organizations remain in the outsider approach, and the question of astroturf lobbying.

Organizations that Use the Outsider Approach

In earlier investigations of lobbying, political scientists believed that interest groups go through a natural progression. The organizations begin as small, forced to use the outsider approach. The “interest organizations seek organizational validation and standing to be taken seriously by supporters and policymakers.”⁴³⁴ Once they become more established, they progress to using the insider approach to lobbying for policies they support.⁴³⁵ In this telling, certain groups have no choice but to operate outside of the government and political marketplace. These outsider groups have few or no ties to political insiders and people of importance. They might include newly formed movements, businesses

⁴²⁸ The deeper the issue is tied to a core facet of the supporter’s identity, the easier it is to consistently motivate them to act on the issue. Some particularly successful interest groups manage to build a particular concern into an essential component of their supporter’s social identities over time. For example, the NRA turned gun ownership into a core identity for many of its members, affecting their political behaviour and beliefs in a way that humidifier ownership does not. See, Matthew J Lacombe, *The Political Weaponization of Gun Owners: The NRA’s Cultivation, Dissemination, and Use of a Group Social Identity* (Working Paper, 2018) at 2.

⁴²⁹ Ken Kollman, *supra* note 427 at 23.

⁴³⁰ *Ibid* at 8.

⁴³¹ Andreas Dür & Gemma Mateo, *supra* note 146 at 664.

⁴³² *Ibid*.

⁴³³ Andreas Dur, Patrick Bernhagen & David Marshall, *Interest Group Success in the European Union: When (and Why) Does Business Lose?* (Bordeaux, 2013) at 676.

⁴³⁴ Joost Berkhout, “Why interest organizations do what they do”, *supra* note 72 at 241.

⁴³⁵ A. Paul Pross, *supra* note 2 at 84.

with no political clout, immigrants, minorities, marginalized groups, and other organizations outside of the mainstream.

When an organization of this sort began to pursue a political cause, it will need to increase public awareness and rally support for its issue.⁴³⁶ If it is successful with a wider public, it will gradually build up the membership, clout and support that allow it to pressure the government on the issues of concern. The success of this pressure in turn allows it to increase its membership and fundraising. As Gamson and Wolfsfeld stated, “the media spotlight validates the fact that the movement is an important player”⁴³⁷. If the organization continues to be successful, it will be able to build a formal organizational structure and permanent employees to support its efforts. This structure in turn allows it to persist and develop the institutional memory, long-term connections and recognition needed for the government to pay attention. At this point, the organization will have developed enough to transition to an insider lobbying approach.

In these earlier works, political scientists believed that insider lobbying was more effective and ultimately the true goal of most interest groups.⁴³⁸ Once established, an interest group would prefer to bring its concerns directly to the government officials who could make the relevant political and regulatory decisions. At the same time, once the organization had the direct ear of government, it would begin to avoid the noisier outsider lobbying approach, for fear of alienating its government contacts and damaging its insider lobbying activities. Successful organizations progressed cleanly from an outsider to an insider lobbying style.⁴³⁹

There is much truth in this view. Many outsider organizations that follow this progression are initially raising issues that are foreign to the general political consciousness. Initially, politicians have little interest, and there are no institutional structures in government that are responsible for the issue. For example, the nascent environmental movement in the 1960s and ‘70s pushed new ideas of environmental stewardship far beyond the previous conservation movement. Eventually, the success of the movement forced politicians to begin to address environmental issues and lead to the creation of government departments dedicated to the environmental management, such as Environment Canada, formed in 1971 (now Environment and Climate Change Canada).

However, this basic account fails in two significant ways. Some organizations never begin with a true outsider approach, and some organizations seek to maintain their outsider status even when they have the ability to move to an insider position.

Organizations that Skip the Outsider Approach

A key component of any outsider lobbying campaign is the belief that the public is or can be made sympathetic. Sometimes this is not the case, either because the outsider group or organization is

⁴³⁶ Joost Berkhout, “Why interest organizations do what they do”, *supra* note 72 at 243.

⁴³⁷ *Ibid* at 241.

⁴³⁸ Fred Thompson & W. T. Stanbury, *supra* note 2 at 43.

⁴³⁹ A. Paul Pross, *supra* note 2 at 84.

unpopular or marginalised, or because they are lobbying for an unpopular position. An example of the former situation can be found in lobbying for entrance of Jewish refugees into Canada and the U.S. in the run-up to the Holocaust. Although Jewish groups tried some outsider lobbying techniques, they were aware that the prevalent anti-Semitism in Canada and the U.S. made public support unlikely.⁴⁴⁰ Hence the nascent Jewish refugee organizations focused on an insider lobbying approach from the very beginning of their efforts.⁴⁴¹ This approach worked a little, late in the war, with the Roosevelt administration, which had some favourable views on Jews, but failed in Canada, where the relevant officials were notably anti-Semitic.⁴⁴²

Small and new organizations might also avoid an outsider lobbying approach because their preferred policies are unpopular or even costly to the public. In this case, they will want to hide their lobbying from public view, and move straight to insider lobbying. This is easier for well-funded organizations, such as industry groups, who can hire consultant lobbyists who already have the expertise and insider connections.

Social media, new organization techniques, and the existence of large funders also offer what might become an alternative growth strategy for new organizations. They might gain size, resources and support so quickly that they can essentially bypass the outsider approach and move almost directly to an established insider approach.

Organizations That Remain in the Outsider Approach

The basic insider-outsider account also fails to address the reality that many organizations choose to deliberately keep to an outsider approach. They might do this because it is necessary to maintain themselves; because it is essential for the organization; because it allows them to access Kollman's two fundamental roles: signalling officials and conflict expansion; or because it is otherwise part of their lobbying strategy and coalition role.⁴⁴³ These roles are discussed in detail below.

Remaining an Outsider: Necessary to Maintain Themselves

Dür and Mateo argue that many citizen groups are locked into using the outsider approach to maintain their existence. They state that,

the public campaign provides publicity to citizen groups among a broader audience, which may ensure the survival of the organisation ... In balancing impact and survival, we expect citizen groups to favour survival and thus opt for an outside strategy.⁴⁴⁴

⁴⁴⁰ Irving Abella & Harold Troper, *None is Too Many: Canada and the Jews of Europe, 1933-1948*, 2nd ed (Lester & Orpen Dennys, 1986) at 51, 58, 61, 66.

⁴⁴¹ *Ibid* at 66. This was not a new tactic. For centuries, Jewish organizations had long relied on insider lobbying with church officials, nobles and kings for protection from the anti-Semitism of the mob – anti-Semitism these officials were often also creating and exploiting.

⁴⁴² *Ibid* at 50, 51, 66, 68, etc.

⁴⁴³ Ken Kollman, *supra* note 427 at 8.

⁴⁴⁴ Andreas Dür & Gemma Mateo, *supra* note 146 at 663.

In this telling, many citizen lobbying organizations would simply fade away if they pursued a pure insider approach. However, Betzold's analysis does not fully uphold this opinion. He found that "[c]ontrary to the theoretical expectations and other studies, the analysis finds no effect of membership on advocacy behaviour"⁴⁴⁵. Nonetheless, citizen groups have other reasons to continue to use the outsider approach. Betzold found that in the U.S. (and presumably Canada), there is systematic variation in advocacy behaviour between organizations. Environmental groups use relatively more outside advocacy, whereas business organizations prefer inside advocacy.⁴⁴⁶

Remaining an Outsider: Central to the Organization

Some organizations maintain their outsider approach because it is central to the organization itself. For some organizations, such as some branches of the Tea Party, the organization is defined by its opposition government.⁴⁴⁷ Even when lobbying, these organizations must run an outsider campaign to prove they have not been co-opted. This purity-based approach can lead to substantial problems when legislators are tied so tightly to some outsider-interest groups that the elected officials also adopt a purely outsider approach, and refuse to negotiate the compromises necessary for democratic governance.

Secondly, organizations might maintain their outsider approach because how the organization has evolved. For example, Chance reported that "[i]nternally, think tank leaders often regard television appearances as an important measure of influence."⁴⁴⁸ Given that many think tanks produce papers directly for officials and lobbyists, they do not need to make public appearances on TV. However, the TV appearances are central to how they define the success of think tanks and the status of individual fellows, so the industry continues to pursue this particular outsider approach.

Thirdly, an outsider status and independence might be essential to lobbying convincing. For example, studies show that officials have a more positive attitude towards non-for-profit health organizations and medical professional groups, than to tobacco industry lobbyists.⁴⁴⁹ The public profile and outsider approach of these groups is part of what grants them this credibility. If the organizations switched to an entirely insider strategy and never spoke out publicly about the harms of tobacco use, they would eventually weaken their credibility with their membership, the public and government officials.⁴⁵⁰

⁴⁴⁵ Carola Betzold, "Business insiders and environmental outsiders? Advocacy strategies in international climate change negotiations" (2013) 2:3 Interest Groups Advocacy 302–322 at 318.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ Ken Kollman, *supra* note 427 at 22.

⁴⁴⁸ Alek Chance, *supra* note 411 at 25.

⁴⁴⁹ "Tobacco Control Interest Groups and Their Influence on Parliamentary Committees in Canada, by Robyn E Hastie & Anita Kothari, Health Studies Publications Paper 12 (Western Libraries, Western University: Scholarship@Western, 2009) at 4.

⁴⁵⁰ Studies do show that the anti-tobacco groups could be more effective if they used more of the tools of the insider approach; namely if they reached out to legislatures more directly and if they brought scientists and doctors to present their findings in person at hearings. *Ibid.*

Remaining an Outsider: Kollman Roles: Signalling Officials, and Influencing the Public

Organizations might take the outsider approach because it allows the lobbying group to engage in two fundamental roles Kollman proposes: signalling officials, and influencing the public and membership through conflict expansion.⁴⁵¹

The signalling role is relatively straight forwards, it is the act of informing officials that the policy position is popular and salient, and that the outsider lobbying can make it even more so. However, it can bleed into the other role of conflict expansion.

Conflict expansion is the process of increasing the salience of the political issue by riling up the membership and the public. Although the popularity of an issue is difficult to effect, the salience of it can change rapidly, and politicians will often have little knowledge of the current salience without the outsider lobbying.

They can try through inside lobbying to convince policymakers that voters care about an issue and are on the side of their group on the issue. But outside lobbying goes a step further in making a costly, public demonstration that, one, the issue is in fact salient to voters and, two, the interest group can make the issue even more salient.⁴⁵²

Kollman argues this duality of purpose makes outside lobbying a powerful tool. “It can simultaneously fan the flames of constituent anger and bring the head of those flames to the attention of representative far away, whose job it is to put out or contain the fire.”⁴⁵³ For example, Canadian citizen lobbying groups often attempt to support their lobbying with activism, attracting media attention and engaging their members on the issue at hand. This can help them by bringing public pressure to bear on the process, if the government has not been receptive to their concerns.

Remaining an Outsider: Otherwise Part of Their Lobbying Strategy

Fundamentally, organizations continue to use an outsider approach because it is a useful strategy and key role in a successful lobbying coalition. The contention that organizations would move from outsider to insider is too simple. It overlooks the fact that lobbying organizations operate in a political eco-system where it is advantageous to seek out strategic approaches and particular niches of specialization. Some situations will call for an insider approach; other situations will reward the outsider approach. The ideal approach will fluctuate depending on the organization’s supporters, its resources, the competition, the officials, the policy goals, the specifics of the issue, and its public salience at any particular moment.

Most lobbying on large issues involves a mix of both approaches, where the insider approach is used to provide direct information and pressure on government officials, while the outsider approach

⁴⁵¹ Ken Kollman, *supra* note 427 at 8.

⁴⁵² *Ibid* at 9.

⁴⁵³ *Ibid* at 10.

provides indirect pressure, and proves that there is public and media concerned about the issue. Large issues involve lobbying coalitions, and the coalitions are strengthened by their ability to use both the insider and outsider approaches by exploiting the different specialities of the coalition members. Outsider groups, especially citizen organizations, that can motivate a large segment of the public, are extremely valuable to the lobbying coalition. There is good reason for these groups, as a matter of strategy, continue to use the outsider approach. There is also good reason the coalitions want particular members to fulfill the outsider role. This outsider approach comes at a risk: the risk of being blamed for a conflict expansion that a key government decision-maker finds harmful, and the risk of being shut out of detailed information provision and negotiations, especially on low salience issues. Building coalitions with insiders helps mitigate these risks.

Astroturf Lobbying

Many insider lobbying groups use astroturf lobbying when they cannot gain the support of outsider groups. This demonstrates the importance they place on having an outsider campaign to match the insider one. Astroturf lobbying is lobbying using the false appearance of outsider grassroots support and mobilization. Lapira *et al.* describe astroturf lobbying as when “organizations... try to suggest the policymakers that the issue is salient, when in reality it is not”⁴⁵⁴.

Astroturf Examples

There are myriads of examples of astroturf lobbying. For his lobbying campaigns Abramoff would sometimes create a company, much like a telemarketing center, where paid employees would pose as concerned citizen. The employees would contact congressional members, write letters to the editors, recruit actual concerned citizens, and otherwise create the semblance of popular support for an issue. Another example of a revealed astroturf lobbying campaign is Citizens for State Power, which fought against utility regulation on the grounds that it would increase prices. The Washington Post later revealed that the organization was secretly funded by utility companies, who funnelled millions through the group to lobbying Congress while creating the appearance of outsider support.⁴⁵⁵ Similarly, a consulting firm, Bonner & Associates, lobbying on behalf of the coal industry, was caught forging letters opposing the *American Clean Energy and Security Act*. “The letters, replete with letterhead and made-up identities, purported to be from Virginian minority organizations including the NAACP.”⁴⁵⁶

Astroturf lobbying is a useful tactic because legislators, media and other officials often do not have the time or desire to investigate the lobbying organization. For example, Exxon, Koch Industries and the other oil companies long denied they were funding climate change denial groups.⁴⁵⁷ In 2005

⁴⁵⁴ Joost Berkhout, “Why interest organizations do what they do”, *supra* note 72 at 242.

⁴⁵⁵ James Ayre, “Lobbyists Behind Elon Musk, Tesla, SolarCity, & SpaceX Attack Site Identified”, (29 November 2016), online: *Clean Tech* <<https://cleantechnica.com/2016/11/29/lobbyists-behind-tesla-elon-musk-attack-site-identified/>>.

⁴⁵⁶ Victor Zapanta, “NAACP-Forgery Group, Bonner & Associates, Has A Decades-Long History Of Astroturf Tactics”, (31 July 2009), online: *ThinkProgress* <<https://thinkprogress.org/naacp-forgery-group-bonner-associates-has-a-decades-long-history-of-astroturf-tactics-868dee12956d/>>.

⁴⁵⁷ Kathy Mulvey & Seth Shulman, *supra* note 32 at 13; John Cook et al, *supra* note 30 at 4.

alone, ExxonMobil spent more than \$2.4 million on astroturf, trade associations, think tanks and other lobbying groups that lobbied for inaction on climate change and furthered climate change denial.⁴⁵⁸ The funding of these organizations was long suspected, but it was over a decade before the scope of the astroturf campaign was fully revealed.⁴⁵⁹

Astroturf lobbying can also act as part of the *echo chamber approach to advocacy*.⁴⁶⁰ This approach involves making a corporate message emanate from virtually all the legislator's sources of influence and information, including their constituents and lobbyists, colleagues and opinion leaders, local and national media, donors and fundraisers, think tanks and advertisers. This tactic is convincing because the same message comes from all those the legislator considers credible, creating an illusion of social unanimity. Part of what makes astroturf groups advantageous is their reliability as a component of the echo chamber.

It is entirely possible that some legislators know the truth behind the astroturf campaigns. The goals of the lobbying often make it clear who is behind it. In these cases, the existence of the astroturf campaign can provide the legislators with a convenient excuse to side with an insider organization while pretending there is wider public support and outside pressure for the decision. Astroturf lobbying groups can also be useful (or deliberately created) as scapegoats if an organization gets caught being involved in shady lobbying practices. The astroturf group will not fight back, and can shield the special interest group from the blame and liability. They are easy to disband and reconstitute as needed.⁴⁶¹

Ironically, legitimate grassroots groups are often reluctant to use widespread outside tactics like letter writing campaigns, because a low response rate can make the organization look weak, and because the campaign does not lead to change (and it usually does not) grassroots supporters can become discouraged.⁴⁶²

Sockpuppetry

Akin to astroturf lobbying is the growing use of internet sockpuppetry. Sockpuppetry is the creation of a fake online identity for the purpose of deception. The wide scale use of these fake identities are sometimes called web brigades or troll armies. A web brigade might employ tens of thousands of people, each of whom run multiple fake sockpuppet identities. Currently Russia, China, the Philippines, and a number of other governments are known to run large web brigades with significant budgets.⁴⁶³ If astroturf lobbying is the creation of fake interest groups, sockpuppetry is the creation of

⁴⁵⁸ Kevin Grandia, *supra* note 35. Reich gives the figures of 39 denial groups and \$2.9 million. Robert B. Reich, *supra* note 224 at 208. See also, John Cook et al, *supra* note 30 at 4.

⁴⁵⁹ Naomi Oreskes & Erik M. Conway, *supra* note 35.

⁴⁶⁰ Phillips Morris was among the pioneers of this approach. The unanimity creates a framing that makes it appear as if there are no valid alternative views.

⁴⁶¹ In the case of Bonner & Associates mentioned previously, despite their history of shady tactics, they blamed the deceptive lobbying letters entirely on a temporary employee whom they fired. Victor Zapanta, *supra* note 456.

⁴⁶² Frank R. Baumgartner et al, *supra* note 59.

⁴⁶³ Sean Williams, "Rodrigo Duterte's Army of Online Trolls" *New Repub* (4 January 2017), online: <<https://newrepublic.com/article/138952/rodrigo-dutertes-army-online-trolls>>; Andrew Higgins, "Effort to Expose

fake citizens. These web brigades use their sockpuppets to post state-sponsored content and talking points, and shout down opposition views on social media, twitter, you tube, news sites, comment sections, and other parts of the internet.⁴⁶⁴ In doing so they create a fake sense of popular support for certain positions, while distracting and disrupting organizations that favour other positions. These activities are aimed at bolstering the administration and distracting the populace of its own state, or influencing events and policies in foreign countries. In foreign countries, the goal is not simply propaganda and influence, but often the creation of a wider sense of distrust, confusion, acrimony, and disinformation to undermine the public's faith in its government. This type of campaign is a form of low-level covert warfare, intended to destroy the functioning and alliance of the developed democracies.⁴⁶⁵

Russia's interference in the 2016 U.S. elections and numerous other democratic countries, and its use of these means to do so, are now well-established. They pose a particular threat to democracy: undermining faith in elections, confusing legislatures about the public's true stance on issues and, affecting the outcome of elections in favour of authoritarian-leaning candidates.⁴⁶⁶ In some countries, Russia has also acted as a secret source of funding for far-right and white-nationalist parties.⁴⁶⁷ Russia's activities stretch beyond visible postings. It is directly attempting to hack the electoral records, bureaucracy, electoral machines, electoral rolls and election results. It is likely involved in other more subtle attempts to influence policies. It is quite possible that sockpuppetry is involved trying to influence down-ballot elections, online polls, petitions, and even masquerading as citizens to directly communicate with democratic representatives.

Although governments run the largest sockpuppetry brigades for now, sockpuppetry is not limited to government action. Large special interest groups and public relation firms have plenty of incentive to also use sockpuppets in astroturf lobbying campaigns, to influence online forums, public polls, and otherwise pressure government. As more digital tools to aid sockpuppetry are developed and more governance moves online, it is likely that private sockpuppetry brigades will become ever more prevalent lobbying tool.

Insider Approach

Using the insider approach and speaking directly to the government decision-makers is not only effective, it is the only way of proceeding once an interest group starts wading through the weeds of the

Russia's 'Troll Army' Draws Vicious Retaliation", *N Y Times* (30 May 2016), online: <<https://www.nytimes.com/2016/05/31/world/europe/russia-finland-nato-trolls.html>>; Natasha Bertrand, "It looks like Russia hired internet trolls to pose as pro-Trump Americans", (27 July 2016), online: *Bus Insid* <<http://www.businessinsider.com/russia-internet-trolls-and-donald-trump-2016-7>>.

⁴⁶⁴ Andrew Higgins, *supra* note 463.

⁴⁶⁵ Garrett M Graff, "Russia's High Tech Tool Box for Subverting US Democracy, A (Semi-Complete) Guide", (Aug 13, 17), online: *WIRED* <<https://www.wired.com/story/a-guide-to-russias-high-tech-tool-box-for-subverting-us-democracy/>>.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ Strobe Talbott & Jessica Brandt, "What Putin Is Up To" *The Atlantic* (2 March 2017), online: <<https://www.theatlantic.com/international/archive/2017/03/putin-trump-russia-flynn-sessions-hack-kremlin/518412/>>.

actual policy details. Direct conversations, negotiations and compromises are necessary to get any new change enacted. Although most groups will use both insider and outsider strategies, Betzold argues convincingly that, “the more experienced a group, the more it will rely on inside advocacy and the less on outside advocacy.”⁴⁶⁸ This is particularly true of business interests.⁴⁶⁹ Even think tanks will ultimately tailor much of their work for the insider approach.⁴⁷⁰ Insider lobbying is,

the more common strategy by far, the preponderance of time spent in conversations between lobbyists and policymakers involves fairly placid negotiations, coordination, and information exchange.⁴⁷¹

There is generally gentility in insider lobbying. It is rarely overtly adversarial, and it usually quite polite.⁴⁷² It is a form of co-operation between the parties. The lobbyists help the officials, and the officials are grateful for their help.⁴⁷³

Most lobbyists will try to make use of the insider approach. Some completely shun outsider advocacy. This may be because the issue is one where the government seeks stakeholder input, the position is unpopular, or the issue has low public salience.

Insider Approach: Government Seeks Stakeholder Input

There are a lot of repeated interactions between government and outside organizations that are not technically considered lobbying. Activities like responding to requests by government officials and regulators, submitting bids on contracts and procurements, submitting position papers and appearing before committees and regulators, are generally not treated as lobbying.

Civil servants and officials regularly seek the input of those they consider stakeholders in their decisions. This is sometimes required by administrative law.⁴⁷⁴ This practice has important advantages, since the government needs to be aware of the impacts of its decisions. These consultations are normally not considered lobbying, since they are required by law or involve officials reaching out to stakeholders; but they can be a backdoor for insider lobbying, in which the government is actively soliciting an organization’s preferences. These consultations can contain many of the same flaws as lobbying. Officials can knowingly or unknowingly bias their decisions if they fail to consult with a

⁴⁶⁸ Carola Betzold, “Business insiders and environmental outsiders?”, *supra* note 445 at 318.

⁴⁶⁹ Andreas Dür & Gemma Mateo, *supra* note 146 at 675.

⁴⁷⁰ “In fundamental ways, think tank scholarship makes certain compromises from the outset in order to achieve influence in Washington. This is not only because they constrain the scope of research to specifically “policy relevant” issues, but because maintaining policy relevance further entails discussing these issues in ways that policymakers are willing to listen to. ... [A]ll Heritage Foundation research products must meet the “airport rule” and the “briefcase rule,” namely, reports must fit in a briefcase and be able to be read in their entirety on the cab ride from Reagan Airport to Capitol Hill (only a few miles).” Alek Chance, *supra* note 411 at 26.

⁴⁷¹ Ken Kollman, *supra* note 427 at 23.

⁴⁷² *Ibid.*

⁴⁷³ *Ibid.*

⁴⁷⁴ Gus Van Harten et al, *Administrative Law: Cases, Text, and Materials*, 7th ed (Toronto: Emond Publishing, 2015) at 577 ff.

particular organization or overly favour the views of a particular stakeholder. These stakeholder consultations should be designed to adhere to the same principles of lobbying reform discussed in Chapter 9. They should be designed to be inclusive, fair, and resistant to becoming backchannels for lobbying. We will return to this issue in Chapter 3.

Insider Approach: The Position is Unpopular

When the policies an interest groups favour are not popular, and the public considers the issue important, the interest group will employ the insider approach, avoiding media attention and the possibility of sparking opposition.⁴⁷⁵ For example, the American banks continue to engage in insider lobbying to undo the regulations placed on them since the 2008 financial crisis.⁴⁷⁶ They have mounted very little in outsider campaigning, knowing repealing the rules is unpopular with the public.⁴⁷⁷

Insider Approach: The Issues has Low Public Salience

When an issue has low public salience, interest groups will avoid the outsider approach. It takes a lot of effort to raise public awareness about an issue, and some issues are simply too technical, abstract, or esoteric to grab the public's imagination. The outsider approach is relatively resource expensive; competing for the public's attention on an issue requires funding or a large number of volunteers to run a publicity campaign. It also risks harming the relationship with government officials. Officials often perceive the outsider approach as an attempt to challenge their legitimate authority, stir up trouble, and damage the government's popularity.⁴⁷⁸ For these reasons, interest groups prefer the insider approach on issues with low public salience.⁴⁷⁹

The Insider-Outsider Approach: Core and Peripheral Lobbying Groups

One added component of the insider-outsider approach is Lapira, Thomas and Baumgartner's finding that in a complex lobbying environment like Washington DC, there are core and peripheral lobbying groups. The core lobbying groups are well known, and take part in a significant number of policy debates, forming the center of lobbying coalitions.⁴⁸⁰ In contrast, the peripheral groups are

⁴⁷⁵ Joost Berkhout, "Why interest organizations do what they do", *supra* note 72 at 243.

⁴⁷⁶ Lisa Lambert, "Bank lobby presses for commission to lead consumer watchdog agency", *Reuters* (7 December 2016), online: <<http://www.reuters.com/article/us-usa-banks-cfpb-idUSKBN13W2BI>>; Pete Schroeder, "Banks Spent Record Amounts on Lobbying in Recent Election" *Bus Insid* (8 March 2017), online: <<http://markets.businessinsider.com/news/stocks/r-banks-spent-record-amounts-on-lobbying-in-recent-election-2017-3-1001816738>>.

⁴⁷⁷ Nik DeCosta-Klipa, "Trump voters don't want Trump to get rid of Elizabeth Warren's consumer agency", (21 December 2016), online: <<https://www.boston.com/news/politics/2016/12/21/trump-voters-dont-want-trump-to-get-rid-of-elizabeth-warrens-consumer-agency>>.

⁴⁷⁸ Ken Kollman, *supra* note 427 at 25.

⁴⁷⁹ Interest groups might still resort to an outsider approach for low salience issues if they are desperate. For example, they might resort to outsider lobbying if the issue is absolutely vital to the group, and they have already lost on the insider track. Similarly, they might have been completely shut out of the insider process (perhaps through bias or bigotry), in which case there is no loss for taking the outsider approach. In rare cases, there might be no official who believes they have authority over the issue, so there is nowhere to direct the insider lobbying.

⁴⁸⁰ Timothy M. Lapira, Herschel F. Thomas & Frank R. Baumgartner, "The two worlds of lobbying", *supra* note 182 at 236.

involved with more obscure and technical issues. The core groups form large coalitions, and use both insider and outsider strategies, depending on the organization and the circumstances. Lapira, Thomas and Baumgartner argue that the core lobbying groups represent a relatively broad range of interests, and hence their lobbying injects a wide variety of views into the system.⁴⁸¹ In contrast, the peripheral lobbying groups are involved in low salience issues, and make use solely of the insider strategy.⁴⁸²

Regulation Mostly Targets the Insider Approach

Most lobbying regulations are limited to activities that make up aspects of the insider approach. Regulations that include registration, providing accurate information to officials, and disclosing the client behind the lobbyist, are all intended to oversee aspects of the insider approach. In a discussion with the former Commissioner of Lobbying, she had expressed doubt that oversight over activities related to the outsider approach fall within their purview. The focus on the insider approach does provide a relatively bright line to guide the lobbying regulations. Moreover, the public is generally most concerned about the power and abuse of insider type activities. However, the Office of the Commissioner of Lobbying has since changed its approach, and now requires lobbyists to disclose grassroots and astroturf lobbying campaigns. In an age of perpetual lobbying, sockpuppets, astroturf lobbying campaigns, and shadow political parties, it is unwise to disregard the possibility of regulating outsider lobbying campaigns.

The Disclosure versus Corruption Approach

Russell presents another way of understanding lobbying, separating the views about lobbying into two camps, the *disclosure heuristic* and the *corruption heuristic*.⁴⁸³

The Disclosure Heuristic

The disclosure heuristic is the view that the lobbying plays a legitimate role in governance. It maintains that so long as lobbyists and public officials disclose their activities, gifts and campaign donations, the public can decide what amounts to inappropriate influence and vote accordingly.⁴⁸⁴ These theorists argue that lobbyists are an integral, if external, component of democratic governance, providing essential information for legislators.⁴⁸⁵ The lobbyists are incentivized to give accurate information in order to maintain their future relationship with politicians, and because the competing lobbyists will point out any inaccuracies. In this heuristic, lobbying can be seen as a form of subsidy to the government, saving it the funds and organizational structures it would otherwise need to gather this information.

The disclosure heuristic is often associated with a branch of public choice theory which maintains that there is no such thing as a clear public interest that officials could pursue, regardless of the influence of lobbying.⁴⁸⁶ The disclosure heuristic is also associated with a Madisonian balance of

⁴⁸¹ *Ibid.*

⁴⁸² *Ibid.*

⁴⁸³ Calon Russell, "Lobbying Reform: What Is the Problem" (2008) 12 Lewis Clark Rev 853 at 3.

⁴⁸⁴ *Ibid.*

⁴⁸⁵ For example, see Posner's pro-lobbying arguments on Posner, Richard Posner, *supra* note 245.

⁴⁸⁶ Timothy K. Kuhner, *supra* note 51 at 2354.

interests argument, which maintains politics is the struggle of various interests, and their lobbying activities will roughly balance each other out.

The Corruption Heuristic

In contrast, the corruption heuristic is more critical of the role of lobbyists. Its adherents argue that lobbyists exert inappropriate influence over public officials through gift-giving, campaign finance donations, job offers, social events, and regular contact with politicians. They argue that the lobbyists do not represent the population as a whole equally. Instead, lobbyists overwhelmingly represent the business interests and the elites that can afford to employ them. Thus the information and influence of lobbyists subtly but strongly biases government decision-making, disproportionately frames the policy debates, and leads to one-sided results.⁴⁸⁷

Lessig, who is among the most prominent advocates of this view, argues that the lobbyists' (and campaign donors') influence creates a kind of structural corruption of the government. Lessig distinguishes between classic *systematic corruption*, the situation where the politicians manipulate the economy for political or personal ends; and *venal corruption*, the situation where the economic elites manipulate the political system for economic ends.⁴⁸⁸ To this he adds the distinction of whether the corruption flourishes because the political elite as a whole secretly support it, despite its illegality, which is classic *quid pro quo corruption*; or whether the corruption flourishes without any evil intentions, simply as the result of the built-in incentives in the political and economic structures. He calls this *dependency corruption*.⁴⁸⁹ Dependency corruption "violates the independence of an institution."⁴⁹⁰ Dependency corruption can be systematic or venal, but in modern developed democracies it tends to be venal. The politics are being corrupted by the marketplace.

Lessig argues the current judicial approach to corruption involving elections and democratic governance is mistaken, because judges are inclined to treat the corruption cases as if they are *quid pro quo corruption*, and search for *mens rea*. However, in most instances, the problem persists even without any evil inclination. It is simply how the system works. The structural pressures and incentives act to corrupt the institutions. People have to participate in the dependency corruption (either as politicians or as interest groups) in order to do their job. The social, political and structural pressures push officials as

⁴⁸⁷ This is an expansion on Calon's view. See, Calon Russell, "Lobbying Reform", *supra* note 483 at 3.

⁴⁸⁸ Lawrence Lessig, *supra* note 273 at 234.

⁴⁸⁹ *Ibid* at 235. There are many other ways of distinguishing corruption. Burke (1997) distinguishes three types of corruption: *quid pro quo*, monetary influence, and distortion. Teachout (2009) uses five categories: criminal bribery, inequality, drowned-out voices, a disillusioned public, and the absence of integrity. Thompson (1995) distinguishes individual corruption and institutional corruption. The latter takes place when the corruption damages the democratic process. Hellman (2013) lists three types: the deformation of judgment, the distortion of influence, and the sale of favors. Dawood (2014) does not distinguish types, but breaks corruption into two different violations: the abuse of power, and the infringement of political equality. Warren (2004) argues corruption is a form of a not publicly justifiable, non-democratic, exclusion of those who have the right to be included in the political decision-making. See Yasmin Dawood, "Campaign Finance and American Democracy" (2015) 18:1 *Annu Rev Polit Sci* 329–348 at 334.

⁴⁹⁰ Lawrence Lessig, *supra* note 273 at 328.

a whole away from their duty to represent the people. Politicians who want to stay in office must engage in certain corrupting activities. He argues that meeting with the lobbyists of powerful interests are one of these activities.

Proponents of the corruption heuristic point out that lobbyists and officials exist in a social exchange, a gift economy. The repeated advice, help, and (in the U.S.) donations the lobbyists provide officials, the adjustments in policies the officials do for the lobbyists, and their repeated interactions form a trust bond. This is a bond that the average citizen lacks with their governing officials. The lobbyists' gifts are moves in a social game that create a deliberate sense of obligation. In contrast, the citizen only provides a single gift to the politician, the anonymous vote on election day.⁴⁹¹ The social obligations pressure officials to value favours for lobbyist over their more abstract obligation to the wider public. There is good evidence for this position, which we will cover in Chapter 3.⁴⁹²

Because of the difficulty the people have in countering the influence of lobbyists, those who support the corruption heuristic argue that disclosure alone is insufficient. This is a theme we will return to in Chapter 3. They maintain the influence of lobbyists should be curbed through more strenuous and discrete measures, including: banning gifts, limiting political donations, and otherwise exercising oversight and regulating the contact between lobbyists and officials.

Krishnakumar presents a useful way to understand how the public and politicians fall into these camps.

While the public views lobbyists as soulless mercenaries, skilled at arm-twisting and bribing legislators into appeasing their clients' interests at the expense of the public good, members of Congress, for the most part, view lobbyists as invaluable policy experts who provide elected officials with useful information about the underlying subjects of proposed legislation.⁴⁹³

Her argument places legislators in the disclosure heuristic camp and the broader public in the corruption heuristic camp.⁴⁹⁴ This might explain why legislators seem willing to support lobbying regulations that provide disclosure, such as lobbying registries, but have shown little interest in regulations that curtail

⁴⁹¹ Government officials often deny this – often unconvincingly. See, Jill Mahoney & Matthew Lapierre, “‘No one influences my government’: Doug Ford says Ontario government decisions cannot be swayed by lobbyists”, *Globe Mail* (23 July 2019), online: <https://www.theglobeandmail.com/canada/article-no-one-influences-my-government-doug-ford-says-ontario-government/?utm_source=Shared+Article+Sent+to+User&utm_medium=E-mail:+Newsletters+/+E-Blasts+/+etc.&utm_campaign=Shared+Web+Article+Links>.

⁴⁹² Lawrence Lessig, *supra* note 273 at 114.. See also Chapter 3 – The Six Concerns about Lobbying: Concern VI: Lobbying Corrupts Democracy: Lobbying Increases Corruption: The Corrupting Influence of the Social Exchange Gift Economy, p. 198.

⁴⁹³ Anita S Krishnakumar, “Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation” (2006) 58 *Ala Law Rev* 513 at 530.

⁴⁹⁴ Cotton & Déllis come to the same conclusion. Christopher S Cotton & Arnaud Déllis, “Informational Lobbying and Agenda Distortion” (2016) 32:4 *J Law Econ Organ* 762–793 at 2.

lobbying. In my interviews, the politicians did fall mostly within the disclosure camp. Civil servants seemed to fall into both camps, with one interviewee talking himself from the disclosure camp to the corruption camp throughout the interview. However, my sample size is too small to make any firm conclusions on the subject.

These heuristic models also help explain why disclosure laws are more prevalent than rules that attempt to restrict lobbying activities. Both heuristic viewpoints justify support for disclosure rules, whereas only the corruption heuristic justifies additional lobbying restrictions.

Although one might expect lobbyists to fall outside both camps, not wanting any regulation, Chari's survey of lobbyists indicates that they tend to resist the enactment of regulations at first, but later support disclosure regulations once the rules are in place. Lobbyists begin to make use of the lobbying registries to keep track of the activities of rival lobbyists and to provide proof of their efforts to their clients.⁴⁹⁵

Both heuristics have valuable insights. It is undeniable that government relies heavily on the information provided by lobbyists. However, the corruption heuristic appears to be the better explanation of the relevant data and studies.⁴⁹⁶ The decisions officials are coming to cannot be explained by the mere provision of information. There is a strong and growing body of evidence that lobbyists are affecting government decision-making in a way that benefits their clients and harms the broader public. We shall examine this evidence in Chapter 3.

The Four Pressures Approach

The *four pressures approach* is a framework this thesis proposes to also help explain lobbying. It is proposed that lobbying occurs within a four-sided structure which applies pressure to government decision-making. Lobbyists must operate within the constraints of these pressures, while also employing or highlighting them as a means to get favourable government decisions. When the lobbyists on one side of an issue have an advantage harnessing one of these pressures, the other side might respond by using one of the other pressures where they have an advantage, rather than competing within the same pressure area. The four pressures consist of *direct power*, *political context*, *passion* and *popularity*.

Direct Power and Influence

Various forms of power can translate into lobbying influence on the decision-maker. We can examine this power by examining influence itself. Lowery points out that influence is hard to measure. This is additionally complicated by the complex feedback loop involved. A lobbyist not only influences an official, but is influenced in turn by the reaction and perceived potential reaction of the official. In turn, the official can often be taking her position based on her anticipation of how important interest groups

⁴⁹⁵ These survey results are not statistically sound due to the low response rate, but the responses do correspond with the other political science information about lobbyists' opinions. Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 131.

⁴⁹⁶ Marianne Bertrand, Matilde Bombardini & Francesco Trebbi, "Is It Whom You Know or What You Know?", *supra* note 252 at 26.

might decide to react. Meanwhile, both the lobbyist and the official are reacting to and anticipating the reactions of other lobbyists, officials, interest groups, and the general public.⁴⁹⁷ Yet, even as precise measurement remains elusive, qualitative analysis can help.

Banfield (1961) breaks influence down into five types. They are: (i) influence based on obligation, including authority and respect; (ii) influence based on the decision-maker's desire to please, such as friendship and benevolence; (iii) influence based on changing the perceived alternatives open to the decision-maker, but not through reasoning, for example, innuendo, selling, deception and fraud; (iv) influence based on positive or negative inducement to change the decision-maker's behaviour, like bribery and threats; and (v) influence that works through providing better reasoning or information, essentially rational persuasion.⁴⁹⁸

Lobbying that relies purely on the power of the social status of the lobbying organization is using type i influence; whereas lobbying that relies on the conventional power of good connections is using both types i and ii influence. If lobbying groups mislead with inaccurate information or disguise who they are working for, they are using type iii influence. When powerful lobbying interests use direct benefits and harms to influence officials, including legal contributions and fundraising, job offers, outright bribery and blackmail, they are usually exercising using types iv Influence – influence that often qualifies as corruption. The powerful might also generate type iv influence through the potential large-scale benefits and harm the lobbyists can inflict on the official's region, party, government, or the society as a whole. For instance, the lobbyist could threaten to run a negative attack publicity campaign or move a factory to a different jurisdiction. In contrast, if the campaign was honest in framing and messaging, or if the factory would need to leave the jurisdiction due to the genuine economic impact of a policy, then this would be type v influence.

Only type v influence stands somewhat outside of traditional power dynamics. The influence of reasoned discourse can be exercised by anyone, from the established billionaire to the powerless school child. Of all five forms of influence, it is this type that justifies lobbying within a democratic society, by providing new facts, arguments, citizen preferences, and information to the government. The Canadian Federal Court of Appeal has stated,

[a] lobbyist's stock in trade is his or her ability to gain access to decision makers, so as to attempt to influence them directly by persuasion and facts. Where the lobbyist's effectiveness depends upon the decision maker's personal sense of obligation to the lobbyist, or on some other private interest created or facilitated by

⁴⁹⁷ David Lowery, "Lobbying influence: Meaning, measurement and missing" (2013) 2:1 Interest Groups Advocacy 1–26 at 6.

⁴⁹⁸ *Ibid* at 5.

the lobbyist, the line between legitimate lobbying and illegitimate lobbying has been crossed.⁴⁹⁹

When lobbying is not based on type v influence, on rational discourse, there is no democratic justification; it is just power politics. In reality, despite the ideal, a fair part of lobbying mixes type v influence with the other four types, or more perniciously, publicly presents another influence as if it was type v. As Berkhout argued, lobbyists would prefer to be able to provide political support for politicians (or use other influences) and not just information, whenever it is possible.⁵⁰⁰ As Draca argues, the political class responds to the prevailing incentives. “If these incentives are not well designed then they can undermine law-making.”⁵⁰¹ Presumably, lobbyists would prefer to exercise as much and as many types of influence as possible on officials, constrained only by what is effective, and to an extent by their own norms. Thus laws and regulations can represent a sort of armistice and setting of norms. As the regulations become more effective, the lobbyists disarm towards type v influence.

Unfortunately, the actual influence of rational discourse is limited by human biases. Studies repeatedly show that people favour information from their own in-group and partisan side, and discount the same information provided by the out-group.⁵⁰² People engage in motivated reasoning and confirmation bias, favouring information that supports their partisan views or prior beliefs.⁵⁰³ Lewis argues that much successful advocacy “emphasizes cues rather than persuasion.”⁵⁰⁴ It is often not rational discourse that is affecting legislation. Lewis points out that key interest groups can affect the outcome of legislation merely by signalling whether they support or oppose it; even if they cannot afford an expensive lobbying campaign and the provision of useful information.⁵⁰⁵ The rational arguments might have been used earlier to initially convince legislators of the value of the interest groups, but often type v influence is not being employed at the later lobbying stages.

Lobbyists and high status individuals also have significant access advantages over normal citizens, and rational persuasion is of little use if the citizens never have a chance to meet with the politicians. There are good social and evolutionary reasons that people favour in-group information, but it is a significant limitation to the application of rational influence within lobbying. This limitation provides good reason to hire a connected lobbyist, even in circumstance where the organization’s position is entirely rationally justified. Due to the biases of human nature, the lobbyist’s contacts, personal presentation and in-group belonging matter.

⁴⁹⁹ *Democracy Watch v Campbell*, *supra* note 118 at para 48.

⁵⁰⁰ Joost Berkhout, “Why interest organizations do what they do”, *supra* note 72 at 245.

⁵⁰¹ Mirko Draca, *supra* note 211 at 5.

⁵⁰² Miles Hewstone, Mark Rubin & Hazel Willis, “Intergroup Bias” (2002) 53 *Annu Rev Psychol* 575–604 at 579.

⁵⁰³ Joshua Klayman, “Varieties of Confirmation Bias” in Jerome Busemeyer, Reid Hastie & Douglas L Medin, eds, *Psychol Learn Motiv* (Academic Press, 1995) 385 at 385.

⁵⁰⁴ Daniel C Lewis, “Advocacy and influence: Lobbying and legislative outcomes in Wisconsin” (2013) 2:2 *Interest Groups Advocacy* 206–226 at 223.

⁵⁰⁵ *Ibid.*

Information is rarely neutral, and the lobbyist can gain influence by how they frame the data, combining type v and iii influence. Less ethical lobbyists, particularly those who know the official has few alternative sources of information, can bias their information more, moving further into type iii influence, and undermining its truth and democratic legitimacy. This is a fundamental problem within lobbying, to which we will return later.

Political Context

Lobbying success is heavily affected by the environment and political context; the party and leaders in power, their platform, beliefs, goals, moods, personalities of key officials, related salient events, recent failures, natural disasters, scandals, political culture, and other factors in the political environment.⁵⁰⁶ There are a myriad of potential policies vying for political attention at any given time. Even when a focusing event brings a policy area to the forefront, it does not mean that the policy outcome will be what one expects from the event in question – the door is open, but the outcome of the lobbying unpredictable. For example, Mahoney finds that a scandal will not necessarily lead to increased regulations in the area.⁵⁰⁷ John Kingdon argues that lobbying interests know the importance of the political context, and generally wait patiently until the situation is fortuitous enough that policy change is likely.⁵⁰⁸ The political context also affects the quality of information the lobbyists provide. If officials are already favourably predisposed to a position, depending on their predilections, lobbyists need less extensive and accurate information.

Rasmussen reports a car manufacturer explaining, “when you are lobbying, it comes down to the fence-sitters because they will swing the group position one way or the other.”⁵⁰⁹ It is often the political context that will heavily prompt the fence-sitters to finally take a position on the particular issue.

Passion

Lobbying tells government officials that there is passionate support or opposition to proposed changes. One of the fundamental purposes of lobbying is to tangibly demonstrate the strength of a group’s policy preference. When groups invest significant resources in lobbying, they are indicating that the issue is important to them. “Policymakers respond not only to the number of people affected by a disturbance but also to the level of harm that the disturbance creates.”⁵¹⁰ Lobbyists have some incentive to bluff in this process, to hide their true bottom line from officials. Yet, they also have the incentive to honestly convey when an issue is of vital import, so in the future officials respond appropriately to their different levels of concern. They cannot always cry “wolf”. A large lobbying campaign conveys passion to the officials, both through the direct communications of the lobbyists and through the willingness of the organization to expend significant resources. Of course, the passion conveyed to the officials might not be proportional to what the groups actually feel. It only takes a tiny fraction of its wealth for a multi-

⁵⁰⁶ Christine Mahoney, *supra* note 177 at 41.

⁵⁰⁷ *Ibid* at 50.

⁵⁰⁸ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 69.

⁵⁰⁹ Maja K. Rasmussen, *supra* note 248 at 247.

⁵¹⁰ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 50.

national to mount a giant lobbying campaign, whereas the collective savings of a small neighbourhood association might not be enough to put the group's concerns on the officials' radar.

Passion is also reflected in how strongly voters' views of an issue affect their ultimate decision at the ballot box, and how likely they are to mobilize on an issue. For this reason, single-issue voters wield disproportionate influence on that particular issue compared to the general public.⁵¹¹

Popularity

Popularity is the fourth pressure on government decision-making and lobbying. It is related to passion, but if passion is depth, popularity is breadth. Passionate supporters on an issue are generally well informed (or well misinformed, depending on their sources). In contrast, an issue might be highly popular or unpopular without the public having much in-depth knowledge about it.

The government's desire to pursue popular policies and avoid unpopular ones is essential in a democracy. Thus a lobbyist who can demonstrate the popularity of a proposal has a large advantage. However, the constraints on popularity are numerous. The party in power might have a position that is unpopular that they feel bound to fulfill, due to the differing priorities of their supporters, a prior promise, the political context, or the passion of those tied to that position. Often officials might desire to pursue an unpopular policy (for selfish or noble reasons), and believe they have enough insulation to weather the unpopularity, or that they can eventually bring enough of the public on-side. Moreover, elites, indeed all people, tend to travel within circles of like-minded individuals, and increasingly consume pre-filtered media and digital content that is ideologically agreeable. As a result, both elites and regular people often assume that their political beliefs are more correct and popular than they really are.⁵¹²

Popularity is tightly linked to the salience of an issue, but it is not the same thing. An issue might be highly salient, regularly discussed in the media, without one side having an advantage in popularity. An issue position might be highly popular, but not covered in the media, reducing its salience; or media personalities might tend towards a less-popular view on the subject, confusing the salience and popularity of a position. Yet, strong popularity will always have a salience impact, pushing an issue towards centrality over the periphery, due to the official's awareness that if the people learn that the

⁵¹¹ This theory is similar to Arnold's distinction between attentive and non-attentive citizens, but the attentive must lead to action to demonstrate passion. Arnold argues that there must also be talented officials who champion the issue. Richard A. Smith, *supra* note 216 at 118.

⁵¹² The one-sided sources of information, particularly if the sources are indifferent to their own accuracy, can be understood as creating a belief superiority in these individuals. This would result in over-confident belief in the rightness and popularity of their opinions, and a resulting ideological and epistemological closure to conflicting facts. Michael P Hall & Kaitlin T Raimi, "Is belief superiority justified by superior knowledge?" (2018) 76 J Exp Soc Psychol 290–306 at 291 & 301; See also, Troy H Campbell & Aaron C Kay, "Solution aversion: On the relation between ideology and motivated disbelief" (2014) 107:5 J Pers Soc Psychol 809–824; This article comes to a similar conclusion, but it is possible that the mechanism in play does not apply to areas of epistemological closure. Max Rollwage, Raymond J Dolan & Stephen M Fleming, "Metacognitive Failure as a Feature of Those Holding Radical Beliefs" (2018) 28:24 Curr Biol 4014-4021.e8.

government is making policy on the issue, they will have strong preferences about it, and there will be repercussions. The popularity of an issue changes relatively slowly, but the salience can change rapidly and frequently.⁵¹³

Given all these constraints, the popularity of a position is only one of the pressures that largely affect lobbying success. Yet, in the American context, increasingly policy proposals and outcomes seem to be divorced from their popularity. This is one of the public's prime concerns about lobbying: that it is a tool that lessens the pressure of popularity, by harnessing the other three pressures to influence government decisions.

The Hydraulic Force Approach

Gerken conceives of the private influence of lobbying as a hydraulic force that pushes its way into political decision-making. She borrows this concept from U.S. campaign finance law, where money is often described as a hydraulic force that bypasses legal restrictions and finds a way into politics.⁵¹⁴ This does not mean that attempting to control or curtail private political influence through laws and norms is impossible. Removing blatant bribery from politics and regulating campaign donations in Canada has been fairly successful. However, any loopholes or oversights in the system, like those in the American campaign finance laws, will be ruthlessly exploited. Those seeking influence over political decisions will seek to bypass the rules if they can.

If private influence is a hydraulic force that pushes its way through the gaps in the system to affect governance, then the rules seeking to contain it must be conceived broadly and cohesively. The analogy of a flowing river is helpful. If the dam is too narrow, in the wrong spot, or built without taking into account all of the terrain features, it will fail. The river will bypass it and continue to flood the community. Likewise, regulations that are too narrow, misconceived, do not cover the entire government, or are punctured by particular legal rulings will not work. The entire political landscape must be taken into account. If norms are porous, oversight spotty, or government open to other methods of political influence, like large campaign donations or lavish gifts, then the river of private influence will flow on regardless.

Private influence cannot be dammed off entirely. The influence should be properly managed and guided to work within democratic governance. The regulations should seek to keep the influence within well-conceived, visible and legitimate channels, so that it flows gently into the polity, instead of flooding it.

Government Created Lobbying

We shall now turn our attention to the other side of the equation, and consider government's use of lobbying. Governments can be a source of lobbying, not just a target. Governments and officials

⁵¹³ Ken Kollman, *supra* note 427 at 25.

⁵¹⁴ Heather Gerken, "Keynote Address: Lobbying as the New Campaign Finance" (2010) 27 Ga State Univ Law Rev 1155 at 1162.

are often involved in lobbying other officials and governments, and occasionally industry. This lobbying can be of other branches and bureaucracies of the same level of government, other levels of government, or of foreign governments. This lobbying can be direct, indirect or removed from government control.

We shall discuss government to government lobbying; indirect government lobbying; lobbying by foreign governments; government lobbying of independent organizations; government creation of independent lobbying organizations; and government suppression of lobbying organizations and influence peddling.

Government-Government Lobbying

Politicians and other officials often lobby other levels and branches of government for policies they would like to see enacted. This lobbying can be direct between branches and departments of the same level of government. For example, the President of the United States regularly calls on Congress to pass particular bills and funding, and meets with individual legislators to discuss policy priorities. The lobbying can also be directed between levels of government, for example the Toronto mayor regularly lobbies the provincial and federal governments to fund particular projects. It is not unusual for governments to hire or form lobby organizations to lobby the higher levels of government.⁵¹⁵ Generally, the Commissioner of Lobbying, officials and lobbyists do not consider this type of inter-government communication to be lobbying that needs to be disclosed. No one in my interviews brought up this facet of lobbying, or seemed to consider it as a possibility when discussing questions involving the effectiveness of lobbying or its transfer of information. It does not fall within the confines of the most lobbying regulations, and there is no disclosure requirement for this type of communication.⁵¹⁶ However, it generally does have to be disclosed when consultant lobbyists or associations are used.

Baumgartner *et al.*'s four year study did consider inter-governmental lobbying as lobbying. They treated the U.S. executive branch as a lobbyist before Congress, pushing for particular legislation, and found the President's lobbying to be the most important factor in determining whether legislation

⁵¹⁵ Claire Withycombe & Aubrey Wieber, "From state to local: how government puts lobbyists to work", (10 April 2019), online: *Salem Report* <<https://www.salemreporter.com/posts/682/from-state-to-local-how-government-puts-lobbyists-to-work>>.

⁵¹⁶ This also includes members of Indian bands and aboriginal governments. *Lobbying Act*, *supra* note 76 s 4(1)(a), (b), (c), (d), (d.1). This does raise some level of unfairness for non-status First Nations organizations, but registering for lobbying is not particularly restrictive. If they operate in a governing role, it would make sense to alter the lobbying regulations accordingly. More restrictive lobbying regulations, like those proposed later in the thesis, could be designed with these groups in mind in the unlikely case that they would run afoul of lobbying caps. Other groups that receive government funding would not qualify as government organizations, unless their responsibilities and authority reach the point where they are acting as a part of the government.

actually passed.⁵¹⁷ It is reasonable to exclude inter-governmental lobbying from lobbying regulations, but regulators should be aware that they are doing so.⁵¹⁸

Indirect Government Lobbying

Inter-government lobbying can also be indirect. For example, in Ontario, hospitals (and other publicly-funded agencies) hired numerous lobbyists to lobby government for more funding, leading to a scandal involving the lack of oversight over the lobbyists' expenses and the use of taxpayer money. New legislation restricted these lobbying expenditures on the provincial level, by banning the use of publicly provided funds. This did not entirely eliminate the practice, as money is fungible.⁵¹⁹ Government officials can also be active partners in traditional lobbying campaigns, providing pressure and information on officials they work with, or co-ordinating with the lobbying organization and helping it influence other areas and levels of government. This is one of the strengths of the Americans for Prosperity network: current and former officials move in and out of the organization, and actively co-ordinate and aid with its lobbying goals.⁵²⁰

Foreign Government Lobbying

The lobbying of foreign governments is not unusual. This lobbying can be direct, through trade missions, diplomats, direct phone calls, and meetings. Like any other form of communication, contact regarding a particular issue can evolve into a lobbying campaign. According to Taras, Canadian parliamentarians often act as direct front-line lobbyists with their counterparts in other countries, including the United States, particularly on trade issues.⁵²¹ They do this, among other means, through the meetings of the Inter-Parliamentary Groups, including the Canada-United States Inter-Parliamentary Groups, which are funded by the Canadian House of Commons and the Senate. The direct diplomatic communication and pressure is generally treated as outside the purview of lobbying regulations, even though it is a form of lobbying.⁵²² It is assumed that the government desires to insulate itself from foreign influence, that foreign officials lack the connection to lobby unfairly, and that the government has other processes to deal with the input of foreign powers. However, the reality is that many countries are as open to the direct lobbying of foreign countries as they are to the direct lobbying of local interests.

⁵¹⁷ Frank R. Baumgartner et al, *supra* note 59 at 209.

⁵¹⁸ For example, the Federation of Canadian Municipalities was one of the top lobbying groups in the Canadian lobbying registrar (it is the only non-business in the top ten lobbying organizations) in 2013. Maclean's, *supra* note 42.

⁵¹⁹ Rob Ferguson & Robert Benzie, "Ontario Tightens Lobbying Rules After Scathing Report", *Tor Star* (20 October 2010), online: <https://www.thestar.com/news/ontario/2010/10/20/ontario_tightens_lobbying_rules_after_scathing_report.html>.

⁵²⁰ Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 29.

⁵²¹ David Taras, "Canada and Congress: Lobbying in Washington by Charles Doran, Joel Sokolsky" (1986) 19:1 Can J Polit Sci 160–161 at 161.

⁵²² *Lobbying Act*, *supra* note 76 s 4(1)e.

This foreign lobbying can also be indirect, through the hiring of local lobbyists, who presumably have the knowledge and connections to navigate the government's policy-making process. In response, generally governments require lobbyists to disclose when they are employed by foreign powers. This rule is extremely common, found even in jurisdictions that have few other lobbying regulations and restrictions, although it may be poorly enforced.⁵²³ Sometimes foreign governments are forthright their lobbying. For example, Canada is quite open about hiring lobbyists to influence U.S. trade policy.

Foreign governments are not always forthright in their lobbying. For example, Michael Flynn was hired as a lobbyist by supposedly independent Turkish organizations which were working on behalf of the Turkish government. He did not disclose these links.⁵²⁴ It is unlikely Flynn would have been caught if he had not been so prominent in the Trump administration. Presumably, this sort of masquerade (to gain type iii influence) is quite common, as the lobbying on many foreign policy positions loses influence if foreign power is openly involved. Similarly, many American think tanks act as lobbying fronts for foreign governments, providing foreign policy papers in support of their backing country's agenda.⁵²⁵

Government Lobbying of Organizations

It is not unusual for government to lobby independent organizations, particularly industry, although it is certainly less common than the other way around. Often this type of lobbying is simply a press release or meeting, encouraging a particular course of action that matches the government's policy goals, particularly on large-scale projects. Sometimes these efforts are long-term and carefully constructed. For example, The Harper government lobbied the American oil industry in support of the Keystone pipeline, to help push through the pipeline and ensure it would have enough customers.⁵²⁶ Similarly, the Obama government regularly lobbied insurers operating in the individual marketplace to maintain their presence in lower profit underserved rural districts.

In contrast, this type of lobbying becomes questionable when it is a method for the government to threaten to exert influence against an organization if it refuses to co-operate with an official's political goals. For example, early in his presidency, Trump regularly attacked corporations that were thinking of outsourcing jobs, until his political capital waned and his threats became ineffective. Such pressure might have been justifiable as part of a larger strategy that included supportive laws and policy against organizations flaunting the rules. However, there was no cohesive policy shift, the targets of Trump's attacks appeared to be random or companies that had offended him, and Trump himself was actually pursuing a pro-corporate anti-worker legislative agenda. His actions were outside of justifiable

⁵²³ For example, in the U.S. the *Foreign Agents Registration Act* was passed in 1938. Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 21.

⁵²⁴ Isaac Arnsdorf, "Flynn's Turkish lobbying linked to Russia", (25 April 2017), online: *Politico* <<http://politi.co/2q0ZV44>>.

⁵²⁵ For example, the Institute of China-America Studies, is an ideological think tank likely funded by the Chinese government to lobby for more China-friendly U.S. policies, particularly involving maritime disputes in the South China Sea; and to counter the think tanks funded by other Asian countries. See Think Tank Watch, "China Sets Up Think Tank in DC to Counter Other Asian Powers", (4 May 2015), online: *Think Tank Watch* <<http://www.thinktankwatch.com/2015/05/china-sets-up-think-tank-in-dc-to.html>>.

⁵²⁶ Simon Doyle, "Tories Lobby Oil and Gas Industry to Keep Keystone XL Plans Afloat", *Globe Mail* (9 June 2015).

democratic norms, because the power was being exercised inconsistently, unpredictably, and unequally. He was attempting to replace the rule of law with a system of personal bullying and fealty, which is antithetical to democracy. It involved a level of public deception that was incompatible with democracy. The companies often only pretended they were saving jobs, and the number of jobs involved was minuscule compared to the national scale – it was a form of theatre.⁵²⁷

Government Creation of Independent Lobbying Organizations

The most indirect form of government lobbying is when it creates or funds permanent lobbying organizations that are intended to act independently. Sometimes the government establishes these organizations to be completely independent. Sometimes it retains a bare minimum of control, or sets out guidelines and gives the organization independent oversight. Sometimes it technically no longer controls the lobbying organizations, but continues to provide funding, which may or may not come with strings attached. Often these organizations are meant to lobby the government itself, and are created as a way of giving the group an independent voice on policy issues. Creating a successful lobbying coalition also creates a long-term pressure that can persist beyond the current political party's stay in power, carrying on support for a particular policy.

There are many examples of lobbying organizations funded by government. The Assembly of First Nations, the Congress of Aboriginal Peoples, the Metis National Council and the Inuit Tapirisat Kanatami regularly lobby the Canadian government, even though they derive the majority of their funding from different departments of the same government.⁵²⁸ Similarly, Woll points out that,

[many] non-profit organizations representing interests that are structurally difficult to mobilize often receive money from the European Commission. By funding and sometimes even founding these associations, the European Commission seeks to balance out the breadth of interests that can be represented at the European level⁵²⁹.

The Canadian government has also been instrumental in establishing a number of trade organizations, particularly in key areas of the economy it wanted to develop.⁵³⁰ This gave it representatives of the industry to consult, who create demand for policies the government wanted to

⁵²⁷ Jeet Heer, "Trump's Populism Is a Sham" *New Repub* (9 December 2016), online: <<https://newrepublic.com/article/139239/trumps-populism-sham>>.

⁵²⁸ Christopher Curtis, "Canada's Aboriginals a Growing Force in Federal Politics", *Montr Gaz* (2 October 2015), online: <<http://montrealgazette.com/news/local-news/canadas-aboriginals-building-political-capital>>; *Consolidated Financial Statements of the National Indian Brotherhood*, Independent Auditor's Report, by Deloitte LLP, Independent Auditor's Report (Deloitte LLP, 2014).

⁵²⁹ Cornelia Woll, "The brash and the soft-spoken", *supra* note 166 at 199.

⁵³⁰ "[I]t is not unusual for Canadian governments to create pressure groups in order to foster relations with 'special publics' and to promote a demand for policies which particular departments are anxious to adopt." Fred Thompson & W. T. Stanbury, *supra* note 2 at 42.

create.⁵³¹ Establishing these associations is a means of creating outside pressure and externally supported experts, rather than creating the expertise in house. In the 1970s the Canadian government funded a number of women's rights organizations that then lobbied the government on key policies and rights. On occasion, the government was embarrassed by the lobbying tactics or timing of the women's groups, and would threaten to cut their funding as a means of controlling them.⁵³² Even when the government funding is not used to restrain the organization's activities and positions, the threat that it may be can restrain an organizations' activities. For example, Haddow argues that the National Anti-Poverty Organization's (NAPO) "reluctance to take part in Ottawa-based lobbying no doubt owed much to NAPO's financial ties with the government"⁵³³.

Government Suppression of Lobbying Organizations and Influence Peddling

Just as government can act to create lobbying organizations, it can act to undermine them. This is a step beyond refusing to meet with lobbyists, and actively seeking to suppress them. There does seem to be some variation between different governments in the amount of lobbyists they meet with, yet most attempts to suppress lobbying seem to specifically target lobbying organizations to which the politicians are ideologically opposed. This suppression is an ugly tool to marginalize those the government wants to silence.

The Harper government launched what appeared to be politically motivated tax audits at specific charity groups. The government targeted environmental and other charities to which it was ideologically opposed, investigating whether they exceeded the legal limit of expending more than 10% of their resources on political activities.⁵³⁴ These audits were intended to chill lobbying and political activism by the targeted charities, cost them resources, and possibly drive them under. Historically, the Canadian 1927 Indian Act forbade

First Nations people from forming political organizations. Hence, it was common for a First Nations leader to be jailed by the RCMP for trying to organize any form of political group. This apartheid law prohibited traditional First Nation government systems from existing in the native communities.⁵³⁵

⁵³¹ *Ibid.*

⁵³² Paul Malvern, *supra* note 2.

⁵³³ Rodney S Haddow, *Poverty Reform in Canada, 1958-1978: State and Class Influences on Policy Making* (McGill-Queen's Press - MQUP, 1993) at 179.

⁵³⁴ Dean Beeby, "Conservative Government Steps up Scrutiny of Charities' Political Activities", (10 July 2014), online: <<https://www.theglobeandmail.com/news/politics/study-cites-chill-from-tax-agency-audits-of-charities-political-activities/article19551584/>>.

⁵³⁵ R Brent Lang, "Lobbying in Canada", (27 September 2014), online: *Can Bus J* <http://www.cbj.ca/lobbying_in_canada/>; See, J R Miller, *Canada and the Aboriginal Peoples 1867-1927*, Historical Booklet 57 (Ottawa: Canadian Historical Association, 1997) at 19; *Indian Act*, R.S., c. 81 1927 s 141.

It was a tool to reduce their political power and maintain a system of oppression. This political oppression led to the First Nations realization that they needed “a national Aboriginal lobby to fight for their rights in Ottawa.”⁵³⁶

The K Street Project, discussed earlier, was a similar attempt to suppress left-wing and Democratic lobbyists by requiring that lobbying organizations have or promote Republican lobbyists into their top positions. This type of interference into the lobby’s internal structure can easily become a form of influence peddling. For example, Carson, a senior adviser to Harper, was convicted of influence peddling.⁵³⁷ In exchange for helping to promote the sale of water-purification system for First Nations communities, he demanded benefits for his girlfriend, who worked at the company. In an indication of the excessive difficulty of obtaining political malfeasance convictions in Canada, Carson was found not guilty by the lower court, despite the judge’s conclusion that Carson had admitted to attempting to persuade officials to buy the systems for his girlfriend’s benefit.⁵³⁸

We have looked at different forms of government created lobbying. This includes governmental lobbying of different branches and levels of government, the use indirect lobbying, foreign governmental lobbying, governmental lobbying of private organizations, government created interest groups, government interference with lobbying organizations, and influence peddling. Now we will move on to consider Canadian lobbying statistics, which will help provide some context for the later discussion of the effectiveness of lobbying and the six concerns that lobbying activities raise.

Canadian Lobbying Statistics

The Office of the Commissioner of Lobbying of Canada publishes annual reports. These charts can give a sense of the amount of lobbying in Canada, where it is directed, and what types of inquiries the Officer of the Commissioner of Lobbying fields. These reports show that federally registered lobbying has risen in Canada over the last year. In 2017, there was approximately a 10% increase in the number of registered lobbyists over the 2012 to 2016 period.⁵³⁹ Considering the stability of the 2012-2016 period, this increase might be a one-time change, rather than an upwards trend. In 2017 there were 5,559 registered active lobbyists. This consisted of 926 consultant lobbyists, 2,893 in-house

⁵³⁶ R. Brent Lang, *supra* note 535.

⁵³⁷ *R v Carson*, [2018] 2018 SCC 12.

⁵³⁸ The trial judge held that Carson’s actions did not technically infringe the statute, since the sale of the water treatment system was not a matter of business related to the government, because it was the First Nations who decided on the what system to purchase. The higher courts held that the judge’s interpretation of the statute was too narrow, since the provision of water to First Nations was a federal responsibility, funded by the government and within its mandate. Notably, the Supreme Court also gave a wide reading to the statute based on its anti-corruption purpose. It was relevant that the behaviour criminalized by the section risked “depriving citizens of a true democracy predicated on free and open access to government. Corruption and the sale of influence, whether real or apparent, with government may undermine the integrity and transparency that are crucial to democracy.” *Ibid* at para 39; Colin Perkel, “Ex-Harper aide Bruce Carson guilty of influence-peddling, top Ontario court rules”, *Tor Star* (17 February 2017), online: <<https://www.thestar.com/news/canada/2017/02/17/ex-harper-aide-bruce-carson-guilty-of-influence-peddling-top-ontario-court-rules.html>>. *R. v. Carson*, *supra* note 537.

⁵³⁹ Office of the Commissioner of Lobbying, *supra* note 151 at 10.

lobbyists for organizations, and 1,740 in-house lobbyists for corporations.⁵⁴⁰ The Commissioner of Lobbying also releases a summary of the departments and branches of government that are primarily lobbied and the subject matter of the lobbying.

The Commissioner of Lobbying's office does assessments, reviews of lobbying, and verifications of accuracy of the reports in the database.⁵⁴¹ It also monitors the media for stories about lobbying, to ensure that the information matches the Commissioner's databases.⁵⁴² The Commissioner verifies 5% of the lobbyists' monthly reports of their activities. They "confirmed that 809 (93%) of the sampled reports were accurate. Of those that were found to be inaccurate, 66% had only minor clerical or over-reporting errors."⁵⁴³ Pross argues that the Commissioner's office is dedicated, but that it is understaffed.⁵⁴⁴ The Commissioner does not perform random audits of lobbyists to ensure their disclosures are accurate. Nor does it require lobbyists to record the amounts spent on lobbying.

Interestingly, despite the strength of the Canadian bureaucracy and the PMO, a great deal of lobbying is directed at the House of Commons.

*Table 4: Government Institutions Mentioned in Canadian Federal Lobbyist Registrations*⁵⁴⁵

Institution	Number of Mentions in Lobbying Registry
House of Commons	30,748
Innovation Science and Economic Development Canada	25,265
Prime Minister's Office (PMO)	25,038
Finance Canada	21,312
Senate of Canada	18,383
Global Affairs Canada	17,084
Privy Council Office (PCO)	14,924

⁵⁴⁰ *Ibid.*

⁵⁴¹ The Commissioner of Lobbying also released summaries of received communications. As one would expect, the vast majority of communication to the Commissioner of Lobbying was by lobbyists (2,370), their representatives (1,292), and potential lobbyists (408). The public (345) and other (229) made up a relatively small percentage of the communication (12%). Current and former public office holders contacted the office less often than the public (245). The commissioner's reports do not delineate between officials still in office and those reaching out because they are interested in becoming lobbyists. *Ibid* at 16.

⁵⁴² *Ibid* at 26.

⁵⁴³ *Ibid* at 25.

⁵⁴⁴ "It is difficult to see how these functions can be effectively performed with the staff at hand. The most recent updating of the Registry has elicited 3,700 registrations. While the great bulk of processing these is carried out electronically, staff must inevitably field a number of questions as lobbyists become familiar with the new registration requirements. Post-registration verification can be a time-consuming process, and is followed up with communications between officials and lobbyists as details and corrections are requested and provided. One can appreciate that investigating complaints and conducting inquiries – not to mention the preparation of interpretation bulletins and advisory bulletins, themselves activities that require research and consultation – puts the Office under considerable strain." A. Paul Pross, *supra* note 2 at 200.

⁵⁴⁵ Office of the Commissioner of Lobbying, *supra* note 151 at 8.

Health Canada	13,920
Environment and Climate Change Canada	13,500
Transport Canada	11,954

Presthus' survey of Canadian interest groups in the late 1970s found that nearly 66% focused on the bureaucracy and cabinet.⁵⁴⁶ The lobbying disclosure is the 2017 Commissioner's report indicate that nearly 75% of the lobbying focused on the bureaucracy and cabinet.⁵⁴⁷

*Table 5: Subject Matters in Canadian Federal Lobbyist Registrations*⁵⁴⁸

Subject Matter	Number of Mentions in Lobbying Registry
Industry	17,339
International Trade	14,392
Environment	12,911
Taxation and Finance	12,722
Health	12,361
Economic Development	10,867
Transportation	10,284
Science and Technology	10,097
Infrastructure	9,871
Employment and Training	9,278

*Table 6: Primary Subject Matter of Communication to the Commissioner of Lobbying of Canada*⁵⁴⁹

Subject Matter	Number of Times Communicated to the Commissioner of Lobbying
Registration support	2,923
Advice and interpretation of the Act and Code	1,301
Registry use	103
Outreach	95
Complaint or disclosure	6
Other	461
Total calls	4,889

In 2016-2017 the Commissioner of Lobbying did 26 preliminary assessments and followed up with 13 administrative reviews of lobbyists infractions of the *Lobbyists' Code of Conduct*. These led to 2 formal investigations.⁵⁵⁰

⁵⁴⁶ Fred Thompson & W. T. Stanbury, *supra* note 2 at 34.

⁵⁴⁷ 54% of the lobbying is focused on the bureaucracy, 21% is focused on the Cabinet, and 26% is focused on the legislators. Office of the Commissioner of Lobbying, *supra* note 151 at 8.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid* at 16.

⁵⁵⁰ *Ibid* at 21.

Table 7: Administrative Reviews by Outcome ⁵⁵¹

Review Outcome/Results	Number
Unfounded – no registrable communication	5
Unfounded – no reportable communication	1
Unfounded – no meetings arranged	2
Unfounded – no improper influence	5
Unfounded – activity not performed for payment	3
Subtotal Unfounded Closed	16
Well-founded – education and monitoring	10
Well-founded – <i>Lobbyists' Code of Conduct</i> investigation opened	2
Subtotal well-founded	12
Total number of administrative reviews closed in 2016-17	28

The Commissioner of Lobbying does not present statistics about the lobbying materials provided. As mentioned, Boucher's 2018 analysis of 51,527 Canadian federal lobbying reports, however, shows that corporations and trade associations dominated over citizen groups and unions, 68% to 15% respectively. Corporations represented 38% of lobbying, trade associations 26%, professional associations 4%, whereas citizen groups represented 8%, and unions 7% of lobbying.⁵⁵² The rest was made up of public institutions (10%), think tanks (3%), and other associations (4%).⁵⁵³ Lang found that the top lobbyists provide a large quantity of lobby materials to the government. For example, over a nine-month period in 2012,

Canadian Association of Petroleum Producers filed 178 reports lobbying on: pipeline regulation, tax credits, Clean Air Act related to greenhouse gas regulations. Canadian Bankers Association filed 131 reports lobbying on: do-not-call list, identity theft laws, corporate income tax. Canadian Cattlemen's Association filed 113 reports lobbying on: livestock carcass grading regulations, imports of non-NAFTA beef and veal, financial loan guarantees, animal health. The Mining Association of Canada filed 105 reports lobbying on: environmental assessment regulations, skills training, corporate taxation, remediation of abandoned mines. Chicken Farmers of Canada filed 92 reports lobbying on: meat inspection regulations, poultry import tariffs, medicated

⁵⁵¹ *Ibid* at 22.

⁵⁵² Maxime Boucher, *supra* note 2 at 324.

⁵⁵³ *Ibid*.

feed mixing regulations. Canadian National Railway filed 88 reports lobbying on: First Nations land claims, replacement worker regulations.”⁵⁵⁴

It is apparent that there is substantial lobbying contact between special interest groups and the Canadian government. As previously discussed, the top lobbying groups are virtually all businesses and trade organizations.⁵⁵⁵

From the data and my interviews, it is apparent that the Commissioner of Lobbying takes its role seriously, and attempts to fulfill its function within its understanding of the law, and its belief that lobbying is fundamentally beneficial to Canadian democracy.

Transparency and Lobbying

In most jurisdictions, transparency is the central goal of lobbying regulation. This is generally premised on the belief that the public – and other lobbyists – have the right to know who is lobbying and which parts of government are being lobbied. This argument is often justified with the argument that sunlight is the best disinfectant. Transparency is also a good in its own right in a democracy.⁵⁵⁶ It is worth investigating the concept of transparency itself, looking at Halberstam’s four levels of transparency; transparency and the disclosure and corruption heuristics; the question of accuracy in transparency; the advantages and disadvantages of transparency; and the future of transparency.

Four Levels of Transparency

Halberstam distinguishes four levels of transparency that apply within the concept of governmental openness.⁵⁵⁷ These are (1) *transparency as the right to know*, (2) *transparency as regulation*, (3) *transparency in regulation*, and (4) *transparency as open government*.

Halberstam describes the right to know (1) as the right to access information about the activities of government. This form of transparency is generally based on one-on-one interaction, and requires that the citizen actively seek out the information, requesting information from the government about the government. An example of this type of transparency is an access to information request. The data is released only to the person who requests it. Transparency as regulation (2) is regulation that requires public disclosure of information. For example, corporations are required to make public filings when they make an initial public offering of their stocks. He argues that this form of transparency is rooted in public welfare rather than individual rights. Transparency in regulation (3) is the concept that the public should be allowed to see and comment on rules as they are being crafted. This participation is not only a

⁵⁵⁴ R. Brent Lang, *supra* note 535.

⁵⁵⁵ Maclean’s, *supra* note 42. In the three top areas of Canadian governance: the PMO, the Department of Finance, and on environment and resources, the sole non-business group in the top ten was the Federation of Canadian Municipalities.

⁵⁵⁶ A. Paul Pross, *supra* note 2 at 197.

⁵⁵⁷ Michael Halberstam, “Beyond Transparency: Rethinking Election Reform from an Open Government Perspective” (2014) 38 Seattle Univ Law Rev 1017 at 1022.

right, but also a means to improve the process and results. It is ideally a form of public participation and increased democracy. Halberstam presents transparency as open government (4) as a higher ideal of transparency, where the government deliberately pursues the open and widespread dissemination of accurate information in a way that is useful to people and enjoins their participation through the use of decentralized networked information. Open government invites “public and private sector participation in government operations and problem solving”⁵⁵⁸ in an attempt to benefit markets, the public and the government through the use of public collaboration.

Applying Halberstam’s model, Canadian lobbying regulation is a hybrid-exercise of using (2) transparency as regulation to develop (3) transparency in regulation. The lobbying regulations require public disclosures, and the Commissioner has fulfilled this with an online system.⁵⁵⁹ This provides some transparency into the lobbying process. This disclosure in turn provides some transparency in the development of legislation and regulations, allowing the public and other interest groups to see which private interests have been lobbying which branches of the government.

The basic transparency of the right to know (1) continues to be a necessary supplement. My interviews revealed that a number of the citizen organizations believe the transparency of the Canadian lobbying disclosures is imperfect. The representative of the organizations recounted that they sometimes have to pursue access to information requests in order to discover that there have been meetings by lobbying groups with government officials that have not been disclosed in the public lobbying filings. There was also concern that casual meetings outside of government offices were not reported, although these meetings could lead to important decisions. A civil servant I interviewed stated that casual meeting at lunch and bars after work often led to important understandings and decisions, and were a vital part of his job. I do not believe these meetings were reported. It is also not clear if the meetings are consistently recorded when the official or civil servants reach out to the lobbyists and industry to get their opinion, which is a common occurrence.

The Commissioner of Lobbying requires the submission of disclosure reports, and checks 5% directly for completeness and accuracy, but does not go further and audit lobbyists. Thus, the lobbying disclosure is a good step towards transparency as regulation (2), but it is far from perfect. There are gaps that need to be closed before the lobbying database is an accurate summary of the real lobbying activities.

The transparency of American lobbying disclosure appears to be much further from ideal. According to LaPira and Thomas’ study, only roughly half of federal U.S. lobbyists who had previously worked in government accurately disclosed it on their forms. “Only 29.7 per cent of lobbyists report their covered official status, although 51.7 per cent of the sample was found to have held a position in government.”⁵⁶⁰ They also point out that “in the year immediately after the passage of Honest

⁵⁵⁸ *Ibid* at 1036.

⁵⁵⁹ *Lobbying Act*, *supra* note 76 s 9(4).

⁵⁶⁰ Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 10.

Leadership and Open Government Act ... a number of previously registered lobbyists ‘de-registered’ to avoid disclosing certain campaign donations under new disclosure requirements”⁵⁶¹. They argue that, if “we are primarily concerned about open government and lobbying transparency then the evidence presented here verifies anecdotal evidence that disclosure is inadequate.”⁵⁶² This is not to say that the disclosures are useless, but that they are far from complete.

There is good reason to believe that the situation is better in Canada. There is less roll-over from government to lobbying, and the Canadian Commissioner of Lobbying is proportionally more empowered and centralized. The subjects of my interviews noted that while the disclosures are not always complete, they are generally substantive and useful. In general, most believed that there is widespread compliance with the lobbying disclosure. As mentioned, there are a few exceptions to this compliance. Many interviewees noted that there was no disclosure of casual meetings, phone calls, encounters at events and fundraisers, and possibly of those hovering just around the lobbying threshold.⁵⁶³ Likewise, as previously discussed, Cayley-Daoust and Girard concluded there is lobbying floating below the threshold using another approach, by lobbying bureaucrats who are low-level enough that they fall below the reporting threshold for registration.⁵⁶⁴

There have been scattered attempts to analyze the information in the lobbying database to determine which industries lobby the most, and which areas of government are the most lobbied. The Commissioner of Lobbying annual report also contains some useful information. None of these uses meet the ideal of transparency as open government. The disclosure database does not enjoin the public to participate in governance and problem-solving through the use of decentralized networked information. Chapter 9 contains some proposed changes that could help fulfill this vision of socially useful transparency.⁵⁶⁵

Transparency and the Disclosure and Corruption Heuristics

Both the disclosure and the corruption heuristic support the need for transparency. In the disclosure heuristic, transparency is enough. Once the public has the information about lobbyists and lobbying practices, they can take it into account when they vote for their leadership. If a particular politician has unsavoury lobbying ties, the public will support her opponents. Implicit in the disclosure heuristic is the belief that the competition between politicians will lead them to avoid ties to lobbyists and interest groups the public considers unsavoury.

⁵⁶¹ *Ibid.*

⁵⁶² *Ibid* at 21.

⁵⁶³ Pross stated that charities had reason to understate lobbying to stay below the 20% employee hour threshold, so they do not risk their charitable status. This situation has changed for charities with the new laws that allow them to pursue non-partisan lobbying based around their mission. It is likely other organizations also try to stay below the lobbying threshold, so they do not need to disclose their activities. A. Paul Pross, *supra* note 2 at 188.

⁵⁶⁴ Daniel Cayley-Daoust & Richard Girard, *supra* note 2 at 9.

⁵⁶⁵ Chapter 9 – Reform Principles: Principles of Lobbying Reform: Principle 12: Promote Strong Disclosure and Transparency, p. 560.

For the corruption heuristic, the transparency is an integral first step, but it alone will not ensure good governance. Lessig argues that improving transparency is like putting a better camera on the Deepwater Horizon leak, it will give a better idea of how much oil is leaking, but it alone cannot prevent the oil spill.⁵⁶⁶ According to the corruption heuristic, voting is essential for determining the overall direction of governance, and expressing ideological and identity views, but it is too coarse a tool to control lobbying. Voters cannot be expected to follow the minutiae of the interactions between lobbyists and officials. Voters cannot express dislike for some political activities of a party, while supporting others. In many cases voters cannot support politicians without lobbying ties, because the dependency corruption results in almost all politicians having ties to lobbyists (and large donors). Voting is too infrequent to counter the daily pressure of lobbyists; and if lobbying is dominated by large interests, there are limited means for the average citizens to convey their preferences to politicians. Sunlight is not enough; actual oversight and regulation are needed.

Accuracy in Transparency

Both the disclosure and the corruption heuristic require a certain amount of accuracy in the lobbying disclosures. Without accuracy, transparency is of little use. The corruption heuristic expects a certain amount of cheating from lobbyists, and proponents would argue that the disclosures must be backed with the force of law and proper oversight to ensure accuracy. Due to its belief in the sufficiency of disclosure, and its greater faith in the rational response of political actors and citizens, the disclosure heuristic lends itself more to the belief that lobbyists are incentivized towards accurate transparency.

The Canadian lobbying regulations straddle this divide. Disclosure is mandatory, and the *Lobbyists Code of Conduct*'s obliges the lobbyist to provide accurate information. On the other hand, the Commissioner's office focuses on a constructive dialogue with lobbyists, searching for completeness of disclosure, but generally accepting their accuracy. They do not do full audits on lobbyists, but they do compliance analyses. In 2017, they performed 94 compliance analyses that reviewed and compared the information in the registry with other sources to verify its accuracy.⁵⁶⁷ Outside of these compliance analyses, they do not contact the officials lobbied to confirm the lobbyists' reports. Since officials rely on lobbyist provided information, in theory, they have a vested interest in ensuring the accuracy of the information. Viewed from this angle, the Canadian *Lobbyists Code of Conduct*'s obligation to provide accurate information makes a good deal of sense. The mandatory disclosure will also reveal which other officials the lobbyists have contacted and who the lobbyists work for, and thereby provide good insight into the lobbyists' agenda and biases.⁵⁶⁸

A number of lobbyists I interviewed reported that honesty and reliability were essential for their jobs. Lobbyists provide specialized information that can be hard to verify, and they want officials to rely on it. Transparency and disclosure should buttress this trust, as dishonesty is more likely to be revealed.

⁵⁶⁶ Lawrence Lessig, *supra* note 273 at 260.

⁵⁶⁷ *Office of the Commissioner of Lobbying of Canada Annual Report 17/18*, by Office of the Commissioner of Lobbying (Office of the Commissioner of Lobbying of Canada, 2018) s Compliance and enforcement.

⁵⁶⁸ Anita S. Krishnakumar, *supra* note 493 at 533.

Moreover, the knowledge that others might be watching and might look into the issue should discourage deception. The strength of transparency and the disclosure heuristic partly relies on these factors, and there is evidence to back it up. Studies show that disclosure discourages corruption.⁵⁶⁹

Yet, those who support the disclosure heuristic often overstate their case. People lie, particularly when it is profitable. The pressures of transparency only go so far in ensuring lobbyists tell the truth. We will return to the question of the accuracy of the information provided by lobbyists in Chapter 3, in the discussion of information and framing biases.

Holman and Luneburg agree overall transparency is the area where the lobbying acts are the strongest. “Of all the shortcomings of the North American systems of lobbying regulation – and there are many – lack of transparency is not, for the most part, one of them, at least when it comes to the basic contours of lobbying campaigns.”⁵⁷⁰

Advantages of Lobbying Transparency

Holman and Luneburg argue that transparency provides a number of important benefits.⁵⁷¹ It helps prevent the corruption of officials and the governmental processes in which they participate.⁵⁷² It prevents the appearance of corruption that might otherwise erode public confidence in the integrity of official decision-making.⁵⁷³ The public can see what is happening in government and this provides legitimacy to its decision-making. Transparency also improves the accountability of government officials, by forcing them to bear the risk that unpopular actions will become widely known and spark repercussions.

Transparency is beneficial to public officials as well. It allows officials to know who is trying to influence them, and what other officials are being lobbied. This allows the public officials to disregard or counter the influences they oppose or think are inappropriate. To some extent, transparency also levels the playing field among different lobbyists and special interests; allowing them to respond to the efforts of those special interests that might otherwise be able to work secretly behind closed doors.⁵⁷⁴

Disadvantages of Lobbying Transparency

Holman and Luneburg, point out that improperly structured transparency with excessive demands can “impose considerable economic costs on both the public and private sectors and those costs can deter appropriate attempts to influence government decision-making.”⁵⁷⁵ Small organizations might not be able to afford the added work-hours, expertise, and funds needed to comply with excessive transparency requirements. There is also the possibility that disclosure might limit the candour

⁵⁶⁹ Craig Holman & William Luneburg, “Lobbying and transparency”, *supra* note 96 at 78.

⁵⁷⁰ *Ibid* at 76.

⁵⁷¹ *Ibid*.

⁵⁷² *Ibid* at 78.

⁵⁷³ *Ibid*.

⁵⁷⁴ *Ibid*.

⁵⁷⁵ *Ibid* at 79.

or willingness to compromise needed for governance, of both lobbyists and officials. The clients or the public might demand uncompromising positions that are at odds with the reality of governing and legislating, limiting the room for co-operation in complex situations.⁵⁷⁶ It could also compromise situations where confidentiality and protection of information are broadly necessary, such as contentious negotiations or information related to trade secrets.⁵⁷⁷ The final risk is that the transparency can turn into a mass unfiltered information dump, so excessive that it becomes damaging rather than helpful for public understanding.⁵⁷⁸

The Future of Transparency

The slow death of the newspaper industry, the collapse of local reporting, and the possible decline of investigative journalism is fundamentally changing democracy. The media is the key conduit between government transparency and public awareness, and it appears to be breaking down. Print journalism is struggling, and online journalism has fallen short in filling the oversight role. In my interviews, a senior bureaucrat noted that his department used to receive calls from journalists investigating issues and watching court cases to see if anything interesting was arising for the basis of an investigate story. He stated that this is not happening anymore. The media is now simply reprinting his department's releases to the public, often verbatim. As this trend continues, the disclosure heuristic begins to look weaker. How can transparency be enough, if the public lacks the tools to investigate? Accordingly, the proponents of the corruption heuristic have an even stronger argument. In the new media environment, active lobbying regulation beyond just transparency will become even more necessary for good governance.

The Effectiveness of Lobbying

There used to be a substantial disagreement in the political science literature about how much effect lobbying had on government decision-making. The older studies (pre-2000) of legislative voting in the U.S. showed a weak to moderate connection between lobbying and the legislators' subsequent voting records.⁵⁷⁹ Some argued that lobbying had little effect on legislation and governance.⁵⁸⁰ These studies suffered from two fundamental flaws. The first is that lobbying influence is often not apparent at the legislative voting stage, but rather at the less public stages of legislative and regulation procedures.⁵⁸¹ The second flaw is that the approach is tautological, because the method uses "voting

⁵⁷⁶ Cornelia Woll, "The brash and the soft-spoken", *supra* note 166 at 207.

⁵⁷⁷ Craig Holman & William Luneburg, "Lobbying and transparency", *supra* note 96 at 79.

⁵⁷⁸ *Ibid.*

⁵⁷⁹ Richard A. Smith, *supra* note 216 at 117.

⁵⁸⁰ Raquel Alexander, Stephen W Mazza & Susan Scholz, "Measuring Rates of Return on Lobbying Expenditures: An Empirical Case Study of Tax Breaks for Multinational Corporations" (2009) 25 JL Pol 401 at 407; Ken Kollman, *supra* note 427 at 6; Richard Posner, *supra* note 245.

⁵⁸¹ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 230.

indices to explain the voting behavior of legislators.”⁵⁸² Jackson and Kingdon argue this approach is fundamentally flawed “substantively and statistically.”⁵⁸³

In support of this earlier consensus, it was argued that it was the bureaucracy that made most of the laws, and that its insulation, informational and systemic advantages gave it the advantage in policy-making.⁵⁸⁴ It was believed by government scholars in the 1960s and ‘70s that the bureaucracy’s advantage over politicians and lobbyists gave it the power to control the agenda.⁵⁸⁵ “What these “strong bureaucracy” theories failed to account for, however, was that elected officials get to set the rules of the regulatory game.”⁵⁸⁶ There has been a growing recognition over the last two decades in academic literature that lobbying significantly affects political decisions and government policy, even when the bureaucracy is comparatively strong, as it is in Canada.⁵⁸⁷ As LaPira and Thomas conclude, “narrative and survey literatures report that interest group influence can be substantial,”⁵⁸⁸ and as would be expected, “the level of influence appears to vary significantly across groups, policy areas, legislative venues, and political contexts.”⁵⁸⁹

Lobbying’s effect on legislation is hard to detect, but studies show that lobbying is influential; that business organizations reap great benefits from it; and that the impact of lobbying is greater in low salience areas.

Why Lobbying Effect on Legislation is Hard to Detect

The effect of lobbying can be hard to detect. Godwin *et al.* argue that government officials do not want to make the benefits they give to special interest groups evident, and they actively work to mask them. This matches Diana Evans’ finding, that the provision of specific private goods to lobbyists do not appear in the legislation passed, and are therefore not apparent in the legislative voting record.⁵⁹⁰ “Instead, legislators hide these benefits in directives to the agencies that will administer the benefits.”⁵⁹¹ They argue that it is almost impossible to identify these exchanges between lobbyists and officials, just as it is extremely difficult to ascertain when a regulator who attains a position due to a recommendation from a lobbying organization goes on to grant waivers or make rule changes that favour that group.⁵⁹²

⁵⁸² Richard A. Smith, *supra* note 216 at 108.

⁵⁸³ *Ibid.* “[T]he explanatory variable, and the votes being modeled, the dependent variable, are almost certain to be tapping the same or related dimensions”

⁵⁸⁴ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 110.

⁵⁸⁵ *Ibid* at 113.

⁵⁸⁶ *Ibid.*

⁵⁸⁷ Richard A. Smith, *supra* note 216 at 97.

⁵⁸⁸ *Ibid* at 117.

⁵⁸⁹ *Ibid.*

⁵⁹⁰ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 230.

⁵⁹¹ *Ibid.*

⁵⁹² *Ibid.*

A second reason that exchanges are difficult to track is that the lobbying organizations often send broad signals to policymakers. Signalling theory tells us that interest organizations use lobbying to show their willingness to support or to challenge an agency's decisions.⁵⁹³

Retnasaba also argues that studies of legislation could not find the connection between legislative voting patterns and contributions and lobbying, because politicians have a variety of means to deliver favours without it being apparent in their voting decisions, including adding riders to bills, anonymous holds, handling issues in committees, selective appointments, and instructions to regulators.⁵⁹⁴ Yet, despite these masking attempts, there is enough evidence to now show that lobbying makes a substantial difference in policy decisions.

Studies Show that Lobbying is Influential

Numerous studies and examples provide decent evidence that lobbyists exercise strong influence over government decisions. It is unlikely that organizations would have spent \$3.15 billion in 2016 on lobbying the U.S. Federal government if there was never any return.⁵⁹⁵ The NRA has been well studied, and is widely seen as effective in pushing for laxer gun laws even when increased gun control is more popular.⁵⁹⁶ In a clever study, Retnasaba concluded that campaign contributions in conjunction with lobbying affected municipal decisions regarding bond underwriting, costing the public an estimated \$500 million a year.⁵⁹⁷ Rheault found that “an increase in the intensity of corporate lobbying on the issue of immigration has a positive impact on the levels of temporary workers admitted to Canada.”⁵⁹⁸

Grossmann's study concluded that,

[according] to policy historians, interest groups are involved in significant policy enactments quite often. Interest groups were partially credited with 279 significant new laws passed by Congress (54.8 per cent of all significant legislative enactments), 31 significant executive orders (41.3 per cent of the total), 35 significant administrative agency rules (39.3 per cent of the total) and 46 significant judicial decisions (36.8 per cent of the total). Policy historians thus credit interest group factors with playing a role in policy making in every type of federal policy making

⁵⁹³ *Ibid.*

⁵⁹⁴ Brian Kelleher Richter, “Lobbying and Taxes” (2009) 53:4 Am J Polit Sci 893–909 at 894.

⁵⁹⁵ OpenSecrets.org, “Lobbying Database: Total Lobbying Spending & Number of Lobbyists”, (15 August 2017), online: *OpenSecrets.org* <<https://www.opensecrets.org/lobby/>>.

⁵⁹⁶ The NRA is a hybrid organization, receiving funds from individual members and gun manufacturers. The NRA claims that most of the money it uses for lobbying comes from individual donors. Matthew J. Lacombe, *supra* note 428; Rifat Darina Kamal & Charles Burton, “Policy Gridlock versus Policy Shift in Gun Politics: A Comparative Veto Player Analysis of Gun Control Policies in the United States and Canada” (2018) 181:4 World Aff 317–347 at 2.

⁵⁹⁷ Gajan Retnasaba, *supra* note 278 s II.5.

⁵⁹⁸ Ludovic Rheault, *supra* note 2 at 692.

venue, but most often in Congress. Interest group activities are sometimes mentioned as the sole explanatory factor in these explanations; more commonly, they are mentioned in combination with other factors such as focusing events, media coverage, negotiations among government officials and the support of specific policymakers.⁵⁹⁹

Skocpol and Hertel-Fernandez found that lobbying by AFP is one of the key reasons that elected Republican officials continue to deny the progression of climate change and fight all attempts to limit carbon and methane pollution – a policy position at odds with most of their own electorate.

As it turns out, even in the constituencies of the GOP Representatives and Senators who have signed the “No Climate Tax” pledge, majorities of Americans believe global warming is happening – and want to take action to address its ill effects. Across the states and districts represented by legislators who signed the AFP pledge in 2015, an average of 59% of Americans say that global warming is happening and an average of 58% believe it threatens future generations... Even more strikingly, 73% of residents in these districts, on average, support action to regulate carbon dioxide... including majorities of moderate Republicans.”⁶⁰⁰

This is worth emphasizing, as climate change risks devastating the planet in a way we can barely comprehend – hundreds of millions of deaths, hundreds of millions of refugees, the loss of entire cities and eco-systems, and mass extinction on an untold scale.⁶⁰¹ Lobbying is a large part of why the most powerful country on Earth refuses to do anything about it.⁶⁰²

⁵⁹⁹ Matt Grossmann, “Interest group influence on US policy change: An assessment based on policy history” (2012) 1:2 *Interest Groups Advocacy* 171–192 at 177.

⁶⁰⁰ Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 34.

⁶⁰¹ David Wallace-Wells, *supra* note 11 at 7.

⁶⁰² Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 34. Brulle’s recent study found that U.S. industry has invested more than \$1.8 billion on climate lobbying on the federal level since 2000 (see note 314). The spending spikes when there is a chance of climate change legislation passing, and has succeeded in stopping it. Robert J. Brulle, *supra* note 30 at 295. John Cook et al, *supra* note 30 at 4. Business has been successful in using lobbying to convince legislators that action on climate change is 5 to 31% less popular than it is. Alexander Hertel-Fernandez, Matto Mildener & Leah C. Stokes, *supra* note 32 at 11. Key EPA actions intended to roll back climate protecting policies is the result of lobbying. Nichols, *supra* note 33. The oil industry successfully lobbied governments (and the public with astroturf groups) with deceptive pseudo-scientific evidence that manufactured doubt about climate change for decades. It also lobbied successfully against international agreements aimed at reducing carbon output. Naomi Oreskes & Erik M. Conway, *supra* note 35; Shannon Hall, *supra* note 35; Kevin Grandia, *supra* note 35; Sabrina Fernandes & Richard Girard, *supra* note 32 at 7; Kathy Mulvey & Seth Shulman, *supra* note 32 at 2.

Benefits to Business Organizations

There is now a large group of studies that show the substantial benefits business organizations acquire through lobbying.⁶⁰³ These benefits are found at the firm level even after controlling for the industrial sector.⁶⁰⁴

A substantial number of studies have found that when producer organizations lobby they receive significant benefits. Politically active firms within an industry achieve higher profits, achieve greater increases in stock values, pay lower taxes, and experience less regulatory oversight than less politically active firms. There is also indirect evidence that legislators receive financial advantages for supporting various interests.⁶⁰⁵

Lux *et al.*'s 2011 meta-analysis of research findings found a positive correlation between corporate political activity and firm performance, indicating that businesses receive economic advantages through influencing government.⁶⁰⁶ They concluded that this is likely why more firms are politically involved than ever before, and predict corporate political involvement is likely to continue to increase.⁶⁰⁷ Bonardi *et al.* found that U.S. utility firms with more political opportunities engage in more lobbying and subsequently received higher rate increases than utilities with less opportunity to lobby.⁶⁰⁸ De Figueiredo and Silverman found that universities in districts represented by members of the U.S. House and Senate Appropriations Committees lobby more and obtain a 2.8% and 3.5% respective increase in federal earmarks for every 10% increase in lobbying.⁶⁰⁹

Similarly, Retnasaba finds that the market price of firms that retain law firms as lobbyists show abnormal gains when a partner at that law firm obtains a cabinet position. These gains disappear when anti-lobbying laws are enacted.⁶¹⁰ Strategas Real-Time Lobbying Index fund, based on investing in firms that lobby heavily, has outperformed the S&P 500 for nearly two decades.⁶¹¹ In 2003-04, Lockheed Martin spent \$15.8 million on lobbying expenses and campaign donations, and received \$39.8 billion in federal contracts.⁶¹² It cannot be ascertained that these contracts were solely the result of lobbying and campaign donations, but this return represents a ratio of contracts to lobbying expenditures of \$2,517 to \$1.

⁶⁰³ Lawrence Lessig, *supra* note 273 at 117.

⁶⁰⁴ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 230.

⁶⁰⁵ *Ibid* at 64.

⁶⁰⁶ Sean Lux, T. Russell Crook & David J. Woehr, "Mixing business with politics", *supra* note 213 at 239.

⁶⁰⁷ *Ibid*.

⁶⁰⁸ *Ibid* at 243.

⁶⁰⁹ *Ibid*.

⁶¹⁰ Gajan Retnasaba, *supra* note 278 s III.1.

⁶¹¹ Nick Wells & Eric Chemi, "Donald Trump is right: Paying politicians pays", (17 September 2015), online: *CNBC* <[https://www.cnbc.com/id/103002422?view=story&\\$DEVICE\\$=native-android-tablet](https://www.cnbc.com/id/103002422?view=story&$DEVICE$=native-android-tablet), [https://www.cnbc.com/id/103002422?view=story&\\$DEVICE\\$=native-android-tablet](https://www.cnbc.com/id/103002422?view=story&$DEVICE$=native-android-tablet)>.

⁶¹² Brad Plumer, *supra* note 234.

Godwin recounted how a single lobbyist spending \$10,000 of his own money passed the *Data Quality Act*, which limited the reach of numerous government agencies, including the EPA, and saved polluting corporations billions at the cost of the environment and public health.⁶¹³ In Canada, the Funeral Service Association of Canada hired a lobbying group which succeeded in doubling their funeral services compensation rate in the 2013 budget, raising it from \$3,600 to up to \$7,376.⁶¹⁴

Tax codes are full of special exemptions and subsidies for businesses that have lobbied the government. Alexander *et al.*'s 2010 study revealed that corporations spent \$282.7 million lobbying on the American Jobs Creation Act and received \$62.5 billion in tax savings. To the extent that the lobbying impacted the tax savings, it resulted in an average return of over \$220 for every \$1 spent, or 22,000%.⁶¹⁵ Lessig recounts how a group of companies spending \$1.6 million on lobbying achieved a change to the tax laws that saved sixty companies roughly \$100 billion.⁶¹⁶ Richter *et al.*'s study of United States lobbying and tax rates found that "firms that increase their lobbying expenditures by 1% in one year reduce their effective tax rates in the range of 0.5 to 1.6 percentage points the following year."⁶¹⁷

The U.S. 1986 *Tax Reform Act* contained 650 special tax exemptions for specific firms or individuals.⁶¹⁸ One study found that from 2008 to 2010, 30 profitable Fortune 500 companies spent more on lobbying than they paid in U.S. taxes, and 29 of them actually had an average negative federal tax rate during the 3-year span, receiving rebates totaling \$10.6 billion.⁶¹⁹ H&R Block has repeated and successfully lobbied to make or keep tax forms more complicated, so its services are needed.⁶²⁰ General Electric, despite numerous years of profit, has managed to pay no corporate taxes by exploiting numerous tax loopholes, many of which it lobbied to create.⁶²¹

Canada continues to subsidize oil producers directly by approximately \$4 billion a year (in addition to the \$4.5 billion purchases of the Kinder Morgan Trans Mountain Pipeline), while provinces

⁶¹³ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60. at 100.

⁶¹⁴ R. Brent Lang, *supra* note 535.

⁶¹⁵ Raquel Alexander, Stephen W Mazza & Susan Scholz, *supra* note 580 at 404.

⁶¹⁶ Vincent R Johnson, "Regulating Lobbyists: Law, Ethics, and Public Policy" (2006) 16 Cornell J Law Public Policy 1 s 37.

⁶¹⁷ Brian Kelleher Richter, *supra* note 594 at 893.

⁶¹⁸ *Ibid* at 895.

⁶¹⁹ This represents \$67 billion in tax subsidies. Fed-Ex was the only one of the thirty that paid any taxes. It paid \$37 million in taxes, equivalent to a rate of 1%, and spent \$50.8 million on lobbying. During that period, it received over \$1.5 billion in tax subsidies. *Representation Without Taxation Fortune 500 Companies that Spend Big on Lobbying and Avoid Taxes*, by Blair Bowie et al (U.S. Public Interest Research Group & Citizens for Tax Justice, 2012) at 4.

⁶²⁰ Dylan Matthews, "H&R Block Snuck Language into a Senate Bill to Make Taxes More Confusing for Poor People", (24 August 2015), online: Vox <<http://www.vox.com/2015/8/24/9195129/h-r-block>>.

⁶²¹ From 2008 to 2010 General Electric spent \$84 million on federal lobbying, and made a U.S. domestic profit of \$10.5 billion. It paid nothing in taxes over that time, and it received \$8.4 billion in tax subsidies. Blair Bowie et al, *supra* note 619 at 5; David Kocieniewski, "G.E.'s Strategies Let It Avoid Taxes Altogether", *N Y Times* (24 March 2011), online: <<https://www.nytimes.com/2011/03/25/business/economy/25tax.html>>.

have drastically cut royalty fees, and hence their own income from the oil extraction. This is in spite of the multiple levels of climate change commitments and treaties to the contrary, and the oil companies' massive profits (well over \$46.6 billion in 2017).⁶²² The subsidies and royalty cuts are likely related to the oil industry's large lobbying presence at the provincial and federal levels.⁶²³

This is not to say that lobbying is always effective. The “unavoidable conclusion is that PACs and direct lobbying sometimes strongly influence Congressional voting, sometimes have marginal influence and sometimes fail to exert influence.”⁶²⁴ In high salience issues, lobbying for change fails more often than it succeeds. Yet, even in America, with all its vetogates, lobbying is generally not zero-sum, with winner-take-all policy outcomes. Instead, generally some type of win-win policy compromise emerges in the final result, particularly in low salience areas.⁶²⁵

Greater Focus on Low Salience Areas and Regulations

Business interests direct the majority of their lobbying to low salience areas involving rule implementation, interpretation, the actions of regulatory agencies, and tax policies.⁶²⁶ Lang found that most “of the issues on the lobbying agenda receive little attention from the media, and hence little attention from the public.”⁶²⁷ Godwin *et al.*'s study concluded that business interests lobbying in low salience areas are more effective than in high salience areas, and often get their preferred result.⁶²⁸ They found that lobbying is focused on these low salience regulatory issues. They discovered that, “almost 90 percent of firms lobby Congress in order to influence agency behavior. Obtaining a private good was the firm's objective in 63 percent of those lobbying efforts.”⁶²⁹ Godwin *et al.* concluded that the advantage greater resources provide for interest groups becomes apparent once lobbying for

⁶²² The aggregate gross profits of just the big five bitumen extractors in 2017 were \$46.6 billion. They control 79.3% of Canada's productive capacity of bitumen. Canada has reduced its coal subsidies, and consumer subsidies for oil consumption, but is the worst of the G7 in terms of its subsidies for oil production. Oil royalties and corporate taxes have been cut across Canada, further subsidizing oil production as compared to past levels. Ian Hussey *et al.*, *BOOM, BUST, AND CONSOLIDATION: Corporate Restructuring in the Alberta Oil Sands*, Corporate Mapping Project (University of Alberta: Parkland Institute and The Canadian Centre for Policy Alternatives, 2018) at 8; Shelagh Whitley *et al.*, *G7 fossil fuel subsidy scorecard: Tracking the phase-out of fiscal support and public finance for oil, gas and coal*, Policy brief (ODI, 2018) at 6; J David Hughes, *Canada's Energy Outlook: CURRENT REALITIES AND IMPLICATIONS FOR A CARBON-CONSTRAINED FUTURE*, Corporate Mapping Project (Vancouver, BC: Parkland Institute and The Canadian Centre for Policy Alternatives, 2018) at 114.

⁶²³ See Daniel Cayley-Daoust & Richard Girard, *supra* note 2 at 4; Maclean's, *supra* note 42; Robert Cribb, “Oil lobby targeted 13 Ontario swing ridings in ‘unprecedented’ pipeline campaign”, (5 July 2018), online: *thestar.com* <<https://www.thestar.com/news/investigations/2018/07/05/oil-lobby-targeted-13-ontario-swing-ridings-in-unprecedented-pipeline-campaign.html>>; The Canadian Press, “Controversial natural gas rule changes came after B.C., oil lobby met”, (14 September 2014), online: *CBC News* <<http://www.cbc.ca/1.2765884>>.

⁶²⁴ David Lowery, “Lobbying influence”, *supra* note 497 at 26.

⁶²⁵ Christine Mahoney, *supra* note 177 at 37.

⁶²⁶ Raquel Alexander, Stephen W Mazza & Susan Scholz, *supra* note 580 at 447.

⁶²⁷ David C Kimball *et al.*, “Who Cares About the Lobbying Agenda?” (2012) Interest Groups Advocacy, online: <<http://www.palgrave-journals.com/doi/10.1057/iga.2012.7>> at 16 & 21.

⁶²⁸ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 267; See also, Lawrence Lessig, *supra* note 273 at 149.

⁶²⁹ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 230.

private good and regulatory changes are included in the analysis.⁶³⁰ McKay also found that lobbyists are more successful when lobbying on low salience issues.⁶³¹

Bernhagen and Trani's study of lobbying in the U.K. came to a different conclusion. Their study, based on news reports, concluded that "contrary to what is suggested by Baumgartner and Leech's (2001) findings for the U.S. case, niche issues as reported in British newspapers are dominated by non-business interests."⁶³² The limitation of their work is that low salience issues are unlikely to be covered in news reports, and news reports are a limited data source of the regulatory activities of government.

Since most of the lobbying goals are low salience, and since low salience lobbying is often effective, it is not surprising that studies of lobbying overall find it effective.

Conclusion – Chapter 2

To help our understanding of lobbying we have examined how lobbying is increasing, the three prime justifications for lobbying, and what lobbyists do. We have discussed how they lobby and convey information, monitor government, build their client base, build relationships with officials, and build relationships with other lobbyists. In doing so, we have seen that lobbying is increasingly dominated by corporate lobbying groups, covered the neo-pluralist and exchange models, touched on the revolving door for regulators and politicians, and examined the ascent of shadow political parties. We looked at four approaches for understanding lobbying, the insider-outsider approach, the disclosure-corruption approach, the four pressures approach, and the hydraulic force approach. In considering these approaches we have discussed astroturf organizations and the five types of influence. We have considered the issues of government created lobbying groups, Canadian lobbying statistics, and lobbying transparency. Lastly, we investigated the effectiveness of lobbying, determining that it has a substantial impact on governance.

This information has prepared us for the inquiry ahead. Building on the knowledge we have established, in Chapter 3 we will consider the negative impacts of lobbying, to see why regulation is necessary.

⁶³⁰ *Ibid* at 267.

⁶³¹ Amy McKay, "Buying Policy?", *supra* note 308 at 914.

⁶³² Patrick Bernhagen & Brett Trani, "Interest group mobilization and lobbying patterns in Britain", *supra* note 143 at 59.

Chapter 3 – The Six Concerns about Lobbying

Introduction – Chapter 3.....	144
Concern I: Lobbying Disproportionately Advantages Businesses.....	144
Advantage in Organizational Structure.....	145
Advantage in Access to Specialised Information.....	145
Resource Advantages.....	145
Generating Reports.....	148
Matching Intensive Lobbying Campaigns.....	148
Competing in Low Salience Areas.....	148
The Counter-Case.....	149
Policy Makers Favour Business Lobbying.....	150
Decline in Countervailing Force of Unions.....	150
Concern II: Misalignment with Popular Opinions.....	153
A: Lobbying Favours the Opinions of the Wealthy Elites.....	154
Wealthy bias even within the lobbying group itself.....	155
A2: Lobbying Shuts Out the Marginalized.....	156
B: The Political Priorities of the Wealthy Differ From the General Public.....	158
C: The Preferences of Lobbyists Do Not Match Those of the Public.....	161
D: The Gap Between Voter Preferences and Government Decisions in Favour of the Wealthy.....	161
Misalignment in Canada and other OECD Countries.....	163
E: This Alignment Gap is Partly a Result of Lobbying.....	163
Concern III: Lobbying Creates an Information/Framing Bias.....	166
Agenda Setting.....	167
Agenda Setting and Think Tanks.....	167
Agenda Setting and the Canadian Government.....	168
Officials Do Not Have to Intend the Framing Bias.....	169
Lobbyists Bias Policies through their Legislative Subsidies.....	169
“Neutral” Information Framing Can Still Create Bias.....	170
Limited Arguments Can Lead to Epistemological Closure.....	171
Lobbying Effects the Salience of Issues.....	171
Framing Bias Favours the Dominant Special Interest Groups.....	171
The Information Provided by Lobbyists is Not Impartial.....	172
The Connection between Framing Bias and Political Polarization.....	175
Government Capacity Decline Strengthens the Framing Bias.....	176

Capacity Cutting Makes Government More Receptive to Lobbying.....	177
Capacity Cutting Locks in the Agenda from Future Change.....	179
Concern IV: Lobbying Increases Inequality	180
Inequality is increasing.....	180
Inequality in Canada.....	181
Return on Capital Exceeding the Returns on Labour	183
F: The Wealthy Oppose Policies that Would Decrease Inequality.....	184
G: Lobbying Increases Inequality by Advancing the Priorities of the Wealthy	185
G2: Policies That Reward the Wealthy with More Income That Can Be Funnelled Back into Lobbying.....	188
Concern V: Lobbying Favours the Legislative Status Quo	189
Maintaining the Status Quo Directly.....	189
Maintaining the Status Quo Indirectly	190
Grossmann’s Dissent.....	191
The Narrow Status Quo in Low Saliency Areas.....	191
Lobbying’s Two Sided Effect	192
Concern VI: Lobbying Corrupts Democracy	194
Lobbying Increases Corruption	195
<i>Quid Pro Quo</i> Corruption and Circumspect Bribery.....	195
The Corrupting Influence of the Social Exchange Gift Economy.....	198
Dependency Corruption.....	199
Regulatory Capture	199
Lobbying Creates the Appearance of Corruption and Unfairness	203
The Practice of Lobbying.....	204
Business Interests Over-Represented Creates an Appearance of Corruption.....	205
A Fence around Decision-Making	205
Lobbying Indirectly Weakens Democracy	206
Conclusion – Chapter 3	208

Introduction – Chapter 3

Having discussed the process of lobbying in the previous chapter, we must consider the impact of lobbying. Lobbying brings key information to decision-makers. Nevertheless, there are fundamental concerns about its effects on democratic governance.

The notion that lobbying has a significant influence on legislative outcomes causes concern among many political observers, including journalists and members of the general public. Many lawmakers also lament what they see as the growing power and influence of private interest groups on government actors.⁶³³

Although lobbying is a key part of democratic governance, there is an increasing concern that as it is being practised it is fundamentally at odds with the long-term health of democracy. It appears to be an exercise of the wrong types of influence (types i to iv), rather than leading to decisions based on the best evidence and rational discourse. This raises six fundamental concerns about lobbying. These concerns form the spine of the argument of this dissertation: that lobbying as it is currently practised and regulated is damaging to democracy, and we are in need of new more comprehensive lobbying regulations. The six concerns are (1) that lobbying disproportionately advantages business organizations; (2) it favours the policy preferences of the wealthy and causes a misalignment of representation; (3) it creates an information framing bias; (4) it increases inequality; (5) it favours the status quo; and (6) it otherwise corrupts democracy.

Concern I: Lobbying Disproportionately Advantages Businesses

There is a reason that businesses lobby more than other organizations. Businesses and trade associations have significant lobbying advantages over citizen groups and other organizations, due to the nature of the marketplace, their organizational structures, and their access to key information. These advantages allow them to dominate lobbying, with the negative repercussions discussed later in this section. Businesses do not win every legislative battle, but over time, their advantages come to the forefront, especially in systems where lobbying has more leeway.⁶³⁴

Business interests are advantaged in their organizational structure; in their access to specialised information; in their greater access to resources; in that policy-makers grant them high status; and by the decline in the countervailing pressure exercised by unions.⁶³⁵

⁶³³ Raquel Alexander, Stephen W Mazza & Susan Scholz, *supra* note 580 at 402.

⁶³⁴ Lee Drutman, *supra* note 172 at 238.

⁶³⁵ Although there are a number of large citizen groups, their size does not make up for the decrease in union size and power. With the decline of the unions, even large citizen groups cannot operate across all the low salience areas in which businesses are active, and there are far fewer of them than large businesses. The unions also had income stability, community ties, ability to activate members and effect on voting decisions that most citizen groups lack. As discussed, in Canada, where unions are proportionately stronger, Boucher found that citizen groups represent only 8% of lobbying, and unions only 7%. Maxime Boucher, *supra* note 2 at 324.

Advantage in Organizational Structure

It is easier for economic interests like corporations to lobby than it is for citizen groups.⁶³⁶ Dur points out that “business has superior access to politically useful resources such as time, money and expertise, that can be traded for access to political decision-makers and favorable legislation”⁶³⁷. Businesses have advantages inherent in the fact that they operate in limited marketplaces. Alexander *et al.* argue that with “only a limited number of firms in each industry, business groups can overcome the free-rider problem and organize voluntarily to provide themselves with an active lobby more easily than larger groups.”⁶³⁸ Nelson and Yackee also posit that it is easier for businesses’ to form coalitions, which helps them greatly in lobbying.⁶³⁹

The organizational structures of businesses offer other substantial advantages in the lobbying field. Businesses have a strong centralized structure free of internal dissention, resource advantages, significant sources of revenue beyond fundraising, simultaneous existence in multiple places, stable organizational structures, perpetual life with long institutional memory, high social status, ongoing relationships with the government and media, clear self-interested goals that require little public buy-in, and the shelter of limited liability.⁶⁴⁰

Advantage in Access to Specialised Informational

Business also has access to specialised information that decision-makers want. The information advantage should not be underestimated. A great deal of lobbying – and most type v influence – relies on strategic information transmission. Businesses’ informational advantage is particularly strong because they gather this specialized knowledge, which is often relevant to policy issues, in the normal course of their work activities.⁶⁴¹ It costs them very little to refine this information for use by their lobbyists. In contrast, a citizen or union group often have to commission expensive studies with outside experts to retrieve equivalent information.

Resource Advantages

Business interests have significantly more resources to devote to lobbying than unions or citizen groups.⁶⁴² As discussed in the section on *Maintaining the Client Base*, in the U.S., on the national level, business groups outspend citizen groups and unions combined by a margin of 34 to 1.⁶⁴³ Makay notes that “the often greater financial resources of corporations and business associations may give them the

⁶³⁶ Dorie Apollonio, Bruce E. Cain & Lee Drutman, “Access and Lobbying”, *supra* note 303 at 32.

⁶³⁷ Andreas Dur, Patrick Bernhagen & David Marshall, *supra* note 433 at 4.

⁶³⁸ Raquel Alexander, Stephen W Mazza & Susan Scholz, *supra* note 580 at 406.

⁶³⁹ David Nelson & Susan Webb Yackee, *supra* note 398 at 352.

⁶⁴⁰ The high status granted to corporations is visible in how U.S. legislators privilege communications from businesses as representative. Hertel-Fernandez *et al.* found that “staffers are more likely to interpret correspondence from businesses as being more representative of their constituents’ preferences than correspondence from ordinary constituents.” Alexander Hertel-Fernandez, Matto Mildenberger & Leah C. Stokes, *supra* note 32 at 2.

⁶⁴¹ Andreas Dur, Patrick Bernhagen & David Marshall, *supra* note 433 at 4.

⁶⁴² Raquel Alexander, Stephen W Mazza & Susan Scholz, *supra* note 580 at 406.

⁶⁴³ Lee Drutman, *supra* note 172 at 79.

ability to influence politicians more easily than groups without comparable resources.”⁶⁴⁴ This resource advantage spawns advantages in professionalism, the reach of lobbying and the quality of lobbyists.

Klüver and Saurugger argue that the

larger the resource endowment of interest groups, the stronger their professionalization. Thus, financially well-endowed interest groups are more professionalized than interest groups with a low resource endowment irrespective of the type of interest they represent.⁶⁴⁵

This professionalism garners additional respect from officials, better organization, and more ability to cooperate with other lobbyists. It is another facet of why wealthier organizations are more effective. The business advantage is not all-encompassing. Citizen groups do seem to pull proportionately more weight when influencing high salience areas, such as the legislative agenda, than business interests do. Of course, since citizen groups represent citizens more directly than business groups do, their participation should carry more weight than business interests.

Large businesses employ many workers and have many individual shareholders, but most businesses are top-down structures, and very few use any form of democracy in their internal governance. Their lobbying decisions tend to reflect the preferences of upper management and occasionally a few large shareholders, not everyone associated with the business. This is visible in the gap between the policies business lobbyists pursue on high salience issues versus the policy preferences of the general public. If business lobbying were strongly influenced by the preferences of their workers, this gap would be much smaller; for example, rather than lobbying for a lower minimum wage, one would expect Walmart to lobby for a higher minimum wage.

Long-term sustained lobbying is expensive. Linked court cases can be prohibitively costly, and most government lobbying involves gathering and preparing information in ways that require significant time and resources to match the bureaucracy or legislative preferences.⁶⁴⁶ The resource advantages allow businesses to handle complex policy issues, provide “aid” to overworked officials and staff, and insert narrow provisions into larger legislation tailored for their advantage.⁶⁴⁷ The resource advantage allows them to hire more, and more connected lobbyists, including many former politicians, aides and regulators.⁶⁴⁸ These lobbyists offer connections, and help them structure arguments and information in

⁶⁴⁴ Amy McKay, “Buying Policy?”, *supra* note 308 at 909.

⁶⁴⁵ Heike Klüver & Sabine Saurugger, “Opening the black box: The professionalization of interest groups in the European Union” (2013) 2:2 *Interest Groups Advocacy* 185–205 at 201.

⁶⁴⁶ “In sum, the cost and level of organization demanded of group actors in the Canadian policy system places an immense burden on most committed groups, but it places the greatest burden on groups that lack a strong resource base, a category that includes most public-interest groups. ... Public interest groups are therefore not able to make the contribution to the evolution of policy that their origins and composition warrant.” A. Paul Pross, *supra* note 2 at 185.

⁶⁴⁷ Lee Drutman, *supra* note 172 at 3.

⁶⁴⁸ Maxime Boucher, *supra* note 2 at 320.

ways that are most palatable to officials. As Baumgartner *et al.*'s study concluded, hiring former officials provides a significant lobbying advantage.⁶⁴⁹

Perhaps the biggest advantage of having more resources is that business interests can lobby simultaneously on multiple issues and fronts over many years.⁶⁵⁰ The high level of participation in many areas matters.

By having the resources and the chance to lobby in different executive, legislative and judicial arenas — but also in different congressional committees, regulatory agencies and even the public sphere — business interests can be effective in getting the policy outcomes they want when they're unopposed, or opposed by interests that can't fight every battle.⁶⁵¹

For example, van manufacturers got the E.U. to lower the standard of acceptable carbon outputs per km. According to Rasmussen, one key factor in this success was that policy advisors were asymmetrically exposed to lobbying from the car industry, whereas citizen groups were less numerous and active in pressuring for their demands.⁶⁵² Similarly, "lobbyists for electrical utilities are 'eternally on the job', whereas the lobbyists for the consumers of this oligopolistic service are ordinarily 'conspicuous by their absence'"⁶⁵³.

Genuine political influence is hard work that requires building a compelling case, "and making that case over and over and over again."⁶⁵⁴ Ultimately, few citizen groups have the resources to compete with the required level of attention and repetition, especially in a myriad of low salience areas at the same time. As discussed, industry groups in Canada significantly out-lobby citizen organizations.⁶⁵⁵ The difference can be astounding, for example, as mentioned, over a four-year span the prominent oil industry association, the Canadian Association of Petroleum Producers, met with important government officials about 90 times more than the equivalently prominent environmental association, the Climate Action Network (536 vs. 6 communication reports).⁶⁵⁶ Moreover, the trend line

⁶⁴⁹ Frank R. Baumgartner *et al*, *supra* note 59 at 208.

⁶⁵⁰ Lee Drutman, *supra* note 172 at 3.

⁶⁵¹ Marie Hojnacki *et al*, "Business Doesn't Always Get its Way", *Wash Post* (10 June 2015), online: <<https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/06/10/business-doesnt-always-get-its-way/>>.

⁶⁵² Maja K. Rasmussen, *supra* note 248 at 255.

⁶⁵³ Patrick Bernhagen & Brett Trani, "Interest group mobilization and lobbying patterns in Britain", *supra* note 143 at 55.

⁶⁵⁴ Lee Drutman, *supra* note 174.

⁶⁵⁵ The evidence indicates that businesses lobby the federal government at least 8.5 to 10 times as much as citizen groups. See Chapter 2 – Understanding Lobbying in Canada and the U.S.: Understanding Lobbying: What Do Lobbyists Do: Build their Client Base: The Clientele are Mostly Business Interests, p. 77, for a summary of some of the evidence that business dominates Canadian lobbying. Nicolas Graham, William K Carroll & David Chen, *supra* note 2 at 6; Maxime Boucher, *supra* note 2 at 324; Daniel Cayley-Daoust & Richard Girard, *supra* note 2 at 4; Sharon J. Riley & Sarah Cox, *supra* note 40; Maclean's, *supra* note 42.

⁶⁵⁶ "The financial realities of these two organizations are in a different league with CAPP's [Canadian Association of Petroleum Producers] membership including the richest companies in the world. It is also clear based on registry

is clear, and businesses are increasing their lobbying, further crowding out citizen groups and unions. The requirements for competition include not only the staff to meet with officials regularly; but also the resources to generate reports; enact massive intensive lobbying campaigns at key moments; and compete in low salience areas.⁶⁵⁷

Generating Reports

Competition in lobbying requires the resources to generate reports to support one's lobbying position. Businesses in the course of their business generate these reports at a rate that citizen groups have difficulty competing with, particularly when industry associations and ideological think tanks are added to the picture. For example of the resources devoted to reports, Lang found that over a nine-month period in 2012, major industry groups provided the government 707 reports related to its lobbying concerns.⁶⁵⁸

Matching Intensive Lobbying Campaigns

Businesses have the resources to launch Intensive campaigns to complement their general lobbying when necessary. For example, Graham, Carroll and Chen found that the fossil fuel industry lobbying occurs in waves. It launches massive lobbying campaigns at key political moments around specific issues. These moments of intensity "account for only 9.75 per cent of all lobbying relations (59 of 595), but these relations represent 94.3 per cent of the 7,661 lobbying contacts occurring between industry and the federal state apparatus."⁶⁵⁹

More and more, the only organizations that are capable of marshalling the resources to do all these effectively are business organizations, – both individual companies and the associations that represent them.⁶⁶⁰

Competing in Low Salience Areas

The resource advantage allows businesses to lobby in many low salience policy areas where other groups can generally not afford to participate, even if their members could be convinced to focus on these areas. As discussed previously, In the U.S., a large business organization can have upwards of a 100 lobbyists representing it, allowing it to lobby across a wide range of low salience areas simultaneously.⁶⁶¹ For comparison, Greenpeace Canada has 11 campaigners and a few executives listed on its 12-month lobbying disclosure summary.⁶⁶²

communication data that the level of influence and access to politicians and policy makers is also quite asymmetrical and largely favors CAPP." Daniel Cayley-Daoust & Richard Girard, *supra* note 2 at 4.

⁶⁵⁷ Nicolas Graham, William K Carroll & David Chen, *supra* note 2 at 33.

⁶⁵⁸ R. Brent Lang, *supra* note 535. See the above section on Canadian Lobbying Statistics for the break-down of the submitted reports by industry. Details are above note 554.

⁶⁵⁹ Nicolas Graham, William K Carroll & David Chen, *supra* note 2 at 33.

⁶⁶⁰ Lee Drutman, *supra* note 172 at 3.

⁶⁶¹ Lee Drutman, *supra* note 174.

⁶⁶² Office of the Commissioner of Lobbying of Canada, "12-Month Lobbying Summary - In House Organization - Greenpeace Canada", (13 February 2020), online: *Off Comm Lobbying Can* <<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/clntSmmry?clientOrgCorpNumber=61&lang=eng>>.

Unions and citizen groups are more likely to be involved when there is a more open and larger process with more conflict and more participants, when there are few lobbyists involved, those few are likely to be representing business interests⁶⁶³.

Businesses' greater resource advantage is most useful in these low salience areas, allowing them to get their preferred result.⁶⁶⁴ As previously discussed, lobbying on low salience issues can be quite rewarding for businesses. Hojnacki *et al.* points out that "only 12 per cent of the sides dominated by business encounter no active opposition"⁶⁶⁵. This is a good rate, since they found that an unopposed business interest will succeed 8 out of 9 times in a low salience area.⁶⁶⁶ To have no opposition on these occasions is to find the bank vault open and unattended. Moreover, business organizations are usually lobbying relatively directly for their own financial benefit, providing additional incentive for lobbying and additional resources to fuel more lobbying when they succeed.

Pross argues the diffusion of Canadian policy-making favours business interests and their ability to lobby in many areas concurrently. The diffusion makes it difficult for civic public interest groups and unions to even participate, never mind participate equally, in the political decision-making discourse.⁶⁶⁷

The Counter-Case

There is a counter-case. Grossmann's aggregation study of the views of policy historians on interest groups found little link between resource advantages and success.

Advocacy organizations are mentioned far more often in explanations for post-war policy change than unions, professional associations or business interests. In fact, advocacy organizations are reportedly associated with 33.8 per cent of all significant policy enactments. Business interests were also partially credited with 19.8 per cent of enactments.⁶⁶⁸

This finding is consistent with the finding that citizen groups have a stronger individual influence on the legislative agenda than business interests. However, it is likely equally explained by the fact that business interests are often seeking specific self-interested changes of little historical note (like changes to tax codes and regulations), and economic interests are disproportionately likely to lobby against policy changes rather than support them.⁶⁶⁹ Grossmann admits that both these types of actions would not be detected by his study. Moreover, in his study businesses were still responsible for 59% as many

⁶⁶³ Andreas Dur, Patrick Bernhagen & David Marshall, *supra* note 433 at 9.

⁶⁶⁴ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 267; Amy McKay, "Buying Policy?", *supra* note 308 at 914; See also, Lawrence Lessig, *supra* note 273 at 149.

⁶⁶⁵ Marie Hojnacki et al, "Assessing business advantage in Washington lobbying" (2015) 4:3 Interest Groups Advocacy 205–224 at 217.

⁶⁶⁶ *Ibid.*

⁶⁶⁷ A. Paul Pross, *supra* note 2 at 157.

⁶⁶⁸ Matt Grossmann, "Interest group influence on US policy change", *supra* note 599 at 179.

⁶⁶⁹ *Ibid.*

enactments as citizen groups, although business organizations work for a small fraction of the population, likely 10-20%, and citizen groups represent the other 80+%.⁶⁷⁰

Policy Makers Favour Business Lobbying

The orientation of liberal democracy as a market state also favours business. Officials across the spectrum tend to support business interests, and believe doing so is good for the economy. This is true in Canada as well as the U.S.⁶⁷¹ “Because major investment decisions in a capitalist system are usually private, public officials are very receptive to the views of business actors”⁶⁷². Business elites often have connections to political elites that other groups lack.⁶⁷³ Consequently, business interests have an easier time making their opinions heard.⁶⁷⁴ Berkhout argues,

research has since confirmed the privileged position of business groups in domestic policymaking ... Similar observations can be made for international policymaking: business groups enjoy better access to policymakers in the climate change negotiations, even if experience improves access for all types of organisations.⁶⁷⁵

This advantage is particularly visible in low salience areas with no counter-lobbying.

When business lobbied on issues that drew no opposition or interest from others, it was often successful... To say business has an advantage when it lacks opposition might seem obvious. However, a lack of opposition did not benefit other types of interests in the same way. When citizen- and occupation-based interest groups had no direct opposition, more often than not they were ignored by policymakers and other interests.⁶⁷⁶

Decline in Countervailing Force of Unions

Unions used to be a key countervailing force pushing against the lobbying interests of businesses in many cases. They were key organizations that often held a different set of priorities, and had the organizational structure, lifespan, size, and resources to counter-lobby effectively. Effective

⁶⁷⁰ Lee Drutman, “Just how unequal is political voice in Washington? Very unequal”, (17 September 2012), online: *Sunlight Found* <<https://sunlightfoundation.com/2012/09/17/unheavenly-choru/>>; Katharina Fiedler, “90% of American workers don’t own their own business, Rick Santorum says”, (13 April 2015), online: *@politifact* <<http://www.politifact.com/truth-o-meter/statements/2015/apr/13/rick-santorum/90-american-workers-dont-own-their-own-business-ri/>>.

⁶⁷¹ “Business interests are viewed as highly legitimate by Canadian political elites; most business groups have the advantage of multiple sponsorship and, consequently, multiple sources of access to the legislative process.” Fred Thompson & W. T. Stanbury, *supra* note 2 at 46.

⁶⁷² Andreas Dur, Patrick Bernhagen & David Marshall, *supra* note 433 at 4.

⁶⁷³ “[I]n many cases the business elites have personal relationships with their counterparts in the political sphere.” Fred Thompson & W. T. Stanbury, *supra* note 2 at 46.

⁶⁷⁴ Joost Berkhout, “Why interest organizations do what they do”, *supra* note 72 at 236.

⁶⁷⁵ Carola Betzold, “Business insiders and environmental outsiders?”, *supra* note 445 at 318.

⁶⁷⁶ Marie Hojnacki et al, *supra* note 651.

union organizing requires a deep connection with its supporters, relying on a shared sense of purpose and duty that goes beyond many other types of political involvement.⁶⁷⁷ This gave unions a more reliable base than other citizen lobbying groups, allowing it to engage in long-term political struggles with business interests.⁶⁷⁸ Unions were far from perfect, sometimes supporting xenophobic or exclusionary positions, and often opposed to environmental policies that would impact the businesses their members worked for. However, overall they were a countervailing pressure, pushing for the broader concerns of the employees and the community.⁶⁷⁹

Although it is still common for politicians and journalists to talk as if unions and business interests both run large lobbying campaigns, opposing each other, in the U.S. this is no longer true. Unions have declined massively since their heyday. Only a few unions are active on the federal level and they are stretched thin.⁶⁸⁰

[U]nion members accounted for 25 percent of U.S. political activity in 1967, but this percentage fell to 18 percent in 1990 and to 11 percent by 2006⁶⁸¹.

In general, unions lack specific advantages over the other groups. They lack the funding advantage of big business and the influence advantage in high salience areas that citizen groups enjoy.⁶⁸²

The collapse of unions is an accelerating trend.⁶⁸³ This decline is partly due to economic reasons, but largely because business interests have defeated labour unions politically. Businesses have pushed

⁶⁷⁷ Many environmental movements also share this aspect of deep commitment, as do pro-gun activists. Eitan Hersh, *Politics Is for Power: How to Move Beyond Political Hobbyism, Take Action, and Make Real Change* (Scribner, 2020) at 101.

⁶⁷⁸ Hersh argues that modern union organizers now spend too much effort on consultants and political donations, and not enough on organizing, and this has made them less effective. However, the change could be a response to their declining power and need to compete in political influence as lobbying grows more important. *Ibid* at 180.

⁶⁷⁹ For example, the 2019 Chicago teacher strike included demands for protection for undocumented immigrants on school property and the expansion of affordable housing. Alexia Fernández Campbell, “The 11-day teachers strike in Chicago paid off”, (1 November 2019), online: Vox <<https://www.vox.com/identities/2019/11/1/20943464/chicago-teachers-strike-deal>>; For more examples, see *Concrete Examples of Bargaining for the Common Good*, by Bargaining for the Common Good (Bargaining for the Common Good, 2018).

⁶⁸⁰ “Although unions are one of the most often mentioned “special interest groups” in the popular press, here (as in virtually all previous studies of advocacy in Washington) they make up a relatively small part of the total interest-group community: just 6 percent. ... So while unions quite often play a prominent role in policy debates... the labor sector is really just a handful of organizations compared to the much larger number of businesses and trade associations that are represented in these same issues. The few union organizations that are active in Washington are well financed and highly professional, but those resources and skills must be spread across an exceptionally wide range of issues compared with other types of groups.” Frank R. Baumgartner et al, *supra* note 59 at 10.

⁶⁸¹ David Jacobs & Lindsey Myers, “Union Strength, Neoliberalism, and Inequality Contingent Political Analyses of U.S. Income Differences since 1950” (2014) 79:4 Am Sociol Rev 752–774 at 755.

⁶⁸² Frank R. Baumgartner et al, *supra* note 59 at 11.

⁶⁸³ James Feigenbaum, Alexander Hertel-Fernandez & Vanessa Williamson, *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws* (Working Paper, 2018) at 30.

for political and legal changes that have destroyed the unions' power bases and income.⁶⁸⁴ Jacobs and Myers argue that since 1980, pro-business officials have successfully used anti-union appointments, legislation, and regulatory practices to weaken unions and labour's overall organizational capacities.⁶⁸⁵ This trend has been fuelled by business lobbying, and supported by anti-union judicial rulings.⁶⁸⁶

Skocpol and Hertel-Fernandez found strong evidence that lobbying by Americans for Prosperity [AFP] bears significant responsibility for Republican state legislatures' attempts to ban public sector unions, even in states where the public firmly believes that public sector employees have the right to form unions.⁶⁸⁷ Their logistic regression model found that the presence of a paid AFP state director increased the probability of curbs to public sector bargaining rights by nearly 300%.⁶⁸⁸ "Only 15% of states without a paid AFP director passed laws cutting public employee bargaining rights, compared to 48% of the states with paid AFP heads"⁶⁸⁹. This is a struggle that tends to ratchet only one way. Business interests can lobby to destroy unions, but unions cannot lobby to destroy business interests. The Republican Party has become opposed to the existence of unions and their lobbyists, but the Democratic Party is not opposed to the existence of businesses and their lobbyists.⁶⁹⁰

The decline has reached a point where unions have become secondary actors in federal lobbying in the U.S. This has combined with the decline of general of citizen participation, and the weakness of citizen public interest groups, to leave lobbying largely the domain of business interests. As already covered, business interests have more lobbyists, and outspend these countervailing groups by a ratio of 34 to 1.⁶⁹¹ Drutman interviewed 60 corporate lobbyists, and asked them to identify the leading opposition on one of their issues. "Not a single lobbyist volunteered a union or a "public interest" group."⁶⁹² This decline in union strength has led to a decline in politicians with a working-class background. This means that there are proportionally fewer politicians with working class background and issues in mind, who might be more skeptical of business lobbying and more receptive to union lobbying.⁶⁹³

⁶⁸⁴ David Jacobs & Lindsey Myers, *supra* note 681 at 753.

⁶⁸⁵ *Ibid* at 754.

⁶⁸⁶ Firms regularly use their political capital to destroy unions. Sean Lux, T. Russell Crook & David J. Woehr, "Mixing business with politics", *supra* note 213 at 227; David Jacobs & Lindsey Myers, *supra* note 681 at 769.

⁶⁸⁷ Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 36.

⁶⁸⁸ *Ibid*.

⁶⁸⁹ *Ibid*.

⁶⁹⁰ There are a few Republicans who oppose anti-union legislation, but these are normally older moderates constrained in blue States with Democratic legislatures. Where the party has a firm majority it has embrace of anti-union, so called *Right to Work* laws [RTW]. This is partly tied to ideology and partly tied to the electoral benefits. It is estimated that RTW decrease Democratic presidential vote share by 3.5%, and the pattern persists in down-ballot races, reducing Democratic turn-out. James Feigenbaum, Alexander Hertel-Fernandez & Vanessa Williamson, *supra* note 683 at 30; See also, Lee Fang, "In Statehouses Won By Republicans, the First Move Is to Consolidate Power By Weakening Unions", (7 January 2017), online: *The Intercept* <<https://theintercept.com/>>.

⁶⁹¹ Lee Drutman, *supra* note 172 at 79; See also, Frank R. Baumgartner et al, *supra* note 59 cs 1 & 11.

⁶⁹² Lee Drutman, *supra* note 174.

⁶⁹³ "The effects of RTW laws go beyond elections... by weakening the relationship between unions and the Democrats, RTW laws may have changed the political landscape across the U.S. states. Working class candidates – politicians most likely to be backed by the labor movement – are less likely to hold federal and state office in states

In Canada, unions have not suffered the same collapse, but they are in decline and they lack the lobbying power of business interests. It seems the same trend is operating at a slower pace. As Reich argues, the increased corporate lobbying (and campaign donations) drowns out citizen voices, even when that may not be the corporations' intentions.⁶⁹⁴

There have been many recent attempts to revive unions, in recognition of their importance as a countervailing force that benefits their members, the community, employees in the industry writ-large, and general equality. So far, though, the decline continues.

Concern II: Misalignment with Popular Opinions

Democratic theory posits that there should be an alignment between the preferences of the voters and those of their representatives.⁶⁹⁵

The Concept of Alignment

The concept of alignment measures how closely the views and preferences of the representatives match those of the public. The concept was initially proposed to gauge the efficacy of campaign finance regulations in remedying the distortions caused by donations, but it applies equally well to gauging the efficacy of lobbying regulations in controlling the distortions caused by lobbying.⁶⁹⁶ There can be alignment between the politician and the public's partisan preferences, the public's policy preferences, or the policy outcomes.⁶⁹⁷ The most important of these is the alignment between the public's preferences and the policy outcomes.⁶⁹⁸ It is likely that misaligned policy outcomes increase the public's dissatisfaction with democracy.⁶⁹⁹

following the passage of RTW laws. State policy as a whole, moreover, moved to the ideological right in RTW states following the passage of those laws." James Feigenbaum, Alexander Hertel-Fernandez & Vanessa Williamson, *supra* note 683 at 30; See also, Lee Fang, *supra* note 690.

⁶⁹⁴ Robert B. Reich, *supra* note 224 at 11.

⁶⁹⁵ Nicholas Stephanopoulos, Eric McGhee & Steven Rogers, "The Realities of Electoral Reform" (2015) 68:3 Vanderbilt Law Rev 761 at 771.

⁶⁹⁶ *Ibid.* Yasmin Dawood, *supra* note 489 at 337.

⁶⁹⁷ All three types of alignment can be measured at the district level and the national level. Alignment is linked to the concept of responsiveness, which marks how quickly the views of the representatives change to match changes in public preferences. If responsiveness is too low, it can weaken alignment, because the politician remains out of sync with the current policy preferences of the electorate. Nicholas Stephanopoulos, Eric McGhee & Steven Rogers, *supra* note 695 at 771.

⁶⁹⁸ *Ibid.*

⁶⁹⁹ There is good evidence that policy outcomes affect citizen's faith in democracy. For example, Foa *et al.* found that "signs of democratic governments working together to resolve policy crises appear to have a positive effect" on people's faith in democracy. Conversely, Armingeon and Guthmann found that poor policy responses to the 2008 financial crisis eroded support for democracy in the E.U. R. S. Foa *et al.*, *supra* note 5 at 10; Klaus Armingeon & Kai Guthmann, "Democracy in crisis? The declining support for national democracy in European countries, 2007–2011" (2014) 53:3 Eur J Polit Res 423–442 at 17.

Misalignment Steps

Lobbying seems to be a significant factor in breaking this alignment, pulling officials away from their representation of more popular positions, or helping to elect politicians who intend to pursue unpopular policies. This misalignment is visible through the following process: (A) Lobbying favours the opinions of the wealthy elites. This is especially problematic because (B) the political priorities of the wealthy differ from the public, as do (C) the policy preferences of lobbyists. Studies find (D) a consistent alignment gap between voter preferences and government policy in favour of the preferences of the wealthy. Putting these factors together, it is reasonable to conclude (E) that this alignment gap is partly a result of lobbying. We shall investigate all these steps in order.

A: Lobbying Favours the Opinions of the Wealthy Elites

There is a pro-wealth and pro-business bias of interest group politics.⁷⁰⁰ In favouring business interests, lobbying is favouring the preferences of the wealthy – the few who run and own the businesses large enough to pursue significant lobbying.⁷⁰¹ This is matched by the fact that the majority of campaign donations also come from this small wealthy donor class and the corporations they run.⁷⁰² Kimball *et al.* agrees that there is a strong upper class bias in the representational system.⁷⁰³ Schattschneider's famous quote: '*The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent,*' remains true. In an analysis of the data of the Sunlight Foundation, Drutman points out that,

while maybe 10% of adults in the United States could be classified as executives, about 74% of the organizations in Washington represent the interests of executives. Another 10% of adults could maybe be called professionals, and 17.3% of Washington organizations represent them. That means that less than 10% of organizations represent the other 80% of Americans.⁷⁰⁴

Being wealthy allows for more discretionary spending on personal luxuries, including political influence. For example, the widespread reach of Charles Koch's political work is about a vision of society for those with the disposable income to push for it. Large donations and lobbying expenditures that average citizens could never afford represent only a small fraction of the wealth of the top 0.001%. For example, Canada's comparatively low \$3,100 yearly political contribution limit represents 2% of the average Canadian's \$148,350 median net worth (as of 2005).⁷⁰⁵ In contrast, a billionaire offered \$1

⁷⁰⁰ Lawrence Lessig, *supra* note 273 at 143.

⁷⁰¹ Peter K Enns et al, *The power of economic interests and the congressional economic policy agenda* (Working Paper, 2016) at 1.

⁷⁰² Lawrence Lessig, *supra* note 273 at 233; David C Kimball et al, *supra* note 627 at 8.

⁷⁰³ David C Kimball et al, *supra* note 627 at 8.

⁷⁰⁴ Lee Drutman, *supra* note 670.

⁷⁰⁵ \$3,100 represents 8% of the average Canadian's income for the year. In 2017, an individual can donate up to \$1,550 to the party and up to another \$1,550 between the district associations, nomination contestants and candidates. There would be a \$1,125 tax credit for the political donation, but the average Canadians would probably still struggle to afford the donation. Statistics Canada Government of Canada, "Net worth of family units,

million if a lobbyist who worked on Trump's inaugural committee could arrange to have the billionaire's picture taken in the Oval Office with the new president.⁷⁰⁶ This \$1 million represents at most 0.1% of the billionaire's net worth.

In Page *et al.*'s study of the political preferences of the top 1%, they find that the wealthy have more political contact and connections with government decision-makers.⁷⁰⁷ This grants them more opportunities to lobby (formally and informally), and more influence when they do lobby.

We asked our interviewees whether or not they had initiated a contact with each of six types of federal government officials or their staffs in the past six months. About half reported contacting at least one type of official... a much higher proportion than among the general public.... Several offered the officials' names, occasionally indicating that they were on a first-name basis with "Rahm" (Emmanuel, then President Obama's Chief of Staff) or "David" (Axelrod, his chief political counsel). The frequency of such close ties to the Chicago-linked Obama administration may be unique to our Chicago-area respondents, but we see no particular reason why their high frequency of contacts with congressional representatives should be atypical of wealthy Americans elsewhere in the country.⁷⁰⁸

Wealthy bias even within the lobbying group itself

Even within the lobbying of trade organizations, there is a bias towards the largest and richest members. Larger firms lobby more.⁷⁰⁹ Considering the scale of wealth disparities even within businesses in the same industry, this is not surprising. For example, three new smaller Canadian mobile telecom companies, Wind, Mobilicity and Public Mobile, withdrew from the Canadian Wireless Telecommunications Association because they perceived a bias in favour of the large incumbents, Rogers, Bell, and Telus, in a way that was contrary to their interests as new wireless carriers.⁷¹⁰ Similarly, one lobbyist interviewed discussed how his trade organization had to follow the lobbying dictates of its largest member, even though its demands were unreasonable and likely to lead to poor results. This was contrary to the wishes and interests of the smaller members.

by selected family characteristics (by sex and age)", (7 December 2006), online: <<http://www.statcan.gc.ca/tables-tableaux/sum-som/I01/cst01/famil112a-eng.htm>>.

⁷⁰⁶ Nicholas Confessore, *supra* note 222.

⁷⁰⁷ Benjamin I Page, Larry M Bartels & Jason Seawright, "Democracy and the Policy Preferences of Wealthy Americans" (2013) 11:1 *Perspect Polit* 51–73 at 54.

⁷⁰⁸ *Ibid.*

⁷⁰⁹ Sean Lux, T. Russell Crook & David J. Woehr, "Mixing business with politics", *supra* note 213 at 230.

⁷¹⁰ R. Brent Lang, *supra* note 535.

A2: Lobbying Shuts Out the Marginalized

In a dark mirror of the outsized influence of the wealthy have in and from lobbying, the marginalized are shut out of lobbying.⁷¹¹ “Relatively few lobbyists represent consumers and nonprofit organizations and even fewer serve the poor or disadvantaged.”⁷¹²

Godwin argues that “[p]luralism assumes that when an economic, social, or political disturbance negatively affects people, they would see that the best way to influence government was to form an interest group.”⁷¹³ In reality, whether those facing harm (or benefits) can form an interest group to lobby the government is highly contextual. It depends on the cohesion of the group, its level of political expertise, its available resources, its social norms, and its awareness of the potential harm or benefits.

Kimball *et al.* point out that the poor and unemployed are not organized, and even groups intended to represent the poor tend to primarily represent the interests of their (proportionally) wealthier members.⁷¹⁴ Other interests, such as disenfranchised minorities, the homeless, the abused, those with less education, those with mental health issues, those who are transient, renters, and people exposed to toxins or unseen pollution, have little chance of organizing. Animals, who are completely beholden to (rare) human generosity and often face extinction due to human action, have virtually no representation or means to form interest groups.⁷¹⁵

The seemingly neutral prediction that those affected will organize can become an assumption that interest group politics will accurately represent the true costs and benefits that society faces. This becomes an expectation that those harmed should have organized into an effective interest group, and their inability to do so is a failing on their part. This failing becomes a justification for exploitation. They deserved to be harmed because they are too weak to resist it.

The 2014 decision to alter the water supply in Flint, Michigan, which led to the 2016 lead poisoning epidemic, is a good example of the limits of the assumption that groups facing harm will and should be able to engage in interest group politics. Once the lead started to appear in the water supply, there were sporadic attempts to oppose the change and bring the issue to light. But the community did

⁷¹¹ Frank R. Baumgartner *et al.*, *supra* note 59 at 256.

⁷¹² Vincent R. Johnson, “Regulating Lobbyists”, *supra* note 616 s 36.

⁷¹³ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 54.

⁷¹⁴ David C Kimball *et al.*, *supra* note 627 at 8.

⁷¹⁵ There are only a few animal and nature protection interest groups, but we fall far short of fairly representing their interest. There have been some novel attempts to grant animals and nature more thorough political rights. There has also been a movement to establish rights of nature, granting personhood to certain natural systems so people can sue on their behalf for pollution and other wrongs. Recognized legal nature entities include Tamaqua in Pennsylvania, the Te Urewera forest and the Whanganui River in New Zealand, the Rio Atrato river in Columbia, the Ganges and Yamuna rivers in India, the Amazon rainforest in Colombia, Manoomin wild rice plants in the Anishinaabe tribal lands in the U.S., and Lake Erie in Ohio. The Ho-Chunk Nation in Wisconsin and the Ponca Nation in Oklahoma have also adopted the rights of nature. Ecuador has included the rights of nature in its Constitution. See, Sue Donaldson & Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford ; New York: Oxford University Press, 2013).

not immediately know it was being exposed to toxic levels of lead, and it had no way of organizing effectively against the issue before it had already become a severe health crisis.

The disparity in interest group representation becomes more pronounced as one moves down the income and age spectrum. The poorest and the youngest have the least lobbying representation. In Washington,

In this group of nearly 12,000 [lobbying organizations], there are no organizations representing children in Head Start programs, Wal-Mart associates, people who are awaiting trial on a felony charge, women at home, and recipients of tested benefits, like SNAP, the EITC, or TANF, organized and working in their own behalf...No one who does unskilled work, who's not in a labor union, has an organization representing him or her in Washington.⁷¹⁶

In Canada, we have the same problem. The National Poverty Organization did not lobby the Canadian federal government, partly because the “organization’s first director, Marjorie Hartling, was herself poor and could not call upon the professional resources necessary to make detailed technical commentaries on evolving policy debates”⁷¹⁷. There has been a decline in the power of citizen lobbying organizations since the 1970s, but even during the height of 1970s activism among and in favour of the poor in Canada, poverty organizations experienced an “inability to mobilize organizational membership, develop issue-oriented coalitions and stimulate public concerns and/or support”⁷¹⁸.

Even when local groups managed to avoid the ire of their governmental sponsors during the early 1970s, the resources available to them for lobbying government on major policy issues were limited. Not only were they ill-equipped to comment on the technical details of governmental policies, but they also had little money.⁷¹⁹

Effect of the Collapse of Unions

The previously discussed use of lobbying to weaken unions has also weakened the poor and disadvantaged. Jacobs and Myers recount the benefits that union lobbying used to provide for the marginalized:

before the politically induced decline in union strength ... unions probably were the most effective advocate for public policies advantageous to the less affluent ... that weakened this growth in inequality⁷²⁰.

⁷¹⁶ Lee Drutman, *supra* note 670.

⁷¹⁷ Rodney S. Haddow, *supra* note 533 at 179.

⁷¹⁸ *Ibid* at 178.

⁷¹⁹ *Ibid*.

⁷²⁰ David Jacobs & Lindsey Myers, *supra* note 681 at 753.

Unions advocated for policies that proportionately helped the disadvantaged, like minimum wage increases, social safety nets, and poverty reduction programs.⁷²¹ As unions have weakened, so has the voice for these programs.

The collapse of unions, the decline of anti-poverty groups, and the attacks on pro-environmental citizen organizations does raise the troubling possibility that business interests could leverage tools like biased news coverage, policies akin to anti-union laws, the infiltration of citizen groups, and shadow political parties to form a technique that is equally fatal to the already outgunned citizen groups. They could thereby capture lobbying completely, and then use lobbying to further capture government.

B: The Political Priorities of the Wealthy Differ From the General Public

The bias in representation would not be as concerning if the preferences of the wealthy and the other classes were identical, but there are substantial differences in their policy preferences.

Page notes that the top 0.1% comprise such a small group that they are often not reliably identified in surveys.⁷²² However, recently, scholars – like Bartels, Piketty and Page – have found means of identifying the preferences and practices of this small group. Page *et al.*'s 2012 U.S. study chartered the differences between the preferences of the wealthy and the general public. This is a version of their chart is condensed to the results where the difference in opinions were approximately 25% or more⁷²³

Table 8: Priorities Differences (≥ 25%) between the Wealthy and the General Public in the U.S.

Priorities on Job & Income Programs	% Public in Favour	% Wealthy in Favour
Government must see that no one is without food, clothing, or shelter	68	43
Minimum wage high enough so that no family with a full-time worker falls below official poverty line	78	40
The government should provide a decent standard of living for the unemployed	50	23
The government in Washington ought to see to it that everyone who wants to work can find a job	68	19
The federal government should provide jobs for everyone able and willing to work who cannot find a job in private employment	53	8
The Earned Income Tax Credit (EITC) [described] should be increased rather than decreased or kept the same	49	13
Health care and retirement pensions	% Public in Favour	% Wealthy in Favour
At present, people do not have to pay any Social Security payroll taxes on money they earn beyond about \$107,000. This amount should be raised [rather than lowered or kept about the same] so that high-income people pay more in payroll taxes	60	47

⁷²¹ *Ibid* at 755.

⁷²² David C Kimball et al, *supra* note 627 at 20.

⁷²³ Benjamin I. Page, Larry M. Bartels & Jason Seawright, *supra* note 707 at 57.

Favour national health insurance, which would be financed by tax money, paying for most forms of health care	61	32
Education Policy	% Public in Favour	% Wealthy in Favour
The federal government should spend whatever is necessary to ensure that all children have really good public schools they can go to	87	35
The federal government should make sure that everyone who wants to go to college can do so	78	28
The federal government should invest more in worker retraining and education to help workers adapt to changes in the economy	57	30
Economic Regulation & Policy	% Public in Favour	% Wealthy in Favour
Wall Street firms need more federal government regulation	45	18
Oil industry needs more federal government regulation	50	5
Big corporations needs more federal government regulation (negative = less regulation)	33	-20
Small business needs less federal government regulation	42	70
The government should run a deficit if necessary when the country is in a recession and is at war	31	73
Favour cuts in spending on domestic programs like Medicare, education, and highways in order to cut federal budget deficits	27	58
Willing to pay more taxes in order to reduce federal budget deficits	34	65
Tax Policy	% Public in Favour	% Wealthy in Favour
Perception that compared to the citizens of Western Europe, Americans pay a smaller percentage of their incomes in taxes	47	71
Government should use the Individual (personal) income taxes a lot for getting the revenue to fund government programs	16	46
Government should use corporate income taxes a lot for getting the revenue to fund government programs	62	38
Perception that higher-income people pay a greater percentage of what they earn than lower-income people on Individual (personal) income taxes	42	74
Inequality	% Public in Favour	% Wealthy in Favour
It is the responsibility of the government to reduce the differences in income between people with high incomes and those with low incomes	46	13
Our government should redistribute wealth by heavy taxes on the rich	52	17

The wealthy represent a very narrow demographic of the citizenry, with all the limitations of scope of understanding and experience that might entail. In Canada, the top 1% tends to be white (90%), male (80%), middle-age (66%), business managers (40%) or workers in other financial jobs

(14%).⁷²⁴ It is unlikely their policy views fully take into account the experiences and needs of other demographics. In the U.S., this is visible in their understanding of the social safety net.

Few wealthy Americans— and few of their friends or family members—are likely to need unemployment insurance or Medicaid. Few have to face unemployment, home foreclosures, or bankruptcy. Even if the wealthy tend to have unusually high cognitive skills and abundant information about politics, they may lack certain kinds of information that can be highly relevant to a balanced assessment of public policies. Their experiential base tends to differ from that of other citizens.⁷²⁵

In Canada, there appears to be a greater appreciation for universal healthcare, which continues to be relatively well-funded. However, social welfare continues to fall short by 15% to 62% of bringing recipients up to the poverty level – depending on the recipient and province.⁷²⁶

Disconcertingly, studies show that as people gain in wealth they tend to decrease in empathy, while increasing in feelings of entitlement, selfishness and unethical behaviour.⁷²⁷ This sense of superiority and deserved entitlement seems to be a natural human reaction to gaining status, and occurs even when individuals did not earn their wealth, but simply won it in a lottery.⁷²⁸ Properly structured social cues can actively work against this tendency. However, if anything, our culture appears to have shifted more towards valuing income and status, and away from valuing communal connection and charity.

Page *et al.* also found that the wealthy place a low attribution of importance on the issue of climate change, despite world-wide alarms on the issue, and the very real possibility that we will make large parts of the planet uninhabitable for humans.⁷²⁹ Only 16 percent of their respondents called it a very important problem facing the United States, (53 percent called it “somewhat important”), putting it at the very bottom of the list of importance.⁷³⁰

⁷²⁴ CBC News, “Canada’s top 1%”, (13 September 2013), online: *CBC News* <<http://www.cbc.ca/news/canada/who-are-canada-s-top-1-1.1703321>>.

⁷²⁵ Benjamin I. Page, Larry M. Bartels & Jason Seawright, *supra* note 707 at 67.

⁷²⁶ *Welfare in Canada, 2017*, by Anne Tweddle & Hannah Aldridge (Toronto: Maytree & the Caledon Institute of Social Policy, 2018) at 54.

⁷²⁷ Paul K Piff et al, “Higher social class predicts increased unethical behavior” (2012) 109:11 *Proc Natl Acad Sci* 4086–4091 at 4089.

⁷²⁸ Yi Ding et al, “The rich are easily offended by unfairness: Wealth triggers spiteful rejection of unfair offers” (2017) 71 *J Exp Soc Psychol* 138–144 at 143.

⁷²⁹ David Wallace-Wells, *supra* note 11 at 40.

⁷³⁰ Page *et al.*’s study is from 2013, and hopefully the increased awareness of climate change and its repercussions has made some inroads in the upper class since then. However, judging from media focus, business responses, official talking points, and the limit tangible action, the elite resistance to treating climate change like a real and present emergency continues. Benjamin I. Page, Larry M. Bartels & Jason Seawright, *supra* note 707 at 55.

C: The Preferences of Lobbyists Do Not Match Those of the Public

Just as the preferences of the wealthy differ from the rest of the population, Kimball *et al.* find the policy priorities of lobbyists differ from those of the American public. They determine that,

the bias in the interest group system means that the issues pushed by lobbyists generally do not correspond to the policy priorities of the public. We find no correlation between the lobbying agenda and the public agenda, using multiple measures of public opinion. Even when public concerns and lobbying activity share the same policy domain, the specific issues advanced by lobbyists tend to be different from the specific policy concerns of the public.... We believe a key reason for the extremely weak correlation between the lobbying agenda and the public agenda is due to the representational biases in the interest group system.”⁷³¹

If all social-economic and marginalized groups were more fairly represented by lobbyists, then there would not be such a large gap between the policy preferences lobbyists pursue and those of the public. But as it stands, lobbyists’ policy priorities differ substantially from those of the public.

D: The Gap Between Voter Preferences and Government Decisions in Favour of the Wealthy

In a democracy one would expect to see alignment between the preferences of the voters and the policy decisions of their officials and representatives. Yet, consistently, officials seem to favour the policy preferences of the wealthy over the remaining 90%. A number of recent American studies have shown this gap between the policy preferences of average U.S. voters and the priorities of their legislators.⁷³²

In important policy realms, these scholars [Bartels, Gilens, and Page] and others have shown the significant divides between what most American voters want and what government does (or does not) do.⁷³³

This alignment gap has reached the point where political scientists are starting to question the authenticity of American democracy.⁷³⁴

⁷³¹ David C Kimball et al, *supra* note 627 at 20.

⁷³² Lawrence Lessig, *supra* note 273 at 132.

⁷³³ Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 40.

⁷³⁴ U.S. democracy is further tarnished by the fact that two of the last three presidents were elected with a minority of the votes (the candidate the majority voted for lost two of the last five elections); the disproportionate nature of Senate representation, where a minority of the population controls a majority of the seats; and by widespread minority voter disenfranchisement and partisan gerrymandering. Donald E Klingner & Charles S Bullock III, “Topic: Voting Rights and Political Participation” (2019) 21:3 Public Integr 358–363 at 359.

Recently political scientists have characterized contemporary America as an *Unequal Democracy*, where an *Unheavenly Chorus* sings with unequal political voices; as an arena of *Winner-Take-All Politics*; even as an outright (albeit circumscribed) *Oligarchy*.⁷³⁵

Lax and Phillips found a similar democratic deficit on the U.S. state level.

Roughly half the time, opinion majorities lose—even large supermajorities prevail less than 60% of the time. In other words, state governments are on average no more effective in translating opinion majorities into public policy than a simple coin flip.⁷³⁶

Studies show that the misalignment of political representation favours the preferences of the wealthy. Jacobs and Page find that policy-makers' views about foreign policy were significantly influenced by business leaders and experts, but not by the opinions of ordinary citizens."⁷³⁷ Bartels concludes that wealthy citizens have significant sway over the day-today decisions of their representative, and their policy preferences differ substantially from those of the less affluent citizens.⁷³⁸ His landmark 2009 study looked at,

broad summary measures of senators' voting behavior as well as specific votes on the minimum wage, civil rights, government spending, and abortion. In almost every instance, senators appear to be considerably more responsive to the opinions of affluent constituents than to the opinions of middle-class constituents, while the opinions of constituents in the bottom third of the income distribution have no apparent statistical effect on their senators' roll call votes. Disparities in representation are especially pronounced for Republican senators, who were more than twice as responsive as Democratic senators to the ideological views of affluent constituents. These income-based disparities in representation appear to be unrelated to disparities in turnout and political knowledge and only weakly related to disparities in the extent of constituents' contact with senators and their staffs.⁷³⁹

⁷³⁵ Benjamin I. Page, Larry M. Bartels & Jason Seawright, *supra* note 707 at 66.

⁷³⁶ Jeffrey R Lax & Justin H Phillips, "The Democratic Deficit in the States" (2012) 56:1 Am J Polit Sci 148–166 at 149.

⁷³⁷ Larry M Bartels, *Political Inequality in Affluent Democracies: The Social Welfare Deficit - Working Paper* (2017) at 5.

⁷³⁸ Larry M Bartels, "Economic Inequality and Political Representation" in *Unsustainable Am State* (Oxford University Press, 2009) 167 at 189.

⁷³⁹ *Ibid* at 167.

It is not that every policy outcome favours the rich; it is that “in the aggregate, policy outcomes lean towards the preferences of corporate interests and wealthy donors.”⁷⁴⁰

Misalignment in Canada and other OECD Countries

Bartels finds that “severe disparities in responsiveness are rampant in contemporary affluent democracies, not limited to the United States.”⁷⁴¹ Across most of the developed countries government economic policy is substantially more conservative than the public would prefer.⁷⁴² Every established democracy shows bias towards the preferences of the wealthy. According to this study, Bartels calculates that the reduction in Canadian social spending due to political bias in favour of the wealthiest class is about 13%.⁷⁴³ This is about the average for OECD countries. In the U.S., the situation is more extreme – the reduction in social spending is about 17%.⁷⁴⁴

E: This Alignment Gap is Partly a Result of Lobbying

The substantial bias in government decision-making towards the views of the wealthy and connected is very likely a result of both a shared worldview and of lobbying.⁷⁴⁵

Indirectly, there are undoubtedly a myriad of shared social factors that contribute to this gap. The lobbyists and their wealthy clients represent the same circles of elites in which politicians operate. They often share the same worldview, background, elite education, and values. For example, Hunter’s study found that the relatively small group of people controlling Atlanta’s policy process included the head of Coca-Cola, Atlanta’s largest private sector employer.⁷⁴⁶ This group also included:

major landowners, top business and industry executives, and corporate lawyers.

Almost all of these individuals had attended elite colleges and universities, lived in the same neighborhoods, belonged to the same social organizations, and sat on the boards of directors of each other’s companies.⁷⁴⁷

Included in this worldview are likely factors that increase the influence of the wealthy, and deter policies that would reduce inequality. This includes the high status of the affluent in an ever more commercial society, a status that increases as one gets wealthier. It also includes a belief in the myth of trickle-down economics, and of meritocracy – which justifies a barebones social welfare system.⁷⁴⁸ The section after the next one discusses the lobbying that goes into shaping this shared worldview.

⁷⁴⁰ Lee Drutman, *supra* note 172 at 238.

⁷⁴¹ Larry M. Bartels, *supra* note 737 at 47.

⁷⁴² *Ibid* at 67.

⁷⁴³ *Ibid*.

⁷⁴⁴ *Ibid*.

⁷⁴⁵ As referenced previously, see *Ibid* at 5; Larry M. Bartels, *supra* note 738 at 167; Lawrence Lessig, *supra* note 273 at 132; Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 40.

⁷⁴⁶ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 51.

⁷⁴⁷ *Ibid*.

⁷⁴⁸ This view of meritocracy often includes the belief that capitalism provides enough opportunity to “pull yourself up by your bootstraps”, even though it is the very phrase means doing something impossible. More generally, a

More directly, the alignment gap is almost certainly a result of the effectiveness of lobbying combined with the American politicians' continuous need for large campaign donations. In the Canadian system – with fewer veto points, a stronger bureaucracy, more regulated campaign donations, lower political campaigning costs, and more income equality – we would expect to see a smaller gap between voter preferences and the government's positions. However, we would still expect to see a gap, as Canada is also a liberal federal democracy with a significant system of corporate lobbying, and many of the same social factors apply. As we covered, Bartels study shows exactly such a gap, large but not as large as the one in the U.S.⁷⁴⁹

Craig and Luneburg argue that lobbying risks “skewing governmental decision-making in ways that undercut attempts to serve the perceived broader public interests at stake in lawmaking and administration.”⁷⁵⁰ Citizens as a whole might choose the actors on the stage of politics by electing them, but the affluent get to return every night to the show, and give the representatives corrective notes on their performances.⁷⁵¹

More affluent citizens, on the other hand, have significant direct and indirect effects on the behavior of elected officials. While their choices at the polls affect the partisan composition of Congress, their political views also have a substantial direct impact on the day-to-day policy choices of their representatives. That impact is a testament to the ubiquitous sway of economic inequality in the American political system.⁷⁵²

Kimball agrees with this conclusion, arguing that the agenda of American lobbyists bears little resemblance to the public's priorities, and Congress appears to respond as much or more to the lobbying agenda than to the public's preferences.⁷⁵³

In their study, Lax and Phillips found that the support or opposition of a powerful interest has a dramatic effect on state level policy outcomes, increasing or decreasing the chance of congruence with

meritocracy is self-contradictory, because some in the subsequent generations will be advantaged by the success of their parents. For a deeper discussion, see Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: Inequality and Lobbying: The Nature of Meritocracy – The Iron Law of Meritocracy, p. 394. Also, see Christopher Hayes, *Twilight of the Elites: America After Meritocracy* (Broadway Books, 2013); Joseph E. Stiglitz, *supra* note 24 at 9.

⁷⁴⁹ Larry M. Bartels, *supra* note 737 at 67.

⁷⁵⁰ Craig Holman & William Luneburg, “Lobbying and transparency”, *supra* note 96 at 78.

⁷⁵¹ “Corporate actors that shape the system to work for them, rather than the public, are, by definition, fundamentally undermining representative democracy.” *The Democracy Playbook: Preventing and Reversing Democratic Backsliding*, by Norman Eisen et al, Zotero, Governance Studies (Washington, D.C. 20036: Brookings Institute, 2019) at 37.

⁷⁵² Larry M. Bartels, *supra* note 738 at 189.

⁷⁵³ David C Kimball et al, *supra* note 627 at 16 & 21.

public support by up to 18%.⁷⁵⁴ In other words, “one would have to increase policy support by about nine percentage points to make up for having a powerful interest group opposed to the policy”⁷⁵⁵. They conclude, however, that the net effect of interest groups is a 4% shift from popular opinion on high salience issues, because interest groups often cancel each other out in publicly visible policy areas.⁷⁵⁶ The study did not look at interest group impact in low salience areas, where they have more influence.

An indication of the strength of this representational bias is that lobbyists appear to be only rarely concerned about popular opinion and the mass public as an obstacle. Kimball *et al.* find,

among the lobbyists we interviewed, the mass public was very rarely mentioned as an obstacle to getting their preferred policy outcome. They more frequently noted organized opposition or a lack of attention from government officials as the main impediments to their policy goals.⁷⁵⁷

As part of the representational misalignment, an increasing number of laws are actually written by special interests, often the very interests they purport to regulate. A recent in-depth two year investigations by USA Today, the Arizona Republic and the Center for Public Integrity put specific examples and numbers to this practice.⁷⁵⁸ They found more than 10,000 bills at the state level that were based on model legislation drafted by special interest groups.⁷⁵⁹

Richter concludes that lobbying also favours more economically conservative policies over the more popular liberal policies.⁷⁶⁰ This is not coincidence; the wealthy and business interests favour conservative economic policy. Economic policy is more conservative than it was in the 1970s, before business lobbying ascended. The success of this conservative take on economic policy is an example of their influence. Even after the enormous impact of the 2008 financial crisis, there was barely the

⁷⁵⁴ . They concluded that over-responsiveness to ideology is responsible for most of the democratic deficit they observe. It is highly likely that interest group effects are playing out in this over-responsiveness. Jeffrey R. Lax & Justin H. Phillips, *supra* note 736 at 163.

⁷⁵⁵ *Ibid.*

⁷⁵⁶ *Ibid.*

⁷⁵⁷ They concluded that over-responsiveness to ideology is responsible for most of the democratic deficit they observe at the state level. It is probable that that interest group influence is a substantial factor in this over-responsiveness to ideology. David C Kimball et al, *supra* note 627 at 21.

⁷⁵⁸ Rob O'Dell & Nick Penzenstadler, “You elected them to write new laws. They’re letting corporations do it instead.”, (4 April 2019), online: *USA Today - Investig* <<https://www.usatoday.com/in-depth/news/investigations/2019/04/03/abortion-gun-laws-stand-your-ground-model-bills-conservatives-liberal-corporate-influence-lobbyists/3162173002/>>; Rui Kaneya & Pratheek Rebala, “Used car dealers didn’t want to fix deadly defects, so they wrote a law to avoid it”, (4 April 2019), online: *USA Today - Investig* <<https://www.usatoday.com/in-depth/news/investigations/2019/04/03/takata-airbag-gm-ignition-switch-recalls-used-car-dealers-sue-deaths-crashes-honda/3162202002/>>.

⁷⁵⁹ Rob O'Dell & Nick Penzenstadler, *supra* note 758.

⁷⁶⁰ Brian Kelleher Richter, *supra* note 594 at 895. Lobbying also favours business subsidies and tax loopholes at a scale that no specific economic policy would countenance; but this is a result of each interest pursuing its own private gain, not the result of lobbyists subscribing to a cohesive intellectual theory.

political will to regulate the banks. Calls to punish or nationalize the U.S. banks that had to be bailed out were not seriously considered, and it is likely this was related to the banking industry's enormous number of lobbyists.⁷⁶¹

In summation, lobbying favours the options of the wealthy and their business interests, the preferences of the wealthy and of lobbyists do not match those of the public, there is a gap in government decision-making in favour of the wealthy, and it is reasonable to conclude that this alignment gap is partly a result of lobbying. Lobbying is a force pushing officials out of alignment with citizen preferences and the public interest.

Concern III: Lobbying Creates an Information/Framing Bias

As mentioned, the *corruption heuristic* subscribers believe that lobbyists wield a disproportionate ability to frame the policy debates, leading to one-sided results.⁷⁶² They argue, convincingly, that the wealthy economic interests outcompete all other groups in lobbying. This creates a systematic information bias, as their views get more access to and more priority with government officials.⁷⁶³ Lessig, and Kimball *et al.* argue that via this framing bias lobbying does damage, even when not combined with campaign contributions, gifts or favours.⁷⁶⁴

Framing bias can be understood as subtle alteration to informational accuracy, so that the type v influence of rational argument bleeds into the type iii influence of deception. The influence mix will vary between accurate and misleading, depending on the lobbyist's approach, the official's access to other sources of information, and the effects of the four pressures.⁷⁶⁵

⁷⁶¹ Joseph E. Stiglitz, *supra* note 38 c 6, s Bank recapitalization & footnote 44.

⁷⁶² This is an expansion on Calon's view. See, Calon Russell, "Lobbying Reform", *supra* note 483 at 3.

⁷⁶³ Lawrence Lessig, *supra* note 273 at 145. "The ability to control the flow of information to decision makers is a crucial component regarding the influence of particular organizations within the governing network" Brulle refers to (Cook and Whitmeyer 1992). Robert J. Brulle, *supra* note 30 at 292.

⁷⁶⁴ Lawrence Lessig, *supra* note 273 at 138; David C Kimball et al, *supra* note 627 at 20.

⁷⁶⁵ "One can manipulate frames and thus perceptions and behavior. These frames and perceptions can be self-reinforcing. One set of experiments shows how "fragile" and easily affected our beliefs can be. Individuals are asked to draw a number out of a hat. They are then asked a question about which they have relatively little information, such as the number of ships that passed through the Panama Canal last year. The answer, it turns out, is systematically related to the random number they previously pulled out of the hat—those who pulled out a larger number systematically respond with a higher number." Joseph E. Stiglitz, *supra* note 38 c 6, s Framing and misperceptions. He cites, George Lakoff, *Don't Think of an Elephant! Know Your Values and Frame the Debate* (White River Junction, VT: Chelsea Green, 2004); discussions of anchoring and framing effects on judgments and preferences in Daniel Kahneman, Paul Slovic, and Amos Tversky, eds., *Judgment under Uncertainty: Heuristics and Biases* (Cambridge: Cambridge University Press, 1982); Daniel Kahneman and Amos Tversky, eds., *Choices, Values and Frames* (New York: Cambridge University Press, 2000); and popular and recent discussions in Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011); and Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven and London: Yale University Press, 2008).

To understand framing bias we need to grasp that lobbyists have special access to officials, granting them the ability to set the agenda; that officials do not have to intend the framing bias; that an impartial or neutral framing bias still creates bias; that the information provided by lobbyists is not impartial; the connection between framing bias and political polarization; and that government capacity decline is a deliberate agenda-shaping tool.

Agenda Setting

It appears incontrovertible that lobbying strongly affects the public agenda.⁷⁶⁶ Lobbyists have access to public officials in a way few others do.⁷⁶⁷ The lobbyists' key value proposition to their clients is this access to officials. Lobbyists often have more access to public officials than even their own constituents.⁷⁶⁸ Chance argues that if this access is key – and it appears to be – then lobbying has a great deal of impact, even more than campaign contributions.⁷⁶⁹

This access allows the lobbyists to place issues on the public agenda. Baumgartner and Jones both find that lobbying by U.S. interest groups significantly influences whether an issue is set on the public agenda.⁷⁷⁰ Kingdon agrees. His interviews contain many examples of items that appear on the government's agenda due to the lobbying of interest groups.⁷⁷¹ Alexander *et al.* note that "others have maintained that what matters in terms of ultimate political outcomes is influence over the legislative agenda and access to those who create and control that agenda."⁷⁷²

Agenda Setting and Think Tanks

Think tanks have been instrumental in framing ideological debates, and ideas they propose often eventually make their way onto the public agenda.⁷⁷³ Lobbying agenda setting often relies on shaping the official's "perception of a specific issue through the development and dissemination of policy reports"⁷⁷⁴ and the saturation of the intellectual environment. The *Affordable Care Act* was indirectly modeled on a plan initially proposed by the Heritage Foundation (although it was never embraced by a majority of the Republicans at the time).⁷⁷⁵ Similarly, "the Heritage Foundation [was]

⁷⁶⁶ Lee Drutman, *supra* note 172 at 52.

⁷⁶⁷ Josh Brodbeck, Matthew T. Harrigan & Daniel A. Smith, "Citizen and lobbyist access to Members of Congress", *supra* note 328 at 329.

⁷⁶⁸ *Ibid.*

⁷⁶⁹ "[L]obbying would seem to be far more effective at influencing political outcomes than campaign and PAC contributions." Raquel Alexander, Stephen W Mazza & Susan Scholz, *supra* note 580 at 407. The connection between lobbying and campaign finance is covered in depth in Chapter 4 – Private Campaign Financing and Lobbying, p. 211 & 254.

⁷⁷⁰ Richard A. Smith, *supra* note 216 at 111.

⁷⁷¹ *Ibid* at 110.

⁷⁷² Raquel Alexander, Stephen W Mazza & Susan Scholz, *supra* note 580 at 407.

⁷⁷³ "[I]mportant as perceptions and beliefs are in shaping individual behavior, they are even more important in shaping *collective* behavior, including political decisions affecting economics. Economists have long recognized the influence of ideas in shaping policies." Joseph E. Stiglitz, *supra* note 38 c 6, s Framing and misperceptions.

⁷⁷⁴ Robert J. Brulle, *supra* note 30 at 292.

⁷⁷⁵ Jon Greenberg, "Is the ACA the GOP Health Care Plan from 1993?", (15 November 2013), online: *Politifact* <<http://www.politifact.com/punditfact/statements/2013/nov/15/ellen-qualls/aca-gop-health-care-plan-1993/>>.

widely regarded to have exercised immense influence in the Reagan White House with its publication *Mandate for Leadership*⁷⁷⁶, although others claimed it merely catalogued ideas that were already circulating in conservative circles in Washington at the time.⁷⁷⁷

Some have argued that the agenda-setting abilities of think tanks are more illusory than real. They contend that political actors have already decided on a policy and then use think tank materials as a screen to provide post hoc justifications.

An extreme expression of this dynamic can be heard in the remarks of a United States Navy admiral admonishing a group of scholars at a conference: “You academics should have no illusions that you have any influence on policy...the Navy knows what it wants; the policy papers you prepare have not one iota of influence on policy...however, if we can use your papers in our fights with the Army or the defense secretary or with the Congress...then we will use your arguments. But don’t think you have any influence on real policy because we have already decided which way we want to go.”⁷⁷⁸

Certainly in some cases the think tank and lobbying materials are fig leaves more than convincers. Overall, though, the studies mentioned above do indicate that lobbyists are affecting the agenda.⁷⁷⁹

Agenda Setting and the Canadian Government

Although the Canadian government is more insulated from lobbyists, it is also more insulated from the public.⁷⁸⁰ No one I interviewed even seemed to know precisely how policy packages made their way through the bureaucracy, the Privy Council’s Office, and the Prime Minister’s Office, to ultimately be promoted onto the public legislative agenda. But no one interviewed worked in those two offices. Nonetheless, it appears to be a confluence of too many factors and players for anyone in the government to completely grasp on the process. The civil servants I interviewed discussed how there would be instructions to prioritize certain policies from the top, and include them in every policy package option they presented. Some of these instructions appeared to be the result of successful

⁷⁷⁶ Alek Chance, *supra* note 411 at 25.

⁷⁷⁷ *Ibid.*

⁷⁷⁸ *Ibid* at 26.

⁷⁷⁹ Drutman points out that even if businesses start with the simple preference to protect their business from a particular policy change, that lobbying is sticky, so they continue to lobby. This will lead them naturally towards agenda setting as they grow in influence. “[O]nce companies start lobbying, they will continue to insert themselves into policymaking. Rather than allowing government to move on to new challenges, companies may prevent government from addressing some issues while demanding it address other issues.” Lee Drutman, *supra* note 172 at 217.

⁷⁸⁰ A. Paul Pross, *supra* note 2 at 6 & 40. Although, Dawson argues that the Canadian Cabinet and PMO remain more accessible than the British ones.

lobbying of the high level of bureaucracy, the Privy Council's Office or PMO. As discussed previously, Canadian lobbyists have to compromise more than American ones, but there is still good reason to believe they have a significant effect on the political agenda.

It would not be as troubling if lobbyists' used their influence to move issues onto the public agenda, if there was no concern about them framing the policy debates. However, there is good reason to believe that they may be doing so, even if officials do not intend to acquiesce to their framing bias.

Officials Do Not Have to Intend the Framing Bias

Lessig points out that representation can be compromised as a whole, even if no individual representative is compromised, and even if lobbyists are only helping members do what they want to do.⁷⁸¹ Officials do not have to intend to support a framing bias for it to appear.⁷⁸² They can be operating with the best of motives in a system structured (accidentally or purposefully) to encourage framing bias. If only certain voices can afford to reach an official, without countervailing information and viewpoints, she might find herself unknowingly led astray. As previously mentioned, one former high-ranking civil servant I interviewed discussed how he would sometimes invite the main participants on an issue relevant to his department to meet with him at a bar for casual discussion. He had no intention of shutting out voices, but by specifically inviting the major players' representatives/lobbyists, and hosting it outside of business hours, he was limiting the scope of voices reaching him.

The strength of this framing bias is boosted by lobbying acting as a legislative subsidy.

Lobbyists Bias Policies through their Legislative Subsidies

Lessig argues that the legislative subsidy operates as a component of the framing bias. He argues that lobbyists are providing resources and information to help officials reach decisions, yet not every view and issue has strong lobbyist support.⁷⁸³ This results in substantially different legislative subsidies.⁷⁸⁴ The subsidies bias officials' attention towards those policy areas where they can receive the most aid from lobbyists. Officials who decide to work on a trade agreement will garner prodigious lobbyist support in resources and information, helping them move forwards even with otherwise inadequate government resources. Officials who decide to work on a low-income housing policy will struggle without the subsidy. Over time those policies with the lobbyist support will flourish, their solvability moving them to the top of the agenda. Those officials working on these issues will also flourish, bringing their pro-lobbyists approach and priorities further up the hierarchy. The lobbyists' subsidy will make addressing business-friendly issues cheaper and more successful for government, and

⁷⁸¹ Lawrence Lessig, *supra* note 273 at 145.

⁷⁸² "The extreme case for the role of shared attitudes and beliefs is expressed in the idea that real power lies in determining the process or framework of decision making" Fred Thompson & W. T. Stanbury, *supra* note 2 at 39.

⁷⁸³ Hall & Deardorff make the same argument, that the "objective of this strategy is not to change legislators' minds but to assist natural allies in achieving their own, coincident objectives." The lobbyists benefit by helping their allied officials succeed, and raising their issue in their ally's priority list. Richard L Hall & Alan V Deardorff, "Lobbying as Legislative Subsidy" (2006) 100:1 Am Polit Sci Rev 69–84 at 69.

⁷⁸⁴ Lawrence Lessig, *supra* note 273 at 145.

will thereby pull government's focus and resources into line with business priorities. This effect is increased by tax and budget cuts, which reduce the funds available for other issues.

Legislative subsidies appear to be appealing in reducing the cost of governance, making use of private resources to solve legislative problems, but they also bias government policies towards the lobbyists' agenda, away from the agenda citizens might prefer. This is particularly problematic when combined with the possibility that the information provided suffers from framing bias.

“Neutral” Information Framing Can Still Create Bias

Neutral information can still create a framing bias by being the only information source, by emphasizing epistemological closure, by changing the salience of issues, or by being based on mistaken beliefs endemic to the information source.

Officials have limited time and attention.⁷⁸⁵ Officials can knowingly or unknowingly bias their decision-making if they fail to consult with a particular stakeholder. Most citizen groups have limited means of reaching out to officials, but businesses can afford the most connected lobbyists, the largest number of lobbyists, and to have their lobbyists working in more policy areas communing with many officials at once. This gives them the most access to officials. Business interests can thereby get more of the officials' limited time.

Even if we take the most benign view of lobbying as merely providing information and legislative support, these data suggest that, on many issues, policymakers hear significantly more often from one side than another. While no single investment leads predictably to any outcome, quantity and quality matter: To hire more and more senior and connected people to be more places to make more and better arguments on your behalf with more detail and build more and more high-impact allies improves one's chances. How much? It depends. But, on average, it is not zero.⁷⁸⁶

There is even more opportunity for bias if officials dismiss a particular group views because they are not seen as a “legitimate” stakeholder. For example, for years the Canadian Department of Fisheries and Oceans seems to have strongly favoured the industrial fishing stakeholders over the views of scientists and local fisherman. This factored into the decline of the East coast cod fisheries.⁷⁸⁷

Krishnakumar points out a fundamental problem with those that hold to the disclosure heuristic. Repeated contact with lobbyists favouring one viewpoint has significant effects.

⁷⁸⁵ Peter K. Enns et al, *supra* note 701 at 4.

⁷⁸⁶ Lee Drutman, *supra* note 174.

⁷⁸⁷ The department also discounted its own mandate to protect the fisheries. Laurel Sefton MacDowell, *An Environmental History of Canada* (UBC Press, 2012) at 302.

Legal scholarship on the subject of group polarization suggests that if an elected official consults with a homogenous set of interest groups representing only one side of an issue—whether because those interests contributed to his campaign or because those interests share the official’s political ideology—then the public policy generated by that official will become polarized, or skewed in an extreme direction, because the official is hearing from a “limited ‘argument pool’” ...⁷⁸⁸

If the official only hears from pro-business lobbyists, she is likely to take on a business-friendly frame. She will see the importance of policies that businesses like, like tax cuts, deficit reduction and business subsidies; and start to doubt the efficacy of policies businesses dislike, like pollution restrictions, business taxes, measures to reduce inequality, and policies to increase union membership.⁷⁸⁹

Limited Arguments Can Lead to Epistemological Closure

This limited pool of viewpoints can create an informational framing bias that can interact with officials associated with the same party and the increasingly ideologically sorted lobbyists on the same side. It can lead to the consideration of such a narrow range of opinions and information sources that the insulated group moves into epistemological closure and irrational extremes, unaware that their information is biased.⁷⁹⁰ It is vital for good decision-making that officials hear from a wide range of views and broad sources of information.

Lobbying Effects the Salience of Issues

Cotton and Déllis argue that even if neutral, the information provided by lobbyists is not a social benefit that improves decision-making. Even unbiased information from lobbyists can lead to worse policy, because it changes the salience of issues, focusing the policy-maker’s limited time on issues of priority to the lobbyists rather than the wider public.⁷⁹¹ “Our results show that the reliance of policymakers on informational lobbying to learn about issues can induce them to prioritize issues with active lobbies.”⁷⁹²

Framing Bias Favours the Dominant Special Interest Groups

Lobbying can also introduce framing biases with supposedly neutral information, if the dominant special interests are consistently wrong in their information. For example, we know that

⁷⁸⁸ Anita S. Krishnakumar, *supra* note 493 at 541. She draws indirectly on John C. Turnere et al., “Rediscovering The Social Group 142 (1987); Amiram Vinokur & Eugene Burnstein, Effects of Partially Shared Persuasive Arguments on Group-Induced Shifts: A Group-Problem-Solving Approach” (1974)29 J. Personality & Soc. Psychol. 305, 306-07

⁷⁸⁹ An example of this kind of bias can be found in studies that show that when U.S. representatives take reduced contributions from unions, they are less likely to speak about jobs and the related issues. The contributions help set the agenda, and it is likely lobbying does the same thing. Peter K. Enns et al, *supra* note 701 at 24.

⁷⁹⁰ Anita S. Krishnakumar, *supra* note 493 at 541.

⁷⁹¹ “[E]liminating special interest money from the political process is not sufficient to ensure that policymakers implement the policies favored by their constituents. Unbiased informational lobbying, even in the absence of money, can have detrimental effects on welfare.” Christopher S. Cotton & Arnaud Déllis, *supra* note 494 at 28; See also, Richard L. Hall & Alan V. Deardorff, *supra* note 783 at 81.

⁷⁹² Christopher S. Cotton & Arnaud Déllis, *supra* note 494 at 28.

companies consistently overestimate the cost of environmental regulations, most often by at least double, and often by a factor of 10. They also routinely underestimate the potential benefits.⁷⁹³ For example, the U.S. Acid Rain Program was projected to cost \$2.4 to 5 billion annually, but actually cost only \$836 million annually, while providing approximately \$100 billion in annual health benefits.⁷⁹⁴

In fact, there is evidence that the entire framing of the economy versus the environment is a mistaken approach resulting from the industry and their lobbyists' approach to the issue. As Arros and Brownlee argue, "the economy is not a subset of the environment, nor is it separate from the environment – instead, a strong and sustainable economy is ultimately dependent on healthy ecosystems."⁷⁹⁵ Moreover, according to the *Porter Hypothesis*, well-designed regulation actually benefit the regulated firms by spurring innovation and reducing waste, thereby improving efficiency and competitiveness; offsetting the initial cost of compliance.⁷⁹⁶ If the business world in general is operating with a particular mistaken frame, then it is likely their lobbyists will be as well. The government would be less susceptible to this framing bias if it gave less weight to the views of business lobbyists.

Even neutral information provided by lobbyists can end up biasing policy-making by allowing business interests to monopolize officials' time; limiting the range of opinions officials hear; polarizing her views in a pro-business fashion; risking epistemological closure; changing the salience of issues, and providing false information the lobbyists as a group mistakenly believe to be true.

The Information Provided by Lobbyists is Not Impartial

Several of the lobbyists I interviewed made the argument that they are merely providing neutral information to officials, who then go on to make the policy decisions. Even if they were providing unbiased information, the combination of access, framing, subsidization, and prioritization from lobbying compounds to undermine this impartiality. These factors combine to pre-frame the government's policy options in favour of the preferences of the wealthy and business interests. However, the framing effect is even stronger than this, because the information provided by lobbyists is not impartial. There is good reason to believe that lobbyists further bias policy-decisions by pre-framing the intellectual milieu and by providing misleading information.⁷⁹⁷ Indeed, one lobbyist I interviewed admitted that the information they provided was biased.

Businesses go to great lengths to fund think tanks and lobbyists to mould the intellectual environment of political decision-makers.⁷⁹⁸ By repeating the same information and world view, they are essentially advertising a particular policy approach, hoping that their preferred solutions will be at the top of officials' minds when it is time to make a decision.⁷⁹⁹ This advertising is designed to pre-frame

⁷⁹³ Pomme Arros & Michelle Brownlee, *supra* note 24 at 19.

⁷⁹⁴ *Ibid* at 12.

⁷⁹⁵ *Ibid* at 5.

⁷⁹⁶ *Ibid*.

⁷⁹⁷ Peter K. Enns et al, *supra* note 701 at 6 & 30.

⁷⁹⁸ Lee Drutman, *supra* note 172 at 220.

⁷⁹⁹ *Ibid* at 36.

the officials' understanding, and there is little indication that it is more bound by truth than any other form of advertising.

As previously discussed, businesses have high status and knowledge that is valuable to government decision-makers.⁸⁰⁰ The businesses and their lobbyists control this relevant information and deploy it strategically.⁸⁰¹ Officials are inclined to trust business interests, but honest dealing is only one of many strategies a lobbyist might pursue. Lopipero, Apollonio and Bero argue that interest groups will misrepresent or withhold information when “the issue is perceived to be critical, and when accurate information does not support interest group preferences.”⁸⁰² Hertel-Fernandez *et al.* found that repeated contact with business interest groups led to Congressional staffers being less accurately informed about the positions of their constituents on issues, indicating that the lobbyists are misleading the staffers.⁸⁰³

In the U.S., for example, the *Asbestos Transparency Act* was introduced by lobbyists in at least 17 states and became law in at least 11 states. This *Asbestos Transparency Act* was deceptively titled to mislead legislators, citizens and opposing lobbyists, since it “didn’t help people exposed to asbestos. It was written by corporations who wanted to make it harder for victims to recoup money.”⁸⁰⁴ The lobbyists further deceived legislators by providing what purported to be neutral experts to testify on behalf of the legislation.

One man testified as an expert in 13 states to support [the] bill ... In several states, lawmakers weren’t told that he was a member of the organization that wrote the model legislation on behalf of the asbestos industry...⁸⁰⁵

Fisher, LeRoy and Mattera analyse a report by the American Legislative Exchange Council used for lobbying, and find it relies on sub-par and misleading information.⁸⁰⁶ The tobacco lobbyists lied to

⁸⁰⁰ Andreas Dur, Patrick Bernhagen & David Marshall, *supra* note 433 at 4.

⁸⁰¹ *Ibid.*

⁸⁰² Peggy Lopipero, Dorie E Apollonio & Lisa A Bero, “Interest Groups, Lobbying, and Deception: The Tobacco Industry and Airline Smoking” (2007) 122:4 Polit Sci Q 635–656 at 655.

⁸⁰³ Their finding also applied to ideologically conservative groups that were aligned with business interests, and to a lesser extent to other organized interest groups. “Through our observational analysis and survey experiment on constituent communications, we have presented evidence consistent with the argument that when senior Congressional staff come into contact with corporate or conservative interests, they are less likely to have an accurate picture of what their constituents want.” Alexander Hertel-Fernandez, Matto Mildenberger & Leah C. Stokes, *supra* note 32 at 16.

⁸⁰⁴ Rob O’Dell & Nick Penzenstadler, *supra* note 758.

⁸⁰⁵ *Ibid.*

⁸⁰⁶ “Instead of relying on serious, peer-reviewed research, Rich States, Poor States proceeds to argue for the powerful effect of taxes on business location on the basis of two kinds of claims: (1) unequivocal assertions with no evidence or research whatever cited in support of them, and (2) simple correlations of the kind that Laffer acknowledges are inadequate and often misleading.” Indeed, the “solutions” presented in Rich States, Poor States would not only fail to increase state growth, but would also transfer more wealth to the already wealthy. *Selling*

government for decades about the negative health effects of smoking and second hand smoke, about the popularity of smoking restrictions – nationally and in key districts, by using astroturf groups to lobby against the bans, by presenting biased studies, and by relying on bought-off “experts”.⁸⁰⁷ Similarly, George Bush (sr.) was convinced not to act at all on the issue of climate change due to misleading information presented by “scientists” who were actually lobbyists working for the fossil fuel industry.⁸⁰⁸ This only came to light twenty years later. The fossil fuel industry’s climate change denial campaigns is a clear example of lobbying organizations willing to provide officials with blatantly false information.⁸⁰⁹ They had great success with this campaign, sowing doubts about climate change and delaying any substantial action to reign in carbon pollution for years, perhaps decades. So far, there have been few repercussions for the deception, certainly they faced no repercussions from the deceived officials, and it is doubtful any repercussions will ever cost as much as the deception saved them. In delaying action on carbon pollution they have reaped enormous profits.

Overall, lobbyists appear quite willing to hide information or to present sub-par information as fact, particularly if it is bolstered by their pre-constructed intellectual framework.⁸¹⁰ The argument that lobbyists provide neutral information is also undermined by the evidence that lobbyists are selected primarily for their connections rather than their expertise.⁸¹¹ If the primary goal was the provision of information, one would expect that lobbyists would be primarily selected for their expertise, since that would be the primary value they are providing. Clearly, that is secondary to their social connections, which give them access to and emotional influence over officials. In his study, Retnasaba concluded that over a five year period the hiring of lobbyists became increasingly related to dependency corruption and increasingly unrelated to providing information and improving communication.⁸¹²

Snake Oil to the States: The American Legislative Exchange Council’s Flawed Prescriptions for Prosperity | Good Jobs First, by Peter Fisher, Greg LeRoy & Philip Mattera (Good Jobs First and The Iowa Policy Project, 2012) at 16.

⁸⁰⁷ Peggy Lopipero, Dorie E. Apollonio & Lisa A. Bero, “Interest Groups, Lobbying, and Deception”, *supra* note 802 at 654; Naomi Oreskes & Erik M. Conway, *supra* note 35 c 5; Neil Francey & Simon Chapman, “‘Operation Berkshire’: the international tobacco companies’ conspiracy” (2000) 321:7257 BMJ 371–374 at 374. Numerous executives also committed perjury in their testimony to congress.

⁸⁰⁸ Naomi Oreskes & Erik M. Conway, *supra* note 35 c Introduction.

⁸⁰⁹ Jordi Xifra, *supra* note 418 at 284; Shannon Hall, *supra* note 35; Dan Bacher, “Western States Petroleum Association’s Astroturf Campaign Exposed!”, (12 December 2014), online: *San Franc Bay Area Indep Media Cent* <<https://www.indybay.org/newsitems/2014/12/12/18765457.php>>; Union of Concerned Scientists, “How Fossil Fuel Lobbyists Used ‘Astroturf’ Front Groups to Confuse the Public”, (11 October 2017), online: *Union Concerned Sci* <<https://www.ucsusa.org/using-astroturf-front-groups-hide-fossil-fuel-lobbying-efforts>>; Kathy Mulvey & Seth Shulman, *supra* note 32 at 12, 16, 22, 27; For a description of the false science and the denial publicity campaign see also, John Cook et al, *supra* note 30 at 4.

⁸¹⁰ “[T]he fact that interest groups possess accurate information does not mean that they will reveal it. For example, the tobacco industry did not make public the results of its surveys that found support for airline smoking bans. ... Our research suggests that commitment to an extensive information-gathering and lobbying campaign should not be viewed as a signal that interest groups are presenting credible information.” They point out that the tobacco industry long hid the cancer risks of smoking, and later of second-hand smoke, even while lobbying against smoking bans Peggy Lopipero, Dorie E. Apollonio & Lisa A. Bero, “Interest Groups, Lobbying, and Deception”, *supra* note 802 at 655; Naomi Oreskes & Erik M. Conway, *supra* note 35 c Conclusion; Kevin Grandia, *supra* note 35.

⁸¹¹ Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 19.

⁸¹² Gajan Retnasaba, *supra* note 278 s III.4.

Lobbyists have a relatively free hand to frame the issues in low information, low salience, peripheral environments, where officials have few other sources of information or where the officials are predisposed to agree with the lobbyists' priorities.⁸¹³ Moreover, even in highly salient areas, organizations can avoid blowback from deceiving officials if they merely omit some alternatives, emphasize certain aspects, and otherwise subtly sculpt the information. Organizations can also use third parties like consultant lobbyists, think tanks and astroturf campaigns to lie more directly. As Retnasaba suggests, one purpose of spinning off these activities is to increase deniability and create a third party to diffuse and take the blame.⁸¹⁴

In theory, any lobbying group could deploy these misleading tactics; however, they are easier to deploy by small cohesive groups that are convinced the tactics are justified by the lobbying ends. This is easier to accomplish in businesses, where the profit motive weighs in on the scales of ethical decisions, and where only a small group of people have to approve of the lobbying tactics.

The Connection between Framing Bias and Political Polarization

Political polarization can be a result of genuine split of the electorate regarding values and policies. However, it is also a problem of limited information framing. The polarized political sides are receiving disparate sources of information that frame events so as to accentuate the political differences of the population. This appears to be a prime source of the political polarization in the U.S. (and to a lesser extent, Canada), where the right and left-wing are operating in increasingly separate media environments. In the U.S., the situation is worse on the right, where the media information is particularly subject to epistemological closure, manipulation, and counter-factual beliefs.⁸¹⁵

Undoubtedly, this large-scale society-wide framing bias affects officials and lobbyists; as well as the four pressures they operate within. The political context, citizens' passion and policies' popularity are heavily affected by the information sources the population relies upon. It is widely contended that the epistemological closure now hurts the Republican Party's ability to govern and form realistic policies.⁸¹⁶ Think tanks, lobbyists, wealthy donors, officials, party members, and shadow political party members both feed into this information framing through actions, donations and advertising campaigns, and are in turn affected by it.

⁸¹³ Graham *et al.*'s study found that Canadian lobbying is dominated by the wealthy and by corporate interests. They argue that the lobbyists' influence over the flow of information to officials can systematically distort communication and decision-making, and this is visible in Canada's pro-oil industry policies. Nicolas Graham, William K Carroll & David Chen, *supra* note 2 at 51.

⁸¹⁴ Gajan Retnasaba, *supra* note 278 s III.1.

⁸¹⁵ *Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election.*, by Yochai Benkler et al (Cambridge, Massachusetts: Berkman Klein Center for Internet & Society at Harvard University, 2017) at 128; Lauren Feldman et al, "Climate on Cable: The Nature and Impact of Global Warming Coverage on Fox News, CNN, and MSNBC" (2011) 17:1 Int J Press 3–31 at 21.

⁸¹⁶ "They Don't Give a Damn about Governing" *Conservative Media's Influence on the Republican Party*, by Jackie Calmes, Discussion Paper Series #D-96 (Shorenstein Center on Media, Politics and Public Policy, 2015) at 23.

Indeed, Fox News was created and managed explicitly as a form of continuous political campaigning for right-wing politicians, yet it has also begun to restrict the decision space the politicians can operate within.⁸¹⁷ “Republicans originally thought that Fox worked for us... Now we’re discovering that we work for Fox.”⁸¹⁸ The larger framing bias of the political polarization has become an environment that well financed business lobbyists work within, as they further frame specific issues and political debates for officials. It is highly probable that lobbying and the wider support structure of think tanks and financiers are intimately tied to the phenomenon of political polarization and society-wide framing, through their attempts to create a favourable information environment for their lobbying and political activities.

Framing the debate to curtail the available choices officials consider is also part of the strength of the shadow political party.

[B]ecause of its massive scale, tight integration, ramified organizational reach, and close intertwining with the GOP at all levels, the Koch network exerts a strong gravitational pull on many Republican candidates and officeholders, re-setting the range of economic issues and policy alternatives to which they are responsive.⁸¹⁹

The lobbyists’ ability to access and set the agenda, to frame information through this access and the legislative subsidy, to bias with even impartial information, to deploy deliberately misleading information, and to operate with and within the partisan polarization, would not be so effective if governmental capacity had not declined.

Government Capacity Decline Strengthens the Framing Bias

As discussed previously, there has been a marked decline in government capacity over the last thirty years, particularly in the U.S., but also in Canada.⁸²⁰ “Congress is receiving unprecedented amounts of information and outside pressure while the capacity of congressional staffs has declined.”⁸²¹ This capacity cutting was and continues to be a deliberate attempt to shape governance. It makes government more receptive to lobbying and it helps lock in the agenda from future change.

Some governmental capacity loss, from cuts or a failure to invest in needed new capacity, was undoubtedly due to short-sighted efforts to save money. Often, though, the savings were merely a rhetorical device. By cutting capacity, high-level officials gain more control over information flow, and thereby more influence over the policy process and other officials.⁸²² They may do this to prevent a

⁸¹⁷ “How Roger Ailes Built the Fox News Fear Factory” *Roll Stone* (9 June 2011), online: <<http://www.rollingstone.com/politics/news/how-roger-ailes-built-the-fox-news-fear-factory-20110525>>; See also, Jackie Calmes, *supra* note 816 at 5.

⁸¹⁸ note 817.

⁸¹⁹ Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 4.

⁸²⁰ See, for example, Chris Mooney, *supra* note 221 at 4.

⁸²¹ Kathy Goldschmidt, *supra* note 219 at 8.

⁸²² Chris Mooney, *supra* note 221 at 3.

neutral source of information from contradicting a pet project or policy goal, or to prevent momentum towards a policy change they oppose.⁸²³ For example, the staff size of U.S. Congress was slashed under Newt Gingrich as a deliberate move to make Congress more compliant to his leadership.⁸²⁴

This sort of capacity cutting is a means of favouring type iii influence, while disguising it as type v influence. It helps lock officials who might otherwise disagree in to the same agenda. Bachrach and Bartz argue that,

power is also exercised when A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A. To the extent that A succeeds in doing this, B is prevented, for all practical purposes, from bringing to the fore any issues that might in their resolutions be seriously detrimental to A's set of preferences.⁸²⁵

Capacity Cutting Makes Government More Receptive to Lobbying

Officials also appear to cut government capacity as a deliberate means to make government more receptive to special interests, by forcing it into a supplicatory position where it has to rely on lobbyists to provide information.⁸²⁶ This is beneficial to the officials aligned with special interest groups that dominate lobbying, as it strengthens these lobbyists and weakens countervailing pressures. It allows officials to frame the issue using the lobbyists' information without having to worry about a neutral government-approved source undermining the framing. This grants lobbyists more influence in framing policy-making decisions, and can form a backbone for regulatory capture. It also allows the officials to paint the opposing sources of information as partisan, since the internal neutral sources have been expurgated. This manoeuvre is particularly effective when a lobbyist's goal is not supported by the best available information.

A good example is the Trump administration. Since 2017, the administration has undermined government capabilities, seemingly deliberately using the capacity cutting strategy to make the government ever more reliant on lobbyists when making policy decisions.⁸²⁷

⁸²³ Althea Manasan, "How Ottawa's restrictions on government scientists affect Canadians", (20 May 2015), online: *CBC News* <<http://www.cbc.ca/news/technology/faq-the-issues-around-muzzling-government-scientists-1.3079537>>.

⁸²⁴ Kathy Goldschmidt, *supra* note 219 at 8; Chris Mooney, *supra* note 221 at 3.

⁸²⁵ Quoting Bachrach and Bartz (1962, p. 948). David Lowery, "Lobbying influence", *supra* note 497 at 7.

⁸²⁶ Chris Mooney, *supra* note 221 at 4.

⁸²⁷ For example, see *A Disgraceful Milestone: Trump's 3,000 Conflicts of Interest*, by Citizens for Responsibility and Ethics in Washington, www.citizensforethics.org (Citizens for Responsibility and Ethics in Washington, 2020); Charlie May, "With the help of industry insiders and lobbyists, Scott Pruitt is rapidly changing the EPA", (2 July 2017), online: *Salon* <<http://www.salon.com/2017/07/02/with-the-help-of-industry-insiders-and-lobbyists-scott-pruitt-is-rapidly-changing-the-epa/>>; Jonathan Chait, "Trump, DeVos, and the Creation of an American Oligarchy",

The process has six components. (1) The White House’s consistent use of untruths and lies undermines trust in its statements, undercutting government as a valid source of information and thereby providing lobbyists with more power to frame policy debates.⁸²⁸ (2) The deliberate understaffing of government departments and political positions reduces the government’s internal capabilities, preventing new regulation, enforcing the status quo, and further reducing the government’s ability to provide information to senior government officials and legislators. (3) The appointment of senior (and junior) officials, who are unqualified or philosophically opposed to the mission of their departments, weakens and demoralizes these departments.⁸²⁹ This creates a situation where the departments are not responsive to their public role, lack the competency to alter the status quo, and are vulnerable to exploitation by the department heads and the special interests the heads favour.⁸³⁰ (4) Many of these department heads explicitly seek the advice of lobbyists and enact their preferred policies while disregarding the findings and opinions of the department’s staff, thus corrupting the very reason these departments exist.⁸³¹ (5) The Trump administration created a norm of disregarding ethical norms, normal procedure and the preferences and well-being of the public.⁸³² (6) The administration

(31 August 2017), online: *Dly Intell* <<http://nymag.com/daily/intelligencer/2017/08/trump-devos-and-the-creation-of-an-american-oligarchy.html>>.

⁸²⁸ Trump has said an astounding number of lies and untruths while in office. It is hard to imagine anyone having more indifference to truth. As of June 2019, he had made over 5,000 false statements. Daniel Dale, “Donald Trump has now said more than 5,000 false things as president | The Star”, (5 June 2019), online: *thestar.com* <<https://www.thestar.com/news/world/analysis/2019/06/05/donald-trump-has-now-said-more-than-5000-false-claims-as-president.html>>.

⁸²⁹ “Environmental Protection Agency director Scott Pruitt has secretly worked in concert with oil and gas lobbyists in the past ... [t]he landing team at the Department of Energy was headed by a lobbyist for Koch Industries.” Jonathan Chait, *supra* note 827.

⁸³⁰ For Example, Tom Price, the head of the Department of Health and Human Services, is a doctor closely tied to the medical lobby. He instituted a number of low-profile decisions that have consistently ratcheted up Medicare payments for doctors. *Ibid*; See also, Molly Hensley-Clancy, “Betsy DeVos Picked A Student Loan CEO To Run The Student Loan System”, (20 June 2017), online: *BuzzFeed* <<https://www.buzzfeed.com/mollyhensleyclancy/betsy-devos-picked-a-student-loan-ceo-to-manage-your->>; Michael Stratford, “Trump administration selects former DeVry official to lead college enforcement unit”, (30 June 2017), online: *POLITICO* <<http://politi.co/2x536uQ>>.

⁸³¹ “DeVos has turned her department [of Education] over to the for-profit college industry, which has used its power to protect its own rackets. One ruling allowing lenders to recover more money from indebted students was issued by Taylor Hansen, a DeVos aide and former lobbyist for the for-profit industry. DeVos’s special assistant is Robert Eitel, the chief compliance officer at a for-profit institution facing multiple investigations for deceptive practices. She has selected A. Wayne Johnson, the CEO of a student-loan company, to run the department’s student loan program. The Department’s General Counsel, Carlos Muñiz, is a consultant who has worked for a for-profit institution that is also facing multiple state investigations for misconduct. This week, she appointed Julian Schmoke, Jr. to run the Student Aid Enforcement Unit, which the Obama administration created to expose and halt fraud by colleges and universities. Schmoke comes directly from DeVry University, which last year had to pay \$100 million over its misleading practices.” Jonathan Chait, *supra* note 827; See also, Molly Hensley-Clancy, *supra* note 830; Michael Stratford, *supra* note 830.

⁸³² For example, the Trump administration has been cutting capacity at the EPA, while bypassing the civil servants, instead relying on external lobbyists. This is a deliberate tactic to favour the polluting industries and increase the amount of allowed pollution. In doing so, it has disregarded the relevant scientific evidence and popular opinion. Charlie May, *supra* note 827; David Roberts, “Scott Pruitt is Dismantling EPA in Secret for the same Reason the GOP Health Care Bill was Secret”, (14 August 2017), online: *Vox* <<https://www.vox.com/energy-and-environment/2017/8/14/16142150/scott-pruitt-epa-secrecy-republican>>.

shows no interest in doing the hard work to research and form good policy.⁸³³ Instead it seems intent on outsourcing policy creation, regardless of the soundness, popularity, or even legality of the resulting policy.⁸³⁴ These factors drive competent bureaucrats out, give lobbyists exceptional leeway, and are likely to weaken the government's overall resistance to future lobbying pressure. We will look at a detailed example of this process in Chapter 3, in our discussion of the EPA (Environmental Protection Agency) under the Trump administration.

Capacity Cutting Locks in the Agenda from Future Change

Mooney argues that officials can also cut information capacity as a means of setting the future agenda.⁸³⁵ This helps lock future officials into present decisions-making frameworks, by decreasing their access to future potentially contradictory information.⁸³⁶ It takes time and active efforts to rebuild lost capacity, assuming future officials are aware of the loss. They might not even know how much they no longer know. In the meantime, future officials will be forced to rely on external sources of information. This will advantage the organizations that lobby more, especially in areas of low salience. So, business interests are likely to benefit the most. Institutional capacity cutting is a method to incorporate framing bias into government decision-making. It is an exercise of power over both the present and future agendas.

In summation, framing bias is a subtle but substantial threat to good governance. It leaves politicians and other officials more reliant on lobbyists. It narrows the official's decision space and limits their ability to evaluate the full range of policy options.⁸³⁷ This framing bias favours business interests; they have the resources to spend on the building the intellectual milieu to support the frame, they do the vast majority of the lobbying, and they have more control over specialized information. The bias is evident in much of the recent U.S. federal regulatory decisions. This framing bias in favour of business interests appears to be operating in Canadian lobbying and governance as well, albeit less blatantly.⁸³⁸

⁸³³ For example, this tax proposal is both short and vague. The New York Times, "Read President Trump's Tax Proposal", (27 September 2017), online: *N Y Times* <<https://www.nytimes.com/interactive/2017/09/27/us/politics/document-Read-President-Trump-s-Tax-Proposal.html>>.

⁸³⁴ For example, President Trump allowed three members of Mar-a-Lago to essentially run the Veterans Affairs department in secret, despite their lack of experience or formal (and legal) government position. Their qualifications seemed to be that they wanted to do it, lobbied him, were members of his club, and showed loyalty by staying members after he doubled the membership fee upon becoming President. Bess Levin, "Three of Trump's Mar-a-Lago Buddies Are Secretly Running the V.A.", (8 August 2018), online: *Vanity Fair* <<https://www.vanityfair.com/news/2018/08/three-of-trumps-mar-a-lago-buddies-are-secretly-running-the-va>>.

⁸³⁵ Chris Mooney, *supra* note 221 at 4.

⁸³⁶ *Ibid.*

⁸³⁷ Lawrence Lessig, *supra* note 273 at 145.

⁸³⁸ Thompson & Stanbury point out that many Canadian interests are excluded from effective representation, and are not heard. Their work is from 1979, but there is little reason to believe the situation in Ottawa is substantially different. "[W]e would conclude that legitimate, wealthy, coherent interests, having multiple sources of access to the legislative process, would tend to be much more influential than less legitimate, poor, diffuse interests, having few sources of access to the legislative process." Fred Thompson & W. T. Stanbury, *supra* note 2 at 48; See, for example, Maclean's, *supra* note 42. Harper also exercised this sort of agenda setting framing bias quite deliberately, through targeted budget cuts and the muzzling of science research related to climate change.

Concern IV: Lobbying Increases Inequality

Economic inequality is increasing. This appears to be intimately connected to lobbying, through the following steps. As we have discussed, (A) lobbying favours the opinions of the wealthy; and (A2) shuts out the opinions of the marginalized; (B) the political priorities of the wealthy differ from those of the general population; (C) just as the political priorities of lobbyists differ from those of the public; (D) there is an alignment gap between government decisions and public priorities, that favours the preferences of the wealthy; and (E) this alignment gap is partly a result of lobbying.

This section adds two findings that enhance our understanding of the link between lobbying and inequality: (F) the wealthy oppose policies that would decrease inequality; (G) lobbying increases inequality by advancing the priorities of the wealthy; and (G2) then passing policies that reward the wealthy with more income that can be funnelled back into lobbying. Thus lobbying both increases and is increased by inequality, in a vicious spiral.

Inequality is increasing

Economic inequality has been increasing.⁸³⁹ In the U.S., real wages have stagnated in the last two decades for the large majority of Americans, while the income of the top 0.1% has increased 600%.⁸⁴⁰ Wealth inequality is even starker; in the U.S., already by 1998 the top 1% of the population had greater assets than the bottom 90%, and disparity has increased since then.⁸⁴¹ According to one metric, in the U.S. the top 1% controls about 40% of the wealth, and 46% of the financial resources (net worth minus net equity in the primary residence).⁸⁴²

Economic inequality has reached such heights that commentators have declared a new gilded age. Although real wages have stagnated in the last two decades for a significant majority of Americans, the income of the top .1% of the population has increased by 600%. In the 1990s, for example, the real median wages of CEOs increased over 60%, and in 2004 a new record was reached: The ratio of CEO

⁸³⁹ *Causes and Consequences of Income Inequality: A Global Perspective*, by Era Dabla-Norris et al (IMF, 2015).

⁸⁴⁰ Timothy K. Kuhner, *supra* note 51 at 5.

⁸⁴¹ Some measurements of wealth come to slightly different conclusions about the distribution between the top 10 and 1 percent versus the rest of the population. However, they all show a marked increase in favour of the wealthy over the last few decades. *Ibid.*

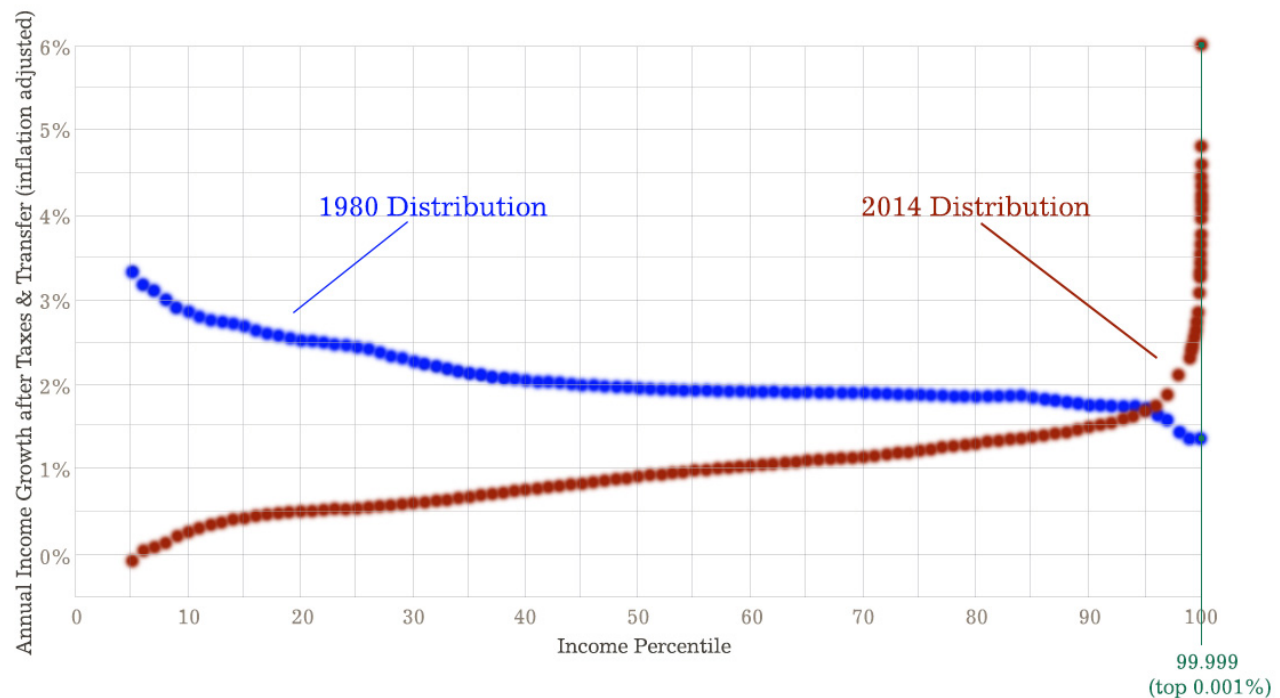
⁸⁴² Wolff argues, "FR [Financial Resources] is a more liquid concept than marketable wealth, since one's home is difficult to convert into cash in the short term. Moreover, primary homes also serve a consumption purpose besides acting as a store of value. FR represents what a household can draw down without lowering its standard of living, and thus excludes homes (and vehicles)". *Household Wealth Trends in the United States, 1962 to 2016: Has Middle Class Wealth Recovered?*, Working Paper, by Edward N Wolff, National Bureau of Economic Research, Working Paper 24085 (National Bureau of Economic Research, 2017) at 6, 9 & 10.

compensation to that of the average U.S. worker [became] the highest in recorded history.⁸⁴³

This unequal growth is visible all the way up the income scale: the income and wealth of the top 10% has pulled away from the remaining 90%; and the top 1% has pulled away from the rest of the 10%; and within the 1%, more money has flowed to the top 0.1%, and the same is true for the 0.001%. The increasingly rich have increasingly more.

Figure 1 shows the enormous gain in the income of the wealthiest 0.001% of Americans over the last 35 years. They have captured virtually all the economic gains from the increase in productivity during this period.

*Figure 1: U.S. Income Growth Distribution, Poor and Middle Class vs. Top 0.001%, 1980 vs. 2014*⁸⁴⁴

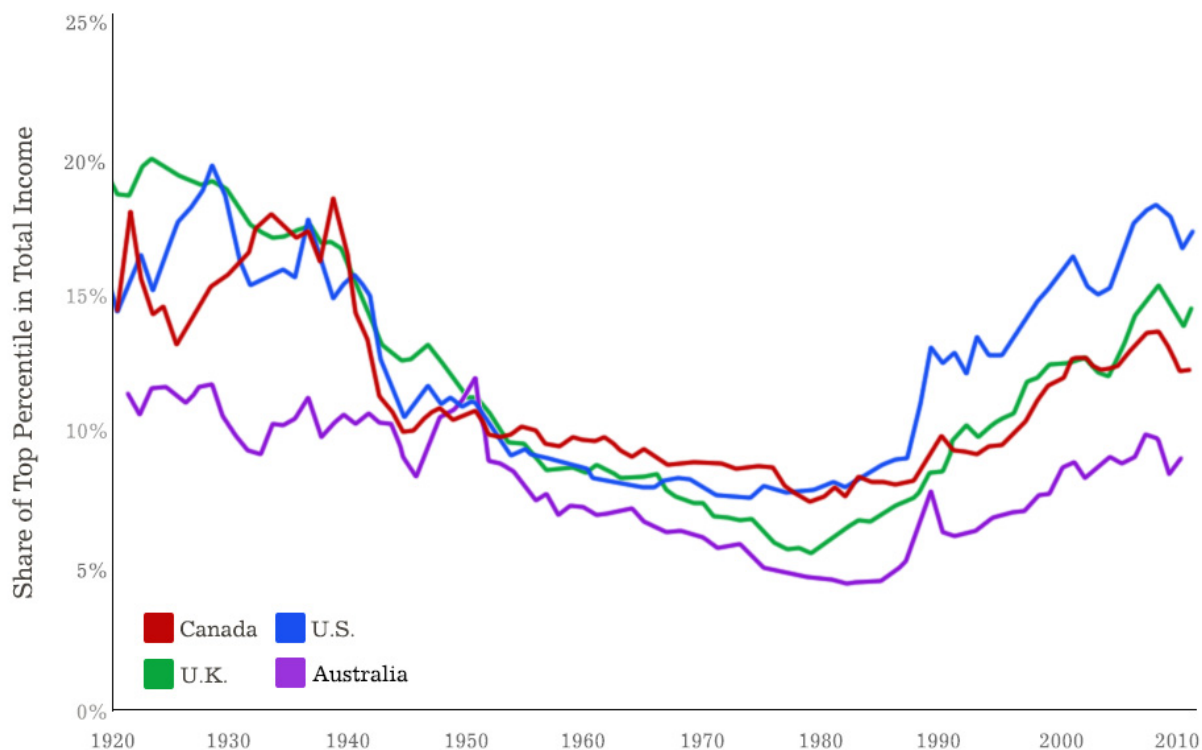


Inequality in Canada

Inequality is not as pervasive in Canada, due to differences in the political system, culture, higher tax rates and more extensive social safety net. Yet, the same trend is apparent in Canada, Australia and the U.K.

⁸⁴³ Timothy K. Kuhner, *supra* note 51 at 2360.

⁸⁴⁴ Source: Thomas Piketty, Emmanuel Saez and Gabriel Zucman; Jessie Ma and Stuart A. Thompson. David Leonhardt, "Our Broken Economy, in One Simple Chart", *N Y Times* (7 August 2017), online: <<https://www.nytimes.com/interactive/2017/08/07/opinion/leonhardt-income-inequality.html>>.

Figure 2: Income Inequality in Canada, U.S., U.K. and Australia, 1910–2010 ⁸⁴⁵

“By 2007, the richest 0.1% of Canadians held 5.5% of total income in Canada, more than double their share in early-1980s.”⁸⁴⁶

Table 9: Percent Share of Total Income to the Top in Canada (incl. capital gains), 1982 vs. 2007 ⁸⁴⁷

	Top 10%	Top 5%	Top 1%	Top 0.5%	Top 0.1%	Top 0.01%
1982	34.0 %	21.7 %	8.3 %	5.7 %	2.5 %	1.1 %
2007	42.5 %	30.6 %	15.7 %	12.0 %	6.5 %	3.1 %
Increase, 1982 to 2007	125%	141%	189%	211%	260%	282%

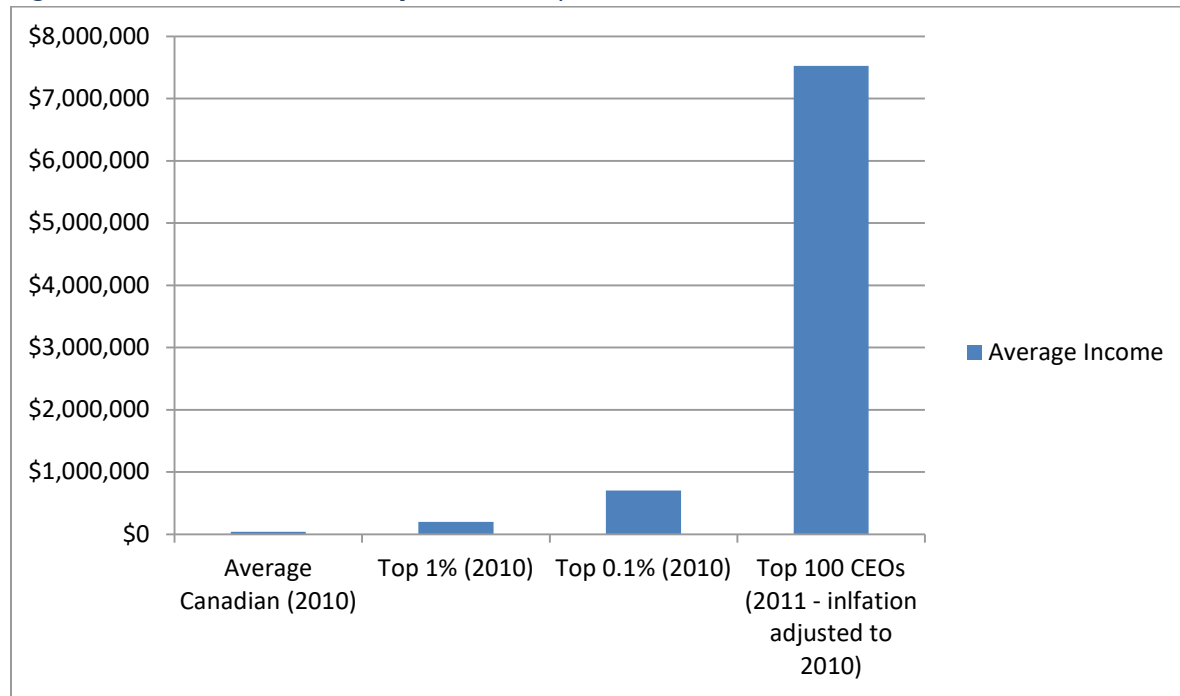
In 2010, the top 1% of Canadian made about \$200,000 a year, the top 0.1% \$700,000 a year, and the top 0.01% \$2.6 million a year. The average compensation package among the top 100 Canadian CEOs came to \$7.7 million in 2011. In comparison, the average Canadian’s income was \$38,700 a year.⁸⁴⁸

⁸⁴⁵ John Cassidy, “Piketty’s Inequality Story in Six Charts” *New Yorker* (26 March 2014), online: <<https://www.newyorker.com/news/john-cassidy/piketlys-inequality-story-in-six-charts>>; extracted from, Thomas Piketty, *Capital in the Twenty-First Century*, translated by Arthur Goldhammer (Harvard University Press, 2017).

⁸⁴⁶ *The Rise of Canada’s Richest 1%*, by Armine Yalnizyan (Ottawa, Ontario: Canadian Centre for Policy Alternatives, 2010) at 12.

⁸⁴⁷ From *ibid* at 13.

⁸⁴⁸ CBC News, *supra* note 724.

Figure 3: Canadian Income Comparison 2010/2011 ⁸⁴⁹

Return on Capital Exceeding the Returns on Labour

Piketty, in his landmark work *Capital in the Twenty-First Century*⁸⁵⁰, argues that this growth in inequality is worldwide phenomenon and a return to historical trends, where the returns on capital outperformed those of labour.⁸⁵¹ The mid-nineteenth century was a historical exception, where growth was high and the return on labour exceeded the return on capital, largely “as a consequence of war and of policies adopted to cope with the shocks of war”.⁸⁵² Piketty suggests that this trend has been reversed. This reversal – this increase in inequality – is a result of deliberate policy decisions.⁸⁵³ Inequality will continue to increase unless governments enact aggressive policies to turn things around.⁸⁵⁴

⁸⁴⁹ *Ibid.*

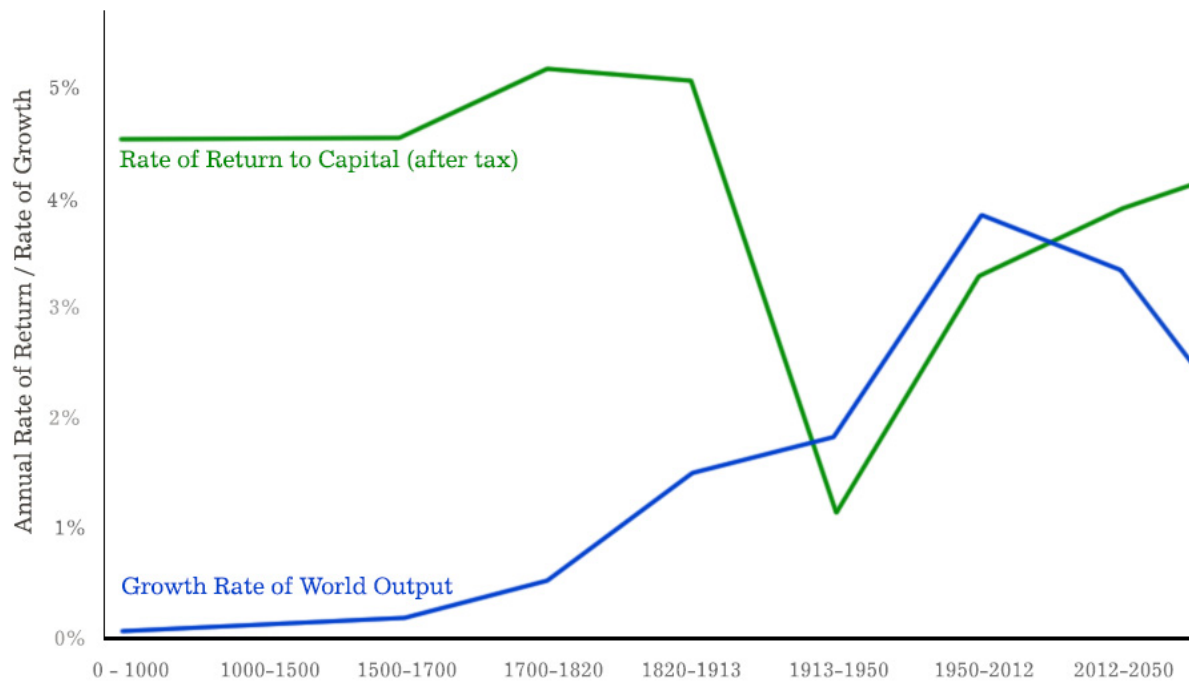
⁸⁵⁰ Thomas Piketty, *supra* note 845.

⁸⁵¹ *Ibid* at 571.

⁸⁵² *Ibid* at 20.

⁸⁵³ Joseph E. Stiglitz, *supra* note 24 at 5.

⁸⁵⁴ *Ibid* at 14.

Figure 4: World Return on Capital vs. Growth Rate, Antiquity–2010⁸⁵⁵

This rise in inequality is disconcerting, and there is good evidence that inequality is damaging to economic growth and democracy, as is discussed in Chapter 6.⁸⁵⁶

F: The Wealthy Oppose Policies that Would Decrease Inequality

We have already covered in the previous section how the policy preferences of the wealthy differ from those of the rest of the population. This includes an opposition to policies that would ameliorate inequality. In general, “the wealthy oppose government action to redistribute income or wealth.”⁸⁵⁷

Social welfare programs are an essential part of reducing inequality and poverty. Page *et al.* conclude that the wealthy are much more concerned about budget deficits, and much more disposed towards cutting social welfare programs, particularly Social Security and health care.⁸⁵⁸ They are also less willing to support job and income programs, and tax-financed healthcare.

⁸⁵⁵ John Cassidy, *supra* note 845.

⁸⁵⁶ See Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: Inequality and Lobbying: Economic Inequality is a Risk to Democracy, p. 379. Lawrence Ezrow, “Do economic inequality and political inequality go together?”, *Wash Post* (5 April 2015), online: <<http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/04/05/do-economic-inequality-and-political-inequality-go-together/>>; Larry M. Bartels, *supra* note 738; Joseph E. Stiglitz, *supra* note 38 cs 5, The evisceration of our democracy; Richard Wilkinson & Kate Pickett, *The Inner Level: How More Equal Societies Reduce Stress, Restore Sanity and Improve Everyone’s Well-Being* (Penguin, 2019) c The misconception of meritocracy.

⁸⁵⁷ Benjamin I. Page, Larry M. Bartels & Jason Seawright, *supra* note 707 at 67.

⁸⁵⁸ *Ibid.*

While they express concern about economic inequality, they oppose all government action that would actually reduce inequality, including raising estate taxes, raising taxes on high-income people, and providing more support to broad education programs. At the minimum, reducing inequality will require reigning in the market, particularly the self-destructive aspects of poorly regulated capitalism, such as those that led to the savings and loans crisis, the 2008 financial crisis, and the Deepwater Horizon disaster. Yet, the wealthy also oppose reigning in the market, being “significantly less favorable to increasing government regulation of Wall Street firms, the health care industry, small business, and especially big corporations.”⁸⁵⁹

It is common for the wealthy and business interests to lobby against anti-poverty programs, against raising the minimum wage, against limits on exposure to carcinogens, against regulations on exploitative lending practices, in favour of laws restricting the consumers’ and employees’ right to go to court, and in favour of lax environmental standards, particularly in lower class neighbourhoods. All of these positions shift costs and risks to the poor and off the wealthy. They reduce the standard of living and opportunities to advance for the disadvantaged. They increase inequality and the outcome of inequality: a growing disparity in life quality.

The wealthy have the lobbying power to press their concerns; most of the rest of society, particularly the marginalized, lack the countervailing interest group pressure.

There is an old Washington adage ... “If you’re not at the table, you’re on the menu.”

When business groups crowd the table and representatives of the less privileged are few and far between, it’s easy to see how the less privileged are going to wind up on the menu..., while the business groups and the rich get lower taxes and more freedom to operate as they see fit. Arguably, this basic principle explains much of what’s been happening in Washington for decades, especially as the amount of business lobbying has exploded.⁸⁶⁰

G: Lobbying Increases Inequality by Advancing the Priorities of the Wealthy

Inequality has increased. Lobbying favours the wealthy, who oppose policies to reduce inequality. There is a representation alignment gap in favour of the policies the wealthy prefer, and this gap is a result of lobbying. Thus lobbying increases inequality. Indeed, there are some works that show the American lobbying system is an important source of inequality.⁸⁶¹

Since the wealthy tend to disfavour government actions that curtails economic inequality, it is not surprising that lobbying as a whole tends both to prevent policies that would decrease inequality,

⁸⁵⁹ *Ibid.*

⁸⁶⁰ Lee Drutman, *supra* note 670.

⁸⁶¹ David C Kimball et al, *supra* note 627 at 8.

and to support policies that increase inequality.⁸⁶² Jacobs and Myers note that “several political scientists have commented on how veto groups blocked policies that would have decreased this acceleration in inequality”⁸⁶³ At the same time, increased inequality alienates people, discourages them from participating in politics, further entrenching the lobbying strength of the wealthy, and leading to more inequality.⁸⁶⁴

Business lobbying can be understood in this framework. We have already covered how businesses profit from lobbying through tax reductions and rent seeking.⁸⁶⁵ These policies also increase inequality. Rent seeking transfers wealth from the general public to the rent extractor. Around 80% of corporate tax cuts go to the wealthy shareholders, directly (60%) or indirectly (20%).⁸⁶⁶ The tax cuts also reduce the government’s revenue, decreasing its ability to regulate the economy and maintain the social safety net. It is not a coincidence that the rise of lobbying over the last forty years has been matched with a rise in inequality and a decline in public assets (despite the increasing market value of publicly held land).⁸⁶⁷

⁸⁶² Peter K. Enns et al, *supra* note 701 at 29.

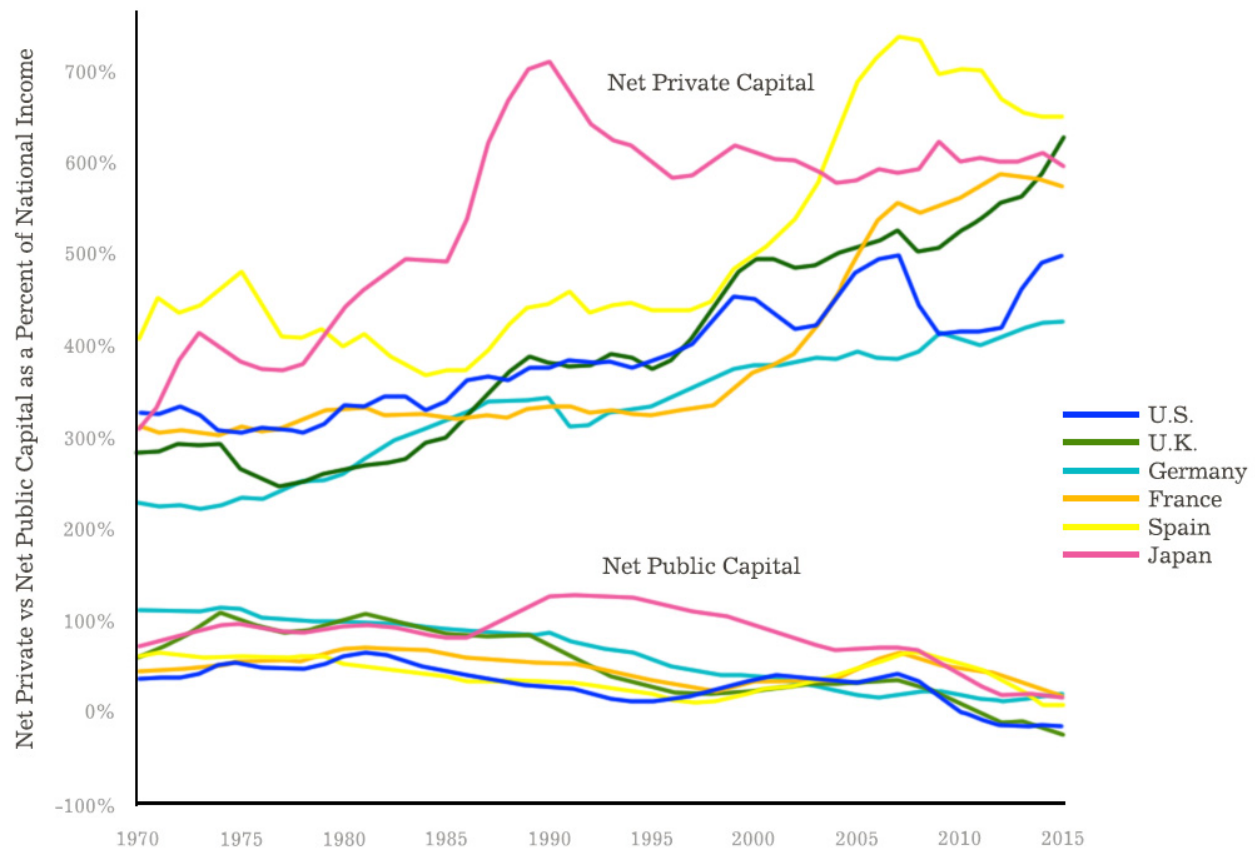
⁸⁶³ David Jacobs & Lindsey Myers, *supra* note 681 at 770.

⁸⁶⁴ “As the estimates suggest, an increase in income inequality by a standard deviation will trigger a reduction to electoral participation by one third of a standard deviation which itself will lead to a further increase in income inequality of around 10 percent of a standard deviation. This highlights John Stuart Mill’s argument (Mill, 1861) that unless there is a proportional representation of all people, the government will serve the interests of a privileged minority.” I Theodossiou & A Zangelidis, “Inequality and Participative Democracy. A Self-Reinforcing Mechanism” (2018) n/a:n/a Rev Income Wealth, online: <<https://onlinelibrary.wiley.com/doi/abs/10.1111/roiw.12401>> s 5.2.

⁸⁶⁵ Joseph E. Stiglitz, *supra* note 24 at 7.

⁸⁶⁶ Top executives are often granted large stock options, so they are part of this small group of large shareholders, the 0.1%. *How TPC Distributes the Corporate Income Tax*, by James R Nunns (Urban Institute and Urban - Brookings Tax Policy Center, 2017) at 15.

⁸⁶⁷ For an account of the increase in worldwide inequality and decline in public assets, see *World Inequality Report 2018*, by Facundo Alvaredo et al (World Inequality Lab, 2017) at 14. Lobbying for the privatization of public assets is an important part of the story of decreasing public assets.

Figure 5: Private vs. Public Capital in Rich Countries, 1970–2016 ⁸⁶⁸

Business lobbying also contributes to financial deregulation and weakening unions. Jacobs and Myers' study concluded that these changes are the two main sources for the unprecedented U.S. expansion in economic inequality.⁸⁶⁹

The lobbying influence of the wealthy in the U.S. appears to be a significant source of recent policy failures that increased inequality. The 2008 financial crisis and the subsequent slow recovery from the great recession are direct consequences of the government following the policy preferences and lobbying of the wealthy over those of the general population.⁸⁷⁰ The crash and subsequent recovery significantly increased American inequality. Ten years after, and the bottom 50% had not even recovered to where they were, while the wealth and percentage share of the wealth of both the

⁸⁶⁸ *Ibid.*

⁸⁶⁹ David Jacobs & Lindsey Myers, *supra* note 681 at 769.

⁸⁷⁰ In the U.S., these preferences included the deregulation of the financial industry, the bail-out of the banks, the refusal to nationalize the failed banks, the payment of bankrupt banker's bonuses, the reluctance to bailout home owners, the reluctance to criminally charge financial actors even in cases of blatant wrong-doing, the unwise focus on balance budgets and deficit reductions during a recession, and the value placed on keeping inflation low instead of increasing employment. See Joseph E. Stiglitz, *supra* note 38 cs 5 & 2.

penultimate 9 % and top 1% increased significantly.⁸⁷¹ It is quite likely that the economic effects of Covid-19 will again increase inequality by knocking the legs out from those in the middle and lower classes.

*Table 10: U.S. Wealth Distribution through Financial Crisis to Recovery, 2004–2018*⁸⁷²

Income Group	2004	2009*	2018
Top 1%	13.62 27.2%	17.78 29.0%	31.08 31.5%
Penultimate 9% (90 to 99%)	18.14 36.3%	24.82 40.5%	38.17 38.7%
Middle (50 to 90%)	17.04 34.1%	18.60 30.4%	28.25 28.7%
Bottom 50%	1.22 2.4%	0.03 0.05%	1.10 1.1%

Wealth in \$ trillions; Colour highlights plurality/majority position.

** Low point of wealth from the 2008 financial crisis*

G2: Policies That Reward the Wealthy with More Income That Can Be Funnelled Back into Lobbying

The growth in inequality appears to be both a cause of and a result of the growth in lobbying.⁸⁷³

The relationship between economic and political inequality is mutually reinforcing: greater political traction for the wealthy leads to public policies favorable to the wealthy, which leads to greater economic inequality, which in turn leads to greater political inequality, and so on. Tighter regulations on money in politics could stop this cycle, but those regulations are harder and harder to pass as wealthy interests become more entrenched in the political process.⁸⁷⁴

This feedback loop is becoming ever tighter, ever more focused on the wealthiest fraction of a percent. Table 10 demonstrates how wealth is moving upwards in the U.S. Canada is not experiencing as extreme a level of inequality, but the same patterns are visible in lobbying and the trend towards increased inequality.

Lobbying is a significant contributing factor to the growth of inequality, and a means by which those who have more power in the private market can leverage that wealth to acquire disproportionate power in the public sphere, undermining the political equality that is foundational to democracy.⁸⁷⁵ The

⁸⁷¹ The Federal Reserve, “The Fed - Distribution: Distribution of Household Wealth in the U.S. since 1989”, (22 March 2019), online: *Fed Reserve* <<https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/chart/>>.

⁸⁷² The wealth of the bottom 50% went from \$1.22 trillion in 2004 to \$0.47 trillion during the crash, to \$1.1 trillion in 2018. The wealth of the top 1% went from \$13.6 trillion to \$14.15 trillion to \$31.1 trillion over the same period. *Ibid.*

⁸⁷³ Timothy K. Kuhner, *supra* note 51 at 2360.

⁸⁷⁴ *Ibid.*

⁸⁷⁵ Joseph E. Stiglitz, *supra* note 24 at 13.

increasingly disproportionate influence of the wealthy exercised through the lobbying system is a disconcerting break with the principles of fair representation and democracy.

Concern V: Lobbying Favours the Legislative Status Quo

There is a status quo bias in all areas of governance. Building consensus for legislative change is hard, and long periods of stasis followed by dramatic change appear to be the norm.⁸⁷⁶ Baumgartner *et al.* found that the status quo generally wins on legislative issues, with 60% of the lobbied upon issues they followed in the U.S. not changing over the study's four year period.⁸⁷⁷ U.S. studies have shown that the status quo bias is enhanced by the effects of lobbying.⁸⁷⁸

Lobbying helps lock-in the status quo directly and indirectly, having a more narrow effect in low salience areas, and a two sided effect overall, increasing the churn in low salience areas while decreasing the passage of large-scale legislation.

Maintaining the Status Quo Directly

A substantial portion of interest group lobbying is devoted to maintaining the status quo by exercising vetogates and using “negative, blocking activities”⁸⁷⁹. Most lobbyists represent business interests, and business groups are disproportionately likely to lobby for the legislative status quo in large salient issues, while pushing for changes in low salience areas that provide private benefits.⁸⁸⁰ These businesses that employ the most lobbyists are dominant within the current political system. They like the status quo and tend to see large-scale legislative change as a risk.⁸⁸¹

The most highly rated reason was that companies need to be in Washington “to protect the company against changes in government policy (or other government actions) that could be harmful.” On the average, lobbyists rated this a 6.2 out of 7. Notably, not a single lobbyist ... rated it below a 4 ... In other words, the most important reason for lobbying is preserving the status quo.⁸⁸²

There is an additional reason and means by which their lobbying works to lock in the status quo; businesses tend to support the current incumbents, because these politicians have a track record of being able to deliver.⁸⁸³

⁸⁷⁶ Frank R. Baumgartner et al, *supra* note 59 at 45.

⁸⁷⁷ *Ibid* at 242.

⁸⁷⁸ Brian Kelleher Richter, *supra* note 594 at 895; Also hypothesized in *Lobbyists as Imperfect Agents: Implications for Public Policy in a Pluralist System*, SSRN Scholarly Paper, by Matthew Stephenson & Howell E Jackson, papers.ssrn.com, SSRN Scholarly Paper ID 1331503 (Rochester, NY: Social Science Research Network, 2009) at 4.

⁸⁷⁹ Richard A. Smith, *supra* note 216 at 110.

⁸⁸⁰ Matt Grossmann, “Interest group influence on US policy change”, *supra* note 599 at 179.

⁸⁸¹ Fred Thompson & W. T. Stanbury, *supra* note 2 at 122.

⁸⁸² Lee Drutman, *supra* note 172 at 73.

⁸⁸³ Sean Lux, T. Russell Crook & David J. Woehr, “Mixing business with politics”, *supra* note 213 at 227.

Businesses are not the only groups working to maintain the status quo. A good example of a (semi) citizen group working to maintain the status quo is the NRA. As mentioned, in the U.S., there are nearly daily mass shootings, but widespread public support for gun control has led to little change in national laws, due in a large part to lobbying by the NRA.⁸⁸⁴ This should not be overstated. The NRA does push for laws allowing easier gun ownership at the state level, but has focused on blocking behaviour on the federal level due to the broad popularity of gun control.

Lobbyists can be quite successful in maintaining the status quo, even when there is a crisis creating the political context and public pressure for change. Mahoney studied four scandals involving derivatives, Enron, stock options maleficence, and anti-cloning. In each case, the focusing events favoured increasing regulations on the topic, but the industry in question won instead, maintaining the status quo.⁸⁸⁵

Maintaining the Status Quo Indirectly

Lobbyists also work for the status quo indirectly, because opposition by an active lobbyist on an issue acts to dramatically reduce the chance of change. In general, lobbyists appear to be somewhat better at marshalling resources against change than for change.⁸⁸⁶ Mahoney found that the likelihood of lobbyists failing to attain their goal increases as the conflict on an issue increases.

[I]n the U.S. 30 per cent of advocates failed to attain any of their goal on issues with no conflict, but that figure more than doubled to 70 per cent on issues with directly opposing camps.”⁸⁸⁷

She also found that in the E.U., if an

advocate is active on an issue with no conflict, 75 per cent attain some level of success. If they are active on an issue with multiple perspectives that were not in direct opposition, 100 per cent attaining some level of success. And if they are active

⁸⁸⁴ The number of mass shootings varies depending on whether one counts the number of people shot or the number of people killed. By the former metric, in 2018, there was on average nearly one mass shooting per day (of four or more people) in the U.S. Yet, despite public pressure for gun control, the NRA has been successful in preventing any significant federal legislation, and much state legislation. In some states they have succeeded in loosening gun control laws. Lacombe argues that a great deal of the NRA’s lobbying success is due to the motivation of their members. This in turn is due to the NRA’s central role in forming the distinct and powerful social identity of being a gun owner. “[I]t has politicized this identity by framing gun control policies as not merely ill-conceived, but as existential threats to gun owners and the things they collectively value.” Matthew J. Lacombe, *supra* note 428 at 28; Melia Robinson, Skye Gould & Samantha Less, “There have been 307 mass shootings in the US so far in 2018 — here’s the full list”, (8 November 2018), online: *Bus Insid* <<https://www.businessinsider.com/how-many-mass-shootings-in-america-this-year-2018-2>>; Rifat Darina Kamal & Charles Burton, “Policy Gridlock versus Policy Shift in Gun Politics”, *supra* note 596 at 328.

⁸⁸⁵ Christine Mahoney, *supra* note 177 at 50.

⁸⁸⁶ Baumgartner *et al.* found a resource advantage helps defenders of the status quo more than it helps those pushing for change, at least over a two year term. Frank R. Baumgartner *et al*, *supra* note 59 at 233.

⁸⁸⁷ Christine Mahoney, *supra* note 177 at 48.

on an issue with directly competing perspectives they are most likely to achieve none of their lobbying goals.⁸⁸⁸

As discussed in Chapter 1, the influence of lobbying in Canada's political system likely lies between that of the E.U. and the U.S.⁸⁸⁹ Therefore, it is likely that lobbyists are also more successful when they seek to reinforce the status quo against lobbyists pushing for change. Due to the lower number of vetogates, Canadian lobbyists are unlikely to be able to hold the status quo when policy change is a priority for the bureaucracy or the governing party. In these cases, they most likely will have to adapt their position to seek compromises instead of trying to stop the change altogether. Still, it would be reasonable to conclude that Canadian lobbyists are also a force for stasis, albeit a slightly weaker one.

Grossmann's Dissent

Grossmann comes to a different conclusion. He found that "the frequency of interest group influence remained in a narrow range between just under 40 per cent and just over 60 per cent of enactments during the entire post-war period."⁸⁹⁰ Grossmann theorized that the lobbying interests competed with each other, cancelling out each other's influence, so despite the rise in the number of interest groups, interest groups' overall influence on the policy-making process did not increase.⁸⁹¹ His conclusion is problematic. If the majority of lobbying is working towards maintaining the status quo, then their influence would be seen primarily in a decline in the passage of large legislation.

Drutman has noted just such a decline, where the fewer large bills that do pass need an increasingly incoherent set of compromises and special favours to buy the support of the multitudes of competing interest groups.⁸⁹² This same pattern seems to be somewhat visible in Canada, with the increasing use of omnibus legislation.⁸⁹³ This increase might partly a result of the increased influence of lobbyists.

The Narrow Status Quo in Low Salience Areas

As previously discussed, lobbying by businesses in low salience areas is relatively successful. In these areas, the status quo effect of lobbying appears to be semi-strong but narrow. When a Fortune 1000 lobbyist requested an agency maintain its proposed rule as is, the organization's success rate is 94%. When the lobbyist requested a change to a proposed rule, the success rate is 31%.⁸⁹⁴ Yet low salience lobbying continues to be successful, because often there is no one lobbying in direct opposition to a particular change. Similarly, when lobbyists pursued a private good (e.g. a one-time land grant) and

⁸⁸⁸ *Ibid.*

⁸⁸⁹ Chapter 1 – Lobbying Regulation: Structural Political Difference that Impact the Practice of Lobbying, p. 44.

⁸⁹⁰ Matt Grossmann, "Interest group influence on US policy change", *supra* note 599 at 192.

⁸⁹¹ *Ibid.*

⁸⁹² Lee Drutman, *supra* note 172 at 3 & 29.

⁸⁹³ Between 1994 and 2005, budget implementation bills averaged 74 pages. Between 2006 and 2013 they averaged 309 pages, and increased to being presented twice a year (except in 2008). So from 1994 to 2013, the average size of omnibus budget implementation bills legislation increased over seven times from 74 pages to 550 pages. Louis Massicotte, "Omnibus Bills in Theory and Practice" (2013) Spring 2013 Can Parliam Rev 13–17 at 16.

⁸⁹⁴ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 235.

not a rule change, there was no statistically significant relationship between protecting the status quo and lobbying success.⁸⁹⁵ “For private goods, the key variable predicting policy success was the strength of the opposition. Stronger opposition reduced lobbying success.”⁸⁹⁶ Yet, for collective goods, Godwin *et al.* found that “firms opposing change were more likely to succeed than were firms proposing change. This result was stronger for regulatory lobbying than for congressional lobbying.”⁸⁹⁷

Low salience lobbying continues to create change, as long as there are not too many lobbyists opposing it in that particular area, and as long as the results would be a narrow private gain and not widespread collective benefit.

Lobbying’s Two Sided Effect

The overall increase in lobbying appears to have had a two sided result. On one side, the status quo is reinforced in high salience issues and low salience issues with communal outcomes. Big legislative change becomes more difficult as the vested interests dig in.⁸⁹⁸ On the other side, small regulatory changes providing private benefits become more prevalent, as the lobbying interests gain more influence and experience in low salience areas. Thus lobbying has increased dramatically, while “[m]ajor political change has become more difficult.”⁸⁹⁹ Increased lobbying by business interests is locking-in the status quo, increasing legislative friction. This pattern is quite apparent in the U.S. It appears to be taking hold in Canada as well.

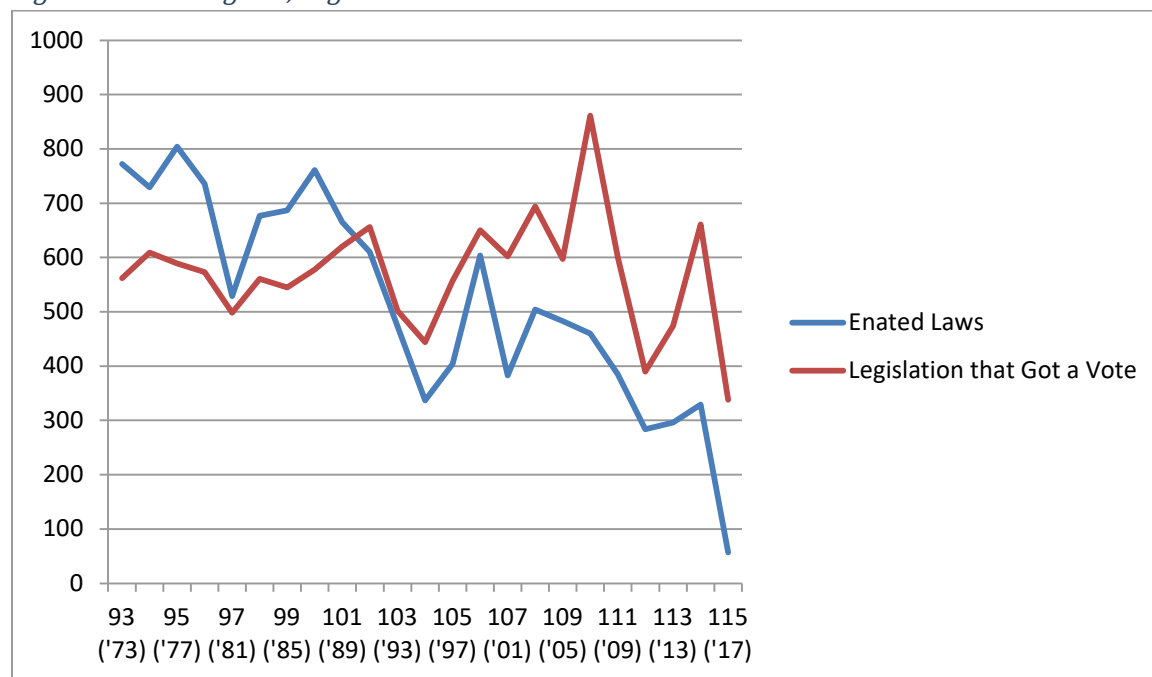
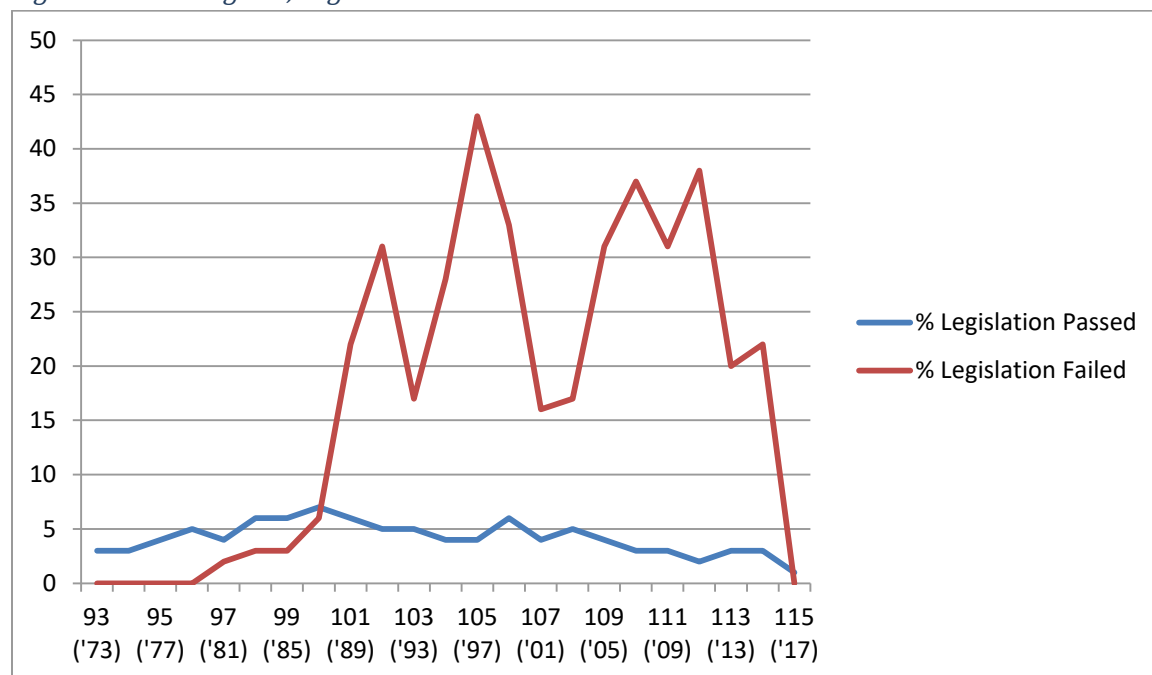
⁸⁹⁵ *Ibid.*

⁸⁹⁶ *Ibid.*

⁸⁹⁷ *Ibid.*

⁸⁹⁸ Similarly, Stephenson & Jackson hypothesize that lobbying might decrease the chance of large reforms that involve any changes to decision-making structure, as it is a risk to the connections and expertise the lobbyists rely upon to attract clients. Matthew Stephenson & Howell E. Jackson, *supra* note 878 at 19.

⁸⁹⁹ Lee Drutman, *supra* note 172 at 3 & 29.

Figure 6: U.S. Congress, Legislation Voted On and Enacted Laws Trend ⁹⁰⁰Figure 7: U.S. Congress, Legislation Passed and Failed Trend ⁹⁰¹

⁹⁰⁰ Govtrack, "Historical Statistics about Legislation in the U.S. Congress", (August 2017), online: [GovTrack.us](https://www.govtrack.us/congress/bills/statistics) <<https://www.govtrack.us/congress/bills/statistics>>.

⁹⁰¹ *Ibid.*

In the U.S., this lobbying pressure for the status quo is linked to the pressure interest groups can bring to bear on politicians through campaign donations. They can and do successfully push for inaction and the status quo by threatening to spend millions of dollars against the politician in the next election.⁹⁰² Canada's current campaign finance law has untied it from this added anchor dragging through the sea bed of the status quo.

A country mired in the status quo faces economic stagnation and long term peril.

[O]ne study found that the growth rates of captured economies over a three-year period were reduced by 10 percentage points, and raising regulatory barriers for new firms to enter the market stifles competition and the long-term health of the captured economy.⁹⁰³

Lobbying pressures officials to ignore problems that cannot be solved with business-friendly solutions, and to instead leave the status quo untouched.⁹⁰⁴ Over time governments seem to be becoming unable to adapt to their people's needs.⁹⁰⁵ If this trend continues, they will be unable to resist ecological and geo-political shocks. A country that cannot adapt to the changing needs of its citizens and environment risks long-term disaster and decline.⁹⁰⁶

Concern VI: Lobbying Corrupts Democracy

There has been a growing disenchantment with democratic and social institutions, and a corresponding weakening of democracy.⁹⁰⁷ "With Congress not functioning as expected, the trust deficit

⁹⁰² Michael Bennet, "Sen. Michael Bennet on why this is a Dismal, Sociopathic Era in Congress" (Podcast) Ezra Klein & Michael Bennet, (8 August 2017) s 27:35.

⁹⁰³ Norman Eisen et al, *supra* note 751 at 37.

⁹⁰⁴ "The large-scale result [of increased corporate involvement in politics] has not only been distortion of democratic priorities. It is also increasingly an immobilization of democracy." Lee Drutman, *supra* note 172 at 212.

⁹⁰⁵ Foa et al. argue that democracies worldwide are failing to address large social issues, and this is one of the factors leading to the growing dissatisfaction with democracy. R. S. Foa et al, *supra* note 5 at 10.

⁹⁰⁶ The U.S. appears to be experiencing this with its haphazard response to the Covid epidemic. Such governing failures put the most vulnerable and dependent on government at the most risk, since it can no longer adapt its policies to help them and they have less access to private resources to fill in the gap. See, Kathy Goldschmidt, *supra* note 219 at 8; Lee Drutman, *supra* note 172 at 238; See also, Raymond J La Raja & Brian F Schaffner, *Campaign Finance and Political Polarization: When Purists Prevail* (Ann Arbor: University of Michigan Press, 2015).

⁹⁰⁷ In 2017, the OECD found that "[v]oter turnout and trust in government have fallen in more than half of all OECD countries since 2005." In 2013, Canada 54% of people said the government is run by a few big interests, strongly indicating a concern about lobbying. In Norway it was 5%, in the U.S. 63%, and in Israel it was 73%. Switzerland, Denmark, Finland, and South Korea do much better than most countries on this score, and a deep study of the differences in lobbying involving these countries might be fruitful. Most major Canadian institutions were seen as somewhat corrupt (3.0/5), with the political parties seen as very corrupt (3.9/5). The majority of Canadians said that the level of corruption had increased over the last two years, although that may have been influence by the lingering effects of the 2008 financial crisis. Notably, 3% of Canadians reported paying a bribe to the judiciary. Freedom House finds that there has been a worldwide decline in freedom since 2005. Among democracies, the U.S. has seen a decline in democracy over the last decade, as has Hungary, Poland, Serbia, Turkey and Venezuela. *How's Life 2017? Measuring Well-Being - 60 second guide*, by OECD, Better Life Initiative (Paris: OECD Publishing,

between citizens and legislators is growing, demonstrated in part by historically low congressional approval ratings.”⁹⁰⁸ There has been a marked decline in political participation in the U.S.⁹⁰⁹ In Canada, the story is a little more mixed, but the trend in democratic participation and faith in democratic institutions is still downwards.⁹¹⁰ The impact of lobbying is likely a factor in the increasing distrust. Lobbying increases corruption; increases the appearance of corruption; and otherwise enfeebles democracy.

Lobbying Increases Corruption

Corruption transfers wealth from the people to the corrupt, causes mismanagement, spreads itself, is self-entrenching, and undermines the public’s faith in democracy.⁹¹¹ As discussed in Chapter 1, democracy is based on the consent of the governed, legitimacy, justice, public trust and the governing in the public’s interest.⁹¹² Corruption sabotages these essential attributes of democracy. Authors such as Lessig and Kimball *et al.* make a convincing case that lobbying increases corruption. Their argument is buttressed by the evidence of lobbying’s effectiveness and the gap between government policy and public preference.⁹¹³ When evaluating the current practices of lobbying, we must account for lobbying’s connection to *quid pro quo* and circumspect bribery; the corrupting influence of the gift economy; dependency corruption; and regulatory capture.

Quid Pro Quo Corruption and Circumspect Bribery

There is a tendency to treat direct *quid pro quo* corruption as solved. However, it is an ever-green problem in need of constant resisting, and lobbying appears to be a significant factor in its continuous rebirth. Craig and Luneburg argue that lobbying can “significantly impair the operation and undercut the perceived legitimacy of a governmental system, producing monetary enrichment or other private benefits for public office holders”⁹¹⁴. When officials are repeatedly approached with requests for favours, there is a good chance that at some point officials and lobbyists will cross the line and come to an agreement that enriches the official. Minor cases arise regularly, and a national scandal is exposed perhaps once a year.

2017) at 1; *Global Corruption Barometer 2013*, by Deborah Hardoon & Finn Heinrich, ISBN: 978-3-943497-36-6 (Transparency International, 2013) at 15 & 35; *Corruption Perception Index 2018*, by Transparency International (Transparency International, 2019); Freedom House, *supra* note 5 at 21. Foa *et al.* find a similar declining faith in democracy. They found 2019 to have the highest level of global dissatisfaction with democracy since their tracking started in 1995. R. S. Foa *et al.*, *supra* note 5 at 2.

⁹⁰⁸ Kathy Goldschmidt, *supra* note 219 at 8.

⁹⁰⁹ Timothy K. Kuhner, *supra* note 51 at 8.

⁹¹⁰ Jesse Ferreras, “Canada Voter Turnout In This Election Was The Highest In 2 Decades”, (20 October 2015), online: *HuffPost Can* <http://www.huffingtonpost.ca/2015/10/20/canada-voter-turnout_n_8335662.html>.

⁹¹¹ Gajan Retnasaba, *supra* note 278 s 1.1. “Beating corruption is crucial to healthy democracy. There are no full democracies that score below 50 on the CPI [Corruption Perception Index]. Similarly, very few countries that have autocratic characteristics score higher than 50.” Transparency International, *supra* note 907.

⁹¹² Chapter 1– Lobbying Regulation in Canada and the U.S.: Definition, p. 30.

⁹¹³ Lawrence Lessig, *supra* note 273 at 138; David C Kimball *et al.*, *supra* note 627 at 20.

⁹¹⁴ Craig Holman & William Luneburg, “Lobbying and transparency”, *supra* note 96 at 78.

The Ohio nuclear bribery scandal is a good example of the connection between corruption and lobbying (and regressive pro-climate change legislation). In July 2020, the Ohio House Speaker Householder, his advisor and three lobbyists (including the former Ohio Republican Party chairman) were arrested for accepting \$61 million in bribes from FirstEnergy to help pass a \$1.3 billion bailout to subsidize nuclear and coal plants. The legislation also rescinded the state's clean energy goals. The corruption scandal included direct bribery, heavy lobbying by the company and the indicted lobbyists, astroturf lobbying, a dark money organization, and elements of campaign funding.⁹¹⁵ FirstEnergy heavily funded Householder and many of the other supportive legislators' primary campaigns.

A more general hint of corruption can be found in the stock market. In theory, legislators, officials, and those aides above a certain income are supposed to hold their stocks in blind trusts. Yet, the stock portfolios owned by legislators and their aides significantly and repeatedly outperform the stock market.

Over a four-year period ... The investments of U.S. senators beat the stock market by an average of 12 percent per year. The stocks that senators bought showed an average gain of 25 percent during the next twelve months; the stocks that senators sold averaged a 0 percent gain during the next twelve months.⁹¹⁶

They must be engaged in some level of subtle corruption, because such consistent gains are impossible.⁹¹⁷ In this light, it is a bad sign that President Trump has demonstrated that one can blatantly disregard even the pretence of a blind trust. For instance, he doubled the already high membership fee to his Mar-a-Lago golf course and then started conducting government business there after his election – giving those who joined a way to pay him for direct lobbying access.⁹¹⁸ He might be setting a new lower norm, if other officials decide nothing better is expected of them. On the other hand, public shame is a powerful motivator against corruption for most people, and officials might find themselves psychologically constrained from following this example.⁹¹⁹

⁹¹⁵ Dan Gearino, *supra* note 347. A dark money group Generation Now ran an astroturf lobbying campaign against a grassroots attempt to repeal the law. The groups hired blockers to stall signature collectors opposed to the bailout. The “non-profit” 501(c)4 group seems to have been a front for Householder, and the method he used to funnel the bribes. For a discussion of dark money, see Chapter 4 – Private Campaign Financing and Lobbying: The Influence of Campaign Contributions: Campaign Contributions Grant Influence: The Curious Case of Dark Money, p. 251.

⁹¹⁶ Milyo raised some question about the study's conclusion; but he noted that there is still good reason to be concerned that some high level officials are enriching themselves, their loved ones, or their associates. R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 64; Jeffrey Milyo, “Corporate Influence and Political Corruption: Lessons from Stock Market Reactions to Political Events” (2014) 19:1 *Indep Rev* 19–36 at 31.

⁹¹⁷ For example, Bernard Madoff's investment fund's consistent returns were a sign of his use of a Ponzi scheme. James B Stewart, “How they failed to catch Madoff”, (10 May 2011), online: *Fortune* <<http://fortune.com/2011/05/10/how-they-failed-to-catch-madoff/>>.

⁹¹⁸ Bess Levin, *supra* note 834.

⁹¹⁹ Jonn Elledge, “Donald Trump is literally shameless. That will make it impossible to hold him to account”, (21 November 2016), online: *NewStatesman* <<https://www.newstatesman.com/microsites/us/2016/11/donald-trump-literally-shameless-will-make-it-impossible-hold-him-account>>; Daniel Dale, *supra* note 828.

The norms against corruption in Canada appear to be healthier, and Canada rates higher on anti-corruption lists.⁹²⁰ On the other hand, the Canadian policy process is particularly closed and secretive; Canadian trusts and numbered shell corporations, moreover, are easy to establish and hard to pierce.⁹²¹

It is clear that in the U.S. campaign donations are intimately tied to lobbying and lobbying success. Beyond gaining access, the former lobbyist Jimmy Williams recounts how blatant the *quid pro quo* of donation and favour could become. He recalls his meeting with one explicitly corrupt congressman.

“Jimmy, we’ve called your PAC fundraiser on numerous occasions, and she hasn’t returned our calls. So why exactly are you here for a meeting?” He held in front of me a call sheet with the times and dates both he and his fundraiser had called us for donations. They were highlighted in yellow. And my only response was, “I don’t know, Congressman, but I’ll take care of it.” He told me he hoped so and then said I could bring my clients into his office ... we sat down as if nothing had happened, he said he supported every one of our pertinent legislative issues ... and the legislation my clients wanted eventually passed the House and Senate and was signed into law. How easy could an all-but-basic bribe have been, really? ... Thank God nothing quite as explicit ever happened again after that — but the winking and the nodding, that kept going and going and going.⁹²²

Williams concludes that,

[e]very fundraiser was yet another legal bribe. Every committee hearing I’d look up and think, “I just bought his vote.” And every time I got a bill passed or, better yet,

⁹²⁰ In 2018, Transparency International rated Canada as 9th and the U.S. as 22nd out of 180 countries in their perceived levels of public sector corruption (1st being the least corrupt). Transparency International, *supra* note 907.

⁹²¹ *Anti-money laundering and counter-terrorist financing measures: Canada*, by The Financial Action Task Force & The Asia/Pacific Group on Money Laundering (Paris, France: International Monetary Fund, 2016) at 101. The fact that Finance Minister Bill Morneau failed to blind trust and sell off his ownership stake in his family’s pension services company indicates that some officials do avoid the use of blind trusts. However, it is a good sign that it became a national scandal in 2017, indicating Canada’s norms are relatively healthy on this front. Brian Platt, “Morneau says he’ll set up a blind trust, divest Morneau Shepell shares | National Post”, (21 November 2017), online: <<https://nationalpost.com/news/canada/bill-morneau-will-put-his-assets-in-blind-trust>>.

⁹²² Jimmy Williams, “I was a Lobbyist for More than 6 Years. I Quit. My Conscience Couldn’t Take it Anymore.”, (29 June 2017), online: Vox <<https://www.vox.com/first-person/2017/6/29/15886936/political-lobbying-lobbyist-big-money-politics>>.

killed, I'd think to myself, "That wouldn't have worked if I hadn't bought the outcome."⁹²³

The corrupting nature of the *quid pro quo* of campaign donations to feed personal political success can be just as damning as other forms of bribery. Many politicians are innately ambitious, wishing to rise to higher political office, and campaign donations help them achieve what they want most. There are also ways to turn campaign donations into influence over other politicians, or even eventually keep it after leaving office, by using ongoing salary positions or a leadership PAC.⁹²⁴

Canada's stricter campaign donation rules should restrict this particular form and path of corruption on the federal level, and increasingly on the provincial level, as new regulations are enacted. However, as many of my interview subjects stated, "pay to play" access at expensive fundraising events is still an issue.

The Corrupting Influence of the Social Exchange Gift Economy

As we discussed in Chapter 2, officials and lobbyists operate within a social exchange gift economy.⁹²⁵ The gifts and help lobbyists provide do not go ignored.⁹²⁶ The social exchange has an effect.⁹²⁷ The social obligations pressure officials to value favours for lobbyist over their more abstract obligation to the wider public. Kristianson found that there is strong evidence that gift economies are quite influential, and politicians are heavily influenced in their decision-making by the gifts received from lobbyists and special interests.⁹²⁸

More obviously corrupting than small gifts are job offers. Abramoff certainly believed that job offers were key to buying influence among aides and officials.⁹²⁹ He was probably right. In the aggregate, it is likely that officials will be biased towards the preferences of the lobbying interests that offer them lucrative employment possibilities over the abstract preferences of the people they currently represent, particularly in regards to low salient policy-decisions. Although such job offers are technically illegal, the restrictions are far from sufficient. Moreover, some decisions might be made not with a specific offer at hand, but the general knowledge that if one shows favours for a well-funded lobbying group, there is quite likely to be a job waiting once one leaves office paying five, ten, or fifteen times the

⁹²³ *Ibid.*

⁹²⁴ Steve Spires, "Politicians Have Numerous Options for Unused Campaign Cash After Leaving Elected Office", (1 March 2010), online: *OpenSecrets Blog* <<https://www.opensecrets.org/news/2010/03/the-retirement-announcement-la/>>; Ethan Trex, "What Happens to Leftover Campaign Funds When a Candidate Drops Out?", (22 February 2016), online: *Ment Floss* <<http://mentalfloss.com/article/29636/what-happens-leftover-campaign-funds-when-candidate-drops-out>>.

⁹²⁵ See Chapter 2 – Understanding Lobbying in Canada and the U.S.: Understanding Lobbying: What Do Lobbyists Do: Social Exchange Theory, p. 72; & Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Disclosure versus Corruption Approach: The Corruption Heuristic, p. 112.

⁹²⁶ Lawrence Lessig, *supra* note 273 at 114.

⁹²⁷ Gajan Retnasaba, *supra* note 278 s 1.2.

⁹²⁸ Gerry Kristianson, *supra* note 154 at 202.

⁹²⁹ Jack Abramoff, *supra* note 1 c 6.

government salary. Job offers to sitting officials by lobbyists are corrupting. The consistent hiring of former officials by lobbyists is only slightly less corrupting. It creates an environment of dependency corruption.

Dependency Corruption

As discussed in Chapter 2, Lessig argues that dependency corruption is a form of venal corruption where politicians have to rely on the economic elites in order to maintain political power.⁹³⁰ The politicians pay disproportionate attention to the preferences of the wealthy, leading to a deliberate currying of their favour and an embrace of their world view. This narrows the decision space politicians (and the other officials they appoint) operate within.⁹³¹ This dependency corruption is magnified by any capacity decline. As covered previously, Retnasaba argues that over time this dependency corruption can become a stronger and stronger motivating force; the role of lobbyists becomes increasingly related to dependency corruption and unrelated to communicating information.⁹³² The political influence moves further and further from type v rationality.

Similarly, Dawood argues when the inequality becomes too entrenched, it becomes a form of systematic dependency corruption in which those elites with money have privileged access to the political process, creating political inequality that entrenches their wealth and power.⁹³³ This is another facet of the vicious spiral into increasing economic and political inequality we discussed previously.⁹³⁴

Regulatory Capture

Regulatory capture is an ever-greening issue. Regulators can be captured via the revolving door, as previously discussed. Alternatively, sometimes the mindset of regulators is captured by those whom they regulate, forming a cognitive capture. “[P]ersuasion is easier if the target of your efforts begins from a sympathetic position.”⁹³⁵ Industries lobby heavily for the appointment of regulators who are already sympathetic to their preferences.⁹³⁶ This is often not difficult; the perceived importance and status of industry, the information their lobbyists provide, the framing effect, and the repeated interactions with them creates a sense of affiliation.⁹³⁷ Stiglitz discussed his first-hand experience with

⁹³⁰ See Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Disclosure versus Corruption Approach: The Corruption Heuristic, p. 112.

⁹³¹ Lawrence Lessig, *supra* note 273 at 145.

⁹³² Gajan Retnasaba, *supra* note 278 s III.4.

⁹³³ Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights Under the *Charter*” (2013) 51:1 Osgoode Hall Law J 251–296 at 282.

⁹³⁴ “Income inequality and political polarization have become mutually reinforcing, creating the vicious circle that now manifests itself daily in the erosion of norms around civility and truth telling, the declining trust in political institutions, legislative gridlock and political dysfunction.” Steven Pearlstein, *Can American Capitalism Survive: Why Greed Is Not Good, Opportunity Is Not Equal, and Fairness Won’t Make Us Poor* (St. Martin’s Press, 2018).

⁹³⁵ “That is why banks and their lobbyists work so strenuously to ensure that the government appoints regulators who have already been “captured” in one way or another. The bankers try to veto anyone who does not share their belief.” Joseph E. Stiglitz, *supra* note 38 c 2, s Politics: getting to set the rules and pick the referee.

⁹³⁶ *Ibid.*

⁹³⁷ Stiglitz notes that neither Alan Greenspan nor Tim Geithner actually worked for a big bank before coming to the Federal Reserve, but they seemed to share the bankers’ mindset. Even though the 2008 financial crisis was caused

regulatory capture during the Clinton administration’s appointment process to the Federal Reserve. He found that the lobbyists for the banks wielded great influence over the appointment.

If any of the potential nominees deviated from the party line that markets are self-regulating and that the banks could manage their own risk—there arose a hue and cry so great that the name wouldn’t be put forward or, if it was put forward, that it wouldn’t be approved.⁹³⁸

It makes sense to consult the industry when drafting regulations, but often officials go further, and the industry is so intimately involved in drafting the rules that it can no longer be considered a form of oversight.⁹³⁹ The more politically connected businesses can draft the regulations to shape the marketplace to their advantage. Having that power, it would be a failure of their fiduciary duty not to do so. This issue with fiduciary duty and the corporate personality is discussed in depth in Chapter 6.⁹⁴⁰

This type of capture poses an obvious risk of corruption. Skocpol and Hertel-Fernandez argue that the influence from the revolving door and regulatory capture far exceeds that of large donations or general lobbying contact.⁹⁴¹ Duchin and Sosurya found that U.S. financial institutions that employed revolving door lobbyists who had worked in government were more likely to receive funding from the Troubled Assets Relief Program during the 2008 financial crisis.⁹⁴² Applying this reasoning to the shadow political parties, one must conclude that dependency corruption is heavily fostered by shadow political parties like the AFP. Its revolving door between working within the government and working as a lobbyist provides the “most pervasive and subtle form of leverage”⁹⁴³.

Here the Trump administration seems to have gone further than previous administrations, moving beyond limited regulatory capture to a deliberate strategy of a widespread giveaway of the bureaucracy to business interests. President Trump’s appointment process crossed a boundary that was only skirted before, almost as if each department existed solely for the lobbyists.

by the banks, they seemed to agree with the banks that there was no need to impose stringent conditions on the banks in the bailout. *Ibid.*

⁹³⁸ *Ibid.*

⁹³⁹ “When we wonder how it is that the financiers get so much wealth, part of the answer is simple: they’ve helped write a set of rules that allows them to do well, even in the crises that they help create.” *Ibid* c 2, s Financial liberalization.

⁹⁴⁰ Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: The Nature of the Corporate Lobbying: Corporate Personality, p. 352.

⁹⁴¹ Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 29. Correia found that firms that employ former members of the Security Exchange Commission have reduced regulatory and enforcement costs. Maxime Boucher, *supra* note 2 at 321.

⁹⁴² Maxime Boucher, *supra* note 2 at 320.

⁹⁴³ Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 29.

Scott Pruitt's appointment to head the EPA is a good example of this corruption.⁹⁴⁴ It is clear that Pruitt was opposed to the EPA's mission, actively working to destroy the EPA from within. He is an anti-environmental climate change denier who has previously sued the EPA fourteen times. As head of the EPA, Pruitt pushed for America's withdrawal from the Paris climate accord; removed all discussion of climate change from EPA websites; and had the EPA refuse to discuss climate change in light of record hurricanes. He was clearly following Prime Minister Harper's playbook of muzzling scientists, deleting data and suppressing environmental reports.

Scott Pruitt has moved to undo, delay or otherwise block more than 30 environmental rules, a regulatory rollback larger in scope than any other over so short a time in the agency's 47-year history, according to experts in environmental law.⁹⁴⁵

He established a pattern of giving the business lobbyists exactly what they wanted. He filed a legal plan to repeal rules curbing pollution in waterways; delayed implementing a rule preventing explosions and spills at chemical plants; reversed a ban on a pesticide that damage children's nervous systems; met with agriculture lobbyists who wanted to repeal a rule restricting fertilizers use near waterways, then drafted a plan to do so; met with the board of directors of the American Petroleum Institute who wanted to repeal a rule restricting methane leaks from drilling wells, and then filed to delay the rule by two years, regardless of its disproportionate effect on children; and so on.⁹⁴⁶ He was deeply connected to lobbyists, and took their advice over that of the scientists and civil servants within his department.⁹⁴⁷ Outside watchdogs concluded, "[i]t amounts to a corporate takeover of the agency, in its decision- and policy-making function"⁹⁴⁸. There was no democratic support for these changes.⁹⁴⁹ Most Americans

⁹⁴⁴ Another example can be found in the appointment of Trump donor Louis DeJoy to Post Master General. DeJoy, is a former CEO, chairman and board member of a number of shipping companies. He is actively degrading postal service both as a means of impairing mail in voting so as to support Trump's re-election, and likely because DeJoy has \$35 to \$75 million invested in private delivery services that compete with the postal service. Indeed, it is unlikely a man rich enough to donate over \$1.2 million to Trump's election campaign would want to be Post Master General without a return that outweighed the cost of the donations. His actions are both anti-democratic and corrupt. It is revolving-door corruption, combined with a corruption due to a failure to divest from specific stocks, combined with a rampant disregard for democracy, combined with the Trump administration's pattern of appointing officials actively dedicated to sabotaging the public service they are overseeing. President Trump has actually admitted that he is having the U.S. Post incapacitated in order to disrupt mail-in voting, so he can seize a second term. His goal is an authoritarian coup, and his method is the sabotaging of democracy. Chelsey Cox, "Fact check: New postmaster general invested in Postal Service competitors", (13 August 2020), online: *USA TODAY* <<https://www.usatoday.com/story/news/factcheck/2020/08/13/fact-check-postmaster-general-louis-dejoy-invested-competitors/5550480002/>>; John Nichols, "Donald Trump and His Postmaster General Are Sabotaging Democracy in Plain Sight" *The Nation* (13 August 2020), online: <<https://www.thenation.com/article/politics/dejoy-usps-postmaster-general/>>.

⁹⁴⁵ Nichols, *supra* note 33.

⁹⁴⁶ Coral Davenport, "Counseled by Industry, Not Staff, E.P.A. Chief Is Off to a Blazing Start", *N Y Times* (1 July 2017), online: <<https://www.nytimes.com/2017/07/01/us/politics/trump-epa-chief-pruitt-regulations-climate-change.html>>.

⁹⁴⁷ *Ibid.*

⁹⁴⁸ *Ibid.*

want the government to do more to protect the air (64%) and water (69%).⁹⁵⁰ Indeed, President Trump and his administration had explicitly promised strict environmental protections.⁹⁵¹ Even in his core base, only a small fraction (~16%) support the roll-back of these environmental protections.⁹⁵²

Pruitt is also an example of how an official becomes entangled with key special interests and their lobbyists, and continues to co-operate with them as he moves through government positions. He was originally deeply allied with the Republican state attorneys general network, and fossil fuel-related companies like Exxon Mobil, Koch Industries, Murray Energy, and Southern Company. These companies donated to the network and worked closely with him on many of the suits he launched against the EPA.⁹⁵³ This alliance continued in the EPA, where he outsourced many decisions to this group and relied

⁹⁴⁹ In 2019, 65% of Americans said that environment should be given priority, even at the risk of curbing economic growth, whereas only 30% would prioritize the economy over the environment. (Although more environmental protection and actions to prevent climate change would likely increase economic growth and the standard of living; for more discussion see Introduction: Inspiration – Climate Change, p. 4; and Appendix: Glossary / List of Theories: Porter Hypothesis, p. 640.) Gallup found that in 2018, 74% of Americans favour higher emission and pollution standards for business, and 25% oppose it; 73% favour stronger federal enforcement of environmental standards, and 26% oppose it; 76% favour spending government money on developing solar and wind, and 23% oppose it; 67% favour mandatory controls on greenhouse gases, and 31% oppose it; and 66% favour higher emission standards for automobiles, and 33% oppose it. Yet, the Trump administration is seeking to roll-back fuel efficiency standards. Gallup, “Environment - In Depth Topic”, (February 2020), online: *Gallup.com* <<https://news.gallup.com/poll/1615/Environment.aspx>>.

⁹⁵⁰ In 2018, 69% of U.S. adults want the federal government to do more to protect water (lakes, rivers, streams), and 64% want more protection of air quality. Only 6 % and 8% want less environmental protection for water and air. 67% of U.S. adults support more government action to reduce the effects of climate change, while 14% oppose it; 63% support more government action to protect animals and their habitats, while 9% oppose it; and 57% support more government action to protect national parks and preservers, while 8% oppose it. , *Majorities See Government Efforts to Protect the Environment as Insufficient*, Data, by Cary Funk et al, Data (Washington, D.C.: Pew Research Center, 2018) at 2.

⁹⁵¹ President Trump has always been a climate change denier, but he did promise “to promote clean air and water.” Scott Pruitt also promised that the Trump administration would impose even stronger clean air protections than the Obama administration had set. In January 2018, the EPA announced it was eliminating a rule from 1995 requiring the use of best achievable technology for pollution control. The rule applied to 200 air pollutants, including lead and mercury, and had reduced their output by up to 95%. Even as the data shows that U.S. had 15% more days with unhealthy air between 2017-2019 under his administration, “Trump has touted clean air and water as a touchstone of his administration’s success, boasting of “crystal clean water and the cleanest and the purest air on the planet.” Jonathan Chait, “Trump Promised to Ignore Climate Change But Have Clean Air. He Lied.”, (26 January 2018), online: *Intelligencer* <<https://nymag.com/intelligencer/2018/01/trump-promised-clean-air-he-lied.html>>.

⁹⁵² Republican adults want the federal government to do more to protect the environment. A majority, 63% of moderate Republicans and 39% of conservative Republicans, want more government protection for water quality. A plurality, approximately 58% of moderate Republicans and 26% of conservative Republicans, want more environmental protection for air quality. Approximately 50% of conservative Republicans say the government is doing the right amount to protect air and water. Only 14% and 18% of conservative Republicans want laxer water protection and air protection, respectively. Cary Funk et al, *supra* note 950 at 6.

⁹⁵³ Since 2013, the Republican state attorneys general network collected \$4.2 million from fossil fuel-related companies like Exxon Mobil, Koch Industries, Murray Energy and Southern Company. Scott Pruitt was enmeshed in a deep web of related alliances, social favours and lobbying. Coral Davenport, *supra* note 946.

heavily on their opinions. These alliances with lobbyists empower the official, but increase dependency corruption. The incentives are misaligned.

Pruitt's actions in the EPA show how lobbying can corrupt government, enabling low salience unpopular policies and damaging public well-being. After Pruitt resigned for ethical violations, he was replaced by Andrew Wheeler, a former coal industry lobbyist who continued all the same pro-polluter policies without the highly visible ethical lapses. The indirect death toll of Pruitt's and Wheeler's actions will likely be in the tens of thousands, and if they succeed in setting back action against climate change enough, then orders of magnitude more than that.⁹⁵⁴

Lobbying is intimately tied to *quid pro quo* and circumspect bribery, the corrupting influence of the gift economy, dependency corruption, and regulatory capture. The disclosure heuristic fails to take lobbying's connection to corruption seriously. In contrast, the corruption heuristic takes it into account, and calls out for more stringent regulations to manage influence.

Lobbying Creates the Appearance of Corruption and Unfairness

Lobbying as it is currently practiced poses a fundamental problem: it creates the appearance of corruption and unfairness. This is untenable in a democracy, raising serious doubts about the process and calling out for rectification.

In *Buckley v. Valeo*⁹⁵⁵, the U.S. Supreme Court held that campaign donations were protected by the First Amendment, and thus could only be regulated and restricted by very specific justifications. It did not accept fairness and equality as one of these justifications. It did, however, accept reducing the "appearance of corruption" as a valid reason to restrict campaign donations. Because of this, much of the American discourse regarding campaign finance and the related field of lobbying had sculpted its

⁹⁵⁴ The World Health Organization summary assessment, "taking into account only a subset of the possible health impacts, and assuming continued economic growth and health progress, concluded that climate change is expected to cause approximately 250 000 additional deaths per year between 2030 and 2050; 38 000 due to heat exposure in elderly people, 48 000 due to diarrhoea, 60 000 due to malaria, and 95 000 due to childhood undernutrition." The numbers do not include deaths from climate-change caused wars (as arguably the Syria civil war was) which are estimated to reach 390,000 in Africa alone by 2030. It does not include deaths from hurricanes, tornadoes, wild fires, air pollution, floods, drought, premature infrastructure decay, and storm surges. It also does not include the huge loss to the biodiversity, health, and beauty of our planet. World Health Organization, "Climate Change and Health Fact Sheet", (1 February 2018), online: *World Health Organ* <<https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>>; For more detail see, *Impacts of 1.5°C Global Warming on Natural and Human Systems.*, by Hoegh-Guldberg, O, D Jacob, M Taylor, M Bindi, S Brown, I Camilloni, A Diedhiou, R Djalante, KL Ebi, F Engelbrecht, J Guiot, Y Hijikata & S Mehrotra, A Payne, SI Seneviratne, A Thomas, R Warren, and G Zhou, Global Warming of 1.5°C: an IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty (IPCC, 2018); David Wallace-Wells, *supra* note 11 at 78,125.

⁹⁵⁵ *Buckley v Valeo*, [1976] 424 US 1.

concerns to fit within the “appearance of corruption” concept.⁹⁵⁶ Chapter 7 and Chapter 8 will cover this in more depth. Canadian jurisprudence takes a broader view of the subject, holding both that fairness and the appearance of government integrity are valid justifications for campaign finance regulations.⁹⁵⁷ Still, the appearance of corruption is an important point in Canadian law and democratic theory, and a good reason to bring government oversight to bear.

Dawood argues that corruption damages democracy by taking away citizens’ opportunities and rights to influence policy-making, robbing them of their inherent equality.⁹⁵⁸ By this reasoning, when government policy-making appears to be too unfair, it bleeds into an appearance of corruption. If entrenched inequality creates corruption, then the appearance that inequality is becoming entrenched creates an appearance of corruption.

Both the practice of lobbying and the dominance of the business interests feed into this appearance of corruption.

The Practice of Lobbying

The public servants, former politicians and lobbyists I’ve interviewed all treat lobbying as a day-to-day activity that forms a legitimate part of governing. I believe they underestimate how corrupt lobbying appears to be for the average person. The spectre of backroom deals and closed door discussion between powerful connected lobbyists and officials creates the appearance of illegitimate activities. The lobbying registries help create some transparency, but they are far from perfect. Moreover, as Lessig argued, they might merely let people see the amount of oil leaking from the well, but not prevent the ongoing disaster. The transparency on its own can make the appearance of corruption worse, by showing how much lobbying there is while not doing much to constrain or regulate it. Americans are deeply concerned about political corruption, and they see lobbyists as even more unethical than members of Congress.⁹⁵⁹

Citizens recognize that the incentives in the political system favour the interests of lobbyists. This creates a reasonable apprehension that officials may be biased. Regardless of the effectiveness of lobbying, citizens see the vast amounts being spent, the increase in inequality, and the large number of officials who go on to engage in lobbying. They see a system where some decisions made by government appear to be deeply influenced by the views of moneyed interests, and in which the same elites keep cycling through it to get another piece of the pie.

Even if officials were scrupulously honest, they reap huge increases in pay as lobbyists. For the citizens, this raises the reasonable question of whose interests the officials are working for while in

⁹⁵⁶ Yasmin Dawood, “Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Context” (2006) 4 Int J Const Law 269 at 278.

⁹⁵⁷ *Harper v. Canada (Attorney General)*, *supra* note 53 at paras 120 & 121; *R. v. Carson*, *supra* note 537 at para 39.

⁹⁵⁸ Yasmin Dawood, “Democracy, Power, and the Supreme Court”, *supra* note 956 at 281.

⁹⁵⁹ Lee Drutman, *supra* note 174; Jeffrey Milyo, “Corporate Influence and Political Corruption”, *supra* note 916 at 21.

office. Certainly, many work genuinely in the public interest, sometimes making pro-business decisions on legitimate grounds. However, the citizenry has little way of knowing when this is true. Draca argues this public perception hurts our political institutions.

A key problem emerges when the incentives that are in place align the personal interests of the political class with special interests seeking to influence public policy. When this alignment of interests is recognised by the public ... it weakens overall trust in our political institutions.⁹⁶⁰

Business Interests Over-Represented Creates an Appearance of Corruption

The dominance of business interests in lobbying adds to this appearance of corruption. In a representational democracy both popularity and passion are legitimate political pressures. However, the inequality of the lobbying representation undermines the validity of the passion it represents. Even if one were to assume that the vast advantages business interests have in lobbying do not lead to unbiased outcomes and framing issues, the public would still have a legitimate concern about business lobbyists. The huge number and disproportionate strength of the business lobby creates a perception of unfairness and corruption.

Democratic governing is both about results and process. Even if the results of the disproportionate business lobbying were neutral, the process is not currently balanced. As we have discussed, the Sunlight Foundation concluded that the top 10% or so of the population does 80% of the lobbying.⁹⁶¹ The remaining 90% of the population is pushed to the margins, and can rightly consider the process unfair. This creates an appearance of an unfair process, which in turn creates the belief that there is corruption.

To counter the population's natural inference of corruption, government needs to structure the lobbying process so that it is and appears to be well-regulated and above board. So far it has only taken minor steps to do so. The public needs to trust that politicians are working honestly in the public interest. Vigorous steps should be taken. A fence around government decision-making needs to be constructed that protects it from the pernicious elements of lobbying identified here, in order to counter the appearance of corruption and unfairness.

A Fence around Decision-Making

In Jewish tradition, there is a concept that when a vital law is at stake, one goes a little further for safety's sake, and creates a fence around it.⁹⁶² This is known as *khumra* (or *chumra*), which means to "build a fence around the Torah". For example, if the technical law says a local judge should not oversee

⁹⁶⁰ Mirko Draca, *supra* note 211 at 5.

⁹⁶¹ Lee Drutman, *supra* note 670.

⁹⁶² This comes from the requirement in Deuteronomy 22:8 to put a fence around the flat roof when you build a house, so you are not responsible for people falling off it. For the Rabbinic extension of the concept, see the *Babylonian Talmud Eruvim* 100b.

a case where he owes a plaintiff money, because of the risk of feeling indebted, we might add the fence that a judge should also not oversee a case where a plaintiff has done him a substantial favour, for risk of feeling gratitude. We can apply a similar concept of fencing to evaluate how rules regulating lobbying can be structured to both guard against the corruption of government decision-making, and to create a fence of good practices to prevent the appearance of corruption. This makes all the more sense in consideration of political influence as a hydraulic force. By building a fence against the appearance of corruption, one is more likely to take the entire political landscape into account, and properly design standards that truly resist and channel the hydraulic pressure of political influence.

It should be noted that so far studies have not found a clear link between a country's lobbying regulations and its population's perception of governmental corruption.⁹⁶³ It is unlikely that the current lobbying regulations are strict enough or known well enough to give that public perception. In my interviews and personal interactions, Canadians believe that their much stricter and more prominent campaign finance regulations decrease political corruption. If campaign finance regulations can decrease the appearance of corruption, lobbying regulations should be able to do the same. The Canadian government has taken important steps towards maintaining trust in the government and insulating government from the deleterious elements of lobbying by creating the Office of the Commissioner of Lobbying of Canada, setting it apart as an independent officer of Parliament, and creating rules on disclosure and a code of conduct. Yet, more can and should be done to create a fence that guards against the appearance of corruption and helps re-affirm faith in Canadian governance.

Lobbying Indirectly Weakens Democracy

Lobbying indirectly weakens democracy.⁹⁶⁴ It can lead to governmental capacity decline, push citizens to rely on business interest to champion their democratic engagement, and creates additional demand for ideologically-based think tanks.

The more useful lobbying is in providing information to officials, the more tempting it is for government to cut its own capabilities, until it relies ever-more on lobbyists.⁹⁶⁵ As we have established, lobbyists generally seek to maintain the status quo, reducing the government's ability to adapt to large and often unpredictable events.

We may be beyond a tipping point where there are just too many people, too much communication, too much pressure, and too many crises for Senators and

⁹⁶³ Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 111. According to the rankings in the Transparency International's Corruption Perception Index.

⁹⁶⁴ Lawrence Lessig, *supra* note 273 at 138; David C Kimball et al, *supra* note 627 at 20.

⁹⁶⁵ For example, in 1998 BC streamlined its oversight of the fossil fuel sector by forming the Oil and Gas Commission, which it funded through industrial fees and levies. After the BC Liberal government embarked on a program of deep cuts to the public sector, the ministries came to rely on the Oil and Gas Commission for its expertise. This commission became a "one-stop shop" for industry, giving them great influence, since it was responsible for "reviewing and assessing applications for industry activity, consulting with First Nations, ensuring that industry complies with provincial legislation and all regulatory requirements and cooperating with partner agencies." Nicolas Graham, Shannon Daub & Bill Carroll, *supra* note 58 at 12.

Representatives to manage without some serious rethinking of congressional operations and capacity. The cornerstone institution of our democracy must be equipped to respond to the challenges we face. Congress must adapt in the face of social transformation so it can effectively govern and lead.⁹⁶⁶

At the same time, lobbying can draw needed talent out of the public sector into the private sector.⁹⁶⁷ In many cases, lobbying appears to make policy-making worse. It appears to complicate legislation, making governance more difficult. Lapira, Thomas and Baumgartner argue that when lobbying operates in low salience peripheral areas and tends to dominate, it creates a system that disregards many relevant policy alternatives and viewpoints. This results in “fragmented and inconsistent policy outputs.”⁹⁶⁸ This decline in the quality of policy responses decreases the public’s faith in democracy.⁹⁶⁹

Unfortunately, the effectiveness of lobbying groups in constraining and directing government action, and in pre-filtering citizen passion and needed information to officials, has papered over deep problems. In the last thirty years governments have become so focused on business issues and interests that they appear to have difficulty addressing fundamental issues that are unrelated to business priorities.⁹⁷⁰

The necessity of forming lobbying coalitions when business interests are so strong and unions and citizen groups so weak, requires that citizens find a business interest to help champion their priorities. Sometimes this can work. For instance, a number large tech firms joined a citizen-led coalition and successfully lobbied in favour of internet neutrality in the U.S. under President Obama.⁹⁷¹ Sometimes this does not work. For instance, citizens found few corporate interests who were willing to seriously lobby against copyright extension. This reliance is further accentuated because citizen access to their high-level representatives is limited in a way that the access of corporations and their lobbyists is not. This reliance moves democracy further towards a form of oligopoly. Citizenship and engagement is funnelled through corporate action, and only those policy concerns shared by wealthy business interests can rise through the lobbying system to grasp the government’s attention.

⁹⁶⁶ Kathy Goldschmidt, *supra* note 219 at 8.

⁹⁶⁷ Lee Drutman, *supra* note 172 at 3 & 29.

⁹⁶⁸ Timothy M. Lapira, Herschel F. Thomas & Frank R. Baumgartner, “The two worlds of lobbying”, *supra* note 182 at 236.

⁹⁶⁹ There is good evidence that policy outcomes affect citizen’s faith in democracy, see note 699. R. S. Foa et al, *supra* note 5 at 10; Klaus Armingeon & Kai Guthmann, “Democracy in crisis?”, *supra* note 699 at 17.

⁹⁷⁰ “If the trends [of increased corporate involvement in politics]... continue, American democracy will continue to decline. And it will not be because corporations necessarily get the policy outcomes they want. It will undermine the functioning of American democracy because it will diminish the problem-solving capacity of government, which will mean that hardly anybody will get anything that they want. But it is important to understand that reform is in everybody's long-term interests. Business as a whole does not benefit from the current system, which is widely criticized as being market distorting and anti-growth.” Lee Drutman, *supra* note 172 at 212.

⁹⁷¹ This FCC position was subsequently changed against net neutrality under President Trump.

Astroturf lobbying and shadow political parties similarly destabilize democracy. They both present the pretence of democratic involvement to officials, and often citizens, when in truth they are non-democratic organizations advancing the concerns of the elites that control them. In combination with the growing influence of business lobbying groups as a means of channelling citizen concerns, it is possible that astroturf lobbying might lead to an astroturf democracy.

The success of ideologically-based think tanks is another way lobbying is damaging democracy. Like anyone, policy-makers are susceptible to ignoring information that contradicts their beliefs, particularly after repeated encounters with like-minded individuals and pre-framed information. These ideological think tanks feed bias into the system. This can lead to officials taking extreme positions and disregarding dissenting views, resulting in “consistently biased decision-making.”⁹⁷² These ideological think tanks, to the extent that they are successful, are poisoning competent decision-making by the officials and the public. These failures can have enormous repercussions; such failures were intimately tied to the G. W. Bush administration’s fiasco of nation-building in Iraq.⁹⁷³

Lobbying weakens democracy, at a time when we can little afford it.

We are also experiencing population growth and unprecedented social, economic, technological, and global change. All of this is taxing our democracy, and much of it is occurring without regard to the fundamental principles at the core of our civic activity, such as political equality; representation of, and consent by, the people; informed deliberation; and distributed and limited power.⁹⁷⁴

Democratic weakening is visible in the decline in civic involvement with local organizations, decreasing voting rates, decline in the news media, the rise of fake news, the rise of foreign sabotage of democratic elections, the decay of several democracies into authoritarianism, and declining public support for the norms of democracy. At the same time, failures in other institutions – economic, technocratic, theological, and international – show that reduced democracy is not the answer. We need more citizen engagement with the problems that face us. We need a new democratic flourishing.

Conclusion – Chapter 3

Stricter lobbying laws should be part of a new democratic flourishing. Stricter lobbying laws are often put into place as a reaction to corruption scandals, such as the Abramoff or the Sponsorship scandals, indicating that politicians believe these rules can help prevent such further scandals.⁹⁷⁵ There are signs that this belief is correct.⁹⁷⁶ In light of the way lobbying increases corruption, increased lobbying regulation is a useful tool for pushing back towards clean government. Disclosure rules

⁹⁷² John de Boer, *supra* note 413.

⁹⁷³ *Ibid.*

⁹⁷⁴ Kathy Goldschmidt, *supra* note 219 at 8.

⁹⁷⁵ A. Paul Pross, *supra* note 2 at 184.

⁹⁷⁶ Gajan Retnasaba, *supra* note 278 s III.1.

discourage corruption, and raise the chance that misdeeds will be caught, providing data points that can be used to look for misbehaviour.⁹⁷⁷ The other lobbying regulations, such as gifts restrictions and cooling-off periods for lobbying after leaving government, both help reduce corruption and provide higher standards of behaviour that become the norm.

We have covered six general ways lobbying is moving official decision-making out of alignment with public preferences. It disproportionately advantages business organizations; it favours the policy preferences of the wealthy and causes a misalignment of representation; it creates an information framing bias; it increases inequality; it favours the status quo; and it otherwise corrupts democracy. Lobbying as it is currently practiced and regulated is damaging to democracy, and we are in need of a new approach.

Lobbying regulations can be more imaginative, going further, not only preventing a race to the bottom, but also encouraging a climb to the top. Chapter 9 contains a number of proposed principles and reforms intended to guide us in this direction.⁹⁷⁸ Stricter lobbying regulations would adhere to the principles of controlling the hydraulic pressure of influence; enhancing democracy; preventing corruption; preventing the appearance of corruption; improving the quality of information available to officials; enhancing political equality; advantaging citizen groups; advantaging collective goods over private goods; separating business and state; empowering the disadvantaged; and promoting strong disclosure and transparency. Together, we can march through the current hazy dawn of lobbying regulation to a bright daylight of a system the public trusts. Before we do that though, we must understand the connection between lobbying and campaign finance donations. That is the topic of the next chapter.

⁹⁷⁷ Craig Holman & William Luneburg, “Lobbying and transparency”, *supra* note 96 at 78.

⁹⁷⁸ Chapter 9 – Reform Principles: Principles of Lobbying Reform, p. 495.

Chapter 4 – Private Campaign Financing and Lobbying

“Nobody wants campaign finance reform more than me. It would save me a fortune.”

– Andrew Tobias, *writer*

Introduction – Chapter 4.....	211
The Mirror Principle of Lobbying and Campaign Financing.....	211
Operating at the Core of Democracy	212
Operational Link Between Lobbying and Campaign Contributions.....	212
Similarities – Theoretical.....	216
Similarities – Regulatory	220
Similarities – The Mirror Principle	221
Regulation of Campaign Financing in Canada.....	222
The Current Canadian Campaign Finance Law	222
The Limits in the Current Canadian Law	226
The Contrasting Practice of Campaign Contributions in the U.S.	227
<i>Buckley v. Valeo</i>	228
<i>Citizens United v. Federal Election Commission</i>	231
U.S. Constitution is Limited by Lacking a Specific Right to Democracy	242
The Influence of Campaign Contributions	243
Campaign Contributions Grant Influence	246
Campaign Finance Limitations	261
Advantages of Private Campaign Funding	262
Disadvantages of Public Campaign Funding	262
Donation Limits	262
Spending Limits	263
The Six Concerns about Unregulated Campaign Financing	264
Concern 1: Campaign Contributions Favours the Wealthy and Business Organizations.....	264
Concern 2: Campaign Contributions Increase Inequality	267
Concern 3: Campaign Contributions Misalign Democratic Representation	269
Concern 4: Campaign Contributions Favour the Status Quo	270
Concern 5: Campaign Contributions Create Bias.....	271
Concern 6: Campaign Financing Otherwise Damages and Corrupts Democracy	281
The Canadian Experience.....	285
Corporate Donations, Union Donations, and Dark Money in Canada.....	286
Donation and Spending Limits in Canada	287
Link to Lobbying	288
Conclusion – Chapter 4	288

Introduction – Chapter 4

Private campaign financing is closely tied with lobbying. To understand how lobbying operates, and how the regulation of lobbying can and should operate, we need at least a fundamental understanding of how campaign financing and campaign finance regulations work. This chapter is intended to provide such a summary, while also laying a foundation for understanding the interaction of campaign financing and lobbying.

Lobbying and campaign finance are so closely linked as means of exercising influence on politics in the modern English-speaking democracies that the lessons of one can apply to the other. They are mirrors of each other – two sides of the same coin.⁹⁷⁹ I will discuss the similarity between the two activities, and use this to justify what I call *the mirror principle of lobbying and campaign financing* (the mirror principle). This principle will serve as a basis for the legal analysis in the later chapters. Then I will discuss the regulated practice of campaign contributions in Canada, and contrast it with the far less regulated practice of campaign contributions in the U.S. We will investigate the U.S. Supreme Court decisions that are most responsible for this state of affairs. We will then investigate the Influence donors wield in the U.S. through campaign donations, direct, indirect or in kind; and how this influence works in conjunction with lobbying to get favourable policy results. We will also look at the use of campaign contributions in some American judicial elections, where it can be easier to discern the influence of campaign contributions. The chapter will consider campaign finance limitations; and then move on to a discussion of six concerns about unlimited private campaign financing. These concerns match the six concerns about lobbying discussed in Chapter 3.⁹⁸⁰ This chapter concludes with a discussion of the contrasting Canadian experience with regulated campaign finance law.

The Mirror Principle of Lobbying and Campaign Financing

Understanding the similarities between lobbying and campaign finance is essential to understanding the regulation of lobbying. They are linked in important ways, being the two legal methods special interests use to achieve political influence in a democracy. Special interests operate across both areas to gain political influence: giving donations to get leverage, access, and the right people elected and then lobbying these officials for the specific policies they want enacted. The regulation of lobbying and campaign finance is also connected, as both must be regulated to account for the hydraulic force of private political influence.⁹⁸¹

Lobbying and campaign financing both operate at the core of democracy; there is a strong operational link between them; and they contain a large number of underlying theoretical and regulatory similarities that justify treating them as mirrors of each other.

⁹⁷⁹ “Lobbying and campaign finance are two sides of the same coin, partly because of the common components of politics and money and partly because of the major role lobbyists play in campaign financing.” Elisabeth Bassett, “Reform through Exposure” (2007) 57 Emory Law J 1049–1086 at 1074.

⁹⁸⁰ The six concerns are that lobbying favours the wealthy and business interests; it increases inequality; it misaligns democratic representation; it favours the status quo; it increases political and informational biases; and it otherwise damages democracy. Chapter 3 – The Six Concerns about Lobbying, p. 142.

⁹⁸¹ See, Heather Gerken, “Lobbying as the New Campaign Finance”, *supra* note 514.

Operating at the Core of Democracy

Lobbying and political campaigning both operate within the essential core of democracy, affecting how policy decisions are made. The rules that govern them are the rules that make the rules. As such, the regulations that govern these two fields are essential to democracy; seemingly small changes and loopholes can have huge repercussions throughout the entire government and society. At the same time, the abstractness and complexity of these fields make voter oversight difficult. Barring enormous scandals, few voters base their voting decisions on the nuances of lobbying and campaign finance regulation. Both lobbying and campaign finance are further complicated by how closely tied they are to politicians' self-interest. There is always the risk that politicians will tamper with the rules for personal gain and increased political power. Since these rules address the hydraulic force of political influence, they are also difficult for the courts to address; striking down the wrong rule could open a gap in the law that makes the entire regulatory scheme ineffective.

Operational Link Between Lobbying and Campaign Contributions

Gerken, Briffault and Lessig all agree that there is a link between lobbying and political campaign contributions.⁹⁸² Yet, most political and legal literature continues to treat these fields as separate, with campaign finance issues receiving the bulk of the attention. In contrast, firms seem to believe that lobbying is more important for political influence. They consistently spend more on lobbying than on campaign contributions, even in the U.S., where campaign contributions are effectively unlimited. Drutman found that companies spend roughly 13 times more on lobbying than on PAC contributions.⁹⁸³

The hydraulic pressure of political influence will divert between lobbying and campaign financing in varying amounts depending on the norms and regulations in play.⁹⁸⁴ Yet, special interests are most effective in influencing policy when their reach into both areas is unfettered. In conjunction, campaign contributions and lobbying can act as an accelerating conduit for political influence and bargaining. There are seven clear ways lobbying and campaign financing feed into each other to grant political influence. (1) Campaign contribution can grant access to politicians for future lobbying efforts; (2) campaign contributions can act as a social exchange to earn lobbying favours; (3) campaign contributions can be a reward for supporting a lobbyist's agenda; (4) campaign contributions can help push friendly politicians into power; (5) even when campaign contributions grant influence, lobbying is still needed for the detailed policy work necessary to push through complex issues; (6) lobbyists can be instrumental in finding and funneling campaign contributions; and (7) lobbyists can help the politician balance the demands of the donors with the demands of the public.

⁹⁸² See, *ibid*; Richard Briffault, "Lobbying and Campaign Finance: Separate and Together" (2008) 19 Stanf Law Policy Rev 105; Lawrence Lessig, *supra* note 273.

⁹⁸³ Lee Drutman, *supra* note 172 at 93.

⁹⁸⁴ For example, in the area of public financing contracts, Retnasaba's found that when direct campaign contributions were prevented because they were causing corruption, the same practices and pressures soon re-emerged in the form of lobbying. Gajan Retnasaba, *supra* note 278 at 23.

(1) Campaign Contributions Grant Access

Campaign contributions are a key means by which lobbyists get access to politicians, opening the door to the meetings.⁹⁸⁵ Lobbyists act as bridge between campaign funds and favours.⁹⁸⁶ The donations act as a signal to the politician that the lobbyists has influence and backing, while also signifying that the lobbyist is willing to expend resources in support of the candidate and can be trusted. Officials have limited time, and the ability to wield significant financial resources is a good clue as to who is important, while also allowing the politician to continue to access these resources in the future, saving on fundraising efforts. The contributions also act as a form of exchange. Applying exchange theory, campaign contributions are a social gift, whereby the campaign contributions create a social obligation for the politician to support the special interest's lobbying agenda.⁹⁸⁷

The current U.S. political economy is an economy that values patterns of conduct involving freely given gifts and has left this kind of wreckage. If we go back to the case of McCormick and the lobbyist, a central facet of its corruption is the way in which the gift embeds itself in something that resembles a real relationship. There is a reason for that. The more these sorts of interactions resemble relationships, the easier communication becomes. Everyone in the dynamic has an interest in making it feel more like an authentic connection and less like a transaction. ... At the same time, no one questions, or has to question, that the exchange of gifts creates interpersonal dependencies. Public officials must not tell lobbyists that they need campaign contributions because everyone knows they do.⁹⁸⁸

Although Teachout treats the process as somewhat cynical; it is likely that for many of the people involved the gratitude and resulting social obligation is real.

(2) Campaign Contributions Act as a Social Exchange to Earn Lobbying Favours

Although some politicians and judges claim large donations do not form any sense of exchange or obligation, this contradicts what we know of human nature. Legislators have admitted that their decisions regarding taxes and subsidies are heavily influenced by campaign contributions.⁹⁸⁹ Abramoff reports that,

I was so used to hearing that senator so-and-so wants \$25,000 for his charity, or representative X wants \$50,000 for the Congressional Campaign Committee, that I

⁹⁸⁵ Jack Abramoff, *supra* note 1 cs 12 & 6; see also, Gajan Retnasaba, *supra* note 278 s III.1.

⁹⁸⁶ Lawrence Lessig, *supra* note 273 at 103.

⁹⁸⁷ Dorie Apollonio, Bruce E. Cain & Lee Drutman, "Access and Lobbying", *supra* note 303 at 22; Joshua L Kalla & David E Broockman, "Congressional Officials Grant Access to Individuals Because They Have Contributed to Campaigns: A Randomized Field Experiment" (2014) Version 4 Work Pap.

⁹⁸⁸ Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (Harvard University Press, 2014) at 251.

⁹⁸⁹ Lawrence Lessig, *supra* note 273 at 133.

would actually double check with my staff when they didn't request lucre for the legislators.⁹⁹⁰

(3) Campaign Contributions Can Be a Reward for Supporting a Lobbyist's Agenda

Lobbyists also use campaign contributions as a reward to politicians for supporting their agenda. For example, as discussed on p. 81, a wealthy activist was fighting a proposed mine that could damage the local salmon runs near his fishing lodge in Alaska. The mine had been blocked by the EPA under President Obama. This block on development was reversed by Scott Pruitt, under his anti-environmental EPA agenda. Unusually, Trump's EPA re-reversed course, re-blocking the mine. Shortly thereafter, the donor met with Trump at Mar-a-Lago, and made a \$250,000 donation to the president's Victory Fund.⁹⁹¹ This was likely a campaign contribution in reward for supporting the donor's lobbying agenda.

(4) Campaign Contributions Can Push Friendly Politicians into Power

Campaign contributions, and electoral spending against opposing politicians, help push friendly receptive politicians into office. It increases the chances that politicians will look favourably on the donor's lobbying, and uses the donation to help build a social exchange bond. Kuhner argues that it is reasonable to conclude that economic interests, such as businesses and trade associations, make campaign contributions with expectations of returns on their investments. This is evidenced by the fact that corporations give heavily to multiple political parties.⁹⁹² Moreover, when large corporations continue to give large campaign contributions to politicians, it is likely because they believe it is giving them some return on investment, otherwise it would be difficult to justify donating the shareholders' money to the politicians.

(5) Lobbying is Needed for the Detailed Policy Work

Campaign contributions also work indirectly to create a favourable lobbying environment. Organizations and individuals donate funds to help elect politicians who will enact policies they prefer, while creating a political environment that is more receptive to their lobbying. The campaign contributions on their own are not enough to garner influence; they are employed in conjunction with lobbying to convey the actual preferences on specific policy issues to the officials. The sheer number of lobbyists employed indicates that campaign contributions are not enough to buy politicians; otherwise there would be no need for companies to hire the lobbyists, or spend \$3.31 billion on lobbying in 2012 alone.⁹⁹³ It is the link between campaign contributions and lobbying that makes the political influence

⁹⁹⁰ Jack Abramoff, *supra* note 1 cs 12 & 6; see also, Gajan Retnasaba, *supra* note 278 s III.1.

⁹⁹¹ Stephani Ebbs, *supra* note 284.

⁹⁹² There are some larger businesses that donate to only one political party. In some cases, it is because only members of that party is likely to be elected, in others is interests align only with that party, and in some it is genuine political preference. Even in those cases, Chapter 2 – Understanding Lobbying in Canada and the U.S.: The Effectiveness of Lobbying: Benefits to Business Organizations (p. 138) provides ample evidence that businesses reap good return from combining large donations and lobbying. See also, Timothy K. Kuhner, *supra* note 51 at 2363.

⁹⁹³ Lee Drutman, *supra* note 172 at 8. "The most active companies now have upwards of a 100 lobbyists representing them who are active on a similar number of different bills in a given session of Congress." *Ibid* at 1.

effective. Political change is difficult, and interest groups need both sets of tools. Political influence on a national scale is hard work and requires making the case for policy change over and over (and over and over) again, in different places to different people, sometimes at the same time.⁹⁹⁴

(6) Lobbyists and Funneling Campaign Contributions

Campaign contributions do not just open the doors for lobbyists – often lobbyists open the doors for new sources of campaign financing. Akerlof and Shiller argue that the very nature of the lobbying profession gives lobbyists specialized knowledge of who is willing to spend money on influencing political outcomes. If an interest group is willing to pay the lobbyist to promote a cause, it is likely willing to donate to a politician with the right policy views. The lobbyists' mere existence and employment by a given industry is an indicator of potential sources of campaign funds – smoke to the fire. Lobbyists can and do act as guides to additional source of campaign funds, and as bundlers of multiple contributions, increasing their influence and their donors' relevance.⁹⁹⁵

(7) Lobbyists Can Help the Politician with the Demands of the Donors and the Public

Akerlof and Shiller also argue that lobbyists fulfill a more nuanced role, linking politicians and donors. Based on their specialized knowledge of the donors, the issues, the politicians and the politicians' constituency, the lobbyists can act as message crafting experts. They argue,

a good lobbyist ... can help the politician thread the needle: of sculpting the story with the best trade-off between extracting votes from the general public, and money from the Interests.⁹⁹⁶

Lobbyists can help craft messages and policies that balance the wishes of the donors and the public, or alternatively disguise the policy preferences of the donors from the public. Lobbyist can also provide expertise determining how much leeway an official has between the wishes of the donor and those of the public. Akerlof and Shiller argue that crafting this narrative requires a deep understanding of the electorate and of the politician. This helps explain the importance of lobbyists for political electoral campaigns, and why it is valuable to recruit former politicians and aides.

Advising on the creation of that narrative requires an intuitive understanding of two faces—public and private—that the politician wants to present simultaneously. That is the sort of sympathetic understanding that we get from our best friends and confidants. It is thus no co-incidence that lobbyists are most typically drawn from ex-staffers, who have held that role in the past, and also from former members of Congress themselves.⁹⁹⁷

⁹⁹⁴ Lee Drutman, *supra* note 174.

⁹⁹⁵ George A. Akerlof & Robert J. Shiller, *supra* note 52 at 78.

⁹⁹⁶ *Ibid* at 79.

⁹⁹⁷ *Ibid*.

Lowery and Marchetti point out a potential repercussion of the strong tie between campaign finance contributions and lobbying. The legislator can limit access to particular lobbyists, and use this gatekeeping as leverage over the lobbyists. They can then use their influence to demand additional campaign contributions or other favours from lobbyists, as the Republican majority did under the K-Street project. The lobbyist often has to bend to the demands and contribution needs of legislators, and pay to play. Sometimes, this need to accommodate and provide campaign contributions can “distort the fidelity with which a lobbyist might represent the interests of clients.”⁹⁹⁸

Similarities – Theoretical

The fields of lobbying and campaign finance regulation are so similar that many of the same tactics are used by the private interests, and many of the same theories and underlying truths apply. The list of theoretical similarities is long and broad. Considering them will help explain and justify why the areas should be treated cohesively. What follows is a list of thirty-two similarities; undoubtedly, additional similarities exist.

(1) Lobbying and campaign financing are the linked methods private interests use to shape public decision-making, often in ways the public cannot easily see. They are the streams within which political influence flows into government, and their regulations are the dams and valves that contain and guide it. (2) Based on this influence, successful campaigning and lobbying can produce stupendous returns. A 2014 study by the Sunlight Foundation found that \$5.8 billion spent by U.S. corporations in lobbying and campaign contributions netted these businesses a return of \$4.4 trillion in federal business and subsidies.⁹⁹⁹ The donation opens the door and helps promotes favourable candidates. The lobbying helps pass the lucrative contracts and policy changes.

(3) Lobbying and campaign contributions have a legitimate role in democracy, but the value of this role is based on widespread public access, political equality, and the legitimate influence of rational discourse. If these foundations crumble, lobbying and campaign financing become the means by which wealthy special interests and the elites bypass public control to exercise an oligarchic influence over government. (4) Similarly, both fields rely on competition, between parties or between special interests, as a key means of making their respective system work. However, in both fields there is good reason to believe that competition alone is not sufficient, and strong regulations are necessary to guide the competition and ensure competing politicians or special interests produce outcomes that align with the principles of democracy.

(5) Debates about the disclosure versus corruption heuristic are present in both fields. Some argue that disclosure is enough, and there is no need for harsh restrictions, while other argue that corruption is endemic to the practice, and strict rules and strong oversights are necessary. In both fields, recent experience and political science favours the corruption heuristic, indicating that disclosure and

⁹⁹⁸ David Lowery & Kathleen Marchetti, “You don’t know Jack”, *supra* note 238 at 146.

⁹⁹⁹ *Fixed Fortunes: Biggest corporate political interests spend billions, get trillions*, by Bill Allison & Sarah Harkins (Sunlight Foundation, 2014).

shame only go so far to restrain the excesses that lead to corruption, especially as the exercise of private political influence becomes ingrained and widespread. (6) The regulation of both areas also requires specific specialized oversight, and many of these regulations have to be continuously in force to be effective. For example, campaign donation restrictions must be continuously in force to be effective, as do proposed lobbying restrictions.

(7) Both areas raise fundamental questions of transparency and disclosure. How much does the public get to know about the donations, meetings and lobbying expenditures? How rigorous are the rules that force disclosure and how easy are they to bypass? How well do voters interpret the disclosed information and put it in context? (8) In both fields, the scandals that get public attention are generally of the *quid pro quo* variety, where a politician or lobbyist is explicitly corrupt stepping well beyond the norm. However, those who express concern about corruption are more concerned about a subtle widespread institutionalized dependency corruption that has developed from the built-in political and economic structures and incentives.

(9) In both areas, one can debate whether the neo-pluralist model of competing interests, the exchange model of a huge bazaar involving political actors, or some combination of the two is relevant. (10) In both lobbying and campaign financing, personal connections, trust relationships and social obligations are all key to achieving influence. As covered in Chapter 2 and Chapter 3, many political scientists and legal scholars believe that some form of social exchange and gift economy better explains the actions of officials, donors and lobbyists than a traditional direct economic exchange model.¹⁰⁰⁰ (11) Both fields are fuelled by access to the policy-makers. Special interests and donors give campaign contributions and employ lobbyists partly as a means of establishing a path to access officials in order to present their views and policy preferences.

(12) Agenda setting and information framing are key practices and goals in lobbying and campaign financing. Political influence is often exercised to present a particular viewpoint, and expressed to establish a particular policy agenda. (13) In both, donors and lobbyists are strongly incentivized to frame and massage the information they provide, so that it plays into the public's or the official's mental models. (14) The possibility of phishing¹⁰⁰¹ is an integral part of campaign finance and lobbying. Because of the special relationships and informational advantages lobbyists and donors have, they have the opportunity, motive and means to manipulate voters or officials into acting against their own interests (or the interests of those they represent). They can, and often do, phish officials and the general public. (15) Lobbyists and donors can phish effectively, because in both fields they can distance themselves from their shadier activities by using legal fronts as masks. In both fields, businesses and

¹⁰⁰⁰ Lawrence Lessig, *supra* note 273 at 109; Gajan Retnasaba, *supra* note 278 at 109; Gerry Kristianson, *supra* note 154 at 202.

¹⁰⁰¹ Phishing is manipulating, tricking and deceiving people "to do things that are in the interest of the phisher but not in the interest of the target." See Chapter 2 and Chapter 6. George A. Akerlof & Robert J. Shiller, *supra* note 52 at xi.

individuals can use industry groups, astroturf groups, Political Action Committees (PACs), dark money¹⁰⁰² or other organizations to conceal their behaviour and avoid the reputation costs that could result from exposure of these activities. (16) Similarly, in both fields it is advantageous to have citizen group support to grant the appearance of legitimacy to a political campaign, a contribution, an advertising campaign, or a policy proposal. When there is little citizen support, groups in both areas may resort to faking it through acts like deceptive naming, funding semi-autonomous groups, and creating astroturf organizations. (17) In lobbying and campaign finance, some politicians and officials have been reducing government capacity by cutting oversight, information gathering or funding. This has been a deliberate tactic to leave politicians and officials more reliant on private interests, and less able to question them or operate without their support. Thus both areas have been subject to an indirect form of privatization with limited public awareness thereof.

(18) Over the last forty years, lobbying and campaign financing have been heavily affected by the shrinking of the public sphere, civic life, and volunteer community participation; and the rise of the ethos of privatization (supply-side economics¹⁰⁰³). They have also been factors further contributing to this shrinking of the public sphere.¹⁰⁰⁴ Legislation and court rulings have cut the public funding of political campaigns relative to inflation and the real costs of elections. Similarly, funding for citizen groups to lobby for non-corporate interests has declined substantially. This trend is particularly apparent in the United States, but has taken place in Canada as well. The rise of privatization is visible in how wealthy private corporations lobby the government while the revolving door tempts officials into private life working for these very businesses. Meanwhile, in campaign financing, candidates seek out money from a few extremely wealthy individuals and corporations, and must reflect back their policy concerns in order to get it. In both fields, privatization is replacing civic virtue with a form of paid-for self-interest, and genuine human connection with manipulation. (19) Along with the push towards privatization and away from civic engagement, both areas have seen a marked decline in citizen participation. Voter turnout and volunteering has declined, and citizen organizations have decreased in number and strength.

(20) The decline of unions since the 1970s has fundamentally changed lobbying and campaign financing. In both areas, union structures and activities formed a core to the citizen engagement that has now hollowed out. Unions were a source of countervailing pressures, providing campaign funding and lobbying activity that pushed back against private corporate interests in favour of wider public goods. (21) In both areas there is a contest between the pressure for private goods, pursued by business interests, and collective goods pursued by citizens and citizen groups (see Chapter 6). In electoral campaigning the contest is more public; in lobbying it is more hidden, but the same struggle is at play. With the decline of unions and citizen groups and the increase in private campaign contributions (in the U.S.), the pressure for public goods has been in decline. Governments appear increasingly unable to respond to public needs, but increasingly able to provide for private business needs, like tax reductions,

¹⁰⁰² Dark money is electoral spending by third-parties where there is no legally requirement to disclose the source of the funds.

¹⁰⁰³ See Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: Inequality and Lobbying: Economic Inequality is an Outcome of Policy Decisions: Supply-Side Economics Increase Inequality, p.384.

¹⁰⁰⁴ Facundo Alvaredo et al, *supra* note 867 at 14.

intellectual property extensions, bailouts, and pipeline purchase agreements. (22) In both areas, there is political demand to present the private benefits to campaign donors and lobbyists as public goods, and this marketing is one of the key functions lobbyists and successful campaign consultants provide to office holders.

(23) Lobbying and political campaigns raise similar questions concerning the involvement of non-citizens in government, particularly of corporations, unions, and foreign governments. What right should and do corporations and unions have to involve themselves in elections and government decision-making? This is discussed on a philosophical level in Chapter 6, and a legal level in Chapter 7 and Chapter 8. Within the corporate structure, what right does it have to spend shareholder money on political campaigns and lobbying, especially if some shareholders disagree with its political stance? Similarly, what say should union members have over the political campaign contributions and lobbying of the union?

(24) Both activities raise challenges to the traditional liberal understanding of political representation, as they open the door for political influence that risks damaging the fidelity of officials to represent their constituents. How much is the accepted current practice of lobbying and campaign financing based on sound principles? And how much is simply the realpolitik of political influence masquerading behind loose theoretical justifications? When government solicits campaign contributions and policy input, does it matter if it disregards who is actually making the contributions and submitting the policy input? This theoretical liberal foundation is also discussed in detail in Chapter 6.¹⁰⁰⁵

(25) The structure of politics is similarly affected by lobbying and campaign contributions, in that when both are powerful and unregulated, even those officials who do not want to engage with either process must do so to compete. The official who does not have the support of powerful lobbyists will flounder, and the politician who does not continuously seek out campaign contributions will suffer in the next election. The engagement with lobbying and solicitation becomes the norm. (26) Yet, as both areas heavily rely on norms of behaviour, this can be a blessing as well as a curse. The norms can be undermined by poor regulations, or unethical leaders. Yet, both areas are also subject to adaptation to a raised norm – the possibility of a race to the top. When new laws and regulations are fairly applied and enforced, it can quickly lead to a new higher norm, where old behaviour is seen as corrupt, passé, and now-unacceptable.

The six concerns about lobbying, explored in Chapter 3, also apply to campaign finance contributions.¹⁰⁰⁶ Both lobbying and campaign contributions (27) favour the wealthy and business interests; (28) increase inequality; (29) misalign democratic representation, (30) favour the status quo; (31) create an informational and political bias; and (32) otherwise corrupt democracy. We will investigate how private campaign financing contributes to these issues at the end of this chapter.

¹⁰⁰⁵ Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: Rawls and Dworkin on Political Equality, p. 337.

¹⁰⁰⁶ Chapter 3 – The Six Concerns about Lobbying, p. 142.

Similarities – Regulatory

Lobbying and campaign financing share an interwoven nature. They are manifestations of the flow of private political influence, they operate at the core of democracy, and they share deep theoretical structures and understandings. Thus, the regulation of the two fields also shares a great number of similarities. In both areas, the law must balance the structures and rules of formal democracy with the influence of particular special interests, particularly wealthy and powerful business interests. Shortcomings and loopholes in the laws in both areas will be ruthlessly and perhaps irreparably exploited. The law in both fields must regulate the expression of economic power into politics.

The regulation of both fields raises questions about the functioning of the democratic representational system; the collective right to free and fair elections and faithful representation, versus the exercise of classic individual rights. They both raise questions about the right to equality of representation versus the rights of expression, pitting the s. 3 *Charter* rights of democracy versus the s. 2 rights of free speech. At the same time, any Court weighing in on the regulation of the two fields must do so carefully and cohesively, due to the hydraulic nature of political influence. In both fields, applying a wide sweeping principle in support of an individual right can make regulating the system as a whole untenable, like the *Buckley v. Valeo*¹⁰⁰⁷ ruling did in the United States, as we will discuss later in the chapter. Essentially, there is the risk that the Court might puncture a hole in the entire dam of regulation, rendering it useless. At the same time, in both areas the regulations tend to be enacted in very specific political moments, generally on the heels of a large scandal or a newly elected party running on an anti-corruption platform. Otherwise, the legislative inertia combines with politicians' self-interest tends to prevent the gradual improvements and patching of legislation that sometimes takes place in other domains. Thus the Court must remain aware that in these fields, overturning a specific part of the law might not lead to a legislative fix; many incumbents might benefit from the hole in the law and push against new legislation to correct it. At the same time, both areas are close to the core of democracy, and officials can alter or change the rules for their own benefit or to favour a particular political party. Thus the Court must carefully scrutinize whether the rules are being restructured for the benefit of the public and whether they are being enforced fairly.

In both areas, in Canada, there has been a gradual extension of formal regulations to compensate for a growing awareness of the power and reach of unelected interests in the political system. In the United States, the story has been more mixed, as Supreme Court rulings and a reluctant Congress have led to a roll-back of the former rules on the Federal level over the last decade. The formalization of the systems raise fundamental questions about leaving room for external voices, and opening democracy to new participants, without undermining equality and without auctioning the systems to market forces. As part of this formalization, in Canada Parliament has recognized the risk of self-dealing and exploiting the rules and loopholes in both areas for partisan advantage. Thus Parliament has recognized that the responsibilities and oversight of these fields should vest in non-partisan

¹⁰⁰⁷ *Buckley v. Valeo*, *supra* note 955.

independent Agent of Parliaments, appointed by both houses of Parliament for periods of time (7 years) that exceed the term of Parliament in order to protect their independence.

The regulations in both areas are now challenged by the rise of the internet and a new wave of authoritarianism. The regulations are challenged by the internet, online media, social networks, astroturf groups, sockpuppets, and the reach of hostile actors into democratic countries in a way that was not possible before. Even determining who is trying to exercise political influence – never mind how much they are expending and how effective it is – is becoming increasingly difficult in a more connected world. The open nature of the internet makes it much easier to bypass regulations and legal restrictions without repercussion. We are in a new world of decreased privacy and increased tracking that allows the micro-targeting and black-mailing of officials as never before, opening whole new doors to private influence over voters and decision-makers.

Depressingly, the increased openness of the internet has been matched by a wave of authoritarian leaders rising in the democracies.¹⁰⁰⁸ The center-right seems to be falling to the far-right. The lessons of WWII and past totalitarianism are being forgotten by a generation far removed from its devastation and newly tempted by simplistic bigoted solutions. These authoritarian leaders are hostile to fair play, to norms of equality, and to regulations that would restrict their powers or interfere with their exploitation of government for private gain. Unfortunately, these leaders have been abetted by friendly courts, more concerned with temporary power struggles and a narrow political ideology than the long-term health of democracy. These leaders and these courts have been actively hostile to both campaign finance and lobbying regulations. They have pushed to loosen rules that restrict their power, prevent supporters of other parties from voting, and dismantle oversight and enforcement.¹⁰⁰⁹ They know that campaign finance and lobbying laws restrict their power and would deter their excesses, and that often these rules can be struck down or bypassed with minimal public awareness and input.

Similarities – The Mirror Principle

Due to the interwoven nature of lobbying and campaign financing, how they are used by those seeking political influence, and their overwhelming theoretical and practical similarities in understanding and regulation, the two fields are essentially reflections of each other. To regulate one effectively, the entirety of both must be taken into account. Based on the connections and the similarities of lobbying

¹⁰⁰⁸ From 2005 to 2018, the world's proportion of free countries has declined to 44%. This pattern is visible in Hungary, Poland, Serbia, Montenegro, Turkey, Venezuela, Brazil, and arguably the U.S. China, Russia and Saudi Arabia have also become more openly authoritarian. Freedom House, *supra* note 5 at 2, 11 & 15.

¹⁰⁰⁹ A number of democracies have fallen further towards authoritarianism experiencing power grabs during their Covid-19 responses. Hungary is now a dictatorship. "Hungarian Prime Minister Viktor Orban on Monday [March 30, 2020] was granted sweeping emergency powers by the country's parliament to combat the coronavirus, giving him the right to rule by decree indefinitely (the power to bypass the national assembly) and suspend existing laws. The European Union member has also suspended future elections, effectively eradicating democracy in the country and making Orban the world's newest dictator." John Haltiwanger, "The coronavirus just created a new dictator in Europe and has emboldened the toxic behavior of authoritarians worldwide", (1 April 2020), online: *Bus Insid* <<https://www.businessinsider.com/coronavirus-created-new-dictator-emboldens-authoritarians-worldwide-2020-4>>.

and campaign financing, this thesis posits a principle, that these fields are mirrors of each other. This is *the mirror principle of lobbying and campaign financing (the mirror principle)*. The mirror principle has two key repercussions: the fields must be considered in conjunction, and that lessons from one area can be applied to the other area.

The hydraulic nature of political influence means that both fields need to be regulated to channel political influence effectively. The regulation of the two areas should be considered as a whole – successfully regulating one requires regulating the other, as political influence flows between them. New legislation in either area should take into account the scope and practices of the other area in order to work seamlessly and successfully channel political influence.

The second part of the mirror principle is that lessons from one area are likely to be applicable in the other. Conversely, approaches that fail in one area should be approached with due skepticism, as they are likely to fail in the other area as well. If lobbying and campaign financing are mirrors of each other, then rules, principles, norms, approaches, regulations, and judicial rulings that apply in one area can likely be applied in the other. If equality of voice is important in political elections, it is important in lobbying. If there is concern about foreign governments funding astroturf lobbying groups, there should be concern about foreign governments funding political advertising and donating to political parties, and visa-versa.

Based on the mirror principle, the judicial principles and *Charter* concerns that apply in one area should be applicable in the mirror area as well. In both fields the Court must play a careful role, balancing the importance of democratic norms, rules of good governance, individual *Charter* rights, and risks of political self-interest. Most importantly, the mirror principle indicates that judicial rulings in one field are good models of how the Court might rule in the other field. There are limited rulings on lobbying regulation in Canada, but these gaps can be filled in by analysing the principles from key Supreme Court rulings on campaign finance regulation. We will return to this principle in Chapter 7 and Chapter 8.

Regulation of Campaign Financing in Canada

The Current Canadian Campaign Finance Law

Federal campaign finance law in Canada is laid out in the *Canada Elections Act* (S.C. 2000, c. 9). They were last amended by legislation passed by the Trudeau government in December 2018, which took force on June 13, 2019. The Act is overseen by the Office of the Chief Electoral Officer. Like the Commissioner of Lobbying, the Chief Electoral Officer is one of the positions that Parliament has tried to place outside of politics by making it an independent officer of Parliament appointed for a ten year term. However, the violations of the Act are enforced by the Commissioner of Canada Elections, who is appointed by the Chief Electoral Officer. The 2014 amendment moved the Commissioner of Canada Elections from Elections Canada to the Public Prosecution Service of Canada. This may have had the effect of weakening the enforcement of the Act, as the expertise regarding elections law resided in Elections Canada, although it also gave the Commissioner access to the resources of the public

prosecution service.¹⁰¹⁰ This weakening may have been balanced in the new law, which allows the Commissioner to lay charges directly, launch investigations and pursue administrative enforcement. This is a substantially increase in her powers.¹⁰¹¹ The Commissioner of Canada Elections can also authorize employees in the Office of the Chief Electoral Officer to assist her, so she does still have some access to their expertise when needed.

The laws in each province vary. Most have lagged the federal laws, but they are coming to approach the federal regulations, and a few feature even stricter regulations.

Donation Limit

Canadian campaign finance law limits the size of donations individuals can make to \$1,625 per year to the leadership contestants, to each political party, and to an individual candidate or riding¹⁰¹² associations. This limit is for 2020, and it increases by \$25 each year. If an election is called, individuals are allowed to donate an additional \$1,625 to each independent candidate. Political actors must have the donor confirm that she is a Canadian citizen, and if the contribution is over \$200, they must disclose the name and address of the donor to Elections Canada. Corporations and unions are forbidden from making campaign contributions.

Donations by Candidates Limits

Nomination contestants can spend up to \$1,000, and candidates are permitted to give a total of \$5,000 in contributions, loans and loan guarantees to their electoral campaign. For a leadership contestant, that total rises to \$25,000. Candidates can give an additional \$1,625 in total yearly to other candidates, riding associations and nomination contestants of each party.

Spending Limit

Candidates and each political party have a spending limit during the election campaign. The limits are calculated when an election is announced. The limits are increased proportionately if the election period is longer, the range being from 36 days to 50 days. Elections Canada publishes the limits yearly, as if the election had been called in November of that year. In 2008, national parties were limited to a total of about \$20 million each. In the 2011 election it was about \$21 million each. In 2015, the limit was doubled because of the long election calendar, to approximately \$54 million per national party. In

¹⁰¹⁰ Standing Committee on Procedure and House Affairs, 41-2, *Evidence - PROC - House of Commons of Canada*, 020, 020 (6 March 2014) s 1145; See also, Angus Reid, "Awareness breeds contempt: The more Canadians are aware of Fair Elections Act, the more they oppose it", (28 February 2014), online: *Angus Reid Inst* <<http://angusreid.org/awareness-breeds-contempt-the-more-canadians-are-aware-of-fair-elections-act-the-more-they-oppose-it/>>; Joyce Nelson, "Whistleblowers Under Harper: The Fair Elections Act", (9 April 2014), online: *Watershed Sentin* <<https://watershedsentinel.ca/articles/whistleblowers-under-harper-the-fair-elections-act/>>.

¹⁰¹¹ Like the Commissioners of Lobbying, the Commissioner of Canada Elections can also publicize her findings and make public reports. The Commissioner of Lobbying lacks the power to lay criminal charges directly. The law also rolled back some of the voter ID changes the Harper government made, increasing the ease of voting, which is good. It also limited the length of elections to a maximum of 50 days (although no modern election period was longer than 66 days anyway).

¹⁰¹² In Canada the term riding and electoral district are used interchangeably. They are referred to as electoral districts in the *Canada Election Act*.

the shorter 2019 election, the limit was back down \$29 million per national party. The new law also established a pre-election period from June 30 of the election year until the election period starts. During the pre-election period, there is a spending limit of \$2 million per party.

In 2019, candidates had a district spending limit varying between approximately \$87,000 and \$135,000, depending on the population, with a bonus to account for physically large districts. The limits begin when the electoral campaign officially starts. Spending before the electoral campaign does not count towards the candidate limits.

Third-Party Limits

The new law makes the scope of the third-party spending restrictions stricter, but increasing the allowable spending limits. As of 2019, during the pre-election period, third-parties could spend up to \$1 million total, with a limit of \$10,000 in a given district. During the 2019 election period they were limited to \$511,000 overall, with no more than \$4,386 spent in a given district. Third-parties must register immediately if they spend over \$500 (even during the pre-election period), and must include an auditor's report if they spend \$5,000 or more. They must include the names and addresses of anyone who contributed over \$200. News media is exempt from this limitation. Partisan advertising expenses, election survey expenses and partisan activity expenses are all now included in the third-party spending limits and reporting requirements, during both the pre-election and election period. Third-parties are prohibited from trying to circumvent the limits, including by splitting themselves or colluding with other third-parties. There are stricter rules preventing the coordination between candidates/political parties and third-parties, or between third-parties. These restrictions start as soon as the pre-election period begins. Collusion is prohibited, including the sharing information in order to influence strategy, partisan activities, partisan advertising, election advertising, or election surveys.

New restrictions have been added to try to prevent foreign interference and false information from effecting the election. Foreign third-parties used to be allowed to spend up to \$500 in election advertising expenses. That has been changed. Foreign entities are not allowed to spend any money on electoral advertising, both during the pre-election period and the election itself. It is an offence for foreign actors to unduly influence the election, including spending money to support or oppose a candidate or party. It is also an offence to collude with a foreign actor for those purposes. The law bars foreign support for third-parties, and foreign parties working with other organizations to circumvent the rules. It places an onus on advertisers to prevent foreign entities from buying electoral ads. Advertisers are barred from accepting foreign spending during the pre-election and election period, and from selling election advertising bought with foreign funds. It is now an offence for third-parties to accept contributions from foreign actors to pay for electoral advertising. This restriction includes online platforms, online advertisers and internet sites over a certain size (e.g. You Tube, Facebook and Google). These online platforms must keep an online registry of the election advertising (related to an issue that is associated with a party or candidate) and partisan advertising (related to a specific party or

candidate).¹⁰¹³ The law includes a more serious offence for online platforms that knowingly fail to adhere to this legal obligation.

There are new offences (s. 91 & 92) for publishing false statements intended to influence the election.¹⁰¹⁴

91 (1) No person or entity shall, with the intention of affecting the results of an election, make or publish, during the election period,

(a) a false statement that a candidate, a prospective candidate, the leader of a political party or a public figure associated with a political party has committed an offence under an Act of Parliament or a regulation made under such an Act — or under an Act of the legislature of a province or a regulation made under such an Act — or has been charged with or is under investigation for such an offence; or

(b) a false statement about the citizenship, place of birth, education, professional qualifications or membership in a group or association of a candidate, a prospective candidate, the leader of a political party or a public figure associated with a political party.

Clarification

(2) Subsection (1) applies regardless of the place where the election is held or the place where the false statement is made or published.

92 No person or entity shall publish a false statement that indicates that a candidate has withdrawn.^{1015 1016}

Public Financing

Canada offers an indirect form of public financing for the election. Individuals are entitled to a declining tax credit of about 75% down to 33% for electoral contributions, for the first \$1,250 donated. The tax credit has a hard cap of \$650 yearly. Candidates are also reimbursed for 60% of their electoral expenses, provided they received at least 10% of the votes in the district. Candidates are reimbursed 90% for childcare or other provision of care expenses during the election; and 90% for paid accessibility expenses (to a maximum \$5,000). Parties are entitled to a 50% reimbursement from the government for their expenses, provided they received at least 2% of the national vote, or if not, then for any district in which they received at least 5% of the vote. They also get 90% for paid accessibility expenses (to a maximum \$250,000). These public funds make it easier for political parties and candidates to borrow

¹⁰¹³ The platform must keep a copy of each political message, and the party or agent that authorized the message. They do not have to host the registry themselves, they can link and use a registry hosted elsewhere. Larger platforms must keep a copy of all such advertising from 1 year before the election, keep it publicly available for 2 years, and retain the records for 7 years.

¹⁰¹⁴ Some of these offences appear to be in response to false statements widely disseminated during the 2016 U.S. Presidential election by certain candidates and third-parties.

¹⁰¹⁵ *Canada Elections Act* (last amended on 2019-06-13), (S.C. 2000, c. 9) 2000 ss 91 & 92.

¹⁰¹⁶ *Lobbying Act*, *supra* note 76.

from the bank, as it is likely they have funds coming in from the government after the election.¹⁰¹⁷ Surpluses after the election must go to a registered party or association of the party in the candidate's district. Independent candidates must transfer any surplus to Elections Canada.

The Limits in the Current Canadian Law

Overall, the Canadian campaign finance law has been relatively successful. Lawlor and Crandall found that in the period they measured, 2004-2008, third-party spending was well controlled by the laws.

It does not appear that third parties in Canada are “abusing” their ability to spend in larger amounts through third-party spending regulations. Further, campaign spending data indicate that there is little strategic action on the part of third parties in terms of spending around contribution limits. During these three elections, third parties quite simply did not spend in significant amounts. Current third-party spending limits, therefore, appear to be situated comfortably within the expectations of the egalitarian model.¹⁰¹⁸

Nonetheless, the current Canadian law has a number of shortcomings. It has increased the third-party spending limits, perhaps excessively, and allows the political parties' use of fundraisers and galas.¹⁰¹⁹ The 2018 reforms lacked the vision to move electoral funding to a higher level of transparency or regulation, or to restrict the use of fundraising events and pay for play donations. The law also missed an opportunity to increase voter participation by lowering the voter age to 16, declaring the set federal election date a national holiday, or by making voting mandatory.

The legislation continues to rely on tax breaks and after-the-fact compensation for the public funding of parties and candidates. This type of reimbursement is better than nothing, but far from ideal. It cuts down on the need for fund raising from large donors, but it magnifies the weight of the donations, essentially doubling them. This disproportionately helps the parties that receive more contributions, as more donations allow more electoral spending, and that provides more money returned on the back end. It is also less transparent for the voters, as the public funding is hidden from view. Moreover, the legislation fails to bring back the per-vote campaign subsidy. The per-vote subsidy provided each party with a small sum, ~\$2.50, per vote it received. This was a good mechanism to open up the democracy, allowing for reduced donation caps, while increasing citizen power. The per-vote

¹⁰¹⁷ Note that The amount an individual can legally guarantee for a loan to a political campaign is subject to the individual's contribution limit. So a large loan might require multiple individuals to act to guarantee the loan. There is no limit to the amount a registered party, a registered association of the party can guarantee (or just loan directly to the campaign).

¹⁰¹⁸ Andrea Lawlor & Erin Crandall, “Understanding third-party advertising: An analysis of the 2004, 2006 and 2008 Canadian elections” (2011) 54:4 Can Public Adm 509–529 at 526.

¹⁰¹⁹ Fundraisers in particular continue to be a source of mini-scandals. See, for instance, Robert Fife & Steven Chase, “Law firm's event for Liberals draws cash-for-access charges”, *Globe Mail* (1 November 2016).

subsidy rewarded parties for their direct citizen support, regardless of the wealth of the citizens. It also helped compensate for some of the shortcomings of Canada's first-past-the-post system, where votes often do not matter on their own, because they are lost in a riding by being swamped by large support for another party, or they are wasted by there already being excessive support for the party. The vote subsidy meant that each vote continued to matter to the parties, regardless of how voters happen to fit in their ridings.

Canada would benefit from a voucher program that provides public support for candidates who received enough vouchers from citizens in a district. This would help open up the election to those with fewer connections to citizens able to make yearly contributions of up to \$5,000 (the combined candidate, riding association, and party maximum).

It remains to be seen if the law adequately deals with the manipulation of online media and social media, the threat of sockpuppets and the risk of foreign governments interfering in the election. Hopefully, the online platforms will take their duty to prevent foreign interference in the election seriously.

The Contrasting Practice of Campaign Contributions in the U.S.

The rules of campaign donation in the United States are complicated. These rules can vary between the federal level and each individual each state. In state elections the state constitution applies, whereas at the federal level the United States Constitution applies. The American federal campaign finance laws and regulations are a half-regulated system with a myriad of loopholes. They are an example of what happens when the rules are incomplete, when the Court punches large exemptions through them, and when the hydraulic pressure of political influence is not accounted for. Certain direct types of campaign finance activities and coordination remain illegal (although enforcement is rare), yet equivalent activities can be accomplished through well-established indirect (and slightly less efficient) alternatives. For example, some types of direct donations are restricted, but there are numerous other ways of funneling support to candidates – including running parallel, supposedly unaffiliated, electoral campaigns.

To understand the current state of American campaign finance law, we need to look at two key Supreme Court cases: *Buckley v. Valeo*¹⁰²⁰ (*Buckley*) and *Citizens United v. Federal Election Commission*¹⁰²¹ (*Citizens United*).

The United States enacted modern campaign finance regulations in 1971 and overhauled the laws shortly thereafter in light of the Nixon scandals. *Buckley* was the Supreme Court's ruling on this attempt to comprehensively regulate campaign spending. In the long run, both the law and the Court case have been a good example of the failure that occurs when political influence is not approached cohesively. At first the law set a relatively restrictive bar on campaign contributions, albeit with

¹⁰²⁰ *Buckley v. Valeo*, *supra* note 955.

¹⁰²¹ *Citizens United v. Federal Election Commission*, [2010] 130 S Ct 876.

significant loopholes due to the ruling in *Buckley*. Over time more and more methods developed to bypass the restrictions and regulations, and Congress repeatedly failed to keep up with regulations and disclosure requirements to reign in the new exploits of the campaign finance laws. Congress tried to reform the system with the Bipartisan Campaign Reform Act of 2002, but left many loopholes open. Congress is not really to blame for this; the ruling of *Buckley*, and the subsequent rulings in *Citizens United* and *McCutcheon et al. v. Federal Election Commission*¹⁰²² (*McCutcheon*) have made any comprehensive regulation of campaign finance law virtually impossible. Many advocates of campaign finance reform have come to believe that a constitutional amendment is needed to enact a comprehensive campaign finance regulations like those existing in Canada. At the same time, the likelihood of new reforms and support for a constitutional amendment has decreased as Congress has become increasingly reliant upon large campaign contributions.

The *Federal Election Campaign Act* of 1971 sought to regulate campaign financing on the premise that the current laws were ineffective, and elected politicians were being corrupted by their reliance on large secretive campaign contributions. The law was relatively comprehensive; however, even in its conception it contained a fundamental flaw. It vested oversight and regulatory authority in a body separate from Congress, the Federal Election Committee (FEC); but it established the FEC as a specifically partisan body by appointing oversight to an independent committee of six members with specific partisan leanings. No more than three commissioners could belong to a particular political party. These people were specifically appointed by parts of Congress (later the President) for six year terms. This built-in partisan structure made it likely that the FEC would hit a political stalemate on any significant issue that affected the political balance of power in Congress. The FEC had a relatively independent lower bureaucracy that could enforce the law, but on any significant issue it was often stalemated by its deliberately partisan design. Recently this problem has been exacerbated by the fact that the FEC can be sabotaged by a lack of appointments. As of 2019, the FEC was down to three commissioners, all serving on expired terms, which is below the minimum quorum needed. It lacked the four commissioners needed for actions such as enforcement, advisory opinions and approval of audit reports. This happened previously in 2008, which was a Presidential election year.¹⁰²³

Campaign finance regulation might have been still have been effective were it not for the Supreme Court's ruling in *Buckley v. Valeo*¹⁰²⁴.

Buckley v. Valeo

The Supreme Court reviewed the 1971 *Federal Election Campaign Act* in *Buckley*. The Court supported the existence of campaign finance law, approving the right to limit campaign donations, the right for public funding for candidates, and the legality of mandatory campaign donation disclosures. Yet the judgment came to four fundamental conclusions that deeply affected campaign finance law,

¹⁰²² *McCutcheon v Fed Election Commission*, [2014] 536 US .

¹⁰²³ Michelle Ye Hee Lee, "FEC commissioner's departure leaves panel with bare-minimum quorum", *Wash Post* (7 February 2018), online: <https://www.washingtonpost.com/politics/fec-commissioners-departure-leaves-panel-with-bare-minimum-quorum/2018/02/07/03fb24a0-0c28-11e8-8890-372e2047c935_story.html>.

¹⁰²⁴ *Buckley v. Valeo*, *supra* note 955.

ultimately rendering it unable to comprehensively manage the pressure of political influence. The Court (1) struck down the limits on third-party election expenditures¹⁰²⁵, (2) struck down the limits on candidate expenditures, (3) held that campaign contributions are a form of political free speech, and (4) held that equality of political voice was not a valid justification for limiting campaign contributions.

The Court partially struck down the limits on third-party electoral expenditures. In doing so, it argued that this helped justify the limits on contributions to candidates, as the individual was always free to spend independently, as well as volunteer and otherwise advocate for the candidate. The Court continued to allow the limitations of third-party spending only when the political advertising was related to the election by using what became known as the eight magic words (and phrases): "vote for," "elect," "support", "cast your ballot for", "Smith for Congress", "vote against", "defeat", "reject", or any variations thereof. The Court maintained that the specificity of these words avoided chilling speech on political issues. It was trivially easy for third parties seeking to craft electoral ads to avoid these magic words. The resulting ads became known as "issue ads", and were soon prevalent in electoral campaigning. The spending limits were virtually moot.

The second damaging conclusion was the Court ruling that there could be no limits on an individual candidate's campaign expenditures, on the basis that it was a restriction of the candidate's free speech. With more money the candidate could theoretically reach more people, run more ads and provide more information to the voters. The Court also argued that limitations on campaign expenditures might favour the incumbent, since the challenger needed to spend more on advertising to increase their profile.¹⁰²⁶ This position was reasonable, but ultimately inaccurate.¹⁰²⁷ Equally importantly, the Court held that reducing the cost of election campaigns was not a constitutionally permissible goal for campaign finance regulations.

The Court of Appeals' assertion that the expenditure restrictions are necessary to reduce the incentive to circumvent direct contribution limits is not persuasive.¹⁰²⁸

Although the Court raised some valid arguments, its ruling did little to address its concerns. One is hard pressed to see any improvement in information transfer to voters despite the increased amounts spent on elections. If anything there appears to be a decrease in actual policy discussion and an increase in political manipulation. Moreover, the incumbency advantage appears to be increased by allowing unlimited donations.¹⁰²⁹

¹⁰²⁵ A third-party is a person or group that conducts election advertising, other than a candidate, registered party or electoral district association, in Canadian election regulations.

¹⁰²⁶ *Buckley v. Valeo*, *supra* note 955 at 57.

¹⁰²⁷ Kevin Milligan & Marie Rekkas, "Campaign Spending Limits, Incumbent Spending, and Election Outcomes" (2008) 41:4 Can J Econ 1351–1374 at 1373.

¹⁰²⁸ *Buckley v. Valeo*, *supra* note 955 at 55.

¹⁰²⁹ The electoral incumbency advantage of U.S. candidates is approximately 2.5 percentage points, which can be significant in closely competitive districts. Alexander Fourinaies, *How Do Campaign Spending Limits Affect Electoral Competition? Evidence from Great Britain 1885-2010* (Unpublished Paper, 2018) at 25. Kevin Milligan & Marie Rekkas, *supra* note 1027 at 1373.

Early studies tended to find that spending by challengers was far more effective than incumbent spending. More recent work argues that in principle campaign spending is equally productive across candidates, but that there are strongly diminishing marginal returns to campaign spending.¹⁰³⁰

The incumbent can often out-raise the challenger, having previous experience raising donations, more established connections to large donors, and more access to power used to trade favours. It seems that incumbents are likely to spend more money than their challengers, and that lower quality incumbents might actually benefit from the higher spending limits, which they exploit to compensate for their shortcomings.¹⁰³¹ Recent studies indicate that raising the spending limits actually advantages the incumbent.¹⁰³² This is covered in more detail below, in the section on how Concern 4: Campaign Contributions Favour the Status Quo.

Overall, this facet of the ruling caused far more harm than it prevented. It struck a foreseeable and lethal blow to campaign finance regulation. A competitive political environment would always seek more money to gain a greater advantage in the election. This demand for money, this lack of a legal bright line on expenditures for the competing candidates and parties to stop at, will invariably suck as much money, and hence influence, into the political system as could be supplied. The unlimited demand means that limits on contributions rarely hold. There is too much pressure to find creative ways around the donation restrictions, from both donors and politicians.

The Court ruled that campaign contributions are a form of political free speech, and as such they deserve the full protection of the law. The donations are also a form of free association, by which individuals express their political affiliation. It upheld the contribution limitations on the basis that there were other ways to associate with the campaign, and that one could spend independently on the election. Although this ruling in its context did not overturn the law, it became the basis for later decisions that expanded political power towards the wealthy elite by raising contribution limits. The ruling tightly integrated money with speech. By placing little on the other side of the scale, the ruling weighed the law in favour of interpreting more contributions and more spending as more speech. Since more speech is better, the logic of the ruling favours always allowing more money into political campaigns. Although giving a small donation is a valid form of speech – a token of support – once the donations exceed the amount most individuals can afford – thousands, tens of thousands, millions of dollars – it has transformed from a show of support into a way of purchasing influence; influence available to only the wealthiest and the largest organizations.

The Court's holding that equality of voice was not a valid justification for regulating campaign contributions was another lethal blow to regulating campaign finance. It held that contribution limits

¹⁰³⁰ Jeff Milyo, "Campaign Spending and Electoral Competition: Towards More Policy Relevant Research1" (2013) 11:3 Forum (Genova) 437–454 at 4; Alexander Fourinaies, *supra* note 1029 at 23.

¹⁰³¹ Kevin Milligan & Marie Rekkas, *supra* note 1027 at 1373.

¹⁰³² Alexander Fourinaies, *supra* note 1029 at 23.

could only be upheld on the basis of preventing corruption and the appearance of corruption. The bar for corruption is too high and hard to prove; not only is the evidence hard to acquire, but the burden of proof is the criminal standard of “beyond a reasonable doubt”. This cannot be a basis for cohesive regulations of campaign finances, and trying to use it as a bar would allow a high level of near-corruption that will inevitably undermine the electoral system. The appearance of corruption is a more useable standard, although a little vague. However, it does not adequately account for the reality of campaign finance issues – and for the separation between the public’s corruption heuristic and the insiders’ disclosure heuristic. Judging the appearance of corruption by the standards of average citizen or by those of the political insider are fundamentally different bars.

Most fundamentally, the Court specifically ruled out political equality as a valid goal of the regulations. As will be discussed in Chapter 6, political equality is a fundamental necessity of any democracy. A major portion of the concern about large political donations is that the wealthy will have disproportionate influence – that the contributions will undermine political equality.¹⁰³³ Campaign laws that cannot work towards political equality are bound to fail to keep the democracy healthy, and will ultimately allow the rise of corruption and the appearance of corruption. In response to *Buckley*, later courts began to squeeze concerns about equality into the box of the appearance of corruption.¹⁰³⁴ It was a messy fit, but it was a promising way of undoing some of the damage of *Buckley* without specifically revisiting the decision. This option was closed by *Citizens United*.

Citizens United v. Federal Election Commission

Citizens United is the most important United States case on campaign finance law since *Buckley*. It marked a clear turning point in Supreme Court jurisprudence by an increasingly activist right-wing Court. This change had begun in *Federal Election Commission v. Wisconsin Right to Life, Inc.*¹⁰³⁵ (*Wisconsin*), in which the Court embraced a deregulated view of political campaigns. This approach was justified by a more expansive reading of the right to freedom of speech, and was increasingly skeptical of campaign finance regulations. *Citizens United* evaluated the *Bipartisan Campaign Reform Act* of 2002, which banned the solicitation or receipt of soft money¹⁰³⁶ and expanded the *Federal Election Campaign Act* ban on corporate and union donations. The act banned these organizations from using their general treasury funds to pay for broadcast political advertisements that clearly reference a candidate up to 60

¹⁰³³ Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: Rawls and Dworkin on Political Equality, p. 337.

¹⁰³⁴ “The only acceptable justification for restricting contributions was the prevention of corruption and the appearance of corruption. [T]he Court broadened the definition of corruption in later cases to include the concepts of antidistortion and undue influence. Many scholars have pointed out that the antidistortion interest was ultimately based on an equality rationale... By focusing on distortion, the Court was responding to the problem that concentrated corporate wealth gives certain voices far greater political influence than others for the simple reason that speech is expensive ... The antidistortion argument in *Austin*, for example, is concerned with inequities in speech capacities that skew electoral outcomes, whereas the undue influence standard in *McConnell* is concerned with the skew in legislative outcomes.” Yasmin Dawood, *supra* note 489 at 336.

¹⁰³⁵ *Federal Election Com’n v Wisconsin Right to Life, Inc.*, [2007] 127 S Ct 2652.

¹⁰³⁶ Soft money was money donated directly to a political party. Unlike donations to particular candidates, soft money was not regulated.

days before a general election or 30 days before a primary election. The Court had specifically solicited a more expansive challenge than the narrow issue at play in the original case, seeking to make the case a pivotal evaluation of the *Bipartisan Campaign Reform Act* and campaign finance law in general.

In *Citizens United*, the Court upheld the challenge to the law, overturning the new limits on broadcasting spending during an election, breaking its own recent precedent from *McConnell v. Federal Election Commission*¹⁰³⁷ and the older precedent from *Austin v. Michigan Chamber of Commerce*¹⁰³⁸. *Citizens United* reiterated and reinforced *Buckley*'s position that political equality is not a legitimate goal for campaign finance law.¹⁰³⁹ It made two rulings that further undermined any cohesive campaign finance regulations. The Court specifically denied the distinction between free speech by citizens and that by corporations, overturned the limits on expenditures for communications that expressly advocated for or against a particular candidate (ads that used the 8 magic words), and it rejected the use of the appearance of corruption as a foundation for campaign finance regulations.

Corporate Free Speech

The majority opinion in *Citizens United*, written by Kennedy J., held that corporations are essentially associations of people, and that since spending money was essential to disseminating speech per *Buckley*, corporations had a free speech right to spend unlimited amounts on an election. Limiting spending was limiting free speech, and there was no distinction between free speech by citizens and that of corporations. The Court showed no concern that its ruling pierced the corporate veil.¹⁰⁴⁰ Kennedy J. also maintained that the First Amendment recognized no distinction between the speech of a media corporation reporting the news and that of any other corporation. Since the former was not restricted by spending limits during election, so too must it be true for other corporations as well.

Akerlof and Shiller argue that Kennedy's interpretation of free speech is essentially bloodless and unrealistic, an issue we will return to later in the chapter.

Kennedy seems to treat speaking solely as conveyance of information, without consideration of its role of persuasion... Speech is also a way to convince other people to act in *our* interests ... it is also a way to convince them to behave in a way that is in our interest, but not necessarily in *theirs*.¹⁰⁴¹

¹⁰³⁷ *McConnell v. Federal Election Commission*, [2003] 93 US .

¹⁰³⁸ *Austin v. Michigan Chamber of Commerce*, [1990] 494 US 652.

¹⁰³⁹ Zephyr Teachout, *supra* note 988 at 303.

¹⁰⁴⁰ Over the last thirty years, the corporate veil has become more of a sheer golden curtain in a high window, which can be opened or closed to suit the flirtatious mood of the wealthy and powerful. When the sparkling curtain is needed to protect from the legal consequences of malfeasance, they playfully pull it closed; when it would interfere with a corporation's claim for freedom of religion or the right to political speech, they teasingly draw it open; when taxes are due, they close it again with an impish wink.

¹⁰⁴¹ George A. Akerlof & Robert J. Shiller, *supra* note 52 at 161.

The Court also overturned the older precedent from *Austin v. Michigan Chamber of Commerce*, which had upheld a law that restricted corporations from making political contributions from their general funds. Instead, corporations had to use an independent fund specifically established for political purposes.

Appearance of Corruption

Equally important to the viability of campaign finance regulation, the majority ruling radically changed the standard for appearance of corruption, practically eliminating it.¹⁰⁴² In previous jurisprudence, the Court had been gradually expanding the scope of the appearance of corruption. It was doing this in recognition that large political donations were more corrupting and troubling to the populace than *Buckley* had held, and in recognition that some concept of political equality was necessary, and this was a way of fitting it within the precedent of *Buckley*. *Citizens United* marked the Court's move in the other direction. In this and subsequent legislation, the Court essentially discarded the concept of appearance of corruption, defining acts that might otherwise appear corrupt as definitionally not so.

In the majority judgment, Kennedy J. argued that independent expenditures do not and cannot cause the appearance of corruption.

The *McConnell* record... "does not have any direct examples of votes being exchanged for . . . expenditures," ... This confirms *Buckley's* reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. ... Ingratiation and access, in any event, are not corruption. The BCRA record establishes that certain donations to political parties, called "soft money," were made to gain access to elected officials... This case, however, is about independent expenditures, not soft money.¹⁰⁴³

Kennedy's search for direct votes being exchange for expenditures appears simplistic. There are a myriad of ways legislators can work in favour of their donors without casting an open vote in their favour. Moreover, as is discussed later in the chapter, legislators do appear to favour the policy preferences of their donors.

Regardless, as a matter of precedent, *Citizens United* exempts expenditures on elections from the appearance of corruption, in contrast to both the thrust of political science evidence and common sense. One can spend tens of millions in support of a candidate, but the appearance of corruption is legally impossible. In *McCutcheon* the Supreme Court further narrowed the definition of corruption, reducing corruption to blatant *quid pro quo* corruption, and essentially eliminating the appearance of corruption from campaign finance law.

¹⁰⁴² Michael S Kang, "The End of Campaign Finance Law" (2012) 98 Va Law Rev 1 at 21.

¹⁰⁴³ *Citizens United v. Federal Election Commission*, *supra* note 1021 s Opinion of the Court III B 2.

Teachout points out that the interpretation of corruption, and its restriction to the term *quid pro quo*, is both bad law and a poor application of the concept.¹⁰⁴⁴ The Court “appears confused about the relationship between different types of corruption laws.”¹⁰⁴⁵ In limiting corruption to the most blatant cases, it discarded the historic view of corruption as the use of public power for private ends.¹⁰⁴⁶ The new view of corruption required a specificity that was crippling to public enforcement. Prior to *Buckley*, *quid pro quo* was not part of any definition of corruption, was rarely used in corruption and anti-bribery law, and was never meant to encompass all forms of corruption.¹⁰⁴⁷ *Citizens United* and *McCutcheon* narrowed the understanding of corruption to this “rootless phrase”, excluding previous understandings of corruption, which had included many forms of exchange – not just money for direct services.¹⁰⁴⁸

This uprooting has real consequences. It is now legal to spend as much money as possible to influence politics except in two ways: First, you cannot directly offer an exchange of money for official action. Second, you must abide by direct campaign contribution limits. These remaining limits are arbitrary. There is not a deep logic to them.¹⁰⁴⁹

Dissent

Stevens J.’s dissent in *Citizens United* was a convincing rebuttal to the majority’s view of democracy and campaign finance regulation. He maintained that the majority’s ruling had disregarded precedent and the government’s compelling interest in regulating free speech; that it set an inadequate standard for corruption; and that it would impoverish the marketplace of ideas.

Disregarded Precedent and the Compelling Interest

Stevens argued that the majority had disregarded precedent and taken an unjustifiably absolute interpretation of freedom of speech, disregarding legitimate distinctions between speakers and the government’s legitimate and compelling interest in regulating campaign finance.¹⁰⁵⁰ He argued that it is common sense to treat corporations differently than people.¹⁰⁵¹ This is particularly true in areas of democracy and governance (this will be theoretically demonstrated in Chapter 6). The majority also discounted the evidence that campaign contributions buy influence, and that large electoral expenditures are rarely truly independent; they are generally intended to help or threaten one of the candidates. The candidates know this. They react to the threats, and they seek to make alliances with those spending in support of their campaigns.

¹⁰⁴⁴ Zephyr Teachout, *supra* note 988 at 238.

¹⁰⁴⁵ *Ibid* at 303.

¹⁰⁴⁶ *Ibid* at 238.

¹⁰⁴⁷ *Ibid* at 239.

¹⁰⁴⁸ *Ibid* at 241.

¹⁰⁴⁹ *Ibid*.

¹⁰⁵⁰ *Citizens United v. Federal Election Commission*, *supra* note 1021 s Opinion of Stevens, J. III Identity-Based Distinctions.

¹⁰⁵¹ *Ibid* s Opinion of Stevens, J. III 2. Legislative and Judicial Interpretation.

The Findings also demonstrate that Members of Congress seek to have corporations and unions run these advertisements on their behalf. The Findings show that Members suggest that corporations or individuals make donations to interest groups with the understanding that the money contributed to these groups will assist the Member in a campaign. After the election, these organizations often seek credit for their support. . . . Finally, a large majority of Americans (80%) are of the view that corporations and other organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from those officials when matters arise that affect these corporations and organizations.¹⁰⁵²

The Quid Pro Quo Standard is Inadequate

The majority's narrowing of corruption to the *quid pro quo* standard – to the simplest rare direct bribe – was a mistake.¹⁰⁵³ It rejected the appearance of corruption and the use of undue influence; it did not account for the needs of democratic governance.

There are threats of corruption that are far more destructive to a democratic society than the odd bribe. Yet the majority's understanding of corruption would leave lawmakers impotent to address all but the most discrete abuses. ... The cluster of interrelated interests threatened by such undue influence and its appearance has been well captured under the rubric of "democratic integrity." This value has underlined a century of state and federal efforts to regulate the role of corporations in the electoral process. Unlike the majority's myopic focus on *quid pro quo* scenarios and the free-floating "First Amendment principles" on which it rests so much weight ... this broader understanding of corruption has deep roots in the Nation's history.¹⁰⁵⁴

Impoverish the Marketplace of Ideas

The majority's view ignored how corporate (and the wealthy's) domination of political speech during an election could impoverish the marketplace of ideas, instead of enriching it. There was no room in the ruling for political fairness, or even the question of what is necessary for healthy political representation. Stevens J. argued that the majority ruling would undermine the integrity of American elections.

¹⁰⁵² *Ibid* s Opinion of Stevens, J. IV The Anticorruption Interest.

¹⁰⁵³ Deborah Hellman, "Defining Corruption and Constitutionalizing Democracy" (2013) 111:8 Mich Law Rev 1385–1422 at 1390.

¹⁰⁵⁴ *Citizens United v. Federal Election Commission*, *supra* note 1021 s Opinion of Stevens, J. IV The Anticorruption Interest.

The Court's blinkered and aphoristic approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve. It will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process. Americans may be forgiven if they do not feel the Court has advanced the cause of self-government today.¹⁰⁵⁵

Repercussions

The Court's narrowing of the government interest in the prevention of corruption has crippled the government's ability to constitutionally justify campaign finance regulations.¹⁰⁵⁶ *Citizens United* is one of the select Supreme Court rulings that has made it into the popular legal canon, well-known by non-scholars and often referenced by activists, cable pundits and politicians. Few, if any, serious scholars believe the case has improved the American electoral system. *Citizens United* was a complete rejection of the idea that government could and should put a limit on those who can afford huge megaphones so that the voices of normal people are not drowned out. The majority's view of free speech so completely tied political speech to spending money that it became untenable to maintain a healthy electoral process.

While corruption has narrowed to quid pro quo, free speech has expanded to encompass all money spent on communication. ... In *Citizens United*, Kennedy's version of the First Amendment is that the Court "must give the benefit of any doubt to protecting rather than stifling speech." The absolute language of "any doubt" confers a veto-providing authority to First Amendment concerns. While the opinion talks a good deal about political speech, it barely mentions politics and only once discusses the integrity of the political process.¹⁰⁵⁷

Senator Bennet expressed the essence of the problem succinctly.

The Supreme Court ... had equated money as speech in *Buckley v Valeo* in an earlier decision. And in this decision [*Citizens United*], they said in a democracy you can never have enough speech. So the corollary to that is in a democracy you can never have enough money, which is what we've gotten as a result of *Citizens United*. I have yet to meet a person in Colorado who has said to me Michael, the problem with our

¹⁰⁵⁵ *Ibid* s Opinion of Stevens, J. IV 1. Antidistortion.

¹⁰⁵⁶ Michael S. Kang, *supra* note 1042 at 21.

¹⁰⁵⁷ Zephyr Teachout, *supra* note 988 at 241.

politics is that there's not enough money in it. But that is the fundamental thesis of *Citizens United*.¹⁰⁵⁸

Information Provision and Manipulation

Akerlof and Shiller's theory of phishing (that manipulation of others against their own self-interest is inherent to the marketplace), undermines the Court's absolutist version of free speech. They argue that,

phishing for phools tells us that Kennedy had the argument wrong: there can be no absolutes in the rules of letting people speak, just as no one would allow someone to play loud music at Speakers' Corner in Hyde Park (where by right all British people, no matter how kooky, can voice their views). Kennedy seems to treat speaking solely as conveyance of information, without consideration of its role of persuasion, inevitably with its phish for phools.¹⁰⁵⁹

Like lobbying, political campaigns and advertising transfers information "through carefully sculpted narrative, which is intentionally colored with bias."¹⁰⁶⁰ The Supreme Court's frame of political campaigning as a means of information transfer is problematic, as we will discuss. Even if one accepts it, recognizing the existence of deception and phishing (including fake news¹⁰⁶¹ and internet sockpuppetry) leads to the conclusion that electoral campaign laws should deter bad sources of information and support less biased sources of information. In time the truth might come out, but electoral campaigns are not run on long enough time spans for the truth to reliably emerge. The electoral campaign laws should be designed to help deter manipulation and phishing, by ensuring that powerful voices do not drown out those with less money. By maintaining spending limits, the law can ensure all third-parties have an equal chance to participate, not just the extremely wealthy and powerful. With an opening for more voices, there is more room for truth to emerge. It also allows there to be spending limits for candidates and political parties without the risk that they will be drowned out. These limits, in turn, prevent the political system from descending into a race for campaign donations, and allow for the channeling of the hydraulic pressure of political influence, leaving room for the influence of rational discourse (type v influence).

It is true that electoral law favours the speech of political parties and candidates, but this is a necessity in a democracy. It is also true that it favours the speech of (legitimate) news media

¹⁰⁵⁸ Michael Bennet, Ezra Klein & Michael Bennet, *supra* note 902 s 30:19.

¹⁰⁵⁹ George A. Akerlof & Robert J. Shiller, *supra* note 52 at 161.

¹⁰⁶⁰ *Ibid* at 79.

¹⁰⁶¹ Fake news is used in its original sense: reporting and articles that the authors know are false, which are intended to manipulate the reader for political or economic ends. The current America President has tried to redefine the term to encompass any news he dislikes or is critical of him. This gross manipulation of language shows no respect for the truth. Sadly, the President has been fairly successful at pushing this redefinition.

organizations over other third-parties. This is also a necessity. As Stevens J. recognized, it is perfectly legitimate to distinguish between the free speech of different types of organizations and companies during an election. The right to free speech in an election is tied and matched with the right to fair elections, and both must mesh with the citizens' and candidates' rights to political equality. In this, candidates, political parties, and news media are treated differently than third-parties by electoral campaign laws because they have a central role in the election.

When considering the information available to voters, there is another good reason to favour the provision of information by candidates and the news media over that of third parties. Manipulation by reoccurring actors, such as political actors and the media, is at least subject to some reputation costs. Likewise, news companies have well-known biases and reputations the voter can predict and react to. News media has to consider its long-term viability. It has a reputational incentive (and often organizational goal) to convey the truth. A news source that is seen as deceptive by its readers/viewers will soon fail. In contrast, third parties have less incentive to tell the truth. They often have no reputation to maintain, no connection to the voters to risk, and frequently no long-term existence outside of the election. It is common for third parties to form PACs and other oblique organizations to disguise their connection to the electoral spending and ads, and mask the true motivation behind the advertising. These organizations, PACs and shell companies are generally unknown to the voters, and are often disbanded after the election. They have a high incentive to phish and lie, and the organizations funding them face little risk, even if the lie is caught. There are numerous signals regulators could use to distinguish legitimate news sources from astroturf and fake news sources.¹⁰⁶² The rise of sockpuppets and fake news sites will probably make this a necessity soon. Good electoral regulations would take advantage of the distinguishing factors of genuine media organizations to at least limit the spending of deceptive and false news sources, especially since many are funded by governments hostile to democracy. The *Citizens United* ruling, which forbids distinguishing between media news organizations and other corporations, would seemingly also forbid distinguishing between legitimate news organizations and false news organizations.

Corruption

The Court's ruling on the appearance of corruption in *Citizens United* and subsequent cases has placed hard limits on the government's ability to resist corruption or the political influence of the wealthy. Teachout argues that,

¹⁰⁶² These signals include: their funding sources; whether they are open about their funding sources; their editorial independence from their ownership; whether they are influenced or controlled by foreign governments and shadow political parties; the transparency of the news and editorial process; whether they clearly separate their reporting and editorializing; their willingness to cover stories that lean against their editorial stance; the respect and accuracy shown to positions with whom they politically disagree; whether they consistently and prominently correct their mistakes; the factual basis of their reporting; whether they present the best available information, and accurately report scientific opinion; whether their reporters, writers, and editors are widely respected; whether they display a drive to seek truth; and whether they call out bigotry, unethical, and illegal behaviour wherever it is found.

[a]fter *Citizens United*, there is only one kind of thing that is clearly corrupt: openly asking for a deal in exchange for a specific government action. The vast range of inappropriate dependencies and self-serving behavior that made up the web of the world of corruption for the founders is gone. It is not merely that the anticorruption value is out-weighed by other values – the due process clause, the First Amendment, and statutory interpretation – it is that it no longer exists. The corruption against which the framers said they must provide, lest “our government will soon be at an end” – that is not a value anymore.¹⁰⁶³

Reich also argues that the Court’s abandonment of its precedent and its narrowing of what counts as corruption was a drastic error.

In 1990, the Supreme Court sensibly viewed corruption as including “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.” Twenty years later, the court defined corruption far more narrowly, to mean the exchange of specific money for specific votes-outright bribery.¹⁰⁶⁴

The Court’s approach to corruption is simplistic at best. It mistakes dependency corruption for a collection of corrupt *quid pro quo* acts – a mistake that Lessig warned that the Court was susceptible to falling into.¹⁰⁶⁵ The Court’s approach fails to recognize that dependency corruption is a type of corruption, a result of structural forces and incentives that push politicians away from their duty to represent the people, and instead towards a need to please their donors in order to stay in office. This is at the heart of the appearance of corruption; the public cannot be sure that the politicians are acting in the public’s interest. The Court ignores this dynamic. It insists on approaching the question of political corruption as a *quid pro quo* situation: a simple series of individual *means rea* acts of a few bad politicians that does not require a system-wide solution.

In an oral interview, Senator Michael Bennet argued that the structural corruption unrecognized by the Court in *Citizens United* goes beyond the mere appearance of corruption into actual corruption.¹⁰⁶⁶

¹⁰⁶³ Zephyr Teachout, *supra* note 988 at 245.

¹⁰⁶⁴ Robert B. Reich, *supra* note 26 at 194.

¹⁰⁶⁵ Lawrence Lessig, *supra* note 273 at 235.

¹⁰⁶⁶ Michael Bennet, Ezra Klein & Michael Bennet, *supra* note 902 s 29:24.

It's actual corruption, but it's a corruption of inaction not a corruption of action. It's a corruption that says I'm not going to introduce that bill, or have that debate, or go on the floor and talk about climate change – just pick that – for fear that if I do in the next election some billionaire's going to drop \$30 million dollars in my race and nobody's going to know that I was ever here, and that will be the end of me.¹⁰⁶⁷

Bennet states that he and all the other politicians feel the pressure from big donors, and the weight of their threats. "The American people know something's wrong, but it's not like you can go and find a guy who's hid the cash in his icebox in Louisiana."¹⁰⁶⁸ The inaction is hard to prove, and impossible to counter on an individual level, because the problem is systemic. It is political influence flowing through the holes punched by the Supreme Court in the dam of campaign finance law.

Citizens United's View of the Citizen

Teachout raises an additional interesting criticism of the ruling. *Citizens United* is not simply a case on electoral law; it is part of the slow moving revolution in political thought that is transforming citizens into mere consumers, no longer central to political life.¹⁰⁶⁹

If Kennedy took a traditional understanding of corruption, he might be concerned for the corruption of the citizens who were using the corporate form to influence politics, and the way in which unlimited corporate speech might exacerbate lobbying culture. Instead, the citizen becomes a consumer of information, the corporation becomes an "association of individuals," and corruption becomes democratic responsiveness. It is a remarkable conceptual triple Lutz. ... *Citizens United* was a revolution in political theory, disguised as a definitional disagreement.¹⁰⁷⁰

This accords with the concern about lobbying raised in Chapter 3, that it can astroturf democracy by pushing citizens to express their concerns through businesses, as corporations and lobbyists become middle-men filtering the communication between citizens and their government.¹⁰⁷¹

Signaling

In a purely legal sense, *Citizens United's* importance is overstated. Much of campaign law stayed the way it was before, the Supreme Court's turning point against campaign finance restrictions was already visible in *Wisconsin*, and the fundamental rulings preventing effective campaign finance law had already been established in *Buckley*. However, a large part of *Citizens United's* significance lies in the

¹⁰⁶⁷ Michael Bennet, *ibid* s 27:35.

¹⁰⁶⁸ Michael Bennet, *ibid*.

¹⁰⁶⁹ Zephyr Teachout, *supra* note 988 at 237.

¹⁰⁷⁰ *Ibid*.

¹⁰⁷¹ Chapter 3– The Six Concerns about Lobbying: Concern VI: Lobbying Corrupts Democracy: Lobbying Indirectly Weakens Democracy, p. 206. See also, Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: Inequality and Lobbying: America as a Winner-Take-All Society, p. 396.

signals the case sent. Because of the timing of the case, the Court's decisions to expand the scope of the dispute, and its capturing of the popular imagination, it has had an effect well beyond its technical legal ruling. *Citizens United* has been widely interpreted as a license that campaign finance laws can be bypassed, that the Court will interpret the laws narrowly and technically, that the rules will only be sporadically and weakly enforced, and that new regulations will be met with disfavour. Indeed, *Citizens United* was followed four short years later by *McCutcheon*, in which the Court struck down the already-high aggregate contribution limit of \$123,000 every two years. How many citizens could spend more than \$60,000 a year on electoral donations? That is a question of political equality, which was of no concern to the Court.

The use of loopholes, the bare technical compliance with the law and the outright rejection of campaign regulation, both as legal and moral norms, are becoming more and more established. This pattern has become so widespread that recent campaign contribution practices are of the scale one would expect if there were no rules at all.¹⁰⁷² Stevens J.'s warnings have come to pass. However, he did not foresee that along with corporations, billionaires and shadow political parties would play their part in giving large campaign contributions and wielding the resulting political influence. For example, the Koch network planned to spend \$300-\$400 million during the 2018 election cycle. Equally troubling, it has 36 state chapters and almost 500 paid staff who campaigned door to door to persuade voters.¹⁰⁷³ It is inconceivable that the politicians elected were not indebted for the tens of millions spent on the campaign. The Court has responded by defining this type of indebtedness as not corruption. However, saying it does not corrupt does not make it so. In a democracy, it is by its very nature corrupting for donors to wield this type of influence over officials. It damages the integrity of elections. We will explore the theory behind this proposition in Chapter 6.

Two additional examples might help illuminate the situation. On November 16, 2017, the House of Representatives passed a massive tax break (the *Tax Cuts and Jobs Act*) that saved the Koch brothers reportedly between \$1 billion and \$1.4 billion. Thirteen days later, they donated \$474,000 to the Speaker of the House's fundraising campaigns.¹⁰⁷⁴ The donation was a reward for legislation the House passed. It is also another example of the high returns lobbying and campaign contributions can have for the wealthy, even taking into account the millions spent in lobbying and previous campaign contributions in support of the legislation.

¹⁰⁷² For example, in 2010 the Taxpayers Against Earmarks PAC spent \$600,000 to oppose a single candidate in Nevada. It was funded and run on behalf of a single person, billionaire Joe Ricketts. Amanda Terkel, "The One-Person Funded Super PAC: How Wealthy Donors Can Skirt Campaign Finance Rules", (22 October 2010), online: *HuffPost Can* <https://www.huffpost.com/entry/super-pac-taxpayers-earmarks-concerned-citizens-campaign-finance_n_772214>.

¹⁰⁷³ Maggie Severns, "Koch Network Prepares Pivot to Tax Reform", (20 July 2017), online: *POLITICO* <<https://www.politico.com/story/2017/07/20/koch-brothers-americans-for-prosperity-taxes-trump-240762>>.

¹⁰⁷⁴ This donation was to his campaign committee, the congressional campaign arm of his party, and his leadership PAC Alex Kasprak, "Did the Kochs Contribute \$500,000 to Paul Ryan After the GOP Tax Plan Was Passed?", (23 January 2018), online: *Snopes.com* <<https://www.snopes.com/fact-check/kochs-contributed-ryan-after-tax/>>.

In May 2018, the billionaire Sheldon Adelson, who received a tax benefit of ~\$670 million from the 2017 *Tax Cuts and Jobs Act*, met with the Speaker of the House, who stressed the importance of a large donation to protect the House majority. Adelson agreed to give \$30 million to a GOP House super PAC. Since the Speaker cannot legally push for such a large donation, he “left the room before a deal on the massive contribution was reached.”¹⁰⁷⁵ By stepping out of the room for the few minutes, the letter of the law was technically upheld, while its spirit was trampled.

Technically, outside groups like super PACs can accept and spend unlimited amounts since *SpeechNow.org v. Federal Election Commission*¹⁰⁷⁶, which relied on *Citizens United* as precedent. In theory super PACs and other third-party electoral organizations are prohibited from coordinating with a political campaign. Yet, coordination has been so weakly defined that it barely means anything. Plans can be arranged outside of the formal election cycle, and it is normal for key members of a campaign to leave as the election’s start, so they can run the supposedly un-coordinated third-party organizations in support of the candidate.¹⁰⁷⁷ During the elections, some candidates have taken to posting their videos and campaign plans on their websites, so the external electoral organizations can download all the information they need to stay in sync with the candidate’s formal campaign.¹⁰⁷⁸ These outside third-party organizations often have deep ties to the politician, can accept unlimited donations, and will eventually inform the politician who the major donor and allies were. These social exchange debts are likely to be repaid.

U.S. Constitution is Limited by Lacking a Specific Right to Democracy

The Canadian Supreme Court has taken a different view of the constitutionality of various aspects of campaign finance regulation, and has been much friendlier to campaign finance regulations. There are various reasons for this: the Canadian Court uses a more nuanced (or flexible) view of freedom of expression; it explicitly views the Constitution as a living tree, it is generally more friendly to regulation, equality as a political goal, and collective interests; it had the example of the repercussions of the American Court’s jurisprudence to draw upon; and it has explicit access to the democratic rights in the *Charter* as a balance to freedom of expression.¹⁰⁷⁹ We will return to the key Canadian decisions on

¹⁰⁷⁵ Jacob Pramuk & Brian Schwartz, “Sheldon Adelson gives \$30 million to House GOP super PAC”, (10 May 2018), online: <<https://www.cnbc.com/2018/05/10/sheldon-adelson-gives-30-million-to-house-gop-super-pac.html>>.

¹⁰⁷⁶ *SpeechNowOrg, et al v Federal Election Commission*, [2010] 08-5223 .

¹⁰⁷⁷ Presidential candidates in 2016 appeared to delay their registration, so they could coordinate better with “un-coordinated” Super PACs. The coordination is also visible in the overlap in hiring. In 2016, “There were at least 632 instances where a super PAC and the candidate it supported both hired the same person or company at some point during this cycle, compared to 86 in 2014 and 161 in 2012.” Ashley Balcerzak, “Candidates and their super PACs sharing vendors more than ever”, (21 December 2016), online: *OpenSecrets News* <<https://www.opensecrets.org/news/2016/12/candidates-super-pacs-share-vendors/>>; *Shadow Campaigns: The Shift in Presidential Campaign Funding to Outside Groups*, by Ian Vandewalker (New York University School of Law: Brennan Center for Justice, 2015) at 11, 13, 15, 17, 19; Stephanie Condon, “Five ways 2016 candidates are testing campaign finance rules”, (15 May 2015), online: *CBS News* <<https://www.cbsnews.com/media/five-ways-2016-candidates-are-testing-campaign-finance-rules/>>.

¹⁰⁷⁸ Stephanie Condon, *supra* note 1077.

¹⁰⁷⁹ In Canada democracy is also an enforceable underlying principle of the Constitution. *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 61.

this topic in Chapters 6, but it is worth touching upon the importance of the explicit democratic rights here.

The American jurisprudence is hamstrung by the lack of an explicit constitutional right to democracy. The Court majority in *Bush v. Gore*¹⁰⁸⁰ stated that there is no right to vote for the President, the most important political position in the United States.

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.¹⁰⁸¹

Overall, the Court has been quite friendly to laws that strip large swathes of the population of their voting rights, from slavery, to Jim Crow laws, to citizens convicted of a felony, to cracked and packed electoral districts, to the destruction of the *Voting Rights Act* in *Shelby County v. Holder*¹⁰⁸² and *Abbott v. Perez*¹⁰⁸³. The lack of democratic rights to balance against the right of free speech is likely part of the reason the American Court has struggled with the importance of political equality and the value of free, fair and well-regulated elections. A right to democracy contains both an individual right to vote and participate, and a collective right to fair elections. Free speech lacks this, it cannot express the collective portion of democracy related to good governance, the right to equal political participation, and fair elections.¹⁰⁸⁴

The Influence of Campaign Contributions

There has been a pattern of increased campaign spending in the United States, matched by an increase in direct donations, as well as indirect donations through super PAC and dark money spending. These funds provide electoral advantages.¹⁰⁸⁵ Indisputably, this money also buys access to politicians. There had been some debate about whether the campaign contributions were harmful and bought

¹⁰⁸⁰ *Bush v Gore*, [2000] 531 US 98 [U.S. Reports].

¹⁰⁸¹ *Ibid* at 104.

¹⁰⁸² *Shelby County v Holder*, [2013] 570 US 2.

¹⁰⁸³ *Abbott v Perez*, [2018] 585 US 1.

¹⁰⁸⁴ The idea and implications of structural democratic rights is discussed in detail in Chapter 8 – Canadian Charter Section 3: Structural Democratic Rights Paradigm, p. 467.

¹⁰⁸⁵ Hall points out that candidates devote an enormous amount of time to fundraising, and that turnout efforts are expensive but reliably increase the vote by targeting key supporting populations. This allows the politicians to reliably turn money into votes. He estimates that a ten percent increase in a party's share of all contributions would cause an approximately five percent increase in the party's share of the legislature. It is likely that there are diminishing returns, but turnout efforts are a strong method of gaining electoral victory using funding advantages without having to change policy to appeal to a wider group of the voters. Andrew B Hall, "Systemic Effects of Campaign Spending: Evidence from Corporate Contribution Bans in US State Legislatures*" (2016) 4:2 Polit Sci Res Methods 343–359 at 353.

influence to go with the access. Recent evidence indicates that campaign contributions do buy influence, and can even affect judicial decisions.¹⁰⁸⁶

Increasing Amounts Spent on Campaign Contributions

There has been substantial growth in American campaign contributions over the last forty years. This increase is matched by an increase in corporate political activity.¹⁰⁸⁷ Kuhner summarizes the sheer growth and scope of campaign spending in the U.S., as of 2007.

The Bush and Gore campaigns combined spent \$325 million on the 2000 election. In 2004, the average House winner raised over \$1 million and the average Senate winner more than \$6 million. Approximately \$2 billion were spent on TV ads this past political campaign season and in the last sixty days before the election, 90% of these ads were negative.¹⁰⁸⁸

In the next election cycle in 2008, just two years later, the average campaign spending by candidate had increased yet again, doubling.

For the U.S. House elections of 2008, total campaign expenditures of all candidates were more than \$2 million per race, with incumbents spending more than double their challengers. In human terms, a representative must raise roughly \$1,800 per day in office ... Open races, with no incumbent, were more than doubly expensive, at \$4.7 million. Senate races are yet more costly. In 2008, Senate elections cost almost \$13 million per race.¹⁰⁸⁹

It is possible that some of this stabilization in U.S. spending might represent a natural ceiling; candidates cannot spend any more time fund raising, donors are not willing to spend any more, and the prices of some forms of campaigning might be declining due to shrinking TV audiences and cheaper web ads. However, it's equally likely that 2016 is an outlier election, and that more money is going through outside groups rather than the candidates themselves.

¹⁰⁸⁶ Special interest groups have affected judicial appointments in other ways. For example, the Federalist Society has been remarkably successful in creating a conservative “bench” of potential judges and having them appointed into the judiciary.

¹⁰⁸⁷ Sean Lux, T. Russell Crook & David J. Woehr, “Mixing business with politics”, *supra* note 213 at 224.

¹⁰⁸⁸ Timothy K. Kuhner, *supra* note 51 at 2361.

¹⁰⁸⁹ George A. Akerlof & Robert J. Shiller, *supra* note 52 at 73. Open Secrets has lower numbers for the 2008 election cycle, likely due to completely excluding all outside spending. Based on the FEC filings, it lists average U.S. House spending by candidates at just under \$500,000, and \$1.34 million per Senate seat. The presidential candidates spent \$1.741 billion combined. The direct spending in 2016 was roughly the same. OpenSecretsorg, “2008 Election Overview”, (24 April 2018), online: *Open Secrets* <<https://www.opensecrets.org/overview/index.php?cycle=2008&type=A&display=A>>.

Outside spending in general has increased every Presidential election cycle, exploding after the *Citizens United* decision. It was \$2 million in 2000, \$10 million in 2004, \$158 million in 2012, and \$461 million in 2016.¹⁰⁹⁰ The story with dark money follows a similar but more uneven trend. Dark money is electoral spending that does not disclose the source of the funds, thus it is harder to monitor. Dark money spending appears to have increased from less than \$5.2 million in 2006 to over \$300 million in the 2012 presidential cycle. In 2014, \$174 million was spent on the midterms, again a new record. In the 2016 presidential cycle, however, only \$176 million was spent on the federal level. This might have been a real decline, or simply a result of more money being spent on the state level and less on Trump and Clinton, due to his unusualness as a candidate and her presumed electoral advantage.¹⁰⁹¹

Teachout argues that there is no natural upper limit on electoral spending, and that the Supreme Court has made campaign contribution limits and curbing electoral spending virtually impossible.

As the framers understood, there is no natural state of politics and no natural level to which political spending will rise: structures, institutions, and laws either enable or disable the purchase of influence. Political spending rose after *Citizens United*. ... Within the decade in which I write this, unlimited outside spending by individuals and groups will likely become greater than political party and candidate spending. ... Congress has tried many different ways to limit the corrupting power of these interactions, and this Supreme Court has banned all of them.¹⁰⁹²

This being the case, barring a revolution within the Supreme Court or a constitutional amendment, we should expect electoral spending to continue to rise into the foreseeable future.

In contrast, in the 2015 Canadian federal election, candidate expenses were limited to an average \$218,000 per district, and national parties were limited to \$54.9 million in expenditures.¹⁰⁹³ These limits were significantly higher, roughly double, for this particular election, because the Harper government had passed legislation to extend the length of the election calendar. Party spending was in the range of the spending limit, but somewhat lower. The Trudeau government recently passed legislation to return to a shorter electoral period. Thus, assuming the Canadian campaign limitations stays in force, Canada should not experience the same cycle of growing electoral spending as the U.S.

¹⁰⁹⁰ Open Secrets, “Outside Spending”, (10 July 2018), online: *OpenSecrets.org* <https://www.opensecrets.org/outsidespending/fes_summ.php>.

¹⁰⁹¹ Open Secrets, “Political Nonprofits (Dark Money)”, (20 June 2019), online: *OpenSecrets.org* <https://www.opensecrets.org/outsidespending/nonprof_summ.php?cycle=2018&type=type&range=tot>.

¹⁰⁹² Zephyr Teachout, *supra* note 988 at 256.

¹⁰⁹³ *Report on the 42nd general election of October 19, 2015*, by Office of the Chief Electoral Officer of Canada (Elections Canada, 2016) at 18.

Campaign Contributions Grant Influence

Historically, there was debate about the influence of campaign contributions on (U.S.) government policy, just as there was debate about the influence of lobbying. The supporters of the disclosure heuristic often argue that there is little risk to introducing more money into politics, as all it does is fund additional campaign ads, which provide more information to voters.¹⁰⁹⁴ However, it has become increasingly clear that the contributions do have a significant effect on public policy by changing the actions and loyalties of the politicians. Smith summarizes some of the major findings and arguments up to 1995.

At one extreme are Chappell (1981, 1982), Wright (1985), Kabashima and Sato (1986), Owens (1986), Grenzke (1989), Vesenska (1989) and Rothenberg (1992) who report that interest group campaign contributions seem to be largely unrelated to the voting decisions of members of Congress. At the other extreme are Silberman and Durden (1976), Welch (1982), Feldstein and Melnick (1984), Peltzman (1984), Coughlin (1985), Ashford (1986), Ginsberg and Green (1986), Jones and Keiser (1987), Saltzman (1987), Wilhite and Thielman (1987), McArthur and Marks (1988), Masters and Zardkoohi (1988), Langbein and Lotwis (1990), Durden, Shogren, and Silberman (1991), Stratmann (1991), and Fleisher (1993) who report statistically significant relationships between interest group campaign contributions and the voting decisions of members of Congress... In addition, Quinn and Shapiro (1991) report that the establishment of corporate political action committees significantly affected corporate related tax decisions by the U.S. Congress over the period 1955 to 1987. Between these two extremes are Kau and Rubin (1981, 1982), Kau, Keenan and Rubin (1982), Navarro (1984), Johnson (1985), Frendreis and Waterman (1985), Wayman (1985), Evans (1986), Godwin (1988), Wilhite (1988), Neustadt (1990), and Langbein (1993) who report more mixed results. Evans (1986) reports that the influence of campaign contributions by interest groups varies across votes on the same issue; Kau and Rubin (1981, 1982), Kau, Keenan, and Rubin (1982), Navarro (1984), Johnson (1985) report that interest group contributions were related to congressional votes on some issues but not on others; Frendreis and Waterman (1985) report that the influence varies across senators according to the proximity of the next election; Wayman (1985) and Wilhite (1988) report that the contributions of particular interest groups may be influential in some election years but not in others;

¹⁰⁹⁴ Timothy K. Kuhner, *supra* note 51 at 2354.

Godwin (1988) claims that Democrats have become increasingly dependent on business related campaign contributions in recent elections, and have therefore become increasingly supportive of business and trade interests in Congress, especially when there is no organized opposition.¹⁰⁹⁵

Donations Buy Access

It is broadly accepted within the political science literature that (larger) campaign donations, at the very minimum, buy access to politicians.¹⁰⁹⁶ This finding is well supported by reports and interviews with officials and lobbyists. For example, Makinson interviewed sixteen Congress members and reported that, “[v]irtually everyone accepted the long-held Washington premise that money buys access to members.”¹⁰⁹⁷ Many politicians will state that they maintain a policy of meeting with their own constituents, as well as their donors, as if meeting their constituents is not simply a basic requirement of the job. Few politicians have been as publicly explicit in favouring donors as Mick Mulvaney, the interim director of the Consumer Financial Protection Bureau in the Trump administration.

“We had a hierarchy in my office in Congress,” Mr. Mulvaney, a former Republican lawmaker ... told 1,300 bankers and lending industry officials at an American Bankers Association conference in Washington. “If you’re a lobbyist who never gave us money, I didn’t talk to you. If you’re a lobbyist who gave us money, I might talk to you.” ... “If you came from back home and sat in my lobby, I talked to you without exception, regardless of the financial contributions,” said Mr. Mulvaney, who received nearly \$63,000 from payday lenders for his congressional campaigns.¹⁰⁹⁸

Despite politicians’ claims to the contrary, Kalla and Broockman’s study shows that politicians value meeting with donors more than constituents.¹⁰⁹⁹

The superior access we observed congressional offices granting to putative donors was not only statistically significant, it was substantively large: senior policymakers

¹⁰⁹⁵ Richard A. Smith, *supra* note 216 at 92.

¹⁰⁹⁶ “When people know you have a \$2 million PAC, it makes a lot more impact than if they know you have a \$100,000 PAC.” Lee Drutman, *supra* note 172 at 95 & 80; see also, Dorie Apollonio, Bruce E. Cain & Lee Drutman, “Access and Lobbying”, *supra* note 303 at 24.

¹⁰⁹⁷ Timothy K. Kuhner, *supra* note 51 at 2362.

¹⁰⁹⁸ Glenn Thrush, “Mulvaney, Watchdog Bureau’s Leader, Advises Bankers on Ways to Curtail Agency”, *N Y Times* (26 April 2018), online: <<https://www.nytimes.com/2018/04/24/us/mulvaney-consumer-financial-protection-bureau.html>>.

¹⁰⁹⁹ Joshua L. Kalla & David E. Broockman, *supra* note 987.

attended the meetings between three and five times as often when offices were informed the attendees were donors [instead of local constituents].¹¹⁰⁰

Kalla and Broockman note that their findings undermine the Court’s holding in *Citizens United*.¹¹⁰¹ The Court dismissed the idea that general donations have a significant impact on lawmakers, but the evidence indicates it does. This again raises the issue of political equality, since donors, particularly large donors, receive access and respect from politicians – a form of favourable treatment over other (generally less-wealthy) citizens.

Political access is a key to political influence, and even without further evidence of corruption it is a knife wound in the ideals of political equality and democracy. It indicates whose opinions and what information will enter the decision-making process. Kalla and Broockman argue access, even on its own, is important for two reasons.

First, access to powerful officials is often necessary for influencing policy, even if it is not sufficient... Second, access is considered a good measure of whose preferences legislators prioritize. Legislators’ time is finite, so when they decide to meet with individuals who ask, they relinquish time they could spend pursuing other activities.¹¹⁰²

Those without access have little means to effect political change. Access is a form and exercise of power. There is strong evidence that campaign contributions go beyond access and minor issue framing, and grant substantive influence over government.

Donations Buy Influence – The Corruption Heuristic

Donations do seem to buy influence.¹¹⁰³ Like lobbying, this is especially true in areas of low public salience. Businesses and trade associations continue to make campaign contributions to multiple political parties simultaneously, favouring business-friendly legislators, indicating that they are buying political influence and expect returns on their investments.¹¹⁰⁴ Kuhner argues a corollary of this is that businesses and individuals who fail to make campaign contributions will receive less attention from officials.¹¹⁰⁵ Many earlier studies of the influence of campaign contributions missed the effect of the donations because they were too focused on high salience votes, and overlooked low salience methods of influence. These low salience methods include tax policy adjustments, altering participation in task

¹¹⁰⁰ *Ibid* at 19.

¹¹⁰¹ *Ibid* at 22.

¹¹⁰² *Ibid* at 8.

¹¹⁰³ “In some other countries, politicians can be directly bought. But American politicians are, for the most part, not so crass. They don’t accept stuffed brown envelopes. Money goes to their election campaigns and into the coffers of their party. This has come to be called “corruption American style.” Some will reap monetary rewards after they leave office, part of the process of revolving doors that is endemic in the United States; for others, the pleasures of power today suffice.” Joseph E. Stiglitz, *supra* note 38 c 6, s Shaping perceptions about policies.

¹¹⁰⁴ Timothy K. Kuhner, *supra* note 51 at 2363.

¹¹⁰⁵ *Ibid* at 7.

forces and committees, the deliberate exclusion of countervailing voices and information, the setting of department budgets, and the rules that govern private businesses' financial transparency and accountability.

There are also the veto points in the system that can be subtly exercised or not countered aggressively, like anonymous holds; and there are always regulatory appointments, personnel decisions, and the decision to avoid championing specific legislation.

Dworkin argues strongly in favour of the corruption heuristic view of campaign contributions, maintaining that it is damaging to rational electoral discourse.

We know that money is the curse of our politics. Candidates and political parties collect enormous sums to finance their various electoral campaigns, and the practice corrupts politics and government ... Large campaign contributors purchase what is euphemistically called "access" to officials; in fact they often purchase not merely access but control. Big money poisons politics in yet another way, moreover, which is less often noticed. It puts enormous sums at the disposal of politicians and their consultants, which makes possible the hugely expensive television and radio campaigns of glitz, slander, and endless repetition of half-truths and pointless factoids that have become the lifeblood of our dumbed-down politics. No candidate can risk sitting out this ugly dance: he who hesitates down-market is lost. In politics money is the enemy not just of fairness but of real argument.¹¹⁰⁶

Tax policy is probably the area where campaign contributions (and the associated lobbying) have the most influence. Legislators have admitted that their decisions regarding taxes and subsidies are heavily influenced by campaign contributions.¹¹⁰⁷ It is an area of low salience to the average citizen, and changes are easy to hide, but the rewards for the donors can be massive and the turn around on investment relatively rapid.

Tax policy is a good example of low-salience influence. As the authors of the 2005 presidential advisory panel report on tax reform noted about the 15,000 changes to the tax code: "Each one of these changes had a sponsor, and each had a rationale to defend it. Each one was passed by Congress and signed into law."¹¹⁰⁸

¹¹⁰⁶ Ronald Dworkin & Frank Henry, *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton University Press, 2006) at 128.

¹¹⁰⁷ Lawrence Lessig, *supra* note 273 at 133.

¹¹⁰⁸ Lee Drutman, *supra* note 172 at 37.

Beyond tax policy, there are innumerable other examples of the influence garnered by campaign donations. Bakan recounts how,

[c]orporations that contributed money to the GOP and Republican candidates were granted significant access to the Cheney Task Force, created by President Bush in 2002 to formulate a national energy policy. Enron gave more than \$2 million between 1999 and 2002 and got four contacts with the task force; Southern Company gave more than \$1.5 million and got seven contacts; Exelon Corporation gave close to \$1 million and got six contacts; and so on. ... Chevron, for example, proposed relaxation of regulations governing the granting of federal permits to develop energy projects and those relating to fuel supply. Its proposals were adopted in their entirety.¹¹⁰⁹

None of the task force's meetings were open to the public or to environmental groups. Its activities and deliberations were kept secret. It was legally enforced low salience that allowed the donors significant, undisclosed, and deliberately unbalanced influence. There was an active decision to exclude counter-vailing pressure and information. This made a perfect recipe for pre-framed biased decision-making, and the exercise of types i to iv influence¹¹¹⁰ (everything but rational discourse). Similarly,

[a]fter donating more than a million dollars to congressional candidates, most of them Republicans, during the 2001 election cycle, Eli Lilly and Company found itself the beneficiary of a provision, buried in the Homeland Security Act, that protected thimerosal manufacturers – of which it is the only one – from lawsuits arising out of harm caused by the drug's use.¹¹¹¹

Akerlof and Shiller argue that the influence of campaign contributions (and lobbying) can be seen in the budgets of various departments. This is another method of altering the regulatory structure to favour donors. It is potent and has low salience – it is unlikely the public will realize what is happening and object.

¹¹⁰⁹ Joel Bakan, *supra* note 50 at 104.

¹¹¹⁰ See Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Four Pressures Approach: Direct Power and Influence, p. 114. Banfield's five types of influence are: (i) influence based on obligation, including authority and respect; (ii) influence based on the decision-maker's desire to please, such as friendship and benevolence; (iii) influence based on changing the perceived alternatives open to the decision-maker, but not through reasoning; (iv) influence based on positive or negative inducement to change the decision-maker's behaviour, like bribery and threats; and (v) influence that works through providing better reasoning or information, essentially rational persuasion. David Lowery, "Lobbying influence", *supra* note 497 at 5.

¹¹¹¹ Joel Bakan, *supra* note 50 at 104. There was no connection between thimerosal and autism, so the policy implications of the rule were minimal, but it is a strong indication of the influence of campaign contributions.

[W]e do not view it as just coincidence that the IRS is so underbudgeted that it fails to collect hundreds of billions of owed taxes (estimated by the IRS itself at \$385 billion for 2006). The budgets of Justice, the IRS, the Securities and Exchange Commission (SEC), and many other regulators are greatly curtailed. ... [It reveals] the influence of rich donors trumps economic policy that would be good for the rest of us.¹¹¹²

The story of the *Fraud Enforcement and Recovery Act* is another example of the effectiveness of campaign contributions over regulatory structures and spending.

Appalled by the financial fraud that led up to the 2008 financial crisis, Kaufman co-sponsored a bill to prosecute it (FERA—the Fraud Enforcement and Recovery Act). One of its major provisions was authorization of \$165 million to the Department of Justice to fight white-collar crime... But in short order he discovered that while his colleagues had authorized \$165 million, they would subsequently appropriate no more than \$30 million farther, since larger expenditures would endanger Wall Street contributions.¹¹¹³

Recently, large donors have begun demanding more control over the parties' platforms, which is another demonstration that their donations come with strings attached.¹¹¹⁴

The Curious Case of Dark Money

The influence over the United States Congress by donors is indirectly visible in its refusal to regulate dark money. Dark money is electoral spending by third-parties that is not legally required to disclose the source of the funding. Its existence carries lessons regarding disclosure and the institutional structure of the entity that regulates elections.

Although *Citizens United* punched a large hole in campaign finance regulation, the ruling explicitly allowed Congress to require the disclosure of electoral donations and spending. Neither the disclosure heuristic nor the corruption heuristic justifies the dark money loophole. In both heuristics voters have the right to know who is spending the money on the election, and donating to politicians directly or indirectly. Otherwise, it is impossible for voters to make an informed decision in response to the funding. The continued existence of the legal loopholes that allow dark money is a demonstration of power politics without justification. The persistence of the dark money loopholes is a demonstration on

¹¹¹² George A. Akerlof & Robert J. Shiller, *supra* note 52 at 82.

¹¹¹³ *Ibid* at 79.

¹¹¹⁴ Nicholas Confessore, "Big-Money Donors Demand Larger Say in Campaign Strategy", *N Y Times* (1 March 2014), online: <http://mobile.nytimes.com/2014/03/02/us/politics/big-money-donors-demand-larger-say-in-party-strategy.html?referrer=>>.

how sometimes failing to propose or pass legislation can be just as beneficial to donors as actively passing a law they support.

Dark money is advantageous to donors, allowing them to avoid disclosure, and repercussions from the public's reaction to the campaign spending. Dark money can also be used by foreign citizens and governments to hide their influence over American elections.¹¹¹⁵ It is technically illegal, but there is no mechanism to catch it, as the source of the funding does not need to be disclosed.¹¹¹⁶ Dark money can also be advantageous to politicians, as it can allow them to hide from voters how indebted they are to outside donors. They can appear to run a "clean" election, unconnected to large political donations, as candidate Trump falsely claimed to be doing in the 2016 Presidential primaries.¹¹¹⁷ Of course, for the social exchange economy to work, the politicians need ultimately to know the desires of the donors.

Dark money expenditures are growing fast. It has increased in the United States "from less than \$5.2 million in 2006 to well over \$300 million in the 2012 presidential cycle and more than \$174 million in the 2014 midterms."¹¹¹⁸

In the 2014 midterm election, more than half the advertising aired by outside groups came from organizations that disclosed little or nothing about their donors. Some of these organizations were established specifically to shield the identities of the wealthy individuals and corporations that contributed to them. These groups financed more political advertising than did super PACs. Economic and political power have thereby been compounded.¹¹¹⁹

The main source of dark money is electoral funding by politically active nonprofits, as they do not have to disclose the source of their funding – their donors. These groups are primarily nonprofit

¹¹¹⁵ For example, Maria Butina pled guilty to conspiracy to act as an unregistered foreign agent of Russia via the infiltration of conservative groups like the NRA. She obtained influence in these groups and seemed to be attempting to funneling dark money through the group to influence the Presidential election. Peter Stone, "NRA in crisis: how the gun group became ensnared in the Russia inquiry", *The Guardian* (1 March 2019), online: <<https://www.theguardian.com/us-news/2019/mar/01/nra-russia-investigations-gun-lobby>>; Emily Stewart, "The government is making it easier for 'dark money' donors to go unnamed", (17 July 2018), online: Vox <<https://www.vox.com/policy-and-politics/2018/7/17/17581384/irs-dark-money-nra-maria-butina-donors>>.

¹¹¹⁶ In July 2018, the Trump administration Treasury Department announced changes that would make dark money even darker. It planned to end requirements that tax-exempt organizations identify their donors on their tax returns. This will make it even easier to get away with corruption and financial fraud. For example, it would be harder to identify activities like those of Maria Butina. Emily Stewart, *supra* note 1115.

¹¹¹⁷ Ben Schreckinger, "Trump not exactly self-funding his campaign", (15 October 2015), online: *Politico* <<https://www.politico.com/story/2015/10/donald-trump-fec-fundraising-214838>>; Dan Alexander, "Trump Has Now Shifted \$1.3 Million Of Campaign-Donor Money Into His Business", (20 March 2019), online: *Forbes* <<https://www.forbes.com/sites/danalexander/2019/03/20/trump-has-now-shifted-13m-of-campaign-donor-money-into-his-business/>>.

¹¹¹⁸ Open Secrets, *supra* note 1091.

¹¹¹⁹ Robert B. Reich, *supra* note 26 at 194.

social welfare groups and nonprofit business associations. They are known as 501(c)(4)s and 501(c)(6)s, respectively, due to their section names in the U.S. *Internal Revenue Code*. They are using the same structure many think tanks and other political organizations in the U.S. are now using, as we discussed in Chapter 2. These dark money organizations, particularly the 501(c)(4)'s, have become perhaps the major force in federal elections over the last decade. Already by 2010, 501(c)(4)'s were outspending super PACs by a 3 to 2 margin.¹¹²⁰

These 501(c) organizations are not are not taxable, but they cannot offer tax deductions for the donations they receive. The law allows them to engage in lobbying and political campaigning for partisan causes, but not as a primary activity. Technically no test exists, but the generally accepted guideline is that political activity should not exceed 40-50% of its budget. However, the reality is that there are ways to avoid the restriction, and to redefine political activity as educational, to avoid the threshold.

For example, Americans for Prosperity, the shadow political party established by the Koch brothers is a 501(c)(4) organization. We discussed this organization in Chapter 2.¹¹²¹ It shares resources, office space and staff with the Americans for Prosperity Foundation, which is a 501(c)(3) charitable organization that was chaired David Koch. This structure provides the traditional dark money shelter of hiding the names of the donors, while also allowing the donations to the Foundation to be tax deductible. It is evident that resources are funnelled between the two organizations to best exploit political needs and tax loopholes.

In Kentucky, Republicans won the legislature for the first time in 95 years with strong campaign support from Americans for Prosperity... No one knows how much Americans for Prosperity spent on local Kentucky races because the group is not required to disclose state-based campaign expenditures or its donors.¹¹²²

More and more political action 501(c)(4) organizations are flowing this lead and establishing a matching 501(c)(3) charitable organization, so that the ultimately partisan donations are tax deductible. Receiving a tax deduction for wielding political influence is another example of how the top 1% have exploited their political power in an era of growing inequality.

Dark money has grown so fast, because the law and oversight have been lax since the signaling of *Citizens United*, and the 2013 IRS targeting controversy. Since it is the tax code that limits the political activity of 501(c) organizations, it is the IRS's responsibility to police these groups. This puts the already unpopular organization in a difficult position, forced to oversee the political activity of well-connected groups, and wade into bitter partisan divides. This resulted in the 2013 IRS targeting controversy, in

¹¹²⁰ Michael Beckel, "Nonprofits Outspent Super PACs in 2010", (18 June 2012), online: *OpenSecrets.org* <<https://www.opensecrets.org/news/2012/06/nonprofits-outspent-super-pacs-in-2/>>.

¹¹²¹ Chapter 2 – Understanding Lobbying in Canada and the U.S.: Understanding Lobbying: What Do Lobbyists Do: Build Relationships with Officials: Large Individual Donors and Shadow Political Parties, p. 90, 121 & 150,

¹¹²² Lee Fang, *supra* note 690.

which the IRS was loudly accused of political bias in targeting right-wing Tea Party 501(c)(4) organizations for investigation of exceeding the political activity limits. The 2017 Treasury Department's inspector general report revealed that left-wing organizations had been targeted to the same extent. There was no bias. However, the outcry sparked a FBI criminal probe, a House Oversight and Government Reform Committee investigation, and the investigation by the Treasury Department's inspector general. The outcry served its purpose, deterring the IRS from future investigations of 501(c)(4) organizations that are heavily involved in politics, allowing the dark money expenditures to continue with little oversight.

The American example of dark money shows how Congress can be captured by the donor class. It has been unwilling to even correct the rules dealing with disclosure, never mind devise new campaign spending controls. This highlights a finding we have touched upon, it is easier to use the political influence of campaign donations and lobbying to prevent action than support it. Except on extremely salient issues, the public will rarely notice a politician failing to take action or failing to draft new legislation. This also highlights a flaw in the disclosure heuristic: it is not clear that disclosure on its own is self-sustaining. If the law allows influence over officials by donors, but insists there must be disclosure, as soon as that disclosure can be avoided by not closing a loophole, then the donors already have the influence to deter the officials from acting. Thus in areas central to political influence, like campaign financing, bribery, or lobbying, disclosure on its own may not be strong enough to maintain itself.

There is also a lesson here about oversight. Oversight of politicized areas should be handled by institutions designed to do so. The IRS is not constituted or designed to oversee the spending of political organizations and does not have the savvy or institutional structure to do so. Due to political blowback, it has largely abandoned this role, because it is not core to its mandate. Proper structure is a necessity for the regulatory institutions that seek to channel and control the impact of private political influence on government. By the mirror principle, lobbying oversight also needs the appropriate regulators, institutional structure, and mandate.

Donations Work with Lobbying

As discussed Chapter 2, campaign donations work in tandem with lobbying, providing the lobbyist with access to politicians.¹¹²³ American lobbyists heavily participate in political campaigns. Lobbyists are often involved in making and bundling donations; running campaigns and grooming possible candidates; running PACs and parallel political campaigns using dark money; directing the donations of their clients; and organizing fund-raising events.¹¹²⁴ One lobbyist stated that making campaign contributions is so important on a seven point scale, it is an 8.¹¹²⁵

¹¹²³ Yasmin Dawood, *supra* note 489 at 341; Lee Drutman, *supra* note 172 at 28. It is contributions linked to extensive lobbying that makes for effective influence on government. It is well established that corporate political activity (campaign financing and lobbying) can help obtain economic advantage. See Chapter 2 – Understanding Lobbying in Canada and the U.S.: The Effectiveness of Lobbying: Benefits to Business Organizations, p. 138. See also, Sean Lux, T. Russell Crook & David J. Woehr, “Mixing business with politics”, *supra* note 213 at 225.

¹¹²⁴ Dorie Apollonio, Bruce E. Cain & Lee Drutman, “Access and Lobbying”, *supra* note 303 at 24.

¹¹²⁵ Lee Drutman, *supra* note 172 at 80.

It gives you credibility that you're serious about what Washington is and about the political process. It gets you phone calls from people who would not necessarily ever care about who you are or what you did. ... When people know you have a \$2 million PAC, it makes a lot more impact than if they know you have a \$100,000 PAC.¹¹²⁶

Business PACs, in particular, direct campaign contributions to incumbents so as to gain access for their lobbyists.¹¹²⁷ Despite public awareness of campaign funding, lobbying is more important to corporations. They spend about thirteen times more on lobbying than on PAC contributions.¹¹²⁸

It would be a mistake to see politicians as innocent in this process. Not only do they write the rules, collectively, but individually, members of congress often make demands of donations from lobbyists, knowing that they will pay rather than risk losing access.¹¹²⁹ Policymakers play an active role in inviting the wealthiest voices into government.¹¹³⁰ However, the need for campaign funds creates its own logic of supply and demand, and opens the valve for private political influence.

Campaign Donations Influence Judges

We can also see the influence of campaign donations in judicial elections and decisions. The more constrained sphere of judicial decision-making makes the effect of private campaign financing even more apparent. Thirty-Eight U.S. states elect the members of their highest courts, the state supreme courts, albeit with somewhat different electoral and funding rules. The spending on judicial elections has increased dramatically over the last thirty years; there is an increased involvement of outside groups and dark money; the donations appear to be influencing judges; and business spending is dominant, likely due to a competition for influence.

Spending on Judicial Elections has Increased Dramatically

Since 1990, American judicial elections have entered a new phase, going from stodgy cheap overlooked affairs to modern elections, with high spending, large donations, dark money, position ads, and attack ads.¹¹³¹ In the American jurisdictions that have them, the cost of judicial elections has increased dramatically, although for now it appears to have (perhaps briefly) stabilized at a higher level, with almost half of the spending concentrated in ten key races.¹¹³²

At the start of 2017, more than half of all states that elect their justices had at least one sitting justice who had taken part in a \$1 million-plus election during his or her

¹¹²⁶ *Ibid.*

¹¹²⁷ Dorie Apollonio, Bruce E. Cain & Lee Drutman, "Access and Lobbying", *supra* note 303 at 25.

¹¹²⁸ Lee Drutman, *supra* note 172 at 210.

¹¹²⁹ Dorie Apollonio, Bruce E. Cain & Lee Drutman, "Access and Lobbying", *supra* note 303 at 25.

¹¹³⁰ Joshua L. Kalla & David E. Broockman, *supra* note 987 at 22.

¹¹³¹ James L. Gibson, *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy* (University of Chicago Press, 2012) at 105.

¹¹³² *Who Pays for Judicial Races: The Politics of Judicial Elections 2015-2016*, by Alicia Bannon, Cathleen Lisk & Peter Hardin (New York University Law School: Brennan Center for Justice & The National Institute on Money in State Politics, 2017) at 4.

tenure (20 out of 38 states). By contrast, in 1999, only seven states fell into this category.¹¹³³

The totals spent in judicial elections remain low compared to national election, but they are high compared to the means of the candidates and the low public awareness of the elections. Bannon *et al.* estimate total 2015-2016 state supreme court elections spending from all candidates, political parties and interest groups to be \$69.3 million. Adjusting for inflation, this is the second highest spending level since 2000.¹¹³⁴ This rise in judicial electoral spending and donations has exhibited roughly the same pattern of increase seen in U.S. electoral campaigns and lobbying. It is a part of the same trend, an empowered top 1% gathering even more political influence through various forms of campaign contributions and lobbying.

Increased Involvement of Outside Groups and Dark Money in Judicial Elections

Just like in traditional elections, the rise in spending on judicial elections has been matched by an increase in the participation of outside groups and the use of dark money. Bannon *et al.* note that this “shift toward outside spending by interest groups has been a consistent trend since the United States Supreme Court’s 2010 ruling in *Citizens United v. FEC.*”¹¹³⁵ It is another sign of the signifying permissiveness of the ruling. In judicial elections, spending by special interest groups continues to break new records.¹¹³⁶ They make good use of dark money to mask their participation in the judicial contests, likely because they will have future business in front of the judges, or because voters would be upset if they knew who was actually funding the judges. Not only are special interests and outside parties seeking to affect judicial trends and outcomes through donations, the public increasingly does not even know who these groups are.¹¹³⁷

These third-party interest groups are much more likely to launch negative ads than political parties and candidates. Many of these interest groups funnel dark money, disappear after the election, and care little about the accuracy of their ads.¹¹³⁸ In other words, these interest groups are quite likely to try to phish the judicial electorate. Their participation is significantly increasing the proportion of negative and misleading ads aired in each election.¹¹³⁹ At the same, an increasing share of the ads are negative in tone. In the 2015-2016 cycle, 55% of ads regarding the state supreme court elections were negative attack ads, and of these 73% were funded by third-party groups.¹¹⁴⁰

¹¹³³ *Ibid* at 15.

¹¹³⁴ *Ibid* at 4.

¹¹³⁵ *Ibid* at 7.

¹¹³⁶ *Ibid* at 2.

¹¹³⁷ *Ibid* at 9.

¹¹³⁸ *Ibid* at 10.

¹¹³⁹ *Ibid* at 3.

¹¹⁴⁰ *Ibid* at 35.

In total, more than half of all negative ads aired in 2015-16 attacked judges for rulings on the bench, often in a misleading way designed to stoke emotion and anger, rather than honestly inform voters.¹¹⁴¹

The use of phishing and deception can be seen in how a large number of special interest groups mask their intentions by attacking the judges on their criminal law decisions, even though they have “little apparent institutional interest in the area.”¹¹⁴² One example of a judicial dark money interest group is the Virginia-based Center for Individual Freedom. It spent more than \$1.7 million in Louisiana and Mississippi state supreme courts in 2015-16, advocating “for tort reform and reduced campaign finance disclosure, among other positions.”¹¹⁴³

The growing use of attacks ads has negative repercussions for the courts. Bannon *et al.* argues that “ad campaigns by interest groups seemed to have undermined the legitimacy of the Court itself.”¹¹⁴⁴ Gibson came to a similar conclusion in his 2012 work, that

elections tend to elevate institutional support, but being exposed to objectionable ads subtracts from support, even if, for the vast majority of respondents, the negative effect of the objectionable ads is smaller than the positive effect of the election.¹¹⁴⁵

Gibson’s finding was with relatively low ad and negative ad exposure. With the increase in negative advertising since then, the attack ads are likely to lower public institutional support for the Courts more substantially.

Multiple millions in dark money is spent regularly on lobbying for particular judicial appointments, particularly for appointments to the U.S. Supreme Court.¹¹⁴⁶ In this case, this dark money is essentially a form of outsider approach lobbying.

Donations Influence Judges

Judges are supposed to be neutral arbitrators, but the evidence from the 39 U.S. jurisdictions with judicial elections indicates that campaign donations do affect their rulings. One study found that 79% of Texas attorneys believe that campaign contributions significantly influence elected judges’ decisions.¹¹⁴⁷ Gibson reported that,

¹¹⁴¹ *Ibid* at 36.

¹¹⁴² *Ibid*.

¹¹⁴³ *Ibid* at 29. Tort reform is essentially another form of deregulation. It is a reasonable position for those who believe that corporations do not have enough power.

¹¹⁴⁴ James L. Gibson, *supra* note 1131 at 108.

¹¹⁴⁵ *Ibid* at 125.

¹¹⁴⁶ Lee Fang, “Corporate Front Groups Lobby to Confirm Brett Kavanaugh. On the Supreme Court, He Could Give Them Vastly Expanded Power.”, (4 October 2018), online: *The Intercept* <<https://theintercept.com/2018/10/04/brett-kavanaugh-supreme-court-confirmation-corporate-regulations/>>.

¹¹⁴⁷ Lawrence Lessig, *supra* note 273 at 229.

for many citizens, contributions to candidates for judicial office imply a conflict of interest, even a quid pro quo relationship between the donor and the judge, which undermines perceived impartiality and legitimacy... Importantly, the judiciary is not distinctive on this score: ... campaign contributions to candidates for the state legislature also imply a conflict of interest and therefore can detract from the legitimacy of legislatures as well.¹¹⁴⁸

Essentially, the campaign contributions are creating an appearance of corruption, lowering trust in the judicial system. Moreover, there is solid evidence of corruption. Ware's study of arbitration cases from 1995 to 1999, finds there was a strong correlation between a judge's vote on arbitration cases and the source of her campaign funds.¹¹⁴⁹ A 2006 study by Liptak & Roberts found that over a 12 year period Ohio elected justices voted in favour of their contributors 70% of the time, and for one justice it was actually it reached 91%.¹¹⁵⁰ Corriher's 2013 report found that the "trend towards limited liability for corporate defendants seems to be growing more pronounced."¹¹⁵¹ In 2011, the Alabama high court in Texas, had reached the point where it found in favour of corporate defendants in tort cases 87% of the time. Reich reported that this problem can also be seen in the effects campaign contributions can have on the elected office of the attorney general.

The New York Times in late 2014 found that major law firms were funneling corporate campaign contributions to attorneys general in order to gain their cooperation in dropping investigations of their corporate clients, negotiating settlements favorable to their clients, and pressuring federal regulators not to sue. The attorney general of Utah, for example, dismissed a case pending against Bank of America, over the objections of his staff, after secretly meeting with a Bank of America lobbyist who also happened to be a former attorney general.¹¹⁵²

None of the studies show any evidence that the donors are meeting with the judges to discuss the trial at hand, although lobbyists are meeting with attorney generals. It might even be that the judges are not consciously aware of their favouritism. Regardless, as long as the judges know who gave them the donations, the social exchange can be effective. Generous gift-giving influences the receiver, creating a halo for the giver; human beings are rarely as neutral as we like to believe.

¹¹⁴⁸ James L. Gibson, *supra* note 1131 at 108.

¹¹⁴⁹ Lawrence Lessig, *supra* note 273 at 230.

¹¹⁵⁰ *Ibid.*

¹¹⁵¹ *No Justice for the Injured: Big Business is Funneling Campaign Cash to Judges Who Allow Corporate Wrongdoers to Escape Accountability*, by Billy Corriher (1333 H Street, NW, 10th Floor, Washington, DC 20005: Center for American Progress, 2013) at 16.

¹¹⁵² Robert B. Reich, *supra* note 26 at 93.

The corrosive effect of money in politics on democratic values is certainly not unique to state supreme court elections. But these elections are a powerful object lesson, precisely because the courtroom is supposed to be a place where everyone is equal before the law. The growth of high-cost and politicized state supreme court elections, exacerbated by the rise of outside spending by non-transparent and unaccountable interest groups, threatens courts' ability to play this role. The United States Supreme Court's campaign finance jurisprudence looms large over this slow-motion justice crisis — and limits the menu of responses available to states.¹¹⁵³

This spending appears to also be affecting decision-making in general, deterring rulings that alienate wealthy donors or enrage wealthy opponents.

While further research is needed, existing anecdotal and empirical evidence supports the observation that the effects of big-money elections can cascade beyond the immediate race, putting an entire court on notice that its members could well be targeted in future elections — thereby heightening pressure judges may feel to avoid rulings that might either make them a target or alienate wealthy supporters.¹¹⁵⁴

A glaring example of the potential pernicious influence of campaign contributions can be found in *Caperton v. A. T. Massey Coal Co.*¹¹⁵⁵. Don Blankenship, chairman and CEO of Massey, lost a \$76 million verdict in a fraud lawsuit brought by a rival. He then spent \$3 million in attack ads to have one of the appeal judges replaced with his own candidate, Benjamin J. This represented the vast majority of the spending in that election. At the appeal Benjamin J. refused to recuse himself, and then cast the deciding vote that overturned the \$76 million verdict. The U.S. Supreme Court declared that the facts and potential bias in this case increased the probability of actual bias to an unconstitutional level, due to the high chance of Blankenship wielding a disproportionate influence over the judge, and ordered Benjamin J. to recuse himself. Blankenship went on to win the case upon retrial (and later to go to jail for a mine explosion that killed 29 miners). The Court attempted to establish some minimal standard for recusal in extreme cases. Yet, even with such blatant influence, the court did not establish any controls of campaign contributions to protect judicial decision-making. It failed to address the dependency corruption at the heart of the issue.

The increasing costs of the elections and matching increasing demands for judicial donations are affecting the attorneys as well. It opens the door for judges to shake down defendants, attorneys that

¹¹⁵³ Alicia Bannon, Cathleen Lisk & Peter Hardin, *supra* note 1132 at 40.

¹¹⁵⁴ *Ibid* at 16.

¹¹⁵⁵ *Caperton v A T Massey Coal Co*, [2009] 556 US 868.

donated too little or those that donated to their opponents. Lawyers undoubtedly feel pressured when asked by judges for donations, even if they have no interest in seeing that particular judge elected.¹¹⁵⁶

Business Spending is Dominant and Likely a Competition for Influence

The rising cost of judicial elections is increasing the influence of the major donors. Even as judicial elections modernize and spending rises, judicial races remain low salience affairs and the number of people paying attention to the elections and making donations to judges remains small.¹¹⁵⁷ This growth in judicial donations appears to be the result of competition for influence.

It might be that this competition is a result of previous pathways for judicial influence – such as old-boys networks or outright bribery – being closed off, forcing the interests to use the more visible pathways of judicial donations. The more likely explanation is that the competition is the result of the spreading of a new litigation strategy. Elites have come to increasingly realize the advantages of donating to elected judges, both to gain an edge in their cases, and to instill judges with more favourable views and ideologies, who will set judicial precedent. In a *Citizens United* era of permissiveness for the top 1%, large donations to judges is an option that was not socially or legally acceptable previously, and a strategy that is particularly beneficial for interests that have regular business before the courts. This strategy is an extension of the general strategy business interests have been exercising to get business-friendly judges appointed to the Courts.¹¹⁵⁸ Unfortunately, it is a strategy that is most beneficial for businesses that are disproportionately litigious or disproportionately reckless. The worst civil actors are the most likely to be defending themselves in court or launching lawsuits with little merit, and are the most likely to benefit by funding judges' electoral campaigns.¹¹⁵⁹

Unsurprisingly, Professor Shepherd's 2013 study found that the more donations justices receive from businesses, the more likely it is that they will rule in favor of business litigants.¹¹⁶⁰ Corriher's report came to a similar conclusion, noting that the insurance industry in Ohio donated money to judges who then voted to overturn decisions the industry disliked; and energy companies in Texas funded judges who then gave favourable legal interpretations.¹¹⁶¹ Corriher finds that,

In the span of a few short years, big business succeeded in transforming courts such as the Texas and Ohio supreme courts into forums where individuals face steep hurdles to holding corporations accountable¹¹⁶².

¹¹⁵⁶ With a more receptive court, there may be a justification for campaign finance regulations based on the pressure to donate infringing the lawyer's freedom of speech right not to support a judge's electoral campaign. The pressure for funding, due to the lack of donations limits and spending limits, puts lawyers in the difficult position where failing to make large donations could leave them disadvantaged in their career appearances before elected judges or when dealing with elected district attorneys.

¹¹⁵⁷ James L. Gibson, *supra* note 1131 at 114.

¹¹⁵⁸ Billy Corriher, *supra* note 1151 at 12.

¹¹⁵⁹ *Ibid* at 3.

¹¹⁶⁰ Robert B. Reich, *supra* note 26 at 92.

¹¹⁶¹ Billy Corriher, *supra* note 1151 at 19.

¹¹⁶² *Ibid* at 11.

As with lobbying, the increase in judicial donations is driven mostly by business interests; although business aligned conservative groups and plaintiff-friendly lawyers are also playing significant roles.¹¹⁶³ Ideological struggle for control of the court is definitely a key factor, but the drive to very large contributions is being driven by businesses and lawyers.¹¹⁶⁴ It is likely they are realizing outsized returns for the donations, competing with each other for influence, or avoiding being squeezed out by competitors that donate regularly. At the same time, as with lobbying, average citizens cannot compete with large donors. The judicial rulings in these jurisdictions risk becoming increasingly business friendly (except for where the barrister donors are pushing for a different outcome). Indeed, citizens likely do not even realize how their judicial system is being transformed. One would expect the same pattern visible in electoral donations, where many business interests give to all the top contenders for office but favour the bulk of the contributions to the most business-friendly options.

It is illegal for judges to show favouritism. Campaign influence is anathema to the independence of the judiciary, the self-government of the people and the rule of law. Yet, the impact of campaign contributions, the strength of the social exchange economy, the reality that the judge needs future money from donors to win future election, the effect of donations filtering for donor-favouring judges, all push judges to favouring their donors. It would be shocking if the same were not true for politicians and their donors – be the donations directly to the politician, or indirect through funding parallel electoral campaign apparatus. Even judges cannot maintain their neutrality, and their job is to be a neutral arbitrator; politicians make no promise of neutrality (although perhaps they should), and their actions consistently favour their donors.¹¹⁶⁵

Campaign Finance Limitations

The evidence indicates that private campaign financing has a significant effect on government decision-making. We will discuss campaign finance limitations, considering the advantages of private campaign funding; the disadvantages of public campaign financing; deduction limits; and spending limits. After investigating these factors, we will look at the six major concerns about unregulated

¹¹⁶³ Alicia Bannon, Cathleen Lisk & Peter Hardin, *supra* note 1132 at 27; Lawrence Baum, “Judicial Elections and Judicial Independence: The Voter’s Perspective” (2003) 64:13 Ohio State Law J, online: <<http://hdl.handle.net/1811/70904>> at 41; Billy Corriher, *supra* note 1151 at 12.

¹¹⁶⁴ *The New Politics of Judicial Elections: How 2000 Was A Watershed Year For Big Money, Special Interest Pressure, And Tv Advertising In State Supreme Court Campaigns*, by Deborah Goldberg, Craig Holman & Samantha Sanchez (NYU School of Law: Brennan Center for Justice & The National Institute on Money in State Politics, 2002) at 4.

¹¹⁶⁵ There are no judicial elections in Canada, but the dimensions in which campaign donations to politicians affect judicial appointments remains somewhat unexplored. Hausegger *et al.* do discuss the problem of patronage, party membership, and judicial appointments. They also discuss the connection between judicial appointees and their previous donations to the political party that appointed them – this appears to be a signifier of party belonging/loyalty rather than a means of “buying” the seat. Lori Hausegger *et al.*, “Exploring the Links between Party and Appointment: Canadian Federal Judicial Appointments from 1989 to 2003” (2010) 43:3 Can J Polit Sci Can Sci Polit 633–659.

campaign financing. These concerns deserve their own investigation, as they parallel those raised in Chapter 3 about unregulated lobbying.

Advantages of Private Campaign Funding

Private campaign financing does offer some genuine advantages for society. It allows private citizens a means to express (or over-express) their support. It provides a path for new political parties to form and garner support. It indicates to politicians who their strongest supports are, and it offers a way for the politicians to connect with these voters that bypasses the bureaucracy. It allows the politicians to gauge the strength of their supporters' preferences, and their reactions to new positions, policies and talking points. The donations provide political parties with some sense of the capabilities of potential candidates to excite the party's base and motivate dedicated supporters and activists. It also gives parties one easy way to gauge who their most dedicated members are, so it can prioritize their views.

Disadvantages of Public Campaign Funding

There is also a potential disadvantage to the alternative of using public fundraising. The political parties can pursue some forms of public fundraising as a means to ensure their continual existence without any matching voter support. In some cases, the parties can collude to structure the state funding to support them regardless of the voters and their voting patterns, giving the public little alternative and little means of replacing them, especially if the laws limit the funding available to new parties. Alternatively, public funding that it is extremely generous can lead to a proliferation of small parties. The effect of this can range from largely harmless, to being a distraction during the election from minor irrelevant parties, to making the formation of a governing coalition difficult and unstable, depending on the structure, laws and norms of the country's electoral system.

Donation Limits

Related to public and private fundraising is the question of contribution and spending limits. Low donation limits encourage a democratization of funding, forcing political candidates to appeal to a wide range of supporters. This can lead to better, more widely supported policies, and candidates who care more about larger segments of the public. On the other hand there is some evidence that widespread individual donations can increase polarization, as candidates on the extremes tend to raise more funds from individuals, pulling politicians away from the middle.¹¹⁶⁶ Higher donations limits make it easier for the candidate to gather funds, as she only needs to find a smaller number of donors. It also increases the dominance of rich donors who can afford to make these high donations. If corporations and unions are allowed to donate, higher contributions limits increase their power, as it is comparatively easier for them to max out their contributions and take advantage of complicated legal structures that can allow additional donations.

¹¹⁶⁶ Yasmin Dawood, *supra* note 489 at 342.

Spending Limits

Spending limits are a necessary corollary to contribution limits. Without spending limits, the competitive pressure will push electoral spending upwards, this will increase demand for more donations, and this will place pressure on the campaign to break the donation limits. Spending limits provide a necessary backstop to donation limits. With any need to garner private donations, there is always the risk that the local election becomes nationalized, because the candidates need to appeal to a larger audience in order to raise sufficient donations, or because a candidate or issue grabs national attention. These national donors might push concerns and opinions at odds with those of the local electorate. This is more likely to occur the as the spending limits get higher.

The Beneficial Effects of Lower Spending Limits

Lower spending limits appear to have a number of knock-on effects that are beneficial for democracy. They allow less wealthy candidates to participate in the election. In contrast, higher spending limits makes money more important in the election, advantaging those with the ability to mobilize large donors, which are generally those who are already wealthy, have connections to other wealthy people, and can afford to invest large sums of their own money in the campaign, which helps show large donors they are “serious” about the candidacy.

Recent research indicates that higher spending limits advantage the incumbents, likely because they have more access to wealthy donors and more efficient fundraising campaigns.¹¹⁶⁷ Fourniaies’ large, unpublished study analysed over 100 years of British House of Commons elections.¹¹⁶⁸ He confirmed that lower spending limits is beneficial to widespread democratic participation, and increasing spending limits increased the cost of campaigns, reduced the number of candidates, increased wealthy candidates’ share of the candidate pool, and amplified the incumbency advantages.¹¹⁶⁹ Increasing spending limits tilted the candidate pool and resulting election results in favour of the wealthy candidate.¹¹⁷⁰

[T]he results suggest that when spending limits are raised by £100,000, on average the mean cost of a campaign increases by £43,000, 0.3 fewer candidates run for office, the percent of candidates with an upper-class background increases by 10 percentage points, and the percent of money and votes that flow to incumbents

¹¹⁶⁷ The electoral incumbency advantage of U.S. candidates is approximately 2.5 percentage points, which can be significant in closely competitive districts. Incumbents in U.S. elections have a 25% financial advantage over their challengers. In the U.K., Fourniaies found that a £100,000 increase in the electoral spending limit leads to approximately a 13 percentage-point increase in incumbents’ total spending. “When spending limits are raised by £100,000, the financial incumbency advantage increases by approximately 3 percentage points and the electoral incumbency advantage increases by 2 percentage points. This finding is consistent with the idea that incumbency status reduces the cost of fundraising for candidates... [T]he results suggest that both the financial and electoral advantages enjoyed by incumbents increase when spending limits are raised.” Alexander Fourniaies, *supra* note 1029 at 23, 25 & 26.

¹¹⁶⁸ *Ibid* at 1.

¹¹⁶⁹ *Ibid*.

¹¹⁷⁰ *Ibid* at 22.

surge by approximately 10-15 percentage points. In summation, high levels of permitted spending diminish electoral competition.¹¹⁷¹

Overall, a £100,000 increase in spending limits also causes a 15 percentage-point increase in the likelihood of a wealthy (upper-class) candidate being elected to Parliament.¹¹⁷² The imposition of campaign finance limitations is a necessity, due to the problems caused by unregulated campaign financing.

The Six Concerns about Unregulated Campaign Financing

In this section we will discuss six key concerns about unregulated campaign financing. These concerns match neatly with the key concerns about the effects of lobbying explored in Chapter 3. This suggests connection between the two fields, and fortifies the suggestion of a mirror analogy. It is another indication that some of the regulatory solutions to unregulated campaign financing could also be applied to unregulated lobbying.

The six concerns are that unregulated campaign financing (1) favours the wealthy and business organizations; (2) increases inequality; (3) misaligns democratic representation; (4) favours the status quo; (5) creates political and framing biases; and (6) otherwise corrupts democracy. These concerns outweigh the benefits of unrestricted private campaign funding, and justify setting low campaign contribution and spending limits.

Concern 1: Campaign Contributions Favours the Wealthy and Business Organizations

The previous discussion makes clear that campaign contributions grant influence. In theory donations could come equally from all parts of society, and the results would be relatively neutral. The U.S. reality is that campaign contributions are primarily given by a small group of the wealthy donor class and the corporations they run.¹¹⁷³ This tiny class of wealthy donors is making up a growing percentage of all campaign contributions, and being rewarded with increasing influence over U.S. policy-making.¹¹⁷⁴ As discussed in Chapter 2, many scholars have argued that major donors and business elites dominate public policy-making and the agendas of both U.S. political parties.¹¹⁷⁵

Wealthy are the Primary Donors

Already by 1995, the vast majority of campaign funding was coming from the top 10%, and the trend of a small veneer of wealthy donors has continued. In a 1995 study, American citizens in the top

¹¹⁷¹ *Ibid* at 3.

¹¹⁷² *Ibid* at 21.

¹¹⁷³ Lawrence Lessig, *supra* note 273 at 233; David C Kimball et al, *supra* note 627 at 8.

¹¹⁷⁴ “The wrong of undue influence from an equality perspective is that elected officials are disproportionately responsive to the wishes of large donors as compared to other constituents.” Yasmin Dawood, *supra* note 489 at 337.

¹¹⁷⁵ Chapter 2 – Understanding Lobbying in Canada and the U.S.: Understanding Lobbying: What Do Lobbyists Do: Build their Client Base: The Clientele are Mostly Business Interests, p. 77 & 144. See also, Benjamin I. Page, Larry M. Bartels & Jason Seawright, *supra* note 707 at 51.

quarter of the income distribution provide almost three quarters of the total campaign contributions, the middle 50% accounted for almost all the rest; citizens in the bottom quarter accounted for only 2% of the donations.¹¹⁷⁶ The 11% of voters whose households make over \$100,000, represent 15% of the votes cast, and 80% of the U.S. political donations over \$200.¹¹⁷⁷ Drutman reports that,

[o]f the billions now spent each election cycle, most is donated in checks exceeding \$1,000. But less than one-tenth of 1 percent of the general population make individual contributions at this rate. And among group contributors, better than 90 percent comes from corporations, which duly record their political investment as a tax-deductible “cost of doing business.” In 2012, 28 percent of the nearly \$6 billion in contributions from identifiable sources in the last campaign cycle came from just 31,385 individuals, a number equal to 1 percent of 1 percent of the U.S. population.¹¹⁷⁸

Most campaign contributions are made by a small donor class, and most politicians focus on soliciting donations from this small group of donors.¹¹⁷⁹ It is easier for a representative to raise \$1 million from 100 donors who can offer \$10,000, than 10,000 donors who each offer \$100. A few star power politicians in high profile races can generate enough excitement to motivate a flood of small donors to cover their campaign costs, but most cannot. Only a small portion of the populace can afford the disposable income to make even a \$1,000 donation.¹¹⁸⁰ Meanwhile, in an era of multi-million dollar donations, it is only the top 1%, or top 0.01% and their corporations who can afford the donations that grant significant political influence.

The Share of Donations by the top 1% are Growing

Not only are the donations to U.S. politicians growing, but a growing share of these donations are being made by a smaller group at the top of the income pyramid.

[S]tarting in 1980, the amounts of political contributions by the richest one-hundredth of 1 percent rose even faster than their incomes. In 1980, the top 0.01 percent accounted for 10 percent of total campaign contributions. By 2012, while the richest 0.01 percent of households received about 5 percent of the nation's total income, their campaign donations soared to 40 percent of all contributions to federal elections.¹¹⁸¹

¹¹⁷⁶ Larry M. Bartels, *supra* note 738 at 187.

¹¹⁷⁷ Lawrence Lessig, *supra* note 273 at 233; David C Kimball et al, *supra* note 627 at 8.

¹¹⁷⁸ Lee Drutman, *supra* note 172 at 210.

¹¹⁷⁹ Yasmin Dawood, *supra* note 489 at 342.

¹¹⁸⁰ Zephyr Teachout, *supra* note 988 at 256.

¹¹⁸¹ Robert B. Reich, *supra* note 26 at 191.

This pattern indicates that the elite’s engagement with politics is growing, and their matching political influence is growing as well. This growth likely reflects growing inequality, a growing return on investment, a more open donation environment following the *Citizens United* decision, and a growing understanding of and desire to exercise power. Many predicted that corporate campaign contributions would increase after the *Citizens United* judgment. Few predicted that donations by individual millionaires and billionaire would increase so radically.¹¹⁸² These wealthy individuals often support extreme positions well-outside the past norms of politics and the positions of the most voters.¹¹⁸³

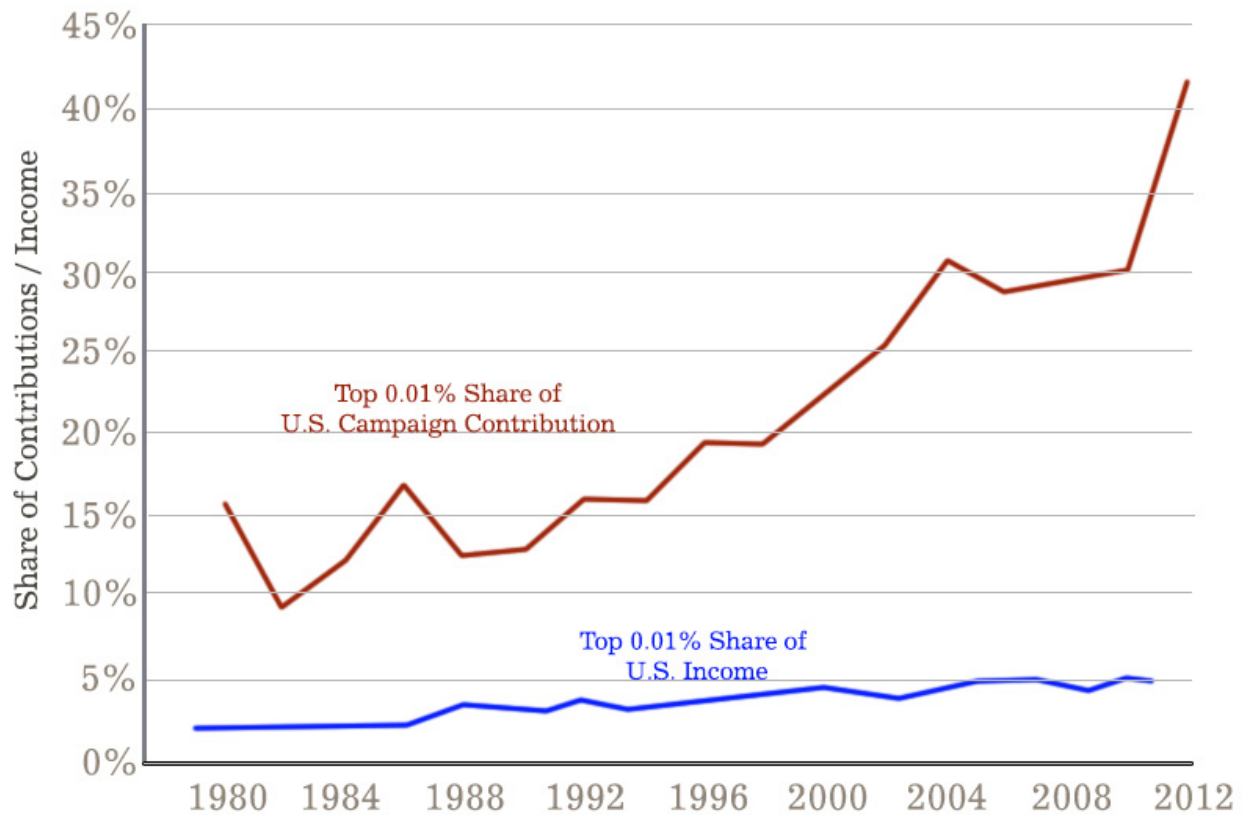
In 2012, the two biggest donors were Sheldon and Miriam Adelson, who contributed \$56.8 million and \$46.6 million, respectively. But the Adelsons were only the tip of a vast iceberg of contributions from the uberwealthy. Of the Forbes list of four hundred richest Americans that year, fully 388 made political contributions. They accounted for 40 of the 155 contributions of \$1 million or more. Out of the 4,493 board members and CEOs of Fortune 500 corporations, more than four out of five contributed (many of the noncontributors were foreign nationals who were prohibited from giving). In the run-up to the 2016 elections, billionaire brothers Charles and David Koch joined forces with their wealthy friends to assemble a war chest of nearly \$1 billion – allowing their political organization to operate on the same scale as the Republican and Democratic parties.¹¹⁸⁴

¹¹⁸² Gregory Koger, “Campaign Donors Are Party Elites Too”, (17 April 2015), online: <<http://www.mischiefsoffaction.com/2015/04/the-money-is-party.html>>; Nicholas Confessore, *supra* note 1114.

¹¹⁸³ *Dark Parties: Citizens United, Independent-Expenditure Networks and the Evolution of Political Parties*, SSRN Scholarly Paper, by Stan Oklobdzija, papers.ssrn.com, SSRN Scholarly Paper ID 3189918 (Rochester, NY: Social Science Research Network, 2018) at 4.

¹¹⁸⁴ Robert B. Reich, *supra* note 26 at 191.

Figure 8: Increasing Share of U.S. Campaign Contributions of the Top 0.01% Exceeds their Increasing Share of Income, 1980-2012¹¹⁸⁵



This chart excludes contributions to non-disclosing 501(c) organizations, which are estimated to have spent approximately \$143 million in 2010 and \$318 million in 2012. Since a substantial portion of this sum was raised from wealthy individuals, including 501(c)'s would increase the trend line 1 to 2 percentage points in 2010 and 2012.

This spending by wealthy interests significantly outweighs the countervailing spending by unions. In the 2012 elections the Koch brother's networks spent more than \$400 million, which was more than twice the spending of the top ten unions. The richest 0.01% of households gave Democratic candidates over four times more than the unions donated.¹¹⁸⁶

Concern 2: Campaign Contributions Increase Inequality

Because the wealthy and business interests can use donations for access, and then lobby to (further) change the rules to favour themselves, campaign contributions serve to transfer more power to the wealthy from the rest of society. They reap the rewards, and that feeds an inequality of political

¹¹⁸⁵ *Ibid.* A. Bonica, N. McCarty, K. Poole, and H. Rosenthal, "Why Hasn't Democracy Slowed Rising Inequality?" *Journal of Economic Perspectives* 27, no. 3 (Summer 2013): 11-2; drawn from income data from Piketty and Saez (2013).

¹¹⁸⁶ *Ibid.* at 187.

influence, which is leading towards a form of plutocracy. Kalla and Broockman come to this conclusion from their study of access to politicians between donors and non-donors.¹¹⁸⁷

The evidence supporting the conclusion that the wealthy have differing policy preferences from the general public, and influence in shaping public policy was proffered in Chapter 2.¹¹⁸⁸ In the U.S., they are more concerned about budget deficits, more in favour of cutting social welfare programs, less willing to support job programs, more supportive of financial deregulation, more supportive of lowering taxes, and opposed to any active efforts to reduce inequality.¹¹⁸⁹ Unlike their poorer counterparts, wealthy citizens have close contact with and significant sway over government decision-makers.¹¹⁹⁰

Predictably, the agenda of lobbyists, which is expressly tied to the agenda of the large donors, also bears little resemblance to the public's priorities, as Kimball argues.¹¹⁹¹ There is evidence that donors wield substantial influence over Congress.¹¹⁹² Studies show that the American lobbying system is an important source of inequality.¹¹⁹³ This influence is linked to the campaign contributions that open the door for lobbying. Reich ties the increasing inequality directly to the Court's evisceration of campaign finance laws.¹¹⁹⁴ The Court effectively accelerated a vicious spiral,

in which large corporations and wealthy individuals pay to shape the rules of the game to their advantage, thereby becoming even richer and having even greater influence over the rules.¹¹⁹⁵

This vicious spiral into inequality (inequality spiral) is further explored in Chapter 6.¹¹⁹⁶ Tighter regulations on campaign contributions can help weaken the wealthy's hold over politics, but those regulations become harder to enact the more the wealthy grow their influence.¹¹⁹⁷

¹¹⁸⁷ "To the extent that who policymakers hear from is determined by individuals' ability to afford to donate to campaigns, policymakers' worldviews may be significantly distorted in ways that benefit the wealthy..." Joshua L. Kalla & David E. Broockman, *supra* note 987 at 22.

¹¹⁸⁸ Chapter 2 – Understanding Lobbying in Canada and the U.S.: The Effectiveness of Lobbying: Studies Show that Lobbying is Influential, p. 136. See also, Larry M. Bartels, *supra* note 738.

¹¹⁸⁹ Benjamin I. Page, Larry M. Bartels & Jason Seawright, *supra* note 707 at 67.

¹¹⁹⁰ Larry M. Bartels, *supra* note 738 at 189.

¹¹⁹¹ David C Kimball et al, *supra* note 627 at 16 & 21.

¹¹⁹² Jeffrey Winters argues that the top 0.1 percent act as an oligarchy that exercises power over key policy decisions as a form of "income defense." Benjamin I. Page, Larry M. Bartels & Jason Seawright, *supra* note 707 at 51.

¹¹⁹³ Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern IV: Lobbying Increases Inequality p. 180 & 384. See also, David C Kimball et al, *supra* note 627 at 8.

¹¹⁹⁴ Robert B. Reich, *supra* note 26 at 194.

¹¹⁹⁵ *Ibid.*

¹¹⁹⁶ Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: Lobbying Feeds the Inequality Spiral, p. 398.

¹¹⁹⁷ Timothy K. Kuhner, *supra* note 51 at 2360.

Concern 3: Campaign Contributions Misalign Democratic Representation

Allowing large campaign contributions leads to a misalignment of representation.¹¹⁹⁸ This is very similar to the misalignment caused by lobbying and discussed in Chapter 2.¹¹⁹⁹ Unregulated campaign donations create a direct pressure for misalignment, and an indirect pressure for misalignment via political deception.

Direct Misalignment of Representation

The evidence indicates that Congress responds as much or more to the lobbying agenda, which is essentially the donor agenda, than to the public's preferences.¹²⁰⁰ This is a fundamental misalignment of representation. As previously covered, Bartels 2009 study provides good evidence for the influence of donors. He found that the Senators favour the wealthy in voting behaviour, being considerably more responsive to the opinions of affluent constituents. They were completely indifferent to the preferences of those on the bottom third of the income distribution.¹²⁰¹ Bartels finds that these differences are most likely explained by the influence of campaign contributions, rather than other factors.¹²⁰²

Bartels also found that the disparities in responsiveness are rampant in the affluent democracies, and are not limited to the United States.¹²⁰³ As previously discussed, Bartels found that the reduction in social spending due to political bias in favour of the wealthiest class is about 13% for OECD countries, and 17% in the U.S.¹²⁰⁴ Voting can get results, but the donations combined with lobbying provide a continuous pressure in favour of the wealthy.

Indirect Misalignment of Representation via Deception

Akerlof and Shiller argue that campaign contributions lead to another form of misalignment. In an election with significant private donations, politicians have two goals: "to appeal to the voters, on the one hand; and to appeal to campaign donors, on the other hand."¹²⁰⁵ They argue that there is a parallel here between economics and politics. Just as in economics, economic competition should produce a good equilibrium that is beneficial to society. So too in politics, free and informed democratic elections should produce a good policy outcome whose compromise approaches the preferences of the mean voter.¹²⁰⁶ Yet, just as consumers can be phished (tricked) into embracing a choice that is harmful to their

¹¹⁹⁸ Democratic theory posits that there should be an alignment between the preferences of the voters and those of their representatives Nicholas Stephanopoulos, Eric McGhee & Steven Rogers, *supra* note 695 at 771.

¹¹⁹⁹ Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern II: Misalignment with Popular Opinions, p. 153.

¹²⁰⁰ The misalignment of representation was especially pronounced for Republican senators, who were more than twice as responsive as Democratic senators to the views of the affluent. This is likely tied to the political bias discussed later below, p. 274. David C Kimball et al, *supra* note 627 at 16 & 21.

¹²⁰¹ Larry M. Bartels, *supra* note 738 at 185.

¹²⁰² "These results provide surprisingly strong and consistent evidence that the biases I have identified in senators' responsiveness to rich and poor constituents are not primarily due to differences between rich and poor constituents in turnout, political knowledge, or contacting." *Ibid*.

¹²⁰³ Larry M. Bartels, *supra* note 737 at 47.

¹²⁰⁴ *Ibid* at 67.

¹²⁰⁵ George A. Akerlof & Robert J. Shiller, *supra* note 52 at 78.

¹²⁰⁶ *Ibid* at 74.

well-being, so too can be voters. Politicians are incentivized – and perhaps required to – deceive the voters in order to appeal to both voters and their donors. Akerlof and Shiller argue voters can be deceived by not being fully informed, or by being psychologically manipulated.¹²⁰⁷

The winning electoral strategy ... is threefold: 1. Publicly, proclaim policies that will appeal to the typical voter on issues that are salient to her, and where she will be well informed. 2. But on other issues, where the typical voter is ill informed, but where potential campaign donors are well informed, take the stance that appeals to donors. Publicize this stance to would-be contributors, without broadcasting it widely to the general public. 3. Use the contributions from these “special-interest groups” for campaigning that increases popularity among the regular run of voters...¹²⁰⁸

If Akerlof and Shiller are correct, large private campaign financing creates an essential deception at the heart of democracy, misaligning representation. Candidates always have to balance the concerns of multiple constituencies, and navigate between the party preferences, the national preferences and the preferences of their various local constituents. However, they can do this relatively openly. In contrast, candidates cannot admit to their voters that they are also serving the differing preferences of the donor class. There is no democratic justification for that, and so they will need to deceive the voters when the preferences of two diverge. This deception is bad for the soul of the politician. It is unfortunate to require habitual lying from our leaders. The deception damages democratic integrity, moving policy-decisions away from the voter preferences. It feeds a legitimate sense that politicians are shady. It creates an appearance of corruption, as is discussed below.

Concern 4: Campaign Contributions Favour the Status Quo

Overall, private campaign financing and lobbying tend to reinforce the status quo.¹²⁰⁹ The increased lobbying of American businesses has made policy change even more difficult.¹²¹⁰ As discussed previously, most large businesses and wealthy elites seek to maintain the overall policy environment, pushing against large scale public changes, while also seeking smaller private changes that will benefit them substantially, like tax breaks and regulatory adjustments. Lobbyists primarily work to maintain the status quo, which is a clear indication of how much the major donors and exercisers of political influence seek to maintain the stability of the policy environment. Under the pressure of donors and lobbyists, decision-makers often allow policy drift, a choice that invisibly reinforces the status quo, and favours the wealthy – the current winners of the system.¹²¹¹

¹²⁰⁷ *Ibid.*

¹²⁰⁸ *Ibid* at 75.

¹²⁰⁹ Lawrence Lessig, *supra* note 273 at 143.

¹²¹⁰ Lee Drutman, *supra* note 172 at 35.

¹²¹¹ *Ibid* at 45.

An entrenched status quo leads to policy drift, and policy drift leads to kludgeocracy.¹²¹² Teles has argued that the U.S. becoming a *kludgeocracy*.¹²¹³ Other democracies are not immune to this problem, since it seems to result from the growing strength of business lobbyists; but the U.S. is especially susceptible due to its higher number of vote points, strong lobbying organizations, and increased polarization blocking many policy options. Kludgeocracy “further entrenches the role of business in the political process”¹²¹⁴. It has become harder to change the status quo, and it requires more resources.

This provides another advantage to the well-off: if the status quo is hard to change, those with considerable money and patience will be in a much better position to advocate for proactive changes.¹²¹⁵

Political science had argued that spending limits help the incumbent, and hence help solidify the status quo by protecting the incumbent from challengers embracing new policies. The reasoning was that the challenger needed more spending to make up for the incumbent’s name recognition, and that each additional dollar in spending proportionately helped the challenger more, so a higher limit would give the challenger more room to catch up. Yet, as we have discussed, this reasoning appears to be flawed. New research shows little challenger advantage in electoral spending, and that higher spending limits help the incumbent.¹²¹⁶ If the goal is to help political challengers, then it makes sense to design programs to do so directly, such as a public voucher system for new candidates, or some form of free advertising for the challengers to raise their name recognition, rather than raising spending limits, which is of questionable usefulness and brings significant harms. Similar to the results of Fourinaies’ study, Milligan and Rekkas found that higher campaign spending is associated with fewer close races, lower voter turnout, fewer candidates running, and a stronger status quo.¹²¹⁷

Concern 5: Campaign Contributions Create Bias

Large unregulated campaign contributions create a bias in political representation. They select for pro-money pro-business candidates; with a political bias that favours wealthy interests and right-wing policies; a matching framing bias; and hurdles that hinder non-wealthy candidates from competing.

¹²¹² *Ibid* at 36. A kludgeocracy is a governmental system that is excessively complicated, where public policy is increasingly full of rickety self-defeating complexity, because it incorporates so many benefits to private special interest groups. See Chapter 1 – Lobbying Regulation: Structural Political Difference that Impact the Practice of Lobbying: Differences: Kludgeocracy, p. 50.

¹²¹³ *Ibid*.

¹²¹⁴ *Ibid*.

¹²¹⁵ *Ibid* at 35.

¹²¹⁶ Jeff Milyo, “Campaign Spending and Electoral Competition”, *supra* note 1030 at 4; Kevin Milligan & Marie Rekkas, *supra* note 1027 at 1373.

¹²¹⁷ Kevin Milligan & Marie Rekkas, *supra* note 1027 at 1373.

Campaign Funding Selects Pro-Money Candidate

One of the greatest effects of allowing large campaign finance donations is that it pre-selects for candidates who hold views that are agreeable to the large donors. Lessig and Kuhner both agree that large contributions from wealthy donors can determine which politicians can even begin to run for office.¹²¹⁸ The influence comes not from changing the candidates' mind, but by pre-selecting the candidates who agree with the large donors – who have the same policy views as the top 1%.¹²¹⁹

[Money] undoubtedly improves access and plays an important gatekeeping role in who can run for office and puts limits on what policies they can publicly support.¹²²⁰

The demands for the enormous sums needed for a political campaign in an environment with unlimited donations and unlimited spending drives candidates to actively seek out wealthy donors.

In a system where Congressional candidates must raise \$1 to \$7 million and presidential candidates must raise hundreds of millions of dollars, candidates must plan and formulate public policy from the perspective of their core donors, rather than the general public. Needless to say, they run on a platform calculated to obtain popular support, but they must satisfy their financial backers to the point of obtaining the funds required to run for office and later secure re-election. In terms of elections, ordinary people cannot gauge what they are voting for; and, their range of choice in candidates is severely limited, as only those candidates amenable to the agenda of moneyed interests will stand a chance.¹²²¹

Dawood has argued that there is “an ideological congruence between donors and members of Congress”¹²²². Since the top 0.01% is responsible for 40% of the donations, and individual donors are increasingly ideologically extreme, there is good evidence that campaign donations are a key source of the alignment gap between voter preferences and members of Congress.¹²²³

Candidates compete for the large donations provided by the big donors. This competition further pushes them to embrace donor-friendly positions. These positions include pro-wealthy and pro-

¹²¹⁸ Lawrence Lessig, *supra* note 273 at 244; Timothy K. Kuhner, *supra* note 51 at 7.

¹²¹⁹ Goldberg *et al.*'s study of oil and gas industry campaign finance donations found the interest groups generally give money as a form of investment to politicians who support their position, rather than trying to influence uncommitted politicians. “These findings provide strong and consistent support for the investment hypothesis and weak and inconsistent support for the influence hypothesis. That is, instead of attempting to sway undecided or opposing legislators’ votes, oil and gas companies seem to provide financial rewards to members of Congress after they have voted against legislation to protect the environment.” Matthew H Goldberg et al, “Oil and gas companies invest in legislators that vote against the environment” (2020) *Proc Natl Acad Sci* 201922175 at 2.

¹²²⁰ Lee Drutman, *supra* note 172 at 210.

¹²²¹ Timothy K. Kuhner, *supra* note 51 at 2381.

¹²²² Yasmin Dawood, *supra* note 489 at 342.

¹²²³ *Ibid.*

business policies, like tax cuts and deregulation. At the same time, the evidence indicates that donations motivate politicians to work harder on the donors behalf.¹²²⁴

Koch organizations do not, as such, endorse particular candidates; instead, they deploy what is arguably a much more effective tactic by encouraging politicians to compete to prove that they can be effective spokespersons for, and executors of, the Koch agenda. Because the Koch seminars attract many wealthy supporters, politicians covet invitations and are glad to audition for the guests.¹²²⁵

The recent practice of billionaire donors providing enormous campaign contributions to fund single candidates (or their own campaigns), is likely accelerating this trend.¹²²⁶ A billionaire donor can provide enough funding to single-handedly push a candidate well into the presidential primary. These billionaire donors can provide so much funding that they can hyper-select the exact candidate they prefer, not guaranteeing the candidate wins, but guaranteeing that many if not all of the candidate have views that specially align with those of the donors. These billionaires and their contacts also control valuable assets that can offer additional support to their chosen candidate, and threaten potentially independent candidates. These assets include Americans for Prosperity, controlled by Charles Koch, Breitbart News Network controlled by the Mercer family, and Fox News and News Corporation, controlled by Rupert Murdoch.¹²²⁷

Just as with lobbying, much of the political influence comes from being able to prevent certain outcomes. In environments with unlimited funding donors can prevent certain candidates from running by refusing to fund them, while funding their opponents. Within the political party, those who can fundraise better, get more power than those with other skills and views, rising to leadership positions, where they are likely to entrench pro-donor policies.¹²²⁸ Candidates who believe in policies the rich dislike, like high top marginal tax rates or corporate income taxes, face an uphill struggle. Teachout argues that the U.S. Supreme Court has essentially created a form of rotten boroughs, where only the donor class represents the district. Even candidates who do not want to participate in this venal dependency corruption will likely have to do so in order to run for office.

¹²²⁴ Elisabeth Bassett, *supra* note 979 at 1060.

¹²²⁵ Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 13.

¹²²⁶ Gregory Koger, *supra* note 1182; Nicholas Confessore, *supra* note 1114.

¹²²⁷ These billionaires own large stakes in their respective companies, exercising control over their direction, and the policies and politicians they support.

¹²²⁸ “[F]und-raising members benefit by two inter-related mechanisms. The first is a decentralized, uncoordinated, bottom-up benefit where giving financial contributions to your colleagues fosters a relationship with grateful beneficiaries that yields support and votes for the donor member in leadership and chairmanship elections. The second is a new centralized, coordinated, top-down benefit from party leaders who reward those most successful at fund-raising for fellow caucus members by supporting their advancement ambitions. While uncoordinated bottom-up benefits have always existed, the formal centralized reward system instituted by the parties is new and has increased the provision of this vital public good, member to member giving.” Eleanor Powell, *Where Money Matters in Congress* (University of North Carolina, Chapel Hill, 2010) at 4.

At the level of power, fewer than 1 percent of people get to choose whom everyone else can vote for. People who want to be ethical still get caught up in a mandatory gift economy... There is simply no alternative way to compete. If contribution limits were allowed, or if the federal government passed public funding of elections, candidates for office would be responsive to a broader public and would have more freedom to be uncorrupted.”¹²²⁹

Lessig and Kuhner both argue that politicians cannot accurately represent the voters when they must be concerned about donations from wealthy donors and lobbyists, as private interests will make their way into the politicians’ public policy decisions.¹²³⁰ Retnasaba’s previously discussed empirical study of public finance contracts in the 1990s supports their position. He found that direct campaign contributions were corrupting political decision-makers, and that corruption fell following a ban on the contributions.¹²³¹

Campaign Contributions Create a Political and Framing Bias

An electoral system that allows substantial campaign contributions creates (or accentuates) a form of political bias. This bias takes two related directions, it is pro-business and wealth, and it tends to favour the right-wing.

Pro-Business and Pro-Wealth Bias

Predictably, since the donors who can afford to make regular substantial donations are mostly businesses and wealthy individuals, it is not surprising that politicians come to favour their views. This has become all the more true as the power and wealth of countervailing groups like unions and citizen associations has declined. “While individual policy outcomes are unpredictable, in the aggregate, policy outcomes lean towards the preferences of corporate interests and wealthy donors.”¹²³² This bias favours money-based interests. These interests have different views of social policy, favour market based policy responses, and arguably tend to favour kludgeocracy and a rent-seeking economy.¹²³³ This is exacerbated by the pro-wealth and pro-business bias of interest group politics.¹²³⁴ As Senator Chris Murphy once said of his campaign donors, “[t]hey have fundamentally different problems than other people.”¹²³⁵

¹²²⁹ Zephyr Teachout, *supra* note 988 at 256.

¹²³⁰ Lawrence Lessig, *supra* note 273 at 244; Timothy K. Kuhner, *supra* note 51 at 7.

¹²³¹ Gajan Retnasaba, *supra* note 278 at 23.

¹²³² Lee Drutman, *supra* note 172 at 212.

¹²³³ *Ibid* at 211.

¹²³⁴ Lawrence Lessig, *supra* note 273 at 143.

¹²³⁵ Lee Drutman, *supra* note 172 at 210.

We are not at the end point of this trend. As they become more comfortable with donating, big donors are demanding a larger say in campaign strategy.¹²³⁶ It is likely this pattern will also be seen in increasing demands about governing decision-making.

Bias to the Right

This bias is matched by a bias towards right-wing political parties and policies, as compared to the preferences of the constituents.¹²³⁷ This is most likely because wealthier people and business leaders tend to be right-wing, and donate that way.¹²³⁸ Other studies have found the same political bias is present on (U.S.) corporate boards, where right-leaning partisan views are disproportionately represented as compared to the general population.¹²³⁹ Similarly, CEOs contribute substantially more (almost three times more according to one newspaper study) to Republican groups than to Democratic ones.¹²⁴⁰ The rightward lean of donors (and the contact of business lobbyists) appears to be partly responsible for the fact that American politicians believe voters to be significantly more conservative than they really are.¹²⁴¹

Right-wing parties have consistently been anti-tax and anti-regulation. Tax and regulations cuts can provide substantial short-term returns to businesses and wealthy individuals, even if they might be economically and socially damaging in the long run. In the U.S., “the biggest political contributions from

¹²³⁶ Nicholas Confessore, *supra* note 1114.

¹²³⁷ “We observe ... that a greater reliance on corporate contributions is correlated with larger constituent mismatches.” Alexander Hertel-Fernandez, Matto Mildenberger & Leah C. Stokes, *supra* note 32 at 12.

¹²³⁸ Cohen *et al.*’s study of 3,800 CEOs of the S&P 1500 (covering 90% of the stock market capitalization of the U.S.), found that 57.7% of executives demonstrated their affiliation by making at least two-thirds of their political donations to the Republican Party, and just 18.4% made the equivalent donations to the Democratic Party. The median chief executive donated 75% of his political donations to Republicans. *The Politics of CEOs*, SSRN Scholarly Paper, by Alma Cohen et al, papers.ssrn.com, SSRN Scholarly Paper ID 3355690 (Rochester, NY: Social Science Research Network, 2019) at 1.

¹²³⁹ “We and our research partners found that Republicans are more highly represented on boards than in the general population: they were 50% Republicans, 24% Democrats, and 26% Independents, while the American public, according to Gallup, is 28% Republicans, 31% Democrats, and 39% Independents.” J Yo-Jud Cheng & Boris Groysberg, “7 Charts Show How Political Affiliation Shapes U.S. Boards” *Harv Bus Rev* (23 August 2016), online: <<https://hbr.org/2016/08/7-charts-show-how-political-affiliation-shapes-u-s-boards>>.

¹²⁴⁰ In the 2018 midterm election cycle, chief executives donated \$7.4 million of their own money to Republican groups, versus \$2.6 million to Democratic groups. Victor Reklaitis & Katie Marriner, “How America’s top CEOs are spending their own money on the midterm elections”, (22 October 2018), online: *MarketWatch* <<https://www.marketwatch.com/story/ceos-are-spending-their-own-money-on-the-midterm-elections-heres-how-2018-10-18>>.

¹²⁴¹ This appears to be true of legislators and their staff. This is likely partially due to continuous contact with donors, as well as the selection effects of donations. Broockman & Skovron argue it is also because Republican citizens are especially likely to contact legislators. Hertel-Fernandez argues it is an effect of the cross-state conservative lobbying groups, including wealthy donors and large corporations, and their campaign donations. Alexander Hertel-Fernandez, Matto Mildenberger & Leah C. Stokes, *supra* note 32 at 1; David E Broockman & Christopher Skovron, *What Politicians Believe About Their Constituents: Asymmetric Misperceptions and Prospects for Constituency Control* (Vanderbilt University, 2013) at 3; David E Broockman & Christopher Skovron, “Bias in Perceptions of Public Opinion among Political Elites” (2018) 112:3 *Am Polit Sci Rev* 542–563; See also, Alex Hertel-Fernandez, *State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States -- and the Nation* (Oxford, New York: Oxford University Press, 2019).

the wealthy have tended to go to conservative causes”¹²⁴². This bias towards the right side of the political spectrum is visible in large direct donations.

Of the top 1,000 donors in 2012, 580 gave at least 90 percent of their party and candidate contributions to Republicans, as compared to 326 who gave at least 90 percent of their party and candidate contributions to Democrats.¹²⁴³

Dark money groups also appear to spend more in support of right-wing policies and candidates.¹²⁴⁴ The story is not always so clear; left-wing candidates do often outraise their counterparts in high-salience elections, especially in terms of direct donations. For example, in the 2016 U.S. Presidential election Clinton raised more money than Trump. In most races though, it seems to be that even when the left-wing party raises more in direct contributions, it is outspent by the third-party spending in support of the right-wing candidate. For example, in the 2018 Pennsylvania Congressional special election, the Democratic candidate raised and spent about \$3.06 million, and the Republican candidate spent about \$614,000. Yet, outside liberal organizations spent \$1.5 million, and outside conservative organizations spent over \$8 million.¹²⁴⁵

We are in a period of asymmetric polarization in the U.S., and much of the rest of the world. Right-wing parties are becoming more extreme. It is likely that in the U.S. private donors networks, including the Koch’s shadow political party, are partly responsible for this polarization. Oklobdzija finds that right-wing dark money donors “prefer candidates that are more ideologically extreme than those supported by official Republican party organizations.”¹²⁴⁶ The donors have consistently selected these more extreme candidates, by focussing on the primaries, where they can have an early large effect on the candidate selected.¹²⁴⁷ They have also built a world-wide intellectual environment more supportive of extreme right-wing ideology by funding think tanks, shadow political parties, and a self-contained echo chamber right-wing media.

The donor networks on the left-wing are not showing the same extremism.¹²⁴⁸ The reduced extremism is likely a combined effect of the wealthy donors being on average more economically right leaning, even if they support left-wing candidates, a different approach to the value of knowledge and

¹²⁴² Benjamin I. Page, Larry M. Bartels & Jason Seawright, *supra* note 707 at 66.

¹²⁴³ Lee Drutman, “What the McCutcheon decision means”, (2 April 2014), online: *Wash Post* <<http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/04/02/what-the-mccutcheon-decision-means/>>.

¹²⁴⁴ For example, “the top five liberal 501(c)(4)s spent \$11.3 million in political expenditures in 2010, less than half of the \$26 million spent by the top conservative group.” Kurt Eichenwald, “The Real IRS Scandal That No One Is Talking About”, (17 May 2013), online: *Vanity Fair* <<https://www.vanityfair.com/news/politics/2013/05/real-scandal-tea-party-irs-tax-code>>.

¹²⁴⁵ Kristin Kanthak, “The Big Pennsylvania Election Really Isn’t about the Candidates”, (12 March 2018), online: *CNN* <<https://www.cnn.com/2018/03/12/opinions/pennsylvania-special-election-funding-opinion-kanthak/index.html>>.

¹²⁴⁶ Stan Oklobdzija, *supra* note 1183 at 36.

¹²⁴⁷ *Ibid* at 4.

¹²⁴⁸ *Ibid*.

expertise, different personality traits associated with the ideology, a bias towards compromise, a structure that involves a more diffuse spread of group identities, and a less sealed off media environment.¹²⁴⁹

The bias in political donations supports right-wing candidates, making them more extreme, while pushing left-wing candidates towards more moderate business-friendly positions. This complicates any attempts to instill stricter campaign finance regulations. It is likely that the right-wing parties will be tempted to prevent and roll-back campaign regulation in order to maintain this funding advantage. Only if party members and their voters are convinced that the gains in clean elections and better policy outweigh their immediate fundraising advantage will their position soften. Hopefully, the voters in the right-wing parties will begin to notice that their politicians are disproportionately favouring wealthy interests, and ignoring the preferences of their other supporters. Hopefully voters on all sides will begin to prefer unbiased elections than gaining an advantage over their political opponents.

Framing Bias

Just as lobbying often acts to frame the policy issues, so does campaign financing. Connecticut Democratic senator Chris Murphy admitted this to an audience at Yale in 2013, when discussing fundraising.

You spend a lot of time on the phone with people who work in the financial markets.

And so you're hearing a lot about problems that bankers have and not a lot of problems that people who work at the mill in Thomaston, Connecticut, have.¹²⁵⁰

Hasen argues that money skews legislative priorities because it enables large donors and lobbyists to gain disproportionate and repeated access to legislators.¹²⁵¹ Drutman describes how the repeated contact with donors can lead to adopting the donor's world view – their frame.

Over time, this can lead to a kind of self-interested worldview osmosis, where candidates take on donors' perspectives as part of a need to appeal to them. If you hear an argument enough times, and you repeat it enough times to raise money, eventually you may even start to believe it. Or at the very least, whatever zeal you may have had on the other side of the issue is gradually replaced by doubt.¹²⁵²

¹²⁴⁹ Left-wing voters tend to have the higher levels of openness, and right-wing voter tend to have high conscientiousness. However, the context historical situation and details of country and the policy positions of the political parties affect how these traits are funneled into political support. Bert N Bakker, David Nicolas Hopmann & Mikael Persson, "Personality traits and party identification over time: Personality traits and party identification over time" (2015) 54:2 Eur J Polit Res 197–215 at 204.

¹²⁵⁰ Robert B. Reich, *supra* note 26 at 191.

¹²⁵¹ Yasmin Dawood, *supra* note 489 at 337.

¹²⁵² Lee Drutman, *supra* note 172 at 210.

Politicians spend a large part of their day reaching out and talking to the donors. Spending so much time talk to and courting the donor class, immersed in the donor's viewpoints, influenced by gratitude powered by the social gift exchange, many politicians will begin to see the views of their donors as the views of their constituents.¹²⁵³ Often, particularly in areas of low media attention or in strongly partisan districts, the support of the donors is more fundamental to getting and maintaining office than that of the voters, and in these cases the donors are essentially the true constituent. The priorities of the donors become the politician's political priorities, especially issues of low salience to the politician, as they have to mimic sympathy to these views, and have little basis for disagreement.

When not talking to donors, politicians are often talking to fellow wealthy politicians and to well-healed lobbyists employed by those same donors. They are surrounded by an intellectual environment that provides policy solutions crafted by ideologically-based think tanks intending to frame the policy debates, which in turn are also funded by the same donors.¹²⁵⁴ When any decision-makers encounter a new problem, they ask themselves whether a familiar solution that will work.¹²⁵⁵ Seeking a solution is mentally tasking, cognitive capacity is limited, and time is always short. Decision-makers, like most people, will seek out solutions that they are already familiar with or that are readily available. "They are most likely to seek out the advice of people they know well and who have shown themselves willing and capable of help in the past."¹²⁵⁶ The repetition becomes the familiar; the familiar becomes the default solution; it becomes the frame.¹²⁵⁷

This social familiarity is emphasized by the similarity of culture that donor control reinforces. Studies show that diverse groups perform better and make better decisions, even if people might be more comfortable in less diverse groups where they share a common background.¹²⁵⁸ The donor class is not only economically similar, being in the top 1%, but it is also culturally similar, being mostly older white heterosexual males, who have attended the same few elite schools. They will tend to fund candidates who they are comfortable with, who share the same views, experiences, and social-economic background. This donor influence, on average, will tend to increase the number of candidates who are similar to the donors, as compared to a political environment that lacked significant donor influence, all other parts of the electoral system being equal. Kwak notes that in lobbying, industries often exert a sort of cultural capture on regulators, through group identification, status and relationship networks.¹²⁵⁹

Donor networks exert a similar cultural capture on the candidates. This leads to a form of group-think, a disregarding of the needs and experiences of those outside the social-economic and sexual-

¹²⁵³ Alexander Hertel-Fernandez, Matto Mildenerger & Leah C. Stokes, *supra* note 32 at 2.

¹²⁵⁴ Lee Drutman, *supra* note 172 at 28.

¹²⁵⁵ *Ibid* at 40.

¹²⁵⁶ *Ibid*.

¹²⁵⁷ *Ibid* at 41.

¹²⁵⁸ Naomi Ellemers & Floor Rink, "Diversity in work groups" (2016) 11 Curr Opin Psychol (Intergroup relations) 49–53 at 49.

¹²⁵⁹ Lee Drutman, *supra* note 172 at 45.

gender group, and an exaggerated tendency to favour the views and policies of those who are culturally similar and familiar. It leads to type ii influence of group belonging, instead of the type v influence of rationality. Undoubtedly, it also leads to a decrease in good political decision-making and a decline in governance capacity.

Limiting Policy Alternatives

The framing effect of essentially unrestricted campaign contributions is matched by a donor pressure to drop issues and avoid certain policy alternatives. Lewis proposes that “the effect of contributions on opposition groups is larger than contributions from groups favoring of passage.”¹²⁶⁰ A donor can run attack ads against a politician, or fund an opponent during the primary and the general, as a means to kill policies, thereby limiting policy alternatives. Chamon and Kaplan argue that this influence might not even require that the donor spend the funds, because a credible threat to support an opponent can be sufficient to kill a policy proposal.¹²⁶¹ Effectively threatening and opposing candidates as a means to kill policy alternatives might result in the public not even knowing that certain policy options are available, if there no elected officials left to champion them.

The threat of outside money is credible, because outside interests often far outspend the candidates themselves in many modern American elections, even in relatively high profile ones. For example, in high profile 2018 Pennsylvania Congressional special election (for a district that would be up for re-election six months later), the candidates spent about \$3.67 million and outside sources spent over \$12.5 million.¹²⁶² Although the spending often takes the form of directly trying to elect a more sympathetic candidate, as that is the most effective way of pursuing policy change on high salience issues, donors also use their influence to kill policy proposals they oppose.¹²⁶³ When virtually all the candidates are competing for donor support, the death of policies that the donor class oppose is a subtle powerful force limiting the options of the rest of the population.

Teachout argues that the virtually unlimited donations create a social exchange gift economy that restricts the politicians’ policy options. Yet, the donations are so essential, and the process legal and mundane, that many politicians might not even be aware of the dependency corruption.

The gift economy enables a sophisticated masking of the *quid pro quo* economy, so sophisticated that even the people inside it may sometimes feel it is a culture of goodwill and not the auctioning off of the public welfare. *Quids and quos* are not named, but the general obligations are broadly understood, and failure to conform to the expectations of the gift economy leads to gifts drying up. When these “gifts” are powerful enough, they can lead to representatives working on issues that are

¹²⁶⁰ Daniel C. Lewis, “Advocacy and influence”, *supra* note 504 at 215.

¹²⁶¹ Lawrence Lessig, *supra* note 273 at 258.

¹²⁶² Kristin Kanthak, *supra* note 1245.

¹²⁶³ Lee Drutman, *supra* note 172 at 210.

not, under any theory of representation, in the interests of the constituents. The sole reason for granting some earmarks is that the candidate or elected official needs campaign money.¹²⁶⁴

Bars Non-Wealthy Candidates

Unlimited campaign contributions and spending can have a significant impact in limiting who runs for office. As already discussed, it selects for pro-money candidates and personality types that can take the grind of continuous fundraising, and against those who seek to restrain the power of the donor class. With rare exceptions, it also locks candidates who lack the connections to fundraise out of the system.

Those who can appeal to these kinds of donors can run for office. Those who can't appeal to these donors usually can't. Appealing to wealthy donors involves both taking on policy positions that are comfortable for these donors and not wasting time with issues that do not concern them.¹²⁶⁵

The poor already face difficulties running for office, as they can rarely afford to take the time off work to campaign. Unrestricted private financing pushes campaigning out of the reach of the middle and upper middle class as well. Potential candidates need to be able to guaranty the party that there will be significant donations to get them in the race, either by being rich, or by having contacts with donors who have already promised to give thousands of dollars in donations. Generally, only wealthy, professionals, and business people will have access to this wealth and these connections.

As Representative Tim Roemer observed, “the amount of time it takes to raise the money. . . [and] some people's inherent access to the political system [because] they come from money . . . certainly precludes poor and low income people from ever running.”¹²⁶⁶

This pattern was visible in the 2020 U.S. Democratic primary. In February 2020, there were 2 billionaires running in the U.S. Democratic primary, hoping to go against the billionaire Republican President in the general election, and one billionaire who recently ended his run as a potential third party candidate. Billionaires represented approximately 0.0002% of the U.S. population, but 30% of the people running to be the next President. At that moment, there were more billionaires running than candidates with a net worth of under \$1 million.

This means that not only is the agenda set by the wealthy, but the politicians themselves are generally wealthy and view the world through that same lens. This pattern has become apparent in the makeup of the U.S. Congress. In 2013, the median net worth of a member of U.S. Congress was \$1.03

¹²⁶⁴ Zephyr Teachout, *supra* note 988 at 254.

¹²⁶⁵ Lee Drutman, *supra* note 172 at 210.

¹²⁶⁶ Timothy K. Kuhner, *supra* note 51 at 2362.

million, compared to \$80,640 for an average American.¹²⁶⁷ Just over 50% of 533 sitting members of office were millionaires.¹²⁶⁸ Cutting out the lower and middle classes from governance cuts out their experiences and viewpoints. If no one in charge has ever needed to rely on public assistance, public transportation, protection from rent increases or protection from exploitive employers, then it is hard for them to really see the value of public services and protective regulations. For the wealthy, many problems look like government overreach into the market, and most preferred outcomes involve trimming government and cutting taxes. This is not how most people live, and shutting out these lived experiences is damaging for democracy.

Some American jurisdictions have experimented with a public voucher system, where every citizen has a voucher of public funds they can allocate to a potential candidate. This helps bypass the selection problem, by allowing a candidate without a wealthy background to be viable if they can convince enough citizens to support them. This also provides the party with a tangible demonstration that the candidate can motivate citizen support. However, even with a voucher system, unlimited donations will continue to drive money-friendly candidates into office, and over time unlimited private campaign spending is likely to swamp any public funding. A combination of a voucher system, public financing and strict regulations would open the door to the widest range of potential candidates, giving the public the most choice in who represents them, and helping to prevent bias and groupthink among elected leaders.

Concern 6: Campaign Financing Otherwise Damages and Corrupts Democracy

Just as with lobbying, unregulated campaign financing moves government policy away from popular opinion. It weakens democratic integrity by creating an appearance of corruption; by the negative effects of campaign advertising; and by taking politicians time away from governance.

Large Contributions Create an Appearance of Corruption

Along with actually affecting the political process, there is evidence that the prevalence of large virtually unregulated contributions create an appearance of corruption for the public. According to one poll, nearly 90% of Americans say that there is too much corporate money in politics.¹²⁶⁹

In Rasmussen polls undertaken in the fall of 2014, 63 percent thought most members of Congress were willing to sell their vote for either cash or a campaign contribution, and 59 percent thought it likely their own representative already had. Sixty-six percent believed most members of Congress didn't care what their constituents

¹²⁶⁷ *Net Worth of Households: 2014*, Current Population Reports, by Jonathan Eggleston & Robert Munk, Zotero, Household Economic Studies Current Population Reports (U.S. Census Bureau, Washington, DC, 2018: U.S. Census Bureau, 2018) at 1.

¹²⁶⁸ Russ Choma, "One Member of Congress = 18 American Households: Lawmakers' Personal Finances Far From Average", (12 January 2015), online: *OpenSecrets News* <<https://www.opensecrets.org/news/2015/01/one-member-of-congress-18-american-households-lawmakers-personal-finances-far-from-average/>>.

¹²⁶⁹ Hall, "Systemic Effects of Campaign Spending", *supra* note 1085 at 343.

thought, and 51 percent said even their own representative did not care what they thought.¹²⁷⁰

It is difficult to determine with certainty whether the public's faith in democracy was further damaged by *Citizens United*, and whether the public sees an appearance of corruption in the increasingly lax rules of campaign donations and enforcement. On one side, the question does not motivate voting choices, process questions rarely come to the forefront during elections, except for during massive scandals. Even when public surveys indicate that people believe officials to be corrupted by donations, it is hard to determine whether the public actually views the electoral process as corrupting because of the specifics of lax campaign finance laws, or whether corruption is merely a stand in term for a general dislike of current policy and opposition to the party that is currently in power. Thus there are some legitimate questions about how the public at large reacts to the appearance of corruption, and whether it affects the public's decision-making and political participation, as the Court argued in *Buckley*.¹²⁷¹

On the other side, an increasingly large number of people are not voting.¹²⁷² Most of this is likely due to factors such as social changes, the social value placed on political participation by different groups, language and technical barriers (some deliberate), the atomization of the individual, and the decay of citizen associations, neighbourhood groups and unions. Yet, the idea that all the politicians are the same, beholden to the same donors, likely has an effect. There are strong anecdotal indications that politically active citizens believe large donations and third-party spending corrupt the political process, creating an appearance of corruption. Rao's study supports this conclusion, indicating that politically active citizens do seem to care about campaign finance laws, and do perceive failures in the laws to lead to an appearance of corruption.¹²⁷³ For politically active citizens, "changes in campaign finance law could have an influence on political behavior."¹²⁷⁴ Since voters often take their cues from their more politically engaged counter-parts, it is reasonable to conclude that for the average citizen, unregulated campaign donations – the rules of the *Citizens United* era – have increased the appearance of corruption.

The Negative Effects of Electoral Advertising

A subtle harm to democracy can be found in electoral advertising. There are upsides and downsides to advertising. It allows the candidate to reach beyond personal contact, and convey style, beliefs and policy positions. This information, this conveyance of personality and beliefs, can reach out to unengaged citizens and bypass the filters of reporters and the media. However, advertising is not a neutral unemotional conveyance of rational information; particularly in video form, it is a hot medium of emotional manipulation. As we discussed in the context of judicial elections, much of political

¹²⁷⁰ Robert B. Reich, *supra* note 26 at 194.

¹²⁷¹ Nitya Tangada Rao, *Courts, campaigns, and corruption: an empirical evaluation of the "appearance of corruption" rationale for campaign finance regulation* (Thesis, 2016) [unpublished] at 30.

¹²⁷² Robert B. Reich, *supra* note 26 at 194.

¹²⁷³ Nitya Tangada Rao, *supra* note 1271 at 30.

¹²⁷⁴ *Ibid.*

advertising is a deliberately misleading attempt at emotional manipulation.¹²⁷⁵ Moreover, negative ads are highly tied to third-party spending. Unlike the candidates, third parties do not have to worry about the blowback from upsetting or misleading ads.¹²⁷⁶ They are incentivised to play on the margins, and manipulate and deceive the public. Political advertising gets more negative as spending and third-party involvement increases.¹²⁷⁷ This pattern has only accelerated with the involvement of internet sockpuppets¹²⁷⁸. The Russian web brigades have widely used online advertising both to push for favourable policies and politicians, and to increase discord to augment internal social tensions, in an effort to make society less manageable and to discredit democratic governance. The problem of negative and manipulative advertising is increases as spending limits increase, and limits on third-party electioneering decrease.

Unlike most other types of advertising, political advertising is often negative. In the 2004 U.S. Presidential election cycle, \$2 billion spent on TV ads, 90% were negative.¹²⁷⁹ Negative ads help in individual races, but damages politics as a whole. There is good reason McDonalds does not accuse Jack in the Box of selling burgers with salmonella poison, even if it might be occasionally true. It would lead to a decline of trust in the industry, and to more people avoiding fast food. Even if McDonalds lost fewer customers than Jack in the Box, it would shrink the market overall, destroying future income. Unfortunately, the zero-sum nature of politics rewards negative campaigning. Deterring people from voting is an effective strategy as long as your opponent loses more voters than you do. This dynamic, the reality that political advertising need not contain truth, or can be framed to activate tribal instincts and disproportionately negative emotions (through camera work, music, emotional language, and dog whistles), means that the informational value of more advertising can be outweighed by its negative impact on trust in the electoral system and democracy. Increased spending limits – and relaxed third-party restrictions – increase political advertising, but that provide little social benefit besides increasing the profits of media companies. The decline in voter turnout might be partly explained by the increased spending on negative campaign ads.¹²⁸⁰

At the same time, the participation of third parties in electioneering can swamp the communication and participation of the average citizen. Volunteering is an essential part of elections, as citizens help participate in running the voting stations, or support candidates and parties they like. This participation can be swamped by the huge megaphone and spending of unregulated third-parties, and their paid “volunteers”. Candidates, especially subpar ones, embracing less popular but donor pleasing policies, can compensate for low citizen and volunteer enthusiasm through donor support, shadow

¹²⁷⁵ Alicia Bannon, Cathleen Lisk & Peter Hardin, *supra* note 1132 at 36.

¹²⁷⁶ *Ibid* at 35.

¹²⁷⁷ *Ibid*.

¹²⁷⁸ A web brigade is an army of sockpuppets. Sockpuppets are disguised internet identities. Generally they are used because the message would not be convincing if one knew its actual source. They can also act as a multiplier, making an opinion seem more popular than it is. See Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: Astroturf Lobbying: Sockpuppetry; or the Appendix: Glossary / List of Theories: Astroturf Lobbying, Sockpuppet and the Echo chamber approach to advocacy.

¹²⁷⁹ Timothy K. Kuhner, *supra* note 51 at 2361.

¹²⁸⁰ Kevin Milligan & Marie Rekkas, *supra* note 1027 at 1373.

political parties support, media buys and paid workers. The large advertising budgets and the unregulated third-party expenditures become another form of the astroturfing of democracy. The matching curtailing of genuine citizen participation in elections is troubling. Unlimited political advertising and electoral spending, particularly by third-parties, has substantial downsides, especially, overall, wearing away at the population's trust in democracy.¹²⁸¹

Fundraising Takes Time from Governing

In all political systems that utilize private funding, politicians have to spend some of their time cultivating donors in order to fund future elections, keep the party's finances healthy, and in many cases, to be able to direct funds to other politicians to gain additional political influence. When elections are expensive, campaign spending unlimited, and third-party spending unregulated, the need for campaign funds becomes more and more pressing.

[P]oliticians, journalists, and political observers regularly bemoan the enormous influence of money noting the tremendous time and energy politicians spend fundraising, and the unprecedented amounts of money circulating in Washington.¹²⁸²

Parties often set fundraising requirements for sitting politicians. For example, in 2016, a Republican Congressman was expected to raise \$18,000 a day. It is reasonable to think that the number was about the same for a Democrat. They cannot legally do this while in their government offices, so they go down the street to a party run call center to fundraise, further separating them from the location of governance. Similarly, a model daily schedule from the Democratic Congressional Campaign Committee allocated 4-5 hours a day (~50%) to fundraising call time and meet & greets.¹²⁸³ Numerous politicians have stated that fundraising can take up to 50% of their time. It is likely the 50% figure is idealized in party literature to push for more donations, or exaggerated in politicians' reports because they often dislike the activity. According to survey data, in 2013, at the federal level, American politician's spent 20% to 25% of their time fundraising.¹²⁸⁴

¹²⁸¹ *Many Across the Globe are Dissatisfied With How Democracy Is Working: Discontent is tied to concerns about the economy, individual rights and out-of-touch elites*, by Richard Wike, Laura Silver & Alexandra Castillo (Pew Research Center, 2019).

¹²⁸² Eleanor Powell, *supra* note 1228 s Abstract.

¹²⁸³ Ezra Klein, "Congress spends too much time fundraising. But it's less time than you think.", (29 July 2013), online: *Wash Post* <<https://www.washingtonpost.com/news/wonk/wp/2013/07/29/congress-spends-too-much-time-fundraising-but-its-less-time-than-you-think/>>; Stacey Selleck, "Congress Spends More Time Dialing for Dollars Than on Legislative Work", (26 April 2016), online: *US Term Limits* <<https://www.termlimits.com/congress-fundraising-priority/>>.

¹²⁸⁴ *Life in Congress: The Member Perspective*, by Society for Human Resource Management & Congressional Management Foundation (Society for Human Resource Management & Congressional Management Foundation, 2013) at 19.

Both politicians and lobbyists in the American system now spend more and more of their time fundraising.¹²⁸⁵ As discussed, it limits their time with the average constituent, and puts them in continuous contact with the views of their wealthy donors. This contact is a form of lobbying for their donors, as politicians need to convince the donors that they agree enough with the donor's priorities to be worth the investment. Taking this time from governing is a substantial ongoing depreciation of good governance.

Members of Congress spend far too much time fundraising. As the costs of campaigns continue to rise, members of Congress spend more and more hours a day in "call time." Increasingly, the main qualification for the job is having a unique personality trait that allows one to withstand several hours a day of begging rich people for money.¹²⁸⁶

Thus the fundraising is selecting for a particular type of personality (and social class), and it is swallowing valuable time that should be spent working on public issues. These time demand deter many potential candidates, who "would like to go to Washington and help fix the problems but don't want to go to DC to become a mid-level telemarketer dialing for dollars."¹²⁸⁷ The fundraising demands make the job worse, encouraging many to give up on office, and likely encouraging elected officials to move on to becoming lobbyists.¹²⁸⁸

Even if it is only 20% of their time, this is damaging to good governance. Many have noted the decline in governing capacity of Congress. The politicians' time spent on fund-raising when they could be governing is undoubtedly a factor in this decline.

The Canadian Experience

The Canadian experience with campaign financing is a stark contrast to the American one. In Canada, the federal regulations have maintained their cohesion, and been largely successful in controlling campaign financing.¹²⁸⁹ Canada stands as a good example of the different that well-designed and maintained regulations can make.¹²⁹⁰ Canada is a smaller country, and it might never have experienced the same level of campaign financing issues as the U.S., but there is still plenty of room for the impact of unregulated campaign financing. For example, as mentioned, in 2012, in Alberta, the billionaire Daryl Katz gave the Progressive Conservatives \$430,000, which was 28 percent of the party's

¹²⁸⁵ Even without the risk of corruption, the time spent on fundraising likely damages the politicians' ability to govern. Lawrence Lessig, *supra* note 273 at 113.

¹²⁸⁶ Lee Drutman, *supra* note 172 at 210.

¹²⁸⁷ Stacey Selleck, *supra* note 1283.

¹²⁸⁸ Lee Drutman, "Yet Another Member of Congress Retires, Complains about the Misery of Fundraising", (8 January 2016), online: Vox <<http://www.vox.com/polyarchy/2016/1/8/10736402/congress-fundraising-miserable>>.

¹²⁸⁹ On the provincial and municipal level, election laws continue to struggle with loopholes, weak enforcement, and sometimes a complete lack of donation and spending limits.

¹²⁹⁰ Robert G Boatright, *Interest Groups and Campaign Finance Reform In the United States and Canada* (Ann Arbor, MI: University of Michigan Press, 2011) at 3.

total fundraising.¹²⁹¹ It is difficult to imagine that Progressive Conservatives would not give a disproportionate attention to the donor responsible for over a quarter of their total funding.

It is possible that some of the same problematic campaign finance behaviour seen in the U.S. does happen on a smaller scale in Canada, but it appears that much of the private political influence is blocked from using campaign contributions to amass disproportionate influence over politicians. The success of Canada's campaign finance laws can be seen in the absence of corporate donations, union donations, and dark money; the donation and spending limits; and the reduced link to lobbying.¹²⁹²

Corporate Donations, Union Donations, and Dark Money in Canada

There is little sign of corporate donations, union donations, and dark money in Federal Canadian politics. News reports continue to express concern about fundraisers and sponsored travel; but there is little indication that businesses and unions are bypassing the donation ban, or using alternative avenues to inject dark money into the political campaigns.¹²⁹³

There are some areas where the law is skirted, and spending on targeted internet, sock puppets and astroturf electoral organizations is difficult to monitor. The effectiveness of the regulations also raises other issues. For example, since climate change has become a political issue, some environmental groups are upset that they have to register as third-parties in order to run legitimate issue ads raising climate change awareness during the two-month election period.¹²⁹⁴ This sort of edge case is inevitable if there are any regulations, and the result is preferable to loopholes present in the American electoral laws. The Canadian system is stronger for its comprehensive campaign contribution regulations.

¹²⁹¹ This was done in the form of multiple \$30,000 donations (the donation limit) from him, his family members, his top employees, and their numbered companies. David Ebner & Dawn Walton, *supra* note 236.

¹²⁹² Boatright agrees that the Canadian regulations have been successful in keeping preventing American-style donations, PACs and dark money from entering Canadian politics. He believes a lot of this success is due to the difference in political structures and the already low levels of campaign spending by businesses and unions in Canada that existed before the campaign spending restrictions were put in place. Robert G. Boatright, *supra* note 1290 at 150.

¹²⁹³ For example, Robert Fife & Steven Chase, *supra* note 1019; Robert Fife & Steven Chase, "Trudeau's lead on legalizing marijuana lobbied during cash-for-access fundraiser - The Globe and Mail", *Globe Mail* (29 November 2016), online: <<http://www.theglobeandmail.com/news/politics/trudeaus-marijuana-czar-lobbied-during-cash-for-access-fundraiser/article33084843/>>; Adrian Morrow, "Ontario Liberals held more than 90 cash-for-access fundraisers in two-year span", *Globe Mail* (9 May 2016), online: <<http://www.theglobeandmail.com/news/national/ontario-liberals-held-more-than-90-cash-for-access-fundraisers-in-two-year-span/article29948904/>>.

¹²⁹⁴ Shawn McCarthy & Marieke Walsh, "Want to talk about climate change during the federal election? You'll have to register for that", *Globe Mail* (19 August 2019), online: <https://www.theglobeandmail.com/politics/article-want-to-talk-about-climate-change-during-the-federal-election-youll/?utm_medium=Newsletter&utm_source=Morning%20Update&utm_type=text&utm_content=MorningUpdate&utm_campaign=2019-8-20_6&cu_id=3dVMickm>.

Donation and Spending Limits in Canada

Since Canada's campaign financing laws are relatively cohesive, with few loopholes, the details about donation and spending limits – for individuals, campaigns and third-parties – matter a great deal. Raising contributions and spending limits too high can still introduce a great deal of inequality, misalignment, corruption and pro-wealth bias into the system. Raising third-party spending limits too high can allow third-parties to interfere in the election to the point where they can overwhelm the spending of the actual political parties.

Donation Limits

The donation limits in Canadian law are reasonable, allowing donors to make a meaningful political expression and contribution without gaining unfair influence over the politician. The Canadian federal electoral system also provides substantial public subsidies. This helps individuals afford to make political contributions. It also helps mitigate the need for excessive donations, allowing politicians to focus on issues besides fundraising and somewhat diffusing the arms race to secure the most and largest donations. These after-the-fact tax credits to the donors and expense reimbursement for the parties and candidates is not the ideal way of providing public funding. Voters have to have the cash on hand to make the donation and then wait for the tax pay back, and candidates and parties need the private donations to fund the election, and then get public reimbursement support back afterwards. This is much better than offering no subsidies, but the structure of these subsidies still favours the wealthier donors. Providing citizens with vouchers they could award to the candidates they support, or awarding the parties with some funding based on the votes they received in the previous election, would be a fairer way of disbursing these electoral subsidies.¹²⁹⁵

Spending Limits

Canada's spending limits are essential to the functioning of the campaign finance regulations. These limits appear to be reasonably low. As discussed previously, Milligan and Rekkas study of Canadian campaign spending limits concluded that,

higher spending limits lead to less close races, lower voter turnout, and fewer candidates running. However, the probability for incumbent re-election is almost unchanged. ... if we consider the welfare of voters rather than candidates, then our results suggest that spending limits can have an impact on voters' welfare – if broader outcomes such as electoral participation through voter turnout and more candidates running are held to be important by citizens.¹²⁹⁶

Fourinaies' previously discussed study of the U.K. comes to the same conclusion, and is particularly informative, as the U.K. has a similar electoral system. He confirmed that lower spending limits are

¹²⁹⁵ Canada did have a subsidy of ~\$2 per vote from 2004 to 2015. It was cancelled by Prime Minister Harper, over protests by the other political parties. The Liberals missed an opportunity to bring it back when they rolled-back some of Harper's other changes to Canadian electoral law.

¹²⁹⁶ Kevin Milligan & Marie Rekkas, *supra* note 1027 at 1373.

beneficial to widespread democratic participation, and increasing spending limits increased the cost of campaigns, reduced the number of candidates, increased wealthy candidates' share of the candidate pool, and amplified the incumbency advantages.¹²⁹⁷ The evidence favours maintaining a low spending limit.

A low spending limit requires a proportionately low limit on third-party spending, to prevent the third-parties from swamping the candidates. Third-party spending limits have accomplished their goals in past elections.¹²⁹⁸ However, the new election law might have erred in allowing too much third-party spending, especially considering that third-party spending might be increasing.¹²⁹⁹

Link to Lobbying

Due to the low campaign limits, and the prohibition of lobbyists running fundraisers and bundling donations, it seems that the hydraulic pressure of private political influence in Canada instead enters through the lobbying system.¹³⁰⁰ Unfortunately, lobbyists can still make individual donations to politicians, and this is likely to increase their influence as compared to a complete donation ban. The Canadian situation is better than the American alternative. It has reduced the undue influence of lobbyists, by reducing the power of the linked tool of campaign finance contributions.

Lobbying in Canada continues to be dominated by the wealthy and large businesses. According to Bartels' previously discussed study, the reduction in Canadian social spending due to political bias in favour of the wealthiest class is about 13%, which is about the average for OECD countries.¹³⁰¹ It is lower than the bias in the U.S. This indicates that the campaign finance regulations, along with other differences in political structures, have comparatively helped to maintain the alignment between Canadian voters and their representatives.

Conclusion – Chapter 4

Lobbying and campaign financing are reflections of each other. Private interests exercise both means, when possible, to influence government decision-making. The regulation of campaign financing in Canada has been fairly successful, and stands as a model for how the hydraulic pressure of political influence can be curtailed.¹³⁰² It is a good example of regulation done right, and by the mirror principle,

¹²⁹⁷ Alexander Fourinaies, *supra* note 1029 at 1. As discussed on p. 280, this pattern of wealthy candidates was visible in February 2020 U.S. primary season. At that moment, including the Republican President, there were more billionaires running than candidates with a net worth of under \$1 million.

¹²⁹⁸ Lawlor & Crandall, "Understanding third-party advertising", *supra* note 1018 at 527.

¹²⁹⁹ Kyle Duggan, "Election 2015 saw large influx of third-party spending: Elections Canada", (30 March 2016), online: *iPolitics* <<http://ipolitics.ca/2016/03/30/election-2015-saw-large-influx-of-third-party-spending-elections-canada/>>.

¹³⁰⁰ For example, there is no evidence that the level of lobbying overall is different at the Canadian provincial level than the American state level. Gerry Kristianson, *supra* note 154 at 201.

¹³⁰¹ Larry M. Bartels, *supra* note 737 at 67.

¹³⁰² Michael S. Kang, *supra* note 1042 at 21; Richard Briffault, "Lobbying and Campaign Finance", *supra* note 982 at 1156.

could stand as guide of how regulations could restructure lobbying practices in the broader public interest.

In contrast, the U.S. now has an essentially unregulated campaign finance system. The structure of campaign funding, the ever increasing costs of election, and the constitutionally protected ability for enormous campaign donations, and unlimited campaign and third-party spending leaves a gaping hole in any attempt to curtail the political influence of donors, lobbyists and their clients.¹³⁰³ After *Buckley* and *Citizens United*, regulating campaign contributions is essentially impossible in the U.S.

People would vote out politicians whose agenda was corrupted and they would vote in politicians whose agenda reflected their own. But the way the Supreme Court has structured politics, the gift economy is not optional. Ever since the Supreme Court struck down expenditure limits in *Buckley*, it has become mandatory.¹³⁰⁴

Change will require a constitutional amendment, or new appointments and a new direction in the Supreme Court jurisprudence.¹³⁰⁵ Barring this transformation, *Buckley* will likely continue to stand as a destructive precedent; even if the more recent *Citizens United* line of campaign finance cases is overturned. With the current composition of the Supreme Court, it is highly possible that it would interpret a constitutional amendment limiting campaign contributions and spending into oblivion; just like the courts did to the 14th Amendment during the Jim Crow era. Currently, the Supreme Court is headed in the other direction, weakening democratic integrity and making it easier for wealthy interests to control government.

As the holes in U.S. campaign finance regulations have grown, and the donors become more open in a post-*Citizens United* era, the influence of campaign contributions has become more apparent. These donations might flow directly to the politician, indirectly through third-parties, or secretly as dark money, but the results are the same. It creates a pernicious influence on government decision-making. Unregulated private campaign financing favours the wealthy and increases inequality. It locks in the status quo, just as more dynamic thoughtful governance is needed. It increases political and informational biases, leading to poor decision-making. As private campaign contributions and third-party spending grows, it introduces a number of subtle harms, damaging governance and the public's faith in democracy.¹³⁰⁶ In the U.S., money is at risk of replacing democracy. It behoves Canadians to learn from the American example, and cling firmly to our commitment to good campaign finance regulations and good government.

¹³⁰³ Lawrence Lessig, *supra* note 273 at 133, 143, 149 & 151.

¹³⁰⁴ Zephyr Teachout, *supra* note 988 at 256.

¹³⁰⁵ Michael S. Kang, *supra* note 1042 at 64.

¹³⁰⁶ For example, 58% of Americans are not satisfied with how democracy is working in the U.S., and only 40% are satisfied. In Canada the numbers are better, 39% not satisfied and 69% satisfied. However, dissatisfaction with democracy is increasing almost everywhere world-wide, with a +9% increase in dissatisfaction between 2017 and 2018 in Canada and a +7% increase in the U.S. Richard Wike, Laura Silver & Alexandra Castillo, *supra* note 1281.

But good campaign finance regulation on its own is not enough. Although campaign contributions provide access and act as a force multiplier for lobbying, it is through lobbying that special interests exercise their effect on government.

However, even if elections were partially or fully publicly funded, this would not solve the expertise and experience problems we've discussed. It would not solve the complexity problem we've discussed. It would not change the revolving door. Corporations would continue to overwhelm the intellectual environment of Washington. There would continue to be an imbalance in the intensity of preference and attention on a wide range of highly technical issues.¹³⁰⁷

In Canada, our campaign finance regulations are well-established, but our lobbying regulations are new, and should be expanded and tuned to fill the gaps between the systems. In chapter 4 we will discuss the series of qualitative interviews I conducted with Canadian officials and lobbyists on the topic of lobbying. After covering the information gleaned from these interviews, we will return to the question of lobbying regulation on a more theoretical level. In Chapter 6 we will investigate the theoretical justifications for stricter, more thorough lobbying regulations.

¹³⁰⁷ Lee Drutman, *supra* note 172 at 210.

Chapter 5 – Interview Results

“If you ask yourself, in which period since 1900 has Canada’s business community had the most influence on public policy, I would say it was in the last twenty years. Look at what we stand for and look at what all the governments, all the major parties... have done and what they want to do. They have adopted the agendas we’ve been fighting for in the past two decade.”

– Tom D’Aquino, CEO (1981–2009) of the Business Council of Canada, quote from the late 1990s¹³⁰⁸

Introduction – Chapter 5.....	294
Chari <i>et al.</i> ’s Questions:	295
My Questions	295
Overview of Interviewees	297
Regulations as a Floor of Good Behaviour and Canada’s Campaign Finance Laws as a Model ...	297
Informal Discussions and Seminar	298
Comparison with the Findings from <i>Regulating Lobbying: a Global Comparison</i>	299
Questions that Also Appeared in <i>Regulating Lobbying: a Global Comparison</i>	300
C. Do you consider yourself knowledgeable about relevant legislation pertaining to the regulation of lobbyists at the federal level?	300
D. In your view, do the overall regulations help ensure accountability in the political system? .	300
E. In your view, do specific rules surrounding individual spending disclosure help ensure transparency?	302
F. In your view, should details of all political party campaign contributions by lobbyists be available to the public?	303
G. In your view, are there loopholes in the system that allow individual lobbyists to give/receive ‘gifts’, regardless of the legislation in force?	304
I. In your view, does the register of lobbyists make ordinary citizens feel inhibited about approaching their local representative alone?	306
J. In your view, does public access to an official list of lobbyists ensure accountability?	306
L. In your view, are reviews or audits by state agencies of lobbyists effective in ensuring accountability?	308
N. In your view, how could the regulation be improved in order to ensure better transparency, accountability and effectiveness?	309
Chari <i>et al.</i> ’s Other Findings	310
My Questions	312
Questions About Lobbying.....	312
1. Which branch of the federal government is lobbied the most?	312
2. Do you think different parties when in power are more or less receptive to lobbying, or lobbying by different industries?	313
3. Are political parties ever lobbied by professional lobbyists?	313

¹³⁰⁸ Nicolas Graham, William K Carroll & David Chen, *supra* note 2 at 51, quoting from Newman, Titans, 159.

4. How much do you think is spent on lobbying in Canada? Is that money well spent for those spending it?.....	314
5. What do you believe the balance of power is between the lobbying of different special interests in Canada?	315
6. How effective do you think lobbying is? How much influence do you think lobbyists have on the Canadian government?	315
7. What do you think the average Canadian thinks about lobbying?.....	316
Questions Related to Regulations.....	317
8. In your view, how accurate are the disclosures recorded in the lobbying database?.....	317
9. In your view, is there a shadow lobbying system that avoids the disclosure rules through loopholes or by failing to register?	317
10. Do you think the government enforces the lobbying regulations fairly and impartially?	318
11. What changes would you like to see to Canada's lobbying regulations?	318
12. How would you or your business/government/employer/party react to regulatory efforts to curtail lobbying?	319
13. What do you think of restrictions on the amount of lobbying that special interests could pursue, if the restrictions applied equally to all special interests, including their opponents?	320
14. What do you think of the idea of providing public funding for citizen lobbying groups, so they can afford to bring their concerns to the government?.....	321
Questions About Lobbyists	322
15. Do you think it is more important for a lobbyist to be an expert in an issue or to have good personal connections?	322
16. What factors do you think make some lobbyists more successful?	322
17. How involved do you think former government officials and politicians are in lobbying?	323
18 a. Do you think the cooling-off period between serving in government and acting as a lobbyist is respected?	323
18 b. What do you think about job offers to sitting politicians and high-level bureaucrats?	323
19. What do you think of lobbyists taking positions in government? Do you think it risks regulatory capture?	324
Questions Related to Campaign Donations	324
20. Do you think lobbying is connected to political campaign donations on the Federal level in Canada?	325
21. Does making a political donation give a lobbyist or his client an advantage in lobbying?	325
22. Do you think Canada's campaign donation laws are effective?	325
Questions Related to Influence.....	327
23. Do you think lobbying has a negative influence? If so, how?	327
24. Do you think lobbying has a positive influence? If so, how so?.....	327
25. Do you think lobbying gives government information it needs? If so, is this information fair and neutral?	327
26. Do you think lobbying makes the government more responsive? Do you think lobbying serves as a sort of fire alarm that warns politicians when government agencies are not fulfilling their assigned policy roles?.....	328
27. Do you think lobbying helps or hurts Canadian democracy?	329

28. Do you think lobbying helps or hurts the government and societies' ability to tackle large-scale long-term problems, such as climate change?	329
29. Do you think lobbying is linked to inequality?	329
Additional Comments	330
30. Do you have any interesting stories about lobbying, or are there any other comments you wish to make?	330
Conclusion – Chapter 5	331

Introduction – Chapter 5

There is a shortage of studies on lobbying in Canada, and some questions that have been illuminated in the U.S., remain shrouded in shadows here.¹³⁰⁹ I undertook a series of qualitative interviews, each lasting 45 to 90 minutes, to shed some light on the subject. I reached out to politicians, former politicians, high-level civil servants, former high-level civil servants, industry lobbyists and NGO lobbyists with interview requests. The response rate was quite low, but ultimately 9 individuals agreed to be interviewed.

My inspiration for the interviews was Chari *et al.*'s 2008 multi-jurisdictional survey on lobbying. Thus, as a comparison, I asked my interview subjects a number of the same questions, to see how the results compared, and if any trends over time were visible. In addition, I asked a number of questions intended to help illuminate the following issues:

- 1) What areas of the Canadian government are lobbied?
- 2) How much is spent on lobbying in the Canada?
- 3) How much influence do lobbyists have in Canada? Is government as insulated as the earlier writings of Pross and Dawson suggest¹³¹⁰?
- 4) What is the balance of power between the different special interests in Canada, and what are factors that make each successful? The kind of questions answered in significant depth about lobbying in the U.S. by *Lobbying and Policy Change: Who Wins, Who Loses, and Why*¹³¹¹ and *Lobbying & Policymaking*¹³¹².
- 5) What is the Canadian public's opinion on lobbying, lobbyists and lobbying regulations?
- 6) How accurate are the disclosures recorded in the lobbying database? Is there a shadow lobbying system that avoids the disclosure rules through loopholes or simply by failing to register¹³¹³?
- 7) What is the status of the revolving door in Canadian politics? Are officials being influenced in their decision-making by future job prospects? Is the cooling-off period working, or are former officials avoiding the cooling-off period?
- 8) What is the connection between lobbying and campaign donations in Canada, and how respected are Canada's campaign finance regulations?
- 9) How influential is lobbying? How closely do Canadian governmental decisions track to popular preferences, and if there is a perceived gap, such as the one established in Bartels' study and Dylan's extension of the study¹³¹⁴, do respondents believe this gap is due to lobbying?

¹³⁰⁹ This was recognized as far back as 1975, and the situation has not improved much since then. A. Paul Pross, *supra* note 2 at 4.

¹³¹⁰ *Ibid* at 6 & 40. Although, Dawson argues that the Canadian Cabinet and PMO remain more accessible than the British ones.

¹³¹¹ Frank R. Baumgartner et al, *supra* note 59.

¹³¹² R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60.

¹³¹³ A. Paul Pross, *supra* note 2 at 187. He refers to a flawed study that indicated 68% of consultant lobbyists, 79% of organization, and 100% of corporate lobbyists surveyed were registered, and that some might be avoiding registration so that their competitors were not alerted to their strategies.

¹³¹⁴ These studies essentially showed that congressional enactments follow the preferences of the wealthy, and completely disregard the preferences of the poor. Lawrence Lessig, *supra* note 273 at 132.

Only by answering these questions will we be able to establish how influential lobbying is in Canada, what effects the lobbying regulations are having, and what their short-comings might be. This will help produce the type of evidence we (and the Court) would need to evaluate lobbying regulations, both on a political and a legal basis.

Due to the relatively loose nature of the qualitative interviews and a few technical difficulties, there is not an answer for every question by every interviewee. The questions in Chari *et al.*'s survey are indicated by the same letter they have in the survey. My questions are indicated by a number. The exact questions I asked are:

Chari *et al.*'s Questions:

- C. Do you consider yourself knowledgeable about relevant legislation pertaining to the regulation of lobbyists at the federal level?
- D. In your view, do the overall regulations help ensure accountability in the political system?
- E. In your view, do specific rules surrounding individual spending disclosure help ensure transparency?
- F. In your view, should details of all political party campaign contributions by lobbyists be available to the public?
- G. In your view, are there loopholes in the system that allow individual lobbyists to give/receive 'gifts', regardless of the legislation in force?
- H. *If you have answered Strongly Agree or Agree ... above, please elaborate on what the loopholes are and what the 'gifts' may consist of.*
- I. In your view, does the register of lobbyists make ordinary citizens feel inhibited about approaching their local representative alone?
- J. In your view, does public access to an official list of lobbyists ensure accountability?
- K. *If you have answered Disagree or Strongly Disagree, please elaborate why you feel that accountability has not been achieved.*
- L. In your view, are reviews or audits by state agencies of lobbyists effective in ensuring accountability?
- M. *If you have answered Disagree or Strongly Disagree, please explain why you feel that is the case.*
- N. In your view, how could the regulation be improved in order to ensure better transparency, accountability and effectiveness?

My Questions

Questions About Lobbying

1. Which branch of the federal government is lobbied the most?
2. Do you think different parties when in power are more or less receptive to lobbying, or lobbying by different industries?
3. Are political parties ever lobbied by professional lobbyists?
4. How much do you think is spent on lobbying in Canada? Is that money well spent for those spending it?
5. What do you believe the balance of power is between the lobbying of different special interests in Canada?

6. How effective do you think lobbying is? How much influence do you think lobbyists have on the Canadian government?
7. What do you think the average Canadian thinks about lobbying?

Questions Related to Regulations

8. In your view, how accurate are the disclosures recorded in the lobbying database?
9. In your view, is there a shadow lobbying system that avoids the disclosure rules through loopholes or by failing to register?
10. Do you think the government enforces the lobbying regulations fairly and impartially?
11. What changes would you like to see to Canada's lobbying regulations?
12. How would you or your business/government/employer/party react to regulatory efforts to curtail lobbying?
13. What do you think of restrictions on the amount of lobbying that special interests could pursue, if the restrictions applied equally to all special interests, including their opponents?
14. What do you think of the idea of providing public funding for citizen lobbying groups, so they can afford to bring their concerns to the government?

Questions About Lobbyists

15. Do you think it is more important for a lobbyist to be an expert in an issue or to have good personal connections?
16. What factors do you think make some lobbyists more successful?
17. How involved do you think former government officials and politicians are in lobbying?
- 18 a. Do you think the cooling-off period between serving in government and acting as a lobbyist is respected?
- 18 b. What do you think about job offers to sitting politicians and high-level bureaucrats?
19. What do you think of lobbyists taking positions in government? Do you think it risks regulatory capture?

Questions Related to Campaign Donations

20. Do you think lobbying is connected to political campaign donations on the Federal level in Canada?
21. Does making a political donation give a lobbyist or his client an advantage in lobbying?
22. Do you think Canada's campaign donation laws are effective?

Questions Related to Influence

23. Do you think lobbying has a negative influence? If so, how?
24. Do you think lobbying has a positive influence? If so, how so?
25. Do you think lobbying gives government information it needs? If so, is this information fair and neutral?
26. Do you think lobbying makes the government more responsive? Do you think lobbying serves as a sort of fire alarm that warns politicians when government agencies are not fulfilling their assigned policy roles?
27. Do you think lobbying helps or hurts Canadian democracy?

28. Do you think lobbying helps or hurts the government and societies' ability to tackle large-scale long-term problems, such as climate change?

29. Do you think lobbying is linked to inequality?

Additional Comments

30. Do you have any interesting stories about lobbying, or are there any other comments you wish to make?

Overview of Interviewees

There were nine subjects who agreed to the interviews. I was unable to get meetings with any of the sitting federal politicians I contacted, including my own representative. Fortunately, two former politicians agreed to be interviewed. One of these is currently working as a lobbyist. I have underlined his responses in the charts for clarity, as they could be construed as the answers of a lobbyist. Three lobbyists agreed to the interviews. One worked for a citizen lobbyist group. Two others worked as lobbyists for trade associations representing different industries. Four civil servants agreed to be interviewed. Three of them worked at the Office of the Commissioner of Lobbying. The fourth had been the head of a department, but was now retired. I was seeking to interview civil servants who were high enough in the ladder that they would have regular contact with lobbyists and the authority to make relevant decisions. This was the only civil servant of that level who agreed to be interviewed. Unfortunately, the demographic sample of the interviewees is relatively narrow. All the respondents were white males in their thirties to late sixties. I believe the retired civil servant originally spoke French as his native language, but his English was so seamless that I am not certain. All the others were native English speakers.

It was unfortunately difficult to find politicians and lobbyists willing to be interviewed about lobbying, despite the offer of flexible timing, and phone or in-person interviews. This is a common problem academics face; those involved in lobbying tend to turn down interview requests. Although the response rate was low, there was still substantial insight to be gleaned from the interviews, due to their depth and long-form nature.

Regulations as a Floor of Good Behaviour and Canada's Campaign Finance Laws as a Model

Underlying this chapter is the contention that regulations can become a floor of reasonable honest behaviour. Regulations can set a standard that becomes accepted norms for lobbyists and officials. The responses to several questions, notably those related to Canada's campaign finance laws, demonstrated some support for this position.

The setting of these standards, and the other responses from the interviews, reinforces the argument carried throughout the thesis, that Canada's campaign finance laws can be used as a model for further lobbying regulations. On this basis, lobbying regulations can be designed to increase political equality. They can prevent the voices of the many from being drowned out by the wealthy few – and prevent the misalignment of political representation. These changed regulations can become the support for new political and moral norms of governance.

Informal Discussions and Seminar

As well as my formal interviews, I had some informal discussions with a few civil servants about lobbying; and attended a semi-public government-hosted educational seminar on lobbying aimed at civil servants and other officials.

Informal Discussions

These informal conversations led to two conclusions. The first is that the policy-making process is much more complicated and convoluted than the formal government structures would indicate. The policy decisions go through a number of opaque crafting and input points which obscure the process enough that no participant knows exactly how an entire piece of legislation was created. The civil servants create policy package options, some of which are passed up to the Privy Council's Office (PCO) and sometimes from there to the Prime Minister's Office (PMO). The PCO and PMO frequently request changes to one or a set of possible policy packages they receive. The civil servants often do not know why one policy package is favoured or the reasoning behind requested changes. Meanwhile, the PMO, PCO, and cabinet members are generally setting policy goals from the bureaucracy and choosing from a menu of options to fit their goals, rather than creating legislation whole cloth. The final result is the ultimate responsibility of the party in power, but not fully their creation.

The second conclusion is that officials often consult with those they consider stakeholders in the policy domain. These consultations can include open forums, submissions, direct consultations, emails, meetings and events organized by the government or by the stakeholder. Sometimes these consultations are legally required.¹³¹⁵ 'Stakeholders' is a broad term that can include trade associations, NGOs and other organizations that might also be lobbying the government. Often these interactions will fall outside the purview of the *Lobbying Act*¹³¹⁶, because the structure of the interactions is not covered by the Act. Some of these interactions include open forums and other transparent interactions, but some are interactions that the public might expect to be recorded on the lobbying registrar. There is a whole host of interactions between lobbyists and government that are not covered in the lobbying registrar, including many where lobbyists will be trying to influence government policy and frame policy debates.

Seminar

The government-hosted educational seminar on lobbying consisted of numerous regulatory experts and lobbyists. It went into considerable detail about the strengths, structure, and some technical shortcomings of the *Lobbying Act*. The lobbyists presented a positive image of lobbying, focusing on lobbying for a charity organization that worked in disadvantaged communities in Africa, a small business, and a community curling club. These represent edge cases in lobbying. Intentional or

¹³¹⁵ There are often requirements for consultation with affected interests in administrative rule making. For example Québec's *Regulations Act*, or the federal government's increasing the number of statutes that require consultation derives from the 2007 policy, or the notice and comment system under the American Administrative Procedures Act. See Cabinet directive on streamlining regulations. Gus Van Harten et al, *supra* note 474 at 577 ff.

¹³¹⁶ *Lobbying Act*, *supra* note 76.

not, there was no presentation on lobbying for large corporations, major industries, or cases where the lobbying interests are orthogonal to the well-being of the community. There were no voices representing skepticism about lobbying, questioning the balance of power within lobbying, or raising other issues related to the corruption heuristic view of lobbying. The seminar was an example of how neutral information can still create a framing bias. Nothing in it was false, but the framing made lobbying appear much more appealing, positive and non-controversial than it is in practice. The seminar provided additional evidence of how officials tend to subscribe to the disclosure heuristic over the corruption heuristic, and how this process can be self-reinforcing as officials seem to seek out and receive from lobbyists information that further reinforces this heuristic.

During the public questions, I asked the panel of lobbyists about the distinction between lobbying in Canada versus the U.S. They maintained that lobbying is much more above board in Canada than in the U.S. They all agreed that there is not an extensive shadow lobbying system that avoids regulation in Canada. They argued that Canadian lobbyists have far less direct influence than in the U.S., and merely provide information to Canadian officials.¹³¹⁷

Comparison with the Findings from *Regulating Lobbying: a Global Comparison*

Chari *et al.* surveyed politicians, administrators and lobbyists and recorded the results in *Regulating Lobbying: a Global Comparison*¹³¹⁸. They sent out 1225 surveys to subjects in Canada, the U.S., Germany, and the European Parliament. They received back 40 surveys representing a response rate of 8.7% for politicians, 19.8% for civil servants, and 6.5% for lobbyists.¹³¹⁹ This low response rate, something I also experienced with my interview requests, means that Chari's responses are not statistically valid. Researchers working on lobbying regulation have repeatedly encountered the problem of low response rates.¹³²⁰ Hopefully, future academics will have the funding and time to conduct a large scale survey and gather statistically-sound data. Still, the results are informative. Some of these results are only applicable to low regulation jurisdictions. Others, however, apply to medium-to-high regulation jurisdictions, like Canada. I asked my interview subjects these questions, so as to compare responses.

Notably, Chari *et al.* consistently found that actors in low regulation jurisdictions have little faith in the ability of regulations to bring about accountability and transparency. They are concerned that meetings take place under the radar. For example, one of their interviewees doubted that a list of the lobbyists' names and the organizations represented provided any useful information for the public as to what they were actually doing. Another of their interviewees was of the opinion "that the register was little more than a marketing device for lobbyists."¹³²¹

¹³¹⁷ There is good reason to be skeptical of this argument, due to framing, bias, and non-impartiality, as covered extensively in Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern III: Lobbying Creates an Information/Framing Bias, p. 166.

¹³¹⁸ Raj Chari, John Hogan & Gary Murphy, *supra* note 2.

¹³¹⁹ *Ibid* at 117.

¹³²⁰ Gary Murphy, John Hogan & Raj Chari, "Lobbying regulation in Ireland", *supra* note 97 at 112.

¹³²¹ Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 121.

Chari *et al.* found that politicians, administrators and lobbyists operating in high regulation jurisdictions believed that the lobbying register and regulations promoted accountability and transparency. They concluded that “respondents from more highly regulated jurisdictions were more likely to believe that an official list did lead to more effective accountability.”¹³²² Chari *et al.* came to the important conclusion that “it is the highly regulated systems that are promoting such ideals of accountability.”¹³²³ As covered previously, this point is central to my thesis: the regulations themselves set the norms for politicians, administrators and lobbyists. The current regulations represent a floor of good behaviour, not a ceiling of possibilities.

Chari *et al.* use the term administrator where I would use the term “civil servant” or “bureaucrat” – essentially officials who are not legislators. To be consistent with their survey, I used the term “administrator” in my survey as well.

Questions that Also Appeared in *Regulating Lobbying: a Global Comparison*

Questions A and B are skipped as they are not relevant to the comparison.

C. Do you consider yourself knowledgeable about relevant legislation pertaining to the regulation of lobbyists at the federal level?

My Findings

Do you consider yourself knowledgeable about relevant legislation pertaining to the regulation of lobbyists at the federal level?	Politicians #	Administrators #	Lobbyists #
Strongly Agree	1	4	1
Agree			1
Neutral		1	
Disagree			1
Strongly Disagree			

The administrators who worked for the Commissioner of Lobbying believed themselves to be extremely knowledgeable about the Federal lobbying regulations. It would be a bad sign if they were not. The lobbyists also considered themselves knowledgeable, which is a good sign, indicating that they consider the legislation relevant. The lobbyist who did not consider himself knowledgeable did indicate that he followed the guidance laid out by the Commissioner of Lobbying, but that he had never read the actual *Lobbying Act*.

D. In your view, do the overall regulations help ensure accountability in the political system?

¹³²² *Ibid* at 122.

¹³²³ *Ibid*.

Chari et al.'s Findings

Do regulations help ensure accountability in the political system? ¹³²⁴	Politicians %	Administrators %	Lobbyists %
Strongly Agree	14	11.1	12.3
Agree	62.8	38.9	56.8
Neutral	16.3	13.3	19.8
Disagree	7	16.7	11.1
Strongly Disagree	0	0	0

My Findings

Do regulations help ensure accountability in the (Canadian) political system?	Politicians #	Administrators #	Lobbyists #
Strongly Agree	2 (100%)*	3 (75%)	
Agree		1 (25%)	3 (100%)
Neutral			
Disagree			
Strongly Disagree			

* Percentage expressed out of number of respondents who choose to answer the question.

There seems to be widespread support for the lobbying regulations as they currently stand. A number of the interviewees confirmed that lobbyists use the lobbying registrar to see what their competitors are doing and to prove to their clients that they are meeting with officials, just as Chari *et al.* found in their work.¹³²⁵

Chari's survey of lobbyists indicates that they tend to resist the enactment of regulations at first, but later support disclosure regulations once the rules are in place.¹³²⁶ Those I interviewed about the Canadian system exhibited a similar pattern. They seemed to be widely supportive of the laws as they currently stand. This is evidence that lobbying regulations can form accepted norms, setting a floor of expected behaviour.

It is unclear whether the skepticism towards stricter regulations covered later in the chapter is part of this same pattern. The lobbyists might oppose such regulations now, before they are in place; but they might come to support the proposed changes once they are in force for a while. These reforms could become widely accepted and even admired by lobbyists and officials, or the reforms could be a bridge too far. The former is more likely; lobbyists and officials would learn to live with, and support, a

¹³²⁴ *Ibid* at 120.

¹³²⁵ *Ibid* at 132.

¹³²⁶ *Ibid* at 131.

reformed system – just as they have with Canada’s strict campaign finance regulations (see Question 22).

E. In your view, do specific rules surrounding individual spending disclosure help ensure transparency?

Chari et al.’s Findings

Do specific rules surrounding individual spending disclosure help ensure transparency? ¹³²⁷	Politicians %	Administrators %	Lobbyists %
Strongly Agree	30.2	29.4	24.2
Agree	62.8	35.3	51.9
Neutral	2.3	29.4	17.3
Disagree	4.7	5.9	4.9
Strongly Disagree	0	0	1.2

My Findings

Do specific rules surrounding individual spending disclosure help ensure transparency?	Politicians #	Administrators #	Lobbyists #
Strongly Agree	1 (100%)*	1 (25%)	
Agree		2 (50%)	2 (66%)
Neutral		1 (25%)	1 (33%)
Disagree			
Strongly Disagree			

* Percentage expressed out of number of respondents who choose to answer the question.

There is general agreement that requiring lobbyists and those who hire them to track their expenditures on the lobbying process would increase transparency. Most lobbyists agreed it would increase transparency, but did not support the idea because they believed it would be too burdensome and the transparency gains would not be worth the effort.

There are valid objections to their position. All businesses have to track their expenditures for multiple purposes, including taxes and client billing. Well-designed regulations should be able to piggy-back onto this information that the business is already tracking. This would not entail any substantial additional burden for the lobbyists and their clients. The U.S. Federal lobbying regulations, and a good number of American states, require that lobbyists disclose their expenditures. Chari *et al.* found that lobbyists in those jurisdictions do not find the disclosure burdensome. Chari *et al.* also point out that those lobbyists in jurisdictions that do not have lobbying disclosure perceive that any disclosure would

¹³²⁷ *Ibid* at 124.

be burdensome, but those who have disclosure do not find it burdensome. In reality, people and businesses adjust, and the costs of disclosure are less than they imagine it would be. It should be possible to make this a one-time adjustment of adding a few fields to the accounting and expense tracking software, and learning how to quickly access that information to add it to the lobbying registrar forms.

Interestingly, the civil servants I interviewed in the Commissioner's office agreed but did not strongly agree that expenditure disclosure improves transparency as a whole by showing what the lobbyists are doing. In contrast, Chari *et al.* believe this rule is essential for good transparency, and they find it to be the main lack of the Canadian system.

It might be that the current laws lack this disclosure requirement because the Lobbying Commissioner's office does not consider it important, or it might be that they do not consider it important because it was not written into the law, and they take their priority cues from the legislation. It is true that the Canadian lobbying regulations generate good transparency as they currently stand, but disclosing the amounts spent on lobbying would increase transparency significantly.

F. In your view, should details of all political party campaign contributions by lobbyists be available to the public?

Chari et al.'s Findings

Should details of all political party campaign contributions by lobbyists be available to the public? ¹³²⁸	Politicians, Administrators & Lobbyists %
Strongly Agree	40.14
Agree	47.89
Neutral	7.75
Disagree	2.82
Strongly Disagree	1.41

¹³²⁸ *Ibid* at 125.

My Findings

Should details of all political party campaign contributions by lobbyists be available to the public?	Politicians #	Administrators #	Lobbyists #
Strongly Agree	1 (100%)*	3 (75%)	1 (33%)
Agree			1 (33%)
Neutral		1 (25%)	1 (33%)
Disagree			
Strongly Disagree			

* Percentage expressed out of number of respondents who choose to answer the question.

A number of the interviewees digressed on this question to discuss what they considered to be the tragic state of electoral politics and the power of big donors in the United States, fuelled by the loose restrictions and Supreme Court rulings on campaign donations. The administrator who was neutral on the question indicated he could support no disclosure only if the campaign donation limits were strict and low, so there was no question of influence through donations. One interviewee noted that campaign donation records were not cross-referenced in the lobbying registrar, and maybe they should be.

G. In your view, are there loopholes in the system that allow individual lobbyists to give/receive 'gifts', regardless of the legislation in force?

Chari et al.'s Findings

In your view, are there loopholes in the system that allow individual lobbyists to give/receive 'gifts', regardless of the legislation in force? ¹³²⁹	Politicians, Administrators & Lobbyists %
Strongly Agree	3.85
Agree	31.91
Neutral	38.17
Disagree	24.11
Strongly Disagree	4.26

¹³²⁹ *Ibid* at 126.

My Findings:

In your view, are there loopholes in the system that allow individual lobbyists to give/receive ‘gifts’, regardless of the legislation in force?	Politicians #	Administrators #	Lobbyists #	Total Percent
Strongly Agree	1	1		25%
Agree		2	1	37.5%
Neutral		1		12.5%
Disagree			1	12.5%
Strongly Disagree			1	12.5%

On average my respondents believe that there are loopholes allowing lobbyists to give officials gifts. Some debated whether these gifts really counted as exploiting loopholes, as the exceptions that allowed the gifts in the rules appeared to be deliberate. Many noted that the situation was better than it had been, with lobbyists relying less on gifts and influence, and more on making an emotional and intellectual case for their position. Others, though, argued that some forms of gift-giving had simply been normalized as acceptable by lobbyists and officials, and they should not have been.

H. If you have answered Strongly Agree or Agree ... above, please elaborate on what the loopholes are and what the ‘gifts’ may consist of.

In Chari *et al.*’s work they note that there are often loopholes in jurisdictions with medium-strength regulation, often consisting of giving gifts of free meals, tickets and travel. They report that one lobbyist knew someone who flew a politician to Turin for the 2006 Winter Olympics.¹³³⁰ They note that in jurisdictions with high-strength regulations, only a few lobbyists get around the rules. They argue that in Canada, lobbyists get around campaign donation restrictions through free consultancy work and hosting private fundraising events.¹³³¹ An administrator I interviewed also listed acting as a campaign spokesperson functions as a loophole. The Commissioner of Lobbying has restricted lobbyists from lobbying politicians for whom they have done paid or volunteer consultancy or electoral work. So it appears that campaign involvement is no longer a loophole. The interviewees do believe there are a number of other loopholes involving gift-giving in Canada’s lobbying regulations.

One administrator argued that the *Lobbyists’ Code of Conduct* limits gifts, which dissuades lobbyists, but it is not technically an outright ban, and he considers that a minor loophole. Several administrators noted that sponsoring travel was still an allowable gift that generates influence over the politician, and the loophole should be closed. Several administrators argued there are gifts given that neither party acknowledges, gifts they think are too small to report, gifts that fall into the murky category of protocol gifts, drinks and food, and social events outside of the office. One administrator stressed that there is a substantial difference between large and small gifts, and only the former should

¹³³⁰ *Ibid.*

¹³³¹ *Ibid.*

be restricted. A former politician noted that some provinces lack rules restricting gifts. Another former politician stated he suspected there are indirect ways of giving benefits, and it is naïve to think the system is leak-proof. He did believe, however, that the movement towards greater disclosure is a good idea. The lobbyist who agreed there loopholes allowing gifts argued that special interests can still give gifts by using shell corporations to mask its source.

I. In your view, does the register of lobbyists make ordinary citizens feel inhibited about approaching their local representative alone?

Chari et al.'s Findings

Does the register of lobbyists make ordinary citizens feel inhibited about approaching their local representative alone? ¹³³²	Politicians %	Administrators %	Lobbyists %
Strongly Agree	0	0	0
Agree	14	0	8.6
Neutral	9.3	11.1	8.6
Disagree	55.8	66.7	50.6
Strongly Disagree	20.9	22.2	32.1

My Findings

Does the register of lobbyists make ordinary citizens feel inhibited about approaching their local representative alone?	Politicians #	Administrators #	Lobbyists #
Strongly Agree			
Agree			
Neutral			
Disagree		2	1
Strongly Disagree	1	2	2

Multiple interviewees noted that one must be paid to contact officials in order to be considered a lobbyist, so the rules do not apply to ordinary citizens. They also noted that most ordinary citizens do not even know there are disclosure requirements for lobbyists. Considering these two factors, there is no reason that ordinary citizens should feel inhibited.

J. In your view, does public access to an official list of lobbyists ensure accountability?

¹³³² *Ibid* at 128.

Chari et al.'s Findings

Does public access to an official list of lobbyists ensure accountability? ¹³³³	Politicians, Administrators & Lobbyists %
Strongly Agree	15.49
Agree	51.41
Neutral	22.54
Disagree	8.45
Strongly Disagree	2.11

My Findings

Does public access to an official list of lobbyists ensure accountability?	Politicians #	Administrators #	Lobbyists #	Total Percent
Strongly Agree		2	1	33.3%
Agree	1	2	2	55.6%
Neutral	<u>1</u>			11.1%
Disagree				
Strongly Disagree				

K. If you have answered Disagree or Strongly Disagree, please elaborate why you feel that accountability has not been achieved.

Chari *et al.* noted that those who disagreed were mostly from low regulation jurisdictions, like the European Parliament, and believed that private meetings slip under the radar and are not actually disclosed. In the low regulation jurisdictions, respondents believe that there is not enough information in the disclosures. The disclosures are just a marketing device for lobbyists; they do not really inform the public and provide no significant transparency.¹³³⁴

One of the former politicians I interviewed was concerned that people might not understand what an entry in the lobbying database means, and that the meeting could be much less or much more important and influential than the public thinks. He also noted that lobbyists can avoid the list and disclosure by advising the client, and acting as a consultant, even though the lobbied officials might know the consultant is giving the advice and directing the client. This is a disclosure shortcoming that came up from multiple interviewees in response to a number of the questions.

¹³³³ *Ibid* at 121.

¹³³⁴ *Ibid.*

L. In your view, are reviews or audits by state agencies of lobbyists effective in ensuring accountability?

Chari et al.'s Findings

Are reviews or audits by state agencies of lobbyists effective in ensuring accountability? ¹³³⁵	Politicians, Administrators & Lobbyists %
Strongly Agree	2.92
Agree	35.04
Neutral	41.61
Disagree	17.52
Strongly Disagree	2.92

My Findings

Are reviews or audits by state agencies of lobbyists effective in ensuring accountability?	Politicians #	Administrators #	Lobbyists #	Total Percent
Strongly Agree				
Agree	1	4 ^A	1	66.7%
Neutral	<u>1</u>		2	33.3%
Disagree				
Strongly Disagree				

^A Two administrators answered that the Lobbying Commissioner does not perform audits, unless someone is already under investigation. However, the Commissioner does take other steps to confirm the accuracy of disclosures, and these administrators indicated they were in favour of there being audits. Thus, their position is closest to “Agree”.

The respondents had a general respect for the Commissioner of Lobbying’s office. I have seen similar respect expressed in other conversations and panels with lobbyists and officials. There is a general sense that the Commissioner does its jobs effectively and fairly within the constraints of the *Lobbying Act*. There seems to be a sense that the regulations and enforcement do increase accountability.

Those that were neutral on this question fell into two categories. Some respondents believed that they were accountable actors, but expressed neutrality on whether others were abiding by the rules and whether this was due to the regulator. The second group expressed the opinion that lobbyists in Canada were generally accountable actors due to general market, media and technological structures, and would act largely the same even if not required to by law. Their argument is not convincing. It drastically underestimates the appeal of short-term thinking, and the advantages that unethical actors

¹³³⁵ *Ibid* at 122.

can accumulate if there are no rules to inhibit them.¹³³⁶ The competition from these bad actors then pressures others to adopt the same bad behaviour.¹³³⁷ Long-term prudence often yields to the promise of short-term profit.¹³³⁸

M. If you have answered Disagree or Strongly Disagree, please explain why you feel that is the case.

Chari *et al.* found that those from highly regulated jurisdictions were more likely to agree that the audits by state agencies of lobbyists were effective (70% of lobbyists). In contrast, those with negative views were mostly from medium and low regulation jurisdictions, probably because the state agencies were less effective, rarely audited, did not ensure timely reporting, and did not mete out punishment when justified.¹³³⁹

N. In your view, how could the regulation be improved in order to ensure better transparency, accountability and effectiveness?

There were three categories of responses to this question: those focused on technical and transparency improvements; those focused on changing the nature of lobbying; and those focused on reducing perceived over-reach.

Those administrators who worked at the Commissioner of Lobbying's office focused their recommendations on technical changes to improve the *Lobbying Act*. A good number of these recommendations came from the 2013 Parliamentary Committee Review, which one administrator directly referenced, wanting to see them enacted. These changes have been echoed in public presentations and seminars. They include giving the Commissioner of Lobbying the ability to levy administrative fines and a broader range of enforcement options. They suggested broadening the disclosure requirements so that everyone attending a meeting is listed; so that in-house lobbyists be named in their lobbying as well as the director of the company; and so that disclosure extends beyond arranged meetings to include informal meetings and events, emails, phone calls and other communication with designated office holders. One lobbyist supported similar changes, adding that there needs to be more detailed information in the disclosures. He noted that his citizen group often has to submit freedom of Information requests to make up for the shortfalls in the current lobbying database, and see what communication is really happening between officials and industry lobbyists. A third repeated suggestion is removing the distinction between in-house and consultant lobbyists, and doing away with the 20% minimum bar for in-house lobbying, setting it to apply to anyone who is paid to lobby. One administrator added that he would like clearer definitions in the *Lobbying Act*, although it is likely only edge cases would hinge on that. One former politician argued for much stronger

¹³³⁶ See Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: The Nature of the Unregulated Marketplace – Phishing for Phools: Need for Government, p. 371.

¹³³⁷ The pressures and outcomes should be similar to those experienced by competitors in an unregulated economic market place, which exhibits many of these problems. See Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations; The Nature of the Corporate Lobbying; Short-Sighted Decisions, p. 356. See also, George A. Akerlof & Robert J. Shiller, *supra* note 52 at xi.

¹³³⁸ For example, banking deregulation led to the 2008 Financial Crisis. Many banks almost destroyed themselves by taking on great risk for short-term gain. Joseph E. Stiglitz, *supra* note 38 c 1: Deregulation.

¹³³⁹ Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 123.

transparency. He argued that the reports should be in real time, indicating who is meeting now, and the lobbyist's goal: whether the lobbyist is advancing a personal, collective or business interest. He believed that the current system waters down the lobbying accountability of business interests, and the system needs significantly more transparency, and more accessibility for the wider public.

The second set of changes applies to the activities of the lobbyists themselves. One administrator wanted the rules to be structured to encourage the lobbyists to be more subject experts, rather than those with good political connections. He felt lobbyists needed a better understanding about the regulations in force in the policy area and the restraints that civil servants operate within. He did not state how the regulations could be structured to accomplish this outcome. Several respondents expressed concern with shadow lobbying and gift-giving, and proposed that lobbyists should not be able to offer sponsored travel, and lobbying at fundraisers and other events should be prevented (or at least registered, as previously discussed).

The third set of changes is closer to criticisms of the *Lobbying Act*, seeking to reduce its scope. One former politician argued that the purpose of the Act should be to ensure transparency. The other restrictions, like revolving-door limits, were not conducive to this goal and should be discarded. In his view, what is important is to treat lobbying as part of the political system and make sure it is in the open. Similarly, a lobbyist argued that the regulations should focus on an understanding of the lobbying taking place. He argued that the Act focused too much on trying to prevent undue influence. He seems to have subscribed to the disclosure heuristic, not the corruption heuristic. Another lobbyist raised concerns about the complication of lobbying across multiple Canadian jurisdictions and wanted the regulations unified and simplified, so that the regulations and submissions are consistent across all levels of government.

Chari *et al.*'s Other Findings

Penalizing unprofessional lobbying behaviour can act as a deterrent against such behaviour. ¹³⁴⁰	Politicians %	Administrators %	Lobbyists %
Strongly Agree	27.3	13.5	22.2
Agree	36.4	50	44.4
Neutral	18.2	13.6	33.3
Disagree	18.2	18.2	0
Strongly Disagree	0	4.5	0

¹³⁴⁰ *Ibid* at 146.

If legislation regulating lobbying were implemented, then transparency, accountability and effectiveness in policy-making would be improved. ¹³⁴¹	Politicians %	Administrators %	Lobbyists %
Strongly Agree	18.2	15.8	8.3
Agree	54.5	31.6	58.3
Neutral	9.1	31.6	27.3
Disagree	18.2	15.8	9.1
Strongly Disagree	0	5.3	0

Chari *et al.*'s survey found that a strong majority, 63.7% of politicians, 63.5% of administrators, and 66.6% of lobbyists in jurisdictions without significant lobbying regulations believe that penalties can act as a deterrent against unprofessional lobbying behaviour.¹³⁴² This is reasonable; we use penalties in all other areas of governance to deter bad behaviour. 77.7% of politicians, 47.4% of administrators, and 68.6% of lobbyists also agree that lobbying regulations improve transparency, accountability and policy-making effectiveness. Administrators in these jurisdictions are the most skeptical of the benefits of lobbying regulations, but only 22.7% and 21.1% of them disagree with the two propositions, respectively.

Politicians, lobbyists and administrators from Pennsylvania, which had no lobbying regulations at the time, overwhelmingly believe that they needed legislation on the subject (which has since been enacted). They maintained it was necessary to level the playing field. One respondent stated that “without legislation, Pennsylvania was seen as a ‘laughing stock’ in the U.S.”¹³⁴³

My survey results of Canada's federal lobbying regulations came to a similar conclusion. Not a single respondent questioned the usefulness of the system for enhancing transparency and accountability; nor did anyone express a desire to see the regulations loosened or the system unravelled now that it was in place. It has become the new normal. This is a very hopeful finding for future enhancements in regulations. The rules become accepted, the system becomes cleaner, and most participants have little desire to go back to the Wild-West days before the rules were in place. Political influence may be a hydraulic force, but like all hydraulic forces it can be contained and channelled, if the system is robust enough and well enough designed.

¹³⁴¹ *Ibid* at 147.

¹³⁴² Chari *et al.* does not explicitly state whether the penalties would be criminal, civil, or administrative. In many jurisdictions that do enact monetary penalties, the penalties are criminal. Administrators overseeing lobbying regulations have consistently requested that they be granted the authority to use administrative penalties, which are easier to levee. Several jurisdictions, including Canada, have other types of penalties available, including publicly naming and shaming non-confirming lobbyists, and lobbying bans for flagrant misbehaviour.

¹³⁴³ Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 148.

My Questions

I did not provide any set answer options to any of the 30 questions below that I asked. Many of the questions could be answered in a yes or no fashion, but some respondents still provided other answers or elaborated on their position. I did occasionally prompt an interview subject to expand on their answer, or I provided more details on a question when they found it unclear. On a few occasions I provided some context for a question, when their response prompted it. For instance, I informed one of the lobbyists that Canada used to fund some lobbying organizations (and continues to do so), when he spoke of the issue in a way that indicated he was unaware of this fact. There are a few questions that do not have responses from all nine interview subjects. This is generally because the respondent did not answer the question, often providing an elaboration on an earlier question or digression. Sometimes the question was missed in the flow of the interview, often due to time or communication constraints.

Questions About Lobbying

1. Which branch of the federal government is lobbied the most?

Which branch of the federal government is lobbied the most?	Politicians #	Administrators #	Lobbyists #
House of Commons		2	
Senate			
Prime Minister's Office			
Civil Service	2 (military, natural resources, & procurement)	1 Finance	1 (industry Canada, environment Canada, finance)
Cabinet & Civil Service			1
All Areas of Government			1

Several of the interview subjects, including the former politicians, expressed the belief that power lies with the bureaucracy in the Canadian system, and it is most effective to lobby the civil service. They maintained that it is often a waste of time to focus on the politicians, who have little say about detailed legislation and cannot allocate funds. One former politician also noted that municipal politics was an exception. Municipal politicians have more leeway, and can alter zoning rules in ways that have large financial repercussions, increasing the chances of scandals, bribery and influence peddling.

An administrator noted that there is no follow-up by the Commissioner of Lobbying to see how effective the lobbying was, and perhaps there should be. This is an idea that merits attention.

2. Do you think different parties when in power are more or less receptive to lobbying, or lobbying by different industries?

Do you think different parties when in power are more or less receptive to lobbying, or lobbying by different industries?	Politicians #	Administrators #	Lobbyists #
Yes	<u>1</u>	3	2
Neutral		1	
No	1		1

Most of the respondents did believe that different political parties were more or less receptive to lobbying when in power. In their exposition, half of the respondents who answered “yes” elaborated that while in power the parties were simply receptive to different lobbying interests. For example, one administrator stated that compared to the Harper Conservatives, the Trudeau Liberals were more receptive to lobbying in favour of climate change action and less responsive to lobbying by the oil industry.

A few interviewees held that there were significant differences between different parties. One former politician argued that both the Liberals and the Conservatives were equally receptive to lobbying, but the NDP were less so. Another administrator argued that the Trudeau Liberals were more receptive to lobbying than the Harper Conservatives, because they were more open to meeting with interests of any point of view. In contrast, the Conservatives were less open, for good or ill.

The lobbyist who believed there was no significant difference between the parties’ receptiveness to lobbying argued that there is an adjustment period where a new government is reluctant to meet with lobbyists due to optics and early positioning. Eventually, though, the desire to have substantive policy results leads to more dialogue with lobbyists. Essentially, he argued that reality takes hold, and the current system requires lobbyists’ input to function.

3. Are political parties ever lobbied by professional lobbyists?

Are political parties ever lobbied by professional lobbyists?	Politicians #	Administrators #	Lobbyists #
Yes	<u>1</u>	2	1
Don’t Know		2	
No	1		2

There was little cohesion in the responses to this question. One respondent argued that unlike the U.S., the Canadian party apparatus is less involved in detailed policy decisions. Another pointed out that TransCanada was connected with one of Trudeau’s campaign adviser during the election, essentially lobbying him.

4. How much do you think is spent on lobbying in Canada? Is that money well spent for those spending it?

How much do you think is spent on lobbying in Canada? Is that money well spent for those spending it?	Politicians \$ / #	Administrators \$ / #	Lobbyists \$ / #
How much do you think is spent on lobbying in Canada?	<u>\$200 million</u> / Don't know	millions+ / a lot / \$25,000 monthly retainers / \$500 million	Don't know / A fair amount
The money is well spent		3	3
The money is sometimes well spent	2	1	
The money is not well spent			

Not even those working in the Commissioner of Lobbying's office have any sense of how much is spent on lobbying at the federal level (or any level) in Canada. This is disconcerting. One of the more important ways to gauge the importance and impact of something is to gauge how much money is involved. The fact that no one really knows how much is spent on lobbying in Canada indicates that the government has yet to fully engage with the issue. Some respondents indicated that they believed lobbying was on the increase, and becoming increasingly professionalized (which would increase its costs, and presumably its effectiveness).

There is a general sense that lobbying is worth the money, at least if the lobbyist is competent. Some have argued that in the U.S., much of the campaign donations and lobbying expenditures are essentially graft, taking advantage of the clients or donors, funnelling money to political consultants and expensive media buys. None of the interviewees held that opinion about the Canadian lobbying system. Although in other contexts I have heard officials state that they would have met with the client regardless of the lobbyist's involvement, and that hiring the lobbyist was often unnecessary from their point of view.

One industry lobbyist argued that there were substantial differences between how lobbying money was spent in Canada versus in the U.S. He stated that unlike America, in Canada lobbyists do not fund Political Action Committees of any sort, and do not create think tanks. Canadian lobbyists do fund research, but they want to hire independent publicly recognized researchers, not fund in-house or ideologically-based think tanks. He argued that this is because substantially more power resides in the professional Canadian civil service than its U.S. counterpart, that there are fewer political appointees, and that the Canadian process involves more independent committees who have their own expertise and researchers. This results in an appetite for higher quality information. He argued that the root of this difference was that the Canadian theory of government is less grounded in individual rights and profited from British Victorian political reforms that the U.S. missed. As a lobbyist, he did have an incentive to argue that the information industry lobbyists provided in Canada was of higher quality than that provided in the U.S., regardless of the facts. It is quite possible that the use of ideological think tanks is more prevalent in the U.S., but they are not absent from Canadian politics.

5. What do you believe the balance of power is between the lobbying of different special interests in Canada?

What do you believe the balance of power is between the lobbying of different special interests in Canada?	Politicians #	Administrators #	Lobbyists #
Industry has the Upper Hand	<u>1</u>	2	1
There is Good Balance			
Civil Groups have the Upper Hand			
Changes Depend on the Party in Power		2	2
Depends on Public Opinion / the Issue	1		

There was an equal split between subjects who said that industry has the upper hand in lobbying in Canada, and those who said that it varies depending on the party in power and the issue in play. Both views fit with the *four pressures approach*, but the latter view emphasizes the political context over all. Some who stated industry has the most power, added that part of its effectiveness comes from its control over employment of large numbers of people, its media connections, and industry's high social status. A number of the respondents who believed lobbying was heavily tilted towards business interests and large corporations specifically named the oil industry as a key powerful player. One respondent added that concentrated industries, like monopolies, were particularly effective at lobbying. A few respondents who believed industry and large corporations have the upper hand added that established citizen advocacy groups, like some environmental groups and indigenous groups, also have some power, as they are often on the government's informal lists of organizations that should be consulted and taken seriously.

One former politician referred to public opinion as the largest lobby. Yet his argument did not take salience into consideration, and does not distinguish between public pressure and the influence of lobbyists. Tellingly, no one indicated that civil groups have the upper hand in lobbying. One could imagine a democracy where the lobbying power of citizens groups exceeded that of industry groups, but that is not the one we inhabit.

6. How effective do you think lobbying is? How much influence do you think lobbyists have on the Canadian government?

How effective do you think lobbying is? How much influence do you think lobbyists have on the Canadian government?	Politicians #	Administrators #	Lobbyists #
Much Influence	<u>1</u>	1	2
Some Influence	1 ^A	3	1
Little Influence			

^A Based on his answer to question 4.

One administrator and one lobbyist emphasized that the influence comes from presenting sound arguments. The lobbyist emphasized that this influence is a good thing, as it demonstrates that the government is open to feedback. They argue that the lobbyists often provide expertise necessary to soundly execute the government's policy goals. The situation is mutually beneficial.

Another administrator emphasized that the influence varies significantly according to the policy area in question, and that lobbyists have less influence when issues of safety are at stake. Other respondents emphasized that there is much influence over government decision-making, and that this influence is wielded primarily by business interests. No respondents believed that lobbyists have little influence over the Canadian government.

7. What do you think the average Canadian thinks about lobbying?

What do you think the average Canadian thinks about lobbying? How right do you think they are?	Politicians #	Administrators #	Lobbyists #
Public has Positive Views			
Public has No Strong Views		2	
Public has Negative Views	<u>2</u>	2	1

One administrator who stated the public had no strong views, argued that the public has negative or positive views of lobbying, depending on whether they see the lobbyist as on their side. Essentially, lobbying is good when their political side does it and bad when the opposing side does it.

How right is the public in its views?	Politicians #	Administrators #	Lobbyists #
Public is Correct			
Don't Know/Neutral	<u>1</u>	3	1
Public is Mistaken	1	1	1

Almost half of the interviewees argued that the public view was mistakenly informed by the practice of lobbying in the U.S., where it has more influence and is substantially more corrupt, but that the situation is different in Canada. One former politician argued there is nothing wrong with lobbying if it is above board and transparent, but that much of it is not. This position did not really prove that the public is mistaken. The other former politicians argued that the public confuses lobbying with bribery. Only one interview subject stated that the public knows that lobbying is somewhat regulated in Canada.

Based on my informal conversations, most of the people I have discussed the issue of lobbying with have expressed a significantly negative view of lobbying, much more than officials and lobbyists seem to realize. The public seems to believe that something untoward is happening in the lobbying system, and that lobbyists are pulling officials away from their duty to represent the public well-being.¹³⁴⁴

¹³⁴⁴ Raquel Alexander, Stephen W Mazza & Susan Scholz, *supra* note 580 at 402. In the U.S., very few people think that lobbyists and big business have too little influence over government, and most want them to have less. This is unsurprising, considering that registered lobbying expenditures more than doubled from \$1.4 to \$3.3 billion a year, between 1998 and 2012, according to Brian Kelleher Richter, *supra* note 594 at 893; and Center for Responsive Politics, “Lobbying Database Total Spending”, (2014), online: *Open Secrets Blog* <<https://www.opensecrets.org/lobby/>>; Gallup Inc, “Big Business”, (September 2018), online: *Gallup.com* <<https://news.gallup.com/poll/5248/Big-Business.aspx>>; See also A. Paul Pross, *supra* note 2.

Questions Related to Regulations

8. In your view, how accurate are the disclosures recorded in the lobbying database?

In your view, how accurate are the disclosures recorded in the lobbying database?	Politicians #	Administrators #	Lobbyists #
Accurate		2	1
Accurate but the Rules Have Shortcomings that Make Disclosure Incomplete	<u>2</u>	1	2
Inaccurate			
Don't Know		1	

Almost all the respondents believe that the disclosures recorded in the lobbying database are mostly accurate. One noted that there may be shortcomings because we do not know what we do not know. Another noted that there are always a few lobbyists who do not realize they have to register. A number of interviewees pointed out that the lobbying registry is incomplete, because lobbyists are not required to disclose some types of communications and encounters with officials. The shortfall in the registry includes the casual conversations between officials and lobbyists that lead to important decisions. One respondent noted that the disclosures are accurate but not necessarily structured in a way that lay people would find meaningful. A former politician repeated the position that there are many people who act as consultants but do not register as lobbyists because they advised the client, but are never present at meetings with government officials. These contacts and sources of lobbying advice are not recorded in the disclosures.

9. In your view, is there a shadow lobbying system that avoids the disclosure rules through loopholes or by failing to register?

In your view, is there a shadow lobbying system that avoids the disclosure rules through loopholes or by failing to register?	Politicians #	Administrators #	Lobbyists #
Yes	1	1	1
Maybe		2	
No	<u>1</u>		2

Although a number of respondents believe there is a shadow lobbying system that avoids the disclosure rules through loopholes, most do not think it is substantial. No one indicated that Canada has the same loopholes as some other jurisdictions, where half or more of lobbyists fail to register or disclose their activities. Both former politicians noted an issue that had come up in previous responses: many former politicians avoid the restriction on lobbying by instructing clients or members of their firm on how and whom to lobby, while never actually meeting the government officials face-to-face themselves. The former politicians argued that the officials know who sent the clients, so the former politicians' connections still carry weight.¹³⁴⁵ One former politician opposed this practice. The other argued that former politicians were unfairly being prevented from using their acquired skills and

¹³⁴⁵ There is some evidence that in-house lobbyists are taking advantage of loopholes to avoid reporting their lobbying when they can, and that former officials do avoid the limits through providing advice. Daniel Cayley-Daoust & Richard Girard, *supra* note 2 at 9; Gen McGregor, *supra* note 104.

lobbying directly, which was even more unfair if they had only been in opposition. He argued the inclusion of opposition members on the list of designated officials had been a political tactic by the Harper government, in response to the oppositions' demand that political aides be put on the list. He maintained that the restriction impoverished former politicians by putting them in a situation where they could not exercise the skills and contacts they have developed. In his view, this deters people from pursuing elected office, and the regulations create a chill that drives lobbying consulting activity underground, hiding the extent of it and undermining the transparency goal.

One lobbyist pointed out that the meetings at fundraisers and social events that do not need to be disclosed advantages wealthy business interests, who can rub elbows with politicians and high-level officials at special events. He also noted that he was aware of situations where ministers had ordered their staff out of the room and decided not to take minutes of the meeting with particular lobbyists, to ensure there was no public record of the conversation.

10. Do you think the government enforces the lobbying regulations fairly and impartially?

Do you think the government enforces the lobbying regulations fairly and impartially?	Politicians #	Administrators #	Lobbyists #
Yes	<u>1</u>	4	3
No			
Don't Know		1	

The respondents agreed almost universally that the Canadian government enforces the lobbying regulations fairly. This is good. The independence of the Commissioner of Lobbying and the norms of Canadian governance have prevented the regulatory enforcement from becoming a political tool. One lobbyist noted that he appreciated the Commissioner of Lobbying's compliance-based approach which focuses on aiding lobbyists seeking to fulfill their disclosure requirements to actually do so, which he thought was particularly helpful in light of the jurisdictional differences in lobbying regulations within Canada. On the other hand, one administrator who worked for the Commissioner of Lobbying indicated that the regulation should be more flexible, allowing a broader range of responses and fines, depending on the exact situation.

11. What changes would you like to see to Canada's lobbying regulations?

This question garnered a wide range of responses. Each group tended toward answers that fit how they interact with the lobbying regulatory system. Administrators focused on technical details they would like to see adjusted in the *Lobbying Act*. These changes include: clarifying the *Lobbying Act* and defining the terms better, particularly the term "lobbying"; removing the distinction between consultant versus in-house lobbyists and standardizing their disclosure; requiring in-house lobbyists to disclose their activities by name, not simply by the name of the person in charge of the organization; and having lobbyists report all communication, not just arranged meetings.

The industry lobbyist who operated at various levels of government wanted to see more standardization between the different federal, provincial and municipal lobbying regulations within

Canada. Those that lobbied for citizen organizations wanted all lobbying communication to be disclosed, so that out of the office lobbying was included in the registry. They also suggested the disclosure should be immediate in real time, that the definition of lobbyists be limited to those with a financial interest (including procurements and grants), that there be a matching lobbying disclosure obligation on the officials being lobbied, and that lobbying at fundraisers, events and casual encounters be prohibited or disclosed.

None of the interview subjects suggested removing or cancelling the lobbying registry. This is evidence that the lobbying regulations and registrar have become an accepted part of lobbying, setting accepted norms of behaviour.

12. How would you or your business/government/employer/party react to regulatory efforts to curtail lobbying?

How would you or your business/government/employer react to regulatory efforts to curtail lobbying?	Politicians #	Administrators #	Lobbyists #
Favourable			1
Neutral	1	2	1
Unfavourable	<u>1</u>	2	1

There was little support for the idea of regulations that curtailed lobbying. The administrators believed that limitations should be approached with caution or lobbying might go underground, and that transparency was better. One administrator stated that there would be opposition in both industry and government. Another administrator insisted that there needs to be trust between a population and its civil servants, and changes should not place more obligations on administrators. In response to my question of his views on recording meetings with lobbyists, he argued that recordings of calls and meetings with lobbyists would be too much like Big Brother. From the perspective of the lobbyists and bureaucrats, there is some truth to his position. However, Big Brother refers to the government watching the people to keep them under authoritarian control. This would be the exact opposite, with the people watching the government, to ensure governmental decision-making is above board and aligns with democratic ideals.

Both former politicians indicated that they thought the regulations were already too restrictive on charities and nonprofits.¹³⁴⁶ One expressed concern that restrictions might be used politically against organizations that the political leadership disliked. The other repeated the point that he would like to see the lobbying cooling-off period by former politicians, especially opposition MPs, be lifted. He stressed that there should be more transparency, and a general understanding that lobbying is an inherent and non-evil part of the political process.

Surprisingly, the lobbyists were more open to the idea of regulatory efforts that curtailed lobbying. Even the one who thought the reaction would be negative stated it might be acceptable if it

¹³⁴⁶ The rules for charity lobbying have since been changed, allowing charities to lobby if it is non-partisan and related to their central purpose.

improves governance, but stressed how government needs input and information from lobbying. The lobbyist in favour of regulatory efforts to curtail lobbying stated that it depends on the details and what is being curtailed. He noted that people have to be able to reach out to their representatives, but curtailing lobbying would be acceptable if it was structured to prevent undue influence and to level the playing field.

These responses are not encouraging, but they do show there is room to garner support for well-designed non-partisan regulatory reforms.

13. What do you think of restrictions on the amount of lobbying that special interests could pursue, if the restrictions applied equally to all special interests, including their opponents?

What do you think of restrictions on the amount of lobbying that special interests could pursue, if the restrictions applied equally to all special interests, including their opponents?	Politicians #	Administrators #	Lobbyists #
Favourable		4	2
Neutral	<u>1</u>		
Unfavourable	1		1

A number of respondents had a favourable, if skeptical, view on restrictions on the amount of lobbying that special interests could pursue, if the restriction applied to everyone. Supporters of the view stated they would support such regulations if they increased transparency and levelled the playing field, and were not too onerous.

A number of interviewees on both sides remarked on the difficulty of measuring and managing such restrictions. This is a valid concern. One lobbyist, who viewed such restrictions favourably, pointed out that balancing such rules for organizations that have a diverse range of interests could be a problem. How does one fairly balance the lobbying of a large union with a million workers versus the lobbying of a small business that is focused on one narrow tax issue? Varying the restrictions based on the situation and the group involved would be complicated. However, it should be noted that the current system does limit the amount of lobbying because officials have limited time; the limits are simply haphazard and dependent on the amount of resources an organization has to use to compete for officials' limited time and attention. One administrator suggested that limiting the number of hours spent on lobbying would be too difficult, but that limiting the amounts expended on lobbying might work, (presuming disclosure of those expenditures was already mandatory).

The former politician who was neutral on the question, argued that government did need some sort of forum to balance lobbying resources, but it should be a more public open process, not built around the concern about entrenched lobbying interests.

Those who opposed the idea argued that lobbying should not be curtailed, just channelled. A former politician argued that enforcement might be impossible, and companies would just work around the restrictions. The industry lobbyist had the strongest opposition to the idea, arguing that it would be

undemocratic and autocratic, an infringement of political rights, difficult to implement, that it would create a second industry of shadow-lobbyists, and would lead to a host of other problems. He maintained that lobbying is about a dialogue and government needs the information it provides.

14. What do you think of the idea of providing public funding for citizen lobbying groups, so they can afford to bring their concerns to the government?

What do you think of the idea of providing public funding for citizen lobbying groups, so they can afford to bring their concerns to the government?	Politicians #	Administrators #	Lobbyists #
Favourable	<u>2</u>	3	1
Neutral		1	2
Unfavourable			

Most of the interview subjects responded favourably to the idea of providing government funding of some sort to help citizen groups lobby the government. They noted that such a program could be used to build capacity for underrepresented groups, particularly groups that were marginalized, or for organizations that are under-represented in lobbying but widely representative. A number of the respondents were concerned about the exact structure of the funding, and whether it could be made fair. Some expressed concern that the government might use the funding to control, exploit or co-opt the lobbying groups.

One former politician was concerned that the funds would not be enough to achieve equal access to those who have power – as important a goal as that is – because a lot of lobbying depends on who you know, not what you know, and these groups would still lack key connections. He also proposed that more important than funding, would be training in how to speak to government. The other former politician was intrigued by the idea of public funding for citizen lobbying. He pointed out that government used to support anti-poverty groups and some other public concerns across the Common Law world, and the decline in that support was linked with a rise in inequality. He suggested it would be good for society, and justice, to provide such funding again, not just so the anti-poverty groups could lobby, but so they could engage in various pursuits to help alleviate poverty.

The lobbyist who viewed the idea favourably proposed that there could be a per-person subsidy for lobbying that citizens could allocate to interest groups they favoured. The administrator who was neutral on the idea stated that he was more in favour of increasing government funding instead, so the government can reach out, gather more information and consult with more communities.

One lobbyist expressed the view that such funding be targeted and limited, so as not to create an industry of people who have incentive to appear and slow down the process of government and industry projects, essentially creating publicly-funded busybodies.

Questions About Lobbyists

15. Do you think it is more important for a lobbyist to be an expert in an issue or to have good personal connections?

Do you think it is more important for a lobbyist to be an expert in an issue or to have good personal connections?	Politicians #	Administrators #	Lobbyists #
Issue Expertise		1	1
Personal Connections	<u>2</u>	2	1
Other		1	

The general response, that for lobbyists connections are more important than expertise, matches with the general findings in the literature.¹³⁴⁷ The administrator who answered “Other” stressed that expertise in running lobbying campaigns was more important than issue expertise or personal connections.

A lobbyist stated that organizations are not monoliths, so lobbyists need to keep track of personnel changes in government, and connections are important. He argued that in Canada lobbyists generally will not follow a civil servant who switches departments; instead the lobbyists will continue to lobby in their area of preference, building connections to the new administrator in the position. He stated that generally lobbyists will continue to maintain a connection with a politician who switches portfolio only in certain cases, most notably if the politician is in the cabinet, because members of the cabinet talk to each other, so it is still effective to lobby the politician on the lobbyist’s area of specialization.

16. What factors do you think make some lobbyists more successful?

What factors do you think make some lobbyists more successful? <i>[multiple answers possible]</i>	Politicians	Administrators	Lobbyists
Better Problem Analysis and Solving		1 ^A	1 ^D
More Experience			2 ^{EF}
More Expertise & Knowledge		1 ^B	
Better Connections	<u>1</u>	1 ^C	
Better Inter-Personal & Listening Skills		2 ^{AB}	1 ^D
Better Organizational Skills		1	
Clout of Client		1 ^C	1 ^E
Political Awareness & Policy Sense		1 ^C	1 ^F
Ability to Frame the Issue and Simplify it		1	

Letters indicate when an interviewee gave multiple answers.

Although there was universal agreement that good personal connections were important for lobbyists, surprisingly, most of the interviewees did not state that having better connections made some lobbyists more successful. The other most stressed factors were issue expertise, inter-personal skills, experience, political awareness, the clout of the client, and preparation.

¹³⁴⁷ Marianne Bertrand, Matilde Bombardini & Francesco Trebbi, “Is It Whom You Know or What You Know?”, *supra* note 252 at 26; Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 19.

17. How involved do you think former government officials and politicians are in lobbying?

How involved do you think former government officials and politicians are in lobbying?	Politicians #	Administrators #	Lobbyists #
Extremely Involved	<u>2</u>	2	2
Involved		2	1
Not Involved			

All the respondents believe that former government officials and politicians are involved in lobbying. A number of respondents remarked, as some had previously, that the former politicians are involved behind the scenes, acting as consultants. These former politicians are more involved in lobbying than they should be, considering the five year lobbying restriction on designated office holders.

18 a. Do you think the cooling-off period between serving in government and acting as a lobbyist is respected?

Do you think the cooling-off period between serving in government and acting as a lobbyist is respected?	Politicians #	Administrators #	Lobbyists #
Period is Respected		3	2
Period is Respected, but Loopholes Exploited	<u>2</u>	1	1
Period is Not Respected			

The respondents who believed that loopholes are exploited repeated the opinion that former politicians are active behind the scenes, providing indirect lobbying expertise to their employers. One administrator remarked that it can be difficult to adjust to retirement, and that lobbying is tempting since it allows the former official to exercise their expertise. He argued the cooling-off period is too long, and that one to two years would be preferable.

18 b. What do you think about job offers to sitting politicians and high-level bureaucrats?

What do you think about job offers to sitting politicians and high-level bureaucrats?	Politicians #	Administrators #	Lobbyists #
Acceptable (as long as they abide by codes)	1	1	
No opinion			
Troubling (a bad idea)		2	2

The respondents did not have any additional comments of note on this issue. No interviewee mentioned knowing of officials who left to job offers, after making important related policy-decisions, but the question did not ask for elaboration. This problem seems to occur regularly in the U.S., and it would be surprising if it does not occur in Canada.¹³⁴⁸ Hopefully it is rare.

¹³⁴⁸ Jack Abramoff, *supra* note 1 c 6; Lawrence Lessig, *supra* note 273 at 123.

19. What do you think of lobbyists taking positions in government? Do you think it risks regulatory capture?

What do you think of lobbyists taking positions in government and does it risk regulatory capture?	Politicians #	Administrators #	Lobbyists #
Yes	<u>1</u>	1	2
Maybe			
No	1	3	1

Those respondents who thought lobbyists taking governmental positions risked regulatory capture stated that the lobbyists bring useful knowledge, but there is a risk that they might not act fairly and impartially once in government. They did however think that the risk can be managed.

The lobbyist who was the most concerned with regulatory capture argued it was frequently a big problem that put the industry in charge of itself, and increased public distrust of the regulatory process. He presented an example of a Shell employee who started a project in Nova Scotia for offshore drilling, and was later appointed to the government board overseeing it, and was in the position approving the project he started. The respondent maintained that government could address the issue of gaining experience from industry employees better by explicitly building capacity among its own employees, and introducing mechanisms to balance regulatory appointments by explicitly creating non-industry positions on boards and oversight bodies to balance industry appointments.

Those respondents who thought lobbyists taking positions in government did not risk regulatory capture stated that the cycle between government and industry is important because it builds and carries expertise from one domain to the other, allowing government and industry to function and communicate better. They did not believe that regulatory capture is as common in Canada, because there is less of a revolving door between industry, lobbyists and government. One lobbyist argued that Industry people generally do what is expected within the public service, because they maintain the position in administration for the longer term. One administrator added that former lobbyists do not pose any more risk of regulatory capture than anyone else, and that the risk of capture comes from a lack of government capacity.

Questions Related to Campaign Donations

The survey included a number of questions about campaign donations. These were intended to help reveal if campaign donations and lobbying are as intimately connected in Canada as they are in the U.S. They were also intended to gauge the interviewees' opinions about Canada's campaign finance regulations. The respondents universally supported Canada's campaign finance regulations; this reinforces the argument that these campaign regulations are a good model for future lobbying regulations.¹³⁴⁹

¹³⁴⁹ There was disagreement about whether lobbying is linked to campaign donations in Canada. This appears to be more about the effectiveness of the lobbying laws than of the campaign finance laws. It does provide extra validation for the need to prevent lobbyists from donating money to politicians that they lobby.

20. Do you think lobbying is connected to political campaign donations on the Federal level in Canada?

Do you think lobbying is connected to political campaign donations on the Federal level in Canada?	Politicians #	Administrators #	Lobbyists #
Yes	<u>1</u>	2	1
Maybe		1	
No	1		2
Don't Know		1	

There was a general consensus in support of the need for transparency, but there was no clear consensus on whether lobbying is connected to political campaign donations on the Federal level in Canada.

21. Does making a political donation give a lobbyist or his client an advantage in lobbying?

Does making a political donation give a lobbyist or his client an advantage in lobbying?	Politicians #	Administrators #	Lobbyists #
Yes	<u>1</u>	1	1
Maybe		1	
No	1		1
Don't Know		1	

There was no unanimity on this question. This might indicate there is more connection between campaign donations and lobbying in Canada than there ideally should be according to the laws in force.

If so, what type of advantage and how significant do you think it is?

The administrator who said yes stated that the donations create a sense of obligation for the politicians. The former politician who said yes stated that being a major donor and attending fundraisers opens the door, and that access is a powerful basis for influence. The lobbyist who said yes stated that it was more about pleasing the donor's sector than its direct influence from the donation itself. He added that the situation in Canada is much more constrained than it is in the U.S.

22. Do you think Canada's campaign donation laws are effective?

Do you think Canada's campaign donation laws are effective?	Politicians #	Administrators #	Lobbyists #
Yes	<u>2</u>	4	3
Maybe			
No			

There is unanimous agreement that Canada's campaign donation laws are effective. No one suggested weakening the campaign donation regulations, and many suggested improving and strengthening them. This is an indication of the strong support there is for Canada's well-regulated campaign finance regime. These interviews were conducted before the Trudeau government passed the

in legislative reforms to Canada's campaign finance laws in December 2018 (discussed in detail in Chapter 4).¹³⁵⁰

Well-designed robust lobbying regulations could likewise achieve this sort of widespread support over time, particularly as the shortfalls and scandals in other countries reinforce the advantages of fair and clean governance.¹³⁵¹

What changes would you like to see to Canada's campaign donation laws?

Most of the interviewees wanted the campaign regulations to be further strengthened. They suggested lowering the donation limit, further reducing third-party spending and bringing back the vote subsidy. The vote subsidy, cancelled by the Harper government, allocated public funds to the parties to run their political campaigns, according to the number of votes they received in the previous election, approximately \$2.50 per vote per year, adjusted for inflation.

Most of the interviewees also brought up the current situation in the United States as an example of a system run amuck. There was universal agreement that the Canadian campaign system was vastly better than the American one. One industry lobbyist added that since the U.S. lacks real campaign finance restrictions, moneyed interest groups can throw a lot of weight around, making lobbyists in the U.S. much more influential. Outside of these interviews, other lobbyists with whom I have raised the question of the difference between lobbying in Canadian versus the U.S. have expressed a similar point on the issue.

Canada's campaign finance laws are explicitly designed to foster equality, and this goal has been widely accepted even by lobbying interests who might benefit from a more American-like deregulated campaign funding system. The seemingly universal acceptance of the campaign finance laws can be used as a model of how regulations can be designed to increase political equality, and become a scaffold for political and moral norms of governance.

¹³⁵⁰ Chapter 4 – Private Campaign Financing and Lobbying: Regulation of Campaign Financing in Canada: The Current Canadian Campaign Finance Law, p. 222.

¹³⁵¹ For example, Canadians have much higher trust in their elections than Americans. 41% of Canadians have a lot of trust, vs. 23% of Americans. Only 9% of Canadians have a lot of distrust in their elections, vs. 21% of Americans. In the U.S. these results are influenced by partisanship, as trust fluctuates significantly depending on the electoral performance of the favoured party. In Canada, the pattern is different. Left-wing faith in elections has increased slightly more since 2014, but there has also been a substantial increase in faith by middle and right-wing voters. The results are likely influenced by perceptions of leadership competency, the treatment of those who did not vote for the ruling party, corruption, the fairness of elections, and the influence of money on electoral outcome. *Political Polarization in Canada and the U.S.*, by Environics Institute for Survey Research, Final Report (Toronto, ON, M4W 3H1: Environics Institute for Survey Research, 2020) at 12.

Questions Related to Influence

23. Do you think lobbying has a negative influence? If so, how?

Do you think lobbying has a negative influence?	Politicians #	Administrators #	Lobbyists #
Yes			1
Sometimes		1	1
No		2	1

There was a general belief that lobbying is not a negative influence, particularly if it was monitored properly.

If so, how so?

The responses to this question were that lobbyists can frame the debate in a way that is disadvantageous to the public, and powerful groups can use lobbying to gain yet more power and influence over government.

24. Do you think lobbying has a positive influence? If so, how so?

Do you think lobbying has a positive influence?	Politicians #	Administrators #	Lobbyists #
Yes	2	3	2
Sometimes		1	
No			

There was a general consensus that lobbying has a positive influence.

If so, how so?

The respondents were more effusive on the positive benefits of lobbying. They noted that lobbying provides vital information, and ensures that decision-makers can hear directly from those affected by the impact of policies. It is a path for disenfranchised people to influence government. They also stated that the populace must be able to express their concerns to their officials. They noted that governance is better when there are more voices contributing, and lobbying is helpful as long as there is a wide diversity of these voices. One lobbyist argued that lobbying helps solve problems, and stops officials from operating within a bubble.

25. Do you think lobbying gives government information it needs? If so, is this information fair and neutral?

Do you think lobbying gives government information it needs? If so, is this information fair and neutral?	Politicians #	Administrators #	Lobbyists #
Lobbying Provides Needed Information that is Fair and Neutral		1	2
Lobbying Provides Needed Information, but it is not Fair and Neutral	2	2	1
Lobbying Provides Information that is Too Biased Towards an Outcome to be Truly Useful		1	

Most respondents believe that lobbying provides vital information for government. Many argued the lobbying must be balanced, and the information is reliable if it is considered with a grain of salt. This appears optimistic. It is hard to correct for biased information because you do not know what you do not know, and might not know how you are being led astray. One former politician stressed the need for external experts, and a sense of constituents' concerns. He insisted that some information is biased and unfair, but some lobbying provides good information, bringing attention and synthesized information to issues officials do not know about and do not have time to otherwise learn.

The administrator that believed that lobbyists provide fair and neutral information added that significant caveat that this is only the case if the lobbying is balanced and representative of all sides.

26. Do you think lobbying makes the government more responsive? Do you think lobbying serves as a sort of fire alarm that warns politicians when government agencies are not fulfilling their assigned policy roles?

Do you think lobbying makes the government more responsive? Do you think lobbying serves as a sort of fire alarm that warns politicians when government agencies are not fulfilling their assigned policy roles?	Politicians #	Administrators #	Lobbyists #
More Responsive & Fire Alarm	<u>2</u>	1	3
Does Not Make More Responsive		1	
Don't Know		1	

The respondents nearly universally agreed that lobbying makes government more responsive and can act as a sort of fire alarm that warns politicians when government agencies are not fulfilling their assigned policy roles.

One former politician pointed out that decision-makers are informed in the fashion that the lobbyists choose – another form of framing the debate – which is an advantage to those who can afford lobbyists and access. The other former politician noted that lobbyists do provide information about the local political context, but their interpretation must be approached skeptically, and often is best ignored on moral issues. He added that the increased presence of lobbyists and their increased provision of information about issues and politics are signs of the increasing professionalization of the lobbying process.

A lobbyist for a citizen group argued that a great deal of lobbying is annoying to officials. In many cases officials have already decided that their policy decision will align with the interests of a powerful group, but the officials still have to meet with many other organizations that are lobbying them on the issue. The officials see these meetings as a waste of time, as they know and have already decided that the powerful group will ultimately get its way.

27. Do you think lobbying helps or hurts Canadian democracy?

Do you think lobbying helps or hurts Canadian democracy?	Politicians #	Administrators #	Lobbyists #
Helps	1	3	1
Both			1
Hurts	<u>1</u>	1	

The majority of respondents, including the majority of those who work in the Commissioner of Lobbying's office, believe that lobbying benefits Canadian democracy. Most of the interviewees argued that getting more views and input makes for better policy and regulations – as long as the process is transparent.

28. Do you think lobbying helps or hurts the government and societies' ability to tackle large-scale long-term problems, such as climate change?

Do you think lobbying helps or hurts the government and societies' ability to tackle large-scale long-term problems, such as climate change?	Politicians #	Administrators #	Lobbyists #
Helps		1	1
Neutral	1		2
Hurts	<u>1</u>	2	

There was no clear answer to this question.¹³⁵² The results were mixed. Multiple lobbyists argued that the effect of lobbying on long-term problem solving is not uniform; it pulls both ways, helping and hurting. One administrator simply stated that regardless, it is the government's responsibility to balance the influence of lobbyists with the long view of issues and come to a good decision.

29. Do you think lobbying is linked to inequality?

Do you think lobbying is linked to inequality?	Politicians #	Administrators #	Lobbyists #
Yes		3	2
Somewhat	1	1	
No	<u>1</u>		1

There was a fairly strong sense that lobbying is linked to inequality. This question was always interpreted to mean economic equality, although in retrospect it could have been interpreted to mean racial or some other form of social inequality. A number of interviewees argued that there is a circle of lobbying, where more wealth allows for more lobbying, and more lobbying generates more wealth, and

¹³⁵² See Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern V: Lobbying Favours the Legislative Status Quo, p. 189, for a discussion on how lobbying appears to be hurting government's ability to tackle large-scale problems. See also, Matthew Stephenson & Howell E. Jackson, *supra* note 878 at 19.

so on (widespread, this process becomes the inequality spiral).¹³⁵³ One administrator noted that lobbying does not cause inequality, but reinforces it, entrenching it. The distinction is not entirely clear. Another administrator identified the even more direct links to inequality, pointing out how some vested interests have successfully lobbied to stop minimum wage increases. This same administrator believes lobbying is overall beneficial for Canadian democracy. One lobbyist believed the link between lobbying and inequality depended on the government in power, presumably because a government that made reducing inequality a goal would not be susceptible to policy lobbying that would increase it instead.

Some responses reflected a more pessimistic view of the chances for lobbying equality. One lobbyist who believed in the link argued that the ability to lobby well itself reflects a general power in society, implying they are inexorably linked and likely inseparable. Those who have power will always be able to lobby successfully, and use it to further entrench their power. Similarly, the former politicians who answered “Somewhat” argued that even if there is an inherent relationship between lobbying and inequality, there might be little that can be done about this through lobbying oversight. One stated that politics is not a monastery and the powerful will always have the loudest voice.

Additional Comments

30. Do you have any interesting stories about lobbying, or are there any other comments you wish to make?

The respondents’ comments fell into four broad categories: comments that confirmed a few points about lobbying; those that stressed the need for balance for non-economic interests; comments that addressed the Canadian bureaucracy; and comments about increasing disclosure.

One group of respondents confirmed a few points about lobbying in general, which matches with other findings from *Lobbying and Policy Change: Who Wins, Who Loses, and Why*¹³⁵⁴ and *Lobbying & Policymaking*¹³⁵⁵. Several lobbyists noted that most of their time is spent gathering information and transferring it to the clients, noting that they tend to be more reactive than proactive. One of these lobbyists explained that his organization pays attention to both large policy issues and regulatory changes, but that it lobbies primarily on regulations. A lobbyist and an administrator both stated that industries lobby for changes to regulations that give them advantages over their competitors.

A number of respondents stressed the imbalance in the current lobbying system in favour of business interests. They stated there was a need to balance the lobbying so government hears from non-economic interests like citizen groups as much as it hears from industry. Several expressed hope that this study could be a help in that direction, and identified the need for more attention and research on the issue of lobbying. They stressed that evil grows in the dark, and activities around the edges of

¹³⁵³ See Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: Lobbying Feeds the Inequality Spiral, p. 398.

¹³⁵⁴ Frank R. Baumgartner et al, *supra* note 59.

¹³⁵⁵ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60.

lobbying – such as informal meetings, after-work meet-ups at bars and attendance at fundraisers – favour wealthy interests. An administrator added that government has to reach out to solicit a wide range of divergent views, and that he hopes citizens become more proactive in lobbying, particularly in areas where a precautionary principle might apply, like health and safety. One administrator added that having the *Code of Conduct* provides more oversight value than measuring financial expenses would. That may be true, but it is not clear why the two would be mutually exclusive. Another administrator added that the Commissioner of Lobbying's Office should have a research mandate to investigate lobbying more broadly.

A number of respondents commented on the Canadian bureaucracy. One former politician stated that the bureaucracy is the center of power and that the opinions of a high-level administrator matters more than any legislator's. He argued that since in majority governments the legislature does not amend bills on the floor, the important decisions are all made by the bureaucracy or between the bureaucracy, the responsible ministers and sometimes the PMO. In discussing the civil service, both former politicians stated that it would be good to have the bureaucrats disclose their meetings with lobbyists, as long as the process was not too onerous or time consuming. Overall, it would be good to open up the bureaucracy up more to the public. One respondent suggested that meetings with lobbyists could be live streamed online, to increase transparency.

An overlapping set of respondents focused these comments on disclosure. They argued that regulating lobbying is a balance, and over regulation will push it underground. They stated that the goal should be to get people to register, so we know who is advising whom, and that the current rules do not produce transparency (or accountability), because they create a chill, since registering is unpleasant. In this vein, one administrator argued you can never eliminate all gifts, and it better to focus on large gifts, as the system currently does. That administrator noted that many lobbyists do not truly understand the framework the civil service and the project are operating within, and so cannot lobby properly. He maintained that the general growth and institutionalization of knowledge in the lobbying arms of larger industries is a good sign of the professionalization and increasing usefulness of lobbyists. This professionalization gives them more insight on how to work with the bureaucracy, which is a significant advantage over less organized interests.

Conclusion – Chapter 5

It must be acknowledged that my sample size is too small for the survey results to establish any firm conclusions. The results are suggestive and helpful, but far from conclusive. The survey has been bolstered by the in-depth interviews, the comparison to Chari *et al.*'s data, and my attendance at informal discussions, seminars and presentations. It is reassuring that the answers given in the interviews coincide with the information gleaned elsewhere. It also coincides with the general findings from *Lobbying and Policy Change: Who Wins, Who Loses, and Why*¹³⁵⁶; *Lobbying and Policymaking*¹³⁵⁷;

¹³⁵⁶ Frank R. Baumgartner et al, *supra* note 59.

¹³⁵⁷ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60.

*Lobbying Reform: What Is the Problem*¹³⁵⁸; *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*¹³⁵⁹; *Pressure Group Behaviour in Canadian Politics*¹³⁶⁰; *Canadian Pressure Groups: Talking Chameleons*¹³⁶¹; *Group Politics and Public Policy*¹³⁶²; *The Business of America is Lobbying: How Corporations Became Politicized and Politics Became More Corporate*¹³⁶³; *Lobbying and Transparency: A Comparative Analysis of Regulatory Reform*¹³⁶⁴; and *Interest Groups and Lobbying: Pursuing Political Interests in America*¹³⁶⁵. This indicates that the interview subjects were not extreme outliers, and their views do fall within the range found within the literature. More investigation is warranted on the subject. The field (and possibly Canadian governance) would benefit from a well-funded, in depth survey of those participating in lobbying in Canada.

The politicians, officials, regulators and lobbyists interviewed had a relatively benign view of lobbying. They believe that lobbying provides vital information to government. There is an operating assumption that the public fails to see the good in the system, and more transparency will ultimately solve any problems with lobbying.

A few other conclusions can be reached from the interviews. The first is that there is general respect for the Commissioner of Lobbying and the professionalism with which the office is fulfilling its role under the *Lobbying Act*. Secondly, as Chari *et al.* propose, the participants in the Canadian system have adapted to the regulations and now see them as a reasonable standard for behaviour and transparency. There appears to be no push to do away with the regulations. Thirdly, there is strong respect for Canada's campaign finance restrictions, and a general belief that they serve a useful function and have weakened the connection between campaign contributions and lobbying.

Universally, respondents think the lobbying practices in Canada are cleaner and more transparent than those in the U.S. They think this is probably a combination of responses to the political structures, the stricter campaign regulations, the stronger bureaucracy, and the comparatively smaller budget of the Canadian government.

Although the current system does a decent job at transparency, there is a general sense that some interactions are not being disclosed, and that gifts are being given and received that should not be. In particular, sponsored travel remains a glaring issue. Respondents are aware that former politicians and others are masking their involvement in lobbying by acting as consultants rather than direct lobbyists. Communications outside of arranged meetings are also going unrecorded, and the disclosures contain shortcomings in specificity and goals, and regarding who is actually present at certain meetings.

¹³⁵⁸ Calon Russell, "Lobbying Reform", *supra* note 483.

¹³⁵⁹ Anita S. Krishnakumar, *supra* note 493.

¹³⁶⁰ A. Paul Pross, *supra* note 2.

¹³⁶¹ A. Paul Pross, *supra* note 2.

¹³⁶² A. Paul Pross, *supra* note 2.

¹³⁶³ Lee Drutman, *supra* note 172.

¹³⁶⁴ Craig Holman & William Luneburg, "Lobbying and transparency", *supra* note 96.

¹³⁶⁵ Thomas T. Holyoke, *supra* note 228.

The 20% of the in-house job standard for reporting lobbying also seems to be causing disclosure shortfalls. Without rules requiring that lobbyists disclose their spending, no one seems to know how much is being spent on lobbying. These makes it hard to judge the scope and impact of lobbying. These disclosure shortcomings should be corrected. Overall, there is a sense that these shortcomings are inherent to the current drafting of the *Lobbying Act*, rather than failures on the part of the Commissioner of Lobbying.

Quite a number of respondents, including those from the Commissioner's office, believe that the information provided by lobbyists is biased. Outside of those representing citizen lobbying organizations, there seems to be little desire for substantial change. Many support funding for citizen groups to lobby, but few support larger reforms. A couple of administrators did stress the need to bring more people into the process, and build governmental capacity so it would not be as reliant on the input of lobbyists. This might include adopting processes to actively reserve committee slots for outsiders like academics and citizens to balance the participation of civil servants and industry members. This would help introduce a broader range of opinions and experiences, and reduce the chances of regulatory capture and group-think.

In general, throughout the course of the interviews, politicians and lobbyists seemed to fall mostly within the disclosure heuristic camp. Civil servants seemed to fall into both camps, with one interviewee talking himself from the disclosure camp to the corruption camp throughout the interview. This aligns with Krishnakumar's argument that politicians and (industry) lobbyists tend to subscribe to the disclosure heuristic view of lobbying, whereas citizens (and perhaps civil servants) tend to fall into the corruption heuristic camp.¹³⁶⁶ This matches the larger pattern I have observed both through these interviews, as well as in seminars and presentations involving government officials and lobbyists. As in many low salience areas, regulators and lobbyists are significant participants in the discussions of lobbying and lobbying regulations, but there is little involvement by citizen groups, activists, academics and other outsiders. In these gatherings, there is much talk of the value of lobbying, its transparency and minor changes to the current regulations, but little on questions of the link between lobbying and corruption, and lobbying's potential un-democratic pro-industry bias. Outsiders might be less likely to subscribe to the disclosure heuristic and less likely to believe that the lobbying system as it currently exists is reasonable, unchangeable and mostly fair. Outsiders might seek more substantial changes to balance representation and outcomes.

Most respondents agree that lobbying is linked to economic inequality. Many would probably agree that tackling inequality of political influence might help mitigate economic inequality, and visa-versa. This subject is addressed in depth in the next chapter. The bad news from the interviews is that there seems to be little internal will for substantive changes or reforms. The good news is that it appears that well-designed regulations, like Canada's campaign finance laws, can help build political norms. Fairly enforced regulations can become accepted across the spectrum of involved actors, as the current lobbying regulations appear to be. The interview results support the contention that regulations can

¹³⁶⁶ Anita S. Krishnakumar, *supra* note 493 at 530.

become a floor of reasonable, honest behaviour. This reinforces the argument that Canada's campaign finance laws can be used as a model for further lobbying regulations. Lobbying regulations could be designed to form a more equal political arena where the voices of citizens are heard rather than drowned out. There is good reason to believe that these reformed regulations could inspire new political and moral norms of governance.

Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations

Introduction – Chapter 6.....	336
Rawls and Dworkin on Political Equality	337
Rawls	337
Dworkin.....	341
Profit Motivated Corporate and Public Interest Citizen Lobbying.....	342
Classification of Groups	343
Business Lobbying versus Citizen Lobbying	344
The Lobbying of Other Groups.....	345
Business Interests Pursue Private Goods.....	348
Citizen Organizations Pursue Collective Goods	349
The Overlap between Private Goods and Collective Goods	350
The Nature of the Corporate Lobbying.....	352
Corporate Personality	352
Corporate Personality is Shaped by Profit	353
Externalities	356
Short-Sighted Decisions	356
Corporate Personality and Lobbying.....	358
The Separation of Business and State.....	361
Separation of Powers	363
Separation of Church and State	364
The Interest and Passion in the Separation of Business and State.....	365
Business and State, Democracy and Lobbying.....	366
The Nature of the Unregulated Marketplace – Phishing for Phools	367
Humans are Neither Rational nor Irrational	368
Phishing is a Natural Aspect of the Marketplace	370
Need for Government Oversight	371
Applying the Lessons about Phishing to Lobbying.....	372
Inequality and Lobbying.....	375
Economic Inequality is a Risk to Democracy.....	379
Economic Inequality is an Outcome of Policy Decisions.....	384
Lobbying Feeds the Inequality Spiral	398
Inequality, Private Goods, Collective Goods, and Lobbying	402
Conclusion – Chapter 6	403

Introduction – Chapter 6

As covered in previous chapters, lobbying has a significant impact on democratic decision-making in favour of the elites. This chapter will show that liberal democratic theory justifies restraining lobbying when its impact unduly hurts political equality.

This chapter uses a web of several different theoretical approaches to justify distinguishing between the lobbying activities of businesses seeking private profit and those of citizen organizations seeking wider collective goods. It will show why it is justified to restrict lobbying activities of the former and promote lobbying activities of the latter. The goal of the chapter is to provide theoretical justification for the distinguishing between different lobbying interests and different regulatory approaches to each kind. Specific principles of lobbying regulations are discussed in the Chapter 9.

The six different theoretical approaches covered in this chapter work together, creating an overlapping web of justifications for restricting and restructuring lobbying. The multiple theories also provide different bases of support; each one individually provides its own justifications for distinguishing between types of lobbying, and restricting lobbying that undermines political equality. The six approaches are (1) Rawls and Dworkin's writings on liberal democracy and political equality; (2) differentiating between profit motivated and public interest lobbying; (3) examining the nature of the corporation; (4) establishing the separation of business and state; (5) examining the nature of the unregulated marketplace; and (6) investigating inequality and lobbying.

We will begin with a discussion of Rawls and Dworkin, who provide deep theories for political equality, and for maintaining some limited level of economic equality among citizens. There are many theoreticians who argue strongly for political and economic equality, but Rawls and Dworkin's works are based upon liberal democratic thought and match well with our liberal democratic capitalist society. The writings of Rawls and Dworkin show that there are good theoretical justifications to restrict the use of wealth to influence public policy to maintain political equality between citizens. The curtailment and control over lobbying is philosophically essential to a democratic society, and well within its proper norms.

The chapter then investigates the differences between the lobbying of business interests and that of citizens. This investigation provides additional reason to distinguish the types of lobbying and regulate them differently. Treating the lobbying of business interests differently is also justified by the exploration of corporate personality in Bakan's work, *The Corporation*¹³⁶⁷, which gives good reason to question the influence of business lobbying. We will find a further theoretical basis for separating between business interests and citizen interests – profit motivated lobbying versus collective good lobbying – in Kuhner's work, *the Separation of Business and State*¹³⁶⁸. The separation of business and state is a clear intellectual model that reinforces the need for political equality, while laying out an easy to grasp principle that can be applied to the regulation of lobbyists.

¹³⁶⁷ Joel Bakan, *supra* note 50.

¹³⁶⁸ Timothy K. Kuhner, *supra* note 51.

The importance of distinguishing between the lobbying of business interests and citizen interests will be bolstered by an investigation of Akerlof and Shiller's economic theory from *Phishing for Fools*¹³⁶⁹. It will provide a market-based framework – expanding beyond Bakan's discussion of the corporate personality – for why profit-driven lobbying is likely to be damaging and deceptive, and needs to be subject to careful regulation.

The chapter concludes with an investigation of the rise in economic inequality and lobbying. This discussion shows how political power and lobbying is tied to the issue of economic inequality, and how unchecked, these power dynamics can feed a spiral into plutocracy.

Rawls and Dworkin on Political Equality

Rawls, in *Political Liberalism*, and Dworkin, in *Sovereign Virtue*, both stress the importance of political equality in liberal democracy.¹³⁷⁰ This equality is desirable for its own sake and for the sake of a healthier democracy. It justifies lobbying regulations that are designed to maintain a higher level of political fairness than Canadians currently experience.

Rawls

Rawls' theory imagines an abstract state of nature hidden behind a veil of ignorance. People know what form society will take, but not which position they will occupy in that society.¹³⁷¹ He argues that humans are rational and moral beings, and that the society they would choose would best reflect this by allowing them to express themselves through justice.¹³⁷² Since people would not know what status they would occupy in this society, they would seek to establish a society that was just and relatively equal, because they could end up in any position in the society. For example, slavery is shown to be unjust by the veil of ignorance, because no one would want to be a slave. The imagined example allows for a concept of justice as fairness. The essence of this idea is that citizens are free, they are equal, and society must express these values. Society should be fair in allocating the burdens and benefits of social life. To be fair, society must be reasonable. That is to say it must be governed by a set of basic laws that all citizens must be able to reasonably accept. This results in a political conception of justice, where the political system allows the most freedom for people to explore their personal moral values. This room for personal moral values is built on the recognition that there is no consensus on moral or religious views.¹³⁷³ A society based on justice as fairness would look a lot like a modern liberal democracy, but with less inequality.¹³⁷⁴

¹³⁶⁹ George A. Akerlof & Robert J. Shiller, *supra* note 52.

¹³⁷⁰ John Rawls, *Political Liberalism*, The John Dewey essays in philosophy no. 4 (New York: Columbia University Press, 1993) at 330; Ronald Dworkin, *supra* note 80.

¹³⁷¹ John Rawls, *supra* note 1370 at 22.

¹³⁷² *Ibid* at 19.

¹³⁷³ *Ibid* at 13 & 36.

¹³⁷⁴ *Ibid* at 327.

Rawls introduces three principles of equality: *equality of basic liberties*; *equality of opportunities*; and the *difference principle*.

The principle of equality of basic liberties is that regardless of wealth or status, everyone must have a fair opportunity to hold public office and to influence the outcome of political decisions.¹³⁷⁵ This principle could justify the regulation of lobbying to ensure everyday citizens retain a voice in the democratic process.

The principle of equality of opportunities – that, relatively speaking, everyone should have equal opportunity in life – is not impacted by lobbying directly. However, if lobbying becomes a tool to entrench the status quo such that it limits the opportunity for the poor to rise on the economic ladder, then it could indirectly infringe this principle. In the section on inequality at the end of this chapter, we will see that Canada and the U.S. are at risk of reaching such a situation of limited income mobility due to the influence the wealthy now exercise through lobbying and campaign contributions.

The difference principle is a powerful statement limiting the justification for inequality. It states that wealth inequalities are only justified to the extent that they work to the advantage of the worst-off groups. If economic inequality can only be justified by the amount of good it does for the poorest people, then much of the modern growth in inequality is unjustifiable. There is no justification for the situation where the wealthy capture the economic gains of productivity, taking the increases in income that would otherwise flow to the poor and middle class.¹³⁷⁶ For example, one might need incentive to create Windows or the iPhone, which benefits even the poor, who now have access to more useful electronics. However, this does not justify tax, business, anti-trust and intellectual property policies that allow one to amass billions of dollars from these innovations; because the incentive to invent it would still be there even if one made merely millions of dollars. This difference between the actual incentive needed for new innovation and the vast rewards offered to the very few is a (deadweight) loss to society. It does not benefit the average person or the poor. It just allows more wealth (and hence power) to accumulate in the hands of the 0.01%. This problem is magnified when one takes into account that a large percentage of millionaires and billionaires are given or inherit their wealth from their parents.¹³⁷⁷ This wealth inequality and the policies that allow it are not justified under the difference principle.

¹³⁷⁵ *Ibid.*

¹³⁷⁶ See the discussion on inequality below for details about how the wealthy have captured an increasingly larger share of the economic growth. Inequality is increasing, per Era Dabla-Norris et al, *supra* note 839; David Jacobs & Lindsey Myers, *supra* note 681 at 752. “[I]n the period of increasing inequality, growth has been slower—and the size of the slice given to most Americans has been diminishing.” Joseph E. Stiglitz, *supra* note 38 c 1, s Trickle-down economics. Wages have stayed flat for most people after accounting for inflation. Thomas Piketty & Emmanuel Saez, “Income Inequality In The United States, 1913-1998” (2003) 118 Q J Econ 1–39 at 33.

¹³⁷⁷ 30-40% of billionaires inherited their wealth in the U.S. It is higher in other countries, where many billionaires receive their wealth through political connections (which is even less justifiable). This number is likely to go up as the baby-boomers retire. However, that is only a small part of the story. Other important advantages comes from support and wealth transfers that are not inheritance. Judging from the Panama papers, the use of trusts, numbered corporations and other reports, it seems that the 1% pass on a great deal of wealth as gifts and seed

Rawls argues that fairness and background justice rest on basic structures of society, which include,

operations that continually adjust and compensate for the inevitable tendencies away from background fairness, for example, such operations as income and inheritance taxation designed to even out the ownership of property.¹³⁷⁸

By his reasoning, government institutions are failing at background justice and fairness when they do not tax the wealthy families and dynasties enough to even out property ownership over time.¹³⁷⁹

Applying Rawls' difference principle, inequality is justifiable to the extent that the wealthy's business provide direct benefits to the poor, and the wealthy's taxes provide funds that the government uses on social services and infrastructure that improves the poor's position. This position is compared to what it would otherwise be if the wealthy had less of the general income and more flowed directly to the poor, taking into consideration what effect this would have on the government's tax base and its ability to supply services and infrastructure that helps the worst off. The wealthy are now capturing an growing share of the societal productivity gains, and paying a shrinking share of the taxes.¹³⁸⁰ Their wealth is not justified by the difference principle, especially considering the inequality appears to be slowing economic growth, and the wealthy are making widespread use of tax havens and tax avoidance schemes.¹³⁸¹

capital to their children in ways that avoid official records and taxes. The 1% also receive business advantages and high positions in large corporations from their relatives. These benefits have no Rawlsian justification. As an example of their scale, the Walton family members got a share of Walmart (and sometimes a position in the business), making them each billionaires, and setting their collective wealth at \$200 billion. Throughout his father's life, President Trump received over \$400 million (valued in 2019 U.S. dollars) through (likely-illegal) tax avoidance schemes from his father's business empire. It is difficult to see any benefit society or the poor gain from this accumulation of wealth. Russ Buettner, Susanne Craig & David Barstow, "11 Takeaways From The Times's Investigation Into Trump's Wealth", *N Y Times* (2 October 2018), online: <<https://www.nytimes.com/2018/10/02/us/politics/donald-trump-wealth-fred-trump.html>>; Robert Frank, "Did the Forbes 400 Billionaires Really 'Build That'?", (25 September 2012), online: *CNBC* <<https://www.cnbc.com/id/49167533>>.

¹³⁷⁸ John Rawls, *Political Liberalism*, The John Dewey essays in philosophy no. 4 (New York: Columbia University Press, 1993) at 268.

¹³⁷⁹ See, *Ibid*.

¹³⁸⁰ See the discussion on inequality below for details about how the wealthy have captured an increasingly larger share of the economic growth. Inequality is increasing, per Era Dabla-Norris et al, *supra* note 839; David Jacobs & Lindsey Myers, *supra* note 681 at 752. Wages have stayed flat for most people after accounting for inflation. Thomas Piketty & Emmanuel Saez, *supra* note 1376 at 33.

¹³⁸¹ The revelations in the Panama Papers demonstrate that many of the wealthiest people are hiding their money in tax havens to avoid paying their fair share of the tax burden. "[I]n the period of increasing inequality, growth has been slower—and the size of the slice given to most Americans has been diminishing." Joseph E. Stiglitz, *supra* note 38 c 1, s Trickle-down economics; Zach Dubinsky, "Panama Papers tax windfall hits \$1B worldwide, with \$15M found in Canada | CBC News", (3 April 2019), online: *CBC* <<https://www.cbc.ca/news/politics/panama-papers-cra-tax-recovered-charges-1.5082058>>.

Lobbying regulations that decreased inequality in lobbying, and thereby decreased political inequality and eventually economic inequality, can be justified on the basis of the difference principle.

Rawls' three principles of equality support the regulation of lobbying, and justify structuring lobbying to ensure it supports equality rather than undermines it. However, any restrictions on lobbying would still need to justify their infringements of free speech. Rawls does not discuss lobbying directly, but he does discuss how the regulation of campaign financing interacts with free speech. Applying the mirror principle¹³⁸² from Chapter 4, we can see how his discussion could also apply to the regulation and equalization of lobbying.¹³⁸³

Rawls argues that limits on campaign contributions are essential to maintain the political liberties, and that these arrangements are acceptable and reasonable infringements on free speech. He sets three conditions: the rules (1) cannot restrict the content of speech or favour a particular political doctrine, (2) cannot place an undue burden on a particular political group (but a prohibition against large contributions from private persons or corporations is okay), and (3) must be minimally impairing on free speech.¹³⁸⁴ He argues that a refusal to abridge free speech in order to control campaign donations is a failure to approach the U.S. Constitution as a cohesive whole. Good campaign finance regulations support a political procedure that is an essential schema of the basic liberties.¹³⁸⁵

Rawls' approach to campaign contributions can also be applied to lobbying regulations. Lobbying regulations that help maintain political equality and support the difference principle are theoretically justifiable, even if they infringe free speech and free access to government officials. By the mirror principle, this infringement of free speech must meet the three equivalent conditions. (1) Lobbying restrictions cannot favour one political party, political doctrine, or adherents to one part of the political spectrum. (2) The lobbying restrictions cannot place an undue burden on a particular political group. Prohibitions that limited economic gains from lobbying for proposed policies could be okay; taking all factors into account, including the vulnerability of the group in question. A prohibition distinguishing between business lobbying coalitions and citizen coalitions would be acceptable, just as campaign prohibitions on large donations and corporate donations are acceptable. (3) The lobbying regulations must be minimally impairing on free speech and the people's ability to access their representatives, while achieving the goals of political equality. Rawls states that society should "keep

¹³⁸² The mirror principle of lobbying and campaign financing posits that the fields of campaign finance and lobbying have deep connections and the similarities, and can be treated as mirrors of each other. This principle is based on the interwoven nature of lobbying and campaign finance, how they are both used by those seeking political influence, and their overwhelming theoretical and practical similarities in understanding and regulation. The mirror principle has two key repercussions: (1) the fields must be considered in conjunction – to regulate one effectively, the entirety of both must be taken into account –; and (2) that lessons from one area can be applied to the other area. See p. 211.

¹³⁸³ Chapter 4 – Private Campaign Financing and Lobbying: The Mirror Principle of Lobbying and Campaign Financing, p. 211.

¹³⁸⁴ John Rawls, *supra* note 1370 at 357.

¹³⁸⁵ *Ibid* at 362.

political parties independent of large concentrations of private economic and social power”.¹³⁸⁶ This independence should apply both to power wielded through campaign donations and to power wielded through lobbying.

Dworkin

Dworkin’s *Sovereign Virtue* is an exposition about equality.¹³⁸⁷ He argues that fundamental equality of economic welfare is impossible and undesirable, and that equality has to be limited to the equality of one’s starting wealth, and of making up for significant handicaps that interfere with pursuing a good life.¹³⁸⁸ He proposes a hypothetical insurance market of those who would found the society, arguing this insurance could be transformed into a progressive tax system to help make up for inborn talents that lead to greater success in life.¹³⁸⁹ By this argument, a progressive tax system is a fundamental tenet of equality, as it makes up for starting advantages of wealth and talent. If there were a structure to lobbying that pushed against equality of opportunity and in favour of regressive taxation, then it would infringe fundamental equality. Regulations that helped shape lobbying so it did not pursue this path would be justifiable.

Dworkin argues inalienable political equality is a fundamental component of equality. He discusses the question of money in politics and campaign funding restrictions. He concludes that the *Buckley v. Valeo*¹³⁹⁰ ruling – that the government cannot cap campaign expenditures or limit third party electoral spending – is a judicial mistake. He maintains that the ruling is based on the (mistaken) principle that free speech is the over-riding value for a democracy; and democracy is best protected by forbidding the government to limit or control political speech, even if the restrictions are intended as a means of protecting democracy.¹³⁹¹ He believes this might be justifiable if democracy were simply a system to enforce the majority’s will, but that this is a deficient view of democracy.¹³⁹² Democracy is better conceived as “a partnership in collective government in which all citizens are given the opportunity to be active and equal partners”¹³⁹³. In this view, democracy includes the values of democratic discourse and citizen equality.

Self-government means more than equal suffrage in frequent elections. It means a partnership of equals, reasoning together about the common good. We can never fully achieve that ideal – no nation could. But when politics are drenched in money, as our politics now are, then we risk not simply imperfection but hypocrisy.¹³⁹⁴

¹³⁸⁶ *Ibid* at 328.

¹³⁸⁷ Ronald Dworkin, *supra* note 80 at 11.

¹³⁸⁸ *Ibid* at 62.

¹³⁸⁹ *Ibid* at 106.

¹³⁹⁰ *Buckley v. Valeo*, *supra* note 955.

¹³⁹¹ Ronald Dworkin, *supra* note 80 at 353.

¹³⁹² *Ibid* at 363.

¹³⁹³ *Ibid* at 354.

¹³⁹⁴ *Ibid* at 364 & 385.

In his view, democracy includes the values of democratic discourse and citizen equality, which cannot be realized when the speech of some is drowned out by those who have more.¹³⁹⁵

Approaching democracy as a partnership in collective government justifies extensive lobbying restrictions. By the mirror principle, just as democracy cannot be realized when the electoral speech of some is drowned out by those who have more, so too it cannot be realized when the lobbying speech of some is drowned out by those who have more. By the mirror principle, the reasoning of equals cannot be maintained if most citizens only give their input every four or five years, and in-between the elections, it is the lobbyists of business interests and the wealthy who get to participate in government. The lobbyists get to sculpt the discussion, give their input, and frame the debate. No amount of transparency will solve this problem, because transparency still places the citizens on the outside looking in, while the lobbyists and officials reason together. A politics drenched in lobbying money is almost as flawed as a politics drenched in campaign money.

Dworkin states we “must target the constraints we designed to bad or inappropriate influence, by reducing the importance of wealth and politics, and by encouraging the forms of political debate in which deception is most likely to be exposed”¹³⁹⁶. This statement applies equally to the regulation of campaign finance and the regulation of lobbying.

Both Rawls’ and Dworkin’s theories support the conclusion that lobbying can be curtailed and managed to maintain political equality. Building on this theoretical foundation, we can further justify regulations that restrict and transform lobbying once we distinguish between profit motivated business lobbying and public interest citizen lobbying.

Profit Motivated Corporate and Public Interest Citizen Lobbying

In seeking to channel and restrain lobbying so to increase equality, it is likely we will need to distinguish between the lobbying of business entities seeking private goods, and the lobbying of citizen organizations for collective (or public) goods. This is not simple, but it is not impossible. There are two inter-related aspects to this division, business vs. citizen interests, and private vs. public goods.

It is easier to distinguish between the lobbying of businesses and citizens than between private from public goods. Although the arguments in favour of distinguishing between the lobbying for private and collective goods are weaker, it is still a conceptual distinction worth investigating and pursuing.

One way to think of the difference between private and collective goods is whether a benefit is concentrated on only a small number of individuals or organizations or

¹³⁹⁵ *Ibid* at 385.

¹³⁹⁶ *Ibid* at 206.

whether the benefits are diffuse, allowing numerous individuals and organizations to receive them.¹³⁹⁷

Ultimately, it may turn out in practice that it is too difficult to reliably distinguish between the lobbying for private and collective goods. More scholarship is warranted before any declaration is made on the subject. It is plausible that good rules creating a practical distinction could be drafted. As will be shown, the concepts of favouring citizen groups and favouring collective goods can be linked. In designing regulations to favour citizen lobbying, one is also favouring the lobbying for public goods, and visa-versa. If lobbying regulations favour citizen groups sufficiently, they might mostly solve the private collective goods distinction problem as a by-product.

We will discuss the various types of lobbying organizations; consider business lobbying versus citizen lobbying; touch upon the lobbying of other groups; investigate businesses' pursuit of private goods; investigate citizen groups' pursuit of collective goods; and explore the overlap between private and collective goods.

Classification of Groups

Building on Binderkrantz and Krøyer classifications, lobbying organizations can be broadly broken down into four categories: (1) business & trade groups, (2) citizen groups, (3) unions, and (4) government and semi-public institutions. Binderkrantz and Krøyer split citizen groups into three categories: (i) identity groups representing their members, for example the elderly or an ethnic group; (ii) public interest groups who are concerned with public goods; and (iii) other groups, such as hobby groups, occupational associations and religious groups.¹³⁹⁸ These sub-categories can be amalgamated for our purposes.¹³⁹⁹

There are reasonable grounds to distinguish the actions and positions of lobbying organizations by their classification. Lobbying organizations of the same grouping tend to fall into certain broadly similar patterns of activity, strategic choices, and approaches to publicity.¹⁴⁰⁰ Organizations of the same type generally also follow the same pattern in lobbying in favour of either private or collective goods. Bernhagen's analysis of British media reports finds that in general, "[a]ctors of the same type of organisation hold similar positions on public policy."¹⁴⁰¹

It is the distinction between business lobbying groups and citizen lobbying groups is the most relevant, and has received the most attention in the literature. Binderkrantz and Krøyer note that,

¹³⁹⁷ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 26.

¹³⁹⁸ Anne Skorkjær Binderkrantz & Simon Krøyer, "Customizing strategy: Policy goals and interest group strategies" (2012) 1:1 Interest Groups Advocacy 115–138 at 125.

¹³⁹⁹ Ideologically motivating lobbying groups, religious groups, and political groups would all qualify as citizen groups under this definition, unless they are controlled by a business interest or government.

¹⁴⁰⁰ Anne Skorkjær Binderkrantz & Simon Krøyer, "Customizing strategy", *supra* note 1398 at 121.

¹⁴⁰¹ Patrick Bernhagen, "Who Gets What in British Politics – and How?", *supra* note 144 at 561.

[t]he distinction between sectional groups promoting the interests of a specific, delimited constituency and public interest groups working for broader causes has attracted much attention from empirical as well as normative perspectives (Schattschneider, 1960; Berry, 1977, 1999; Gais and Walker, 1991).¹⁴⁰²

Business Lobbying versus Citizen Lobbying

In theory, the lobbying process is the method whereby citizens can bring their passions, concerns and new issues to political attention. It is an integral part of democratic governance. However, as covered in depth in Chapter 2, it has become dominated by business interests.¹⁴⁰³ This leads to the six concerns about lobbying: it disproportionately advantages business organizations; it favours the policy preferences of the wealthy and causes a misalignment of representation; it creates an information framing bias; it increases inequality; it favours the status quo; and it otherwise corrupts democracy. Restructuring lobbying to address these concerns requires that regulations distinguish between citizen and business lobbying. Without doing so, it will be almost impossible to rebalance lobbying.

There is a substantial difference between the lobbying of business interests and the lobbying of citizen groups. Only citizen groups have the inherent justification for their lobbying participation that they are the political actors of the polity.¹⁴⁰⁴ Even when citizens form a pressure group, very few of these pressure groups can reach the level of lobbying substantially. Citizen groups are outsized and out-organized, and often face a losing battle.¹⁴⁰⁵ Bakan points out that the sheer magnitude of the corporate lobbying shuts the citizens out of the process, and that policy solutions focused on private goods dominate those based on collective goods.

Democracy requires, at a minimum, some measure of equality of opportunity to participate in the political process. Yet profound inequality is the result when corporations – huge concentrations of shareholder wealth – exercise the same rights as individuals within that process. Today, warns Robert Monks, we face a "situation of great precariousness"; we are "dangerously close to the co-optation of government by business."¹⁴⁰⁶

¹⁴⁰² Anne Skorkjær Binderkrantz & Simon Krøyer, "Customizing strategy", *supra* note 1398 at 121.

¹⁴⁰³ Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern I: Lobbying Disproportionately Advantages Businesses, p. 144 & 77.

¹⁴⁰⁴ Citizens can and should lobby in favour of policies supported by their religion (or business). Yet, the core of lobbying should reside with the citizen not the church or business. Hate groups would not qualify as a genuine citizen groups due to their goal of seeking to strip rights from others. "Since hate mongers aim to deprive members of the target group of their right to non-discrimination, their hate speech may be prohibited." Stephanie Farrior, "Molding the Matrix: The Historical and Theoretical Foundations of International Law concerning Hate Speech" (1996) 14:1 Berkeley J Int Law 1–98 at 97; John C Knechtel, "When to Regulate Hate Speech" (2005) 110:3 Penn State Law Rev 539–578 at 541. See footnote 2266.

¹⁴⁰⁵ Richard L Hasen, "Lobbying, Rent-Seeking, and the Constitution" (2012) 64:1 Stanford Law Rev 191–253 at 227.

¹⁴⁰⁶ Joel Bakan, *supra* note 50 at 206.

There is little reason to believe the increased dominance of corporate lobbying will shape a government that cares about democratic values, or the wellbeing of the nation's residents.

The Lobbying of Other Groups

It is worth considering how other governments and unions fit with the citizen-business dichotomy of lobbying. Astroturf organizations and shadow political parties must also be considered.

Government Lobbying

The lobbying of government agencies can be largely set aside in the discussion of the normative framework for evaluating lobbying regulations. Lobbying by other branches and levels of government is an odd by-product of poor internal channels of communication, or limited communication between different levels of government. Government agencies' use of lobbying channels for communication is probably inefficient, and not ideal; but it is a reasonable part of democracy, and it does not need to be restricted or structured by lobbying regulations, except to the extent that communication is public, honest and does not drown out others trying to lobby. Unlike other forms of lobbying, intra-governmental lobbying does not threaten equality or democratic norms, and disclosure is mostly sufficient for regulating it.

Lobbying by foreign governments is another issue. Many lobbying regulations have shortcomings that allow foreign governments to mask their involvement. These regulations are deeply flawed. Lobbying by foreign governments can and should be treated with radical transparency, and careful regulations and restrictions. Such restrictions do not raise normative questions. There is no reason a foreign government should have a right to lobby, and the reasons to carefully monitor its lobbying are self-evident.

The Unique Case of Unions

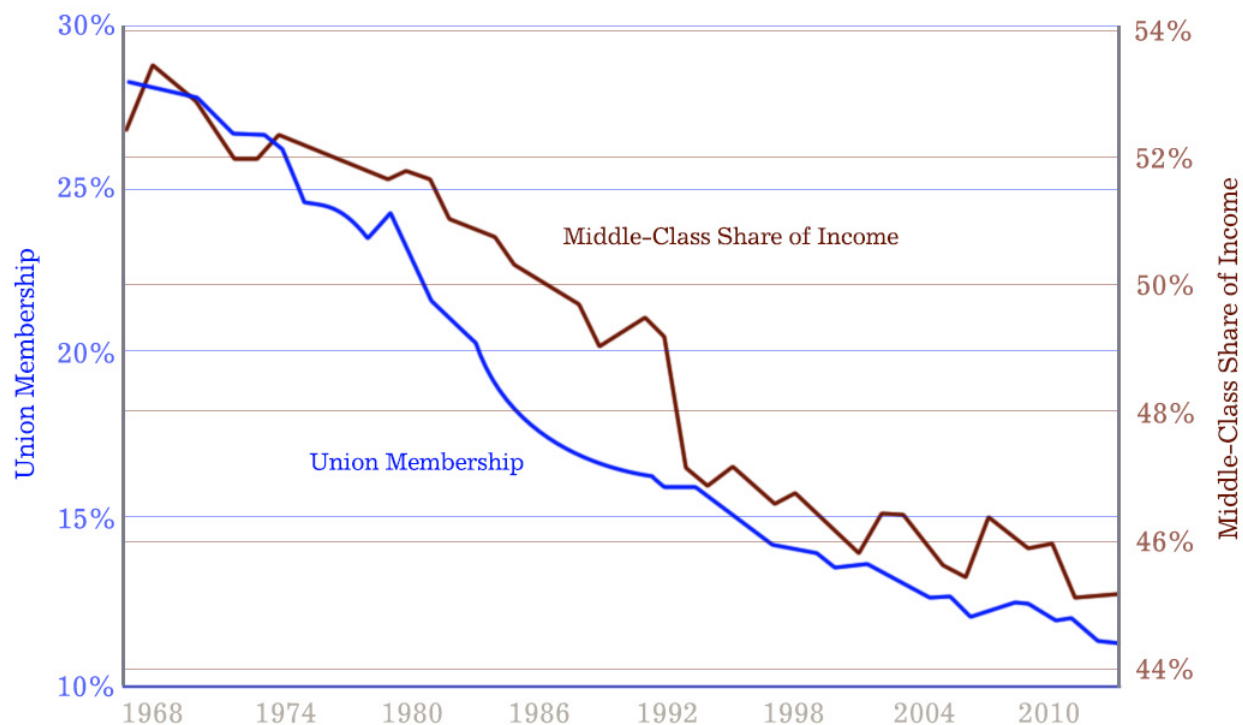
Unions are a difficult case. While they advocate for private benefits for their members, they are also integral in advocating for wider collective goods. Additionally, the private benefits they advocate for in their workplaces can become de facto standards of the industry, providing a wider standard for the public's benefit.¹⁴⁰⁷

Unions have been in decline, with negative repercussions for the broader society. Unions are essential in pushing for fairness, strengthening the middle classes, raising the income of the lower class, and empowering workers.¹⁴⁰⁸ Thus, even with the weakened state of unions in the U.S., the damage from anti-union laws on the wider population is visible. For example, in states with so called "right to work" laws, designed to weaken unions, wages are 3.2% lower, 2.6% fewer workers have employer-sponsored health insurance, and 4.8% fewer workers have employer-sponsored pensions.¹⁴⁰⁹

¹⁴⁰⁷ *How unions help all workers*, Briefing Paper, by Lawrence Mishel & Matthew Walters, Zotero, Briefing Paper (Washington, D.C. 20036: Economic Policy Institute, 2003) at 11.

¹⁴⁰⁸ Henry S Farber et al, "Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data" (2018), online: <<http://www.nber.org/papers/w24587>> at 6.

¹⁴⁰⁹ Peter Fisher, Greg LeRoy & Philip Mattera, *supra* note 806 at 23.

Figure 9: Middle Class' Declining Share of Income is Linked to Declining U.S. Union Membership ¹⁴¹⁰

Unions are also a benefit to vulnerable minorities in the workplace, helping to ensure that they are treated fairly by the business management. Unions are often accused of retarding innovation and change, and causing inefficiency in the workplace. This may be true at certain times for certain businesses, but studies have found no correlation between higher union membership rate and slower economic growth.¹⁴¹¹ In fact, Faber *et al.*'s recent study found a small positive correlation between higher union membership rate and economic growth at the state level.¹⁴¹²

Although unions might sometimes lobby on the same side as business, viewing a particular policy as beneficial because it creates more jobs, evidence from Britain indicates that "business and organised labour are reported to have opposing views on most policy proposals: they disagree much more than they agree."¹⁴¹³ At worst, union activities are slightly anti-consumer but substantially pro-citizen.

¹⁴¹⁰ Robert B. Reich, *supra* note 26 at 146.

¹⁴¹¹ So called right to work states have no gain in overall economic activity, job growth or the rate of new business creation. They do result in lower per capita income and lower wages. Peter Fisher, Greg LeRoy & Philip Mattera, *supra* note 806 at 24; Henry S. Farber et al, "Unions and Inequality Over the Twentieth Century", *supra* note 1408 at 31.

¹⁴¹² Henry S. Farber et al, "Unions and Inequality Over the Twentieth Century", *supra* note 1408 at 32.

¹⁴¹³ Patrick Bernhagen, "Who Gets What in British Politics – and How?", *supra* note 144 at 571.

Considering the weakness of unions compared to their heyday, unions' role in raising general wages, and their role as a countervailing power balancing the strength of business interests and supporting public interest policies, it makes sense to treat unions as adjacent to citizen lobbying. They are closer to being organizations that pursue collective good than private goods, and, ideally, lobbying regulations should treat them accordingly. However, if this is not politically feasible, it would still be an improvement to restrict both corporate and union lobbying equally, just as they are both banned from making political donations. Such a restriction would still be a significant improvement over the current status quo, where unions (and citizen groups) are massively out lobbied and outspent by corporations.

The Problem of Disguised Organizations and Astroturf Lobbying

Astroturf lobbying¹⁴¹⁴ campaigns pose a problem for any system of lobbying regulations, but a much more significant problem for a regulatory regime that tried to prioritize citizen lobbying. It can be difficult to distinguish a genuine citizen led lobbying effort from an astroturf campaign, but wise regulations and active investigation should be able to unravel this knot – especially if the laws require lobbying organizations to reveal their members, bottom-up or top-down structure, funding sources, and disclose the policies they are pursuing (whether those are private or collective goods). Publicizing the goal of the lobbying and the funding sources behind the organization should help reveal astroturf campaigns. In contrast, the more a group pushed for secrecy, and did not want its lobbying goals publicized, the more one might suspect the group was merely a facade. In general, the more a citizen organization believes their argument is truly in the public interest, providing a collective good, the more they would want the public to know about it. This might not work in all situations, but it can be a useful guide.

Strong anti-astroturf regulations should help discourage astroturf lobbying. The more the regulations were well-structured on the issue, the more those pursuing astroturf lobbying would be required to build a deeper and more convincing organization that was closer and closer to a real citizen group. Ideally, good regulations and enforcement would prevent enough astroturf lobbying campaigns that it would make more sense for the organization to either lobby directly, or to enlist the public and build an actual citizen lobbying group, rather than an astroturf organization.

This problem will always be more difficult on the web. If the government wants to ensure genuine online citizen input, it's going to have to invest in tools to help distinguish citizens from bots and sockpuppets for the purpose of surveys and online submissions. Based on the porous nature of the web, and the massive implications of an election result, it strikes me as unlikely we will ever be able to move to an online voting system. However, for more targeted uses, such as lobbying submissions to committees or virtual citizen assemblies, a secure online system with anti-bot and anti-sockpuppet detection seems plausible.

¹⁴¹⁴ Astroturf lobbying is lobbying that involves organizations that disguise themselves as grassroots. They are fake grassroots, so they are "astroturf". It is a common means lobbyists use to create the perception of popular support. See p. 106.

Shadow Political Parties

Shadow political parties are organizations that mimic the structure and scope of political parties in a democracy, but are run as private top-down entities rather than by citizens, activists, and politicians (see Chapter 2)¹⁴¹⁵. Shadow political parties pose their own challenge for democracy. Good campaign finance restrictions, revolving door limitations, and the multiplicity and strength of already existing political parties in Canada should help prevent them from becoming rooted here. However, pre-emptive rules about the necessarily internally democratic structure of political parties would be a good idea. Once established, shadow political parties have phenomenal lobbying strength. Well-designed rules should treat them as an astroturf group or as akin to a powerful trade association, despite their mask of citizen involvement.

Business Interests Pursue Private Goods

There is strong evidence that corporations primarily lobby for private goods. Godwin *et al.* found that, “corporate lobbyists report spending almost two-thirds of their resources pursuing goods that benefit four or fewer interest organizations (goods near the private end of the continuum).”¹⁴¹⁶ The pursuit of private goods is by far the main reason companies lobby the executive branch and regulatory agencies.¹⁴¹⁷ The lobbying pursuit of private goods is often extremely narrow and technical, with few beneficiaries.¹⁴¹⁸ Goodwin *et al.* argue this indicates that the lobbying benefits are extremely private, benefiting individual firms more than the industry as a whole, are rarely extending to the wider society.¹⁴¹⁹ This lobbying often takes the form of rent-seeking, where,

individuals or groups devote resources to capturing government transfers, rather than putting them to a productive use, and lobbyists are often the key actors securing such benefits.¹⁴²⁰

This lobbying might also take the form of pushing for expenditures on wasteful projects, excessive subsidies, unproductive tax breaks, and other inefficient use of government resources.¹⁴²¹

¹⁴¹⁵ Chapter 2 – Understanding Lobbying in Canada and the U.S.: Understanding Lobbying: What Do Lobbyists Do: Build Relationships with Officials: Large Individual Donors and Shadow Political Parties, p. 90.

¹⁴¹⁶ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 257.

¹⁴¹⁷ *Ibid* at 231.

¹⁴¹⁸ Anne Skorkjær Binderkrantz & Simon Krøyer, “Customizing strategy”, *supra* note 1398 at 130.

¹⁴¹⁹ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 230.

¹⁴²⁰ Richard L. Hasen, *supra* note 1405 at 197. Stiglitz argues that rent-seeking has become endemic to the upper echelons of America.

“Disproportionately, [the 1%] are those who have excelled in rent seeking, in wealth appropriation, in figuring out how to get a larger share of the nation’s pie, rather than enhancing the size of that pie. (Such rent seeking activity typically actually results in the size of the economic pie shrinking from what it otherwise would be). ... The notion that large fractions of today’s inequality are associated with rent seeking is supported by a look at the composition of the wealthiest and top income earners. But there is additional evidence. Piketty’s recent research has emphasized a different aspect of the “just deserts” argument: the increasing fraction of inequality arising from inheritance.”

Joseph E. Stiglitz, *supra* note 24 at 8.

¹⁴²¹ Richard L. Hasen, *supra* note 1405 at 197.

Hansen, Mitchell and Drope also found that firms are primarily motivated to lobby for private goods, not collective ones.¹⁴²² They found that there are five best predictors of a firm's political activity. Four of these factors relate to private goods. They are (1) the level of regulation of the industry, (2) the level of regulation of the business, (3) the importance of possible government contracts, and (4) the number of lawsuits involving the firm. The fifth factor is how many times the press has reported that the firm has had a negative impact on public welfare.¹⁴²³ This last factor is not exactly a private good, but it is a sort of anti-collective good indicator.

The lobbying for private goods deserves an added level of scrutiny, because there is always a stronger temptation to deceive when private rewards are at stake. When a person smells the promise of personal or business profit, there is always an added chance that personal integrity and concerns about legitimate democratic participation will be disregarded.

Just as business interests are the most likely to pursue private goods, Binderkrantz and Krøyer found that they are the least likely to pursue generalized collective interests.¹⁴²⁴ There is a reason that business interests tend to pursue selfish private goods. Business is constructed to operate in the narrow profit-driven domain built around self-interest, and its lobbying reflects this. We will investigate this later, in the discussion of the nature of the corporation.

Citizen Organizations Pursue Collective Goods

Citizen lobbying groups, or public interest groups, operate in a broader political and social context, expressing a wider aspect of human nature, and are generally organized to seek "a collective good, the achievement of which will not selectively and materially benefit the membership or activists of the organization"¹⁴²⁵. The groups are not necessarily correct in their views, but they are residents and citizen actors. They express themselves in their role as members of the democracy, as humans engaging in politics, not simple as economically self-interested consumers or producers. They are concerned about collective goods.

A sense of fairness is an inborn human trait, and necessary for basic co-operation and for society to flourish. This sense of fairness will often lead to lobbying for goods that also help others – collective goods. Humans are also selfish, and we must account for both personality traits in approaching lobbying regulations. Yet, for a healthy society, the lobbying for collective goods should be prioritized.

In allowing business interests to dominate lobbying, we have in effect collapsed political and moral concerns into economics and capitalism, and heavily biased government decision-making towards economic issues, favouring policies that generate the most profit – regardless of their morality, long-term sustainability and fit within the democracy. The lobbying system's focus on private goods over

¹⁴²² R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 231.

¹⁴²³ *Ibid.*

¹⁴²⁴ Anne Skorkjær Binderkrantz & Simon Krøyer, "Customizing strategy", *supra* note 1398 at 130.

¹⁴²⁵ Ken Kollman, *supra* note 427 at 15.

collective goods is narrowing and damaging to wider public concerns. It limits the range of options the government genuinely considers.

This increase in business lobbying for private goods is likely the reason government can have such a large size in modern society, yet often seems to be so impotent when it comes to significant issues.¹⁴²⁶ There is a lot of churning, a lot of lobbying negotiating and government decision-making, but it is often re-directed to intense small-scale fights over private goods prioritized by the current lobbying system.¹⁴²⁷ Our unregulated lobbying system “tends to skew public policy toward narrow groups that ... pursue their policy goals at the expense of the general public.”¹⁴²⁸ It tends towards kludgeocracy.¹⁴²⁹ This pattern of business lobbying for private goods over citizen lobbying for collective goods provides good reason to distinguish between the lobbying of business interests and citizen organizations, and prioritize the lobbying of citizen groups. In contrast, a system that treats the lobbying of both groups the same, as the current system does, is not actually neutral, due to the lobbying advantages businesses have, it will prioritize business interests and private economic goods over citizen interests and collective non-economic goods. Democracy should be built to prioritize citizen input.

The Overlap between Private Goods and Collective Goods

There can be an overlap between private and collective goods. Often this overlap is the basis for alliances between business interests and citizen activists groups. For example, Google and Netflix allied with citizen groups in many of lobbying fights in support of net neutrality. Binderkrantz and Krøyer address the issue of overlap.

Whether a group promotes special or general interests is partly a matter of perception and framing. ... Further, groups may deliberately seek to portray their goals in terms of the public interest in order to attract support for their position. For example, unions representing public sector employees tend to argue that improving the working conditions of their members will benefit more general interests such as securing better schools or day care. Nevertheless, not all policy goals are equally easy to frame in general terms and group leaders may be expected to be conscious of the extent to which their primary aim to promote the interests of members or citizens more generally.¹⁴³⁰

¹⁴²⁶ Lee Drutman, *supra* note 172 at 3 & 29.

¹⁴²⁷ *Ibid* at 29.

¹⁴²⁸ Richard L. Hasen, *supra* note 1405 at 227. The influence of lobbyists also leads to more low salience provisions favouring particular business interests in legislation, leading to more kludge in the bills – more clumsily established systems to address policy problems while satisfying business lobbyists. Lee Drutman, *supra* note 172 at 30.

¹⁴²⁹ See Chapter 1 – Lobbying Regulation: Structural Political Difference that Impact the Practice of Lobbying: Differences: Kludgeocracy, p. 50.

¹⁴³⁰ Anne Skorkjær Binderkrantz & Simon Krøyer, “Customizing strategy”, *supra* note 1398 at 122.

According to Pross, classifying groups by self-interest vs. public interests has its downsides. He contends it is messy, since many groups pursue both types of goals at the same time. Moreover, it presents a one-sided view of the relationship between the groups and government, because groups are often adapting to the pressures the government places on them.¹⁴³¹

Other authors distinguish between the lobbying of different groups. Chari *et al.* argue that, “[l]egislation should differentiate between paid lobbyists, ordinary citizens and representatives of sectorial interest groups such as farmers, trade unions and employers organizations.”¹⁴³² This is far from impossible: the EU already specifically distinguishes between the two, provides funding for diffuse citizen interests to help overcome their collective action problem.¹⁴³³ The literature has moved in favour of clarifying and supporting the distinction between the groups, as the dominance of business interests in the lobbying process has become greater and more apparent.

While the distinctions might occasionally be fuzzy, most of the time we can and do distinguish between the citizen groups and business interests quite effectively in day-to-day life and regulatory decisions. Tax law regulations distinguish charities from businesses, nonprofit organizations from profit-driven ventures, and volunteers from employees. It would not be too technically difficult to design a lobbying system that distinguished between citizen groups and business interests, and prioritized the lobbying of the former. There may be political resistance, but that is a different issue.

It is more technically challenging to establish neutral rules and oversight that distinguish between private and collective goods. The rules might evaluate how wide-spread the benefits of the policy change would be, how much the organization would profit directly from the change, and the nature, structure and funding of the organizations pushing for the change. They can also evaluate the likelihood that the lobbying organization will profit from their preferred policy outcome, even if it is eventually revealed that their lobbying was deliberately deceptive.¹⁴³⁴ We regularly distinguish corporations from people, economic actors from voters, workers from volunteers, politics from business, genuine believers from paid mouth pieces, and moral values from consumerism. There will always be edge cases, but it seems quite possible to design a system that distinguishes lobbying for collective goods from private goods, and to prioritize the former.

¹⁴³¹ A. Paul Pross, *supra* note 2 at 146; Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 138.

¹⁴³² Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 138.

¹⁴³³ Maja K. Rasmussen, *supra* note 248 at 242. For example, in 2011, environmental non-governmental organizations (ENGOS) received € 8 997 284 in EU funding

¹⁴³⁴ For example, oil companies continue to profit from the results of their denialist lobbying, even after the revelation that much of their lobbyists deliberately misled the government regarding the reality and threat of climate change. In contrast, the Union of Concerned Scientists would not continue to profit from their lobbying, if it was revealed that they had deliberately misled the government by creating a threat of climate change that was not real. See Jordi Xifra, *supra* note 418 at 284; Shannon Hall, *supra* note 35; Dan Bacher, *supra* note 809; Union of Concerned Scientists, *supra* note 809; Kathy Mulvey & Seth Shulman, *supra* note 32 at 12, 16, 22, 27; John Cook et al, *supra* note 30 at 3.

The Nature of the Corporate Lobbying

There is a good basis for differentiating the lobbying of citizen organizations and businesses. There are three key reasons a business is distinct from a citizen organization, and not simply another form of collective association.¹⁴³⁵

The first reason is that, unlike citizen groups, businesses are by design not representative of their membership. Businesses are top-down hierarchical structures, whose positions and activities represent the decisions of only a small cadre of upper managers and owners. The wider employees of a business are not truly voluntary members, as they need employment, and have little say in the business' political decisions or ideology. Businesses often do not even disclose their lobbying practices to their own shareholders, never mind their lower level employees.¹⁴³⁶ Moreover, unlike citizen organizations, businesses are largely structured for the pursuit of profit, not the general pursuit of the employees', communities' or even shareholders' overall well-being – and a business' political influence will reflect this priority.

The second reason is that, as discussed in Chapter 2, businesses have numerous advantages in lobbying that have allowed them to almost monopolize large-scale lobbying, granting them disproportionate policy-framing influence as compared to citizen groups.¹⁴³⁷ This political influence pushes officials to focus on areas that profit business, and minimizes governmental responsiveness in other areas that concern citizens. Business lobbying drowns out citizen lobbying, damaging democracy.

The third reason is the questionable nature of business and the corporate personality, a personality shaped by its pursuit of profit. This issue bears substantial investigation. It is explored at length in Bakan's work, *The Corporation: The Pathological Pursuit of Profit and Power*¹⁴³⁸, and the insights that follow are largely derived from his work.

Corporate Personality

The large corporation is often treated as simply a collection of individuals, bound by contracts, working towards a common end.¹⁴³⁹ Any goods owned by the corporation are viewed as essentially the

¹⁴³⁵ There are also relevant differences in their rights as corporate legal personalities as compared to actual citizens. Those differences are discussed in detail in Chapter 7 and Chapter 8.

¹⁴³⁶ For example, I recently received a Board of Directors' recommendation for the annual shareholder meeting in which they urged me to vote against a measure that would force them to reveal the company's lobbying practices to the shareholders.

¹⁴³⁷ Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern I: Lobbying Disproportionately Advantages Businesses, p. 144.

¹⁴³⁸ Joel Bakan, *supra* note 50.

¹⁴³⁹ For the purpose of the following discussion, we can treat businesses and corporations as essentially identical. Although smaller businesses and professional organizations are often not incorporated, almost universally businesses large enough for a significant lobbying presence are incorporated. With rare legal or tax-based exceptions, running a large business successfully requires incorporation. Trade associations are often nonprofits, but, as many of my interviewees stated, they follow the lead of their largest members, who generally will be incorporated businesses.

property of its shareholders, while any action it takes reflects the decisions of its managers acting as agents for the goals and values of the shareholders. This bloodless description of the corporation is far from complete. It serves the economic-political goal of naturalizing the corporation as automatic outgrowth of the free market, while neutralizing criticism of its actions by deflecting them onto the shareholders. The shareholders in turn are protected from responsibility by being too diffuse, have too little direct power over the corporation, and by their limited legal liability (that in turn relies on the corporation actually having a distinct personhood). In truth, as Bakan argues, corporations are the creation of laws and statutes. These rules delineate the corporation's structure, legal responsibilities, and the shareholder's protection from corporate liabilities.

Large corporations are significant loci of power that maintain and wield tremendous wealth and political influence, according to their own internal social norms, managerial decisions with varying degrees of shareholder input, and the laws that govern their structure and goals.¹⁴⁴⁰ Bakan argues that,

[w]hen, in 1933, Supreme Court Justice Louis Brandeis likened corporations to "Frankenstein monsters," there was more to his observation than rhetorical flair. Governments create corporations, much like Dr. Frankenstein created his monster, yet, once they exist, corporations, like the monster, threaten to overpower their creators.¹⁴⁴¹

The corporation exists as a distinct existence, a permanent institution. The law grants this organization legal personhood, and the pattern of actions it takes can be understood to express a sort of corporate personality, which includes the fusion of its activities, its dictatorial structure, the views of employees (heavily weighted to the few in charge), and its corporate culture.

Corporate Personality is Shaped by Profit

The corporate personality may vary depending on corporate culture, the style of the directors and the priorities shareholders. However, Bakan argues that the essence of its personality always remains the same, due to the corporation's overriding goal: profit.¹⁴⁴²

[T]he corporate design contained in hundreds of corporate laws throughout the world is nearly identical... the people who run corporations have a legal duty to shareholders, and that duty is to make money. [The law] dedicates the corporation to the pursuit of its own self-interest... Corporate law thus casts ethical and social

¹⁴⁴⁰ See also Chapter 9 – Reform Principles: Principle 10: Separate Business and State: Loci of Power, p. 544.

¹⁴⁴¹ Joel Bakan, *supra* note 50 at 149.

¹⁴⁴² It can be argued that large corporations are also risk averse organizations, which seek to pursue profit through their already known and experienced methods. Nonetheless, the profit motive remains central to their existence. Several countries are experimenting with corporate structures that do not prioritize shareholder profits, but these are still too rare to have any real impact on the marketplace. Smaller corporations might also exhibit less focus on profit, but they have less power and participate far less in lobbying.

concerns as irrelevant, or as stumbling blocks to the corporation's fundamental mandate.¹⁴⁴³

Bakan argues that while a corporation may pursue some level of social and environmental responsibility, ultimately, the vast majority will only do so to the extent that this does not interfere with their prime directive of profit. He argues that by the logic of the current corporate law, prioritizing social responsibility is immoral. His view is supported by Milton Friedman's position.

There is but one "social responsibility" for corporate executives, Friedman believes: they must make as much money as possible for their shareholders. This is a moral imperative. Executives who choose social and environmental goals over profits—who try to act morally—are, in fact, immoral. There is, however, one instance when corporate social responsibility can be tolerated, according to Friedman—when it is insincere... hypocrisy is virtuous when it serves the bottom line.¹⁴⁴⁴

Not every corporation will be as cynical as Friedman advocates, but the logic of the marketplace, particularly for larger corporations, pushes them in this direction.¹⁴⁴⁵ Moreover, regardless of the technical merit of Friedman's views, the belief that profit must be prioritized over social responsibility is in itself socially damaging. The more people inside and outside corporations believe that a corporation's sole duty is to maximize profit, the more it will act that way, disregarding others' wellbeing. It is a creed that has increasingly taken hold over since the 1980s and it is not clear if there is the political and social will to roll this process back.¹⁴⁴⁶

Bakan argues that no matter the individual merits of the executives, it is the general personality of the corporation – as legally constructed – that is at issue.¹⁴⁴⁷ Executives are managers of the company; its resources are not theirs.

¹⁴⁴³ Joel Bakan, *supra* note 50 at 37.

¹⁴⁴⁴ *Ibid* at 34.

¹⁴⁴⁵ Litowitz argues that the disregard for ethical obligations results from the (1) size, (2) agency and indirect casual chains from any insider's actions to the resultant external harm, and (3) the prestige and authority of the organization in the eyes of the employees and public. He argues these factors can apply to any large institution and are not the result of the corporate structure (although they are endemic to large corporations). Undoubtedly, he is right that size is a factor, as is distance from the community, the higher status of the decision-maker (making internal and external moral opposition more difficult), the requirements of agency that separate business decisions from personal ethical ones, and the lack of repercussions for wrong-doing. In contrast, many corporations noted for their more ethical behaviour or altruistic goals were also explicitly established with those goals and headed by a powerful founder(s) who instilled them into the corporate culture (Tesla, Ben & Jerry's, the Body Shop, etc.), and these corporations still often fall short in the areas outside of the main ethical goal. Whether Litowitz or Bakan are closer to the truth, the amoral nature of large corporations remains the same, and the resulting lessons equally applicable to lobbying regulations. Douglas Litowitz, "Are Corporations Evil?" (2004) 58:3 Univ Miami Law Rev 811–841 at 839.

¹⁴⁴⁶ This view is deeply tied to the stress on meritocracy and the winner-take-all society discussed below.

¹⁴⁴⁷ Joel Bakan, *supra* note 50 at 56.

They can no sooner use it to heal the sick, save the environment, or feed the poor than they can to buy themselves villas in Tuscany.¹⁴⁴⁸

This duty requires they manage the corporation to prioritize profit above all, leading the corporation to develop a type of personality.

[W]hen we asked Dr. [Robert] Hare [an internationally renowned psychologist] to apply his diagnostic checklist of psychopathic traits... to the corporation's institutional character, he found there was a close match. The corporation is irresponsible, Dr. Hare said, because "in an attempt to satisfy the corporate goal, everybody else is put at risk." ... A lack of empathy and asocial tendencies are also key characteristics of the corporation, says Hare—"their behavior indicates they don't really concern themselves with their victims"; and corporations often refuse to accept responsibility for their own actions and are unable to feel remorse: "if [corporations] get caught [breaking the law], they pay big fines and they . . . continue doing what they did before anyway." ... Finally, according to Dr. Hare, corporations relate to others superficially— "their whole goal is to present themselves to the public in a way that is appealing to the public [but] in fact may not be representative of what th[e] organization is really like."¹⁴⁴⁹

Bakan argues that the corporation as a legally designated person acts to prioritize self-interest and disregard morality. He points out that most of us "would find its "personality" abhorrent, even psychopathic, in a human being, yet curiously we accept it in society's most powerful institution."¹⁴⁵⁰ This psychopathy is visible in corporations' disregard of legal restrictions, a result of its design which leaves only the person of the corporation legally responsible, not the owners or decision-makers within it.

Shareholders cannot be held liable for the crimes committed by corporations because of limited liability... Directors are traditionally protected by the fact that they have no direct involvement with decisions that may lead to a corporation's committing a crime [and by liability insurance]. Executives are protected by the law's unwillingness to find them liable for their companies' illegal actions unless they can be proven to have been "directing minds" behind those actions. Such proof is difficult... because corporate decisions normally result from numerous and diffuse

¹⁴⁴⁸ *Ibid* at 50.

¹⁴⁴⁹ *Ibid* at 56.

¹⁴⁵⁰ *Ibid* at 28.

individuals' inputs, and because courts tend to attribute conduct to the corporate "person" rather than to the actual people who run the corporations.¹⁴⁵¹

The corporation is the most practical target for prosecution. Yet, since it lacks a corporal form to imprison, and – since officials are extremely reluctant to fine a business so severely it risks shutting down and causes a surge in unemployment – punishing the corporation generally has limited effect. Legal fines simply fall within a calculated cost of doing business. “Like the psychopath it resembles, the corporation feels no moral obligation to obey the law... compliance with law, like everything else, is a matter of costs and benefits.”¹⁴⁵² Ironically, the legal duty to maximize the shareholder’s return inclines corporations to break most other laws, as long as it appears that the return will exceed the potential fines and publicity costs. “No corporation is exempt from this built-in logic”¹⁴⁵³.

Externalities

It is inevitable that corporations, indifferent to the general well-being of the populace when it interferes with their profits, will pursue activities that create large externalities, pushing the costs of their actions onto others. Bakan argues that the corporation,

is deliberately programmed, indeed legally compelled, to externalize costs without regard for the harm it may cause to people, communities, and the natural environment. Every cost it can unload onto someone else is a benefit to itself, a direct route to profit. ... [A] thousand ... points of corporate darkness, from Bhopal and the Exxon Valdez to epidemic levels of worker injury and death and chronic destruction of the environment, are the price we all pay for the corporation's flawed character.¹⁴⁵⁴

These externalities undermine the functioning of the market by misaligning private and social returns.¹⁴⁵⁵

Short-Sighted Decisions

It would be some consolation if there were good evidence that despite their psychopathic personality, corporations valued long-term success and operated with foresight about the repercussions of their actions. It would complicate the picture if corporations also displayed awareness that there are more profits to be had over the long-term in a healthy society. However, the lure of significant short-term profits combined with the pressure of quarterly results and the minimal chance that a corporation will suffer repercussions of its poor decisions, have repeatedly lead to entirely foreseeable disasters.

¹⁴⁵¹ *Ibid* at 79.

¹⁴⁵² *Ibid*.

¹⁴⁵³ *Ibid* at 80.

¹⁴⁵⁴ *Ibid* at 72.

¹⁴⁵⁵ Joseph E. Stiglitz, *supra* note 38 c 6, s The battle over the big ideas: government versus market failure.

Drutman argues that the establishment of significant business lobbying appears to have been an inflection point where American corporations switched from long-term planning that included the wellbeing of society as a factor in their decisions, to short-term entirely self-interested decision making.¹⁴⁵⁶ Drutman quotes Waterhouse and Mizruchi's position that the 1972 establishment of the founding of the Business Roundtable represented a move towards a short-term focus on the returns on lobbying.

The new Business Roundtable, unlike the storied CED (which was primarily a research institute), existed solely to lobby. Instead of attempting to accommodate the forces of the state and organized labor ... the corporate elite shifted its focus toward an effort to reduce the role of government and the power of labor¹⁴⁵⁷.

The 2008 financial crisis is a good example of how an entire industry can value short-term profit over its long-term stability and the social damage of its actions. The banks lobbied for the deregulation that allowed them to over-extend themselves in the first place. This deregulation, although it increased profits in the short-term, also increased risk, and forced the competing banks to increase their own leverage and risk to continue to compete. It created a race to the bottom, to financial collapse; leaving the populace to bear the cost of the crisis: the massive unemployment, the economic recession, the global instability, and the expense of the bank bailouts. The banks did not wait long before they began to lobby against the rules put in place to prevent another financial crisis.¹⁴⁵⁸

Enron is another example of how a company can combine psychopathic disregard to externalities and its own long-term sustainability. After successfully lobbying for deregulation, Enron was able to run a power auction for the California energy market on its own trading floor. This proved to be a short-term gain and long-term loss.¹⁴⁵⁹

In a series of brilliantly diabolical schemes, whose sinister character is best captured by Enron insiders' nicknames for them—"Death Star," "Get Shorty," and "Fat Boy"—the company helped manufacture an artificial energy shortage that drove the price of electricity, and consequently its profits, sky high. Thirty-eight blackouts plagued California over the six months... As Ralph Nader's Public Citizen organization concluded, "Phil Gramm's commodities deregulation law allowed Enron to control electricity in California, pocket billions in extra revenues and force millions of California residents to go hundreds of hours without electricity and pay outrageous

¹⁴⁵⁶ Lee Drutman, "The origins of modern business lobbying" (2014) 3:3 Interest Groups Advocacy 315–321 at 317.

¹⁴⁵⁷ *Ibid.*

¹⁴⁵⁸ Gary Rivlin, "How Wall Street Defanged Dodd-Frank" (30 April 2013), online: <<https://www.thenation.com/article/how-wall-street-defanged-dodd-frank/>>.

¹⁴⁵⁹ Joel Bakan, *supra* note 50 at 99.

prices." On June 19, 2001, the crisis was brought to an end when the Federal Energy Regulatory Commission imposed strict price controls on California's electricity markets... Enron filed for bankruptcy four months later.¹⁴⁶⁰

Enron operated with complete disregard for the external harm the blackouts were causing to the populace of California. It also operated with extreme short-sightedness, ignoring the risk that the reoccurring blackouts would cause the government to re-regulate the energy market and destroy a key source of its income, even as it was engaging in massive accounting fraud to cover up previous losses.

Corporate Personality and Lobbying

The corporate personality, as corporations are currently legally constructed, raises obvious problems with their dominance of lobbying. It undermines the argument that the clashing lobbying of different businesses will lead to a wider social good. If the social exchange model of lobbying is correct, then social forces, norms, and influences are as important as economic ones in the lobbying process. In this case, if those involved in lobbying believe that corporations should be psychopathic, and should not value the unprofitable public good, then the effects of lobbying will be even worse. The social expectation will be to never support an unprofitable good, no matter how little the loss and much the benefit to the public. Beyond this, the corporate personality raises three substantive doubts about lobbying concerning the validity of the information corporations provide; the types of policies corporations lobby for; and the very notion of corporate partnership with government.

Corporate Information Provision

Corporate lobbyists often argue they are doing good by “educating people”¹⁴⁶¹ and that the lobbying process is fair because everyone has the opportunity to gather resources and lobby the government.

“It is very difficult for a member of Congress, who is a very busy person, to understand what every issue is, every day,” [corporate lobbyist Anne Wexler] says.

“Our job . . . is to be sure that the folks who are going to be making the decisions at least have an understanding of what the issues are.”¹⁴⁶²

Yet, as Bakan points out, there is a lack of well-resourced countervailing lobbies representing the interests of the general citizens – the positions that support more collective outcomes – across the broad range of topics the corporations are lobbying on.¹⁴⁶³ Moreover, as covered in Chapter 3, there is good reason to doubt the veracity of the information provided by corporate lobbying.¹⁴⁶⁴ Taking into

¹⁴⁶⁰ *Ibid.*

¹⁴⁶¹ *Ibid* at 206.

¹⁴⁶² *Ibid.*

¹⁴⁶³ *Ibid* at 107.

¹⁴⁶⁴ Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern III: Lobbying Creates an Information/Framing Bias: The Information Provided by Lobbyists is Not Impartial, p. 172.

account the corporation's motivation and low risk of repercussions, it is likely that corporations will often be fundamentally dishonest in the information they provide through lobbying, deliberately misframing issues when their profits are at stake and when the benefits exceed the risks.¹⁴⁶⁵

Corporate Lobbying for Externalities

Motivated by the profit motive and bound by the rules of self-interest, corporations will naturally lobby for policies that are harmful for the public; policies that allow them to offload their costs onto others and avoid the repercussions of the harm they might do.¹⁴⁶⁶

As institutional psychopaths, corporations are wont to remove obstacles that get into their way. Regulations that limit their freedom to exploit people and the natural environment are such obstacles, and corporations have fought, with considerable success over the last twenty years, to remove them. Through lobbying, political contributions, and sophisticated public relations campaigns, they and their leaders have turned the political system and much public opinion against regulation. The law's ability to protect people and the environment from corporate harm has suffered as a result.¹⁴⁶⁷

Government regulations, as imperfect as they might be, are necessary to control corporate activities to ensure their externalities are minimized, and that they bear the cost and responsibilities for their actions. When corporations have influence over the government, they will seek to ensure it does not do this.

When corporations lobby governments, their usual goal is to avoid regulation.

Sometimes they seek to stop governments from introducing new or stronger regulations (as the auto industry did with the fuel efficiency standard); other times

¹⁴⁶⁵ Peggy Lopipero, Dorie E. Apollonio & Lisa A. Bero, "Interest Groups, Lobbying, and Deception", *supra* note 802 at 655; See also, Naomi Oreskes & Erik M. Conway, *supra* note 35 c Conclusion; Kevin Grandia, *supra* note 35; Peter Fisher, Greg LeRoy & Philip Mattera, *supra* note 806 at 16; Kathy Mulvey & Seth Shulman, *supra* note 32 at 12, 16, 22, 27. See also, John Cook et al, *supra* note 30 at 4.

¹⁴⁶⁶ The corporate push for modern (defense-friendly) tort reform can be understood as an extension of corporate power and a de-regulation agenda. It is an attempt to reduce the potential repercussions and costs of harming others. Once there are no regulations restricting their use of externalities, the legal system might step in and impose liability via a tort case. Hence the deregulation agenda includes lobbying for tort reform. This deregulatory goal is evidenced by how tort reform (dismantling) does not offer any alternative forms of deterrence to keep corporate actors in line. Page leveled this criticism at Huber's argument for tort reform.

"What Huber proposes is a giant leap backward. ... He fails to explain why the political and economic realities that previously left workers, consumers, and others at the mercy of those with whom they did business will somehow produce more just and humane relationships under the sort of libertarian regime he espouses, rather than replicate the conditions that initially gave rise to the old tort reform. In effect, his radical reform is an invitation for history to repeat itself."

Joseph A Page, "Book Review: Deforming Tort Reform" (1990) 78 Georgetown Law J 649 at 656.

¹⁴⁶⁷ Joel Bakan, *supra* note 50 at 85.

they pressure governments to repeal, weaken, or narrow the scope of existing regulations (as Enron did with the regulation of energy futures trading).¹⁴⁶⁸

Bakan argues that it is corporate structure that prompts this form of private self-interested lobbying. To expect them to do otherwise is to misunderstand their basic personality. Akin to Freeman's argument that immorality is morality for corporations, so too is influencing democratic government for their private benefit proper behaviour from their point of view.

The executive who, out of principled concern for the integrity of the democratic process, refuses to be involved in political influence, fails his or her shareholders, as well as the corporation's legal mandate to promote its best interests. The job of a corporate executive is not to protect democracy but to manage its uncertainties and avoid the obstacles it presents.¹⁴⁶⁹

Corporations, by their nature, will seek to pervert the democratic process when it profits them. To do otherwise is against their mandate. We should not expect them to voluntarily lobby with honesty and integrity.

Corporate Partnership with Government

Corporations often frame themselves as partners with government; they do not see their lobbying as illegitimate, but rather as helpful.¹⁴⁷⁰ The industry lobbyists I interviewed expressed this viewpoint. They saw no conflict between their lobbying and good governance. Indeed, many officials, including some of my interview subjects, also see the economic partnership with the corporations as an essential part of governance. Bakan argues that this misconstrues a fundamental aspect of democracy.

Democracy, on the other hand, is necessarily hierarchical. It requires that the people, through the governments they elect, have sovereignty over corporations, not equality with them; that they have authority to decide what corporations can, cannot, and must do. If corporations and governments are indeed partners, we should be worried about the state of our democracy, for it means that government has effectively abdicated its sovereignty over the corporation.¹⁴⁷¹

Bakan argues this concept of partnership has given corporations additional undeserved sway in lobbying.

¹⁴⁶⁸ *Ibid* at 102.

¹⁴⁶⁹ *Ibid*.

¹⁴⁷⁰ *Ibid* at 107.

¹⁴⁷¹ *Ibid* at 108.

Though corporations have a place in representing their concerns to government and cooperating with government on policy initiatives, the special status they currently enjoy as “partners” with government endangers the democratic process. At a minimum, their influence should be scaled back to a degree more commensurate with that of other organizations, such as unions, environmental and consumer groups, and human rights advocates.¹⁴⁷²

A good number of my interview subjects stated that government takes the lobbying concerns of business more seriously than that of citizen groups and unions. There is a long history of this prioritizing of business concerns in Canada.¹⁴⁷³ The Canadian government continues to refer to businesses as co-equal partners in policy-making. This is likely both a result and another source of this bias.

In summary, a consideration of the corporation’s personality leads to valid questions about its lobbying practices. Corporations are by nature creations that will pursue externalities who will exploit democracy and democratic governance when it is profitable. There is good reason to be suspicious of corporate lobbying, and this provides more justification for stricter regulations and to treat business lobbying differently than citizen lobbying. In *Citizens United*¹⁴⁷⁴, Justice Stevens stated that it is common sense to treat corporations different from people in regard to voting and electoral participation.¹⁴⁷⁵ By the mirror principle, this common sense conclusion should also apply in the area of lobbying. The legal fiction of corporate personality is at its heart a legal fiction. It does not necessitate endowing corporations with all the rights of a real person.¹⁴⁷⁶

The Separation of Business and State

Another normative support for distinguishing between the lobbying of businesses and the lobbying of citizens can be found in Kuhner’s article *The Separation of Business and State*¹⁴⁷⁷. Kuhner argues that the problem of money and influence entering politics through campaign contributions and lobbying is a fundamental problem of distinct systems overlapping: “the system of capitalism and the private economic sphere of business on the one hand, and the system of democracy or the public sphere of governance and state activities on the other.”¹⁴⁷⁸ He proposes an additional constitutional, psychological, and social principle should be created: a wall of separation between business and

¹⁴⁷² *Ibid* at 162.

¹⁴⁷³ Fred Thompson & W. T. Stanbury, *supra* note 2 at 121.

¹⁴⁷⁴ *Citizens United v. Federal Election Commission*, *supra* note 1021.

¹⁴⁷⁵ *Ibid* at 979.

¹⁴⁷⁶ Sinhababu makes this point clearly and succinctly in his blog post on *Citizens United*. Neil Sinhababu, “Fiction, Reality, And Corporate Personhood”, (6 November 2011), online: <<http://www.donkeylicious.com/2011/11/fiction-reality-and-corporate.html>>. See Chapter 7 and Chapter 8.

¹⁴⁷⁷ Timothy K. Kuhner, *supra* note 51.

¹⁴⁷⁸ *Ibid* at 2355.

state.¹⁴⁷⁹ The separation of business and state would be modelled on both the federal separation of powers, and the separation between church and state.¹⁴⁸⁰ Although separated, the different branches of government are engaged in a joint enterprise of running the state. Similarly, businesses and the state are engaged in a joint enterprise in making a working economy, providing for the physical needs of population. Yet, this joint goal is still premised on each operating in their own proper role. Kuhner suggests this separation as a “framework for conceptualizing limits on the ability of financial power to translate into political power”¹⁴⁸¹, arguing it is “general enough to account for the many dimensions of the issue and culturally resonant enough to motivate good faith consideration.”¹⁴⁸² Democracy and market freedom are both essential values of our society, but the increasing inequality and influence of money in politics represents an excessive entanglement between the two systems.¹⁴⁸³

However, Kuhner argues that the political power of business can “undermine democratic values and procedures, and produce poor public policies”¹⁴⁸⁴. The excessive power and interference of business can be found in the influence of money in politics, the drafting of legislation by business lobbying organizations, the replacement of debate with sound bites, and widespread ethical lapses by elected leaders.¹⁴⁸⁵ He argues that the excess of corporate power is visible not just in its ability to influence political decisions, but also in its ability to define the context, and determine which problems government will respond to, and which externalities will be allowed at tremendous social costs to others. He points out that business’ self-interested drive for profit maximization is beneficial in the economic realm, but damaging in the public sphere.¹⁴⁸⁶ There may be an invisible hand of the market, but there is no invisible hand of the state.

We will consider Kuhner’s adaptation of the test from *Lemon v. Kurtzman*¹⁴⁸⁷; the text of his proposed constitutional amendment; the model of the separation of powers; the model of the separation of church and state; his concepts of interest and passion; and how this comes together in considerations of business and state, democracy and lobbying.

The Test from *Lemon v. Kurtzman* and Model Amendment

Kuhner’s proposal is based on the final stage of the U.S. Supreme Court’s three-pronged test from *Lemon v. Kurtzman* regarding the separation between church and state. Applied in Kuhner’s context, the test would state that the statute/activity must not foster an excessive government entanglement with business. He proposes a specific U.S. constitutional amendment enforcing the separation of business and state. Such an amendment would not map exactly onto the Canadian *Charter*, but it is still a useful guide.

¹⁴⁷⁹ *Ibid* at 2374.

¹⁴⁸⁰ *Ibid*.

¹⁴⁸¹ *Ibid* at 2354.

¹⁴⁸² *Ibid*.

¹⁴⁸³ *Ibid* at 2355.

¹⁴⁸⁴ *Ibid*.

¹⁴⁸⁵ *Ibid* n 3.

¹⁴⁸⁶ *Ibid* at 2372, quoting Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* 60-110 (2004).

¹⁴⁸⁷ *Lemon v Kurtzman*, [1971] 403 US 602.

Section 1: Democratic integrity being vital to the principles and operation of our system of government, and the political rights of natural persons, the Separation of Business and State is hereby established. Popular sovereignty and political equality shall not be denied or abridged by allowing monetary power to translate into political power. To this end, presidential and congressional elections shall be publicly financed.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

Section 3. This amendment shall not be so construed as to limit the power of the United States to regulate economic actors or economic affairs within its jurisdiction.¹⁴⁸⁸

Section 3 is vital. The principle would not limit the government's ability to regulate business and economic activity, but it would justify limiting the government's ability to interfere in the internal workings of a corporation to gain political (or personal) advantage.

Separation of Powers

The concept of the separation of powers within a federal government, between branches of the government and between levels of government, can provide some insight into how a separation between business and government might operate.

Madison's argument that *ambition must be made to counteract ambition* undergirds the separation of governmental powers. By keeping the powers separate, different branches of government can balance each other, stopping one individual or group from dominating, and providing a larger public sphere of freedom. The contending power centers, the contention of ambitious people, leaves room for more personal freedom. It also ensures that if one branch of government should be corrupted or act with tyrannical tendencies, the other branches can restrain it. It requires that there be slightly more freedom-loving democracy-loving people than authoritarians, but it helps balance out the worst of human nature. It does not require officials to be angels.

Similarly, separating business from state – economic power from government power – provides balance. It makes room for many more ambitious people whose drive can be funnelled for human benefit by raising power in different areas, without risking a society struggle for a few seats of over-arching power. There is no one position in society that gets all the benefits. This is a key distinction from many dictatorships, where a few top government posts also control the wealth of society, leading to vicious fatal struggles for power and obscene levels of corruption. Separating economic power from

¹⁴⁸⁸ Timothy K. Kuhner, *supra* note 51 at 2378.

political power increases freedom by creating different power centers that oppose, offset and balance each other.¹⁴⁸⁹ If the power centers combine, it destroys this essential balance. Politics cannot combat the excesses of business if it is controlled by those very businesses. Business cannot make good decisions in the marketplace if it is beholden to political control.¹⁴⁹⁰

Kuhner points out that the separation of powers does not just mean there are separate branches of power, it also means that the powers must be vested in different people. There is a separation of people. The head of the province cannot be the head of the country, and cannot be the head of the judiciary. No individual can be a member of two or more of the different branches of power at the same time. “Indeed, what sense would it make if, although the branches themselves remained separate, one group of people was permitted to control them all?”¹⁴⁹¹ We recognize that democratic officials should not even be interfering with individual businesses, never mind running a business while in power. So too should business be limited from doing the same in the political sphere. If rising to the top of a large corporation opens the door to politically dominating society as well, ambitious people will try to walk through that door, to everyone else’s disadvantage.

Separation of Church and State

The separation between church and state provides even better guidance for mapping the separation of business and state. The separation of church and state was intended both to protect the state from religion, and to protect religion from the state. The U.S. Supreme Court's 1947 decision in *Everson v. Board of Education*¹⁴⁹² forbade religious groups from driving government affairs, and prohibited government from openly or secretly participating in the affairs of religious groups. This does not prevent religious people from participating in democracy and government. It prevents religious groups from effecting formal or informal control over government. “It is the difference between inspiration and control that one must note when contemplating the political influence of religious or economic actors.”¹⁴⁹³ Businesses can express their political views, “but their superior resources should not be allowed to drastically affect political outcomes.”¹⁴⁹⁴

Separation is not a perfectly clean exercise; it is a matter of degree. Although total separation is impossible, and the line can be blurry at times, it provides a baseline principle from which to judge how much influence religious authorities can exercise. This is something that is needed for evaluation and control of the influence business exercises over governance – a standard to set as a guideline. Kuhner argues that there is a clear symmetry between excessive religious entanglement with the state, which results in theocracy, and excessive business entanglement with the state, which results in plutocracy.

¹⁴⁸⁹ *Ibid* n 55.

¹⁴⁹⁰ There are the complex exceptions of natural monopolies, media oversight, and essential military industries, and other areas where significant government interference in the marketplace might be necessary, but here the proper recourse is independent committees and regulators, with clear guidelines, free of political control.

¹⁴⁹¹ Timothy K. Kuhner, *supra* note 51 at 2369.

¹⁴⁹² *Everson v Board of Education*, [1947] 330 US 1.

¹⁴⁹³ Timothy K. Kuhner, *supra* note 51 at 2374.

¹⁴⁹⁴ *Ibid* at 2377.

Just as one's religion becomes integral to one's political participation in a theocracy, so too does one's wealth and business affiliations become integral to political participation in a plutocracy. He argues that both entanglements threaten the rights of citizens.

Religious authority encroaching on civil authority leads to theocracy and oppression of minority religions. Corporate political activity, when insufficiently regulated, inserts economic authority over civil authority and leads to plutocracy and oppression of lower socio-economic classes.¹⁴⁹⁵

Just as religion can undermine their own moral authority and purity when it becomes too involved in politics, business can undermine the authority of the marketplace by becoming too involved in politics.

First, when religious or monetary power is allowed to translate into political power, sovereignty is redefined. When sovereignty comes from a superior being or wealthy interests, the notion of popular sovereignty becomes pure myth. Second, when policies and candidacies become significantly influenced by money or religion, the frequency and value of reasoned debate on the merits of candidates or policy alternatives decrease. Third, when power stems from corporations or religious groups instead of ordinary people, political equality declines. Inequality in access and the distributive effects of policy outcomes reveals that all citizens are far from equal in their political rights.¹⁴⁹⁶

The lobbying for private goods also risks undermining the very justification for a market economy, that markets efficiently produce goods and services for the population. Markets operate on the exchange of property rights, but governments define these rights.¹⁴⁹⁷ In the pursuit of private goods, business lobbying often works to redefine the rules governing the market and the exact scope of particular property rights. This undermines the effectiveness the marketplace. Too much business lobbying influence not only undermines democratic governance, it can undermine the marketplace as well.

The Interest and Passion in the Separation of Business and State

Kuhner states that the separation of business and state must account for both interest and passion. He defines interest as the tangible benefits that influence the political system. Passion is the spirit with which the game is played. He considers campaign contributions a form of interest, to this can be added lobbying, political ads, shadow political parties, and partisan propaganda media. In Kuhner's account, the passion is expressed in the excessive ideological entanglement between governance and

¹⁴⁹⁵ *Ibid* at 2375.

¹⁴⁹⁶ *Ibid*.

¹⁴⁹⁷ David Jacobs & Lindsey Myers, *supra* note 681 at 768.

business. This includes government officials thinking of government as a business, adopting a profit-maximizing ethos, and viewing businesses as equal partners in governmental decision-making.¹⁴⁹⁸

Separation in Interest

For the separation to work, the direct interests of politicians must be severed from business control. Kuhner is primarily concerned with the bankrolling of political figures by moneyed interests through campaign donations.¹⁴⁹⁹ Additional concerns related to lobbying would include political favours from businesses, gifts, free travel, high-paying revolving door job offers, the grooming for office by shadow political parties, and officials' use of political policies to reward themselves and damage their economic rivals. The separation of interest provides another justification for separating lobbying from any potential return to the official being lobbied.

Separation in Passion

Creating a theoretical understanding in support for the separation between business and state is as important as the practical rules of conduct. Only if people believe in this approach, only if there is passion, will the separation last. Kuhner argues it would be healthier for political ideology to separate itself from the profit-maximizing view of business, and focus instead on patient pursuit of facts and genuine discussion of policy options. This is at odds with how many currently view politics, and it will require push-back through education and activism.¹⁵⁰⁰ This is especially applicable in Canada, where large businesses are often granted a pre-eminent say in policy-making.¹⁵⁰¹

Lobbying itself is sometimes of direct benefit to officials, and sometimes a source of ideological framing. Apply his understanding, lobbying contains aspect that express both interest and passion. Regardless, the lobbying system could be restructured to encourage the separation, by emphasizing high quality information, favouring those without a financial stake in the policy debate, favouring the lobbying of citizen groups over businesses, and favouring collective goods over private goods.

Business and State, Democracy and Lobbying

Kuhner describes democracy as “a large-scale mediation where the interests of millions of parties are mediated through representative institutions.”¹⁵⁰² But he argues that it is more than that, it is a system of beneficial means: participating in political dialogue with those of different viewpoints and experiences opens the way to personal, and even collective, transformation.¹⁵⁰³ The goal of separating business and state is to strengthen democratic accountability, participation, resistance to corruption, and to ensure real debate, so that the democracy empowers people.

¹⁴⁹⁸ Timothy K. Kuhner, *supra* note 51 at 2380.

¹⁴⁹⁹ *Ibid* at 2381.

¹⁵⁰⁰ The current worldview of many elites over-emphasizes the merits of business interests, granting too much priority to their political preferences. “There appears to be considerable agreement among the political elite as to the intrinsic merits of certain interests, particularly those of the economic elite.” Fred Thompson & W. T. Stanbury, *supra* note 2 at 39.

¹⁵⁰¹ *Ibid* at 121.

¹⁵⁰² Timothy K. Kuhner, *supra* note 51 at 2390.

¹⁵⁰³ *Ibid*.

Erecting a separation between business and state is not entirely straight forward, but neither was the creation of the separation of powers, or the separation of church and state when they were first applied. There will be and still are fuzzy edge cases in both models. Conceptually, we already do separate business and government to various degrees. Business and government have different aspirations, act in distinct realms, and must take into account different factors, constituencies, and standards. Governments should and will always consider jobs, profit, fiscal returns, stock market performance, industrial priorities, and the fostering of innovation. Yet, these issues do not have to be framed from the perspective of business interests. The goal of Kuhner's suggestion is to build a mental model that reinforces this separation more fully, declaring that both work best when they are treated as separate realms. Separation is a way of binding us to resist the inclinations, corruption, and temptations of the human heart.

The policy would not be costless. It would hinder some private-public partnerships, and some privatization schemes. These costs are relatively small compared to the likely gains of separating business influence from government and cutting back on corruption, dependency corruption, and rent-seeking behaviour.¹⁵⁰⁴

Lobbying is one of the key methods by which business interests interact with and influence government. Kuhner's separation becomes a reasonable basis for treating business lobbying groups and citizen lobbying groups differently, limiting the lobbying access of the former and favouring the latter. It is not that business cannot interact with the state in many beneficial ways; it is that we should start from a place of skepticism, and prove that the interaction is beneficial while maintaining a clear separation between the two realms. Recognizing the difference in lobbying between businesses and citizens, just as we recognize a difference in the right to electoral participation, is a good step towards a healthier democracy.

The Nature of the Unregulated Marketplace – Phishing for Phools

Akerlof and Shiller's work *Phishing for Phools: The Economics of Manipulation and Deception*¹⁵⁰⁵ investigates the working of deception in the marketplace. A brief consideration of their work and conclusions will provide key insights about the marketplace of lobbying.

Akerlof and Shiller argue that although a marketplace should produce goods and services consumers want, market participants are inherently susceptible to manipulation. They are open to being

¹⁵⁰⁴ Many public-private partnerships and privatization schemes reducing government oversight are applied to natural monopolies, areas where market competition does not work, areas too vital to allow the business to fail, and areas where consumer decisions cannot make up for the reduced government oversight (like private prisons). In all these cases, one must question how often these schemes are intentionally a way of funneling public wealth to private entities, socializing risks while privatizing rewards, damaging unions, avoiding higher employment standards (which hurts the standard of living overall), or avoiding other high standards of business practices. In these cases, preventing privatization might be a net gain to society.

¹⁵⁰⁵ George A. Akerlof & Robert J. Shiller, *supra* note 52.

phished – a term they borrow from a type of online scamming that hides malicious intentions behind the disguise of a trustworthy entity. In Akerlof and Shiller’s definition, phishing is when participants in the market, normally consumers, are manipulated “to do things that are in the interest of the phisher but not in the interest of the target.”¹⁵⁰⁶ Phishing makes victims, *phools*, as they label it, out of marketplace participants. Being a phool, at least some of the time, is unavoidable, because there are simply too many ways humans are open to manipulation. Phishing can range from internet scams, to pyramid schemes, to deceptive marketing, to products with hidden designed obsolescence, to exploitive payday loans, to the tempting smell of baked Cinnabon® luring you to scarf down an entire 6 pack while waiting for your flight in the airport.

Akerlof and Shiller argue that humans are neither wholly rational nor irrational; can be deceived by inaccurate mental frames; that phishing is a natural aspect of the marketplace; and that there is a need for government to actively regulate the marketplace. Applying the lessons about phishing provides additional justification for strong regulations to control business lobbying.

Humans are Neither Rational nor Irrational

Akerlof and Shiller argue that the classic economic model of the rational human is mistaken. We all have certain psychological and logical weaknesses that can be and are exploited.¹⁵⁰⁷ They are not alone in this conclusion; the evidence that human decision making is not fully rational is overwhelming.

¹⁵⁰⁶ *Ibid* at xi.

¹⁵⁰⁷ Stiglitz presents a more traditional argument for the necessity of government regulation in the marketplace. His approach is not tied to behavioural economics, but the outcome is similar. One can mostly replace the role phishing plays in this chapter with a more classical approach that recognizes that in reality markets are almost never efficient, because market failures are so common that government must regulate virtually all markets, virtually all of the time.

“When government does its job well, the returns received by, say, a worker or an investor are in fact equal to the benefits to society that his actions contribute. When these are not aligned, we say there is a market failure, that is, markets fail to produce efficient outcomes. Private rewards and social returns are not well aligned when competition is imperfect; when there are “externalities” (where one party’s actions can have large negative or positive effects on others for which he does not pay or reap the benefit); when there exist imperfections or asymmetries of information (where someone knows something relevant to a market trade that someone else doesn’t know); or where risk markets or other markets are absent (one can’t, for instance, buy insurance against many of the most important risks that one faces). Since one or more of these conditions exist in virtually every market, there is in fact little presumption that markets are in general efficient. This means that there is an enormous potential role for government to correct these market failures. Government never corrects market failures perfectly, but it does a better job in some countries than in others. Only if the government does a reasonably good job of correcting the most important market failures will the economy prosper. Good financial regulation helped the United States — and the world — avoid a major crisis for four decades after the Great Depression. Deregulation in the 1980s led to scores of financial crises in the succeeding three decades, of which America’s crisis in 2008–09 was only the worst.”

Joseph E. Stiglitz, *supra* note 38 c 2, s Adam Smith’s invisible hand and inequality.

Humans exist in the realm between rationality and irrationality, with limited information, time and cognition, in a complex mix of emotions, experiences and reasoning.¹⁵⁰⁸

Psychological and Informational Weakness

Akerlof and Shiller argue that there are two ways phools get exploited, informational weaknesses and psychological weaknesses. Informational phools act on information that is deceptive, such as fraudulent returns from a Ponzi scheme, or fake “evidence” that climate change is not happening.¹⁵⁰⁹ Psychological phools act on emotions that override their common sense, or that exploit cognitive biases.¹⁵¹⁰

Phishing can occur in the economic or the political realm. Akerlof and Shiller argue that politics is

vulnerable to the simplest phish, whereby politicians silently gather together money from the Interests, and use that money to show that they are “just one of the folks.”... [even though] (almost) no one wants a democracy where elections are bought in this way.”¹⁵¹¹

A politician might phish the voters’ psychologically by exploiting their emotions. The politician could exploit negative emotions using tribalism or xenophobia to leverage voter support for plutocratic policies that ultimately harm the voters. A politician might also exploit his supporters’ cognitive biases, such as the sunk cost fallacy. The politician could tell increasingly larger lies and break increasingly more political norms in a move towards self-enrichment and authoritarianism. Each time the supporters have to contort their reasoning further to continue to justify their support. At first these contortions might seem small, but eventually the supporters would find themselves far from their original principles, ceding more power to the politician at a cost of their own prestige, power and morality. Locked into the sunk cost fallacy, the steps already taken in support of the politician become a reason to bind themselves further to the politician, much to the politician’s advantage and his supporters’ (and the nation’s) growing disadvantage.

Inaccurate Mental Frames

Akerlof and Shiller contend that the phool, being phished, is essentially deceived into building an inaccurate mental frame. Akerlof and Shiller describe the mental frame as a story the person is telling herself.

The phish is a way to get someone to make a decision that is to the benefit of the phisher, but not to the benefit of the phool. Since our decisions are usually based on

¹⁵⁰⁸ Elizabeth Mertz, Stewart Macaulay & Thomas W Mitchell, *The New Legal Realism* (Cambridge University Press, 2016) at 35. This is not a new thought, Plato argued something similar in the Chariot Allegory. The human soul rides a chariot pulled by two winged horses, one that is rational (noble) and one that is emotional (ignoble).

¹⁵⁰⁹ George A. Akerlof & Robert J. Shiller, *supra* note 52 at xi.

¹⁵¹⁰ *Ibid.*

¹⁵¹¹ *Ibid* at xvi.

the stories we are telling ourselves about our situation, ... [mental framing] gives us a transparent characterization of motivation that allows us to understand how most phishing for phools happens. It also brings into economics a new variable. That variable is the story that people are telling themselves. Furthermore, it makes natural the idea that people make decisions that can be quite far from maximizing their own welfare, and that these stories are quite manipulable. Just change people's focus and one can change the decisions they make.¹⁵¹²

This account provides a vital link between the psychology of people operating in the marketplace and the role of lobbyists. Lobbyists are providing information to officials, while meeting with them in person. This gives the lobbyists the opportunity to phish the politician, by manipulating the information they provide and manipulating the official's psychology.

When providing information, lobbyists can frame the debate, sculpting the mental frame the decision-makers are using. When interacting with officials, lobbyists have the advantage of personal relationship. Lobbyists have repeated interactions to build a psychological sense of the official's priorities, desires and weak points. They have the opportunity to manipulate the official. As discussed in Chapter 3, lobbyists have the opportunity to exercise type ii and iii influence. This is an added layer of influence that those with less access lack. As we have established, this advantage will go to those with the most resources to employ lobbyists, which are the wealthy and the business interests.

The lobbyists help create the story the decision-makers are telling themselves about the policy decision they must make. The amount of influence the lobbyists have over forming the story varies depending on many factors, but it is far from zero; and as the evidence in the earlier chapters indicates, it is often significant. Yet influence is not the same as phishing. Phishing requires that lobbyists influence the officials against the interests that the officials are appointed to represent. Unfortunately, based on Akerlof and Shiller's argument about the natural functioning of the commercial marketplace, there is good reason to suspect that there is substantial phishing in the marketplace of lobbying.

Phishing is a Natural Aspect of the Marketplace

Akerlof and Shiller argue that phishing is a natural component of the marketplace. One cannot have a market without it.

It may be standard economics to pretend that economic pathologies are only "externalities." But the ability of free markets to engender phishing for phools of many different varieties is not an externality. Rather, it is inherent in the workings of competitive markets. And the same motives for profit that give us a healthy benign

¹⁵¹² *Ibid* at 172.

economy if everyone is fully rational are the same motives that give us the economic pathologies of phishing for phools.¹⁵¹³

Phishing is a general trait of the market; some will always try to profit from convincing people to act against their own self-interest because it is profitable. People will pay more than they should, if deceived, tempted or addicted. Deceiving people and exploiting their psychological weaknesses is an efficient, if unethical, way of making money.

In general equilibrium, if a Cinnabon® stall at the airport could make a profit – absent something like it – then it will be there. So if we have a weakness – if we have a way in which we are phishable – the phishermen will be there in waiting. Just as much as the baker and the brewer and the butcher will be there if we have the resources to pay what it takes them to supply the bread and the beer and the meat, so too the tricksters will be there to phish us for phools.¹⁵¹⁴

Even in our relatively well-regulated society, there is a staggering amount of economic activity associated with some form of phishing (and profiting from externalities the public pays for indirectly), from alcohol and cigarettes, to fast food and junk food, to payday loans and prosperity churches, to cancerous chemicals and climate change-denying oil companies. Yet we remain surprisingly reluctant to see how much phishing and deception is entwined in our day to day activities.¹⁵¹⁵ Akerlof and Shiller contend that if economists had had a broader awareness of the two-edged nature of the market they might have had more awareness of how financial derivatives linked to mortgage-backed securities could turn into the 2008 financial crisis.¹⁵¹⁶

Need for Government Oversight

Akerlof and Shiller argue convincingly that in an unregulated competitive marketplace there is pressure for a race to the bottom, as phishing generally shows greater returns than scrupulous honesty. Those businesses that try to stay honest, avoid deceiving customers and inflicting externalities on the public, have higher costs and are at a competitive disadvantage.

Unregulated free markets rarely rewarded different kind of heroism, of those who restrain themselves from taking advantage of customers' psychological or informational weaknesses. Because of competitive pressures, managers who restrain themselves in this way tend to be replaced by others with fewer moral qualms. Society and social norms to place some brakes on such phishing; but in the resulting market equilibrium, if there is an opportunity to phish, even firms guided by those

¹⁵¹³ *Ibid* at 170.

¹⁵¹⁴ *Ibid* at 171.

¹⁵¹⁵ *Ibid* at 164.

¹⁵¹⁶ *Ibid* at 165.

with real moral integrity will usually have to do so in order to compete and survive.¹⁵¹⁷

Government plays an essential role in controlling phishing in the market, to ensure that the marketplace operates to further the general well-being of the people. The government makes the market work by setting regulations, safety standards, food inspections, weights and measures, pollution controls, and preventing scams and fraud. Government oversight compliments the free market; it does not hinder it. “There can be no “free market” without government ... rules create markets, and government generates the rules”¹⁵¹⁸. For “just as our computers need protection against malware, so too we need protection against phishing for phools more broadly defined.”¹⁵¹⁹

Applying the Lessons about Phishing to Lobbying

In applying the lessons from phishing to lobbying, we will discuss the encouragement of rational argument; how rules to control phishing in lobbying would interact with the right to freedom of expression; and how the interview results do show some support for instituting such rules.

Phishing and Encouraging Rational Argument in Lobbying

Akerlof and Shiller posit that an unregulated marketplace incentivises deception for profit. It is an essential aspect of the marketplace. The same incentive applies to lobbying which is, to an extent, a marketplace of ideas and influence.¹⁵²⁰ If there are no rules to restrict phishing, if there are no rules preventing dishonest framing, then the marketplace of lobbying will foster it, particularly when policy changes will bring monetary rewards.¹⁵²¹ Unregulated lobbying is susceptible to the realities of phishing, the rewards of deception, and the limits of human cognition. It invites a race to the bottom. In lobbying, so much happens behind closed doors, with those who have substantial profits at play, that there is ample room for phishing.

As covered in depth in Chapter 3, informational advantages are endemic to lobbying, allowing the lobbyist to set the agenda, frame the issues, and exercise substantive room for phishing.¹⁵²² It is hard for officials to counter this, because they do not know what they do not know, and often lack the time or incentive to find out. Good regulations should account for the need for alternative sources of information, particularly when the information is provided by those seeking a low salience private good.

¹⁵¹⁷ *Ibid* at xi.

¹⁵¹⁸ Robert B. Reich, *supra* note 26 at 17.

¹⁵¹⁹ George A. Akerlof & Robert J. Shiller, *supra* note 52 at xvi.

¹⁵²⁰ “[I]f goods can be marketed, so can ideas and especially the ideas that underpin policies. Modern marketing has taught the art and science of shaping perceptions—and for those with enough resources (disproportionately the wealthy) there are tools to do so.” Joseph E. Stiglitz, *supra* note 38 c 6, s Shaping perceptions about policies.

¹⁵²¹ “Whenever a policy proposal threatens a clearly defined interest group, particularly a corporate interest group, lobbying tactics may include the misrepresentation of information to policymakers.” Peggy Lopipero, Dorie E. Apollonio & Lisa A. Bero, “Interest Groups, Lobbying, and Deception”, *supra* note 802 at 856.

¹⁵²² Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern III: Lobbying Creates an Information/Framing Bias, p. 166.

This would decrease the risk that the decision-maker is operating in a frame set by the lobbyist, or otherwise being phished.

Lobbying regulations recognize the risks of manipulation posed by emotional connections, restricting family members and campaign supporters from lobbying officials. Still, in light of the psychological and emotional weaknesses, the regulations could go further, embracing rules that encourage rational arguments and deter emotional phishing, tribalism and authoritarianism. These rules need not be draconian, but could rather be principles that encourage rational decision-making. This is discussed in detail in Chapter 9.¹⁵²³

Likewise, lobbying can and will try to exploit cognitive biases, such as confirmation bias, the availability heuristic, status quo bias, the sunk cost fallacy, in-group bias, and groupthink. Humans being what they are, some officials will fall into these cognitive traps. Disclosure and active oversight by non-partial regulators and some natural skepticism of self-interested lobbying could be employed to limit this risk. There is a balance here, as with any type of oversight, that it accomplish its goals of supporting the regulatory purpose, without the legitimate process being exploited or corrupted by officials for their own ends.¹⁵²⁴

¹⁵²³ For example, rules could encourage hearing both sides of an argument, encourage the use of supporting data from verified sources, deter snap judgements, encourage consultation with experts who have no pecuniary stake in the decision, and prefer open the processes when possible. See Chapter 9 – Reform Principles: Principles of Lobbying Reform: Principle 5: Improve the Quality of Information, p. 520.

¹⁵²⁴ An interesting and terrible example of manipulation of an important legitimate process – and of regulatory capture – is happening in the EPA. Under the guidance of EPA administrator Andrew Wheeler, the (former) coal lobbyist, the Trump administration is trying to implement *Secret Science Reform Act* that will limit the “scientific and medical research that the government can use to determine public health regulations”. The measure has been put forward as a transparency change that requires the agency to only use scientific and medical research where the entire raw data set is publicly available, including patient’s confidential health records. The studies would also have to be replicable, so studies of disasters and other one-time events could not be considered. The malicious intention of the “transparency” rule is particularly evident in the fact that it would be applied retroactively. The goal is not transparency, but to exclude many scientific studies that did not or cannot comply with these unnecessary criteria. This will reduce the amount of health studies available to evaluate pollution. With fewer studies available, it will be harder to show that a pollutant is causing harm, and thus less pollution would be subject to limitations. The underlying theory is that if the harm can no longer be officially measured, then it is not happening. Making the rule retroactive would likely undo important pollution controls already in place. For example, it was specifically written to make sure that the EPA could no longer base its decisions on the groundbreaking 1993 Harvard University study that definitively linked polluted air to premature deaths. This study is currently the foundation of the U.S.’s air-quality laws. The rule would also force those concerned about public health inside and outside of the EPA to work backwards, redoing previous studies just to play catch up to where they were. There would be fewer resources available to impose regulations to counter climate change or regulate or control new sources of pollution. Industry groups lobbied heavily for the change for years. This is a good example of the harms of regulatory capture, in conjunction with the harm of an administration that favours business lobbying and discounts scientific evidence.

“The change is part of a broader administration effort to weaken the scientific underpinnings of policymaking. Senior administration officials have tried to water down the testimony of government scientists, publicly chastised scientists who have dissented from President Trump’s positions and blocked government researchers from traveling to conferences to present their work. In this case, the administration is taking aim at public health studies conducted outside the government that could justify

Phishing Restrictions in Lobbying and the Right to Freedom of Expression

In theory, rules to control phishing might infringe the right to free expression, but they should pass a s. 1 *Oakes*¹⁵²⁵ test.¹⁵²⁶ The connection between strong lobbying regulations and their *Charter* justifications is explored in detail in Chapter 7 and Chapter 8. Here we will only sketch the justification in order to consider the anti-phishing rules being proposed.

To pass the *Oakes* test, the rules would need to:

- I. establish that the law under review has a goal that is both pressing and substantial; and
- II. the measures adopted are reasonable and demonstrably justified in a free and democratic society, by being
 - i) rationally connected to the objective,
 - ii) impairing the right as little as possible, and
 - iii) having proportionality between the salutary and deleterious effects of the measure.

A rough *Oakes* defence is that (1) since lobbying has such a deep impact on government decision-making, improving the quality of lobbying would be both pressing and substantial.

This is (2) reasonable and demonstrably justified in a free and democratic society, because the rules should improve government decision-making, and deter corruption and fraud which is important in a democracy. They would improve the connection between lobbying and rational decision-making.

These rules are (i) rationally connected to the objective. Because lobbyists will be more or less tempted to phish depending on much how oversight they face, and how much reputational damage they might incur. As oversight remains low, and potential returns high, and lobbying more extensive and central to business returns, then a race to the bottom increases in likelihood. This is increased by the nature of the corporate personality, and its goal to take advantage of others to maximize profit. Since countervailing non-business sources of information as minimized by the current lobbying system, phishing will likely remain constant without regulatory intervention.

These rules should (ii) impair the right to free speech as little as possible. It is difficult to envision improving lobbying without employing rules that control the quality of lobbying by deterring phishing activities. The rules are required to balance the informational advantages of lobbyists.

tightening regulations on smog in the air, mercury in water, lead in paint and other potential threats to human health.”

Lisa Friedman, “E.P.A. to Limit Science Used to Write Public Health Rules”, *N Y Times* (11 November 2019), online: <<https://www.nytimes.com/2019/11/11/climate/epa-science-trump.html>>.

¹⁵²⁵ *R v Oakes*, [1986] 1 SCR 103.

¹⁵²⁶ *Ibid* at para 69; The third component of the second part of the test was altered by the Court in *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 839; Applied in *Harper v. Canada (Attorney General)*, *supra* note 53 at para 91 to 119; The test continues to be used by the Court. *R v Morrison*, [2019] 2019 SCC 15 (canLII) at para 63.

The exact rules at issue will affect the proportionately test. However, there is an innate level of (iii) proportionality between the salutary and deleterious effects of the measure. The rules are seeking to channel lobbying to provide good quality information and avoid influences that do not belong in government decision-making. The small limitation on the exact form of the expression is balanced by the improvement in the accuracy and quality of the information provided by the lobbyists. Just as a marketplace needs regulations preventing phishing to function well, so too does the marketplace of lobbying need regulations preventing phishing to produce good decision-making. The downside of the rules should be outweighed by the upsides of the measures.

Phishing Control Supported by My Interview Results

Some degree of support for this proposition can be found in my interviews. Most interview subjects agreed that lobbying provides needed information, but it is not fair and neutral. They all agreed or strongly agreed that the current lobbying regulations help ensure accountability in the Canadian political system. They expressed support for the more constrained lobbying in the Canadian system over the practices of lobbying in the American political system. Likewise, the interviewees all thought that Canada's campaign donation laws are effective. They mostly supported the idea of providing funding or support for citizen groups to lobby more effectively. They were mostly favourable to restrictions on lobbying, provided they applied to all groups equally. These interview results suggest that the interview subjects believe that robust lobbying legislation can become a standard of behaviour, and the possibility that regulations would provide benefits to government decision-making. However, this agreement should not be overstated. Most believed that current lobbying practices are more beneficial than harmful to Canadian democracy. Most interviewees also believed that the organization they worked for would view regulatory efforts to curtail lobbying unfavourably.¹⁵²⁷

The natural presence of phishing in the market is another good reason to be skeptical of the activities of business lobbying motivated by private gains. Especially when combined with the influence of the corporate personality, it is an additional reason to treat business lobbying differently than citizen lobbying, and contain it with a stronger set of restrictions.

Inequality and Lobbying

As we have established, there is good reason to be concerned with self-interested profit-motivated lobbying, particularly when the lobbying crosses the barrier between business and state. This concern is increased when the lobbying leads to policies that rollback beneficial regulation, opening the door to phishing and business externalities like pollution and accelerated climate change.¹⁵²⁸ Inequality is another reason to be concerned with lobbying.

¹⁵²⁷ See Chapter 5 – Interview Results: Conclusion – Chapter 5, p. 331, for more detail.

¹⁵²⁸ "Special interests have incentives and scope to shape our society – in their interests. Even when most citizens care about the environment, they see actions to protect the environment as costing them profits, and they use their economic and political power resist such actions. This has proved to be a major impediment to dealing with the challenges of global warming." Joseph E. Stiglitz, *supra* note 24 at 13.

As discussed in Chapter 3, economic inequality has been increasing worldwide, as wealth becomes increasingly stratified, and the returns on capital outperform those of labour.¹⁵²⁹ Although the poorest have seen their standard of living go up as never before, the richest have been pulling away at an astounding pace. Inequality increases the chance of democratic decay to dictatorship, and there is good reason to be concerned.¹⁵³⁰ A number of weak democracies appear to be falling or fallen into strongman autocracies, including Hungary, Poland, and Turkey.¹⁵³¹ Political scientists have raised concerns that the U.S. may be following the same route, along a road paved by growing inequality.¹⁵³² Reducing inequality is a vital goal.¹⁵³³ Inequality is not as bad in Canada as in the U.S., but Canada appears to be displaying a number of the same underlining pathologies.¹⁵³⁴ It is unlikely that inequality can be significantly reduced without controlling the influence of lobbying and the mirror influence of private campaign financing.

The rise in inequality can also be seen in the rise of the wealth and power of corporations. “Of the top 100 richest entities in the world, as measured by the Gross Domestic Product or sales, 52 are corporations and 48 are countries.”¹⁵³⁵ At the same time, there has been an increase in the concentration of corporations within the marketplace, and decline in competition. This change is not yet overwhelming, but the trend is clear. Between 1997 and 2012, there has been an increase in market concentration in nine out of thirteen tracked markets in the U.S. (as marked by revenue share of the 50 largest firms).¹⁵³⁶ The trend in growing inequality is also visible in the rise in corporate profits as a share of the GDP. From 1960 to 2012, U.S. corporate profits (after tax) averaged 6.3 % of the GDP. Profits began to swing upwards in the early 2000s. Despite a downturn during the 2008 financial crisis, they continued to go up overall. By 2012, corporate profits had reaching a high of 9.7% of GDP.¹⁵³⁷

It should be noted that income and wealth inequality are somewhat interchangeable for the purpose of our investigation. Most plans to reduce inequality focus on income inequality, as a first step to reducing total wealth inequality, but ultimately both must be addressed. The differences between

¹⁵²⁹ Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern IV: Lobbying Increases Inequality: Inequality is increasing, p. 180. See Figure 4: World Return on Capital vs. Growth Rate, Antiquity–2010 p. 184.

See also, Era Dabla-Norris et al, *supra* note 839; David Jacobs & Lindsey Myers, *supra* note 681 at 752.

¹⁵³⁰ Christian Houle, “Inequality and Democracy: Why Inequality Harms Consolidation but Does Not Affect Democratization” (2009) 61:4 World Polit 589–622 at 591.

¹⁵³¹ Yascha Mounk, *The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It* (Cambridge, Massachusetts: Harvard University Press, 2018) at 93 & 124. Hungary appears to have now fallen to dictatorship. John Haltiwanger, *supra* note 1009.

¹⁵³² Yascha Mounk, *supra* note 1531.

¹⁵³³ *Ibid.*

¹⁵³⁴ Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern IV: Lobbying Increases Inequality: Inequality is increasing: **Error! Reference source not found.**, p. **Error! Bookmark not defined.**

¹⁵³⁵ Timothy K. Kuhner, *supra* note 51 at 2361.

¹⁵³⁶ Council of Economic Advisors, *Benefits of Competition and Indicators of Market Power*, Issue Brief (The White House Council of Economic Advisers, 2016); See also David Autor et al., *Concentrating on the Fall of the Labor Share*, Working Paper 23108 (National Bureau of Economic Research, 2017) at 7.

¹⁵³⁷ From Robert B. Reich, *supra* note 26 at 100.

income and wealth inequality can have significantly repercussions in the discussion of racial issues and historically disadvantaged communities, but that is beyond the scope of this chapter.

We will investigate four facets of the inequality problem: how it is a risk to democracy; how it is the outcome of political decisions not natural market forces; how lobbying is feeding an inequality spiral; and how preventing inequality provides additional justification for distinguishing between the lobbying for private goods and collective goods.

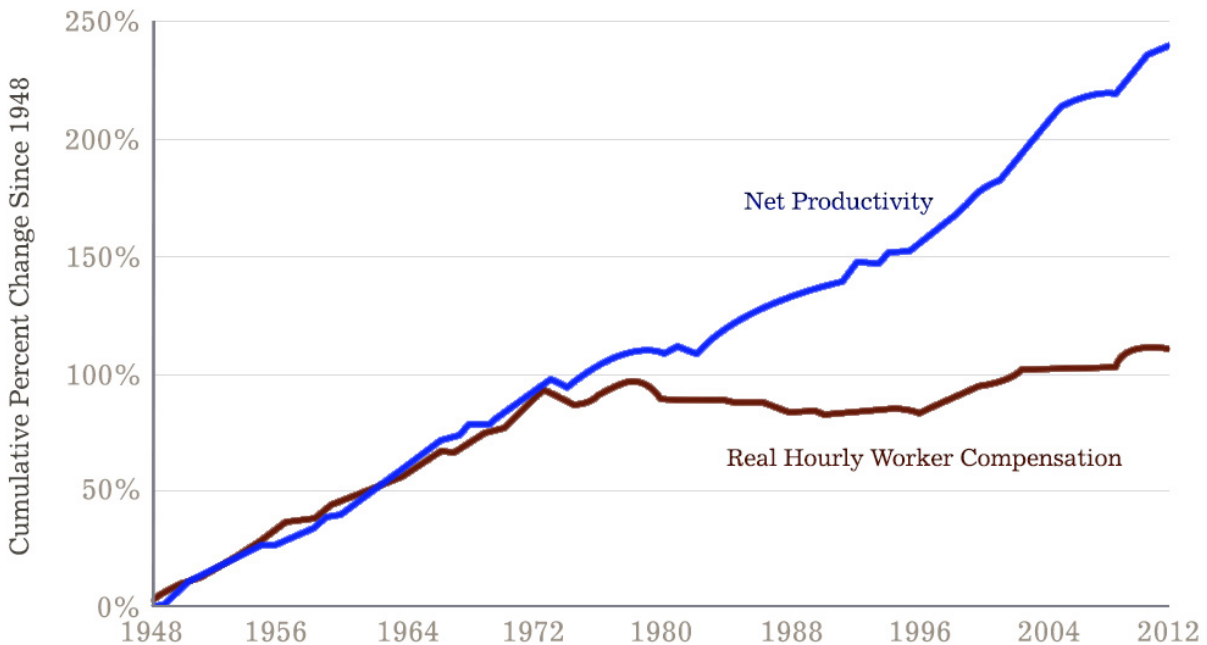
Elites Capture Growth – Economic Growth is a Rushing River Not a Tide

Many politicians have argued for increased economic growth even at the cost of increased inequality, on the basis of the analogy that *a rising tide lifts all boats*. However, the analogy is fatally flawed. The elites are capturing more and more of the economic growth. Economic growth is not a tide; it is more akin to a rushing river. If those upstream can divert a larger portion off for themselves, there is less left for those downstream.¹⁵³⁸ Inequality is increasing, despite economic growth and gains in productivity, as the wealthiest have captured the economic gains from these increases in productivity.¹⁵³⁹ In contrast, the wages for the vast majority of the population have remained almost flat after adjusting for inflation.¹⁵⁴⁰ The divergence in income is fuelled by depressed salaries at the lower end of the income scale, increased salaries among the top 0.1%, the increased use of stock as payment for executives, increased returns on capital, and decreases in the top tax rates. Society cannot grow its way out of this problem. It is a political problem, and, as we will discuss, it needs a solution at the political level.

¹⁵³⁸ Those who support trickle-down economics argue, “[g]iving more to the rich leads to a larger pie, so though the poor and middle get a smaller share of the pie, the piece of pie they get is enlarged. I wish that were so, but it’s not. In fact, it’s the opposite: as we noted, in the period of increasing inequality, growth has been slower—and the size of the slice given to most Americans has been diminishing.” Joseph E. Stiglitz, *supra* note 38 c 1, s Trickle-down economics.

¹⁵³⁹ “Given the inequality in wealth, it’s not surprising that those at the top get the lion’s share of the income from capital—before the crisis, in 2007, some 57 percent went to the top 1 percent. Nor is it surprising that those in the top 1 percent have received an even larger share of the increase in capital income in the period after 1979—some seven-eighths—while those in the bottom 95 percent have gotten less than 3 percent of the increment.” *Ibid* cs 1, subsection: A Snapshot of America’s Inequality.

¹⁵⁴⁰ Thomas Piketty & Emmanuel Saez, *supra* note 1376 at 33.

Figure 10: U.S. Workers' Wages Detached from Productivity, 1948-2012 ¹⁵⁴¹

Increasing GDP in a developed economy by more than a few percent is virtually impossible, and could never make up for the 44% decline in absolute income mobility in the U.S. (the distinction between income opportunity and absolute income mobility is covered in the next section).¹⁵⁴² Chetty *et al.* find that,

most of the decline in absolute mobility is driven by the more unequal distribution of economic growth in recent decades, rather than by the slowdown in GDP growth rates. In this sense, the rise in inequality and the decline in absolute mobility are closely linked. ... With the current distribution of income, higher GDP growth rates alone are insufficient to restore absolute mobility to the levels experienced by children in the 1940s and 1950s. If one wants to revive the “American dream” of high

¹⁵⁴¹ Workers are nonsupervisory workers in the private sector. Net productivity is the output of goods and services less depreciation. Robert B. Reich, *supra* note 26 at 130; Creative Commons License; *Cumulative change in total economy productivity and real hourly compensation of production/nonsupervisory workers, 1948–2014*, by Economic Policy Institute, State of Working America (Washington, D.C.: Economic Policy Institute, 2016).

¹⁵⁴² Most serious economists recognize that increasing economic growth for a developed country that is not in a recession/depression is extremely difficult. For the U.S., “achieving 3 percent sustained growth would require a heroic combination of good policy and good luck, and 4 percent sustained growth would not likely be possible under any realistic circumstance.” *How Fast Can America Grow?*, by Committee for a Responsible Federal Budget (1900 M Street NW, Suite 850, Washington, DC: Committee for a Responsible Federal Budget, 2017) at 8.

rates of absolute mobility, then one must have an interest in growth that is spread more broadly across the income distribution.¹⁵⁴³

Politicians have often focused on education as a panacea for inequality, but it cannot alleviate the problem.

To state it another way, while a college education has become a prerequisite for joining the middle class, it is no longer a sure means of gaining ground once admitted to it. The middle class's share of the total economic pie continues to shrink, while the share going to the top continues to grow.¹⁵⁴⁴

Moreover, eventually increased inequality undermines future economic growth.¹⁵⁴⁵ The increase in inequality has consequences that are socially damaging and destabilizing.

Economic Inequality is a Risk to Democracy

Having considered the evidence that inequality is increasing, we will now consider the resulting economic and democratic repercussions.

Economic Repercussion

Economists have known for some time that there is a strong association between equality and economic growth.¹⁵⁴⁶ “Cross-country analyses of growth during the postwar period done in the early and mid-1990s tended to confirm an association of high income inequality with lower growth.”¹⁵⁴⁷ Similarly, redistributive policies, like progressive marginal tax rates, are not associated with lower growth.¹⁵⁴⁸ Moreover, studies of cross-country regressions of GDP growth consistently found a negative correlation between measures of inequality and the average rate of growth.¹⁵⁴⁹ Recent work has supported the negative effects on inequality on economic growth; the OECD calculated that on average the inequality has decreased economic growth of OECD countries by 4.7% between 1990 and 2010, from

¹⁵⁴³ Raj Chetty et al, “The fading American dream: Trends in absolute income mobility since 1940” (2017) Science, online: <<http://science.sciencemag.org/content/early/2017/04/21/science.aal4617>> at 9.

¹⁵⁴⁴ Robert B. Reich, *supra* note 26 at 224.

¹⁵⁴⁵ OECD, *In It Together: Why Less Inequality Benefits All* (Paris: OECD Publishing, 2015) at 15.

¹⁵⁴⁶ Many economists were hesitant to embrace these findings, probably because they were locked into the Kuznets hypothesis model, which had found that inequality should peak during the early stages of industrialization, and then decline after more development. Philippe Aghion, Eve Caroli & Cecilia García-Peñalosa, “Inequality and Economic Growth: The Perspective of the New Growth Theories” (1999) 37:4 J Econ Lit 1615–1660 at 1616. Alternatively, many favoured policies that increased inequality, and were reluctant to accept that these policies would also lead to decreasing economic growth. Partly, this might have been because the accelerating growth of inequality in the developed economies, particularly the U.S., was not so apparent until after the 2000s. Until the 2008 Financial Crisis, many economists seemed to have expected the inequality to level off, viewing it as a naturally developing phenomenon rather than as a result of entrenching political policies favoured by the top 1%.

¹⁵⁴⁷ Nancy Birdsall, “Why Inequality Matters: Some Economic Issues” (2001) 15:2 Ethics Int Aff 3–28 at 12.

¹⁵⁴⁸ *Ibid* at 13.

¹⁵⁴⁹ Aghion, Caroli & García-Peñalosa, “Inequality and Economic Growth”, *supra* note 1546 at 1615.

wasted potential and decreased income mobility.¹⁵⁵⁰ The IMF found a similar inverse relationship between inequality and economic growth. “If the income share of the top 20 percent increases by 1 percentage point, GDP growth is actually 0.08 percentage points lower in the following five years”¹⁵⁵¹. In contrast, an identical 1 percent increase in the share of wealth to the bottom 20 percent increases economic growth by 0.38 percent.¹⁵⁵² Piketty also finds that increased inequality is connected to slow growth rates of world output.¹⁵⁵³

There is growing evidence that inequality increases the risk and severity of financial crises, which in turn hurts economic growth.¹⁵⁵⁴ The causal mechanism for this is thought to be extended leverage and overextended credit to the lower and middle classes, as they attempt to make up for their stagnating income.¹⁵⁵⁵ The IMF also found that a “a 10-percentile decrease in inequality increases the expected length of a growth spell by one half.”¹⁵⁵⁶ Increased inequality is associated with decreased economic growth due to decreased aggregate demand. This is because those at the bottom spend a greater percentage of their income, and as inequality increases they have proportionately less to spend.¹⁵⁵⁷ The rise in inequality not only increases the income of those on the top, it also decreases the income opportunity for those on the bottom.¹⁵⁵⁸ As society becomes more unequal, it reduces investment in the shared goods and public infrastructure, which hurts future economic growth.¹⁵⁵⁹ At the same time, legal frameworks begin to shift to allow more rent-seeking and economically wasteful behaviour, since it is an easy way for the wealthy to profit.¹⁵⁶⁰

Absolute Income Mobility

So far, we have treated the churning of economic position, the chance and freedom to move along the income scale, as the definition of income mobility and opportunity. Chetty *et al.* provide a better definition. They argue that income opportunity is better understood as absolute mobility, which is the chance that the children will be better off than their parents.¹⁵⁶¹ This measurement better captures what people mean when they seek the “American dream”, and why so many people can be discontent with their economic prospects, even when they are employed, the GDP is rising, and they are

¹⁵⁵⁰ OECD, *supra* note 1545 at 15.

¹⁵⁵¹ Era Dabla-Norris et al, *supra* note 839 at 7.

¹⁵⁵² *Ibid.*

¹⁵⁵³ Thomas Piketty, *supra* note 845 at 25.

¹⁵⁵⁴ Era Dabla-Norris et al, *supra* note 839 at 8.

¹⁵⁵⁵ *Ibid.*

¹⁵⁵⁶ Joseph E Stiglitz, “Inequality and Economic Growth” (2016) 86:51 Polit Q 134–155 at 11.

¹⁵⁵⁷ *Ibid.*

¹⁵⁵⁸ OECD, *supra* note 1545 at 27.

¹⁵⁵⁹ Joseph E. Stiglitz, *supra* note 24 at 12.

¹⁵⁶⁰ “[S]ocieties with greater inequality are less likely to make investments in the common good, in say public transportation, infrastructure, technology, and education. The rich don’t need these public facilities, and they worry that a strong government which could increase the efficiency of the economy might at the same time use its powers to redistribute. Moreover, with so many at the top making their money from financial market shenanigans and rent-seeking, we wind up with tax and other economic policies that encourage these kinds of activities rather than more productive activities.” *Ibid.*

¹⁵⁶¹ Raj Chetty et al, “The fading American dream”, *supra* note 1543 at 1.

comparatively well-off. People measure themselves against their previous state and their childhood to see if life is getting better; and in many developed countries, on an economic level, it is not. This is likely the essence of what people miss about the mid-twentieth century economy, the sense of hope in the future on a personal and social level.¹⁵⁶²

On the whole, absolute income mobility is declining. In the U.S., in 1940, 90% of people earned more than their parents; now it is only 50%.¹⁵⁶³ “Absolute income mobility has fallen across the entire income distribution, with the largest declines for families in the middle class.”¹⁵⁶⁴ This decline in mobility is a result of political decisions. In the U.S., this decline in income mobility has been matched by a levelling off and now decline in average lifespan – the first time this has ever occurred since World War I and the Spanish flu pandemic.¹⁵⁶⁵

In contrast to the U.S., income mobility has remained relatively stable in Canada.¹⁵⁶⁶ This is likely due to the different political structures and incentives, the more urban population, the lower levels of inequality, the more equal access to healthcare, the higher percentage of union membership, and more progressive taxes with higher levels of taxation at the top. However, the increasing inequality in Canada is likely to lead to a decline in absolute income mobility in the future.¹⁵⁶⁷

Democratic Repercussions

The democratic repercussions of growing inequality exceed the economic risks. Inequality is divisive and socially corrosive, damaging democracy.¹⁵⁶⁸ Although subtle at first, as inequality takes hold the risks to democratic representation increase dramatically as the gap between classes widens. Inequality is fundamentally damaging to trust and the social compact, and social trust is essential for

¹⁵⁶² Although, for some people it is simply a longing for a simpler more racist time.

¹⁵⁶³ Raj Chetty et al, “The fading American dream”, *supra* note 1543 at 8.

¹⁵⁶⁴ *Ibid* at 9.

¹⁵⁶⁵ *United States Life Tables, 2017*, by Elizabeth Arias & Jiaquan Xu, National Vital Statistics Reports Volume 68, Number 7 (U.S.: U.S. Department of Health and Human Services, 2019); Steven H Woolf et al, “Changes in midlife death rates across racial and ethnic groups in the United States: systematic analysis of vital statistics” (2018) 362 *BMJ* k3096 at 13. This decline is likely linked to decreasing income mobility, through drug overdoses, alcoholism, suicide, and other diseases of despair, as well as exposure to pollution and inadequate medical care. Many of these problems are connected to communal collapse, which is again connected to declines in income mobility and opportunity.

¹⁵⁶⁶ *Doing as Well as One’s Parents? Tracking Recent Changes in Absolute Income Mobility in Canada*, by Yuri Ostrovsky, Catalogue no. 11-626-X - No. 073, Economic Insights 73 (Canada: Statistics Canada, 2017) at 5.

¹⁵⁶⁷ “A number of studies have noted the link between inequality of outcomes and inequality of opportunities. When there are large inequalities of income, those at the top can buy for their offspring privileges not available to others, and they often come to believe that it is their right and obligation to do so.” Joseph E. Stiglitz, *supra* note 1556 at 4.

¹⁵⁶⁸ Richard Wilkinson & Kate Pickett, *supra* note 856 c This is not a selfhelp book; R. S. Foa et al, *supra* note 5 at 18. See also, Lawrence Ezrow, *supra* note 856; Larry M. Bartels, *supra* note 738; Joseph E. Stiglitz, *supra* note 38 cs 5, The evisceration of our democracy; Richard Wilkinson & Kate Pickett, *supra* note 856 c The misconception of meritocracy.

democracy.¹⁵⁶⁹ The lack of income growth for the remaining 99% of the population is not sustainable in a healthy democracy.¹⁵⁷⁰ The increased economic power of those on top translates into increased political power.¹⁵⁷¹ This decreases the room for democracy, making a slide into authoritarianism more likely.

Indeed, Foa *et al.* found that,

In recent years, there has been an especially acute crisis of democratic faith in the “Anglo-Saxon” democracies – the United States, Australia, Canada, New Zealand, and the United Kingdom. Overall, the proportion of citizens who are “dissatisfied” with the performance of democracy in these countries has doubled since the 1990s, from a quarter, to half of all individuals.¹⁵⁷²

These are mostly the same developed democracies that have experienced the largest increase in inequality.¹⁵⁷³ Foa *et al.* conclude that this increase in dissatisfaction is likely a result of the increase in inequality, the adoption of supply-side economics (discussed below), and the increased influence of lobbyists on the political system.¹⁵⁷⁴

¹⁵⁶⁹ At the individual level, people who believe most other people can be trusted “give more to charity and are more tolerant toward minorities and to people who are not like themselves. Trusting people also tend to be more optimistic about their own ability to influence their own life chances and, not least important, to be more happy with how their life is going. We see the same positive pattern at the societal level. Cities, regions, and countries with more trusting people are likely to have better working democratic institutions, to have more open economies, greater economic growth, and less crime and corruption.” Bo Rothstein & Eric M Uslaner, “All for All: Equality, Corruption, and Social Trust” (2005) 58:1 World Polit 41–72 at 41 & 48; Richard Wilkinson & Kate Pickett, *supra* note 856 c This is not a selfhelp book.

¹⁵⁷⁰ Ironically, big social programs are a good way of restoring equality and social trust, and rolling back corruption and inequality. However, the power of lobbyists makes it hard to enact these sorts of policies, especially as the country becomes more unequal and corrupt.

“In countries with high levels of corruption, the public is hostile to people who have more. Where corruption is high, voters are likely to believe that the poor are treated unfairly by society in general and by government institutions in particular. ... In such a situation, it is easy for “radical” political entrepreneurs to argue that dispensing justice to those who prosper illegitimately (for example due to various forms of corruption) means taking resources away from the poor and needy. Thus, inequality and corruption breed mistrust, which produces no support for the very type of social welfare programs that are most effective in reducing disparities of income.”

Bo Rothstein & Eric M. Uslaner, “All for All”, *supra* note 1569 at 56.

¹⁵⁷¹ R. S. Foa *et al.*, *supra* note 5 at 19.

¹⁵⁷² *Ibid* at 18.

¹⁵⁷³ Foa *et al.* note that New Zealand has less dissatisfaction with democracy than the other countries listed. It also has less inequality and is the only one with a proportional electoral system. The proportional electoral system might reduce elite signaling of dissatisfaction with democracy, and might increase the proportion of popular policy enacted. *Ibid*.

¹⁵⁷⁴ They refer to the adoption of supply-side economic policies as the “financialisation” of the economies. *Ibid*.

Economic Power to Political Power

Both Rawls and Dworkin raise concerns that economic inequality when translated into political power can lead to political inequality, destabilizing liberal democracy.¹⁵⁷⁵ Many thinkers have expressed the concern that the U.S. has been moving towards plutocracy, with so much of the wealth controlled by such a small percent of the population.¹⁵⁷⁶ President Obama raised those same concerns in his farewell address. He argued that “[o]ur democracy won’t work without a sense that everyone has economic opportunity”¹⁵⁷⁷ and that inequality is “corrosive to our democratic principles.”¹⁵⁷⁸ Without a new social compact that repairs education, the social safety net, and the tax code, “the disaffection and division that has stalled our progress will only sharpen in years to come.”¹⁵⁷⁹

Mounk identifies the rise in inequality and stagnating living standards as a key driver of voters’ discontent with democracy, and their willingness to support authoritarian candidates.¹⁵⁸⁰ Stiglitz warns that inequality damages political equality and social trust. It assaults the values that are essential to democracy, including fair play, equality of opportunity, and the sense of community.¹⁵⁸¹

Decreasing Room for Democracy

Reich warns that wealthy and corporate political influence can drown out the voices of the majority of citizens, even if it is not intended.¹⁵⁸² As political influence of the average citizen declines due to increasing political power of the wealthy, the rise in the power and wealth of corporations also raises fundamental questions about their influence on democracy. Along with their pursuit of profit and discounting of externalities, the vast majority of corporations are hierarchical and structured, lacking internal principles of consultation and democracy. As these hierarchical institutions rise in power and size, the room for democratic decision-making and citizenship in society further declines, especially as privatization advances. More of society is governed according to consumerism and the norms of corporate life, and less according to the ethos of democratic participation.

The declining room for democratic participation, the weakening influence of the average citizen, and the increasing unfairness and inequality, further reinforces the dangerous appeal of authoritarianism, xenophobia, racism, and other symptoms of democratic decline. Ultimately, these “solutions” will make things worse, but they will be appealing to many nonetheless.

¹⁵⁷⁵ John Rawls, *supra* note 1370 at 357; Ronald Dworkin, *supra* note 80 at 364 & 385.

¹⁵⁷⁶ Joseph E. Stiglitz, *supra* note 38 c 6, s The Battle Over Policies as a Battle Over Perceptions; See also, Era Dabla-Norris et al, *supra* note 839 at 5; I. Theodossiou & A. Zangelidis, *supra* note 864; Facundo Alvaredo et al, *supra* note 867 at 12.

¹⁵⁷⁷ President Obama, “President Obama’s Farewell Address”, (10 January 2017), online: *White House* <<https://obamawhitehouse.archives.gov/node/360231>>.

¹⁵⁷⁸ *Ibid.*

¹⁵⁷⁹ *Ibid.*

¹⁵⁸⁰ Yascha Mounk, *supra* note 1531 at 193.

¹⁵⁸¹ Joseph E. Stiglitz, *supra* note 38 c 4, s Concluding comments; Joseph E. Stiglitz, *supra* note 24 at 13.

¹⁵⁸² Robert B. Reich, *supra* note 224 at 11.

Economic Inequality is an Outcome of Policy Decisions

The increase of inequality is largely the result of political decisions interacting with market mechanisms.¹⁵⁸³ Thus, as Piketty argues, inequality will continue to increase if government policies are not changed to prevent it.¹⁵⁸⁴

Throughout the 1990s and early 2000s a dominant explanation in economics for the increase in inequality was that it is a result of increased rewards for those with more education and a decline in manufacturing wages due to increased free trade.¹⁵⁸⁵ This account provides some explanation into the 2000s, but it failed to explain the runaway income growth of the top 1%, and the even greater income growth of the top 0.1%. In the U.S., since 2000, most university graduates have experienced little income gain, and even those in the top 10% of university graduates “increased their cumulative income by only 4.4 percent between 2000 and 2013”.¹⁵⁸⁶ The impact of manufacturing decline is also insufficient to explain the changes in income, and cannot account for the increased income of the top 1%. Education and trade offer inadequate explanations.

Most studies of the growth of income inequality neglected politics as an explanatory factor.¹⁵⁸⁷ Recent economic literature has turned towards a more political, and more nuanced explanation. These studies show that acceleration of the top 1% is far better explained by political decisions that gave the top 1% more market and political power, and that this power was used to move wealth from the bottom to the top.¹⁵⁸⁸

We will cover several aspects of these policy decisions and their connection to lobbying. We will discuss how inequality was increased by the supply-side economics; how meritocracy requires high marginal taxes; and the transition into a winner-take-all society.

Supply-Side Economics Increase Inequality

At about the same time that lobbying began its phase of rapid growth, the U.S. began to institute supply-side economics policies. It is unlikely this timing is coincidental. This policy approach began in the U.S and was widely copied in the U.K., Canada, and Australia, and to a lesser extent in the E.U, following the same general pattern as the spread of increased business lobbying.

Since the 1980s, these policies – ostensibly enacted to push back against economic stagnation – have dramatically increased inequality.¹⁵⁸⁹ They resulted in the private sector regularly dominating the

¹⁵⁸³ Joseph E. Stiglitz, *supra* note 24 at 5.

¹⁵⁸⁴ In particular, he recommends a progressive global tax on capital. Thomas Piketty, *supra* note 845 at 27.

¹⁵⁸⁵ David Jacobs & Lindsey Myers, *supra* note 681 at 756.

¹⁵⁸⁶ Robert B. Reich, *supra* note 26 at 224.

¹⁵⁸⁷ David Jacobs & Lindsey Myers, *supra* note 681 at 753.

¹⁵⁸⁸ “[W]e have a system that has been working overtime to move money from the bottom and middle to the top, but the system is so inefficient that the gains to the top are far less than the losses to the middle and bottom.” Joseph E. Stiglitz, *supra* note 38 c preface, s Concluding Comments.

¹⁵⁸⁹ Joseph E. Stiglitz, *supra* note 24 at 5.

public sector.¹⁵⁹⁰ They removed support from the bottom of the economic spectrum and reduced infrastructure spending, while also loosening the lid on the top, reducing taxes on high incomes earners, capital and businesses.¹⁵⁹¹

[The increase in] inequality is largely a result of policies. The laws of economics are universal: the fact that in some countries there is so much less inequality and so much more equality of opportunity, the fact that in some countries inequality is not increasing – it is actually decreasing – is not because they have different laws of economics. ... Every aspect of our [American] economic, legal, and social frameworks helps shape inequality: from the education system and how it is financed, to the health system, to tax laws, to our governing of bankruptcy, corporate governance, the functioning of our financial system, to our anti-trust laws. In virtually every domain, the United States, for instance, has made decisions that help enrich the top at the expense of the rest.¹⁵⁹²

Jacobs and Myers agree that political policy decisions accounts for a number of the factors that contributed to the growth of inequality.¹⁵⁹³ They argue that the two largest aspects of supply-side economics that factored into the rise of inequality were the decline in unions, and the decline in taxes and financial regulations.¹⁵⁹⁴ The former had provided political pressure up from the bottom, and the latter had provided government pressure down on the top. Both of these changes were the result of heavy lobbying.

The rise in inequality is driven by a deliberate supply-side economic agenda of breaking unions; of financial deregulation; of reducing taxes on the wealthy; of reducing business taxes; it has been driven by the wealthy; and its arguments for lower taxes on the wealthy do not hold up to scrutiny.

Supply-Side Economics: Anti-Union

Unions decrease inequality.¹⁵⁹⁵ Conversely, the decline of unions has accelerated inequality. As covered in Chapter 3, the decline in unions has been a deliberate political goal, pursued by corporate interests and supporters of supply-side economics.¹⁵⁹⁶

¹⁵⁹⁰ The resulting policies have regularly favoured the preferences of the elites. Laura Kollmar & Raymond Koen, “Lobbying against Democracy” (2017) 1 J Anti-Corrupt Law 9–45 at 15.

¹⁵⁹¹ Facundo Alvaredo et al, *supra* note 867 at 15; Thomas Piketty & Emmanuel Saez, *supra* note 1376 at 37.

¹⁵⁹² Joseph E. Stiglitz, *supra* note 24 at 5.

¹⁵⁹³ David Jacobs & Lindsey Myers, *supra* note 681 at 753.

¹⁵⁹⁴ *Ibid.*

¹⁵⁹⁵ Henry S. Farber et al, “Unions and Inequality Over the Twentieth Century”, *supra* note 1408 at 4.

¹⁵⁹⁶ Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern I: Lobbying Disproportionately Advantages Businesses: Decline in Countervailing Force of Unions, p. 150. See also, Sean Lux, T. Russell Crook & David J. Woehr, “Mixing business with politics”, *supra* note 213 at 227; David Jacobs & Lindsey Myers, *supra* note 681 at 753, 754, 769; Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 36;

Reductions in union strength should accelerate inequality for two reasons: First, strong unions decrease within-firm earnings differences. Second, before the politically induced decline in union strength ... unions probably were the most effective advocate for public policies advantageous to the less affluent that weakened this growth in inequality¹⁵⁹⁷

Regulatory, economic, social and legal changes have weakened unions. The weaker unions and the declining participation in citizen groups disrupted the countervailing lobbying pressure that had been responsible for widely distributing the benefits of economic growth.¹⁵⁹⁸ This may have produced a short-term economic rush, but it also produced long-term damage, feeding inequality.

Jacobs and Myers calculate that a 10% increase in union strength, in the pre-Reagan era, would have reduced U.S. income inequality by 2.5% to 3 %.¹⁵⁹⁹ The decline in unions is also a factor in the declining size of the middle class.¹⁶⁰⁰ The decline of unions has allowed managers to pay themselves more, increasing inequality.¹⁶⁰¹ Economic equality increases economic growth.¹⁶⁰² So, it is not surprising that unions appear to be a slight net benefit to economic growth over the long-term.¹⁶⁰³ More importantly, they are a substantial benefit to the standard of living by ensuring that the gains of economic growth flow to the lower and middle class. This is better – politically, economically, socially and morally – than slightly higher growth that accrues mostly to the 1%, which is the alternative North America has embraced.

At the same time, increases in free trade, competition, deregulation and privatization has increased access to consumer goods, but also reduced wages for those on the bottom in the developed countries.¹⁶⁰⁴ It has raised wages significantly in developing countries, but those are also now experiencing rising inequality.¹⁶⁰⁵ Those on the top of the income pyramid have fully benefited from

James Feigenbaum, Alexander Hertel-Fernandez & Vanessa Williamson, *supra* note 683 at 30; See also, Lee Fang, *supra* note 690.

¹⁵⁹⁷ David Jacobs & Lindsey Myers, *supra* note 681 at 753.

¹⁵⁹⁸ Robert B. Reich, *supra* note 26 at 185.

¹⁵⁹⁹ David Jacobs & Lindsey Myers, *supra* note 681 at 767.

¹⁶⁰⁰ In the U.S., unions declined from 20.1% of wage-earning workers in 1980 to 11.9% in 2010. “This has created an imbalance of economic power and a political vacuum. Without the protection afforded by a union, workers have fared even more poorly than they would have otherwise. Market forces have also limited the effectiveness of the unions that remain. The threat of job loss by the moving of jobs abroad has weakened their power.” Joseph E. Stiglitz, *supra* note 38 c 2, s Beyond market forces: changes in our society.

¹⁶⁰¹ “Gradually, beginning in the 1980s and 1990s, management realized that the measures taken to fend off outside attacks, combined with weaker unions, also meant that they could take a larger share of the corporate rents for themselves with impunity.” *Ibid* c 2, s Beyond market forces: changes in our society.

¹⁶⁰² Joseph E. Stiglitz, *supra* note 1556 at 11.

¹⁶⁰³ Henry S. Farber et al, “Unions and Inequality Over the Twentieth Century”, *supra* note 1408 at 32.

¹⁶⁰⁴ Reich refers this process as *supercapitalism*. Robert B. Reich, *supra* note 224 at 91; Facundo Alvaredo et al, *supra* note 867 at 5.

¹⁶⁰⁵ Facundo Alvaredo et al, *supra* note 867 at 11.

these changes, facing little risk to their wages, gaining additional opportunities to invest their capital, while also paying less for consumer goods.

Supply-Side Economics: Financial Deregulation

Jacobs and Myers note that “financial deregulation during neoliberal presidencies also contributed to this acceleration in inequality.”¹⁶⁰⁶ The decline in financial regulations, heavily lobbied for by the financial industry, has opened the market up to more phishing, allowing financial entities to take advantage of their customers, and resulting in scandals with enormous economic repercussions, like the 2008 Financial Crisis.¹⁶⁰⁷ Both the phishing and the scandals accelerate inequality, and the inequality was also a factor leading to the 2008 crisis; it is those on the bottom who are most exploited and who then most suffer the economic fallout of the crisis.¹⁶⁰⁸

The 2008 Financial Crash and the subsequent slow recovery from the great recession are direct consequences of the government following the policy preferences and lobbying of the wealthy over those of the general population.¹⁶⁰⁹

Supply-Side Economics: Decline in Taxes on the Wealthy

There has also been a notable decline in the top tax rate in most countries since the heyday of income equality.¹⁶¹⁰ This decline in top tax rates is due to deliberate policy decisions and has contributed substantially to the growth of inequality.¹⁶¹¹ In the U.S. during the three-decade heyday of equality after World War II, the top marginal tax rate never fell below 70%, and the top effective rate never below 50% (after credits and deductions).¹⁶¹² Reich argues that if the current trends in inequality continue, not even returning to these rates will be enough to restore widespread equality over the next forty years.¹⁶¹³

The story of the top tax rate in Canada is not as extreme, but the same declining trend is evident. For example, the top marginal tax rate in Ontario has been declining since the 1950s.¹⁶¹⁴ It was

¹⁶⁰⁶ David Jacobs & Lindsey Myers, *supra* note 681 at 769.

¹⁶⁰⁷ Joseph E. Stiglitz, *supra* note 38 cs 2, Adam Smith’s invisible hand and inequality.

¹⁶⁰⁸ “[T]here is absolutely no doubt that the increase of inequality in the United States contributed to the nation’s financial instability.” Thomas Piketty, *supra* note 845 at 297; Joseph E. Stiglitz, *supra* note 1556 at 2.

¹⁶⁰⁹ In the U.S., these preferences included the deregulation of the financial industry, the bail-out of the banks, the refusal to nationalize the failed banks, the payment of bankrupt banker’s bonuses, the reluctance to bailout home owners, the reluctance to criminally charge financial actors even in cases of blatant wrong-doing, the unwise focus on balance budgets and deficit reductions during a recession, and the value placed on keeping inflation low instead of increasing employment. See Joseph E. Stiglitz, *supra* note 38 cs 5 & 2.

¹⁶¹⁰ Facundo Alvaredo et al, *supra* note 867 at 15; Emmanuel Saez, *Income and Wealth Inequality: Evidence and Policy Implications* (University of Chicago, 2014) at 25.

¹⁶¹¹ Emmanuel Saez, *supra* note 1610 at 25.

¹⁶¹² Robert B. Reich, *supra* note 26 at 224.

¹⁶¹³ *Ibid.*

¹⁶¹⁴ From Armine Yalnizyan, *supra* note 846 at 17.

between 80% and 90% from 1935 to around 1950. The top rate was reduced down to 60% throughout most of the 1970s, and reduced again to about 50% in 1980s.¹⁶¹⁵

Despite much political propaganda to the contrary, high top tax rates reduce the income inequality without any visible effect on economic growth.¹⁶¹⁶

Research has demonstrated that tax progressivity is an effective tool to combat inequality. Progressive tax rates do not only reduce post-tax inequality, they also diminish pre-tax inequality by giving top earners less incentive to capture higher shares of growth via aggressive bargaining for pay rises and wealth accumulation. Tax progressivity was sharply reduced in rich and some emerging countries from the 1970s to the mid-2000s. Since the global financial crisis of 2008, the downward trend has leveled off and even reversed in certain countries, but future evolutions remain uncertain and will depend on democratic deliberations. It is also worth noting that inheritance taxes are nonexistent or near zero in high-inequality emerging countries, leaving space for important tax reforms in these countries.¹⁶¹⁷

Young *et al.* point out that,

[r]ising income inequality is one of the deepest challenges facing U.S. society in the twenty first century. Yet there have been few clear policy responses to growing inequality. Indeed, over the past three decades, federal tax policy has shifted away from taxation of the elite, reducing tax rates on top incomes, capital gains, and multi-million dollar inheritances—a process to “untax the one percent”.¹⁶¹⁸

Supply-Side Economics: Decline in Business Taxes

The decrease in business taxes is another method of transferring wealth to the already wealthy. Multiple studies show that these taxes fall mostly on the business and those at the very top of the income scale, who own the lion share of corporate shares. There has been a worldwide trend towards lower corporate tax rates over the last twenty years. From 2000 to 2018, the average statutory corporate tax rate fell from 28.6% to 21.4%.¹⁶¹⁹ Reductions in business taxes increase the power of businesses as institutions, while essentially being tax breaks for the very wealthy. Depending on the tax

¹⁶¹⁵ From *Ibid.*

¹⁶¹⁶ Emmanuel Saez, *supra* note 1610 at 25.

¹⁶¹⁷ Facundo Alvaredo et al, *supra* note 867 at 15.

¹⁶¹⁸ Cristobal Young et al, “Millionaire Migration and Taxation of the Elite: Evidence from Administrative Data” (2016) 81:3 Am Sociol Rev 421–446 at 421.

¹⁶¹⁹ This is undoubtedly related to successful corporate lobbying. *Corporate Tax Statistics*, by OECD, First Edition (OECD, 2019) at 8.

structure, the decreased business taxes can allow the wealthy to park their income in businesses when need be, to reduce their personal tax rate.¹⁶²⁰ More importantly, since other business pressures remain unchanged, they allow executives to funnel more money to themselves and to shareholders (executives often also being shareholders). Around 80% of corporate tax cuts go to the wealthy shareholders, directly (60%) or indirectly (20%).¹⁶²¹ Corporate tax cuts are payouts to the top 1%; payouts that also reduce public funding sources, and the government's ability to provide support and infrastructure for the rest of the people. Cuts in business taxes also create pressure on other jurisdictions to cut their business taxes due to (the often mistaken) belief that it is needed to stay economically competitive; a belief carefully reinforced by business lobbying.

Canada's business tax rate has declined substantially since the 1980s, from a peak of 50.9% down to 26.5% in 2018.¹⁶²² Canada's marginal top tax rate has increased slightly under the Trudeau government to 53.5%.¹⁶²³ However, the low corporate tax and capital gains rates makes it likely that Canadian taxes on the top 0.1% have declined in aggregate. The decision to reduce taxes on the capital gains is a key factor in the increase in inequality.¹⁶²⁴ Moreover, Canada's beneficial ownership laws allow wealth to be stashed in numbered corporations, trusts, real-estate and transferred to tax havens with little oversight.¹⁶²⁵ "The wealth held in tax havens has increased considerably since the 1970s and

¹⁶²⁰ "The rich and superrich often use corporations to protect themselves and shelter their income, and they have worked hard to ensure that the corporate income tax rate is low and the tax code is riddled with loopholes. Some corporations make such extensive use of these provisions that they don't pay any taxes." Joseph E. Stiglitz, *supra* note 38 c 2, s Role of government in redistribution.

¹⁶²¹ James R. Nunns, *supra* note 866 at 15. Similarly, tax cuts on capital gains also go mostly to the top 1%. Yet, capital gain taxes are often proposed by politicians, and in Canada 50% of capital gains are not even taxed (which is equivalent to a 50% reduction in capital gains taxes). McClelland found that 75.7% benefit of lower tax rates on long-term capital gains in the U.S. would go to individuals with income over \$1,000,000. The bias towards the wealthy is likely the same in Canada. *Capital Gains*, by Rob McClelland, Tax Policy Center (Urban Institute & Brookings Institution, 2017) at 3.

¹⁶²² The corporate tax rate in Canada averaged 38.2% percent from 1981 to 2018. Trading Economics, "Canada Corporate Tax Rate", (July 2019), online: *Trading Econ* <<https://tradingeconomics.com/canada/corporate-tax-rate>>; OECD, *supra* note 1619 at 8.

¹⁶²³ This is in the upper 2/3 of the OECD, which ranges from 33% to 56%, with the bulk of countries falling in the 43% to 53% range. Trading Economics, *supra* note 1622; OECD, *supra* note 1619 at 8.

¹⁶²⁴ In Canada the capital gains inclusion rate was reduced from a high of 75% in 1988 to 50%. This means that only 50% of capital gains are even subject taxed. This is a huge tax benefit for the wealthy. In the U.S. the superrich now pay on average a lower tax rate than the bottom 50%.

"The most egregious aspect of recent tax policy was the lowering of tax rates on capital gains. ... In this way we have given the very rich, who receive a large fraction of their income in capital gains, close to a free ride. It doesn't make sense that investors, let alone speculators, should be taxed at a lower rate than someone who works hard for his living, yet that's what our tax system does. And capital gains are not taxed until they are realized (that is, until the asset is sold), so there is an enormous benefit from this deferral of taxes, especially when interest rates are high. The inequality in dividends is greater than that in wages and salaries, and the inequality in capital gains is greater than that in any other form of income, so giving a tax break to capital gains is, in effect, giving a tax break to the very rich."

Joseph E. Stiglitz, *supra* note 38 c 2, s Role of government in redistribution.

¹⁶²⁵ Numbered corporations and trusts are widely used in Canada for money laundering and tax evasion.

"[A] high number of companies being established without carrying out any business activities, and the use of corporate entities and trusts in Canada to facilitate foreign investment. LEAs [Law Enforcement

currently represents more than 10% of global GDP.”¹⁶²⁶ From the Panama Papers, we know that the wealthiest Canadians are taking extensive advantage of these tax avoidance methods.¹⁶²⁷

Supply-Side Economics: Decline in Taxes is Driven by the Wealthy

The policy decisions to lower taxes on the top are clearly being driven by the wealthy, as there is little widespread public support for it.¹⁶²⁸ There have also been a matching decrease in funding for tax enforcement in the U.S. and Canada.¹⁶²⁹ This favours business interests and the top 0.1%, who are often engaged in complex tax avoidance schemes that take vast expertise and resources to unravel.¹⁶³⁰ These cuts cost the government money, indicating that improving government finances is not their purpose.¹⁶³¹ In 2017, due to budget cuts, the IRS investigations of non-filers decreased from 2.4 million in 2011 to 362,000. This resulted in at least \$3 billion in lost revenue each year. The IRS failed to collect in \$8.3 billion tax debt lapses from those who filed but failed to pay, an increase of 17 times since 2010. It conducted 675,000 fewer audits, a decrease of 42%. The number of auditors declined a third to 9,510, the smallest number of employees since 1953, when the economy was a only 14% of its 2017 size.¹⁶³²

The policy deliberately defunding tax enforcement has also been used in Canada. Prime Minister Harper deliberately cut the Canada Revenue Agency (CRA) agency’s budget, causing it to fold international tax evasion unit, despite pledges to increase enforcement against off-shore tax evasion.¹⁶³³

Agencies] also stated that they encounter difficulties in identifying beneficial owners of Canadian companies owned by entities established abroad, particularly in the Caribbean, Middle East, and Asia. While the legal powers available to LEAs are comprehensive and sufficient, the instances in which LEAs were able to identify the beneficial owners of Canadian legal entities and legal arrangements appear to have been very limited and investigations do not sufficiently focus on international and complex ML [Money Laundering] cases involving corporate elements.”

The Financial Action Task Force & The Asia/Pacific Group on Money Laundering, *supra* note 921 at 103; *Canada Beneficial Ownership Transparency*, by Transparency International (Transparency International, 2015) at 4.

¹⁶²⁶ Facundo Alvaredo et al, *supra* note 867 at 15.

¹⁶²⁷ “Canada Revenue Agency says it has now identified 894 Canadian taxpayers — individuals, corporations and trusts — in the Panama Papers and has finished reviewing 525 of those cases. So far, the CRA said Tuesday, it has completed 116 audits, resulting in \$14.9 million in federal taxes and penalties assessed.” Zach Dubinsky, *supra* note 1381.

¹⁶²⁸ Hannah Fingerhut, “More Americans favor raising than lowering tax rates on corporations, high household incomes”, (27 September 2017), online: *Pew Res Cent* <<https://www.pewresearch.org/fact-tank/2017/09/27/more-americans-favor-raising-than-lowering-tax-rates-on-corporations-high-household-incomes/>>.

¹⁶²⁹ Paul Kiel & Jesse Eisinger, “How the IRS Was Gutted”, (11 December 2018), online: *ProPublica* <<https://www.propublica.org/article/how-the-irs-was-gutted>>. Bill Curry, “CRA to cut managers, fold tax-evasion units, memo shows”, *Globe Mail* (19 September 2014), online: <<https://www.theglobeandmail.com/news/politics/cra-to-cut-managers-fold-tax-evasion-units-memo-shows/article20704948/>>.

¹⁶³⁰ There have been deliberately targeted budget cuts to the IRS ever since the Republicans gained control of Congress. “Corporations and the wealthy are the biggest beneficiaries of the IRS’ decay. ... [I]t takes specialized, well-trained personnel to audit a business or a billionaire or to unravel a tax scheme — and those employees are leaving in droves and taking their expertise with them.” Paul Kiel & Jesse Eisinger, *supra* note 1629.

¹⁶³¹ *Ibid.*

¹⁶³² *Ibid.*

¹⁶³³ Bill Curry, *supra* note 1629.

A survey of CRA agents found that 81% agree or strongly agree that tax credits, tax exemptions and tax loopholes disproportionately benefit corporations and wealthy Canadians compared to average Canadians; 84% agree or strongly agree that the CRA can do more to increase revenues without raising taxes by better enforcing tax laws that are currently in place; only 16% agree that the CRA currently has adequate audit coverage capacity to ensure tax laws are being applied fairly across the country; and 75% agree that multinational corporations shift profits to low-tax regions even when there is little to no corresponding economic activity taking place in that jurisdiction. 45% in total agree that the ability of the CRA to carry out its mandate has been compromised by political interference.¹⁶³⁴ As discussed, Since Prime Minister Harper left office, Canada's top marginal tax rate on individuals has increased with the creation of a new highest income tax bracket.¹⁶³⁵ However, the enforcement of these taxes remains weak.

The decline in taxes on the top 1%, be it capital gains, inheritance, marginal, business, or reductions in funding for tax enforcement, has all been a result of deliberate political decisions. It is another facet of how the lobbying system increases inequality.¹⁶³⁶

Supply-Side Economics: The Arguments for Lowering Taxes on the Wealthy

It is often argued that reducing taxes on the wealthy is a good idea because it increases economic growth for everyone; because the wealthy can easily avoid taxes by moving away; and because businesses will flee high tax locales for low tax ones.¹⁶³⁷ These arguments are not sound.

We have already covered the flaws in the first argument. The trickle-down economic argument that reducing taxes boosts the economy enough to make up for the tax loss was never widely accepted by academics, and has been discredited in both practice and theory. It persisted because there was demand for a theoretical justification to transfer more wealth to the already wealthy. States and countries that institute it never see the promised rates of growth, or the promised increases in revenue to make up for the lost tax revenue.¹⁶³⁸ Even more refined supply-side argument that tax cuts on the wealthy boost the economy over the long-term (and not as a brief stimulus) has proven to be false. In reality, inequality increases economic instability and decreases economic growth substantially.¹⁶³⁹ The OECD estimated that,

¹⁶³⁴ *Survey of Professional Employees at the Canada Revenue Agency 2018*, by The Professional Institute of the Public Service of Canada (Canada: The Professional Institute of the Public Service of Canada, 2018).

¹⁶³⁵ *Canada's Rising Personal Tax Rates and Falling Tax Competitiveness*, by Charles Lammam et al (Fraser Institute, 2016) at 1. A country could create higher tax brackets for the top 0.01%, that applied at the \$1 million, \$10 million level, etc.

¹⁶³⁶ David C Kimball et al, *supra* note 627 at 8.

¹⁶³⁷ Cristobal Young et al, "Millionaire Migration and Taxation of the Elite", *supra* note 1618 at 422.

¹⁶³⁸ Peter Fisher, Greg LeRoy & Philip Mattera, *supra* note 806 at 21.

¹⁶³⁹ Joseph E. Stiglitz, *supra* note 1556 at 11.

in countries like the US, the UK and Italy overall economic growth would have been six to nine percentage points higher in the last two decades, had income inequality not risen.¹⁶⁴⁰

Moreover, when top tax rates are cut, the money does not flow to those at the bottom, instead inequality increases and government services decline.¹⁶⁴¹ Almost immediately after the deficit-increasing \$1.5 trillion U.S. *Tax Cuts and Jobs Act of 2017*, which was targeted to benefit the top 1%, President Trump and the Republican Party began to pivot to claims that entitlement reform was needed to tackle the deficit.¹⁶⁴² In contrast, increasing the income of those at the bottom, not the top, is actually a good way of increasing economic growth.¹⁶⁴³ It increases demand, thereby growing the economy while increasing economic participation for those with less.¹⁶⁴⁴

The risk of tax flight is also greatly exaggerated. Young *et al.*'s study finds that the wealthy rarely move to avoid taxes.¹⁶⁴⁵ They conclude that tax flight is rare because economic elites are embedded in the regions where they live, and tied by network effects, partners, family, and locale preferences to where they achieve their success.¹⁶⁴⁶ The wealthy have limited interest in moving for tax advantages.¹⁶⁴⁷ Young *et al.* conclude that the optimal tax-maximizing rate on millionaires in the U.S. is far below where it should be. They find that a 10% increase in taxes leads to only a 1% decrease in millionaire

¹⁶⁴⁰ *Ibid.*

¹⁶⁴¹ *Ibid* at 12.

¹⁶⁴² By 2027, the top 1% would receive 82.8% of the benefits of the tax cuts. *Distributional Analysis of the Conference Agreement for the Tax Cuts and Jobs Act*, by TPC Staff (Tax Policy Center, 2017) at 5. This pivot towards social cuts was not as strong as previous occasions, likely because a Republican president was in power, and as a candidate Trump had expressed opposition to such cuts as part of his election campaign. Margaret Hartmann, "After Passing Trump's Tax Cuts, What's Next on the GOP's Agenda?", (27 December 2017), online: *N Y - Intell* <<http://nymag.com/intelligencer/2017/12/after-passing-tax-cuts-whats-next-on-the-gops-agenda.html>>.

¹⁶⁴³ "If the income share of the top 20 percent increases by 1 percentage point, GDP growth is actually 0.08 percentage point lower in the following five years, suggesting that the benefits do not trickle down. Instead, a similar increase in the income share of the bottom 20 percent (the poor) is associated with 0.38 percentage point higher growth." Era Dabla-Norris et al, *supra* note 839 at 7.

¹⁶⁴⁴ Joseph E. Stiglitz, *supra* note 1556 at 11. Stiglitz notes the importance of demand in driving economic growth.

"One of the popular misconceptions is that those at the top are the job creators; and giving more money to them will thus create more jobs – and indeed this is the only way by which jobs can be created. This view, I believe, is fundamentally wrong: America and other countries are full of creative entrepreneurial people throughout the income distribution. What creates jobs is demand: when there is demand, firms (especially if the financial system could be made work in the way it should, providing credit to small and medium-sized enterprises) will create the jobs to satisfy that demand. But in the United States, for example, the distorted tax system provides incentives for those at the top to destroy jobs by moving them abroad."

Joseph E. Stiglitz, *supra* note 24 at 8.

¹⁶⁴⁵ Cristobal Young et al, "Millionaire Migration and Taxation of the Elite", *supra* note 1618.

¹⁶⁴⁶ *Ibid* at 425.

¹⁶⁴⁷ *Ibid* at 440.

population.¹⁶⁴⁸ To “rationalize the current U.S. top tax rates, the migration response to taxes would need to be 10 to 15 times greater than what we actually observe.”¹⁶⁴⁹

There is limited truth to the claim that cutting business taxes prevents businesses from moving to other jurisdictions. Businesses generally do not flee higher taxed locals, because they are also tied by network effects to their locale, and need to be located where the supplies are, the skilled employees are, or some combination of these factors. Moreover, most businesses provide services, and they need to be where their customers are located. Business taxes are only one of a number of inputs and expenses that a business needs to consider. Presuming the taxes are well-designed, they will rarely be the determining factor in a businesses’ success, and hence rarely a reason to locate elsewhere.

Large businesses regularly restructure their accounting to transfer profits to low tax jurisdictions, but this is mostly an accounting fiction taking advantage of international trade and tax law. Countries need to adjust their tax law to prevent this sort of creative accounting. The alternative is a disastrous race to the bottom as these accounting practices spread.

The arguments in favour of reducing taxes on the top persist, because they provide a justification for the tax cuts. The persistence of the arguments, and the tax cutting policies, is a demonstration of the power of the wealthy to influence democracy. Page *et al.* survey of wealthy Americans shows that,

certain tendencies in U.S. policy making – particularly the decades-long decline in top marginal income tax rates and the erosion of the estate tax and corporate income tax – may be more closely related to the preferences of very wealthy Americans than to those of average citizens.¹⁶⁵⁰

One unfortunate finding from Page *et al.*’s survey of U.S. voter preferences is that although the wealthy recognize the increase in inequality, they do not believe the government should intervene to correct it.¹⁶⁵¹ There is little reason to believe that the views of the wealthy are substantially different in Canada.

Table 11: View on Inequality by the Wealthiest Americans vs. the General Public ¹⁶⁵²

Inequality Issue	% General Public	% Wealthiest Americans
Median perception of the proportion of the total wealth in the U.S., including the value of homes, money in the bank, stocks and bonds and the like, owned	50	43

¹⁶⁴⁸ *Ibid* at 439.

¹⁶⁴⁹ *Ibid* at 434.

¹⁶⁵⁰ Benjamin I. Page, Larry M. Bartels & Jason Seawright, *supra* note 707 at 65.

¹⁶⁵¹ *Ibid* at 63.

¹⁶⁵² *Ibid*.

by the top 1% of richest people ¹⁶⁵³		
The difference in income between rich people and poor people in the United States today is larger [vs. smaller or about the same] than it was 20 years ago	82	86
Differences in income in America are too large	63	62
It is the responsibility of the government to reduce the differences in income between people with high incomes and those with low incomes	46	13
Our government should redistribute wealth by heavy taxes on the rich	52	17

These survey results give extra reason to be concerned about the potential for a vicious cycle. At least in America, the wealthy oppose the taxes and intervention necessary to halt the cycle of inequality; as they gain more influence, the government is increasingly likely to adopt policies that speed up the vicious inequality spiral, rather than prevent it. The risk of this spiral is increased by the nature of the meritocracy in capitalism. At first glance, meritocracy should run counter to inequality, opening new opportunity for everyone. Yet, this is not always the case.

The Nature of Meritocracy – The Iron Law of Meritocracy

A market economy will produce a certain amount of economic inequality.¹⁶⁵⁴ This is fundamentally justified on the basis that it provides rewards and opportunity to those who are willing to work. The reward for merit is an essential justification for the marketplace; it funnels ambition into production and innovation that benefits everyone (assuming the problems of phishing and externalities have been adequately restrained). However, growing inequality has been tied to a decrease in income mobility and opportunity.¹⁶⁵⁵ This is a reflection of a fundamental irony inherent to all meritocracies, which Hayes refers to this as the *iron law of meritocracy*.¹⁶⁵⁶ The iron law of meritocracy is that any merit system destroys itself generationally, unless it is periodically reset. This is because children in next generation inherit the advantageous or disadvantageous position that their parents earned through merit, so are no longer competing on a level playing field.

One way of understanding this is that a meritocracy cannot survive repeated plays without a reset. For a simple example consider Monopoly – a game originally designed to show the evils of property monopolies. A player wins Monopoly, to an extent, based on merit (and luck). If the winner was allowed to play a new game of Monopoly with all the cash and property accumulated from the old game, or to pass that money on to a player joining a new game, then winning the new game would no longer be an indication of merit. A meritocracy needs resetting forces to continue to function.

¹⁶⁵³ “This is not far from the actual figure of about 35 percent (or substantially more than that if net home equity is excluded) [as of 2012].” *Ibid*.

¹⁶⁵⁴ “Markets, by themselves, even when they are stable, often lead to high levels of inequality, outcomes that are widely viewed as unfair.” Joseph E. Stiglitz, *supra* note 38 c preface, s Inequality and unfairness.

¹⁶⁵⁵ In a 2012 speech, Alan Krueger introduced the *Great Gatsby Curve*, showing that high levels of economic inequality leads to low social mobility. *Ibid* c 3, s Government and opportunity.; OECD, *supra* note 1545 at 27; Raj Chetty et al, “The fading American dream”, *supra* note 1543 at 8.

¹⁶⁵⁶ Christopher Hayes, *supra* note 748.

In the marketplace, the iron law of meritocracy plays out through generational wealth and growing inequality. Those who succeed due to their merits can and do use their wealth to give their children advantages, and these advantages undermine the competition of the next generation. The advantages of the wealthy accrue over time, essentially un-leveling the playing field for their dependents through better education, access, contacts, seed capital, legal protection, and shelter from risk. As inequality grows, opportunity shrinks for those on the bottom, and the meritocracy falls apart. This problem is compounded if the wealthy can use their influence to establish political dominance, and then alter the rules of the marketplace to further entrench themselves, decreasing income mobility and moving from meritocracy towards plutocracy.

Similar to Piketty's argument about the wave of general income equality in the mid-twentieth century, Hayes contends that World War I, the final collapse of the European aristocracies, the Great Depression, the establishment of social safety nets in the Western Democracies, World War II, competition with the U.S.S.R., the establishment of high wealth taxes, and the decrease in legally enforced racism and misogyny acted as dramatic resetting devices throughout the 1930s to the 1970s, opening up the pathways of meritocracy, and providing enormous economic and productivity growth.¹⁶⁵⁷ However, he argues that since then, those who flourished in this wave, the new upper class, entrenched by their success, rolled back the room for merit in the marketplace. The iron law of meritocracy has taken hold, and the explosion of equal opportunity has led to a new wave of inequality, extinguishing it. Stiglitz comes to a similar conclusion. He notes that the process is not only economic, but involves a deliberate shifting of norms. Over the last fifty years, the disproportionate rewards to those already at the economic top – including massive salaries and golden parachutes for CEOs that lack any economic or social justification – have been reinterpreted as a form of fairness.¹⁶⁵⁸

In some circles, so engrained did these schizophrenic attitudes to “fairness” become that early in the Great Recession an Obama administration official could say, with a straight face, that it was necessary to honor AIG bonuses, even for the officials who had led the company to need a \$150 billion bailout, because of the sanctity of contracts; minutes later he could admonish autoworkers to accept a revision of their contract that would have lowered their compensation enormously.¹⁶⁵⁹

Meritocracy Requires Active Governmental Intervention

Hayes insight is that meritocracy, especially combined with capitalism, is not self-sustaining. The government needs to structure the system to push towards resetting for the next generation if the meritocracy – the vibrancy – is to continue. The tools to do this are relatively straight forward, they are

¹⁶⁵⁷ *Ibid*; See also, Raj Chetty et al, “The fading American dream”, *supra* note 1543 at 9.

¹⁶⁵⁸ “Norms of what was “fair” changed too: the executives thought little of taking a bigger slice of the corporate pie, awarding themselves large amounts even as they claimed they had to fire workers and reduce wages to keep the firm alive.” Joseph E. Stiglitz, *supra* note 38 c 2, s Corporate governance.

¹⁶⁵⁹ *Ibid*.

almost the exact opposite of the policies embraced by supply-side economics discussed earlier. Resetting the meritocracy requires policies that lift the bottom up and press down on the top over time. The former includes free education, free health care, high minimum wages, abundant welfare, income support, anti-discrimination rules, union support, widespread social services, widely available bankruptcy protection, regulations against phishing, and investments in infrastructure so new opportunities have a foundation on which to flourish. The latter includes high progressive income taxes, higher capital taxes, higher corporate taxes, higher property taxes on high value properties, wealth taxes, higher taxes on large wealth transfers and inheritances, strong financial regulations, restrictions on the use of tax havens, rules against corruption, rules preventing rent-seeking, anti-trust enforcement, and government action to reign in externalities and pollution.¹⁶⁶⁰ The collected taxes can then be directed towards providing the social, environmental and physical infrastructure society needs to continue flourishing.

High Marginal Taxes are a Necessary Component of Meritocracy

By creating pressure on the top, friction so to speak, the government ensures that the wealthy have to make wise use of their resources to grow them, and cannot simply coast on the success of previous generations. The taxes help push them back towards equality so that the meritocracy can continue to churn.¹⁶⁶¹ It is not simply a matter of freedom, or letting the free market run its course.

It is perhaps no accident that those who argue most vehemently on behalf of an immutable and rational “free market” and against government “intrusion” are often the same people who exert disproportionate influence over the market mechanism. They champion “free enterprise” and equate the “free market” with liberty while quietly altering the rules of the game to their own advantage. They extol freedom without acknowledging the growing imbalance of power in our society that’s eroding the freedoms of most people.¹⁶⁶²

Lobbying is an essential part of the tragedy of the iron law of meritocracy. It is through lobbying that many of the rules that eventually sabotage the meritocracy are pushed into the political system. At the same time, these norms that justify the new inequality are also used to justify the outsized political influence exercised by the new economic elites. These norms lead to a winner-take-all society.

America as a Winner-Take-All Society

Hayes argues that the outcome of supply-side policies, combined with the iron law of meritocracy, has led to increased inequality and a multiplication of the risks and rewards of economic competition.¹⁶⁶³ As these risks have multiplied, America has increasingly become a “winner take all

¹⁶⁶⁰ OECD, *supra* note 1545 at 16.

¹⁶⁶¹ Cristobal Young et al, “Millionaire Migration and Taxation of the Elite”, *supra* note 1618 at 422.

¹⁶⁶² Robert B. Reich, *supra* note 26 at 25.

¹⁶⁶³ Christopher Hayes, *supra* note 748.

society, where the most successful competitors reap a disproportionate share of economic rewards.”¹⁶⁶⁴ Other OECD countries, including Canada seem to be walking the same path. This same pattern appears to be impacting lobbying.

One example of this phenomenon can be seen in the outsized rewards for successful internet and social media start-ups. For example, Jan Koum, the founder of WhatsApp, received \$6.8 billion when he sold it to Facebook. His co-founder made \$3 billion. Other early employees reportedly netted \$160 million each.¹⁶⁶⁵ This shift of wealth to start-ups and investors provides more pressure in the winner-take-all economy, while, at the same time, an average salaried position does not provide enough to support a middle-class family.

Thus the importance of every small advantage has multiplied, and the chance of roughly equal outcome later in life has declined. Taxes at the top are reduced, magnifying the reward for success, and support at the bottom is reduced, raising the cost of failure. In many cases, additional subsidies and rewards go to those on top, further emphasizing the winner-take-all structure of society.

The annual government subsidy to Princeton University, for example, is about \$54,000 per student, according to an estimate by economist Richard Vedder. ... [T]he average annual government subsidy per student at a public university comes to less than \$6,000, about one-tenth the per-student government subsidy at Princeton.¹⁶⁶⁶

Those who get into the top universities have access to contacts, investment opportunities, and salaries that vastly outstrip even those graduating with the same degree from a slightly less prestigious school. A graduate from a top law school can earn almost triple the starting salary of a graduate from an average law school.¹⁶⁶⁷ At the same time, students are carrying heavier student loans, which makes the higher income all the more important.¹⁶⁶⁸ Hayes contends that the increased rewards and tilted playing field has pushed competition earlier and earlier in life; since every advantage, disadvantage, or lucky break is excessively magnified. The disproportionate result of a small success or failure, the knife’s edge of luck, makes the temptation to give one’s kids the best advantages – to cheat when necessary, and to phish when possible – largely irresistible.¹⁶⁶⁹ This effect applies to locales as well, with wealthy regions gaining significantly more wealth and other regions declining.¹⁶⁷⁰ There is less pride in normal success, less room for small joys, less space for failure of any kind, and hence less scope for living a good life.

¹⁶⁶⁴ Cristobal Young et al, “Millionaire Migration and Taxation of the Elite”, *supra* note 1618 at 440.

¹⁶⁶⁵ Robert B. Reich, *supra* note 26 at 222.

¹⁶⁶⁶ *Ibid* at 162.

¹⁶⁶⁷ \$180,000 vs. \$ 65,000. Farran Powell & Briana Boyington, “What Type of Salary You Can Expect With Your Law Degree”, (26 July 2018), online: *US News World Rep* <<https://www.usnews.com/education/best-graduate-schools/top-law-schools/paying/articles/2018-07-26/what-type-of-salary-you-can-expect-with-your-law-degree>>.

¹⁶⁶⁸ Christopher Hayes, *supra* note 748.

¹⁶⁶⁹ *Ibid* at 19.

¹⁶⁷⁰ R. S. Foa et al, *supra* note 5 at 10.

The winner-take-all ethos is damaging to social well-being, over-emphasizing economic pursuits over other aspects of life, breaking social bonds and belonging in favour of excessive work and ambition for disproportionate rewards, undermining fair competition by merit, and accelerating inequality. As previously discussed, this rise of supply-side economics and the winner-take-all-economy appears to be hurting the people's faith in democracy.¹⁶⁷¹

The Winner-Take-All Society and Lobbying

There is a good chance that winner-take-all economy process is also a factor in the growth of lobbying and dark money campaign expenditures in the U.S. If the economy is structured to be more cut-throat, the rewards of executives more tied to business profits and stock prices, the rewards of success and costs of failure that much higher, then it becomes all the more tempting to employ every available method, including political leverage.

Increased economic competition has leaked into the political sphere. The pattern is repeated within lobbying, with a few top organizations monopolizing most of the political influence, and citizen and union groups struggling not to be shut out entirely. Just as the unconstrained market is now damaging the meritocracy that justified it, so too is unconstrained lobbying damaging the political system that once justified lobbying as a way to hear more voices. In both cases, the system requires pressure on the top and support for those on the bottom to keep it running. Otherwise those on top will come to dominate and shut down the next generation of merit, of outside voices who could challenge their pre-eminence. This process has led to a winner-take-all society, and it appears to be leading to a winner-take-all politics. Understanding this progression helps us understand the broader need for government intervention to curtail inequality.

Lobbying Feeds the Inequality Spiral

Lobbying has a strong pro-wealth and pro-business bias.¹⁶⁷² As covered in Chapter 3, studies show that the American lobbying system is an important source of inequality.¹⁶⁷³ Reich argues that political influence wielded through lobbying and campaign donations has caused widening inequality to “become baked into the building blocks of the “free market” itself”¹⁶⁷⁴. He states that market power has been gained through many of the changes already covered in this chapter. He focuses on the more technical rules that have given the wealthy and corporate interests substantial advantages over time. These include changes to market-property definitions, copyright rules, patent rules, unionization rules, anti-trust rules, contract rules, bankruptcy rules, and enforcement procedures.¹⁶⁷⁵ Reich argues that,

¹⁶⁷¹ Foa *et al.* propose that another (or additional) factor in the rising dissatisfaction in democracy is the use of a winner-take-all electoral system (as opposed to proportional representation) combined with political polarization fed by social media and explicitly partisan media establishments. *Ibid* at 18.

¹⁶⁷² Lawrence Lessig, *supra* note 273 at 143.

¹⁶⁷³ Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern IV: Lobbying Increases Inequality: G: Lobbying Increases Inequality by Advancing the Priorities of the Wealthy, p. 185. See also, David C Kimball *et al*, *supra* note 627 at 8.

¹⁶⁷⁴ Robert B. Reich, *supra* note 26 at 97.

¹⁶⁷⁵ *Ibid* at 167.

it is not the unique and perceptible government “intrusions” into the market that have the greatest effect on who wins and who loses; it is the way government organizes the market. Power and influence are hidden inside the processes through which market rules are made, and the resulting economic gains and losses are disguised as the “natural” outcomes of “impersonal market forces.”¹⁶⁷⁶

Reich and Piketty disagree somewhat on the importance direct returns on capital play in fuelling inequality in the U.S. They do agree that the reason for the increase in inequality is that those controlling an increasing share of the wealth have also gained increasing influence over the rules governing the marketplace.¹⁶⁷⁷

Spiraling into Inequality

As covered in Chapter 3, lobbying is undoubtedly tied to the inequality spiral. The policies that feed inequality are generally unpopular.¹⁶⁷⁸ It is unlikely legislators would enact these policies without the political influence exercised through lobbying and campaign donations.¹⁶⁷⁹ The political and economic forces that give rise to inequality are, unfortunately, self-reinforcing. The wealthy convert their wealth into political influence via campaign donations and lobbying, and use this political influence to push for policies that will increase their wealth, heightening inequality.¹⁶⁸⁰ There is good reason to

¹⁶⁷⁶ *Ibid* at 24. For example, “Comcast and other American cable companies face little or no competition and are consolidating their power even further... Of its 126 lobbyists in 2014, 104 had worked in government before joining Comcast. Former FCC member Meredith Attwell Baker, for example, went to work for Comcast four months after voting to approve Comcast’s bid for NBCUniversal in 2011 (she subsequently went to work for the industry’s lobbying group).”

¹⁶⁷⁷ *Ibid* at 98; Thomas Piketty, *supra* note 845 at 39 & 572. This is strongly implied in Piketty’s reasoning and stated in his discussion of the (political) struggle between labour and capital, and his proposed solution.

¹⁶⁷⁸ Dawood notes that some of the difficulty in disrupting the inequality spiral is that “while political power is viewed as public and therefore properly subject to constraint, wealth is generally viewed as falling within a sphere of private liberty and therefore not legitimately subject to government interference.” The difficulty is further increased by the reluctance to regulate lobbying as thoroughly as we regulate campaign donations. Yasmin Dawood, “The New Inequality: Constitutional Democracy and the Problem of Wealth Symposium: The Maryland Constitutional Law Schmooze” (2007) 67 Md Law Rev 123–149 at 147. Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern IV: Lobbying Increases Inequality: G2: Policies That Reward the Wealthy with More Income That Can Be Funnelled Back into Lobbying, p. 188.

¹⁶⁷⁹ For example, American Legislative Exchange Council (ALEC) is an extremely influential lobbying organization, and it regularly pushes for cutting taxes for the wealthiest segment of society.

“Any doubts that the main objective of [ALEC’s] *Rich States, Poor States* is political – cutting taxes on the wealthiest segments of society in order to redistribute income upwards – are put to rest by the fact that the report devotes an entire chapter (one of only four) to a condemnation of the most progressive tax of all: the estate tax. The federal estate tax currently exempts the first \$5 million of an estate ... It is a tax on the extremely wealthy. Nowhere are logic and evidence stretched farther than in this chapter’s attempts to tag estate and inheritance taxes as “job killers” that “strangle economic growth.””

At that time the estate tax only applied to the top 2% of Americans; since 2018 it only applies to the top 1%. Peter Fisher, Greg LeRoy & Philip Mattera, *supra* note 806 at 16.

¹⁶⁸⁰ Robert B. Reich, *supra* note 26 at 171.

worry that rising inequality may culminate in a vicious inequality spiral, collapsing democracy into plutocracy.¹⁶⁸¹

Democracy is undermined, as economic inequality inevitably translates into political inequality. ... [T]he outcomes of America's politics are increasingly better described as the result of a system not of one person, one vote but of one dollar, one vote. ... [W]ith the rich having more and more influence, they write the rules of the political game to give them more power and influence, which means economic inequality gets even more translated into political inequality, and the political inequality gets translated into ever more economic inequality, in a vicious circle. The same process is occurring in other countries where the wealth and income have become stubbornly concentrated.¹⁶⁸²

The growth in inequality is a cause of and a result of the growth in lobbying, and the growing imbalance in the power of economic lobbyists over citizen lobbyists.¹⁶⁸³ Lobbying is quite effective in areas of low salience, particularly where the details are complex, like tax regulations. There has been a worldwide decline in the top effective tax rates. Lobbying also is responsible for regulatory changes that favour large corporations, deregulation, low enforcement, reduced penalties, and monopolization.¹⁶⁸⁴ This is the result of deliberate lobbying strategies, and larger political strategies like the establishment of

¹⁶⁸¹ Many scholars have discussed the connection between economic inequality and political inequality, and their self-reinforcing feedback loop that can form a vicious inequality spiral. See Larry M. Bartels, *supra* note 738 at 188; Joseph E. Stiglitz, *supra* note 24 at 13; Robert B. Reich, *supra* note 26 at 171; Timothy K. Kuhner, *supra* note 51 at 2360; Yasmin Dawood, "The New Inequality", *supra* note 1678 at 147.

¹⁶⁸² Joseph E. Stiglitz, *supra* note 24 at 13.

¹⁶⁸³ Timothy K. Kuhner, *supra* note 51 at 2360.

¹⁶⁸⁴ Robert B. Reich, *supra* note 26 at 47, 84 & 90. The October 2018 and March 2019 crashes of the Boeing 737 MAX 8's are also linked to a failure of self-regulation and lobbying. The crashes were caused by problems with the Maneuvering Characteristics Augmentation System (MCAS) on the plane, which should not have received U.S. Federal Aviation Administration's (FAA) safety certification. The FAA has delegated increasing authority to Boeing and other airplane manufacturers to do their own certification of the safety of their airplanes over the years. Boeing rushed the design and implementation of the Max 8, and the FAA received lobbying pressure from Boeing and the executive branch to rush the certification of the plane. Decisions about what could be delegated, and what could be certified without additional safety testing were made by the FAA's management instead of their technical experts, likely in reaction to lobbying pressure. Apparently some engineers in Boeing were aware of the flaws in the system, but were told to keep it quiet. The failure of the MCAS "is only the latest indicator that the agency's [FAA's] delegation of airplane certification has gone too far, and that it's inappropriate for Boeing employees to have so much authority over safety analyses of Boeing jets." The lack of oversight has also damaged the company, allowing it to take short-sighted safety shortcuts. Besides the tragedy of the deaths from the crashes, Boeing lost about \$40 billion in stock market valuation after the second crash. Dominic Gates, "Flawed analysis, failed oversight: How Boeing, FAA certified the suspect 737 MAX flight control system", (17 March 2019), online: *Seattle Times* <<https://www.seattletimes.com/business/boeing-aerospace/failed-certification-faa-missed-safety-issues-in-the-737-max-system-implicated-in-the-lion-air-crash/>>; Matthew Yglesias, "Boeing's effort to get the 737 Max approved to fly again, explained", (5 April 2019), online: *Vox* <<https://www.vox.com/2019/4/5/18296646/boeing-737-max-mcas-software-update>>.

shadow political parties. “It’s useful to view the strategy of the new monopolists as integrating economic and political dominance.”¹⁶⁸⁵

In U.S., the Federal government is enacting policies like the U.S. *Tax Cuts and Jobs Act of 2017* that directly increases inequality.¹⁶⁸⁶ This is the type of action one would expect of a society with more inequality, more lobbying and fewer campaign finance restrictions. It is the pattern one would expect of a country further down the vicious inequality spiral.

In Canada, the pattern is not quite as clear, as one might expect considering the stronger more insulated bureaucracy. There have been some attempts to raise the top tax rates and close certain loopholes, but it has been matched with a reduction in corporate taxes and a disregard of the use of numbered corporations and tax havens to shelter wealth.¹⁶⁸⁷

Although the tax system is a crucial tool for tackling inequality, it also faces potential obstacles. Tax evasion ranks high among these, as recently illustrated by the Paradise Papers revelations.¹⁶⁸⁸

Lobbying is also strongly tied to the ability to frame the debate. Policies that the wealthy do not support appear to be discounted from serious consideration.¹⁶⁸⁹ Most OECD democracies have not embarked on any significant steps to reduce inequality and restore absolute income mobility, despite public concern. The framing function of lobbying appears to have limited the range of policy options that governments will seriously consider. A clear analogy can be found in the policy recommendations of think tanks. Chance notes that reliance “on corporate money tends to inhibit organizations from promoting radical critiques of capitalism, and pushes them toward the ideological center of American politics.”¹⁶⁹⁰

Others describe the influence of money on research as being a more general and diffuse pressure. Rather than being required to deliver particular results, think tanks instead stay within a domain of options that is comfortable for donors: they are

¹⁶⁸⁵ Robert B. Reich, *supra* note 26 at 50.

¹⁶⁸⁶ TPC Staff, *supra* note 1642 at 5. See Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: Inequality and Lobbying: Economic Inequality is an Outcome of Policy Decisions: Supply-Side Economics: The Arguments for Lowering Taxes on the Wealthy, p. 391.

¹⁶⁸⁷ The Financial Action Task Force & The Asia/Pacific Group on Money Laundering, *supra* note 921 at 103; Transparency International, *supra* note 1625 at 4.

¹⁶⁸⁸ Facundo Alvaredo et al, *supra* note 867 at 15.

¹⁶⁸⁹ Policies such as increase social benefits, guaranteed housing, a public guarantee of employment, free college tuition, higher corporate taxes, stock trading fees, restrictions on capital transfers to tax havens, limitations on stock options and buy-backs, progressive capital taxes, increased estate taxes, wealth taxes, increased property taxes, de-incorporation as a penalty for malfeasance, mandatory union membership on corporate boards, strong punishments for union bashing, and preferences for democratically-run businesses are generally disregarded.

¹⁶⁹⁰ Alek Chance, *supra* note 411 at 19.

generally supportive of a status quo of capitalism, liberal international trade and high levels of defense spending.¹⁶⁹¹

Lobbying by business interests will tend to follow the same path, supporting the status quo of capitalism, and deterring the large policy changes that would be necessary to reverse the inequality spiral. The business interests cannot be expected to lobby otherwise. It is their personality. They are structured to push towards profit and private goods. It will always be more immediately profitable to push for lower taxes and reduced oversight, regardless of the long-term repercussions to inequality and democracy (or their own long-term sustainability). Unregulated lobbying will always push against equality. It will always feed and be fed by the inequality spiral.

Inequality, Private Goods, Collective Goods, and Lobbying

The economic system of a healthy society should support a wide range of liberal values, including prosperity, freedom, absolute income mobility, human rights and democracy. “However that may be, the economic order of the contemporary United States poses a clear and profound obstacle to realizing the democratic value of political equality.”¹⁶⁹² Lobbying that provides economic rewards must be carefully curtailed in an era of rising inequality, as money is easily leveraged back into lobbying activities. Reducing all lobbying would be better than nothing, but reducing business lobbying for private goods would be far more targeted.

It took a series of extreme crises and enormous policy changes to establish the initial state of meritocracy and relative income equality in the West: World War I, the Great Depression, new social-welfare programs, World War II, and de-colonization (and likely competition with the U.S.S.R.’s promise of equality under communism).¹⁶⁹³ In light of the extreme events needed in the first place to create this levelled playing field, returning to a state of relative income equality and re-establishing the economic meritocracy will require strong policies. Without confronting the pressure of the current lobbying system’s push towards inequality, it will be difficult to maintain equalizing policies over the time span needed to establish real change. Instead, the lobbying for private goods will be an underlying current wearing at the foundations of the policies seeking to re-establish meritocracy. Tax increases on the wealthy will be quietly matched with ever-growing exceptions and loopholes that allow them to shelter their wealth. Policies to control the financial industry will be subtly undermined by years of patient lobbying to dismantle these rules.¹⁶⁹⁴ Big legislation to restore equality will be met by watered-down

¹⁶⁹¹ *Ibid* at 20.

¹⁶⁹² Larry M. Bartels, *supra* note 738 at 31.

¹⁶⁹³ Piketty does not discuss the social-welfare programs and competition with communism as factors in the balance between public and private capitalism. Thomas Piketty, *supra* note 845 at 118.

¹⁶⁹⁴ See also, Robert B. Reich, *supra* note 26 at 71. “For example, lawmakers in several states have increased interest rates lenders can charge on ... low-income borrowers... It’s not unusual for borrowers ... to agree to ... an annualized interest rate of 300 percent or more. Citigroup’s OneMain Financial unit, one of the leading lenders making these types of loans, has been hugely profitable as a result, which explains why Citigroup and similar lenders have been pouring money into state legislative races... Rick Glazier, a North Carolina ... told The New York

implementation, and subversion by the appointment of regulators opposing the policies they are charged with implementing.¹⁶⁹⁵ Confronting the rise in inequality also requires confronting the political levers the wealthy use to enact the policies that favour inequality.

The continuing movement into inequality is not compatible with a healthy society.¹⁶⁹⁶ Decreasing inequality is necessary for democracy, social stability, and a well-functioning economy.¹⁶⁹⁷ The reduction of inequality, restoration of meritocracy, and avoidance of plutocracy provides good reason to distinguish between self-interested and public-interested lobbying.

Conclusion – Chapter 6

This chapter has covered six different theoretical approaches, each of which provides its own form of support for the premise that we should redesign lobbying regulations so that lobbying shores up political equality instead of sabotaging it.

The overlapping web of Rawls and Dworkin’s writings on liberal democracy and political equality; the differentiation between profit motivated and public interest lobbying; the nature of the corporation; the separation of business and state; the nature of the unregulated marketplace; and the rise of inequality creates a compelling justification for lobbying law that distinguishes citizen organizations from business organizations, and the pursuit of collective goods from the pursuit of private goods.

Democracy requires the restraint of those who are too powerful, be the power physical or economic.¹⁶⁹⁸ Currently, lobbying is used by the wealthy business interests to further their agenda, often in opposition to policies that the public prefers.¹⁶⁹⁹ The public is rightly concerned about the power of lobbyists and wealthy interests.¹⁷⁰⁰ To help restore equality, lobbying regulations should go further than

Times. “It was one of the most brazen efforts by a special interest group to increase its own profits that I have ever seen.””

¹⁶⁹⁵ See, *Ibid* at 26; Michael Stratford, *supra* note 830. For example, the Trump administration has been actively trying to destroy the Consumer Financial Protection Bureau, which was created to protect Americans from predatory banks. Nicholas Confessore, “Mick Mulvaney’s Master Class in Destroying a Bureaucracy From Within”, *N Y Times* (16 April 2019), online: <<https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html>>.

¹⁶⁹⁶ Thomas Piketty, *supra* note 845 at 297.

¹⁶⁹⁷ Stiglitz discusses inequality in the U.S., but his points apply equally to Canada, as it advances down the same path. “[W]e are paying a high price for the inequality that is increasingly scarring our economy – lower productivity, lower efficiency, lower growth, more instability – and that the benefits of reducing this inequality, at least from the current high levels, far outweigh any costs that might be imposed.” Joseph E. Stiglitz, *supra* note 38 c 4, s Concluding comments.

¹⁶⁹⁸ Timothy K. Kuhner, *supra* note 51 at 2361.

¹⁶⁹⁹ Lawrence Lessig, *supra* note 273 at 131.

¹⁷⁰⁰ In the U.S., very few people think that lobbyists and big business have too little influence over government, and most want them to have less. This is unsurprising, considering that registered lobbying expenditures more than doubled from \$1.4 to \$3.3 billion a year, between 1998 and 2012. Brian Kelleher Richter, *supra* note 594 at 893;

they go now, they should deter businesses seeking private goods and favour citizen groups seeking collective goods.

and Center for Responsive Politics, *supra* note 1344; Gallup Inc, *supra* note 1344; See also A. Paul Pross, *supra* note 2.

Chapter 7 – Canadian Charter Section 2

Introduction – Chapter 7	406
Canadian Jurisprudence – Lobbying Cases	407
<i>Makhija v. Canada</i>	408
<i>Democracy Watch v. Campbell</i>	408
<i>Democracy Watch v. Canada</i>	409
<i>R. v. Carson 2019 – ONCA</i>	410
<i>R. v. Carson 2018 – SCC</i>	410
American Jurisprudence – <i>United States v. Harriss</i>	413
The Mirror Principle of Lobbying and Campaign Financing	414
S. 2(b) – Freedom of Expression	415
S. 2(d) – Freedom of Association	418
Principles from <i>Harper and Libman</i>	419
S. 1 – Applying Charter Principles	420
Political Equality and Fairness in Healthy Democracy (principles 1 and 2)	420
Affluent Cannot Set Guideposts of Political Choices (principle 3)	421
Limiting Expression of Some to Help Many Others (principle 4)	422
Enhancing Democracy (principle 5)	422
Supporting Electoral Laws and Equality (principle 6)	423
Hearing all Points of View (principle 7)	423
Perception of Fairness and Confidence in Democracy (principles 8 and 9)	425
Mandatory Disclosure (principle 10)	425
Challenges from Campaign Finance Principles	427
The Principle of Proportional Regulatory Duration	427
S. 1 – Deference to Parliament	428
(i) The Nature of the Harm	429
(ii) The Vulnerability of the Group to that Harm	430
(iii) The Apprehension of Harm	430
(iv) The Nature of the Infringed Activity	431
S. 1 – Skeleton Evaluation Based on <i>Harper</i>	431
Conclusion – Chapter 7	439

Introduction – Chapter 7

In order to understand the potential boundaries of lobbying regulations, we need to understand how they would interact with the protections and ideals of the *Canadian Charter of Rights and Freedoms*¹⁷⁰¹ (*Charter*). There is little point in positing new regulations if they will be found to be unconstitutional. On the other hand, if the regulations help fulfill *Charter* values and democratic ideals, then it is all the more reason to implement them. The next two chapters will investigate how lobbying regulations would likely interact with the s. 2 fundamental freedoms (specifically s. 2(b) & (d)) and s. 3 democratic rights in the *Charter*.

In Chapter 1, we discussed lobbying regulations in Canada and how they differ from those in the United States. In Chapter 2, we covered the growing body of evidence indicating that lobbying has a substantial influence on governance. In Chapter 3, we discussed how lobbying results in business interests and elites receiving favorable treatment at the expense of democratic representation. In Chapter 4, we investigated how lobbying is fundamentally linked to campaign financing, and the justifications for the mirror principle. In Chapter 5, we reviewed my interviews, which revealed how those involved in the lobbying process subscribe to the disclosure paradigm, but also how the stricter rules regarding lobbying became an established and accepted norm once in place. In Chapter 6, we established that there is a strong theoretical basis for more robust lobbying regulations that restore the power of citizens and citizen groups, and weaken the hold of corporate, wealthy and business interests on the lobbying process. We saw how lobbying is a factor in the growing power of the wealthy and the resulting political and economic inequality spiral. We hypothesized that more robust lobbying regulations are likely to be an integral part of breaking this vicious spiral, restoring political and economic fairness. However, stronger regulations will need to meet the standards of the *Charter*.

The current Canadian lobbying laws and regulations, including the *Lobbyists' Code of Conduct*¹⁷⁰² (*Code of Conduct*), appear to be *Charter* compliant, as they focus mostly on disclosure. Changes of the sort requested by the Lobbying Commissioner are also likely to pass muster. These are mainly aimed at improving disclosure, reporting and gaps in enforcement. They include establishing random mandatory audits, establishing stricter penalties, and allowing the Commissioner to level fines. To date, the courts has supported the Office of the Commissioner of Lobbying of Canada's right to enforce the existing lobbying regulations.¹⁷⁰³

The constitutionality of significantly stronger lobbying regulations is a more complicated question. Some possible reforms are discussed in detail in Chapter 10.¹⁷⁰⁴ We will use these proposed changes as the basis for our suggested robust regulations. Thus if we find that the suggested robust lobbying passes *Charter* muster, we will have also found that the specific reforms recommended in Chapter 10 are likely constitutionally acceptable. These proposed reforms are: clear prohibitions on

¹⁷⁰¹ *Canadian Charter of Rights and Freedoms*, *supra* note 3.

¹⁷⁰² Government of Canada, *supra* note 117.

¹⁷⁰³ *Makhija v. Canada (Attorney General)*, *supra* note 119; *Makhija v Canada (Attorney General)*, [2010] 2010 FCA 342, [2011] 1 F.C.R. D-9; *R v Carson*, [2019] 2019 ONCA 396.

¹⁷⁰⁴ Chapter 9 – Reform Principles: Principles of Lobbying Reform, p. 495.

astroturf lobbying; limits on the amount of lobbying individual businesses and trade associations can pursue – based on a measure of spending or employee hours; and public support for citizen lobbying¹⁷⁰⁵. These reforms are premised on the argument that is constitutionally acceptable to distinguish between citizen and corporate lobbying – a proposal we shall also test.

While there have been no lobbying cases directly involving *Charter* issues, there is a good deal of Canadian Supreme Court jurisprudence on campaign finance regulations, much of which indicates what direction the Court would likely take with lobbying regulation. In the field of campaign finance law, the Canadian Court, unlike the American Court, has been amenable to broad government regulation of donations, spending limits, and third-party electoral expenditure limits.¹⁷⁰⁶ Using the mirror principle, it will be argued that based on this jurisprudence stronger lobbying regulations should pass *Charter* review.

This chapter will consider how the Court would approach a s. 2 challenge to more robust lobbying regulations. We will begin by covering the major Canadian lobbying cases, and the sole American Supreme Court lobbying case. We will then move on to the mirror principle; freedom of expression; the fundamental principles of campaign finance restrictions; how lobbying regulations interact with the principles from campaign finance jurisprudence; the deference the Court would accord Parliament; and a skeleton s. 1 evaluation of robust lobbying regulations based on *Harper v. Canada (Attorney General)*¹⁷⁰⁷.

Canadian Jurisprudence – Lobbying Cases

The Canadian Court has been receptive to the lobbying regulations and the *Code of Conduct* as it currently stands. This does not prove *Charter* compliance, but it does imply it to a degree. No one charged with violating the regulations has seen an easy path to mount a *Charter* challenge against the existing laws. The current *Lobbying Act* mostly requires disclosure, registration, and abiding by the *Code of Conduct*. It is unlikely those would be held to violate the s. 2 fundamental rights.

¹⁷⁰⁵ The latter could include providing subsidies to citizen groups, providing some form of meeting preference, or offering lobbying and input opportunities not available to business groups. As discussed in Chapter 2 and Chapter 6, the opposite is currently the case. The government tends to offer business groups meeting, lobbying and input priority over citizen groups. See Fred Thompson & W. T. Stanbury, *supra* note 2 at 39.

¹⁷⁰⁶ See *Harper v. Canada (Attorney General)*, *supra* note 53; *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569.

¹⁷⁰⁷ *Harper v. Canada (Attorney General)*, *supra* note 53. Harper continues to be used by lower courts and the Supreme Court as a binding precedent in cases involving electoral and democratic issues. See *Frank v Canada (Attorney General)*, [2019] 2019 SCC 1 at para 44; *BC Freedom of Information and Privacy Association v British Columbia (Attorney General)*, [2017] 1 SCR 93 at paras 4 & 14; for lower court application see, *R v Del Mastro*, [2017] 2017 ONCA 711 (CanLII) at para 63; *Reference re the Final Report of the Electoral Boundaries Commission*, [2017] 2017 NSCA 10 at para 156; *Canada (Chief Electoral Officer) v Callaghan*, [2011] 2011 FCA 74 (CanLII) at para 13. *British Columbia Teachers' Federation v British Columbia (Attorney General)*, [2011] 2011 BCCA 408 (CanLII) at para 44. *British Columbia Teachers' Federation* relied on Harper, but came to the conclusion that an additional 60 day pre-writ spending limit on third parties failed the minimal impairment requirement of the s. 1 test. This was an appeal level decision. In *B.C. Freedom of Information and Privacy Association*, the Supreme Court held it was permissible to require third parties to register if they are involved in any amount of sponsored electoral spending.

Makhija v. Canada

In the *Makhija v. Canada*¹⁷⁰⁸ series of cases, the Federal Court of Appeal ruled that lobbyists need to register with the Commissioner, and that the *Code of Conduct* is binding for those undertaking lobbying activities. The court rejected the lower court's position that the lobbying regulations and the *Code of Conduct* were not binding for lobbyists who declined to register with the government. The lower court's ruling would have undermined the *Act* by making registration voluntary, destroying any attempt to cohesively regulate lobbying. The Federal Court of Appeal held that the *Act* was binding on anyone meeting the lobbying threshold. It sent the case back for adjudication, and subsequently upheld the lower court's finding that Makhija violated the *Code of Conduct* in the follow-up *Makhija v. Canada* [2010]¹⁷⁰⁹ case.

Democracy Watch v. Campbell

In *Democracy Watch v. Campbell*¹⁷¹⁰ the Federal Court of Appeal ruled on the question of personal obligation, essentially type i to iv influence.¹⁷¹¹ It held that using this type of influence violates the *Code of Conduct*.

Where the lobbyist's effectiveness depends upon the decision maker's personal sense of obligation to the lobbyist, or on some other private interest created or facilitated by the lobbyist, the line between legitimate lobbying and illegitimate lobbying has been crossed. The conduct proscribed by Rule 8 [now Rule 6] is the cultivation of such a sense of personal obligation, or the creation of such private interests.¹⁷¹²

Although this does not preclude dependency corruption, it does preclude wide forms of *quid pro quo* corruption.¹⁷¹³ It also precludes lobbying a politician if the lobbyist has engaged in political activities on behalf of that person, although this prohibition has not faced a *Charter* challenge. The Court was quite clear that the lobbyist has no right to lobby an official if the official owes the lobbyist any personal obligation. The Court's ruling was broader than the then Commissioner's interpretation of the then *Code*

¹⁷⁰⁸ *Makhija v. Canada (Attorney General)*, *supra* note 119. Subsequent case *Makhija v. Canada (Attorney General)*, *supra* note 1703.

¹⁷⁰⁹ *Makhija v. Canada (Attorney General)*, *supra* note 1703.

¹⁷¹⁰ *Democracy Watch v Campbell*, *supra* note 118. Rule 8 reads, "Lobbyists shall not place public office holders in a conflict of interest by proposing or undertaking any action that would constitute an improper influence on a public office holder." Rule 6 now reads, "A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest." Government of Canada, *supra* note 117.

¹⁷¹¹ See Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Four Pressures Approach, p. 114 for a detailed explanation of the influence types.

¹⁷¹² *Democracy Watch v Campbell*, *supra* note 118 at 53.

¹⁷¹³ See Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Disclosure versus Corruption Approach: The Corruption Heuristic, p. 112 for a detailed explanation of the types of corruption.

of Conduct. The current Commissioner’s interpretation of the current *Code of Conduct* provided more detailed guidance concerning lobbyists and political activities.

The new 2019 guidance separates political activities into no, low, and high risk. Lobbyists who engage in high-risk or multiple low-risk political activities related to a politician are prohibited from lobbying that politician during the following four-year electoral cycle.¹⁷¹⁴ Interestingly, making personal donations below the legal limits is considered no risk and allowed.

Democracy Watch v. Canada

*Democracy Watch v. Canada*¹⁷¹⁵ is a more recent Democracy Watch case. It is currently being appealed to the Federal Court of Appeal. The judgment of the lower court has been stayed while it is being decided. Yet, it is worth discussing as part of the pattern visible in the Court’s decisions on the *Lobbying Act*.

The judgment considered whether Aga Khan had breached the *Code of Conduct* when he hosted Prime Minister Trudeau and his friends and family on a private island. Most notably, the case turned on the Commissioner’s determination that the *Code of Conduct* did not apply, because there is no evidence Aga Khan was remunerated for his work as a board member of the Aga Khan Foundation Canada.¹⁷¹⁶ The lower court took an expansive view of remuneration/payment when considering whether someone is a consultant lobbyist or in-house lobbyist for the purpose of the *Lobbying Act*. It concluded that,

[t]he Commissioner’s analysis does not consider whether the Aga Khan may have received “anything of value”; it begins and ends with the simple question of monetary payment. Restricting the analysis to this narrow question is inconsistent with both the wording of the Act and the objects and purposes of the Code.¹⁷¹⁷

¹⁷¹⁴ The scheme of higher-lower-no risk was drafted with an awareness of the *Charter*, to balance the right to political participation with the rule preventing lobbyists from exploiting a politician’s sense of personal obligation.

Higher risk activities include: serving as a campaign chair or in another strategic role on a campaign team; serving in a named position on behalf of a registered party as set out in the Canada Elections Act; serving as an electoral district association officer within the meaning of the Canada Elections Act, such as chief executive officer, financial agent, appointed auditor, or any other officer; organizing a political fundraising event; gathering or soliciting donations that are then provided to a registered party or electoral district association; working in a war room for a registered party in a strategic role; preparing candidates for debates; or acting as a designated spokesperson for a political candidate, campaign, registered party, electoral district association, or other organization. Speech writing is likely a higher risk activity, but is not listed.

Lower risk activities include: volunteering, canvassing, or scrutineering for a registered party or electoral riding association without significantly interacting with candidates; attending fundraising events; or expressing personal political views strictly in an individual capacity. Lawn signs and campaign donations are considered no risk.

Office of the Commissioner of Lobbying, *supra* note 121.

¹⁷¹⁵ *Democracy Watch v Canada (Attorney General)*, [2019] 2019 FC 388.

¹⁷¹⁶ *Ibid* at para 129.

¹⁷¹⁷ *Ibid* at para 140.

The Commissioner failed to consider the other benefits Aga Khan received as a member of the board of his foundation. The Court's position better fits with the goal of lobbying legislation, as it would prevent board members from lobbying for their organization while avoiding the applicability of the *Code of Conduct*.¹⁷¹⁸ The Court also clarified that the Commissioner's opinions and bulletins are not statutory instruments and "cannot have the effect of limiting the provisions of the Act or the Code."¹⁷¹⁹

This case fits within the beneficial pattern of jurisprudence the Court has adopted, that gives a broad interpretation of the *Lobbying Act*, so that it applies cohesively. The Court has been hostile to narrow interpretations that would create loopholes for conflicts of interest and illegitimate influence. Simultaneously, this case seems to fit into a troubling pattern of the Commissioner deliberately reading down her powers, seemingly so that she does not interfere in certain somewhat common and potentially corrupting lobbying practices.¹⁷²⁰

R. v. Carson 2019 – ONCA

In *R. v. Carson* [2019]¹⁷²¹, the Ontario Appeal Court showed an awareness of the importance of the cohesion of the *Lobbying Act*. The lower court held that one has to initiate the communication with the government to breach the 5-year lobbying ban for designated public office holders. The Appeal Court reversed this holding, stating that the lower court's position would "very seriously undermine the efficacy of the *Lobbying Act*."¹⁷²² The Appeal Court also held that the financial benefits derived from lobbying should be relatively broadly understood, when it concluded that an extension of a funding window "constituted the award of a financial benefit every bit as much as the initial award of the funds did."¹⁷²³ The Court's support for the cohesiveness of the *Lobbying Act* is a good omen for future rulings.

R. v. Carson 2018 – SCC

The recent Supreme Court ruling in a different *R. v. Carson* [2018]¹⁷²⁴ case stressed the importance of the integrity of government decision-making and preventing the appearance of corruption.¹⁷²⁵ The case upheld a guilty finding that Carson was involved in Influence peddling regarding

¹⁷¹⁸ As stated, Court's determination that the *Code of Conduct* applies to board members, and the order for the Commissioner to re-evaluate whether Aga Khan's violated the Code, has been stayed for now by the appeal court.

¹⁷¹⁹ *Democracy Watch v. Canada (Attorney General)*, *supra* note 1715 at para 143.

¹⁷²⁰ This pattern is also visible in the attempt to narrow the considerations of conflict of interest in *Democracy Watch v Campbell*, the allowance of lobbying to a politician one has donated to, and the allowance of sponsored travel. This pattern could be a result of adopting (troubling) norms, insufficient resources to fulfill a broader oversight role, or concern that certain rulings might alienate Parliament, causing it to turn on the independence of the Commissioner. Office of the Commissioner of Lobbying, *supra* note 108.

¹⁷²¹ *R. v. Carson*, *supra* note 1703.

¹⁷²² *Ibid* at para 20.

¹⁷²³ *Ibid* at para 24.

¹⁷²⁴ *R. v. Carson*, *supra* note 537.

¹⁷²⁵ Both Carson cases involved the same defendant, Bruce Carson, who was a senior advisor to Prime Minister Harper. The cases were distinct charges against a fascinating individual with a history of criminal activity. In the 1980s he was disbarred by Law Society of Upper Canada for defrauding clients. In the 1990s he pleaded guilty to defrauding a car rental agency and a bank. Harper was aware of his history when he made him a senior advisor and "fixer". The Supreme Court case related to Influence peddling activities regarding the sale of a water treatment

the sale of a water treatment system to First Nations communities. In return the treatment company would give a commission to his girlfriend, who worked there. In its ruling, the Court evaluated the application of s. 121(1)(d) of the *Criminal Code*.

Frauds on the government

121 (1) Every one commits an offence who

(a) directly or indirectly

(i) gives, offers or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or

(ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person,

a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

(iii) the transaction of business with or any matter of business relating to the government, or

(iv) a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow,

whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be;

...

(d) having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

(i) anything mentioned in subparagraph (a)(iii) or (iv), or

(ii) the appointment of any person, including themselves, to an office;¹⁷²⁶

The Court emphasized that government decision-making should not be for sale, and the importance of preventing both corruption and the appearance of corruption.

system by H2O Professionals Inc to First Nations communities. The Ontario Court of Appeal's case involved lobbying activities related to a grant by Industry Canada to the Canada School of Energy and Environment. This school was a think tank hosted at the University of Alberta (Prime Minister Harper's alma mater). It started off as a legitimate research institute, but once Carson was appointed as chair, it devolved into a political institute intended to support the oil sands and falsely rebrand them as sustainable. At the same time he was the chair of the Canada School of Energy and Environment, Carson was also employed by the industry-funded lobby group. The transformation of the Energy Policy Institute of Canada is a good demonstration of effect of the ties between insiders, lobbyists and government. Andrew Nikiforuk, "Canada's Biggest Political Scandal You Never Heard Of", (5 October 2015), online: *The Tyee* <<http://thetyee.ca/News/2015/10/05/Canada-Biggest-Unheard-Political-Scandal/>>.

¹⁷²⁶ *Criminal Code* (R.S.C., 1985, c. C-46) (last amended on 2019-12-18), R.S.C. 1985 s 121.

The behaviour criminalized by this section risks depriving citizens of a true democracy predicated on free and open access to government. Corruption and the sale of influence, whether real or apparent, with government may undermine the integrity and transparency that are crucial to democracy. Where a person accepts a benefit in exchange for a promise to influence the government to change its policies or funding structure, they flout the notion that government decision-making should not be the object of commerce...¹⁷²⁷

Sinha and MacIsaac argued that in *Carson*, the Court was clearly concerned with government integrity and the appearance of integrity.¹⁷²⁸ They maintain that, “*Carson* is responsive to an era when citizens are losing faith in government and there is a pervasive perception that the system is rigged in favour of well-connected elites.”¹⁷²⁹ Unlike the American Court, the Canadian Supreme Court has maintained its concern about the appearance of corruption. Attempts at influence-peddling are a violation of the law, even if they fail or are based on a mistaken belief about one’s influence. This is because attempted influence-peddling creates the appearance of corruption. It causes the public to doubt their government.¹⁷³⁰

Carson continues a long line of cases holding the offences in Criminal Code s. 121 (“frauds on the government”) as concerned with preserving not only actual government integrity, but also the appearance of government integrity.¹⁷³¹

Democracy Watch and *Carson* both stand for the proposition that it is illegal to place “private interests in conflict with the public interest in the context of government decision-making.”¹⁷³²

It is more clearly illegal after *Carson* to sell influence. 121(1)(d) of the Criminal Code, according to the majority, is intended to protect government integrity. The Court maintained that this integrity is undermined when there is influence over the official – this indicates that the Court believed lobbying should consist solely of type v rational influence. This matches with the requirements of the *Code of*

¹⁷²⁷ *R. v. Carson*, *supra* note 537 at para 39.

¹⁷²⁸ Awanish Sinha & Ryan MacIsaac, “Under the influence: R v Carson broadly defines criminal offence of influence peddling”, (4 April 2018), online: *McCarthy Tétrault* <<https://www.mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/under-influence-r-v-carson-broadly-defines-criminal-offence-influence-peddling>>.

¹⁷²⁹ *Ibid.*

¹⁷³⁰ Dawood argues that the appearance of corruption is a key means by which citizens judge if they can trust in their officials. Thus, for the public, the appearance of corruption is the signifier for corruption. Even if the government is not corrupt, people will lack faith in it if it appears corrupt. Yasmin Dawood, *supra* note 489 at 334. It is plausible that the appearance of corruption deeply relates to the sense of fairness; situations perceived as consistently unfair begin to appear corrupt. Stiglitz argues that fairness is important to individuals, and that economists erroneously focus almost exclusively on efficiency instead. Joseph E. Stiglitz, *supra* note 38 c 5, s Fairness and disillusionment.

¹⁷³¹ Awanish Sinha & Ryan MacIsaac, *supra* note 1728.

¹⁷³² Adam Goldenberg & Jessica Firestone, *supra* note 4.

Conduct, which prohibit lobbyists from placing public office holders in real or apparent conflicts of interest.¹⁷³³ Thus, Goldenberg and Firestone argue that lobbyists must be clear that they are selling communication skills and the ability to open doors for meetings, not influence over officials.¹⁷³⁴ Stricter lobbying rules – that helped ensure integrity by further preventing lobbyists from exercising type i to iv influence – would reinforce this principle of governmental integrity.¹⁷³⁵

American Jurisprudence – *United States v. Harriss*

There is extensive American jurisprudence on the issue of lobbying regulation at the state and appeals level. In general, these cases have upheld lobbying regulations that are similar to the current Canadian ones. There has only been one Supreme Court decision, *United States v. Harriss* (1954)¹⁷³⁶. In *Harriss*, the defendants were charged with violating the *Federal Regulation of Lobbying Act* (1946). The Court upheld the Act, concluding that it was not too vague, but struck down some components.¹⁷³⁷ The Court's ruling limited the Act's applicability to only paid lobbyists who directly communicated with members of Congress on pending or proposed federal legislation. Due to the Court's interpretation, the Act did not apply to the lobbying of congressional or executive staff, or to lobbying on any non-legislative congressional or executive activity, such as appointments. This rendered the Act mostly useless and toothless.¹⁷³⁸ The Court also distinguished between lobbying involving directly contacting Congress, and communication with the public, holding the latter to a stricter standard of constitutional scrutiny.¹⁷³⁹ This ruling thus appears to prohibit the regulation of astroturf lobbying organizations. The Court concluded that,

Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection.¹⁷⁴⁰

The judgment upheld disclosure requirements, but strongly implied that a law which explicitly prohibited lobbying would be a violation of the First Amendment guarantees of freedom of speech and the right to petition the Government.¹⁷⁴¹

¹⁷³³ Rule 6: "A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest." Government of Canada, *supra* note 117.

¹⁷³⁴ Adam Goldenberg & Jessica Firestone, *supra* note 4.

¹⁷³⁵ *R v Duffy*, [2016] 2016 ONCJ 220.

¹⁷³⁶ *United States v. Harriss*, *supra* note 88.

¹⁷³⁷ *Ibid* at 619 & 620.

¹⁷³⁸ The current *American Lobbying and Disclosure Act of 1995* (2 U.S.C. § 1601) does not have these loopholes, but it does contain the gapping loophole that lobbyists can deregister and call themselves consultants to avoid the requirements of the Act.

¹⁷³⁹ Interestingly, the Court considered an artificially-stimulated letter campaign to fall under the category of direct communication with the members of Congress. *United States v. Harriss*, *supra* note 88 at 620. William V Luneburg, "Anonymity and Its Dubious Relevance to the Constitutionality of Lobbying Disclosure Legislation" (2008) Stan Pol Rev at 7; See also, *Autor et al v Blank et al*, [2012] Civil Action No 11-1593 (ABJ), which applies the standard of rational basis.

¹⁷⁴⁰ *United States v. Harriss*, *supra* note 88 s II.

¹⁷⁴¹ *Ibid*.

Harriss is an early example of the Court undercutting a law that attempts to control political influence. It made the law unworkable by not viewing the control of political influence as a cohesive whole.¹⁷⁴² Although the ruling supported the legality of lobbying regulations overall, it exempted so many types of officials that the Act became ineffective. It has also made it difficult to regulate astroturf lobbying, although it did treat some astroturf lobbying as direct lobbying that fell within Congress' purview. It is unlikely that stronger American lobbying regulations would meet the requirements set by the *Harriss* precedent.

The court rulings since *Citizens United*¹⁷⁴³ have been at odds with cohesive campaign finance regulation. The Court has discarded the concept of the appearance of corruption, and it has prioritized corporate free speech over equality and government's legitimate and compelling interest in regulating campaign finance.¹⁷⁴⁴ This jurisprudence further indicates that the Court is unlikely to uphold cohesive lobbying regulations.

The Mirror Principle of Lobbying and Campaign Financing

Chapter 4 covered how there is a fundamental symmetry between lobbying and campaign financing.¹⁷⁴⁵ Lobbying and campaign donations are symmetrical and tied means by which private interests legally channel their influence into the political system. The regulation of both areas involves directing the hydraulic pressure of political influence so it does not overwhelm the democracy, and so that the views and policies of officials remained aligned with those of the voters. The regulation of both areas must be considered in conjunction for truly effective curtailment of private political influence. The fundamental connection and symmetry of the two fields justifies the mirror principle.

The mirror principle in turn justifies the approach taken in this chapter to analysing Canadian judicial precedent. By the mirror principle, the norms established in the *Charter* cases regarding campaign finance law should be directly applicable to lobbying regulation. *Harper* and *Libman v. Quebec (Attorney General)*¹⁷⁴⁶ are particularly useful for this purpose.

Many of the officials interviewed, and some of the writing on Canadian lobbying law, have assumed that more robust, more restrictive lobbying regulations would violate the *Charter*. This is premised on the reasonable position that more restrictive regulations would violate the s. 2(b) freedom of expression rights of the lobbyists, and possibly the s. 2(d) freedom of association rights. This reasoning is tied to a belief that robust lobbying restrictions violate the First Amendment right in the U.S. Constitution, infringing on the rights of freedom of speech and to petition the government.

¹⁷⁴² Richard L. Hasen, *supra* note 1405 at 194.

¹⁷⁴³ *Citizens United v. Federal Election Commission*, *supra* note 1021.

¹⁷⁴⁴ *Ibid* s Opinion of Stevens, J. III Identity-Based Distinctions.

¹⁷⁴⁵ Chapter 4 – Private Campaign Financing and Lobbying: The Mirror Principle of Lobbying and Campaign Financing, p. 211.

¹⁷⁴⁶ *Libman v. Quebec (Attorney General)*, *supra* note 1706.

The American example does not map to the Canadian context without significant modification. There are fundamental differences in how the two courts have approached free speech and campaign financing law. More restrictive lobbying regulations that limited lobbying, prevented astroturf lobbying, distinguished between citizen groups and business organizations, and limited lobbying would violate s. 2(b) of the Canadian *Charter*; but these regulations could be upheld on the basis of a s. 1 justification. Not only would more strict lobbying regulations be constitutionally sound, but they appear to be a better match than the current regulations with the *Charter* principles expounded by the Supreme Court, particularly in the context of the s. 3 voting rights discussed in the next chapter.

S. 2(b) – Freedom of Expression

In Canada, any serious restriction of lobbying, or attempt to regulate it to favour citizen groups over businesses, would have to meet the requirements of the fundamental freedoms enshrined in s. 2 of the *Canadian Charter of Rights and Freedom*, particularly the s. 2(b) freedom of expression.

2. Everyone has the following fundamental freedoms:
 - (a) freedom of conscience and religion;
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 - (c) freedom of peaceful assembly; and
 - (d) freedom of association.

The Court has “consistently and frequently held that freedom of expression is of crucial importance in a democratic society”¹⁷⁴⁷. It is an essential value of a democratic society that permeates all truly democratic institutions.¹⁷⁴⁸ The Court has justified freedom of speech on the basis that

(1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.¹⁷⁴⁹

The Court has distinguished between types of expression, holding that some types of expression are less or more worthy of *Charter* protection. “Since political expression is at the very heart of freedom of expression, it should normally benefit from a high degree of constitutional protection”¹⁷⁵⁰. Lobbying,

¹⁷⁴⁷ *Ibid* at para 28.

¹⁷⁴⁸ *Ibid* at 28.

¹⁷⁴⁹ *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976 g.

¹⁷⁵⁰ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 60.

being a component of political expression, is thus at the very heart of the s. 2(b) protection. Lobbying infringements of s. 2(b) accordingly will be held to high standards of justification. However, it is possible to overstate this case. Lobbying for personal beliefs or any sort of citizen lobbying clearly falls within the heart of this definition. Business lobbying for self-interested economic advantage strays further from this political core, since it does not involve truth seeking, self-fulfillment or human flourishing. Moreover, lobbying is not the same as simple political expression; it is much more refined, persistent activity, involving a long-term (generally paid) and targeted in-person political communication that most individuals do not and could not spare the time to pursue. It is an important part of political participation, but it is not the same as general political speech or reaching out to one's representative to express concerns or policy views.

Gee argues that petitioning the government is a specific democratic activity that belongs to moral agents (people) and cannot be transferred to corporations.¹⁷⁵¹ The right belongs specifically to individual citizens.¹⁷⁵² By his reasoning, restrictions on business lobbying cannot infringe the right to petition or free speech.¹⁷⁵³ His argument has a sound theoretical basis, but stands somewhat outside the norms of *Charter* interpretation. It is unlikely the Court would fully accept his argument. Nonetheless, it bolsters the justification for distinguishing between *Charter* protection for citizens lobbying and protection for corporate lobbying.

The test for s. 2(b) free expression was set out in *Irwin Toy Ltd v Quebec (Attorney general)*¹⁷⁵⁴.

The Court must ask, first, whether the form of expression at issue is protected by s. 2(b) and, second, whether the purpose or effect of the impugned legislation is to restrict that form of expression.¹⁷⁵⁵

¹⁷⁵¹ Quentin Gee, "Corporations, Rights, and Lobbying" (2016) 19:2 Ethical Theory Moral Pract 397–408.

¹⁷⁵² Gee argues that there is a general principle inherent in democracy: the *non-transferability of democratic process*. It is required for political equality that democratic rights cannot be transferred to someone else. You cannot give/sell your citizenship or right to vote to another person. Therefore, the idea of transferring the right to lobby fails, because it is an inherent democratic process. It is bound innately to the person of the polity (the citizen). So corporations cannot take on their members' or owners' right to petition. His arguments raise some difficulties for large citizen lobbying organizations; but the right for their lobbying can be grounded in moral necessity, practical necessity and citizen support, in a way that corporate lobbying cannot. "The right of corporations to lobby is clear cut example of an institutional feature precisely designed to violate equal consideration, so the right to do so cannot be justified on the grounds of transference." *Ibid* at 405, 397–403.

¹⁷⁵³ Essentially, Gee's argument is that corporations have no moral or inherent right to lobby, because they are moral patients not moral agents. Corporations are not complete persons, and so are not entitled to the same moral rights and considerations. (Otherwise, corporations should have the right to vote and hold office; owning a corporation would be a form of slavery; and dismantling a corporation would be akin to murder or assisted suicide). He argues that the corporation's legal right to lobby can only be justified because it is transferred from its members or because on a practical basis it is useful for society. Otherwise, there is no moral basis for the corporation's legal right to lobby. It cannot be transferred, because the right belongs is non-transferrable. The practical basis also fails, because corporate lobbying misaligns representation, damages democratic equality, and most citizens do not support unlimited corporate lobbying. *Ibid* at 397–403, 405.

¹⁷⁵⁴ *Irwin toy Ltd. v. Quebec (Attorney general)*, *supra* note 1749.

¹⁷⁵⁵ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 28.

In *Harper*, the Court held that campaign funding restrictions for third parties infringe s. 2(b), because they restrict the spending with which individuals and groups express their political views.¹⁷⁵⁶ “There is no doubt that freedom of expression includes the right to employ any methods, other than violence, necessary for communication.”¹⁷⁵⁷ By the mirror principle, lobbying restrictions would also infringe s. 2(b) freedom of expression rights, because the protected forms of political expression available to the lobbyists would be deliberately restricted.¹⁷⁵⁸

In Canadian law, a s. 2 infringement could still be saved under s. 1 of the *Charter*.

2. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

To meet the requirements of s. 1, a law must pass the *Oakes*¹⁷⁵⁹ test.¹⁷⁶⁰ The standard of the test is the balance of probabilities. It has two parts, with the second part having three components.

- I. The government must establish that the law under review has a goal that is both “pressing and substantial.”
- II. The means chosen of the law must be proportionate to that goal, according to these three sub-tests:
 - i) The measures adopted must be rationally connected to the objective.
 - ii) The means must impair the *Charter* right as little as reasonably possible in order to achieve the law’s objective. This is judged within a range of reasonable alternatives; the law does not have to be perfect.
 - iii) There must be proportionality between deleterious and salutary effects. The benefits of the law must outweigh the costs of limiting the right or freedom. The proportionality inquiry is both normative and contextual, and requires that courts balance the interests of society with those of individuals and groups.¹⁷⁶¹

¹⁷⁵⁶ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 66.

¹⁷⁵⁷ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 35.

¹⁷⁵⁸ *Ibid* at para 36.

¹⁷⁵⁹ *R. v. Oakes*, *supra* note 1525.

¹⁷⁶⁰ *Ibid* at para 69; The third component of the second part of the test was altered by the Court in *Dagenais v. Canadian Broadcasting Corp.*, *supra* note 1526 at 839; Applied in *Harper v. Canada (Attorney General)*, *supra* note 53 at para 91 to 119; The test continues to be used by the Court. *R. v. Morrison*, *supra* note 1526 at para 63.

¹⁷⁶¹ *Frank v. Canada (Attorney General)*, *supra* note 1707 at para 38. In *Frank*, the dissent distinguished between justified *infringements* of a right and justified *limits* of a right on the basis of s. 1. They argue that “[w]e do not believe the *Charter* can (or should) be read so as to ever allow for justified “infringements”. It does, however, allow for justified “limits”. They maintain that the court should start paying attention to the distinction. The majority rejected their distinction. This chapter follows the majority and treats the terms interchangeably. It is possible that the minority’s position, if embraced, would lead to a subtle but significant difference over the long-term in the interpretation of the *Charter*. It is difficult to determine what the long-term effects would be. *Ibid* at para 121.

Stricter lobbying regulations that seek to curtail and rebalance lobbying undoubtedly violate s. 2(b) of the *Charter*. The question is whether they can be justified under the s. 1 *Oakes* test.

S. 2(d) – Freedom of Association

In *Harper*, the Court deeply investigated the freedom of expression issues, but curtly dismissed the parallel freedom of association issues. It held that the campaign spending limit

does not prevent individuals from joining to form an association in the pursuit of a collective goal. Rather, [the spending limit] ... precludes an individual or group from undertaking an activity, namely circumventing the third-party election advertising limits¹⁷⁶².

In contrast, in *Libman*, the Court held that there were parallel freedom of association issues, because the “referenda legislation in *Libman* effectively forced individuals to associate with an affiliated or national committee to incur regulated expenses”¹⁷⁶³. The Court used the same s. 1 analysis to evaluate the legislation, addressing s. 2(b) and 2(d) at the same time.

Our strong lobbying restrictions resemble the campaign regulations in *Harper* more than *Libman*, preventing an activity rather than forcing individuals to associate with affiliate groups or committees. Thus in lobbying regulations, it is the freedom of expression rights that bear deep investigation. In the rare potential case that lobbying regulations forced lobbying organizations to associate with particular affiliate committees in order to communicate with officials, it is likely the Court would come to the same conclusion it came to in *Libman*. The legislation would fail the s. 1 test if it did not allow at least a small amount of independent lobbying. The Court would likely recognize that the “legislature’s objective can only be achieved through stricter limits on independent spending”¹⁷⁶⁴, and allow independent expenditures on lobbying to be limited accordingly. In *Libman*, the Court did not state the exact acceptable minimum, but it implied that the \$1,000 limit proposed by the Lortie Commission might be acceptable.¹⁷⁶⁵

In the case where freedom of expression and freedom of association issues are both raised, as in *Libman*, the focus will probably be on the s. 2(b) question. The s. 2(d) questions will likely be subsumed into the same s. 1 analysis. For this reason, we will proceed on the basis of a s. 2(b) freedom of expression analysis and matching s. 1 justification. This analysis starts with an extraction of the Court’s *Charter* principles elucidated in the campaign finance cases of *Harper* and *Libman*.

¹⁷⁶² *Harper v. Canada (Attorney General)*, *supra* note 53 at para 126.

¹⁷⁶³ *Ibid* at para 127.

¹⁷⁶⁴ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 56.

¹⁷⁶⁵ Recently national third-party spending limits on elections have been in the \$150,000 to \$500,000 range. It is likely that the government would propose a yearly limit based on new research but influenced by these figures.

Principles from *Harper* and *Libman*

We can extract a number of *Charter* principles from *Harper* and *Libman*. The following ten condensed principles are a mix of some generalized principles, and a number of more specific ones relating to free expression and the practice of campaign finance law. The next section will expand on these condensed principles, applying them to lobbying regulation.

The Court established the principle of electoral fairness based on the political equality of citizens (principle 1).¹⁷⁶⁶ This electoral equality is an essential goal which can justify restricting the personal rights of some for the health of the democracy (principle 2). Freedom of political expression itself would lose much value if this political equality is undermined (principle 3).¹⁷⁶⁷ Thus the Court in *Harper* set the principle that the limitations of the free speech of some are acceptable, when the provisions enhance the political expression of many more (principle 4).¹⁷⁶⁸ Similarly, freedom of expression can be restricted to promote political expression when it better fulfills democratic traditions (principle 5).¹⁷⁶⁹

The Court accepted that controlled electoral spending is required for elections and democracy to function (principle 6). The spending of both political parties and third parties must be curtailed.¹⁷⁷⁰ Uncontrolled spending is an unchecked power that can undermine elections. Since an informed citizenry is essential for democracy, voters need to hear all points of view, and for that there needs to be spending limits so the wealthy do not drown out the voices of everyone else (principle 7).¹⁷⁷¹ In addition to the risk of a flood of campaign spending, public perception is also critical. It is an essential concern that citizens believe the electoral regimes advance the values of the democracy (principle 8). This is important enough that freedom of political expression can be curtailed (principle 9). Freedom of expression should not undermine the public's perception of the fairness of the political process.¹⁷⁷² Lastly, the Court upheld the principle that mandatory disclosure is a justifiable infringement on third parties' free expression because it increases the transparency and accountability of the electoral process (principle 10).

Robust campaign finance limitations on third-party expenditures were upheld under s. 1 on the basis of these principles. The same judicial reasoning should apply to robust lobbying regulations, allowing them to pass the s. 1 test. We will investigate how these principles would match with robust lobbying legislation. Following that, we will investigate the same question with two inter-related approaches: an evaluation of deference the Court would accord to Parliament, and a skeleton s. 1 evaluation based on *Harper*.

¹⁷⁶⁶ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 47.

¹⁷⁶⁷ *Ibid* at para 82.

¹⁷⁶⁸ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 86.

¹⁷⁶⁹ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 61.

¹⁷⁷⁰ *Ibid* at para 56.

¹⁷⁷¹ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 71.

¹⁷⁷² *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 82.

S. 1 – Applying Charter Principles

Since more restrictive lobbying regulations would infringe s. 2 of the *Charter*, they will need to pass the s. 1 *Oakes* test. They must, on the balance of probabilities, address a pressing and substantial concern in a democratic society, with means proportional to that objective.¹⁷⁷³ While there is little Canadian jurisprudence on the constitutionality of lobbying restrictions, we can turn to the mirror principle, and consider Supreme Court decisions in *Libman* and *Harper*. We can look at the justifications that supported campaign finance law and see how they apply to lobbying law.

In *Libman*, the Court set out three justifications for limiting campaign expenditures.

The objective of the Act that restricts spending is egalitarian in that it is intended to prevent the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources.

... Second, from the voters' point of view, the system is designed to permit an informed choice to be made by ensuring that some positions are not buried by others. Finally, as a related point, the system is designed to preserve the confidence of the electorate in a democratic process that it knows will not be dominated by the power of money.¹⁷⁷⁴

Similarly, these same goals apply to the regulation of lobbying from the point of view of the voter's political representative. Robust lobbying regulations would first seek to prevent the most affluent from exercising disproportionate influence over government decision-making. Second, it would aim to rebuild the equality of influence between average citizens and business interests. This should help politicians make more informed choices by having access to less biased information.¹⁷⁷⁵ Third, it would preserve and build the citizens' confidence in their government's democratic alignment and responsiveness. This would reassure them that the government is not being swayed by the power of wealth. Since robust lobbying legislation mirrors the goals of campaign finance legislation, it is reasonable to apply the *Charter* principles previously elucidated in those cases to lobbying regulations. If robust lobbying regulations adhere to these principles, they are likely to pass the s. 1 test.

Political Equality and Fairness in Healthy Democracy (principles 1 and 2)

In *Harper* and *Libman* the Court addressed a case in which the speech of some, particularly third parties and wealthy donors, was restricted by campaign regulations in order to make the election fairer.¹⁷⁷⁶ Unlike the American jurisprudence in cases like *Citizens United*, the Canada Supreme Court

¹⁷⁷³ *Ibid* at para 38. *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra* note 1749 at 991 e.

¹⁷⁷⁴ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 41.

¹⁷⁷⁵ The bias in the information present by lobbying business interests is discussed in depth in Chapter 3 and Chapter 6. This bias includes the pre-framing of information, a pro-business and pro-wealthy slant, and the provision of deliberately misleading information.

¹⁷⁷⁶ *Figuerola v Canada (Attorney General)*, [2003] 1 SCR 912 at para 49.

jurisprudence specifically supports the creation of a level playing field.¹⁷⁷⁷ This is a key principle (principle 1). “The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens.”¹⁷⁷⁸ The Court has held that (principle 2), “the principle of fairness presupposes that certain rights or freedoms can legitimately be restricted in the name of a healthy electoral democracy”.¹⁷⁷⁹

Both the principles of electoral fairness and the right to restrict certain freedoms to support healthy democracy would justify stronger lobbying regulations. These would enhance the political fairness for citizens and citizen groups, even at the cost of the free speech of businesses and wealthy citizens. This is buttressed by the Court’s express concern that the *Charter* not be used as a tool by which the powerful oppress the powerless.

In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the conditions of less advantaged persons.¹⁷⁸⁰

Stronger lobbying regulations would buttress the representation of citizens and the disadvantaged. It is inevitable that wealthy and business interests will press back with claims of s. 2(b) infringement. By the Court’s reasoning, it should be hesitant to apply a strict freedom of expression argument. It should instead apply principles supporting a level playing field and democratic fairness as part of the s. 1 justification for the lobbying restrictions.¹⁷⁸¹

Affluent Cannot Set Guideposts of Political Choices (principle 3)

In campaign finance, the Court has argued the principle (principle 3) that freedom of political expression would lose much of its value “if it could only be exercised in a context in which the economic power of the most affluent members of society constituted the ultimate guidepost of our political choices.”¹⁷⁸² In lobbying, it is apparent that the economic power of the most affluent already frames the issues and thereby sets the guidepost of political debate and lobbying outcomes. Stronger lobbying regulations could lessen business lobbyists’ power to frame debates by instituting lobbying limits and rules that require alternative sources of information. Such legislation would support and be supported by this principle.

¹⁷⁷⁷ *Citizens United v. Federal Election Commission*, *supra* note 1021 s III; *Harper v. Canada (Attorney General)*, *supra* note 53 at para 62.

¹⁷⁷⁸ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 47.

¹⁷⁷⁹ *Ibid.*

¹⁷⁸⁰ *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at 779.

¹⁷⁸¹ “First, the State can provide a voice to those who might otherwise not be heard. The Act does so by reimbursing candidates and political parties and by providing broadcast time to political parties. Second, the State can restrict the voices which dominate the political discourse so that others may be heard as well. In Canada, electoral regulation has focussed on the latter by regulating electoral spending through comprehensive election finance provisions. *These provisions seek to create a level playing field for those who wish to engage in the electoral discourse.* [emphasis added]” *Harper v. Canada (Attorney General)*, *supra* note 53 at para 62.

¹⁷⁸² *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 82.

Limiting Expression of Some to Help Many Others (principle 4)

The Court argued that the third-party electoral spending limits do curtail the free speech of some people – those who would otherwise spend more than the limits allow. The Court held this curtailment was acceptable, since the provisions enhance the political expression of many more people (principle 4).¹⁷⁸³

The same reasoning can apply to regulations that seek to rebalance lobbying by supporting citizen groups and limiting the lobbying of corporations. This corresponds to Sethi's argument that commercial speech should always be approached as on the periphery of protected speech, in line with the cases that hold the doctrine that political expression lies at the core of the section 2(b) guarantee.¹⁷⁸⁴ Sethi argues that the framework of these cases should be formalized by holding that infringement of commercial speech be held to a more deferential intermediate standard of review.¹⁷⁸⁵ Business lobbying for private goods (as business overwhelmingly does) touches the line between commercial expression and political expression, but it is closer to the former. By this reasoning, the distinction between citizen lobbying and business lobbying is supported, as is a laxer standard of *Charter* review for regulations controlling business lobbying. This reasoning also accords with Kuhner's principle of the separation of business and state, covered in Chapter 6.¹⁷⁸⁶ For the health of democracy it would be better to separate the two realms as much as possible.¹⁷⁸⁷

Enhancing Democracy (principle 5)

The Court has reasoned (principle 5) that restricting the campaign spending and freedom of speech of some to increase political equality actually enhances democracy. The Court argued that third-party spending restrictions' "primary purpose is to promote political expression by ensuring an equal dissemination of points of view and thereby truly respecting democratic traditions."¹⁷⁸⁸ This reasoning equally applies to lobbying regulations, where reducing the lobbying of businesses would make it easier for citizen groups to counter-lobby and express their views, enhancing equality and democracy. Funding for citizen groups would also support this goal. The enhancement of democracy is an issue we will return to in the next chapter.

¹⁷⁸³ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 86.

¹⁷⁸⁴ See *R v Keegstra*, [1990] 3 RCS 697 at para 82; *Harper v. Canada (Attorney General)*, *supra* note 53 at para 11; *Thomson Newspapers Co v Canada (Attorney General)*, [1998] SCR 1 877 at para 92.

¹⁷⁸⁵ Chanakya Sethi, "Beyond Irwin Toy: A New Approach to Freedom of Expression under the *Charter*" (2012) 17 *Appeal Rev Curr Law Law Reform* 21 at 38.

¹⁷⁸⁶ Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: The Separation of Business and State, p. 361.

¹⁷⁸⁷ Timothy K. Kuhner, *supra* note 51.

¹⁷⁸⁸ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 61.

Supporting Electoral Laws and Equality (principle 6)

The Court has accepted the argument that (principle 6) third-party spending can be controlled when it is necessary for electoral laws to function and support political equality.¹⁷⁸⁹ This principle applies to two different facets of lobbying regulations: astroturf¹⁷⁹⁰ lobbying restrictions and spending limits.

Astroturf Restrictions

The principle of controlling third-party spending for electoral laws to function also justifies restrictions on astroturf lobbying. Astroturf lobbying is falsely representing a group as a genuine ground-up citizen organization, and no attempt at limiting expenditure and rebalancing lobbying will succeed if business organizations can bypass the rules by forming astroturf lobbying groups that appear to be citizen-run. The use of astroturf groups is so pervasive and deceptive to civic health that prohibitions are warranted.¹⁷⁹¹ Regulations controlling astroturfing will be integral to lobbying limits the same way regulations controlling third-party spending and collusion are integral to campaign spending limits.

Spending Limits

The Court has stated, “If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate.”¹⁷⁹² By the mirror principle, the Court’s reasoning should equally apply to lobbying. Business interests and the wealthy massively outspend citizen groups. It should be constitutionally justifiable by s. 1 for legislation to limit lobbying spending, because excessive spending on lobbying increases inequality and damages political equality.

The idea that unchecked spending on lobbying undermines democracy is not (currently) widely accepted among the political elites, who generally subscribe to the disclosure heuristic. Limitations on astroturf lobbying and on lobbying expenditures stand outside of the current political consensus in Ottawa. At first, the courts might be reluctant to embrace these ideas. Yet, these limitations are justifiable from a policy and a jurisprudential perspective. They are the reflection of the principle of controlling third-party spending to support political equality.

Hearing all Points of View (principle 7)

An informed citizenry is essential for democracy.¹⁷⁹³ The Court has accepted the principle (principle 7) that for voters to hear all points of view there needs to be spending limits.

Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to

¹⁷⁸⁹ *Ibid* at para 56.

¹⁷⁹⁰ An astroturf group is a fake grassroots organization, see Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Outsider Approach: Astroturf Lobbying, p. 106.

¹⁷⁹¹ Technically, astroturf lobbying might be prohibited by rule 1 of the *Code of Conduct*, but the prevalence of astroturf lobbying groups indicates that the Code is not preventing this practice. It is possible – doubtful, but possible – that astroturf groups do reveal their nature to the officials they are lobbying in person.

¹⁷⁹² *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 47.

¹⁷⁹³ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 71.

present their positions so that election discourse is not dominated by those with access to greater financial resources.¹⁷⁹⁴

This principle of informational equality was of central concern in *R. v. Bryan*¹⁷⁹⁵. In this case, the Court upheld legislation that prohibited the broadcasting of election results until all the polling stations in Canada were closed, on the basis that it ensured informational equality between voters.¹⁷⁹⁶

Public confidence in the electoral system is dependent not only on the belief of Canadians that the election is fair in that the premature availability of returns does not affect the outcome of the election, but also on the belief in that the principle of information equality is upheld.¹⁷⁹⁷

In theory, the concept of information equality could be applied to politicians as well as voters. This could take the form of either a right for representatives to hear diverse information, or a right for voters to have their representatives exposed to a diversity of views. In the latter case, hearing all (relatively speaking) points of view would help ensure that the representative was exposed to the main range of the views of the voters themselves. In winning the election, the politician might have the public's authorization to subscribe to a particular point of view, but the systematic structure of lobbying should not predetermine the politician's options by precluding and narrowing the voices she hears. Lobbying should not be dominated by the affluent, framing the debate and drowning out the voices of citizens. If this happens, the politician remains uninformed, which is the reflection of the problem of the uninformed voter. Applying the mirror principle, the principle that voters need to hear all points of view justifies spending limits on lobbying and rebalancing lobbying laws to favour citizen groups so politicians hear all points of view.

This principle also justifies the prevention of astroturf lobbying. How can officials know if they are fairly informed, if they are being deceived about the nature of the lobbying group? How can citizens participate in lobbying in an informed manner, if they are deceived about the nature or purpose of the lobbying groups they encounter? Forcing organizations to lobby in their own name would help make groups take responsibility for their claims, pressuring them to provide more accurate information.¹⁷⁹⁸ It

¹⁷⁹⁴ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 47.

¹⁷⁹⁵ *R v Bryan*, [2007] 1 SCR 527.

¹⁷⁹⁶ *Ibid* at para 53.

¹⁷⁹⁷ *Ibid* at para 45.

¹⁷⁹⁸ For example, the oil industry has quietly lobbied directly against policies that would prevent climate change catastrophe. It has also successfully lobbied indirectly using more deceptive tactics via astroturf organizations that peddle fake science, false expertise, specious arguments, and dishonest claims to represent independent concerned citizens. This has allowed it to keep its reputation relatively intact with officials and the media. See Naomi Oreskes & Erik M. Conway, *supra* note 35; Bruce Cheadle, "Oil And Gas Lobbying In Canada Overshadows All Other Pressure Groups: Polaris Study", (4 December 2012), online: *Huffington Post* <http://www.huffingtonpost.ca/2012/12/04/oil-gas-lobbying-canada-polaris_n_2237826.html>; David Roberts, *supra* note 29; Union of Concerned Scientists, *supra* note 809.

would allow officials and voters to better understand who is participating in the lobbying and the potential biases of their arguments.

Perception of Fairness and Confidence in Democracy (principles 8 and 9)

In both *Harper* and *Bryan*, the Court stressed the importance of the public perception of electoral fairness and trust in Canadian democracy as a fundamental goal of electoral law (principle 8). “Electoral fairness is key. Where Canadians perceive elections to be unfair, voter apathy follows shortly thereafter.”¹⁷⁹⁹ This is important enough that (principle 9) freedom of political expression should not become a tool to undermine “the confidence of citizens in the political [referendum] process”¹⁸⁰⁰. These two principles are closely related to the appearance of corruption. Elections must be fair and perceived to be fair. Unlike the American jurisprudence, these principles put the appearance of corruption as centrally important in evaluating campaign finance and lobbying laws. So, if lobbying regulations help prevent the appearance of corruption, this will help them pass the s. 1 test.

The public’s perception that they are fairly represented is as important as their perception that the politicians are fairly elected. The public should perceive that politicians are aligned with the voters, and are not being swayed from their duties by lobbyists. Polls about public perception and support of electoral regulations were important factors in the Court’s decisions on campaign finance law.¹⁸⁰¹ The polls are additional evidence of the connection between the campaign restrictions and maintaining the public’s confidence in the electoral system. Similarly, polls and social science evidence demonstrating the connection between lobbying regulations and the public’s confidence in their representatives would be important to the Court’s decision on new lobbying laws.¹⁸⁰² Enhancing the citizens’ faith in their democratic representation is an important goal which can help justify stricter lobbying regulations.

Mandatory Disclosure (principle 10)

The Canadian Court has been very friendly to the concept of disclosure. Transparency in government is an essential component of democracy.¹⁸⁰³ In *Harper* the Court upheld the principle (principle 10) that although rules requiring disclosure infringed the third parties’ right to free expression, this infringement was justified by s. 1 because it increased the transparency and accountability of the electoral process.¹⁸⁰⁴ The Court upheld this point again in the recent case of *BC Freedom of Information*

¹⁷⁹⁹ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 82.

¹⁸⁰⁰ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 82.

¹⁸⁰¹ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 83; *R. v. Bryan*, *supra* note 1795 at para 41.

¹⁸⁰² The public is not broadly aware of the specifics of lobbying regulations, but the polls could check whether they gained confidence in their democratic representation upon learning of the stricter rules – or would gain confidence if the rules were not yet in place. Studies that showed an egalitarian outcome and improved representation from lobbying regulations would also be quite valuable. Such supporting studies and polls would be a key component of any roll-out of more robust lobbying regulations.

¹⁸⁰³ See *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 41; *Reference re Secession of Quebec*, *supra* note 1079 at para 64. See also A. Paul Pross, *supra* note 2 at 197.

¹⁸⁰⁴ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 146.

*and Privacy Association v. British Columbia (Attorney General)*¹⁸⁰⁵, which hinged on disclosure and registration requirements of sponsors of advertising under British Columbia’s provincial electoral law.

The registration requirement permits the British Columbia public to know who is engaged in organized advocacy in their elections, by creating and maintaining a register of sponsors. The provision ensures that those who sponsor election advertising must provide the public with an assurance, in the form of a signed statement, that they are in compliance with British Columbia’s election law. Finally, registration provides the Chief Electoral Officer with information that can assist in the enforcement of the Act and in informing sponsors of its requirements. In my view, the benefits of requiring sponsors of election advertising to register outweigh the deleterious effects on sponsors’ s. 2(b) right.¹⁸⁰⁶

The Court ruled that requiring registration and disclosure of sponsors of all election advertising (even amounts below the \$500 federal threshold in *Harper*) infringed s. 2(b) but was justified under s. 1.¹⁸⁰⁷

Disclosure is equally central to the integrity of lobbying oversight and the *Lobbying Act*. By the mirror principle, the disclosure rules in the current *Lobbying Act* could infringe s. 2(b), but they would pass s. 1 evaluation on the same basis. It is likely that the Court would uphold much more stringent disclosure requirements. These more stringent disclosure requirements might include lobbying expenditures and more detailed records of lobbying means, goals, and officials contacted. It is likely the Court would also uphold rules forcing disclosure of funding and structure of astroturf lobbying. This would help prevent astroturf organizations from deceiving citizens and government into believing that there is popular or passionate support for unpopular policies.¹⁸⁰⁸

The ten principles used to justify the campaign finance regulations and limitations under s. 1 provide support for the constitutionality of robust lobbying regulations. Yet, the jurisprudence of *Libman v. Quebec*¹⁸⁰⁹ and the recent B.C. Appeal Court ruling in *Reference Re Election Act (BC)*¹⁸¹⁰ (B.C. *Reference*) do pose some challenges for lobbying regulation passing the s. 1 test.

¹⁸⁰⁵ *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, *supra* note 1707.

¹⁸⁰⁶ *Ibid* at para 55.

¹⁸⁰⁷ *Ibid* at para 59.

¹⁸⁰⁸ Marin Austin, “Concerned Citizens Turn Out to Be Political Theater”, (18 February 2016), online: *NBC South Calif* <<http://www.nbclosangeles.com/news/local/Concerned-Citizens-Turn-Out-to-Be-Political-Theater-369230811.html>>; Michael Isaac Stein, “Actors were paid to support Entergy’s power plant at New Orleans City Council meetings”, *New Orleans Advocate* (4 May 2018), online: <https://www.theadvocate.com/new_orleans/news/article_22c14ee8-4fdd-11e8-b374-c3348ad26f04.html>.

¹⁸⁰⁹ *Libman v. Quebec (Attorney General)*, *supra* note 1706.

¹⁸¹⁰ *Reference re Election Act (BC)*, 2012 BCCA 394.

Challenges from Campaign Finance Principles

There are two cases that set precedents that could challenge robust lobbying legislation. In *Libman*, the Court upheld the principle of third-party electoral spending limits in theory, but stated that the limits in this case were too low. It also held that it was unfair to limit the plaintiff to advocating only within the yes or no campaigns of the referendum.¹⁸¹¹ Lobbying regulations that set too low an expenditure cap or limit lobbyists to narrow categories of issues might run afoul of this precedent.

In the *B.C. Reference* the B.C. Appeal Court ruled that the B.C. Legislature's attempt to limit third-party expenditures in the time period before an election starts did not pass the minimum impairment portion of the s. 1 test. The Court argued that limiting third-party spending during the election period was justifiable by *Harper*, but the legislature had not provided any evidence demonstrating that "limitations in the pre-campaign period are necessary."¹⁸¹² This precedent, while not determinative, does point out a key difference between some aspects of campaign regulations and lobbying regulations. Campaign expenditures limits are only in place for a short period of time, and outside that time period third parties are free to express their political speech as they like. In contrast, lobbying restrictions would need to be perpetually in force in order to function properly. This perpetuity could increase the challenge of the s. 1 test, and raise the bar of the evidentiary support.¹⁸¹³

The Principle of Proportional Regulatory Duration

The Court might accept a proposed unifying principle that mitigates this perpetuity issue. We shall call this approach the principle of *proportional regulatory duration*. This principle addresses the ruling in *B.C. Reference* by proposing an alternative understanding to the time limit on the campaign finance restrictions. This principle proposes that the duration of the legislation designed to regulate democratic decision-making should match the duration in which the democratic decision-making is being made.¹⁸¹⁴ The decision-making in question could be members of the public making their electoral decisions, or politicians who are making their policy decisions. It does not matter if the legislation applies periodically for a relatively short duration or is perpetually in force. What matters is that the restrictions do not extend beyond the period of the democratic decision-making. This approach is based on the reasonable argument that the anti-corruption and fairness goals require that the timespans match to make the legislation effective.

¹⁸¹¹ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 84; "Lobbying Spending Database 2017", (5 November 2018), online: [OpenSecrets.org](https://www.opensecrets.org/lobby/top.php?showYear=2017&indexType=i) <<https://www.opensecrets.org/lobby/top.php?showYear=2017&indexType=i>>.

The Court suggested that a limit of \$1,000 might be acceptable. Currently the law allows \$1 million in the 30 days pre-writ, and \$500,000 during the electoral cycle (the limit was increased from \$150,000), with a \$4,300 limit in a given electoral district. It is difficult to say what a reasonable limit would be for lobbying, as the current Canadian regulations do not require lobbyists to disclose their expenditures. The limit should be set to reduce the spending of the top interest groups, so it is reasonably effective. In the U.S. the insurance industry alone spent more than \$162 million on federal lobbying in 2017.

¹⁸¹² *Reference re Election Act (BC)*, *supra* note 1810 at para 39.

¹⁸¹³ However, political donation limits are perpetually in force, which is a factor that weighs in favour of decreasing the challenge of the s. 1 test of (perpetually in force) lobbying restrictions.

¹⁸¹⁴ I am indebted to Michael Pal for the basis of this insight.

According to the principle of regulatory duration, in campaign finance law the timespan of the election campaign has special priority, because it is the period in which citizens make their decisions. It makes sense to focus the spending restrictions on this time period (including the pre-election period). Having third-party spending limits in force beyond this period would be excessive to protect the electoral decision-making. It would not act to substantially prevent additional corruption. In contrast, lobbying continuously affects political decision-making. Since the duration that the regulatory restrictions are in force should match the decision-making period, the principle of proportional regulatory duration dictates that the perpetuity of lobbying restrictions is justifiable and would not increase the challenge of the s. 1 test.

Moreover, the ruling in *Baier v. Alberta*¹⁸¹⁵ hints that the Supreme Court will be far more open to perpetual lobbying restrictions than the Appeal Court ruling in *BC Reference* implies. In *Baier*, the Court ruled that excluding teachers from running for school trustee office is not an infringement of s. 2 as long as there are other ways to express oneself politically. This case does not fall under the auspices of the mirror principle. Yet, it does provide another indication that robust lobbying restrictions might not infringe s. 2, provided there are other ways to express oneself politically. These methods could include contact with government that does not reach the threshold of lobbying, and participation in open meetings, public consultations, town halls and other consultation processes. Since government deliberately seeks out the opinions of businesses as key stakeholders, a well-run consultation process might cover much of their political needs. If the majority of standard business were addressed through a fairer, more open consultation process, then limited lobbying would be more than enough for the edge cases where businesses need to introduce brand new ideas into the policy process.

Even if the principle of proportional regulatory duration was rejected, and the perpetual nature of lobbying regulations increased the challenge of the s. 1 test, the lobbying laws could be justified by the evidence of the domination of lobbying by business interests. There is strong evidence of the gap between the public's priorities and the more business- and affluent-friendly policies the government adopts.¹⁸¹⁶

S. 1 – Deference to Parliament

To understand the likelihood of robust lobbying legislation passing a *Charter* challenge, we need to gauge how much deference the Court is likely to show to Parliament. The Court's evaluation of the appropriate standard of deference is a critical facet in any *Charter* case. If the Court concludes more deference is warranted, it is more likely to uphold the legislation. In *R. v. Bryan*¹⁸¹⁷ Bastarache J. for the concurring majority reiterated the four-fold contextual test for deference.

This context can be best established by reference to the four factors which this Court set out in *Thomson Newspapers* and *Harper*: (i) the nature of the harm and the

¹⁸¹⁵ *Baier v Alberta*, [2007] 2 SCR 673.

¹⁸¹⁶ See Chapter 2 and Chapter 6.

¹⁸¹⁷ *R. v. Bryan*, *supra* note 1795.

inability to measure it, (ii) the vulnerability of the group protected, (iii) subjective fears and apprehension of harm, and (iv) the nature of the infringed activity.¹⁸¹⁸

(i) The Nature of the Harm

The nature of the harms that robust lobbying legislation seeks to remedy weighs in favour of deference to Parliament. This is true even if the social science evidence were not fully conclusive. In evaluating the nature of the harm, the Court in *Harper* argued that,

[w]here the court is faced with inconclusive or competing social science evidence relating the harm to the legislature's measures, the court may rely on a reasoned apprehension of that harm.¹⁸¹⁹

The Court held that the third-party electoral spending limits fell into this category. "Given the difficulties in measuring this harm, a reasoned apprehension that the absence of third-party election advertising limits will lead to electoral unfairness is sufficient."¹⁸²⁰ The nature of the harm of unlimited third-party spending weighed in favour of deference to Parliament.

The same reasoning should apply to lobbying limitations. There is a lack of absolutely determinative Canadian studies on the effects of lobbying. Yet, the Court would likely recognize the legislature's legitimate concern about unrestrained lobbying's probability of increasing corruption and the appearance of corruption, of granting disproportionate influence to the wealthy and business interests, of reducing the fairness of democratic representation, of introducing bias into government decision-making, and of increasing inequality.¹⁸²¹ The Court has held that it will accept American studies on a topic, albeit in a more limited way.¹⁸²² The American evidence of the negative effects of lobbying is quite strong, indicating it is a significant challenge to fair political representation.

The Court has repeatedly stated that in complex cases involving the claims of conflicting groups and conflicting scientific evidence, the Court should be respectful of Parliament's decisions and its representative function.¹⁸²³ The regulation of lobbying is a complex field with conflicting groups and unclear scientific evidence. It is also deeply associated with Parliament's power to protect and oversee

¹⁸¹⁸ *Ibid* at para 10.

¹⁸¹⁹ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 77. "To require the Attorney General to produce definitive social science evidence establishing the causes of every area of social concern would be to place an unreasonably high onus on the Attorney General. In this case, the Attorney General adduced sufficient informed evidence of the importance of electoral regulation in our free and democratic society." *Ibid*, para 92.

¹⁸²⁰ *Ibid* at para 87.

¹⁸²¹ In *Harper*, the Court pointed out that "[s]urely, political parties, candidates, interest groups and corporations for that matter would not spend a significant amount of money on advertising if it was ineffective." The same reasoning also applies to lobbying. *Ibid* at para 106. As discussed in Chapter 2, a lobbied for change in the U.S. tax laws saved sixty corporations approximately \$100 billion, indicating the effectiveness of lobbying. Vincent R. Johnson, "Regulating Lobbyists", *supra* note 616 s 37.

¹⁸²² *Harper v. Canada (Attorney General)*, *supra* note 53 at para 99.

¹⁸²³ *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra* note 1749 at 993 g.

itself. According to the nature of the harm, the Court should be deferential to Parliament's regulation of lobbying, and to the social science evidence used to justify it.

(ii) The Vulnerability of the Group to that Harm

The vulnerability of the group to the harm component of the test leans in favour of deference to Parliament's lobbying legislation, depending on the exact regulations.

The Court held that the campaign finance legislation was intended to protect two groups. The first group is the voters. The spending limits make it "possible to hear from all groups and thus promote a more informed vote"¹⁸²⁴. The second group is the politicians and political parties. The limits ensure they have an equal opportunity to present their positions to the electorate.¹⁸²⁵ With lobbying legislation, the reasoning would be the same, but flipped. First, lobbying limitations would protect the citizens and their organizations, by ensuring that they have an equal opportunity to present their positions to their representatives. It would also help ensure that government decisions were made with the interests of citizens in mind. Second, lobbying limitations would protect the officials, by making it possible to hear from all groups and thus promote a more informed decision-making process. These factors lean lightly in favour of deference to Parliament.

In *Harper*, the Court stated it should be particularly deferential when the legislature is trying to protect vulnerable groups.¹⁸²⁶ The Court ruled that neither voters nor politicians were considered vulnerable, and the same would be true in lobbying. However, lobbying legislation designed to help disadvantaged groups, such as funding to establish lobbying organizations for vulnerable groups, should receive additional deference from the Court.

(iii) The Apprehension of Harm

When the apprehension of harm relates to a danger to democratic fairness, it is a factor that leans in favour of deference to Parliament. In *Harper*, the Court held that "the danger that political advertising may manipulate or oppress the voter means that some deference to the means chosen by Parliament is warranted."¹⁸²⁷ The public perception of fairness is integral to the electoral system.¹⁸²⁸ It is related to the "very values the Canadian *Charter* seeks to protect, in particular the political equality of citizens that is at the heart of a free and democratic society."¹⁸²⁹ This justified additional deference to legislation that seeks to maintain electoral fairness and the appearance there-of. The legislature is also owed deference when there are multiple *Charter* values at play, as is the case when balancing between the values of freedom of expression and electoral fairness.¹⁸³⁰

¹⁸²⁴ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 80.

¹⁸²⁵ *Ibid* at para 81.

¹⁸²⁶ *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra* note 1749 at 993 g.

¹⁸²⁷ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 85.

¹⁸²⁸ *Ibid* at para 82.

¹⁸²⁹ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 61.

¹⁸³⁰ *Ibid*.

This reasoning is equally applicable to lobbying regulations, where the legislature must make an equivalent trade-off between fairness of representation and freedom of expression. Lobbying legislation must be carefully and comprehensively crafted to effectively control the hydraulic pressure of political influence. These factors weigh in favour of deference to the legislature when it enacts lobbying legislation.

(iv) The Nature of the Infringed Activity

The Nature of the Infringed Activity is the fourth factor to consider in the deference test. The Court held that since third-party electoral advertising lies at the core of the expression guaranteed by the *Charter*, by default it warrants a high degree of constitutional protection. Yet, the Court maintained that political equality of citizens is at the heart of a free society. The spending limits improve the political discourse by allowing voters to hear more points of view and experience more meaningful participation. This increase in meaningful electoral participation enhances a second *Charter* right, the right to vote.¹⁸³¹ Since Parliament needs to balance the rights of the various participants in the electoral process, the Court approached the justification analysis with deference.¹⁸³²

The same reasoning should apply to limitations on lobbying. Lobbying is deserving of a reasonably high degree of constitutional protection. Nonetheless, Parliament is owed due deference when it balances the free speech of business interests with the meaningful participation and representation of citizens and citizen organizations.

The *Harper* Court held that in campaign finance, evidence of the malice of third-party spending is not necessary; the reasonable danger that voters might be manipulated or oppressed is enough to warrant deference to the regulations enacted by Parliament.¹⁸³³ The same should hold for robust lobbying regulations. However, as previously discussed, good social science evidence would bolster this case.

After evaluating all four aspects of the deference test, the Court determined that it supported showing deference to the legislature's approach to the regulation of campaign finance law. By the mirror principle, the same reasoning should apply to lobbying. Three of the four factors of the deference test provide good reason for the Court to defer to Parliament. If the lobbying legislation includes provisions to help vulnerable groups lobby the government, all four factors would strongly support showing deference to the legislature.

S. 1 – Skeleton Evaluation Based on *Harper*

Based on the s. 1 justification in *Harper*, we will now perform a skeleton s. 1 evaluation of robust lobbying legislation. This will demonstrate that robust lobbying regulations would likely pass *Charter* muster. For the purpose of this evaluation we shall assume the same specific reforms discussed in the

¹⁸³¹ *Harper v. Canada (Attorney General)*, *supra* note 53 at 86.

¹⁸³² *Ibid* at para 87.

¹⁸³³ *Ibid* at para 85.

introduction of the chapter, and in Chapter 10: a ban on astroturf lobbying; limits on business lobbying; and public support for citizen lobbying.

By the s. 1 *Oakes* test, the government must

- I. establish that the law under review has a goal that is both pressing and substantial; and
- II. the measures adopted are reasonable and demonstrably justified in a free and democratic society, by being
 - i) rationally connected to the objective,
 - ii) impairing the right as little as possible, and
 - iii) having proportionality between the salutary and deleterious effects of the measure.

Pressing and Substantial – The Three Objectives

In *Harper* the Court set out three objectives of the campaign financing legislation. These objectives had to be pressing and substantial to pass this stage of the s. 1 analysis. They were

first, to promote equality in the political discourse; second, to protect the integrity of the financing regime applicable to candidates and parties; and third, to ensure that voters have confidence in the electoral process.¹⁸³⁴

The first and third objectives are essentially the same as those articulated in *Libman*, but the second objective is different. In *Libman* the objective is to ensure voters have an informed choice by ensuring that some positions are not drowned out by the megaphones of others.¹⁸³⁵ In *Harper*, the concern is similar, but the focus is on the integrity of the campaign financial regime established by the legislation.

These same objectives, with slight variation, would apply to robust lobbying regulations closely enough that we can use the same framework to evaluate whether they are pressing and substantial. The matching objectives would be: first, to promote equality in lobbying officials; second, to protect the integrity of the lobbying regime; and third, to ensure that citizens have confidence in the representational process. In *Harper*, the Court argued that all three objectives were indeed pressing and substantial, and the third-party spending limitations were rationally connected to the objectives.

Objective 1 – Political Equality

The Court has established that political equality is a fundamental principle of Canadian democracy and the *Charter*.

In *R. v. Bryan*, the Court extended the egalitarian model so far as to guarantee “informational equality” to voters... It would be unfair and harmful to democratic participation, the Court reasoned, to furnish voters in British Columbia with

¹⁸³⁴ *Ibid* at para 91.

¹⁸³⁵ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 41.

information about election results that might shape their behaviour, on whether to vote and for whom, that had not been available to those in the East.¹⁸³⁶

In *Harper* the Court held that establishing the spending limits in order to protect political equality is a pressing and substantial concern, and that spending limits are rationally connected to political equality.¹⁸³⁷

This would equally apply to lobbying regulations. It is difficult to envision a system that could equalize lobbying without some sort of spending limit on the wealthiest industries. No government support could ever fund citizen groups to the level where they can afford to lobby as much as trillion-dollar industries.¹⁸³⁸ Officials have limited time and attention, and the well-financed organizations can drown out their competitors and influence the scope and framing of the political agenda. One of the most effective ways to ensure most views are heard is to provide some limit on how much the wealthy few can lobby. Lobbying limits are rationally connected to political equality.

Objective 2 – Integrity of the Legislation

The Court argued that the integrity of the financial restrictions on candidates and parties would collapse if third parties could run parallel electoral campaigns. Third-party spending would augment the spending of some candidates or parties, providing an unfair advantage. “Thus, limiting third-party advertising expenses is rationally connected with preserving the integrity of the financing regime set for candidates and parties.”¹⁸³⁹ By the same reasoning, rules limiting lobbying expenditures are rationally connected to fairness in democracy, and would be justified as pressing and substantial. Additionally, such rules would justify preventing astroturf lobbying and other lobbying disguised through the use of third-parties.

Objective 3 – Public Confidence

The Court held that the public’s faith in democracy is a pressing and substantial concern.¹⁸⁴⁰

In *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136, Dickson C.J. concluded that faith in social and political institutions, which enhance the participation of individuals and groups in society, is of central importance in a free and democratic society. If Canadians lack confidence in the electoral system, they will be discouraged from participating in a meaningful way in the electoral process. More importantly, they will lack faith in their elected representatives.¹⁸⁴¹

¹⁸³⁶ Michael Pal, “The Fractured Right to Vote: Democracy, Discretion, and Designing Electoral Districts” (2015) 61:2 McGill Law J 233 at 245.

¹⁸³⁷ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 102.

¹⁸³⁸ It is worth noting that the situation can be complicated, as lobbying groups often form coalitions on high profile issues, see Frank R. Baumgartner et al, *supra* note 59 at 222.

¹⁸³⁹ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 107.

¹⁸⁴⁰ *Ibid* at para 102.

¹⁸⁴¹ *Ibid*.

The Court opined that third-party expenditure limitations maintain public confidence in the electoral process by i) preventing the bypass of spending limits through special interest groups, ii) preventing domination by the wealthy, and iii) preventing overall electoral expenses from escalating uncontrollably.¹⁸⁴² Similarly, unlimited spending on lobbying damages the public's faith in democracy and the faithful representation of officials. Robust lobbying regulations i) prevent the bypass of electoral results by special interest groups, ii) prevent the domination of the lobbying process by the wealthy, and iii) help prevent the (further) uncontrolled escalation of lobbying expenditures. Because business interests have little incentive to deescalate lobbying unilaterally, robust lobbying regulations are the only reasonable way to move towards a mutual disarmament. The Court ruled that third-party limits cause Canadians to see the electoral process as fairer. It held that this is a pressing and substantial goal rationally connected to maintaining confidence in democracy.¹⁸⁴³ The same result is likely to follow judicial consideration of robust lobbying regulations.¹⁸⁴⁴

Means Chosen of the Law Must Be Proportionate to That Goal in a Free and Democratic Society

The means chosen by the law must be proportionate and fit within the context of a free and democratic society. The means must be rationally connected to the objective; minimally impairing; and there must be proportionality between the legislation's salutary and deleterious effects.

Rationally Connected to the Objective

The Court held that the campaign finance limitations were rationally connected to the goals of the legislation.¹⁸⁴⁵ This test touched on the same goals of the legislation discussed above: political equality, preserving the integrity of the law, and preserving public confidence.

Political Equality

The Court held that the legislation was rationally connected to promoting equality in political discourse.

Where advertising influences the electorate, and those who have access to significant financial resources are able to purchase an unlimited amount of advertising, it follows that they will be able to dominate the electoral discourse to the detriment of others, both speakers and listeners. An upper limit on the amount

¹⁸⁴² *Ibid* at para 109.

¹⁸⁴³ *Ibid*.

¹⁸⁴⁴ The Canadian Bar Association in its opinion on (the then) Rule 8 of the *Code of Conduct*, agreed that regulating the activities of lobbyists is a pressing and substantial concern, albeit while discussing the more narrow case of conflicts of interest. "Similarly, seeking to ensure that lobbyists do not compromise the integrity of public office holders through a conflict of interest is an important public good and a pressing and substantial objective." National Constitutional and Human Rights Law Section, *supra* note 135 at 10.

¹⁸⁴⁵ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 104.

that third parties can dedicate to political advertising curtails their ability to dominate the electoral debate.¹⁸⁴⁶

It is reasonable to hypothesize that the court would similarly rule that robust lobbying restrictions would do the same in the field of lobbying, preventing the wealthy business interests from drowning out citizen voices.

Integrity of the Legislation

The Court held that the campaign finance limits were rationally connected to “preserving the integrity of the financing regime set for candidates and parties.”¹⁸⁴⁷ It embraced the Lortie Commission’s conclusion that “the electoral financing regime would be destroyed if third-party advertising was not limited”¹⁸⁴⁸. We have seen this exact problem in U.S. electoral finance regulation. Spending and donation limits in some areas appear moot when compared to the enormous third-party and dark money expenditures. In contrast, the Canadian electoral system has remained relatively healthy.

Lobbying spending limits are rationally connected to the integrity of a robust lobbying regulatory regime. It will be difficult to rebalance lobbying power without limiting corporate spending on lobbying. Special interests must be prevented from bypassing these limits through the use of astroturf organizations. If we fail to rebalance lobbying power, we will likely see a further spiral into inequality and plutocracy.

Public Confidence

The Court maintained that the spending limits foster public confidence in the electoral process in three ways. (1) They “address the perception that candidates and political parties can circumvent their spending limits through the creation of special interest groups.”¹⁸⁴⁹ (2) They “prevent the possibility that the wealthy can dominate the electoral discourse and dictate the outcome of elections.”¹⁸⁵⁰ (3) They “advance the perception that access to the electoral discourse does not require wealth to be competitive with other electoral participants.”¹⁸⁵¹

The first way does not clearly apply to lobbying regulations. Nevertheless, it is reasonable to hypothesize that rules that prevent astroturf lobbying would reassure the public and officials that they were not being deceived about the interests at play. Lobbying limits would promote public confidence in ways that parallel to the latter two points. The limits would (2) address the perception that special interests can dominate the lobbying process and dictate policy outcomes. They would show (3) that lobbying access to officials does not require wealth. The restrictions would help demonstrate that it was rational argument that convinces officials to favour specific policy outcomes.

¹⁸⁴⁶ *Ibid* at para 107.

¹⁸⁴⁷ *Ibid* at para 108.

¹⁸⁴⁸ *Ibid*.

¹⁸⁴⁹ *Ibid* at para 109.

¹⁸⁵⁰ *Ibid*.

¹⁸⁵¹ *Ibid*.

The Court stated that, “Canadians, in turn, perceive the electoral process as substantively fair as it provides for a reasonable degree of equality between citizens who wish to participate in that process.”¹⁸⁵² It would be wise to make the lobbying process equally fair. Robust lobbying legislation would be rationally connected to the goals of strengthening political fairness, the integrity of the lobbying regime, and public confidence in democratic representation.¹⁸⁵³

Minimally Impairing

Having found that the electoral spending limits were rationally connected to the objectives of the law, the Court also found that the law was minimally impairing.

The Court held that there should be deference to the balance struck by Parliament between the right to freedom of expression and the right to a fair electoral process.¹⁸⁵⁴ Parliament has latitude in designing the law; it does not have to be as minimally impairing as possible.¹⁸⁵⁵ There is room for a range of solutions. As discussed above in the deference section, there were a number of factors that support deference to Parliament. The Court held that the deference to Parliament weighed in favour of finding the law minimally impairing. The same factors and reasoning should apply to robust lobbying regulations, which require balancing the right to freedom of expression with the right to fair political representation.

Countervailing Factors Against Minimal Impairment

There are two factors which would weigh against robust lobbying regulations passing a minimal impairment test. These are (1) the perpetuity of lobbying regulations, and (2) the fact that there is no official equivalent of political parties.

As discussed previously, electoral spending restrictions only apply for a month (and the pre-election period) every four years. Outside that period, the political speech of third parties is not limited. The Court held the spending limits were less impairing because third parties can publicize their views outside of the electoral period.¹⁸⁵⁶ In contrast, strong lobbying regulations are more impairing because they must be perpetually in force to be effective. This concern could be somewhat mitigated by carefully tailored regulations that allowed citizens to pursue some amount of lobbying.

¹⁸⁵² *Ibid.*

¹⁸⁵³ The Canadian Bar Association in its opinion on (the then) Rule 8 of the *Code of Conduct*, agreed that regulating the activities of lobbyists is rationally connected to the goals of the rule, albeit while discussing the more narrow case of preventing conflicts of interest. National Constitutional and Human Rights Law Section, *supra* note 135 at 10. It later argued that Rule 8 was not minimally impairing. This is not relevant to our discussion of minimal impairment, because the reasons were specific to the Commissioner’s interpretive guidance on the rule. See Chapter 8 – Canadian *Charter* Section 3: S. 3 Principles: S. 3 Principles: Right to Meaningful Participation: Problem with the Code of Conduct Prohibiting Conflicts of Interest, p. 454 for more detail. *Ibid* at 11.

¹⁸⁵⁴ *Harper v. Canada (Attorney General)*, *supra* note 53 at 111.

¹⁸⁵⁵ *Ibid* at para 110.

¹⁸⁵⁶ *Ibid* at para 112.

Alternatively, the Court could accept the principle of proportional regulatory duration.¹⁸⁵⁷ According to this principle, the perpetuity of lobbying regulations would pose no issues for the minimal impairment test. This is because lobbying continuously impacts political decision-making, so its matching regulatory restrictions need to be continuously in force. Since the regulatory duration matches the decision-making period, the perpetuity of lobbying regulations would not weigh against a finding of minimal impairment.

The Court held it was relevant for third-party campaign spending limits that individuals can join existing political parties to express themselves, as an alternative to spending on political messaging.¹⁸⁵⁸ This raises some difficulty when applied to lobbying. In some situations lobbying might be the only pathway to express oneself effectively to government. For example, the policy issue in question could be new, extremely complex, or fall outside of the purview of the existing government departments. In these cases, there is no equivalent to a political party that one can join to express one's policy preference to government. This concern is partially alleviated by the recognition that a more limited lobbying process would actually be fairer for most citizens and citizen organizations. Currently, wealthy business interests can frame the issues and outspend citizen groups to drown out alternative viewpoints.¹⁸⁵⁹ The lack of alternatives to lobbying could be further alleviated by creating additional routes for citizens and outsider groups to express their concerns to officials. For example, the government could run additional public forums and citizen assemblies. These alternatives could be specifically structured to include topics that are new or fall outside the standard categories of bureaucratic regimentation.

These two concerns about minimal impairment are somewhat offset by two of the Court's findings regarding campaign finance law. First, the Court noted that the electoral expenditure registration requirements would naturally exempt "individual political self-expression by persons who are not sponsors".¹⁸⁶⁰ This weighed in favour of a holding of minimal impairment. The law contained a threshold that most citizens would naturally fall beneath. It did not interfere with their political expression. Similarly, lobbying legislation exempts individual contact with representatives. Registration is only necessary when the contact reaches the high threshold of 20% of work hours or if one is hired as a consultant lobbyist. Average citizens will naturally fall below this threshold and face no interference in their freedom of expression.

Secondly, the Court held that reasonably low spending limits minimally impaired the third-parties' freedom of expression.¹⁸⁶¹ In *Harper*, the Court held that it was relevant that the spending limits

¹⁸⁵⁷ See Principles from *Harper* and *Libman*: Challenges from Campaign Finance Principles: The Principle of Proportional Regulatory Duration, p. 427.

¹⁸⁵⁸ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 113.

¹⁸⁵⁹ See Chapter 2 and Chapter 6 for in-depth discussion and supporting evidence of the disproportionate dominance of business lobbying.

¹⁸⁶⁰ *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, *supra* note 1707 at para 53.

¹⁸⁶¹ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 75. In

left room for meaningful voter participation.¹⁸⁶² It was also relevant that the third-party limits exceeded what the vast majority of Canadians could afford to spend.¹⁸⁶³ By the mirror principle, it should be considered minimally impairing if regulations limit lobbying spending to the lower levels that citizen groups can afford to match.¹⁸⁶⁴ This would put business interests and citizen groups on a more equal footing. It would fit with the Court's holding on minimal impairment, that the "proper focus is on protecting the right to meaningful participation of the entire electorate."¹⁸⁶⁵

The Court held that the third-party campaign spending limits were minimally impairing and that the "limits promote a free and democratic society."¹⁸⁶⁶ It is reasonable to conclude that robust lobbying regulations would also be minimally impairing, and would likewise promote a free and democratic society.

Proportionality between the Salutory and Deleterious Effects

The proportionality test is complicated, and the outcome would be contingent on the exact text of the lobbying laws in question, the public's view of lobbying and the lobbying regime, and the Court's acceptance of the mirror principle. Still, some guidance can be found in the *Harper* ruling. That guidance is favourable to stricter regulations.

In *Harper*, the Court returned to the three objectives of the campaign finance law, and determined that they are proportional to the freedom of expression infringement. The infringement is proportional to the objective of "ensuring that affluent groups or individuals do not dominate the political discourse"¹⁸⁶⁷. It is valid to promote the political expression of the less affluent at the cost of some freedom of expression. Secondly, the infringement is also proportional to the objective of ensuring "that candidates and political parties who are subject to spending limits are not overwhelmed by third-party advertising."¹⁸⁶⁸ The law protects the integrity of the spending limits by ensuring they are not circumvented "through the creation of phony third parties."¹⁸⁶⁹ Thirdly, the infringement is proportional to the objective to "promotes fairness and accessibility in the electoral system and consequently increases Canadians' confidence in it."¹⁸⁷⁰

All three objectives match with the salutary objectives of stronger lobbying regulations. Firstly, stronger lobbying regulations would be a reasonable way to pursue the objective that the affluent do

¹⁸⁶² *Harper v. Canada (Attorney General)*, *supra* note 53 at paras 113 & 115.

¹⁸⁶³ *Ibid.*

¹⁸⁶⁴ The calculation for an appropriate range for the limit for lobbying spending is an empirical question that requires more study to determine, taking into account the various sizes of citizen organizations, and the breadth of their lobbying on different issues. It might be appropriate to set lower limits for individual department or areas, and a higher overall limit for total lobbying.

¹⁸⁶⁵ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 113.

¹⁸⁶⁶ *Ibid* at para 118.

¹⁸⁶⁷ *Ibid* at para 120.

¹⁸⁶⁸ *Ibid.*

¹⁸⁶⁹ *Ibid.*

¹⁸⁷⁰ *Ibid.*

not dominate the political discourse. Secondly, they would help prevent the voices of citizen organizations from being drowned out by the spending of business and wealthy on lobbying.¹⁸⁷¹ Thirdly, they would promote fairness and accessibility in lobbying, and help align political representatives with the preferences of their voters. This should increase Canadians' confidence in representational democracy. The Court held that the salutary effects of all three objectives outweighed the deleterious effect of the infringement on freedom of speech in campaign finance law. By the mirror principle, the benefits of the equivalent three objectives of robust lobbying law should also be justified as outweighing their deleterious impact for the purpose of s. 1.

Conclusion – Chapter 7

The Canadian cases on lobbying law have not yet addressed the extent to which the *Charter* guarantee of free expression acts as a brake on legislative efforts to enact strong lobbying regulatory provisions. The cases on campaign finance law, however, strongly indicate that the current legislation meets *Charter* standards, and that the Canadian Supreme Court takes corruption and the appearance of corruption seriously.

The American Supreme Court ruling in *Harriss* was an early attempt to provide Congress the leeway to regulate lobbying. However, its ruling created exemptions in the coverage of the lobbying regulations that left them incoherent and ineffective.¹⁸⁷² *Harriss* is more than fifty years old. If a new case came before the Court, new evidence and legal interpretations could lead to a different outcome. Yet, no lobbying oversight scheme is likely to succeed in the era of *Citizens United*, where the American Court appears intent on upholding the free speech rights of corporations and disregarding issues of political equality, corruption, and the appearance of corruption.

More robust lobbying regulations intended to rebalance lobbying in favour of citizen groups seeking public goods by limiting the lobbying of the wealthy, funding citizen lobbying, and preventing astroturf lobbying would likely infringe the freedom of expression rights in the Canadian *Charter*. This proposed legislation, discussed in detail in Chapter 10, would then need to pass the s. 1 *Oakes* test. Applying the mirror principle of fundamental symmetry between lobbying and campaign finance legislation, we extracted the Canadian Court's principles from *Harper* and *Libman*. We then applied ten principles taken from these cases to the framework of more robust lobbying restrictions and regulation, investigated the standard of deference, and did a skeleton s. 1 test modelled on the one in *Harper*. Although there are a few concerns regarding the perpetuity of lobbying restrictions, overall this evaluation showed that it is likely that robust lobbying legislation would pass s. 1 evaluation.

Robust lobbying regulations should be justifiable under s. 1 for all the same reasons that campaign finance regulations are.¹⁸⁷³ Robust lobbying regulations fulfill the same objectives: enhancing electoral results by enhancing democratic representation; preventing the domination of the lobbying

¹⁸⁷¹ Provided they were not astroturf lobbying organizations.

¹⁸⁷² Richard L. Hasen, *supra* note 1405 at 194.

¹⁸⁷³ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 121.

process by the wealthy; and preventing the escalating spiral of lobbying expenditures (and the resulting power and inequality spiral). Strong lobbying regulation would also enhance democracy, increase equality, decrease dependency corruption, decrease the appearance of corruption, and enhance the people's trust in self-governance. In the next chapter we will consider whether stronger lobbying legislation would be inhibited by the Court's consideration of a *Charter* challenge based on s. 3 democratic rights.

Chapter 8 – Canadian Charter Section 3

“Democracy is finding proximate solutions to insoluble problems.”

– Reinhold Niebuhr, *theologian*

Introduction – Chapter 8.....	442
S. 3.....	443
Interpretation of the Right to Vote.....	444
Deep Democratic Principles.....	445
Constitutional Principles	446
Constitutional Principles: Federalism	448
Constitutional Principles: Substantive Democracy	449
Constitutional Principles: Rule of Law and Legitimacy	451
Constitutional Principles: Respect for Minorities	452
S. 3 Principles	452
S. 3 Principles: Respect Cultural and Group Identities.....	452
S. 3 Principles: Right to Meaningful Participation.....	453
S. 3 Principles: Equality and Fairness	456
S. 3 Principles: Anti-Corruption and Appearance of Anti-Corruption.....	460
S. 3 Principles: Governmental Transparency	462
S. 3 Principles: Conclusion.....	464
<i>Haig</i> Precedent on Referendum	465
Economic Welfare as a Justification for Lobbying Law	466
Structural Democratic Rights Paradigm.....	467
Contrasting Individual Rights Paradigm	468
Structural Rights – Pal	470
Four Components of Competition Approach – Pal	470
Three Entrenchment Breakdowns – Pal	475
Structural Approach in <i>Harper, Figueroa</i> and <i>Sauvé</i> – Pal.....	478
Competition versus Private Power	479
Structural Paradigm and Independent Officers of Parliament	479
Structural Bundles of Rights Approach – Dawood.....	480
Bundle of Rights – Dawood.....	481
Pal’s and Dawood’s Approaches	483
Conclusion – Chapter 8	486

Introduction – Chapter 8

In the previous chapter we covered how stronger regulations would likely infringe the s. 2(b) right to free expression, but would probably be upheld based on the existing s. 1 jurisprudence on campaign finance law. In this chapter we will investigate the relationship between more robust lobbying laws and s. 3 of the *Charter* – the democratic rights.

Since lobbying is a form of communication, it is likely that most challenges to lobbying regulations by a lobbyist that included a s. 3 challenge would also include a s. 2(b) challenge. In *Thomson Newspapers Co v. Canada (Attorney General)*¹⁸⁷⁴, Bastarache J, speaking for the majority, stated that where the rights to vote and free expression overlap “[e]ach right is distinct and must be given effect.”¹⁸⁷⁵ Even if lobbying regulations do not infringe the s. 3 right of representation, they might still infringe the s. 2(b) right to free expression.¹⁸⁷⁶ For example, In *Thomson Newspaper*, Bastarache J, preferred to address the ban against publishing opinion surveys as a s. 2 issue rather than a s. 3 issue, due to lack of evidence on how the poll ban affected voter information. Gonthier J, speaking for the minority, held that the blackout period on polls was not an infringement of s. 3.

Based on the jurisprudence of campaign finance cases, it is likely that the Court would focus more on the lobbyists’ s. 2 rights than their s. 3 rights. If so, then a skeleton evaluation of s. 3 will not be as useful as it was for s. 2. Moreover, there is no obvious court case on which to build a s. 3 test for lobbying law. Lobbying law shares many common traits and principles with key democratic cases that the Court has addressed, but does not track onto any specific one. These democratic cases have included the right to vote in referendums¹⁸⁷⁷, prisoners’ right to vote¹⁸⁷⁸, small political parties’ right to be officially recognized¹⁸⁷⁹, population equality between electoral ridings¹⁸⁸⁰, and a province’s right to secede¹⁸⁸¹. Instead, we will take a different approach in this chapter, and focus on the principles embodied in this jurisprudence.

We will investigate how lobbying connects to the deep democratic principles of the Canadian Constitution. Many of these principles come out of s. 3 jurisprudence, but a few come out of wider constitutional jurisprudence. As we investigate each principle, we will look at how it relates to lobbying law. We will buttress the investigation of the s. 3 principles by considering Pal and Dawood’s structural approaches to democracy. Overall, these principles indicate that robust lobbying laws would not infringe s. 3.

¹⁸⁷⁴ *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 1784.

¹⁸⁷⁵ *Ibid* at para 80.

¹⁸⁷⁶ Note that this view conflicts somewhat with the opinions of Rawls, Dworkin and Pal’s structural approach to democracy, discussed previously.

¹⁸⁷⁷ *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995.

¹⁸⁷⁸ *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519.

¹⁸⁷⁹ *Figueroa v. Canada (Attorney General)*, *supra* note 1776.

¹⁸⁸⁰ *Reference re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158.

¹⁸⁸¹ *Reference re Secession of Quebec*, *supra* note 1079.

In considering the s. 3 implications, the constitutional issues engaged by the lobbying regime will depend heavily on the exact regulations at issue. There is a huge variation of potential lobbying regulations, but as in the previous chapter, we will proceed with an assumption of the stronger specific reforms proposed in Chapter 10. These are rules that limit lobbying expenditures for businesses, akin to campaign donation limits¹⁸⁸²; rules that bar astroturf lobbying; and rules that include some public funding for citizen lobbying organizations.

We will investigate s. 3; the democratic principles contained in Canadian jurisprudence; *Haig v. Canada (Chief Electoral Officer)*'s¹⁸⁸³ precedential significance on referendums; economic welfare as a justification for lobbying law; and Pal's and Dawood's structural approach paradigms.

S. 3

S. 3 grants every citizen the right to vote in elections for House of Commons or other legislative assemblies, and the right to be elected to these positions.

Every citizen of Canada has the right to vote in an election of the members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

If the Court finds that there is a s. 3 violation of the right to vote, this violation can still be upheld under s. 1.

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The *Oakes*¹⁸⁸⁴ test is used for s. 1 analysis of s. 3.¹⁸⁸⁵ The government must establish that the goal is pressing and substantial; and that the measures adopted are justified in a free and democratic society by being rationally connected to the objective, by minimally impairing the right, and by having proportionality between the effects of the measure and the objective (including a balancing of its salutary and deleterious effects).¹⁸⁸⁶ Unlike the s. 2 rights, the s. 3 rights are not subject to the notwithstanding clause in the *Charter*, and cannot be overridden by a legislative vote.

¹⁸⁸² These limits could take the alternative form of a tax/fee on business lobbying that increased progressively according to the amount spent on lobbying. Senator Warren suggested such a tax as part of her 2019 Presidential campaign platform. This chapter proceeds using the case of absolute spending limits, because such limits are more likely to be effective, since they limit the activity of lobbying, instead of simply raising its cost. Elizabeth Warren, "My Plan to End Washington Corruption", (16 September 2019), online: *Medium* <<https://medium.com/@teamwarren/my-plan-to-end-washington-corruption-554c7f01aaa5>>.

¹⁸⁸³ *Haig v. Canada (Chief Electoral Officer)*, *supra* note 1877.

¹⁸⁸⁴ *R. v. Oakes*, *supra* note 1525.

¹⁸⁸⁵ *Frank v. Canada (Attorney General)*, *supra* note 1707 at paras 59, 66, 76.

¹⁸⁸⁶ *R. v. Oakes*, *supra* note 1525 at para 69; The third component of the second part of the test was altered by the Court in *Dagenais v. Canadian Broadcasting Corp.*, *supra* note 1526 at 839; Applied in *Harper v. Canada (Attorney*

Interpretation of the Right to Vote

The Court has interpreted the right to vote in a broader sense than its literal wording. In *Figueroa v. Canada (Attorney General)*¹⁸⁸⁷, Iacobucci J, for the majority, stated “[t]his Court has subsequently confirmed, on numerous occasions, that the purpose of s. 3 is effective representation”¹⁸⁸⁸. Effective representation is a deep right that includes a number of sub-rights and principles. The Court has stated that each citizen is entitled to be represented and to play a meaningful role in electoral politics, which includes having a voice in political deliberations and a right to bring concerns to the attention of their representatives.¹⁸⁸⁹ The right to vote is fundamentally different from the right to free expression.¹⁸⁹⁰ The cases state that voting is an inherent right for all citizens. No citizen can be banned from voting, regardless of their criminal status, race, religion, mental abilities, career, or absence from the country.¹⁸⁹¹ In *Haig*, the Court held that the right to vote does not include the right to vote in referendums, as referendums are merely advisory. We will return to the potential implications of *Haig* for lobbying regulation later.

The Court’s interpretation of the right to vote as effective representation has three important consequences. The first is that the Court favours a substantive over a procedural approach to voting rights, holding it is a better expression of the essence of the *Charter*.¹⁸⁹² “It is well recognized in the jurisprudence that where electoral legislation is found to be ambiguous, it should be interpreted in a way that is enfranchising”¹⁸⁹³. For example, when recounting ballots, only substantive problems should disqualify a vote; procedural mistakes do not justify disenfranchisement of a voter through the disqualification of her ballot.

The substantive approach is recommended by the fact that it focuses on the underlying right to vote, not merely on the procedures used to facilitate and protect that right. In our view, an approach that places a premium on substance is the approach to follow...¹⁸⁹⁴

The spirit of this principle should animate both the drafting and interpretations of lobbying law. The principle favours stronger lobbying regulations that pursue the substantial goal to increase the effective representation of citizens.

General), *supra* note 53 at para 91 to 119; the test continues to be used by the Court. *R. v. Morrison*, *supra* note 1526 at para 63.

¹⁸⁸⁷ *Figueroa v. Canada (Attorney General)*, *supra* note 1776.

¹⁸⁸⁸ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 1880 at para 21.

¹⁸⁸⁹ *Ibid* at para 22.

¹⁸⁹⁰ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 67.

¹⁸⁹¹ *Frank v. Canada (Attorney General)*, *supra* note 1707 at para 62.

¹⁸⁹² *Opitz v Wrzesnewskyj*, [2012] 3 SCR 76 at para 56.

¹⁸⁹³ *Ibid* at para 37.

¹⁸⁹⁴ *Ibid* at para 57.

The second consequence is that the right to vote is deeply tied to political representation. According to the Court, political representatives fulfill two fundamental roles: the legislative role, to enact new laws, and the ombudsman role, to represent the constituents.¹⁸⁹⁵ The connection to political representation reinforces the substantive value of the right to vote. It is not just about the procedure of voting, it is a right to have the vote play a meaningful role in governance.

The tie to effective political representation becomes a tie to lobbying, as lobbying fundamentally supports or breaks with the preferences of the electorate during the period between elections. Lobbying can be a means to bring genuine citizen concerns to representatives so they can act in their legislative and ombudsman roles to address the issues. Lobbying can also be a means to convince officials to follow unpopular policies, breaking the alignment between voters and representatives.¹⁸⁹⁶ The practices, norms and regulatory structure within which lobbying operates are essential to determining whether it augments or undermines effective representation.

The third consequence is that whether a lobbying law infringes the right to vote is essentially a question of whether a lobbying law's substantive impact helps or hurts effective representation. If a lobbying law hurts effective representation, then it infringes s. 3, since the right to vote embodies deep democratic principles. We will now consider how these principles fundamentally impact lobbying.

Deep Democratic Principles

The Court has listed a number of deep democratic principles. In *Reference re Secession of Quebec*¹⁸⁹⁷ [the *Secession Reference*], the Court stated that,

[t]hese supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government.¹⁸⁹⁸

¹⁸⁹⁵ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 1880 at 183 f.

¹⁸⁹⁶ Not every policy has to be popular at large, although one would expect the policies to be at least popular with the politician's base. It is a sign of trouble if policies are consistently unpopular, representing a substantial sustained misalignment of representation. As discussed in Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern II: Misalignment with Popular Opinions: The Concept of Alignment, p. 153, alignment measures how closely a representative's preferences align with the public's preferences. There are three types of alignment: partisan, policy preference, and actual policy outcome. Nicholas Stephanopoulos, Eric McGhee & Steven Rogers, *supra* note 695 at 771.

¹⁸⁹⁷ *Reference re Secession of Quebec*, *supra* note 1079.

¹⁸⁹⁸ *Ibid* at para 32.

In the *Secession Reference* the Court listed some fundamental principles of the Canadian Constitution. It stated that democracy is an ongoing experiment in self-governance.¹⁸⁹⁹ It is an arc that bends towards greater democracy and enfranchisement.¹⁹⁰⁰ Lobbying regulations should be evaluated for constitutional viability on this basis.

These unwritten principles are presented as bundles of values, existing as overlapping collections that lie within the s. 3 right to vote, or within the broader conception of democracy that the *Charter* supports. The Court has recognized that these principles are complex and overlapping, and has not attempted to lay out an exhaustive list of all the principles.

These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does anyone principle trump or exclude the operation of any other.¹⁹⁰¹

Several cases have elucidated on these principles, creating different sets of values, or highlighting different aspects of these values.

Matched with these deep democratic principles is the Court's view of the Constitution as a living tree that evolves over time.¹⁹⁰² From these cases, particularly the *Secession Reference*, it is clear that this doctrine supports the expansion of democracy towards a freer more politically equal society with an ever greater recognition of universal suffrage and human dignity.¹⁹⁰³ The expansion of lobbying law to instill more political equality corresponds with this ethos of the living tree view of the Constitution.

Constitutional Principles

In the *Secession Reference* the Court laid out a series of deep Constitutional principles related to the issue of Quebec's Secession from Canada. The Court stated,

there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities.¹⁹⁰⁴

These are not s. 3 principles, but they can lay the foundation for s. 3, as part of the wider Court discourse about deep democratic principles. These principles assist in interpreting the text of the

¹⁸⁹⁹ *Ibid* at para 64. Refers to *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 186 and p. 188.

¹⁹⁰⁰ *Frank v. Canada (Attorney General)*, *supra* note 1707 at para 2.

¹⁹⁰¹ *Reference re Secession of Quebec*, *supra* note 1079 at para 49.

¹⁹⁰² *Attorney General of British Columbia v Canada Trust Co et al*, [1980] 2 SCR 466 at 478; *Reference re Same-Sex Marriage*, [2004] 3 SCR 698 at para 22; *Reference re Securities Act*, [2011] 3 SCR 837 at para 56.

¹⁹⁰³ *Reference re Secession of Quebec*, *supra* note 1079 at para 52.

¹⁹⁰⁴ *Ibid* at para 32.

Constitution, the scope of rights, the reach of jurisdiction and the role of Canadian political institutions.¹⁹⁰⁵ These principles also overlap, to some extent, with the s. 3 right to vote.

In *Reference re Prov. Electoral Boundaries (Sask.)*¹⁹⁰⁶ (*Sask. Reference*), the Court quoted the contextual guiding principles from Dickson C.J. in *Oakes*.

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.¹⁹⁰⁷

Overall, the Court has listed a number of principles that are fundamental components of the right to vote. They include: respect for cultural and group identities; the right to meaningful participation; equality and fairness; preventing corruption and the appearance of corruption; and governmental transparency.¹⁹⁰⁸ The principles also include the right to be informed, which we already covered in depth in Chapter 7.¹⁹⁰⁹

Analyzing these principles and their relationship to lobbying reveals if and when strong lobbying laws could infringe on s. 3 of the *Charter*. To constitute an infringement, according to the cases so far, lobbying laws would need to reduce democratic accountability, reduce meaningful democratic participation, hurt the participation of minorities or cultural groups, hamper access to representatives, prevent officials or voters from accessing needed information, or otherwise damage the guarantee of effective representation.¹⁹¹⁰ However, stronger lobbying laws would generally seem to do the opposite. Robust lobbying laws would increase democratic accountability by shifting power to citizen groups and away from business interests. They would increase democratic participation and the participation of minority groups. They would increase access to officials for regular citizens, by preventing business groups from dominating lobbying and monopolizing officials' available time. The effect on information is more uncertain, but robust lobbying regulations should improve the quality of information available to officials by helping to break the framing bias of the information provided by business interests.¹⁹¹¹ For

¹⁹⁰⁵ *Ibid* at para 52.

¹⁹⁰⁶ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 1880.

¹⁹⁰⁷ *Ibid* at 181 i; & *R. v. Oakes*, *supra* note 1525 at 136 b.

¹⁹⁰⁸ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 1880 at 181 i; *Reference re Secession of Quebec*, *supra* note 1079 at para 64; *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 41; *Harper v. Canada (Attorney General)*, *supra* note 53 at paras 71 & 102; *R. v. Bryan*, *supra* note 1795 at para 49; *R. v. Carson*, *supra* note 537 at para 39.

¹⁹⁰⁹ See Chapter 7 – Canadian Charter Section 2: Principles from *Harper* and *Libman*: Hearing all Points of View (principle 7), p. 423.

¹⁹¹⁰ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 1880 at 183.

¹⁹¹¹ For the detailed argument about how the information provided by lobbying creates a pro-business framing bias, see Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern

all these reasons, robust lobbying regulations better fulfill the democratic principles derived from s. 3 than the regulations currently in place. It appears that such laws would rarely infringe s. 3.

If robust lobbying regulations did infringe s. 3, there is good reason to believe that they would pass the s. 1 test. They generally accord with deep democratic principles and the structural approach, both of which are discussed later in the chapter. These factors warrant that the Court approach robust lobbying regulations with a high standard of deference, providing an additional reason to believe that such legislation would be upheld on the s. 1 test.

We will now look at this argument in more detail by considering the deep democratic principles of federalism; substantive democracy; the rule of law; and respect for minorities. We will also consider how robust lobbying law would accord with each principle.

Constitutional Principles: Federalism

The Court has stated that although democracy expresses the sovereign will of the people, it must be interpreted in light of the other constitutional values and principles, including federalism. “The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.”¹⁹¹² There is no single majority in Canada; there are different majorities in different institutions across the varying levels of Canadian governments.¹⁹¹³

Federalism is already incorporated into lobbying law as it exists in Canada, as every level of government has set up its own lobbying rules. A federal law that set lobbying standards for provincial officials, or visa-versa, would offend this principle. The federal and each provincial government have the sole authority to set their own lobbying law.¹⁹¹⁴ A number of Canadian cities have established their own lobbying register and by-laws. In my interviews, some of the lobbyists expressed their preference that lobbying laws be made consistent across Canada, so the same standards, rules and forms would apply.¹⁹¹⁵ Likewise, it would be good if robust lobbying law enacted at the federal could be applied universally. But that is not the Canadian system. For better or worse, it includes layers of independence and redundancy.

III: Lobbying Creates an Information/Framing Bias, p. 166. Lee Drutman, *supra* note 172 at 238; Andreas Dur, Patrick Bernhagen & David Marshall, *supra* note 433 at 4; Dorie Apollonio, Bruce E. Cain & Lee Drutman, “Access and Lobbying”, *supra* note 303 at 32; Raquel Alexander, Stephen W Mazza & Susan Scholz, *supra* note 580 at 406; Amy McKay, “Buying Policy?”, *supra* note 308 at 909. See also, Lawrence Lessig, *supra* note 273 at 145; Lee Drutman, *supra* note 670 at 145; Richard A. Smith, *supra* note 216 at 111; Richard L. Hall & Alan V. Deardorff, *supra* note 783 at 69; Anita S. Krishnakumar, *supra* note 493 at 541; Peter K. Enns et al, *supra* note 701 at 24.

¹⁹¹² *Reference re Secession of Quebec*, *supra* note 1079 at para 66.

¹⁹¹³ *Ibid.*

¹⁹¹⁴ It is likely that these powers are either inherent to Parliament, or fall under the management of the public sector in *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK)*, 1982 s 91.8 and 92.4.

¹⁹¹⁵ See Chapter 5.

Good lobbying law can take another note from the guiding principle of federalism. It should not seek to suppress all lobbying to one citizen voice; rather, it should seek to ensure that citizen voices are heard in their wide variety at every level of government.

Constitutional Principles: Substantive Democracy

The Court has stated that substantive democracy itself is a deep democratic principle of the Constitution. This position is a powerful rebuke to the anti-democratic argument that seeks to raise formal laws and entrenched powers above the substantive practice of democracy. It is a rebuke to those who argue against pro-democratic reforms on the basis of tradition or pre-existing legal gaps that excluded people from meaningful participation. The Court maintained that,

democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. ... Put another way, a sovereign people exercises its right to self-government through the democratic process.¹⁹¹⁶

This principle of democracy includes the value of self-governance; and the sub-values of accommodation of a wide variety of beliefs, and faith in social and political institutions which enhance citizen participation.¹⁹¹⁷

Democracy: Self-Governance

The Court interpreted democracy as fundamentally a process of self-governance to form representative and responsive government. There is a right to citizen participation in the political process, both as voters and candidates.¹⁹¹⁸ In the *Secession Reference*, the Court held that this value exists both in the Constitution as a whole, and as a fundamental principle of s. 3.¹⁹¹⁹ This is the key value that connects lobbying to s. 3.

The goal of s. 3 is effective representation. If the government is to be representative and fulfill this duty, its decisions must be informed by the preferences of its citizens and their votes. We have covered the evidence that lobbying has a strong effect on government decision-making in the previous chapters. The more the lobbying process strengthens political representation, the more it fits with democracy. The current loosely regulated lobbying system does little to tie lobbying to the interests of citizens. Instead it actively favours the preferences of the wealthy and business interests.¹⁹²⁰ It weakens

¹⁹¹⁶ *Reference re Secession of Quebec*, *supra* note 1079 at para 64.

¹⁹¹⁷ *Ibid.*

¹⁹¹⁸ *Ibid* at para 65.

¹⁹¹⁹ *Ibid* at para 32.

¹⁹²⁰ For the detailed argument, see Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern I: Lobbying Disproportionately Advantages Businesses, p. 166. Lee Drutman, *supra* note 172 at 238; Andreas Dur, Patrick Bernhagen & David Marshall, *supra* note 433 at 4; Dorie Apollonio, Bruce E. Cain & Lee Drutman, “Access and Lobbying”, *supra* note 303 at 32; Raquel Alexander, Stephen W Mazza & Susan Scholz, *supra* note 580 at 406; Amy McKay, “Buying Policy?”, *supra* note 308 at 909. See also Lawrence Lessig, *supra* note 273 at 143; Peter K. Enns et al, *supra* note 701 at 1; David C Kimball et al, *supra* note 627 at 8; Frank R. Baumgartner et al, *supra* note 59 at 256; Lee Drutman, *supra* note 172 at 238; Lee Drutman, *supra* note 670; David C Kimball et al, *supra* note 627 at 20; Jeffrey R. Lax & Justin H. Phillips, *supra* note 736 at 149; Larry M. Bartels,

effective representation and undercuts self-governance. As covered in Chapter 3, the current lobbying regime pushes for the astroturfing of democracy, as citizen lobbying needs to piggyback on corporate efforts. Strong lobbying laws, conversely, could act to strengthen democracy.

Democracy: Accommodation of a Wide Variety of Beliefs

The Court has held that democracy should accommodate a wide variety of beliefs.¹⁹²¹ There is an indirect connection between accommodation of a wide variety of beliefs and strong lobbying regulations. The current practices of lobbying act to indirectly shut out voices with less financial backing. They tend to reinforce the status quo, particularly in areas with diffuse wide-spread benefits.¹⁹²² This reduces beneficial change that the public supports. Stronger regulations should help open the way for more point of views. There is no certainty that every voice will be heard, but if the loud megaphones are no longer drowning out the weaker competing voices, there will be more viewpoints represented. Moreover, if the wealthy few are limited in their total lobbying, it will reduce the cost of lobbying competition and more voices will be able to afford a seat at the table.

Democracy: Faith in Public Institutions

The Court has stated that citizen faith in public institutions is a fundamental component of democracy.¹⁹²³ In Chapter 7 we discussed the three ways that third-party spending limits helped maintain the public's faith in democracy.¹⁹²⁴ Using the mirror principle, we covered three matching ways that lobbying limits would also help maintain public confidence in the government. Robust lobbying regulations i) prevent the bypass of electoral results by special interest groups, ii) prevent the domination of the lobbying process by the wealthy, and iii) help prevent the (further) uncontrolled escalation of lobbying expenditures.

Beyond these three matching ways, the public's faith in democratic institutions, in so far as it relates to lobbying, is likely deeply tied to the divide between the disclosure and the corruption heuristic.¹⁹²⁵ If the general public subscribes to the corruption heuristic, which appears to be the case, then looser lobbying laws should weaken public faith, whereas stronger lobbying laws would strengthen public faith. At first the public might not be aware of these stronger rules. In general, the public pays little attention to the rules involving democratic process and the workings of government, except when

supra note 737 at 5; Larry M. Bartels, *supra* note 738 at 189; Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 40.

¹⁹²¹ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 1880 at 181 i.

¹⁹²² For the detailed argument, see Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern V: Lobbying Favours the Legislative Status Quo, p. 189. Richard A. Smith, *supra* note 216 at 110; Matthew Stephenson & Howell E. Jackson, *supra* note 878 at 19; Govtrack, *supra* note 900; Lee Drutman, *supra* note 172 at 3, 29 & 73; Kathy Goldschmidt, *supra* note 219 at 8; See also, Raymond J. La Raja & Brian F. Schaffner, *supra* note 906; Christine Mahoney, *supra* note 177 at 48; Sean Lux, T. Russell Crook & David J. Woehr, “Mixing business with politics”, *supra* note 213 at 227.

¹⁹²³ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 1880 at 181 i.

¹⁹²⁴ See Chapter 7 – Canadian Charter Section 2: S. 1 – Skeleton Evaluation Based on *Harper*: Objective 3 – Public Confidence, p. 433.

¹⁹²⁵ See Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Disclosure versus Corruption Approach: The Corruption Heuristic, p. 112.

scandals bring them to public attention. Over time, though, the reduction in number of lobbying scandals in Canada as compared to other countries should increase Canadians' faith in their democratic governance. This seems to have taken place with Canada's campaign finance laws, as indicated by Canadians' relatively high faith in their elections.¹⁹²⁶ It is probable that the same thing would take place with equally strong lobbying laws. If lobbying laws advantage citizen organizations, it is likely that they will enhance political participation. This participation should in turn further amplify citizens' faith in their democratic institutions.

Constitutional Principles: Rule of Law and Legitimacy

The Court insisted that democracy must rest on the consent of the governed, and the consent needs to rest on an institutional framework that in turn is based on the rule of law.¹⁹²⁷ The legal foundation grants the democratic institutions legitimacy.

In a democracy such as ours, the ... delegation from voters to legislators gives the law its legitimacy or force. Correlatively, the obligation to obey the law flows from the fact that the law is made by and on behalf of the citizens. In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote.¹⁹²⁸

The Court held that the rule of law requires positive rules that regulate the relationship between the state and the individual.¹⁹²⁹ The Court focused on the power of the state over the individual, but the rule of law must also apply to the power of the individual over the state.

Kuhner's principle of the separation of business and state connects to this principle of the rule of law.¹⁹³⁰ It sets a standard. If the two areas become too intermingled then corruption is inevitable.¹⁹³¹ The rule of law breaks down the more political power becomes a tool for private benefit, and visa-versa. As with campaign financing, a robust legal structure for lobbying is a better expression of the principle of rule of law and the liberal democratic theories of Rawls and of Dworkin.¹⁹³²

¹⁹²⁶ Canadians have higher trust in their elections than Americans. 41% of Canadians have a lot of trust, vs. 23% of Americans. Only 9% of Canadians have a lot of distrust in their elections, vs. 21% of Americans. Environics Institute for Survey Research, *supra* note 1351 at 12. See Chapter 5 – Interview Results: My Questions: 22. Do you think Canada's campaign donation laws are effective? Page 325.

¹⁹²⁷ *Reference re Secession of Quebec*, *supra* note 1079 at para 67.

¹⁹²⁸ *Sauvé v. Canada (Chief Electoral Officer)*, *supra* note 1878 at para 31.

¹⁹²⁹ *Reference re Secession of Quebec*, *supra* note 1079 at para 71.

¹⁹³⁰ Timothy K. Kuhner, *supra* note 51. See Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: The Separation of Business and State, p. 361.

¹⁹³¹ *Ibid* at 3.

¹⁹³² See Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: Rawls and Dworkin on Political Equality, p. 337.

Constitutional Principles: Respect for Minorities

The Court has stated that the protection of minority rights is an essential part of the Constitution and Canadian democratic values.¹⁹³³ Canadian governments often fail to live up to this duty, but it is a fundamental value nonetheless.

Lobbying laws that instituted spending limits could theoretically violate this principle if a minority group's lobbying spending exceeded the limits. However, the law would likely be upheld in a s. 1 justification exercise, just as campaign spending limits have been upheld, provided the regulations were applied equally and there was sufficient room to lobby effectively within the limits. Moreover, overall, spending limits would open more space for cultural and minority groups to express themselves, by advantaging citizen lobbying groups, and decreasing the monopolization of officials' attention by business-related lobbying.

Strong lobbying laws that included citizen funding and organization tools for minorities would aid them in expressing their concerns to government. Rather than infringe s. 3, this would better accord to the principle of protection of minorities than the current lobbying regime. The current lobbying system disadvantages the less organized minority groups. This leaves them vulnerable to be exploited by more powerful interests influencing the policy agenda. It is no accident that polluting industries are often located in poor minority communities.¹⁹³⁴

S. 3 Principles

S. 3 Principles: Respect Cultural and Group Identities

Along with the fundamental principle of minority rights in the Constitution, there is a matching s. 3 *Charter* principle that effective representation recognizes cultural and group identities.¹⁹³⁵ People and groups have multiple identities, and a serious respectful treatment of cultural and group identities acknowledges that these represent both deep values and deep concepts of self. The Court is aware that cultural and group identities are an essential component of effective representation.¹⁹³⁶ Groups falling within the social mosaic deserve to be treated as integral wholes, and kept together within riding boundaries. This allows them to express themselves in voting and garner effective representation.

This reasoning did harm to the principle of representation by population, but the Court's theory of representation cannot be said to ignore the principle of equality entirely. All groups of citizens forming part of the social mosaic could potentially benefit from the doctrine of effective representation.¹⁹³⁷

¹⁹³³ *Reference re Secession of Quebec*, *supra* note 1079 at para 71. Minority groups include those based on race, national or ethnic origin, colour, religion, language, sex, age, mental disability, physical disability, sexual orientation, and gender identity.

¹⁹³⁴ Mary B Collins, Ian Munoz & Joseph Jaja, "Linking 'Toxic Outliers' to Environmental Justice Communities" (2016) 11:1 *Environ Res Lett* 015004 at 8.

¹⁹³⁵ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 1880 at 188.

¹⁹³⁶ *Ibid.*

¹⁹³⁷ Michael Pal, *supra* note 1836 at 246.

More robust lobbying law does not deeply incorporate this principle. However, the principle does provide an additional anchor for extending widespread public funding to citizen lobbying groups. This funding could enhance the lobbying participation and voice of minorities, disadvantaged groups, cultural groups, the poor, religious organizations, and other citizen groups. This would reflect the deep principle of political participation through group identity.

S. 3 Principles: Right to Meaningful Participation

There are a number of aspects to the relationship between lobbying and the principle of meaningful participation. We will consider the Court's view of meaningful political participation; the problem with the Lobbyists' Code on Conduct rule prohibiting conflicts of interest; the applicability of participation to citizens versus corporations; and the Court's rulings in *Figueroa* and *Harper v. Canada*¹⁹³⁸.

The Court has stated that there is a democratic right "to play a meaningful role in the election of elected representatives who, in turn, will be responsible for making decisions"¹⁹³⁹. The right of meaningful participation varies depending on the context.¹⁹⁴⁰ The law must leave an open path for all types of participation, including running for office, expressing political options, volunteering for a campaign, acting as an activist, and voting.¹⁹⁴¹ Participation is both an inherent and an instrumental value.¹⁹⁴² There is meaning in the participation in all the stages of self-governance. "Each vote has expressive content, communicating not only the identity of one's preferred candidate, but the values and policy choices they represent."¹⁹⁴³ To be denied the vote is an attack on the person's dignity and sense of self-worth.¹⁹⁴⁴

Participation in lobbying is another aspect of self-governance. Lobbying is an essential component of and influence on the politician's role as both legislator and representative. Lobbying allows citizens to communicate directly with the officials, and thereby influence the policy-decisions that impact upon daily life. Lobbying should be open both as an inherently meaningful activity for citizens and as an instrumental path to change policy. Lobbying regulations should not prevent Canadian citizens from exercising their rights of political participation completely.¹⁹⁴⁵ Instead, the legislation should

¹⁹³⁸ *Harper v. Canada (Attorney General)*, *supra* note 53.

¹⁹³⁹ *Ibid* at para 69; See also *Haig v. Canada (Chief Electoral Officer)*, *supra* note 1877 at 1031.

¹⁹⁴⁰ Yasmin Dawood, "Democracy and the Right to Vote", *supra* note 933 at 278.

¹⁹⁴¹ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 69.

¹⁹⁴² *Ibid*.

¹⁹⁴³ *Frank v. Canada (Attorney General)*, *supra* note 1707 at para 108.

¹⁹⁴⁴ *Ibid* at para 82.

¹⁹⁴⁵ For example, in *Osborne v. Canada* the Supreme Court held that the section of a law that prohibited partisan-related work by all public servants was overly broad. The law failed to distinguish between the types of partisan-related work, or consider the relative importance of the civil servant. It disregarded the large group of civil servants who have no discretion in their job that could be affected by political considerations. The section failed the minimal impairment test because it was over-inclusive and went beyond what was needed for an impartial civil service. *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 at 101 c.

provide open channels for political participation that welcome citizen lobbying engagement, while correcting the flaws in unregulated lobbying.

Problem with the Code of Conduct Prohibiting Conflicts of Interest

An example of overly broad lobbying regulation can be found in the Canadian Bar Association's opinion on the Commissioner's early interpretation of the then Rule 8 (now Rule 6) of the *Code of Conduct*.¹⁹⁴⁶ The rule prohibited lobbyists from putting officials in a real or apparent conflict of interest.¹⁹⁴⁷ In the earlier guidance, the Commissioner had stated that political activities could constitute an improper influence upon a public office holder, creating a conflict of interest that contravened the rule. Although certain political activities can genuinely create a conflict of interest, the guidance failed to include any specifics and left the determination to an after-the-fact evaluation. The Bar Association argued that this created two related problems.¹⁹⁴⁸

First, it is over-inclusive because it purports to prohibit any political activity which could place a public office holder in a real or apparent conflict of interest. Its lack of precision means that it could apply to political activities as mundane as canvassing for a particular candidate or displaying a lawn sign signifying a lobbyist's political preference. ... Second, the ex post facto determination of whether a particular activity contravenes the Guidance creates a chilling effect on the ability of registered lobbyists to participate in the political process.¹⁹⁴⁹

The Bar Association's position was valid but slightly overstated, for the guidance only deterred a lobbyist from engaging in political participation with politicians he intended to lobby. Moreover, in the Canadian system, much of lobbying is directed at non-elected officials. Nonetheless, the revised guidance was needed. The new guidance solved these problems by specifying levels of political involvement and indicating where political participation would be at a higher risk of contravening the *Code of Conduct*.¹⁹⁵⁰ It is a good lesson about the importance of specifics in lobbying regulations.

¹⁹⁴⁶ National Constitutional and Human Rights Law Section, *supra* note 135. Rule 8 was also at issue in *Democracy Watch v Campbell*, *supra* note 118.

¹⁹⁴⁷ At the time Rule 8 read,

"Lobbyists shall not place public office holders in a conflict of interest by proposing or undertaking any action that would constitute an improper influence on a public office holder."

Rule 6, the replacement, now reads,

"A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest."

Government of Canada, *supra* note 117.

¹⁹⁴⁸ National Constitutional and Human Rights Law Section, *supra* note 135 at 3. It is likely that this opinion is what led to the Commissioner of Lobbying releasing the updated more complete guidance on lobbyist and political activity. Office of the Commissioner of Lobbying, *supra* note 121.

¹⁹⁴⁹ Office of the Commissioner of Lobbying, *supra* note 121 at 10.

¹⁹⁵⁰ There are higher, lower, and no risk political activities. See note 121 for details. Office of the Commissioner of Lobbying, *supra* note 121.

Citizen versus Corporate Political Participation

Lobbying should be open to citizens, but, like the other ways citizens participate in democracy, it can and should be regulated. Lobbying regulations that boosted citizen lobbying and restrained corporate lobbying could not infringe s. 3, because only citizens have access to the s. 3 rights (otherwise corporations would have the right to vote).¹⁹⁵¹ The issue is slightly more complicated with small businesses that are not incorporated. It would still be a reasonable principle to treat their business lobbying differently than citizen lobbying, reinforcing the separation between business and state. However, as long as these people were lobbying for themselves, it would not be essential.

The Court's rulings in Figueroa and Harper

Figueroa and *Harper* provide justification for lobbying restrictions based on the principle of meaningful participation.

In *Figueroa*, the Court held that the right of meaningful participation would be infringed if it were too difficult for smaller political parties to meet the threshold of official party status.¹⁹⁵² Official party status grants a number of tax benefits, and allows the party to have its name listed on the ballot beside the candidate's name. It is an important benefit for the parties participating in the election. The Court concluded that smaller parties play a meaningful role in the political process. Smaller parties help keep larger parties accountable, and introduce new approaches and policy ideas into politics. The existence of smaller parties is an important component to civic participation. Similar to the electoral rules challenged in *Figueroa*, the current lobbying regulations allow a competitive disadvantage for smaller citizen groups. Just as smaller political parties allow citizens to play a meaningful role in the political process, so too do smaller citizen lobbying groups allow for meaningful participation in the lobbying process.¹⁹⁵³ Lobbying regulations should be designed to enhance this type of participation.

The ruling in *Harper* has important implications for the political participation. The right to vote includes "the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative."¹⁹⁵⁴ As covered in the previous chapter, the Supreme Court has recognized that effective democracy requires the restraint of those who are too powerful, be the power physical, political, or economic.¹⁹⁵⁵ The Court in *Harper* recognized that,

¹⁹⁵¹ Gee argues that, like the right to vote, the right to petition is non-transferrable. It is bound innately to the person of the polity (the citizen). Thus, corporations cannot exercise the right to petition. Lobbying regulations that restricted business lobbying could not infringe the *Charter*. Quentin Gee, *supra* note 1751 at 402–407. Gee's argument against non-transferability applies to unions and citizen organizations as well (even if they have internal democratic legitimacy). By his reasoning, no paid actor has the right to lobby, nor do any organizations on behalf of anyone else. Only individual citizens have an actual right to lobby the government. See Chapter 7 – Canadian *Charter* Section 2: S. 2(b) – Freedom of Expression, p. 415, and notes 1752 & 1753.

¹⁹⁵² *Figueroa v. Canada (Attorney General)*, *supra* note 1776 at para 25.

¹⁹⁵³ *Ibid* at para 41.

¹⁹⁵⁴ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 1880 at 183.

¹⁹⁵⁵ Timothy K. Kuhner, *supra* note 51 at 2361.

by limiting political expression, the spending limits bring greater balance to the political discourse and allow for more meaningful participation in the electoral process.¹⁹⁵⁶

In *Harper*, Bastarache J. held that these limits do not infringe s. 3. The principle of political participation does not entail unlimited participation.

Meaningful participation in elections is not synonymous with the ability to mount a media campaign capable of determining the outcome. In fact, such an understanding of “meaningful participation” would leave little room in the political discourse for the individual citizen and would be inimical to the right to vote. Accordingly, there is no infringement of s. 3 in this case and no conflict between the right to vote and freedom of expression.¹⁹⁵⁷

By the mirror principle, the same reasoning should apply to lobbying regulations. Robust lobbying regulation would make room for citizens to voice their opinions on essential issues. The limits might infringe the meaningful participation of the most powerful lobbying groups, but in doing so they would enhance the meaningful participation of the majority. According to the principle of meaningful participation, and the precedent in *Harper*, limits on lobbying would probably not infringe s. 3. If they did do so, it is likely the limits would be upheld under s. 1.

S. 3 Principles: Equality and Fairness

Even without the theoretical liberal underpinnings from Rawls and Dworkin discussed in Chapter 6, equality and the closely related principle of fairness are deep values of the Canadian *Charter*. Equality is an inherent component of the s. 3 right to vote.¹⁹⁵⁸

Equality

In the *Sask. Reference*, the Court considered the acceptable variation in riding size population, and its implications for voter equality.¹⁹⁵⁹ Due to the compromises needed for Confederation and maintaining national unity, there is and will generally be a difference in seats per capita between the provinces. This is inherent to the Constitution and Confederation. In the *Sask. Reference*, the Court chose to allow some variation in capita per riding within the province. More variation between riding sizes gives voters in smaller ridings (by population) more political sway than voters in larger ridings. Since the Court allowed a reasonable size difference between ridings, one might conclude that it placed a low value on political equality. This would weaken the argument that the political equality fostered by strong lobbying laws accords with a deep constitutional principle.

¹⁹⁵⁶ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 86.

¹⁹⁵⁷ *Ibid* at para 74.

¹⁹⁵⁸ See *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 41; *Reference re Secession of Quebec*, *supra* note 1079 at para 64.

¹⁹⁵⁹ The *Sask. Reference* is *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 1880.

The *Sask. Reference* supports a different understanding of political equality, but one that is equally supportive of stronger lobbying laws. The Court stated that boundary commissions may take into account factors like “geography, community history, community interests and minority representation”¹⁹⁶⁰ to pursue more effective representation. La Forest J. argued that,

it would be wrong to infer that in enshrining the right to vote in our written constitution the intention was to adopt the American model. On the contrary ... the goal was to recognize the right affirmed in this country ... to effective representation in a system which gives due weight to voter parity but admits other considerations where necessary.¹⁹⁶¹

The principle is *equality of effective representation*. Yet, the Court did emphasize the importance of voter equality, stating that,

each person's vote should, subject only to reasonable variations for geographic and community interests, be as nearly as possible equal to the vote of any other voter residing in any other constituency. Any significant diminution of the right to relative equality of voting power can only lead to voter frustration and to a lack of confidence in the electoral process.¹⁹⁶²

The s. 3 precedent in the *Sask. Reference* does raise some problems for the balance of urban-rural voting power in Canada. However, the Court’s approach to political equality does not endanger robust lobbying regulations.

Firstly, the Court is specifically concerned with community interests. This neatly maps onto the concerns of citizen organizations. These groups are significantly disempowered in the current lobbying environment. Robust lobbying law will never achieve exact parity of political power between differing citizens groups. However, lobbying limits and public support for citizen interest groups would work to condense the range of political inequality across different communities of interest. This resulting tighter variation in range of political equality would be somewhat akin to the acceptable range of variation in riding size in the *Sask. Reference* – not ideal, but acceptable. The Court’s approach to riding representation better accords with stronger lobbying regulations that push for more voice for citizen groups.

Secondly, the Court is seeking equality in effective representation. This is essentially what is at issue in lobbying, that the voices of different citizens and groups all get a say. Currently, effective lobbying representation is damaged for citizens whose public interest concerns do not match with the priorities of the rich.

¹⁹⁶⁰ *Ibid* at 184h.

¹⁹⁶¹ *Ibid* at 185 j.

¹⁹⁶² *Ibid* at 170a.

Thirdly, the disparity in effective representation is closely tied to the egalitarian approach to democracy, which the Court has embraced. In *Libman*, the Court recognized a “right of equal participation in democratic government.”¹⁹⁶³ Dawood notes that the egalitarian approach makes it important to prevent the most affluent from disproportionately dominating the electoral process.¹⁹⁶⁴ The Court’s egalitarian considerations should equally apply to the exercise of lobbying on the democratic decision-making process. As covered in Chapter 3, those with more resources can afford more lobbyists; can afford better connected lobbyists; can lobby in more areas at once; can provide more supporting research; can enlist the help of think tanks; and can co-ordinate with expensive court cases.¹⁹⁶⁵ The principle of equality would be expressed by stronger lobbying regulations that restrained the private power of the few to empower the many.

Fairness

The Court has established the principle of fairness as a constitutional value in the sphere of election law and equality. In *Libman v. Quebec (Attorney General)*¹⁹⁶⁶, the Court stated that the principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens. The Court recognized that the principle of fairness is threatened by the fact that not all people have the same financial resources to communicate with the electorate.¹⁹⁶⁷

Fairness of the electoral system is an important enough legislative objective to ground a s. 1 analysis.¹⁹⁶⁸ It is perhaps the simplest and deepest principle of democracy. The variation in financial resources leads to unfairness in lobbying. For example, as discussed in Chapter 2, businesses in the U.S. often employ more than 100 lobbyists at a time, and outspend citizen groups by a ratio of 34 to 1; and Boucher’s 2018 analysis of Canadian lobbying reports found that corporations and trade associations dominated over citizen groups and unions by a ratio of 4.5 to 1.¹⁹⁶⁹ Moreover, advantages in financial resources can be leveraged to create political outcomes that further increase market rewards, thereby creating an inequality spiral.¹⁹⁷⁰ By the mirror principle, fairness in lobbying should be a sufficiently important legislative objective to ground a s. 1 analysis.

¹⁹⁶³ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 47.

¹⁹⁶⁴ Yasmin Dawood, “Democracy and the Right to Vote”, *supra* note 933 at 282. See *Harper v. Canada (Attorney General)*, *supra* note 53; *Libman v. Quebec (Attorney General)*, *supra* note 1706.

¹⁹⁶⁵ See Chapter 3 and Chapter 6 for a description of how the resource advantage of wealthy interests and large organizations lead to lobbying advantages. Heike Klüver & Sabine Saurugger, “Opening the black box”, *supra* note 645 at 201; A. Paul Pross, *supra* note 2 at 185; Lee Drutman, *supra* note 172 at 3; Frank R. Baumgartner et al, *supra* note 59 at 208.

¹⁹⁶⁶ *Libman v. Quebec (Attorney General)*, *supra* note 1706.

¹⁹⁶⁷ *Ibid* at para 47.

¹⁹⁶⁸ *Frank v. Canada (Attorney General)*, *supra* note 1707 at para 55.

¹⁹⁶⁹ Lee Drutman, *supra* note 172 at 79; Maxime Boucher, *supra* note 2 at 324; Lee Drutman, *supra* note 670; Lee Drutman, *supra* note 174.

¹⁹⁷⁰ For the detailed argument, see Chapter 3 and Chapter 6. Lee Drutman, *supra* note 172 at 238; Andreas Dur, Patrick Bernhagen & David Marshall, *supra* note 433 at 4; Dorie Apollonio, Bruce E. Cain & Lee Drutman, “Access

A more complicated question arises if the lobbying regulations fund or otherwise support lobbying organizations that represent marginalized groups and minorities.¹⁹⁷¹ Public funding has been widely touted as a potential lobbying reform. It has been practiced by the Canadian government at various times to a degree, but not as a cohesive widespread independent program.¹⁹⁷² This funding increases equality by helping the marginalized get political access so they can communicate their needs to officials. It also matches with the principle of respecting cultural and group identity. Yet, the support for some groups but not others could be seen as infringing the principle of equality. As discussed, in the *Sask. Reference*, the Court specifically included community interests and minority representation as factors that can be taken into account to justify the departure from absolute voter parity in the pursuit of more effective representation.¹⁹⁷³ The Court's ruling indicated that the equality principle in s. 3 includes room for the representation of the diversity of the Canadian social mosaic.¹⁹⁷⁴ Thus, support targeted at minority groups would probably be upheld under s. 1.¹⁹⁷⁵

Providing funding for some citizen groups and not others could also infringe the s. 15 equality clause of the *Charter*; if the distinction was based on an enumerated or analogous ground.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Court has held that that s. 15(1) applies to several areas that are similar to the government funding of lobbying groups. This includes publicly-funded activities and the delegation of governmental

and Lobbying", *supra* note 303 at 32; Raquel Alexander, Stephen W Mazza & Susan Scholz, *supra* note 580 at 406; Amy McKay, "Buying Policy?", *supra* note 308 at 909. See also, David Jacobs & Lindsey Myers, *supra* note 681 at 769; Timothy K. Kuhner, *supra* note 51 at 2360; Joseph E. Stiglitz, *supra* note 24 at 13.

¹⁹⁷¹ It is worth clarifying that hate groups might exist on the margins of society, but they are not marginalized. There is no need to tolerate intolerance. Individuals in these groups can be rescued and reformed with patience and understanding, but that understanding should not extend to the organization, its goals or its ideology.

¹⁹⁷² Fred Thompson & W. T. Stanbury, *supra* note 2 at 42; Rodney S. Haddow, *supra* note 533 at 179; See also, Paul Malvern, *supra* note 2; A. Paul Pross, *supra* note 2.

¹⁹⁷³ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 1880 at 184.

¹⁹⁷⁴ *Ibid.*

¹⁹⁷⁵ *Ibid.*

decision-making¹⁹⁷⁶, a program developed in partnership with third parties¹⁹⁷⁷, and forms of administrative action¹⁹⁷⁸. In *R. v. Kapp*¹⁹⁷⁹ the Court laid out the test for discrimination in s. 15.

The template in *Andrews* ... established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?¹⁹⁸⁰

Depending on how the lobbying was funded, it could create a distinction based on an enumerated or analogous ground. The question is whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping. It is unlikely that the lobbying funding would satisfy the second part of the test, since the funding would be intended to help ameliorate a disadvantaged group's lobbying position. Moreover, the Court has ruled that if the funding is targeted to the specific problems of a disadvantaged group, it does not fall within s. 15(1) just because it is not applicable to other disadvantaged groups in differing circumstances.¹⁹⁸¹ It is likely that any funding intended to help a disadvantaged group lobby more effectively would be saved under s. 15(2), since that provision shields any law, program or activity intended to ameliorate the conditions of disadvantaged groups.¹⁹⁸²

The Court has upheld the importance of the political equality of citizens.¹⁹⁸³ Current lobbying practices sabotage this equality on both a theoretical and practical level. Stronger lobbying laws would better accord with the principles of fairness and equality embodied in s. 3 of the *Charter*.

S. 3 Principles: Anti-Corruption and Appearance of Anti-Corruption

As discussed in the previous chapters, the Canadian Supreme Court has stated that preventing both corruption and the appearance of corruption is a fundamental constitutional principle. The Court's

¹⁹⁷⁶ *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 50. The case dealt with sign language provision for deaf patients.

¹⁹⁷⁷ *Lovelace v Ontario*, [2000] 1 SCR 950 at para 56. The case applied to a development of a casino with Ontario First Nations.

¹⁹⁷⁸ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] 2 SCR 1120 at para 154. The case dealt with the implementation of an administrative decision in a discriminatory way by border security against books purchased by an LGBQ bookstore.

¹⁹⁷⁹ *R v Kapp*, [2008] 2 SCR 483.

¹⁹⁸⁰ *Ibid* at para 17.

¹⁹⁸¹ *Lovelace v. Ontario*, *supra* note 1977.

¹⁹⁸² "The fundamental question is this: up to what point does s. 15(2) protect against a claim of discrimination? The tentative answer suggested by *Kapp*, as discussed above, is that the distinction must serve or advance the ameliorative goal. This will not be the case, for instance, if the state chooses irrational means to pursue its ameliorative goal. This criterion may be refined and developed as different cases emerge."

"This brings us to the following propositions. Ameliorative programs, by their nature, confer benefits on one group that are not conferred on others. These distinctions are generally protected if they serve or advance the object of the program, thus promoting substantive equality. This is so even where the included and excluded groups are aboriginals who share a similar history of disadvantage and marginalization: *Lovelace*." *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, [2011] 2 SCR 670 at paras 46 & 53.

¹⁹⁸³ *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 47.

repeated concern for the integrity of the electoral system is reflected in the approach that values preventing the appearance of anti-corruption. Contrary to this approach, the American Court has downplayed the importance of preventing the appearance of corruption in campaign finance cases.¹⁹⁸⁴

Electoral systems with few regulations and unconstrained spending display an appearance of corruption; they seem to invite in corruption over the long run. The same is true for lobbying systems.¹⁹⁸⁵ Citizens are concerned about corruption and the appearance of corruption in both elections and lobbying. Bassett argues that,

[t]he revolving door between Congress and the lobbying industry contributes to the public perception of corruption. Further, the public perceives that lobbyists shower legislators with free gifts, meals, and travel.¹⁹⁸⁶

¹⁹⁸⁴ The U.S. Supreme Court has prioritized corporate free speech over the government's compelling interest in regulating campaign finance. See Chapter 4 – Private Campaign Financing and Lobbying: The Contrasting Practice of Campaign Contributions in the U.S.: *Citizens United v. Federal Election Commission*: Appearance of Corruption, p. 233. See also, *Citizens United v. Federal Election Commission*, *supra* note 1021 s Opinion of Stevens, J. III Identity-Based Distinctions; as compared to *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 41. See also A. Paul Pross, *supra* note 2 at 197.

¹⁹⁸⁵ For example, there have been numerous scandals involving lobbying under the Trump administration. Most notably, corrupt campaign funding and lobbying are deeply tied to President Trump's 2020 impeachment trial. The trial centered on his withholding of military aid to Ukraine to pressure them to start a political investigation to damage Joe Biden, his likely political opponent in the next election. The Ukrainian portion of this scandal also involves a plan to lobby and otherwise press for the changes in management of the largest gas company in the Ukraine, so that it would be willing to accept (likely inflated) contracts with Trump donors and lobbyists, Lev Parnas and Igor Fruman. These individuals were working to get the Ukrainians to investigate Biden's son, and to discredit the earlier Muller investigation of Russian meddling in the previous American election. They were also clients of Trump's lawyer, Giuliani, who was deeply involved in the Ukraine scandal, and claimed to be working for the president pro-bono. This (corrupt) pro-bono work neatly corresponded to goals of his paying clients. There were likely Russian interests bankrolling Giuliani, since Parnas and Fruman appear to have received Russian backing to fund their activities. Parnas and Fruman were subsequently arrested for illegal campaign contributions when trying to flee the U.S. The charges included funneling Russian money into President Trump's re-election campaign, making illegal concealed donations of at least \$325,000, and funneling several million dollars to a Texas Congressional representative, Pete Sessions. After their lobbying meeting with Sessions, he subsequently helped push out the American ambassador to the Ukraine, who was blocking the efforts to get Ukraine to investigate Biden's son. Thus the corrupting effects of the lobbying and campaign donations were deeply tied into the core of the scandal, which was an attack on American democracy. Richard Lardner, Michael Biesecker & Desmond Butler, "Trump allies pressed Ukraine over gas firm, sources say", *Globe Mail* (6 October 2019), online: <<https://www.theglobeandmail.com/world/us-politics/article-president-trumps-allies-pressed-ukraine-gas-firm-over-profit-not/>>; Lachlan Markay & Pervaiz Shallwani, "Rudy's Ukraine Henchmen Arrested on Campaign-Finance Charge", *Dly Beast* (10 October 2019), online: <<https://www.thedailybeast.com/giulianis-ukraine-henchmen-lev-parnas-and-igor-fruman-arrested-on-campaign-finance-charge>>; Alex Ward, "The last 24 hours in the Ukraine drama were the worst for Trump yet. Here's what happened.", (4 October 2019), online: Vox <<https://www.vox.com/2019/10/4/20898612/trump-ukraine-texts-china-volker>>; For an opinionated but factual overview, see Jonathan Chait, "Trump's Watergate Burglars, Lev Parnas and Igor Fruman, Just Got Arrested", (10 October 2019), online: *Intelligencer* <<http://nymag.com/intelligencer/2019/10/parnas-and-fruman-trumps-ukraine-fixers-just-got-arrested.html>>.

¹⁹⁸⁶ Elisabeth Bassett, *supra* note 979 at 1064.

Eventually the influence of lobbying becomes visible in high salience areas, and citizens notice that private organizations are setting government policy. Unregulated lobbying creates an appearance of corruption.

Chapter 3 presented the growing evidence that lobbying corrupts officials, moving them out of alignment with voter preferences. Lobbying introduces corruption into the political system in a variety of ways, some of which insiders fail to see as corrupting. It introduces corruption through regulatory capture, the revolving door into highly-paid lobbying careers, dependency corruption, circumspect corruption, and outright quid-pro-quo bribery.¹⁹⁸⁷

Special interest involvement in the legislative process affects not only the outcomes of the process but also the integrity of the process itself. The close relationship between lobbyists and legislators, and the money that interest groups pour into lobbying and campaign contributions, result in corruption and the perception of corruption.¹⁹⁸⁸

As Teachout has argued, lobbying also corrupts government by devaluing the concept of civic virtue. Officials are regularly immersed in rhetoric that values private self-interest over civic duty. This rhetoric comes both from the business lobbyists themselves and from the living example of former officials who become highly-paid business lobbyists.¹⁹⁸⁹ How well can officials govern for the public's well-being in an environment where the norms are to seek private reward?

Strong lobbying regulations are needed to counter the pressure of private influence. As Lessig argues, such regulations would act to prevent dependency corruption and reduce the appearance of corruption, thereby enhancing the government's representation of its citizens.¹⁹⁹⁰ Stronger lobbying laws do not infringe the anti-corruption principle; they support it much better than does the status quo.

S. 3 Principles: Governmental Transparency

Governmental transparency is a fundamental principle of democracy.¹⁹⁹¹ A government that operates in secrecy and hides its policy-making process cannot be accountable. The Court has held that

¹⁹⁸⁷ For the detailed argument, see Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S., p. 142. Craig Holman & William Luneburg, “Lobbying and transparency”, *supra* note 96 at 78; Lawrence Lessig, *supra* note 273 at 114 & 145; Gajan Retnasaba, *supra* note 278 s I.2 & III.4; Jack Abramoff, *supra* note 1 c 6; Theda Skocpol & Alexander Hertel-Fernandez, *supra* note 28 at 29; Coral Davenport, *supra* note 946; Jimmy Williams, *supra* note 922; Bess Levin, *supra* note 834; Yasmin Dawood, “Democracy, Power, and the Supreme Court”, *supra* note 956 at 281; David C Kimball et al, *supra* note 627 at 20; Timothy M. Lapira, Herschel F. Thomas & Frank R. Baumgartner, “The two worlds of lobbying”, *supra* note 182 at 236.

¹⁹⁸⁸ Elisabeth Bassett, *supra* note 979 at 1064.

¹⁹⁸⁹ Zephyr Teachout, *supra* note 988 at 248.

¹⁹⁹⁰ Lawrence Lessig, *supra* note 273 at 83.

¹⁹⁹¹ See *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 41; *Reference re Secession of Quebec*, *supra* note 1079 at para 64. See also A. Paul Pross, *supra* note 2 at 197.

rules requiring disclosure of electoral spending by third parties offer many benefits to society. They ensure the “transparency and accountability of the electoral process, they discourage circumvention of the third-party limits and enhance the confidence Canadians have in their electoral system”¹⁹⁹². In election law, the Court has reasonably viewed the deleterious effects of spending disclosure as minimal, arguing that there is no evidence legitimate political donations have been deterred due to disclosure requirements.¹⁹⁹³

Although lobbying disclosure rules might infringe s. 2, it is difficult to see how these disclosure rules could infringe s. 3. Lobbying disclosure would not interfere with the right to vote or to effective representation. If anything, more disclosure enhances the exercise of the vote and effective representation by increasing access to information and official accountability. Lobbying disclosure thereby helps fulfill multiple s. 3 principles.¹⁹⁹⁴

Bassett has argued that transparency rules that reveal the interactions of lobbyists and officials will decrease both corruption and the appearance of corruption, by making it more difficult to conduct and conceal corrupt activities and bargains.¹⁹⁹⁵ As the public receives more information about the activities of lobbyists, and as that forces a decline in corrupt behaviour, people's faith in public institutions will be enhanced.¹⁹⁹⁶ The argument contains substantial truth about the importance of transparency. Yet, we should not overestimate the power that transparency has to counter deceptive framing, the gift economy, regulatory capture, dependency corruption, and circumspect bribery.

Luneburg has taken a different tack on the question of transparency. He has argued that lobbying disclosure regulations improve governance, and that there is no essential right to privacy in lobbying activities. The requirement to disclose is not and cannot be an infringement of the right to petition or free speech, unless disclosure requirements are economically or otherwise unduly burdensome.¹⁹⁹⁷ His arguments are set in the American context regarding the rights to petition and to free speech. They should be equally applicable to the Canadian s. 3 context. He argues that to “the extent lobbying is considered to involve the right to petition, history favors disclosure, not anonymity.”¹⁹⁹⁸ Communication between lobbyists and decision-makers ought not to be private, so that

¹⁹⁹² *Harper v. Canada (Attorney General)*, *supra* note 53 at para 146.

¹⁹⁹³ *Ibid*; See also *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, *supra* note 1707 at para 56.

¹⁹⁹⁴ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 140. According to Halberstam's four levels of transparency, these stronger lobbying regulations would be a movement from the second level of transparency as regulation, to the third level, full transparency in regulation. Transparency in regulation is the concept that the public should be allowed to see and comment on rules as they are being crafted. This participation is not only a right, but also a means to improve the process and results. It is ideally a form of public participation that increases democracy. The levels are discussed in more detail in Chapter 2 – Understanding Lobbying in Canada and the U.S.: Transparency and Lobbying: Four Levels of Transparency, p. 129. See also, Michael Halberstam, “Beyond Transparency”, *supra* note 557 at 1022.

¹⁹⁹⁵ Elisabeth Bassett, *supra* note 979 at 1075.

¹⁹⁹⁶ *Ibid*.

¹⁹⁹⁷ William V. Luneburg, *supra* note 1739 at 17.

¹⁹⁹⁸ *Ibid* at 10.

the decision-maker can ensure that all potentially relevant information is available, and so that other members of the public have the opportunity to counter the arguments.¹⁹⁹⁹ Lobbying anonymity would grant some lobbyists' a substantially unfair or corrupting influence at a crucial point in the decision-making process.²⁰⁰⁰ Luneburg points out that in situations of confidentiality, sharing the information deliberately with a third party, to reap some benefit, removes that confidentiality. Since the officials work on behalf of the public, they cannot and should not be imbedded in that secrecy. Anonymity is important in general public speech; but when applied to lobbying, it can have seriously distorting effects on self-government.

Anonymity should not, therefore, be given any weight in the constitutional analysis of lobbying disclosure legislation to the extent the statute at issue focuses on the lobbyist-decision-maker sphere of speech."²⁰⁰¹

Luneburg's approach provides a different reason that lobbying disclosure rules would not infringe s. 3 (or s. 2(b)). By this understanding, there would be no infringement to be saved by s. 1 analysis.

As covered in Chapter 7, in campaign finance cases the Court has held that campaign funding disclosure requirements can infringe on the s. 2(b) right to free expression, since they force a donor to reveal their political donations. However, the Court upheld the disclosure requirements under s. 1, because they allow citizens to find out who is behind the advertising and contributing to political parties.²⁰⁰² By the mirror principle, should lobbying disclosure laws be held to infringe s. 3, it is likely they would be upheld on a similar basis in a s. 1 evaluation.

Citizens have a right to know who is trying to influence government, and for what ends. Stronger lobbying regulations would better fulfill this principle of government transparency.

S. 3 Principles: Conclusion

In summary, an inquiry into the s. 3 principles shows that to constitute an infringement of the right to vote, a regulation would have to alter the political institutions to reduce voter participation, prevent minority or group identity involvement, hamper access to representatives, or otherwise damage the guarantee of effective representation.²⁰⁰³ However, the robust lobbying regulations proposed in Chapter 10, of business lobbying limits and public support for citizen groups, would not infringe upon these principles. Instead, they would contribute to growing democracy by increasing democratic representation, group and cultural involvement, equality, meaningful participation, the resistance to corruption, and governmental transparency.

¹⁹⁹⁹ *Ibid* at 13.

²⁰⁰⁰ *Ibid*.

²⁰⁰¹ *Ibid* at 14.

²⁰⁰² *Harper v. Canada (Attorney General)*, *supra* note 53 at para 144.

²⁰⁰³ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 1880 at 183.

Haig Precedent on Referendum

Haig offers an interesting counter-point to the approach to s. 3 we have taken so far in the chapter. In theory, it could render the entire investigation of lobbying and s. 3 moot. For, *Haig* could stand as a challenge to the claim that lobbying law falls within the ambit of s. 3. In *Haig*, the Court held that the right to vote did not include the right to vote in a referendum, since ultimately referendums are merely advisory.

A referendum ... is basically a consultative process, a device for the gathering of opinions. Voting in a referendum differs significantly from voting in an election. First, unless it legislatively binds itself to do so, a government is under no obligation to consult its citizens through the mechanism of a referendum. ... Second, though a referendum may carry great political weight and a government may choose to act on the basis of the results obtained, such results are non-binding in the absence of legislation requiring a government to act on the basis of the results obtained.²⁰⁰⁴

If the Court considers lobbying as akin to a referendum, then it might conclude that lobbying, being merely informative, has little to do with the right to vote. In this view, lobbying law would not fall within the parameters of s. 3 and could not infringe it.

This would have two implications for lobbying law. The first implication is that stronger lobbying law is not at risk of infringing s. 3. Providing the law passes a s. 2 evaluation, as argued in the previous chapter, there is little concern about lobbying regulations being undermined by a s. 3 challenge. The second implication is that arguments supporting lobbying regulations could not rely on lobbying being an essential component of the s. 3 right to effective representation. Concerns about equality, fairness and anti-corruption would still be compelling. Yet, the argument in favour of fairness in lobbying is stronger if it is an essential component of effective representation. In *Harper* the Court held that,

by limiting political expression, the spending limits bring greater balance to the political discourse and allow for more meaningful participation in the electoral process. Thus, the provisions also enhance a second *Charter* right, the right to vote.²⁰⁰⁵

This link to the right to vote was an important factor in justifying deference to Parliament in the s. 1 test. The structural arguments of Dawood and Pal discussed shortly are also a more compelling approach to lobbying law if the Court concludes that lobbying regulation is an essential part of democracy.

It is quite likely that the *Haig* precedent would not apply to lobbying because referendums and lobbying are fundamentally different. Referendums are rarely used tools that survey the public's preference on a particular issue. Lobbying is an ongoing process that continuously provides key

²⁰⁰⁴ *Haig v. Canada (Chief Electoral Officer)*, *supra* note 1877 at 1032.

²⁰⁰⁵ *Harper v. Canada (Attorney General)*, *supra* note 53 at 86.

information, arguments, and preferences to officials. It is a core component of modern governance, and it is likely that the Court will treat it as such. Based on the realities of lobbying and the political science evidence of its impact, it is unlikely the Court would apply the *Haig* precedent to lobbying law.

Economic Welfare as a Justification for Lobbying Law

Hasen has argued that since lobbying has such a strong systemic distortionary effect on the economy and the national well-being, U.S. lobbying regulations can be justified on the basis of national economic welfare.²⁰⁰⁶ He maintains that when business lobbyists have significant influence, it results in significant economic harm to the nation's welfare. This harm comes from the business lobbyists' rent-seeking, their use of government to create economic monopolies, and their distorting influence over government taxation and spending. He did not include lobbying's tendency to create kludgeocracy, but it fits with the thrust of his argument. Kludgeocracy imposes another layer of harm and further reduces national competitiveness.²⁰⁰⁷ Lobbying thus results in a large competitive disadvantage with other nations.²⁰⁰⁸

The competitive disadvantage justifies limiting and controlling lobbying to promote national economic welfare.

The government's interest in promoting national economic welfare seems to be at least as strong as these other government interests. Especially if we give credence to Olson's concerns about the international competitive disadvantage of countries with high amounts of rent-seeking, the national economic welfare interest seems to be a variant of the government's indisputably compelling interest in maintaining our national security.²⁰⁰⁹

Hasen's approach is particularly relevant in the U.S., where the Supreme Court's jurisprudence does not accept the goals of equality and avoiding corruption as justifications for abridging free speech in campaign finance law.²⁰¹⁰ He acknowledges that the U.S. Supreme Court has not accepted economic welfare as a compelling government interest that could uphold a law against a free speech challenge.²⁰¹¹ He hopes that it might prove a viable path for upholding lobbying laws in the future. The current Court is

²⁰⁰⁶ Richard L. Hasen, *supra* note 1405 at 234.

²⁰⁰⁷ A Kludgeocracy is characterized by the messy complexity of its governance. Teles argues these governments have adopted jerry-rigged, opaque and complicated policy responses, due to the pressures of special interests. See Chapter 1 – Lobbying Regulation: Structural Political Difference that Impact the Practice of Lobbying: Differences: Kludgeocracy, p. 50.

²⁰⁰⁸ Richard L. Hasen, *supra* note 1405 at 226–235.

²⁰⁰⁹ *Ibid* at 241.

²⁰¹⁰ see *Buckley v. Valeo*, *supra* note 955; *Citizens United v. Federal Election Commission*, *supra* note 1021.

²⁰¹¹ Richard L. Hasen, *supra* note 1405 at 235.

unlikely to accept this reasoning. Still, it is promising for a future Court seeking to escape the shadows of *Buckley v. Valeo*²⁰¹² and *Citizens United v. Federal Election Commission*²⁰¹³.

Canada does not need the same concept of national economic welfare. Still, such arguments could be helpful. Economic welfare would provide additional s. 1 justification for strong lobbying legislation. There are substantial national benefits in avoiding rent-seeking, the quicksand of kludgeocracy, and the damage to taxation, to spending and to economic efficiency. The national economic welfare argument is also another argument in favour of lobbying regulations being comprehensive and cohesive. Otherwise, they cannot hope to prevent corporate rent-seeking and the deflection of government taxation and spending.

Structural Democratic Rights Paradigm

Dawood and Pal have each proposed a structural approach for the Court to take when evaluating democratic issues, as an alternative to the more traditional individual rights approach. This approach provides a context for how the Court should consider legislation that attempts to control the hydraulic pressure of private political influence. It also provides additional justification for strong lobbying regulation under a s. 1 test. The core value of the structural approach is that in cases involving components of democracy, the healthy functioning of democracy as a whole must be of concern. It is not just a matter of individual rights; there is an interest in enabling mechanisms that make the democratic system function better.

Structural rights have two facets: they have inherent value, and they have instrumental value because they are necessary for self-governance.

By considering each issue in isolation, a court risks removing a piece of the puzzle without turning its attention to the effect on the puzzle as a whole. ... Structural theorists merely argue that the court should apply a broader lens and pay attention to the effects of its potential decision on the functioning of the other pieces of the democratic puzzle.²⁰¹⁴

The structural approach would apply to cases involving democratic governance, whether the claim involved s. 3, s. 2 or other *Charter* issues. Dawood and Pal are deeply concerned with riding boundary and campaign finance decisions. Concerns about informational equality and third parties dominating electoral discourse are structural in nature. They impact the institutional outcome, not just the individual whose rights are at issue.²⁰¹⁵ Dawood argues that the s. 3 right to vote is structural. It

²⁰¹² *Buckley v. Valeo*, *supra* note 955.

²⁰¹³ *Citizens United v. Federal Election Commission*, *supra* note 1021.

²⁰¹⁴ Michael Pal, “Breakdowns in the Democratic Process and the Law of Canadian Democracy” (2011) 57:2 McGill Law J 299–347 at 322.

²⁰¹⁵ Yasmin Dawood, “Democracy and the Right to Vote”, *supra* note 933 at 289.

presupposes the existence of a broader institutional framework to make the election meaningful.²⁰¹⁶ By the mirror principle, lobbying is also an area where the structural approach applies. Lobbying works within a general institutional framework where small legal changes can have large effects on democratic outcomes.

Dawood builds on the theories of Gey, who argued that structural rights include constitutional provisions that protect freedom of speech, the separation of church and state, due process, equal protection, voting rights, the prevention of government overreach, and the allocation of power within the government.²⁰¹⁷ Dawood argues that

structural rights arise when: (1) the right presupposes an institutional framework without which the right cannot be exercised; (2) the right is framed in such a way that it accounts for how the broader institutional framework impacts the exercise of the right [e.g. threshold to be a registered party]; (3) the right is intelligible only with reference to a system-wide account of how power, fairness, or equality ought to be distributed; or (4) the right accounts for the ways in which the activities of other individuals or private entities affects the exercise of the right [e.g. third party spending limits].²⁰¹⁸

By her definition, the structural approach should equally apply to the question of lobbying law. It lies at the heart of democratic governance, involves questions of system-wide power and fairness, and involves private entities operating within and upon its institutional framework.

A deliberate adoption of the structural approach would assist courts in evaluating arguments about the proper scope of lobbying law. The structural approach provides another justification of why stronger lobbying law accords with the deep democratic values.

Contrasting Individual Rights Paradigm

Before further investigation of the structural approach, it is worth considering the alternative. Many legal scholars prefer the more traditional individual rights approach to democracy and law cases. They argue that the courts are experts in individual rights, not political theory and democratic systems. These scholars are concerned that the courts might focus on structural theory rather than the importance of individual equality. Pal states that,

the rights versus structure debate has been overblown in the American literature. There are important points of convergence, notably over the need to regulate self-interested behaviour. Structural theories do not claim that individual rights are

²⁰¹⁶ *Ibid* at 263.

²⁰¹⁷ *Ibid* n 58.

²⁰¹⁸ *Ibid* at 264.

irrelevant, or that it is group rights or the interests of the state that should be dominant in election law cases. Rather, I interpret them to be arguing that in assessing the meaning of the individual right, courts should be cognizant of the systemic impact of a seemingly small change in election law.²⁰¹⁹

Rights theorists point out that judicial review has limited ability to solve political problems, citing *Bush v. Gore*²⁰²⁰ as an example.²⁰²¹ This skepticism finds further support in the U.S. Supreme Court's decisions in the *Citizens United* and other recent U.S. democracy and law cases. However, these cases were decided by majorities that purported to hold to a narrow rights approach, often emphasizing literal originalist interpretations and the individual rights of corporations. The current Court majority is heavily pro-corporate, pro-wealthy in its rulings.²⁰²² Moreover, the individual rights approach, as exemplified in *United States v. Harriss*²⁰²³ and *Buckley*, has produced case law that makes controlling the hydraulic pressure of private influence practically impossible.²⁰²⁴ A structural approach cannot prevent bias, but it would have strongly favoured the minority position in *Citizens United* and the related line of cases. In *Harris* and *Buckley* it would have upheld the laws intended to protect the government from dependency structural corruption.

The structural approach provides a method for the Court to evaluate cases involving democratic issues cohesively. As Pal points out, the individual rights approach lacks a way of approaching laws where legislators change democratic rules for political advantage.²⁰²⁵ In contrast, the structural

²⁰¹⁹ Michael Pal, *supra* note 2014 at 321.

²⁰²⁰ *U.S. Reports*, *supra* note 1080.

²⁰²¹ Michael Pal, *supra* note 2014 at 309.

²⁰²² "We have long monitored big business's success in the Supreme Court by tracking cases in which the United States Chamber of Commerce submits friend-of-the-court briefs to advance its deregulatory agenda. The Chamber filed briefs in ten cases decided this Term, and it prevailed in nine of those cases. This remarkable 90% victory rate is the Chamber's highest in six years. All told, since Justice Samuel Alito joined Chief Justice John Roberts on the bench in 2006, the Chamber has won over 70% of its cases. That commanding record before the Roberts Court stands in sharp contrast to the Chamber's 56% success rate before the late Rehnquist Court (1994 to 2005) and its 43% success rate before the late Burger Court (1981 to 1986). [2] A year later, however, it's clear that Justice Gorsuch has been a sound return on investment for the business interests that cheered and bankrolled (often anonymously) the campaign for his confirmation. Of the 15 Chamber cases in which he has participated, Justice Gorsuch sided with the Chamber in 14, meaning that he has supported the Chamber with 93% of his votes. By comparison, the figures for the Court's more liberal members range from Justice Ginsburg's 46% up to Justice Kagan's 55%. Plainly, the corporate lawyers predicting last year that Gorsuch would advance the Court's "pro-business conservative trajectory" have been proven right—and then some." *A Banner Year for Business as the Supreme Court's Conservative Majority Is Restored*, by Brian R Frazelle (2018). Even the more left-wing Democratic appointed judges have become more business friendly. "[T]he Democrats on the Roberts Court vote in favor of business at significantly higher rates than Republican appointees in all the other chief justice periods since 1946. Because the current Democratic and Republican appointees support business at record levels, the fraction of unanimous pro-business decisions—what we call the Business Favorability Index—has never been higher." Lee Epstein, William Landes & Richard Posner, "When It Comes to Business, the Right and Left Sides of the Court Agree" (2017) 54:1 Wash Univ J Law Policy 033–055 at 36.

²⁰²³ *United States v. Harriss*, *supra* note 88.

²⁰²⁴ See Chapter 4 and Chapter 7 for a more detailed discussion.

²⁰²⁵ Michael Pal, *supra* note 2014 at 319.

approach provides an approach for handling private political influence. In these cases it should lead to better judicial decisions because it takes into account the wider repercussions on the democratic system.

We will consider Pal's structural approach rooted in election law, and then Dawood's structural rights approach.

Structural Rights – Pal

In *Breakdowns in the Democratic Process and the Law of Canadian Democracy*²⁰²⁶, Pal focuses on structural rights as they apply to election law.²⁰²⁷ Within this constrained domain, Pal's view of structural rights is rooted primarily on the issue of self-dealing by elected officials intent on reducing democratic competition. He refers to this as the competition approach. In his view, the courts should be highly skeptical of legislation that impacts democracy, and approach it with a low standard of deference. Pal summarizes the essential issue at play.

When the interests of representatives do not align with those of the electorate, one can reasonably worry that the interests of representatives will tend to be served at the cost of those of their constituents. Incumbents have a direct self-interest in the rules of the electoral game in a way that they do not in other areas, raising the chances of misaligned incentives.²⁰²⁸

Four Components of Competition Approach – Pal

Pal recommends the Court use a structural framework to address this risk of self-dealing in legislation involving democratic processes. The Court has to be vigilant, because small manipulations of the democratic process can have large electoral consequences.²⁰²⁹ These small changes might include adjustments to riding boundaries, primary ballot access, registration processes, IDs used for voter verification, and locations and hours of polling stations. For example, the legislation might alter voter identification rules to disallow the use of student ID but allow the use of concealed handgun license in order to gain a partisan advantage.²⁰³⁰

²⁰²⁶ Michael Pal, *supra* note 2014.

²⁰²⁷ Pal's intent was not to exclude the structural concerns that attach to other types of rights. John Hart Ely identified election law, laws affecting racialized minorities, and laws affecting religion as likely blockages in the political process for good reason. Thus he holds election law as a sub-category of a broader set of constitutional rights for which the political process is less likely to effectively protect. In all of these areas, the courts have a special role to play.

²⁰²⁸ Michael Pal, *supra* note 2014 at 319.

²⁰²⁹ *Ibid* at 306.

²⁰³⁰ Rebecca Leber, "In Texas, You Can Vote With a Concealed Handgun License—but not a Student ID" *New Republic* (20 October 2014), online: <<https://newrepublic.com/article/119900/texas-voter-id-allows-handgun-licenses-not-student-ids>>.

These rules cannot be left for the political system to work out on its own, because they alter the working of the system. After such changes, the resulting political leadership lacks legitimacy. It is imperative for the Courts to prevent such changes, if possible.

A majority constituted on unfair electoral grounds is not a legitimate majority. Legitimacy in a democracy is partly determined by elections. If unaccountable to the actual preferences of the electorate because of the manipulation of electoral rules, a legislative body's enactments cannot be equated with the preferences of the electorate. The primary rationale against judicial review of election law is therefore significantly weakened.²⁰³¹

Judicial review should take into account how politicians might impair electoral competition in order to stay in power.²⁰³²

[T]here are four main features of the competition approach: (1) a view of the state as perpetually subject to capture by self-interested incumbents; (2) a claim that a singular focus by courts on the constitutional harm to the individual claimant is insufficient for election law because the real concerns to be addressed are systemic harms; (3) a normative valuation of electoral competition as the best guarantor against self-interested lock-ups of the political process by incumbents; and (4) an adoption of a minimalist version of democracy as the baseline level for interventions to break up lock-ups of the process.²⁰³³

1: The State is Subject to Capture

The first feature is commonly visible in democratic legislation. Pal points out that the leading determinant of whether a governing party will enact electoral system change is whether it will gain seats in the next election.²⁰³⁴ This demonstrates how partisan consequences often guide election law reform. In the U.S., many states have altered election law for partisan advantage. Pal argues that the same was true of Prime Minister Harper's electoral legislation, which contained several changes that advantaged his ruling party.²⁰³⁵ However, the story is not always straightforward. The electoral legislation contained changes that improved democracy, like lowering the donation limits, and changes that harmed democracy, like removing the per-vote electoral subsidy.

²⁰³¹ Michael Pal, *supra* note 2014 at 326.

²⁰³² *Ibid* at 319.

²⁰³³ *Ibid* at 305.

²⁰³⁴ *Ibid* at 307.

²⁰³⁵ *Ibid*.

2: The Real Concerns to Be Addressed Are Systemic Harms

The second feature is the consideration of systemic harms. This is the most fundamental feature for evaluating lobbying law. The changing rules in areas of democratic decision-making can have downstream consequences that the courts should take into account. Pal notes how the U.S. Supreme Court's decision on campaign finance also affected lobbying.

Eliminating the ban on corporate spending during election campaigns, as the US Supreme Court recently did in *Citizens United v. Federal Election Commission*, for example, has the potential to augment the leverage of lobbyists, who can threaten corporate spending against an incumbent. On a structural view, what was truly at stake in *Citizens United* went far beyond the specific issue of corporate spending.²⁰³⁶

It is for this reason that counsel in such cases should consider providing the court with a record that demonstrates the likely downstream consequences of striking down sections of the legislation. The record should include the likely paths that private political influence might take to influence political decision-making in reaction to the potential judgment. This will equip the Court to make a decision that includes essential structural considerations.

3: Electoral Competition Maintains Electoral Accountability

Pal maintains that the third component of structural theory is that electoral competition is the most effective way to maintain electoral accountability.²⁰³⁷ Incumbents often attempt to protect themselves by altering the rules to improve their re-election chances. Upholding competition – preventing incumbents from rigging the game in their favour – upholds political accountability.²⁰³⁸

The equivalent competition within the field of lobbying would be the competition for influence. The competition between lobbying groups is essential to bring new information to officials – information that is often too specialized to be provided by civil servants.²⁰³⁹ As in election law, when the competition between lobbying groups is not fair, political accountability and decision-making suffers. We have discussed how lobbying regulations should function to create a competitive marketplace of ideas and policy options.²⁰⁴⁰ As we covered about the real market in Chapter 6, marketplaces need good regulations to produce good outcomes. Otherwise they are subject to phishing.²⁰⁴¹ Bassett argues,

²⁰³⁶ *Ibid.*

²⁰³⁷ *Ibid* at 308.

²⁰³⁸ *Ibid.*

²⁰³⁹ The information provided by lobbyists becomes all the more important if the government has experienced a (potentially deliberate) decline in informational capacity. See Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern III: Lobbying Creates an Information/Framing Bias: Capacity Cutting Makes Government More Receptive to Lobbying, p. 177.

²⁰⁴⁰ A political party might favour certain approaches and policies, but ideally it should be doing so within a lobbying system that provides a wide variety of views and information, so the party is making the best decision it can make within the constraints of its own preferences and election promises.

²⁰⁴¹ See Appendix: List of Theories: Phishing.

interest groups can be seen as an obstacle to a well-functioning democracy, even outside of concerns about corruption. Although the number and diversity of interest groups have dramatically increased, the central view to which these groups adhere is fairly narrow because of how they are managed and funded. Allowing this narrow segment a greater voice in the legislative process can result in decisions that are contrary to the public good.²⁰⁴²

In computer science and audio engineering there is an expression: *garbage in, garbage out*. If the government is essentially soliciting bad (or bias) informational inputs, then no matter how pristine the decision-making process, it will generate bad (or bias) outputs: garbage in, garbage out. If government favours the voices of the wealthy business interests, it will enact policies that do not benefit the majority of citizens, and sometimes actively harms them.

Two examples can demonstrate these harms: the anti-regulation policies lobbied for by the American Legislative Exchange Council [ALEC], and the pro-pollution, pro-climate heating policies lobbied for by the Canadian oil industry.

ALEC is an extremely influential U.S. organization of conservative legislators and business representatives that drafts and shares model legislation for state governments. It is essentially a cross between an ideologically-based think tank and a lobbying group pushing pre-packaged conservative legislation. In support of its lobbying work, it published a yearly economic competitive outlook ranking. This outlook purported to show which states were the most likely to prosper, based on their adherence to ALEC's low-tax, low-regulatory-oversight lobbying agenda. Fisher *et al.* found that not only was ALEC's work riddled with faulty logic and misrepresented studies, but that the agenda is actively harmful to the populace, increasing inequality, and transferring more wealth to the top 1% while doing nothing for overall economic growth.²⁰⁴³

The more a state's policies mirrored the ALEC low-tax/regressive taxation/limited government agenda, the lower the median family income; this is true for every year from 2007 through 2011; ... the better a state did on the ALEC Outlook Ranking, the more family income declined from 2007 to 2011. The correlation, -.30, is statistically significant. The story repeats itself when we consider state poverty rates. The more a state followed the ... policies, the higher its poverty rate, every year from 2007 to 2011.²⁰⁴⁴

States aligning themselves with ALEC's policies were not only failing to see the growth the lobbying organization promised, its advice was actively hurting the state's populace.

²⁰⁴² Elisabeth Bassett, *supra* note 979 at 1063.

²⁰⁴³ Peter Fisher, Greg LeRoy & Philip Mattera, *supra* note 806 at ii.

²⁰⁴⁴ *Ibid* at 4.

The Albertan fossil fuel industry is an example of a sector that has lobbied for policies that offload large harms and costs to the public. Despite significant public subsidies, the industry has avoided paying for the health, climate effects and clean-up costs of its pollution.²⁰⁴⁵ Alberta's Energy Regulator has estimated that just the physical clean-up costs of the tar sands pollution could reach \$260 billion.²⁰⁴⁶ The industry has not and is not required to set aside the funds to cover these costs until after the company closes, in which case it might well be bankrupt.²⁰⁴⁷ This loophole is likely a result of lobbying.²⁰⁴⁸

²⁰⁴⁵ It has also faced no government or legal repercussions for its 50-year campaign of deceptive climate change denial, even though this delay will ultimately cost trillions of dollars, could wipe out entire cities, will put much of the life on Earth at risk, and will likely kill hundreds of millions of people. David Wallace-Wells, *supra* note 11 at 7. See also, See also, John Cook et al, *supra* note 30 at 4.

²⁰⁴⁶ This figure does not include the massive future costs of the climate change fueled by Alberta's oil industry. Mike De Souza et al, "Cleaning up Alberta's oilpatch could cost \$260 billion, internal documents warn | Globalnews.ca", (1 November 2018), online: *Glob News* <<https://globalnews.ca/news/4617664/cleaning-up-albertas-oilpatch-could-cost-260-billion-regulatory-documents-warn/>>.

²⁰⁴⁷ It is not uncommon for industries to spin off new companies to inherit the clean-up and pollution liabilities. Additionally, many oil companies have closed without putting away funds to cover the oil sands clean-up costs. Regan Boychuk, "Who should pay to clean up the oil patch's Alberta mess?", (31 March 2017), online: *Can Natl Obs* <<https://www.nationalobserver.com/2017/03/31/analysis/who-should-pay-clean-oil-patches-alberta-mess>>.

²⁰⁴⁸ The evidence of the influence of the oil industry on Alberta politics is substantial. The decisions to structure the cleanup costs so that oil companies do not need to put the money away while they are profitable is otherwise baffling.

"In recent years, the number of orphan wells designated for abandonment has climbed from fewer than 800 to more than 2,000, according to industry data. This number appears likely to continue climbing, according to Wadsworth's presentation."

Mike De Souza et al, *supra* note 2046. Meanwhile, the industry is lobbying the federal government to cover the costs of cleaning up the wells and land.

"Last year, the oilfield service lobby asked for half a billion federal dollars to clean up old wells, but the Trudeau government demurred. Rebranded as a half-billion dollar 'loan' this year, the Petroleum Services Association of Canada's request had the support of the Alberta government, but did not find it's [sic] way into the federal budget. Instead, the world's richest and most powerful industry will get \$30 million in federal dollars to clean up wells whose owners have gone bankrupt."

Regan Boychuk, *supra* note 2047. Even when a site is cleaned up, the government is failing to make sure that it is cleaned up properly. It is allowing the industry to get certification with little verification.

"[A] previously unreleased report commissioned by the Alberta government that raises red flags about whether the government's own program to ensure oil and gas sites are cleaned up is actually working in the long term. The 55-page report ... cites "mounting evidence" that Alberta's land reclamation program is not ensuring former oil and gas sites meet regulatory requirements in the long run, and instead confirms that, of the sites studied so far by an internal government pilot project, all but one failed to meet the government's standards. ... [R]eleasing the report was "seen as an extreme risk to the department" and that there was "extreme pushback" against it being made public."

Sharon J Riley, "Report 'buried' by Alberta government reveals 'mounting evidence' that oil and gas wells aren't reclaimed in the long run", (23 January 2020), online: *The Narwhal* <<https://thenarwhal.ca/report-buried-by-alberta-government-reveals-mounting-evidence-that-oil-and-gas-wells-arent-reclaimed-in-the-long-run/>>.

The industry's federal lobbying on orphan wells paid off. In April 2020, The Trudeau government announced \$1.7 billion to clean up orphan oil wells as part of the coronavirus stimulus package. Caley Ramsay, "Trudeau announces \$1.7B to clean up orphan wells in B.C., Alberta, Saskatchewan", (17 April 2020), online: *Glob News*

4: *Minimal Standard is the Peaceful Transfer of Power*

The fourth component of competition theory is the peaceful transfer of power between elites. If this fails, it is doubtful that the other components of responsible democratic government will last. Thus competitive elections are a minimal essential component of a democratic society.²⁰⁴⁹

Applying this principle to lobbying, it indicates that robust regulations should encourage change in the voices lobbying government. Just as we have rules designed to prevent the domination of elections by a few politicians, and antitrust laws to prevent the domination of the marketplace by a few large businesses, strong lobbying laws should prevent the domination of the lobbying agenda by a few large lobbyists. Otherwise, if new leaders are receiving much of the same pre-filtered information and arguments, they are likely to come to similar decisions as the old leaders, particularly in low-salience areas. This is not as bad as a lack of competition in elections, but it is the same type of damage.

It is likely that if there were real competition in lobbying, we would see more fluctuation in the prominence of different lobbying organizations over time. Instead, the evidence indicates that the same industry lobbying groups continue to dominate the agenda.²⁰⁵⁰ This is likely a combination of spending, experience, and social connections.²⁰⁵¹ Just as a democracy is unhealthy when only the same rich elites can compete in elections, it is unhealthy when only the same rich business organizations can compete in lobbying. Strong lobbying regulations would help open the door for more competition between lobbying groups.

We have considered Pal's four factors of structural competition, and how they relate to lobbying. These are (1) the risk of capture by the incumbents; (2) the consideration of systemic harms; (3) the need for a fair marketplace of lobbying competition for political accountability; and (4) the need for the transfer of power between different lobbying groups over time. Now we will consider how democratic competition can breakdown.

Three Entrenchment Breakdowns – Pal

Pal argues that,

<<https://globalnews.ca/news/6832608/coronavirus-trudeau-alberta-bc-saskatchewan-energy-industry-orphan-well-cleanup/>>.

²⁰⁴⁹ Michael Pal, *supra* note 2014 at 308.

²⁰⁵⁰ Frances E Lee & Nolan McCarty, eds, *Can America Govern Itself? edited by Frances E. Lee* (Cambridge University Press, 2019).

²⁰⁵¹ The top tier of lobbying organizations, "are analogous to the current generation of very wealthy families who now pay for every conceivable tutor so that their children can be advantaged in applying to elite prep schools and colleges, which are now more and more essential to getting ahead in our increasingly economically stratified society. In both circumstances, financial resources and social connections build up over time, reinforcing stratification. Money does not guarantee outcomes. But it helps reinforce inequalities by widening the gap between the very top and everyone else." *Ibid.*

[the] structural approach to the law of democracy suggests that we should be skeptical of appeals by incumbents to abstract values such as democratic stability when the particular law under consideration aids incumbents.²⁰⁵²

He proposes three types of breakdowns in democratic competition: partisan; incumbent; and interest entrenchment.²⁰⁵³ A discerning court will consider these factors when evaluating arguments about democratic legislation.

Partisan Entrenchment Breakdown

A partisan breakdown occurs when a governing party passes legislation that distorts the democratic process to gain advantage over its competitors.²⁰⁵⁴ Whoever is in power will always have some incentive to do this. This has become a significant problem in many nascent democracies, and even in some parts of the U.S.²⁰⁵⁵

The direct equivalent to partisan entrenchment in lobbying is when officials push lobbying organizations to become partisan supporters in order to be heard.²⁰⁵⁶ A small amount of favour towards party supporters is to be expected. However, it is an unhealthy step towards one party rule when those petitioning the government are forced to adopt the partisan leanings of the ruling party. Lobbying is also indirectly tied to partisan entrenchment. As covered in Chapter 3– Understanding Lobbying in Canada and the U.S., lobbying strengthens the partisan entrenchment of the political parties associated with business interests.²⁰⁵⁷

Incumbent Entrenchment Breakdown

An incumbent breakdown occurs when a majority of existing representatives cooperate across parties to advantage themselves against would-be challengers.²⁰⁵⁸ An example of incumbent entrenchment can be found in *Figueroa*, where the Canadian campaign rules favoured the more established parties.²⁰⁵⁹ Although the Court did step in, Canada’s use of the first-past-the-post voting

²⁰⁵² Michael Pal, *supra* note 2014 at 338.

²⁰⁵³ *Ibid* at 333.

²⁰⁵⁴ *Ibid*.

²⁰⁵⁵ Many extreme right-leaning parties have entrenched their electoral advantages through control over the media and the judiciary, and by enacting anti-democratic legislative and constitutional changes. For example, anti-democratic authoritarianism is on the rise in the Brazil, Hungary, Poland, Serbia, Montenegro and Turkey. Freedom House, *supra* note 5 at 10. The Economist Intelligence Unit, “Democracy Index 2016”, (2017), online: *The Economist* <https://www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex2016>.

²⁰⁵⁶ For example, the K-Street Project was intended to push for Republicans-partisans to be promoted to the top of lobbying organizations, and then use that to push for more lobbying support for Republicans and right-leaning policies.

²⁰⁵⁷ The political parties more favourable to business interests will generally be furnished with more campaign, lobbying and resource support, giving them an advantage in the election. This is particularly likely where campaign financing is loosely regulated and the media is more heavily concentrated.

²⁰⁵⁸ Michael Pal, *supra* note 2014 at 336.

²⁰⁵⁹ *Ibid* at 337.

system continues to favour the larger parties. Smaller parties are disadvantaged, despite being a necessary component of democracy.²⁰⁶⁰

There is a form of incumbent entrenchment present within American lobbying. As mentioned, there is significant entrenchment of the top tier lobbying organization. 90% to 95% of the top 100 lobbying associations and firms represent business interests. These top 100 lobbying associations contain less than 0.89% of the 11,000+ registered lobbying groups, but have at least 33% of the in-house lobbyists and hire about 20% of the contract lobbyists from multi-client firms in Washington.²⁰⁶¹ It is unlikely that the situation is as extreme in Canada, but the same pattern of dominance by a few large players in a handful of industries seems to hold.²⁰⁶² The current regulations do nothing to prevent the lobbying entrenchment of large corporations and other economic winners.²⁰⁶³

Interest Entrenchment Breakdown

The third type of breakdown is the interest entrenchment breakdown. This occurs when a set of viewpoints, interests and opinions are disadvantaged, rather than a particular electoral competitor.²⁰⁶⁴ The interest breakdown overlaps with the incumbent breakdown, but the focus is specific interests, rather than specific competitors for power. This agreement across political parties to suppress particular interests can create a facade of political harmony, when in reality they have suppressed contesting viewpoints.²⁰⁶⁵

Pal argues that it is not always easy to assess whether there is an interest entrenchment.

The line between what is an illegitimate freezing of political power and what is simply a legitimate legislative precommitment pact required to bring parties with different interests together is a fine one. To some extent, all governments seek to entrench their policy preferences over time.²⁰⁶⁶

²⁰⁶⁰ *Ibid.*

²⁰⁶¹ Frances E. Lee & Nolan McCarty, *supra* note 2050.

²⁰⁶² Maclean's, *supra* note 42; Daniel Cayley-Daoust & Richard Girard, *supra* note 2 at 4.

²⁰⁶³ See Chapter 2 and Chapter 6. Inequality in Canada has been increasing, and this appears to be driven by political decisions. For example, the corporate tax rate in Canada has declined, which increases the income of wealthy shareholders. Around 80% of corporate tax cuts go to the wealthy shareholders. This is undoubtedly related to successful corporate lobbying. James R. Nunns, *supra* note 866 at 15; Trading Economics, *supra* note 1622; Armine Yalnizyan, *supra* note 846 at 12.

²⁰⁶⁴ For example, the interests of the poor, and of minority racial and religious groups have historically been under-represented in most democracies. Another common interest entrenchment breakdown is the over-representation of specific states. Canada's allocation of seats undervalues voters in Ontario, Alberta and BC, and overvalues rural voters over urban voters. Michael Pal, *supra* note 2014 at 342.

²⁰⁶⁵ Much of the seemingly low political partisanship in the U.S. from the end of WWII to the early '60s seems to have been the result of both parties colluding to disenfranchise black citizens.

²⁰⁶⁶ Michael Pal, *supra* note 2014 at 340.

There is a clear equivalent to the interest breakdown in lobbying, visible in the entrenchment of the preferred policies of large business interests. It benefits interests and issues that have the most monetary support, like the concerns of the oil, banking, and pharmaceutical industries.

Structural Approach in *Harper, Figueroa* and *Sauvé* – Pal

Pal maintains that there are already hints of this structural approach in *Harper, Figueroa* and *Sauvé v. Canada*²⁰⁶⁷.

He contends that Chief Justice McLachlin and Major's J. dissent in *Harper* came close to a competition analysis, by expressing concern that the spending limits might be a means to protect incumbents.²⁰⁶⁸ There is merit to his position. However, recent political science evidence indicates that spending limits actually advantage the challenger and lead to more electoral competition.²⁰⁶⁹ The dissenting position would have punched a hole in the campaign finance laws, creating systemic harm and actually decreasing electoral competition.²⁰⁷⁰ There are equivalent elements of a structural approach in the majority judgment related to the capture of election by the wealthy, systemic harms, and maintenance of electoral competitiveness.²⁰⁷¹

Pal argues that there are structural elements in *Figueroa*, where the Court struck down the requirement that a party must field fifty candidates to make official registered status. He notes that the concurring opinion acknowledged the political parties might manipulate the electoral rules, implying the rules were designed to harm the smaller competing parties.²⁰⁷² He does not regard the majority's concern that the provisions impacted the individual voter's participation in the election as a structural decision.

In *Sauvé*, the Court was concerned about the legitimacy of a legislature selected by an electorate that deliberately excluded a group of citizens. Pal maintains that this was a major step in the jurisprudence "because it showed the potential for the democratic process to be flawed."²⁰⁷³ In his view the Court failed to go further and recognize the ongoing risk that those in power "will diminish their accountability to the electorate by disenfranchising voters likely to be hostile to them."²⁰⁷⁴

²⁰⁶⁷ *Sauvé v. Canada (Chief Electoral Officer)*, *supra* note 1878.

²⁰⁶⁸ Michael Pal, *supra* note 2014 at 311.

²⁰⁶⁹ When there are no spending limits, the pool of candidates shrinks, and wealthy candidates with ties to wealthy backers are more likely to run and to win. Alexander Fourinaies, *supra* note 1029 at 22; See also Kevin Milligan & Marie Rekkas, *supra* note 1027.

²⁰⁷⁰ See Chapter 4 for a discussion of campaign finance laws.

²⁰⁷¹ The majority expresses concern that individuals have an equal opportunity to participate in the election, the electorate can hear from all groups, the parties have an equal chance of presenting their viewpoint, the wealthy not dominate the election, and that electoral expenses do not escalate uncontrollably. *Harper v. Canada (Attorney General)*, *supra* note 53 at paras 62, 80, 81 & 109.

²⁰⁷² Michael Pal, *supra* note 2014 at 314.

²⁰⁷³ *Ibid* at 315.

²⁰⁷⁴ *Ibid*. Although the Canadian Supreme Court has barred the most direct ways of disenfranchising voters, there are still indirect methods such as variation in riding size, demands for voter ID, and the cancellation of government run voter turn-out campaigns. In contrast, steps to enhance voter power and fairness might include: lowering the

Competition versus Private Power

Pal puts great stress on competition and self-dealing. In his later work, *Democratic Rights and Social Science Evidence*²⁰⁷⁵ he suggests a higher standard of s. 1 social science proof for cases involving democratic rights than the Court has used.

A more rigorous justification analysis than the Court adopted in *Harper* or *Bryan* that requires a higher standard of social scientific proof is appropriate. ... Demanding too high a degree of scientific certainty would lead to paralysis and a lack of regulation where it may be needed. Carving out democratic rights as requiring a higher degree of proof, however, is an appropriate measure given their core or fundamental nature and the risk of self-dealing by governments.²⁰⁷⁶

Pal argues in favour of a minimalist approach to structural review that focuses on democratic competition.²⁰⁷⁷ The downside is that it can discount the systemic issue and the risk of private power influencing public governance.²⁰⁷⁸ It might be better if the Court maintains a differential attitude on these issues, even at a slight cost to competition. The Court's decisions can be extremely difficult to revisit. For example, *Buckley* and *Citizens United* have blocked virtually all future attempts at campaign finance reform.²⁰⁷⁹

Structural Paradigm and Independent Officers of Parliament

Canada currently has a number of independent officers of Parliament, who are explicitly non-partisan. These positions stand outside the executive and the bureaucracy, reporting directly to Parliament. They are intended to reduce self-dealing, political interference, and the chance of scandal.²⁰⁸⁰

voting age to 16; making the election day a holiday; making voting mandatory; increasing the priority of riding size parity in the instructions to the boundary commissions; replacing the first-past-the-post voting system with one that was more proportional (like mixed-member-proportional); reinstating the per vote funding to the parties; lowering the third-party campaign spending limit; and strengthening lobbying law.

²⁰⁷⁵ Michael Pal, "Democratic Rights and Social Science Evidence" (2014) 32:2 Natl J Const Law Scarb 151–171.

²⁰⁷⁶ *Ibid* at 169.

²⁰⁷⁷ Michael Pal, *supra* note 2014 at 327.

²⁰⁷⁸ Pal might apply the concern about competition to lobbying in a different fashion, focusing on the concern that the current status quo of lobbying represents a decline in competition, and the court should favour robust lobbying regulation because it increases competition.

²⁰⁷⁹ For details, see Chapter 7. The political scientist Bernstein summarizes the situation like so, "that ruling was pretty much the whole ballgame on campaign finance... Since then, regulatory efforts have focused on finding ways to erect walls to make unlimited money, well, difficult to use." Jonathan Bernstein, "Our Pointless, Futile Campaign Finance Regulation", (18 February 2014), online: *Bloomberg* <<http://www.bloomberg.com/news/2014-02-18/our-pointless-futile-campaign-finance-regulation.html>>.

²⁰⁸⁰ Yalkin and Baud discuss methods to address concerns about the partisan affiliations of officials in these positions. They suggest that the regulations could require "agents to disclose aggregate statistics on the number and seniority of employees who have held politically partisan positions or, in some cases, the same characteristics

Pal argues that the Court should show added deference in areas where independent officers are appointed.²⁰⁸¹ By the reasoning of structural democracy, there is a reduced chance that the officer is trying to give one party a competitive advantage. Simultaneously, the independent officer removes the self-interested decision from the legislators' own hands. Thus, the Court should be more lenient with rules and regulations promulgated by independent officers. Considering that the Commissioner of Lobbying is an independent officer, the Court should treat rules proposed by the office with deference. New lobbying legislation might warrant similar deference insofar as it vests more power in the Commission of Lobbying, indicating that it is not intended to give any particular party an advantage.

Independent officers are creations of regular legislation, and they can be dismantled by regular legislation, as Premier Ford's government has recently demonstrated in Ontario. They can also be sabotaged by the appointment of partisan overseers. The dismantling or curtailing of an independent officer's power in areas of legislative self-interest is a strong indication of self-dealing. The Court should be particularly skeptical of the legislation that eliminates these independent officers and consolidates the power into the hands of the government.

Structural Bundles of Rights Approach – Dawood

Dawood proposes a somewhat different approach: a structural bundle of rights paradigm. In her view, the structural approach holds that the Court should use system-wide solutions to resolve democratic problems that cause little harm to any single individual, but deep structural harm to the democratic representation itself.²⁰⁸² She argues that the Court can use individual rights as the basis to resolve these challenges.²⁰⁸³ "Structural rights are individual rights that take into account the broader institutional framework within which these rights are defined, held, and exercised."²⁰⁸⁴ Democratic rights can be understood as a bundle of overlapping rights. She maintains that the Court can use this bundle of democratic rights to justify the necessary systemic component of the decision.

While Pal leans towards low deference in his approach, Dawood leans towards more deference to Parliament in her approach. She is aware of the difficulty the courts face in finding the appropriate balance.

If the courts are not deferential enough, they run the risk of imposing their vision of democracy on the political process; if, however, courts are too deferential, they run the risk of allowing legislative lock-ups [entrenchment] to occur.²⁰⁸⁵

of specific teams undertaking specific, politically-sensitive work." Tolga R Yalkin & Patrick F Baud, "Nonpartisanship of Agents of Parliament: Bill C-520's Redundant and Likely Unconstitutional Approach" (2014) 23:3 Const Forum 7–17 at 13.

²⁰⁸¹ Michael Pal, *supra* note 2014 at 346.

²⁰⁸² An example of this sort of issue is partisan gerrymandering.

²⁰⁸³ Yasmin Dawood, "Democracy and the Right to Vote", *supra* note 933 at 268.

²⁰⁸⁴ *Ibid* at 255.

²⁰⁸⁵ Yasmin Dawood, "Judging Democracy" (2009) 8:2 Election Law J 141–146 at 142.

Bundle of Rights – Dawood

Dawood argues that the Canadian Court has adopted a bundle of rights approach to the law of democracy, recognizing multiple overlapping democratic rights. This leads to a democracy jurisprudence with cases that are at times inconsistent with one another, due to the inherent challenge of arbitrating between sometimes conflicting rights.²⁰⁸⁶ Some of the internal tensions are the unavoidable result of contradictions between competing values in different rights. Yet, the results are not primarily contradictory. The jurisprudence strengthens democracy by upholding all these rights together. Like forming a rope, the threads of the individual rights weave together into a stronger whole, capable of bearing the weight of societal decision-making.

Dawood argues that the Court has used the structural rights approach in the multitude of judgments that take into account various impacts on democratic institutions.

The Court's theory of democracy is notable for its inclusion of a number of principles and values, including legitimacy, participation, deliberation, equality, and dissent. In addition, the Court is attentive to the fundamental role played by the legal framework in both constituting and fostering democratic institutions and values.²⁰⁸⁷

The Supreme Court's decisions have expanded the s. 3 right to vote to cover a wider bundle of democratic rights. This substantive interpretation breathes life into the right to vote. It demonstrates a way that the Court is already using a structural rights approach.

By diversifying the right to vote so that it includes additional democratic rights, the Court has developed a set of sophisticated jurisprudential tools with which to regulate the democratic process. The Court's attention to the structural dimension of democratic rights not only enables it to respond to the individual and institutional aspects of democracy, it also sheds fresh light on the nature of democratic rights.²⁰⁸⁸

Dawood argues that the bundle of democratic rights consists of four essential rights: (1) the right to effective representation; (2) the right to meaningful participation; (3) the right to equal participation; and (4) the right to a fair and legitimate democratic process.

Dawood argues that the first two rights (effective representation and meaningful participation) are grounded solidly in s. 3. These rights are both forms of structural rights that the Court used to "regulate democratic participation, the structure of political representation, the rules governing political

²⁰⁸⁶ Yasmin Dawood, "Democracy and the Right to Vote", *supra* note 933 at 295.

²⁰⁸⁷ *Ibid* at 259.

²⁰⁸⁸ *Ibid* at 295.

parties, and the redrawing of electoral boundaries.”²⁰⁸⁹ Electoral disputes adjudicated in light of s. 3 are inherently systemic, concerning questions of how power is to be distributed across groups and institutions in the democracy.²⁰⁹⁰ The right to effective representation also includes the right to equal participation and the right to a free and informed vote.²⁰⁹¹

The latter two rights (equal participation and fair process) are also connected to s. 3, but heavily informed by decisions made about secs. 2(b) and 15. The right to equal participation provides a good example of how the structural rights contain individual aspects.²⁰⁹²

The right to participate in the electoral process is understood within a larger systemic account of the distribution of wealth and political power in society. In sum, the right to equal participation is structural because it is based on the idea that an individual’s rights are affected by how other individuals exercise their democratic rights and by the institutional framework within which these rights are exercised.²⁰⁹³

Dawood’s four essential rights connect to our earlier discussion of democratic principles, showing an essential link between the two concepts. The rights of individuals flow from these democratic principles, while also depending on the institutional structures of the democracy. These rights can be used as tools to uphold the structural strength of the democracy. At the same time, the structural approach can inform the interpretation of these rights. “As the Court recognized in the *Secession Reference*, democracy has both individual and institutional aspects.”²⁰⁹⁴ By using this bundle of rights flexibly, the Court can and has regulated the structural dimension of rights through the use of an individual rights regime.²⁰⁹⁵

Dawood argues that *Harper*, *Figueroa* and *Sauvé* all incorporate systemic reasoning, coming to conclusions that uphold the various democratic institutions at issue. Unlike Pal, she believes that all three cases were decided correctly on the merits, and that the majorities all used implicit structural reasoning in coming to their decisions. She argues that there is room for the Court to use the structural rights approach more deliberately, thereby highlighting the systemic nature of democratic rights. This would help guide officials, lower courts and scholars. Yet, Dawood believes the Canadian approach is already successful enough that it is a useful paradigm for other jurisdictions.

This approach is a good roadmap for how the Court should tackle other issues at the core of democracy, like stronger lobbying regulations. As we covered above, lobbying is deeply tied to the same

²⁰⁸⁹ *Ibid* at 269.

²⁰⁹⁰ Yasmin Dawood, “Democracy, Power, and the Supreme Court”, *supra* note 956 at 271.

²⁰⁹¹ Yasmin Dawood, “Democracy and the Right to Vote”, *supra* note 933 at 255.

²⁰⁹² *Ibid* at 284.

²⁰⁹³ *Ibid* at 285.

²⁰⁹⁴ *Ibid* at 262.

²⁰⁹⁵ *Ibid* at 256.

democratic principles, and is reliant on the same government institutions. Stronger lobbying law aligns both with the deep democratic principles and the structural rights approach. Robust lobbying laws would help build institutional strength and foster effective representation. Applying Dawood's systemic approach, stronger lobbying laws are unlikely to infringe s. 3. Despite a few individual conflicts, on the whole, robust lobbying law aligns with the bundles of democratic rights rooted in s. 3.

Pal's and Dawood's Approaches

Pal's and Dawood's structural rights paradigms deliver a deeper notion of the connection between democratic rights and robust lobbying law. For lobbying regulations, Pal's approach is informative, but places too much emphasis on self-dealing. It is better to build on Dawood's structural bundle of rights approach, with an awareness of the issues that Pal raises.

Pal's Approach

Pal's approach to structural rights presents a clear standard of evaluation to prevent legislators from entrenching themselves in office. He argues that the courts should be less deferential when the policy is intended to favour political entrenchment or to decrease democratic representation. Changes that roll-back democracy and citizens' ability to affect politics must be carefully considered. He argues that the Court should apply a lower standard of deference when evaluating the government's social science evidence. It can be difficult to prove when legislation is intended to be a form of self-dealing.²⁰⁹⁶ Pal's focus on the competitive structure of the democracy can be a useful tool to help determine when politicians are entrenching themselves in power.

Pal's concern about self-dealing can be applied to lobbying. Lobbying legislation could be used as a political tool to harm opposition parties, accrue power, shut out certain citizen groups, garner campaign donations, or gain influence over lobbyists and donors. Yet, Pal's approach was intended for election law, and there are good reasons that the Court should not apply Pal's lower standard of deference directly to lobbying legislation. The four reasons for this are that (i) self-dealing is not as large a threat in lobbying, (ii) there is an acceptable level of self-dealing involved in many democratic reform, (iii) lobbying legislation is hard to enact, and (iv) a lower standard of deference could threaten the cohesiveness of the legislation.

(i) Self-Dealing Is Not as Large a Threat in Lobbying

It is easy to over-emphasize the problem of self-dealing. Lobbying is an exercise of private power. The more likely abuse of power regarding lobbying is that a political party rolls back lobbying regulations as a favour to key business organizations, so they can exercise private influence with less oversight. On the whole, active self-dealing in lobbying law is not as big a threat to democracy as self-dealing in campaign law, because it is less directly related to a party's ability to hold onto power. In

²⁰⁹⁶ For example, many tax deductions and programs have sunset clauses, on the reasonable justification that they should not continue beyond the circumstances they were intended to address. Yet, Lessig argues that Congress often favours sunset clauses because they force the beneficiaries and their lobbyists to return to their representatives yearly with requests for extensions. This in turn generates perennial favours and campaign donations for the politicians. Lawrence Lessig, *supra* note 273 at 203.

lobbying, the bigger threat is the current non-democratic influence businesses and the wealthy exercise over government decision-making. Self-interest is inherent to the activity. Self-dealing can mostly be seen in the limitations of the *Code of Conduct*. It is visible in how the interests of influential lobbyists overlap with important officials to maintain the laxity in the current lobbying regulations. This locks in the advantages for the dominant lobbying groups.²⁰⁹⁷ In other words, the problem is a lack of robust lobbying regulation, not mis-targeted regulation.²⁰⁹⁸

(ii) Acceptable Level of Self-Dealing in Democratic Reforms

Pal makes a good case that some democratic reforms are merely disguised self-dealing, which are not intended to improve representational government and could even damage it. The reality might be that political parties will only enact electoral and lobbying reform if the contemplated changes offer them partisan advantage. At the very least, most politicians expect legislative changes to raise their popularity and provide them with conditions under which they will thrive. Yet, self-interest sometimes aligns with the public good. The proposed reforms might benefit the party in power and the long-term health of the democracy. For this reason, it is best not to evaluate changes based on whether they happen to benefit a particular party in the short-term. Instead, the Court should consider what they do for the competition, electoral fairness, and the health of the democracy in the medium and long run.

The key is to find a mean where partisan advantage is relatively minor and the reforms substantial. In this situation the competitors can quickly adapt, and the lasting improvement is worth the risk. For example, lobbying restrictions on businesses might help parties with fewer ties to large business interests in the short-term. This does not make the restrictions a form of self-dealing. It does not justify the Court's approach to the regulations with a low standard of deference. This is a case where the political parties with ties to these business interests are likely to adapt to the changes, and continue to compete in the now more representative political climate.²⁰⁹⁹

(ii) Lobbying Reform is Rare and Hard to Enact

Lobbying reform, like all structural democratic reforms, is difficult to enact. It is rare for politicians and the public to engage in systematic transformation rather than address more immediate and direct concerns. Stronger lobbying legislation is generally enacted only in the rare moment when a large scandal propels the issue to salience, the public is engaged, and the party in power is sufficiently

²⁰⁹⁷ Graham *et al.* found that in Canada there is a tight network of powerful oil lobbyists and high-rank non-elected officials who are in regular contact with each other. "Across both time periods [Harper's government and Trudeau's government] we find a network core of a small world of leading industry associations and targeted offices and individuals within government that are in regular contact with each other." Nicolas Graham, William K Carroll & David Chen, *supra* note 2 at 6.

²⁰⁹⁸ I am indebted to Michael Pal for his insights on this issue. Canada's relatively egalitarian campaign finance model reduces the opportunities for corruption furthered by lobbying; but there is still self-dealing risk visible in the laxity of the lobbying rules. Self-dealing is likely part of the reason Canada (and other democracies) does not have more robust lobbying legislation.

²⁰⁹⁹ The political environment will feature better representational alignment based on the arguments established in Chapter 2 and Chapter 6. Currently lobbying misaligns political representations towards the wealthy and the status quo; and otherwise corrupts democratic representation.

politically motivated. Meanwhile, powerful interest groups have the incentive and ability to push back against change, delay it, or wear it away after it is in place. It is likely that if the Court were to strike down parts of robust legislation, the gaps would go unaddressed by Parliament for long periods of time. For this reason, one can hope that the Court remain cautious in overturning lobbying legislation.

(iv) The Cohesiveness of the Legislation

Lastly, this thesis has repeatedly stressed the necessity for cohesiveness in legislation that regulates the hydraulic pressure of private political influence. Those seeking influence over government decision-making will use any legal opening available. The legislation must be comprehensive to be effective. This concern is part of the essence of the structural approach. The Court should be mindful of the systemic risk that lobbying poses to democratic institutions and that the law requires cohesiveness to respond effectively to that risk. Constitutional jurisprudence should avoid punching holes in the dam of regulation through which private influence can flow, without providing an alternative means to channel the influence. The importance of cohesiveness in lobbying regulation weighs in favour of deference to the social science evidence supporting the legislation.

Pal's emphasis on self-dealing is beneficial to a structural conception, particularly in cases where the legislation has little to no redeeming features beyond partisan advantage. Yet, we should remain primarily concerned about the Court undermining robust lobbying law. Self-dealing is just not as large a threat in lobbying regulation. We may have to accept that there is an acceptable level of self-dealing in enacting reform. Self-dealing in lobbying law is most likely to be expressed by regulators interpreting the rules leniently to give an advantage to the powerful lobbying groups and the officials connected to these interests. This is where Court attention is likely needed. The contextual factors favour showing deference to Parliament when robust lobbying regulations conflict with s. 3.²¹⁰⁰

Dawood's Approach

For lobbying regulation, Dawood's structural bundle of rights approach provides a solid foundation on which to build the importance of cohesive regulations, and control over the hydraulic pressure of private political influence. In the previous section we discussed how strong lobbying regulations work well with the fundamental principles of substantive democracy, meaningful participation, equality and anti-corruption. These four values match Dawood's fundamental values of the right to effective representation; the right to meaningful participation; the right to equal participation; and the right to a fair and legitimate democratic process. Her approach calls for a s. 1 analysis informed by these fundamental considerations. This approach to the s. 1 review would include the importance of cohesiveness of electoral and lobbying legislation.

²¹⁰⁰ This would match the Court's position in *Harper*. "In this case, the contextual factors indicate that the Court should afford deference to the balance Parliament has struck between political expression and meaningful participation in the electoral process." *Harper v. Canada (Attorney General)*, *supra* note 53 at paras 111 & 87.

As discussed, there are already elements of a structural approach in the Court's judgments.²¹⁰¹ Embracing these elements should allow the Court to consider the full impact of ruling on components of legislation that seek to control the hydraulic force of private political influence.

Conclusion – Chapter 8

We have considered how lobbying interacts with the deep democratic principles of federalism, self-governance, the accommodations to a wide variety of beliefs, faith in public institutions, the rule of law, protection of minorities, respect for cultural and group identities, meaningful participation, equality and fairness, anti-corruption and the appearance of anti-corruption, and governmental transparency. In most cases, the stronger lobbying laws proposed in Chapter 10 would be a better match for the democratic principle at issue than the laws currently in place. Robust lobbying limits, however, would likely infringe the principles of meaningful participation of some individuals. Yet, the restrictions would open the way for more meaningful participation of the public overall. By the *Harper* precedent, any infringement that robust lobbying restrictions might cause should be upheld under s. 1.²¹⁰² Overall, the harmonization between robust lobbying laws and the deep democratic principles is a good indication that they would be upheld under s. 3. In many cases, their close alignment could also provide additional support for the regulations on a s. 1 review.

It is unlikely that the Court would apply the *Haig* precedent on referendum to lobbying, because lobbying is too essential a component of modern democratic representation. Yet, if the Court were to do so, then lobbying regulations would be entirely outside the scope of s. 3. There would be no concern that the regulations would infringe the right to effective democracy.

We have also considered Hasen's economic welfare argument. In the American context, the argument presents an alternative path of constitutional justification for lobbying regulations, avoiding the precedent of *Citizens United*. In the Canadian context, this path is not necessary; but the economic welfare argument could provide additional support in a s. 1 review.

Finally, we have considered Pal's structural competition and Dawood structural bundle of rights approaches. They both provide a framework for a cohesive view of democratic reform laws. Their approaches show how the courts can take the virtues of a well-functioning democracy into account, while still considering the individual rights at issue. The structural approach provides a cohesive method to address the hydraulic pressure of private political influence. It allows the Court to consider whether the legislation at issue is an attempt to reduce democratic competition, or a long-term contribution to the healthy functioning of democracy as a whole. The structural approach will generally provide additional justification for strong lobbying regulations, helping them to pass a s. 1 review.

²¹⁰¹ Yasmin Dawood, "Democracy and the Right to Vote", *supra* note 933 at 262.

²¹⁰² "Further, by limiting political expression, the spending limits bring greater balance to the political discourse and allow for more meaningful participation in the electoral process. Thus, the provisions also enhance a second *Charter* right, the right to vote." *Harper v. Canada (Attorney General)*, *supra* note 53 at para 86.

It cannot be said for certain that strong lobbying regulations would pass s. 3 scrutiny. However, there is good reason to believe they would. We have covered a myriad of reasons that would weigh in their favour in a s. 1 review, should it arise.

On the surface it might appear that stronger lobbying laws would infringe s. 2 or s. 3 of the *Charter*. Our deeper investigation has shown that this is not the case. Robust lobbying laws uphold the principles of democracy and effective representation that form the basis of our free society. We should not hesitate to enact stronger lobbying laws because of *Charter* concerns.

The next chapter, Chapter 9, presents twelve general principles of lobbying reform that can anchor specific reforms, like those that are proposed in Chapter 10.

Chapter 9 – Reform Principles

“No one influences my government”

– Premiere Doug Ford, responding to accusations that his government’s decisions are swayed by lobbyists, while continuing to take advice from senior advisors who have founded lobbying firms after his election.²¹⁰³

Introduction – Chapter 9.....	489
Principles of Lobbying Reform	495
Tenets of Design of Reform	496
Principle 1: Control the Hydraulic Pressure of Influence.....	500
Principle 2: Enhance Democracy.....	506
Principle 3: Prevent Corruption	511
Principle 4: Prevent the Appearance of Corruption	517
Principle 5: Improve the Quality of Information.....	520
Principle 6: Maintain Political Neutrality	526
Principle 7: Enhance Political Equality	529
Principle 8: Advantage Citizen Groups.....	533
Principle 9: Advantage Collective Goods over Private Goods.....	539
Principle 10: Separate Business and State	542
Principle 11: Empower the Disadvantaged	557
Principle 12: Promote Strong Disclosure and Transparency.....	560
Conclusion – Chapter 9	570

²¹⁰³ “Mr. Froggatt and Mr. Teneycke, who started government-relations firms weeks after playing senior roles on the Progressive Conservative Party’s election campaign, have become powerful advisers to the Premier at the same time as their employees lobby his administration. Their companies have each signed up more than two dozen clients, many of which have a financial interest in government initiatives, including liberalizing beer and wine sales, rolling out cannabis retail policies and tendering on public-sector construction contracts.” Jill Mahoney & Matthew Lapierre, *supra* note 491.

Introduction – Chapter 9

It is no longer evident that democracy is satisfying its population.²¹⁰⁴ Some authoritarian systems seem to be on an upswing, while democracy appears to be hollowing out.²¹⁰⁵ It has been contended throughout this thesis that this malaise in democracy is tied to lobbying, and its tendency to prioritize private gain while imposing social costs.²¹⁰⁶ Lobbying exercises great influence over our body politic. The current practice of leaving lobbying largely unregulated is not a decision to go without regulation. It is a decision to allow a myriad of government decisions to be made with more business and elite input, and less public input. As Hasen argues, unchecked, these decisions have a significant effect on the national economic welfare. Regulating lobbying is a compelling state interest.²¹⁰⁷

This chapter establishes a set of twelve principles to guide and evaluate future reforms to lobbying regulations. These principles align with and support the long-term health of democracy. It is my hope that these principles will create a useful starting point for future lobbying reform. The general principles will provide a means to evaluate whether specific reforms further the goals of increased political equality, the alignment between citizens and officials, transparency, anti- corruption, and other *Charter* values elucidated throughout the thesis.

These principles can be a useful starting place for future reform efforts. One could evaluate lobbying regulation and determine if a principle is not being upheld by the current legislation, and then design a specific reform to fulfill that principle. The principles are also useful as a means of evaluating a specific reform, to ensure that the proposal fulfills its intended principle, and would not undermine a different vital principle of lobbying reform. The principles can also serve as a means to compare alternative reform ideas, by gauging how well each reform would fulfill the principle at issue, or fulfill the largest number of principles. Another approach would be to design a set of reforms (like those laid out in Chapter 10) that together might fulfill many or most of the principles. Twelve is a large number of principles to keep in mind at once. In many cases it will be difficult and unnecessary to operate with all twelve principles at once. In these cases, such as a court evaluation of a piece of legislation, it will often make more sense to focus on how the legislation interacts with the primary principle or two it is intended to fulfill. Although a smart lawyer might take a moment to confirm that the legislation does not sabotage one of the other principles.

²¹⁰⁴ "In developed democracies ... public satisfaction has eroded since the 1990s, with levels of discontent rising from a third to half of all respondents." R. S. Foa et al, *supra* note 5 at 14.

²¹⁰⁵ "As Farrell puts it: "We have become squatters in the ruins of the great democratic societies of the past."" Laura Kollmar & Raymond Koen, *supra* note 1590 at 16.

²¹⁰⁶ "After the "democratic moment", the trajectory of modern democracy was decidedly downhill, into the post-democratic epoch. ... However, the continuation of democratic forms belies a significant abandonment of democratic content, as the sectional interests of the business elite take centre stage and side-line the general interests of the mass of people. ... Conventional representative democracy presumes that "elected officials make policies which public officials then implement" and that "officials are accountable to politicians and the politicians to the voters". In terms of post-democratic governance, by contrast, both the formulation and implementation of public policy routinely are surrendered to private sector actors who are understood to possess the resources and expertise which politicians and state agencies do not." *Ibid* at 15.

²¹⁰⁷ Richard L. Hasen, *supra* note 1405 at 199.

Before discussing these principles, it is worth considering the Organization for Economic Co-operation and Development's (OECD) recommendations for robust lobbying regulation. These recommendations can be seen as an attempt to establish some direction for lobbying regulation.

OECD Recommendations

The OECD has listed five elements of strong lobbying regulation.²¹⁰⁸

- I. Definition of lobbyist and lobbying activities targeted by regulation are clear and unambiguous.
- II. Disclosure requirements provide pertinent information on key aspects of lobbyists and lobbying such as its objective, beneficiaries, funding sources and targets.
- III. Rules and guidelines set standards for expected behavior, for example to avoid misuse of confidential information, conflict of interest and prevent revolving door practices.
- IV. Procedures for securing compliance are framed in a coherent spectrum of strategies and mechanisms, including monitoring and enforcement.
- V. The organisational leadership promotes a culture of integrity and transparency in daily practice through regular disclosure and auditing to ensure compliance.²¹⁰⁹

More specifically, the OECD has laid out ten principles for transparency and integrity in lobbying.²¹¹⁰ These principles are narrower than the ones presented in this thesis, but they provide a good basis to evaluate current lobbying law.

1. Countries should provide a level playing field by granting all stakeholders fair and equitable access to the development and implementation of public policies.
2. Rules and guidelines on lobbying should address the governance concerns related to lobbying practices, and respect the socio-political and administrative contexts.
3. Rules and guidelines on lobbying should be consistent with the wider policy and regulatory frameworks.
4. Countries should clearly define the terms 'lobbying' and 'lobbyist' when they consider or develop rules and guidelines on lobbying.
5. Countries should provide an adequate degree of transparency to ensure that public officials, citizens and businesses can obtain sufficient information on lobbying activities.
6. Countries should enable stakeholders – including civil society organisations, businesses, the media and the general public – to scrutinise lobbying activities.
7. Countries should foster a culture of integrity in public organisations and decision-making by providing clear rules and guidelines of conduct for public officials.
8. Lobbyists should comply with standards of professionalism and transparency; they share responsibility for fostering a culture of transparency and integrity in lobbying.

²¹⁰⁸ 10 Principles for Transparency and Integrity in Lobbying, by OECD (OECD, 2013) at 1.

²¹⁰⁹ *Ibid.*

²¹¹⁰ *Ibid* at 3.

9. Countries should involve key actors in implementing a coherent spectrum of strategies and practices to achieve compliance.
10. Countries should review the functioning of their rules and guidelines related to lobbying on a periodic basis and make necessary adjustments in light of experience.²¹¹¹

The OECD's five elements of strong lobbying regulation and ten principles of transparency are modelled on the Canadian and American laws already in place. There are a few improvements that could be made to the Canadian system to fully live up to the OECD's standards, but not many. Canada's current registrar meets the integrity standards for government (no. 7).

Countries should provide principles, rules, standards and procedures that give public officials clear directions on how they are permitted to engage with lobbyists. Public officials should conduct their communication with lobbyists in line with relevant rules, standards and guidelines in a way that bears the closest public scrutiny.²¹¹²

The requirements on lobbyists (no. 8) are likewise met by the Canadian *Lobbyist' Code of Conduct*.

To maintain trust in public decision-making, in-house and consultant lobbyists should also promote principles of good governance. In particular, they should conduct their contact with public officials with integrity and honesty, provide reliable and accurate information, and avoid conflict of interest in relation to both public officials and the clients they represent, for example by not representing conflicting or competing interests.²¹¹³

Here are the related rules in the *Lobbyist' Code of Conduct*.

2. A lobbyist shall avoid misleading public office holders by taking all reasonable measures to provide them with information that is accurate and factual.
6. A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest.²¹¹⁴

In general, Canadian lobbying law also meets the OECD's transparency requirements. It does fall short in a few areas: the disclosure of lobbying subjects and goals might not be sufficiently detailed, there is insufficient burden on officials to uphold the rules, there is no disclosure of amounts spent, and

²¹¹¹ As part of this principle, the OECD argues that to "foster citizens' trust in public decision-making, public officials should promote fair and equitable representation of business and societal interests." They likely intend this principle to improve on the current business domination of the lobbying process. Yet, it condones the position that business interests have as much right to lobby as citizens. The same position is repeated in principle 4 a. *Ibid*.

²¹¹² *Ibid* at 4.

²¹¹³ *Ibid* at 5.

²¹¹⁴ Government of Canada, *supra* note 117.

there is no system to disclose who has sought to influence legislative or policy-making processes.²¹¹⁵ Overall, Canadian law comes close to the OECD standards, but, as argued below, this is not enough.

The Need for Broader Reform

Insiders are comfortable with the lobbying system as it is. Few of the politicians, bureaucrats, or corporate lobbyists interviewed expressed any desire to see significant reforms to Canada's lobbying regulations.²¹¹⁶ The citizen lobbyists were less sanguine, but they suggested minor reforms, generally to disclosure, rather than significant change. Like the OECD, many officials seem to believe small changes to lobbying are enough. On the other hand, the public is not happy with the lobbying system as it stands.

The public perceives two main categories of problems with the lobbying process: quid pro quos and unequal access... the public fears that through campaign contributions, personal gifts, and perhaps even outright bribery, lobbyists make elected officials beholden to them.²¹¹⁷

Americans (and Canadians) have been losing faith in their institutions, and this has opened the door for bigotry, ignorance and demagoguery.²¹¹⁸ The power of lobbying and the resulting elite-favouring policies are a key factor in this loss of faith. The public has reason to be skeptical.²¹¹⁹ “[T]he social function of lobbying is to take money and turn it into political power,” so that state power can “serve the social goals of those who can afford lobbyists.”²¹²⁰ Insiders argue that lobbyists provide information and make only compromised changes to any single salient issue. They fail to take into account the sheer scope of the business lobbyists’ participation in every issue and at every step of the process. Business lobbyists provide input on the initial policy idea, to the committees involved, on the draft legislation, to the PMO’s office, on the submitted legislation, on the legislative votes, on the bureaucratic interpretation of the law, on the specific regulations, and on the enforcement of the law. In every step of the process the business lobbyists get a little say; a myriad of changes on a myriad of issues through the myriad levels of government add up to policies that substantially favour the interests

²¹¹⁵ OECD, *supra* note 2108 at 4.

²¹¹⁶ See Chapter 5 – Interview Results: My Questions: Questions Related to Regulations: 11. What changes would you like to see to Canada’s lobbying regulations? P. 318.

²¹¹⁷ Anita S. Krishnakumar, *supra* note 493 at 522.

²¹¹⁸ For example, 58% of Americans are not satisfied with how democracy is working in the U.S., and only 40% are satisfied. In Canada the numbers are better, 39% not satisfied and 69% satisfied. Dissatisfaction with democracy is increasing almost everywhere world-wide, with a +9% increase in dissatisfaction between 2017 and 2018 in Canada and a +7% increase in the U.S. This decreased faith in democracy has been matched by an increased openness to nondemocratic alternatives. Richard Wike, Laura Silver & Alexandra Castillo, *supra* note 1281. Similarly, in the U.S., 58% of citizens believe that officials do not care what ordinary people think, and only 41% believe they do care. In Canada the numbers are better, but are still concerning. 42% say politicians do not care, and 56% believe they do care. Almost half the population believes their representatives do not act to represent them, which is dangerous for democracy. *Ibid.*

²¹¹⁹ “Public distrust of lobbying is as old as the profession itself”. Anita S. Krishnakumar, *supra* note 493 at 514.

²¹²⁰ Laura Kollmar & Raymond Koen, *supra* note 1590 at 11.

of businesses and the elites. The more the public sees the influence of special interests, the more popular policies fail to be instituted, the more ordinary citizens loses faith in government.

The Canadian government has taken some steps to control lobbying. Yet reforms remain limited, and the pace of reform slow. Lessig and Kimball *et al.* have pointed out that lobbying creates dependency corruption, and the danger this corruption poses to society, equality and democracy.²¹²¹ We seem to be moving towards plutocracy (and ecological collapse) faster than we have been improving democratic governance.

There is hope, though.

Truly effective lobbying regulations can be designed to strike at the heart of the problem, reducing “the underlying incentives and opportunities for corruption”²¹²². Lobbying legislation can address the six major concerns about lobbying: that lobbying disproportionately advantages business organizations; favours the policy preferences of the wealthy and causes a misalignment of representation; creates an information framing bias; increases inequality; favours the status quo; and otherwise corrupts democracy. Addressing these problems requires regulations that go further than those recommended by the OECD.

At the same time, the legislation can be designed to make sure that the benefits of lobbying are not lost. Well-regulated lobbying can continue to fulfill the democratic right to petition government, and provide necessary information to decision-makers. Comprehensive lobbying reform is a step towards a more democratic and a more equitable society – where citizens have a more equal say in the decisions of their government and where the government better responds to the needs of the people.

Reform is Not Impossible

Lobbying reform will be difficult, but it is not impossible. Developed democracies have universalized the vote, established rights for minorities, instituted income taxes, and established the welfare state. Each of these national transformations was opposed by powerful groups and elites within society. The same can be true for lobbying reform.

Even in currently unregulated jurisdictions a substantial majority of officials and lobbyists agree that there should be regulations for lobbying.²¹²³ In the regulated jurisdictions, there is support among officials and lobbyists for the disclosure rules already in place.²¹²⁴ The broad public appears to have a strong preference for stricter lobbying regulations. A number of the officials and lobbyists who oppose stronger regulations likely do so because they think there is no need for it, rather than because of deep seated ideological opposition to the idea.²¹²⁵ There is the possibility of reform if officials can be shown

²¹²¹ Lawrence Lessig, *supra* note 273 at 235; David C Kimball et al, *supra* note 627 at 16 & 21.

²¹²² Gajan Retnasaba, *supra* note 278 s III.6.2.

²¹²³ Chari p. 141

²¹²⁴ Raj Chari, John Hogan & Gary Murphy, *supra* note 2.

²¹²⁵ Chari p. 140

the benefits of it, and if democratic reformers can push for it with the zeal they have shown for other reforms. The change will not be easy to pass, but if change is brought about it will be beneficial for democracy and governance.

Twelve Principles of Lobbying Reform

This chapter proposes twelve principles of lobbying reform that should address the key failings of the current lobbying system. These principles are not meant to replace the basics of the lobbying regulations currently in place, but to build upon them. They assume the existence of a Lobbying Commissioner or equivalent, mandatory disclosure requirements, a lobbyists' code of conduct or equivalent, and some level of enforcement. Lobbying reform legislation will need to work in conjunction with other legislative changes and fit in with wider governmental policy frameworks. The changes will need to be matched by adjustments in other pieces of legislation that work in tandem with the lobbying legislation.

This includes stakeholder engagement through public consultation and participation, the right to petition government, freedom of information legislation, rules on political parties and election campaign financing, codes of conduct for public officials and lobbyists, mechanisms for keeping regulatory and supervisory authorities accountable and effective provisions against illicit influencing.²¹²⁶

There is a set of standard recommendations for lobbying reform that reoccurs in the political science and legal literature. They address many of the failings of lobbying regulatory regimes, particularly those related to disclosure. Yet they do not provide a sufficiently broad framework for reform. Chari *et al.*'s definition of a highly regulated lobbying system provides a long list of specific improvements.²¹²⁷ These match with the standards recommended by Johnson, and by Holman and

²¹²⁶ OECD, *supra* note 2108 at 3.

²¹²⁷ According to Chari *et al.*, highly regulated jurisdiction has the following traits:

- The Rules on individual registration are the tightest. Lobbyist must state subject matter, target of lobbying, name of all employers, include photo of the lobbyist, and immediately update the registration after any changes or new information
- Both those lobbying legislative and executive branch count as lobbyists who must register. [Like medium level jurisdiction.]
- Tight spending disclosure is required: must file a spending report; must report salary; must account for and itemize all spending; must identify all people on whom money was spent; must report all spending on household members and direct family members of officials; and must account for all campaign spending. [Unlike low and medium jurisdiction.]
- Employer spending disclosure is also tight; employer of lobbyist must also file a spending report and account for all salaries. [Unlike low and medium jurisdiction.]
- There are strict limits on gifts and campaign donations by lobbyists. Lobbyists cannot offer free consultations to officials, re-election campaigns and politicians. [Unlike low and medium jurisdiction.]
- Lobbying register is open to public, up to date, and also includes spending disclosure.
- State agencies can and do conduct mandatory reviews and audits; and there are penalties for late and incomplete filings that have a reasonable chance of being imposed.

Luneburg. Their reforms include rigorous rules on individual registration; clear and sufficiently broad definitions of lobbyists and lobbying activities that apply to both in-house and consultant lobbyists, and across all sectors of the society²¹²⁸; regulations that apply to lobbying all branches of government, including the legislature, the executive, support staff and bureaucrats; registration in the form of electronic filing to an up-to-date publicly accessible well-maintained database that includes details about the lobbyists, whom they represent, the officials contacted and the issues they discussed with them; spending disclosures by lobbyists and their employers²¹²⁹; bans on gifts, honorariums, meals, trips, favours and political campaigning from the lobbyists to government officials and politicians²¹³⁰; a long cooling-off period before officials and politicians at all levels of government are allowed to register as lobbyists; and reviews and enforcement actions by an independent state agency.²¹³¹ These reforms would fit within the broader set of principles proposed here.

The twelve principles are: (1) to control the hydraulic pressure of private influence, (2) enhance democracy, (3) prevent corruption, (4) prevent the appearance of corruption, (5) improve the quality of information, (6) maintain political neutrality, (7) enhance political equality, (8) advantage citizen groups, (9) advantage collective goods, (10) separate business and state, (11) empower the disadvantaged, and (12) promote stronger transparency. All these principles are compatible with Canadian *Charter* values. In many cases they uphold the values better than the current lobbying regulations.

In some cases, there are listed examples of specific reforms that fit within a particular principle. The specific reforms are not intended to be complete, and there may be better ways of fulfilling the principles of reform. They are intended merely to start a conversation and provide some ideas for the necessary project of lobbying reform. In Chapter 10, we will examine two reforms in detail: limits to business lobbying and support for citizen lobbying.

Principles of Lobbying Reform

We will cover some tenets of design that are integral to lobbying reform before we move on to the 12 principles. These tenets will establish a shared understanding from which we can proceed to deeper reform.

-
- There is a cooling-off period of a reasonable length before officials can become lobbyists.

Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 105.

²¹²⁸ “If registration and disclosure are not uniform across all sectors and business interests, the registration records will not reflect the reality of money and influence peddling” Craig Holman & William Luneburg, “Lobbying and transparency”, *supra* note 96 at 99.

²¹²⁹ “Uncovering corruption or its appearance is almost always a matter of following the money.” *Ibid* at 100.

²¹³⁰ “As of 2008, only six states have banned all gifts and trips, and only 3 have banned all honoraria.” Vincent R. Johnson, “Regulating Lobbyists”, *supra* note 616 s 23.

²¹³¹ Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 106; Vincent R. Johnson, “Regulating Lobbyists”, *supra* note 616 ss 50 & 55.

Tenets of Design of Reform

New lobbying regulations of the type proposed here are a complex and fundamental change to Canadian governance. A well thought-out process of reform is essential for democratic legitimacy, and coherence. The design of the lobbying legislation should set out a loose hierarchy of principles; avoid complexity; use campaign finance law as a model; and be planned as a deliberate process of reform.

A Loose Hierarchy of Principles

We will cover the twelve principles in a loose order of importance. Pal, when discussing the criteria used by electoral boundary commissions, argues in favour of a hierarchy.

A hierarchy of criteria has several clear advantages over the balancing model deployed in the EBRA. First, imposing a hierarchy clarifies what criteria can and must be taken into account. There is enduring confusion among Canadian redistricting commissions about which criteria can be applied. A hierarchy ... clarifies that commissions do not have the liberty to declare that it is impossible to balance all relevant criteria and then simply ignore those they disfavour.²¹³²

By the same reasoning, revised lobbying legislation could set out a loose hierarchy of goals for the Commissioner. This will help guide regulatory discretion. A strict hierarchy is not ideal, because it risks locking the legal regime into a structure that might not be reactive to the realities of regulatory, legal and societal change. The principles discussed earlier in the chapter should be loosely understood as having a higher priority over those discussed later, all other things being equal. The hierarchy should provide some guidance for what reform goals to prioritize when different principles come into conflict.

Controlling the hydraulic pressure of private influence is the most important of these principles. If lobbyists can use alternative routes to influence officials, then the lobbying regulations will fail. Only good actors will stay within the regulated system, and the worst will leave so they can act without oversight.

Although current lobbying regulations tend to focus mostly on disclosure, the other principles have a higher priority. The proposed loose hierarchy is: control of the hydraulic pressure of private influence; enhance democracy; prevent corruption; prevent the appearance of corruption; improve the quality of information; maintain political neutrality; enhance political equality; advantage citizen groups, advantage public goods; separate business and state; empower the disadvantaged; and lastly, promote disclosure and transparency. Basic transparency is essential to lobbying regulation, but once it is in place the other principles become more important.

Avoid Complexity

Lobbying regulations should be strong and complete, but they should not be complex. The rules and forms should be as clear and simple as possible. Complexity is unfair to those trying to reach out to

²¹³² Michael Pal, *supra* note 1836 at 269.

their government, particularly those with fewer resources and less education. Complexity can also be a way of rigging the game, allowing those with the most experience and wealth to hire experts to evade the rules while tying their lobbying opponents up in red tape. This can create a system of technical rigidity and lax substantive oversight. This type of system would fail to fulfill the goals of lobbying regulations and would damage the public's faith in government.

As Teles warns, excessive complexity can lead to a Kludgeocracy, where the system becomes so complicated, so enmeshed in layers of cross-purpose policies, that it is unable to react to change and grinds to a near halt. Teles argues that kludge is likely where market-orientated solutions are layered onto governmental responsibilities, creating an awkward partial privatization.²¹³³ In the case of lobbying oversight, the temptation to introduce private actors into an oversight capacity must be resisted. It is an area central to the running of government, and should be kept within the boundaries of public oversight.

Campaign Finance Law as a Model

When considering lobbying reforms, Canada's successful campaign finance rules are a good place to start. They provide a guide for how to reform an area of democratic governance. In contrast to the American situation, Canada's electoral campaigns are highly regulated. There are strict donation and spending limits on individuals, politicians, political parties and third parties. Corporations and unions are banned from making political donations.

As discussed in Chapter 4, the looser American rules have produced a suite of problems Canada has so far avoided. Canadian campaign finance regulation shows how concerns about the influence of money on politicians can be addressed with tangible rules. Applying the mirror principle of lobbying and campaign financing, lobbying regulations could adopt many similar rules. It is likely that the campaign finance regulations have increased Canadians' faith in the electoral process, and decreased their concern that rich elites are buying elections.²¹³⁴ In similar manner, lobbying reforms would likely increase Canadians' faith in their government's decision-making.

²¹³³ These governmental responsibilities often include services cannot be left to a real market. So forms of privatization must involve layers of complex rules to prevent monopolization and exploitation of citizens. At the same time, since the market does not operate effectively in the area and the service is a necessity, the government must find mechanisms that substitute for competition, while protecting the privatized business from failure. A restaurant can go out of business. The city's privatized garbage collection cannot. Thus the market is used, but not really, and the system acts as a kludge mechanism, stumbling forwards. Steven M Teles, "Kludgeocracy in America" *Natl Aff* (Fall 2013) 97 at 100. See Chapter 1 – Lobbying Regulation: Structural Political Difference that Impact the Practice of Lobbying: Differences: Kludgeocracy, p. 50.

²¹³⁴ As of 2016, 67% percent of Canadian respondents trusted in their elections. In comparison, 50% of U.S. respondents have trust in their elections. *The Political Culture of Democracy in the Americas, 2016/17: A Comparative Study of Democracy and Governance*, AmericasBarometer (Latin American Public Opinion Project, 2017) at 15.

A Deliberate Process of Reform

Significant lobbying reform will not be easy. It will require a well-planned process of reform. There should be a plan in place for when moments of change arise. The process will need to employ deliberation and consultation.

Plan for Moments of Change

Ideally, lobbying reforms should be designed with the friction model of change in mind. Scandals offer opportunities for improvement, but the ground work should be laid in advance.²¹³⁵ The American Legislative Exchange Council (ALEC) operates with an effective model of legislative change. It prepares legislation for when the moment is ripe. The same should be done for lobbying reforms. The yearly review the Commissioner of Lobbying submits to Parliament is a good step in the process, but its reforms are too mild.²¹³⁶ Reform proposals should be bold and comprehensive, because the moments for lobbying reform are fleeting. Reformers should make the case to politicians, aides and bureaucrats that change requires specific legislation in advance.

There are a myriad of proposed and prepared reforms for corruption and campaign finance reform, but ideas for lobbying reform remain relatively sketchy and incomplete. This chapter represents one of the first attempts to lay out principles for lobbying reform, at least in the Canadian context. Like most first attempts it will contain flaws, but hopefully it can become the basis for future research and reform. Attempts at legislative reform are more likely to succeed if the groundwork for the right political moment has already been prepared.

Employ Deliberation and Consultation

Despite the preparation in advance, lobbying reform will also require deliberation and consultation. It will require a process of legislative drafting that includes widespread input, and room for citizens to express their concerns and proposals. Consultation is an essential democratic value, particularly when fundamental changes of governance are at stake. Yasmin argues that,

the Court's interpretation of the requirements for constitutional amendment is based upon a deeper democratic commitment to ensuring dialogue and deliberation between and among the relevant stakeholders. The process by which democratic institutions are to be reformed must itself be democratic in this deeper sense regardless of the substance of the proposed reforms. Although the Court's approach has the unfortunate effect of making large-scale institutional reform difficult (if not impossible), the alternative is arguably worse. If it were possible for the government

²¹³⁵ Dorie Apollonio, Bruce E. Cain & Lee Drutman, "Access and Lobbying", *supra* note 303 at 15.

²¹³⁶ It also tends to trigger opposition attacks on the government over their lobbying history, which could form an inflection point to launch a reform process.

to unilaterally reform democratic institutions, then it could unilaterally reform them in an anti-democratic direction as well.²¹³⁷

Lobbying reform is not constitutional per se, but it does affect democratic decision-making, so some of the same principles of amendment should apply – albeit more loosely. The reform process should be open, transparent, fair, informed and substantively democratic – both in process and outcome. These standards might be applicable to all legislation, but they should apply at a high level to lobbying reform.

It is inevitable that lobbyists will be aware of the reform process. Many lobbyists will see reforms as a threat to their power and livelihood. This is not necessarily true. Strong lobbying regulations will still leave room for lobbying, and newly awakened citizen groups will be in need of lobbying expertise. Still, many lobbyists will be threatened by significant reform. They will seek to involve themselves to frame its goals and constraints, impacting the process before open hearings and consultations begin. A fair process will seek to hear from all the participants, including lobbyists and officials, but it should be designed, as much as possible, so that lobbyists cannot use their influence to sabotage the reforms.

Similarly, most lobbyists and many officials operate within the disclosure heuristic, and many will see little harm in constraining the deliberations to issues of disclosure.²¹³⁸ As discussed in Chapter 2, transparency alone will not ensure good governance.²¹³⁹ The process must give equal room for those who subscribe to the corruption heuristic.²¹⁴⁰ It will need to actively seek out input from citizens, activists, academics and other experts. Otherwise, it will produce inadequate regulations that fail to establish deep democratic legitimacy.

Two promising ways for preparing the groundwork for reform would be to establish citizen assemblies or an independent royal commission.²¹⁴¹ The Royal Commission on Electoral Reform and Party Financing (the Lortie Commission) submitted its report in 1991. Its report became the foundation of significant campaign and democratic reforms. A similar commission on lobbying could likewise lay the groundwork for future legislation and democratic reforms.

Having touched on the design, we can now move on to the twelve principles of lobbying reform.

²¹³⁷ Yasmin Dawood, “The Senate Reference: Constitutional Change and Democracy” (2015) 60:4 McGill Law J 737–761 at 739.

²¹³⁸ For an example of a work by an official (the Lobbyist Commissioner of Quebec at the time) that subscribes to the disclosure heuristic, see André C Côté, *supra* note 2.

²¹³⁹ See Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Disclosure versus Corruption Approach, p. 111. See also, Lawrence Lessig, *supra* note 273 at 260.

²¹⁴⁰ “[T]here are limits as to what can be achieved by regimes that seek to thrust masses of information on a citizenry too busy, distracted, or simply unable to utilize that information. In many respects, legal prohibitions that directly address bad practices offer a more efficient, albeit sometimes overlooked, means for resolving problems related to lobbying.” Vincent R. Johnson, “Regulating Lobbyists”, *supra* note 616 at para 56.

²¹⁴¹ Fred Thompson & W. T. Stanbury, *supra* note 2 at 131.

Principle 1: Control the Hydraulic Pressure of Influence

The most fundamental principle of lobbying reform is that lobbying regulations need to be cohesively designed to handle the hydraulic pressure of private influence. If there is an opening left in the system that lobbyists and private interests can use to avoid registration and restrictions, they will exploit it. Upright actors pursuing above board policy changes might remain within the system, but those pursuing shadier goals are will likely take advantage of gaps in the rules. Upright individuals will find it hard to compete, and it will likely lead to a race to the bottom. Gaps weaken the system, and if the gaps are large enough, they will render the regulations largely moot.

In the U.S., lobbyists could deregister to avoid the disclosure requirements of the *Honest Leadership and Open Government Act of 2007* [HLOGA].

Lobbyists were deregistering in record numbers in 2008 after HLOGA took effect, and more deregistered in 2009, perhaps in part because of the new Obama Administration rules. ... In addition, many former elected officials took steps to ensure that their activities did not trigger lobbying registrations, such as by devoting less than twenty percent of their time to lobbying activities as defined by federal statutes. One prominent example is former Senate Majority Leader Tom Daschle. He is not a registered lobbyist, but instead is a “high-paid policy advisor.” “Although he never registered, Daschle, in fact, made millions of dollars after he left government doing stuff that looks, smells and tastes a lot like lobbying”²¹⁴²

This ability to avoid registering sabotaged oversight and public disclosure. Loopholes or voluntary guidelines will never provide the participation and disclosure rates necessary for an effective regime.²¹⁴³ Lobbyist registration must be cohesive and mandatory.²¹⁴⁴ Lobbyists must feel a legal, moral, financial and professional need to participate in the process. Fines and penalties should be designed so that they are more than an easily discounted cost of business for bad actors.

Cohesiveness is Necessary at the Heart of Democracy

Both Dawood and Pal argue that a cohesive approach is necessary for matters that operate at the core of democracy, like campaign financing or lobbying. Pal points out that little loopholes in these rules have large downstream consequences.²¹⁴⁵ He argues that the state is perpetually subject to capture by self-interested incumbents (and likewise private business interests).²¹⁴⁶ The lobbying regulations need sufficient strength to contain private influences and their allied officials within the

²¹⁴² Richard L. Hasen, *supra* note 1405 at 248.

²¹⁴³ For example, the early version of the U.S. lobbying regulations had very low registration rates when it was essentially voluntary, and only about an estimated half of EU lobbyists have voluntarily registered under the current rules. Craig Holman & William Luneburg, “Lobbying and transparency”, *supra* note 96 at 96.

²¹⁴⁴ *Ibid* at 99.

²¹⁴⁵ Michael Pal, *supra* note 2014 at 305.

²¹⁴⁶ *Ibid*.

regulatory system. This will be impossible if a significant number of officials are insufficiently motivated to maintain lobbying norms and legality.

Perfect compliance is unrealistic. To protect the system against the expected few officials that will try to bypass the rules, the regulations will need to be cohesive; they need to cover all areas of interaction between lobbyists and officials. The regulations need to go beyond disclosure to actual regulation of the conduct of lobbyists, officials, and interest groups.²¹⁴⁷

If lobbying reform is to be meaningful, it should regulate not only lobbyists but also those actors with whom the public is most concerned – the elected officials whom lobbyists seek to influence. Further, if lobbying reform is to be both meaningful and successful, it should take into account a third, currently overlooked, set of actors in the lobbying process – the interest groups who hire lobbyists to represent their positions. In other words, lobbying reform should become less concerned with disclosure for the sake of disclosure and more concerned with the dynamics created by disclosure – how disclosures will be used and whom they can benefit in the legislative process.²¹⁴⁸

The Canadian regulatory regime contains a number of good practices to contain the pressure of private influence. It includes the (partially) binding *Code of Conduct* prohibition of undue influence²¹⁴⁹; the requirement of an annual Commissioner’s report; and the Commissioner’s provision of information about the lobbying regulations to other branches of government, lobbyists, and the public.²¹⁵⁰ While these specific limitations are good practice, they fail to address the entirety of the problem of the hydraulic nature of influence. Ideally, the *Code of Conduct* prohibition against undue influence should be clarified and broadened to exclude all gifts, sponsored travel and donations. It is worth considering lowering the workhour threshold for in-house lobbying, perhaps to 20 hours in a month, so that lobbying does not go unreported.²¹⁵¹ Serious investigation should be made into Cayley-Daoust and

²¹⁴⁷ Lobbying regulations might need to cover political parties as well, as they can act as quasi-state institutions. However, the guidelines for this will need to be very carefully written to separate illegitimate external influence from the need to craft policies and decisions to respond to the concerns of the myriad of party supporters.

²¹⁴⁸ Anita S. Krishnakumar, *supra* note 493 at 516.

²¹⁴⁹ Pierre B. Meunier et al, *supra* note 4 at 169; *Democracy Watch v Campbell*, *supra* note 118. The then Rule 8 stated, “Lobbyists shall not place public office holders in a conflict of interest by proposing or undertaking any action that would constitute an improper influence on a public office holder.” The Court interpreted this expansively, stating that a reasonable apprehension of an apparent conflict of interest is sufficient to violate the rule. Rule 8 has been replaced with the essentially identical Rule 6, “A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest.” Government of Canada, *supra* note 117.

²¹⁵⁰ A. Paul Pross, *supra* note 2 at 223.

²¹⁵¹ Sean Moore (from the Advocacy School) made a similar recommendation at a public talk I attended on lobbying in 2017. He argued that the reporting is simple enough that a threshold is not necessary; it is easier to simply report than to track the time across an organization to see if the threshold is met. If lobbying limits are

Girard’s finding that there may be significant industry lobbying targeting bureaucrats who are too low-level to require disclosure under the current rules. If this is prevalent, the rules should be adjusted to include these bureaucrats.²¹⁵²

Lobbying is increasingly employed as part of a full media campaign; the regulations should take this into account. It is likely that lobbying regulations need some form of anti-avoidance clause, and methods to prevent individuals from simply refusing to register as lobbyists, as is common in the U.S.²¹⁵³ Lobbying legislation must be designed to contain the full scope of lobbying.

Oversight

Lobbying oversight requires an independent and professional regulator.²¹⁵⁴ The oversight has to reside in a body with the independence, power, structure, cohesion, authority, legitimacy and drive to properly oversee lobbyist activities. Like the Department of Justice, the office must hold to a high standard of impartiality and independence. It should be well staffed and adequately funded.²¹⁵⁵ Oversight should not be split into multiple units, as it is in the American model. Nor should it be buried in another department with little independent authority, as it was in some earlier lobbying regulatory systems. Canada’s establishment of the Lobbying Commissioner as an independent officer of Parliament with an extended term in office is the right approach to fulfill this aspect of the principle.²¹⁵⁶ To make the system cohesive, the rules and oversight authority must apply to both lobbyists and officials, with appropriate restrictions and sanctions for both groups. Too often, the legislation exempts one side or the other from a particular restriction, creating ambiguity and an incentive for the exempt group to ignore the law. Cohesiveness is best maintained when both officials and lobbyists face the same restrictions and reporting obligations. Both lobbyists and the officials being lobbied should be required

instituted, there would still be a need to track the time and funds dedicated to lobbying. However, this might begin to catch too many people, and place a lot of stress on the exact definition of lobbying. Sean Moore, *Canadian Study of Parliament Group Seminar on Lobbying* (131 Queen Street, Ottawa, Ontario, 2017).

²¹⁵² “In one example consultant lobbyist Dan Seekings has not recorded communications with any DPOHs since 2010 even though as of September 3rd, 2012 he is registered as a consultant lobbyist for 14 companies and organizations from the oil and gas industry and one forestry industry company. This situation means that Seekings could have had multiple communications with public officials not covered by the current Lobbying Act, thereby leaving the general public in the dark about who he has been meeting with.” Daniel Cayley-Daoust & Richard Girard, *supra* note 2 at 9.

²¹⁵³ A. Paul Pross, *supra* note 2 at 212. This idea has been supported by Democracy Watch, but opposed by Pross, who argues it is unclear what the penalty should be. The Court has been friendly to a broad applicability of lobbying regulations, holding that one cannot avoid their application by refusing to register. *Makhija v. Canada (Attorney General)*, *supra* note 119 at paras 9 & 11.

²¹⁵⁴ Craig Holman & William Luneburg, “Lobbying and transparency”, *supra* note 96 at 100.

²¹⁵⁵ If there is concern that interest groups might convince the government to cut funding to cripple lobbying oversight, the legislation can include statutorily protected sources of funds. For example, it could collect lobbying registration fees or other fees; some percentage of the lobbying fines; a small percent of some general tax; or it could follow the model of the U.S. Consumer Financial Protection Bureau, which gets 12% of the Federal Reserve’s operating expenses directly from the Federal Reserve Board.

²¹⁵⁶ Strict rules about lobbying could shift power to the executive, because it will have enforcement powers, and have more knowledge and expertise about how best to comply with the rules. Placing oversight in a separate body of Parliament that is also tasked with informing legislators on how to fulfill their obligations to the lobbying legislation largely prevents this power shift.

to ensure that lobbyists have registered, reported their activities, and are in compliance with the law. This way, violations and bad actors are more likely to be deterred and caught. Concerns about excessive paperwork and overhead should be addressed by making the rules simple and reporting easy, not by leaving loopholes in the law.

Ideally, the oversight body should take on a broader role than simply overseeing the lobbying regulations. It should be structured to include an analysis component. The Commissioner of Lobbying publishes an annual report, and some summaries of lobbying disclosure and enforcement, on its website. This could go further.²¹⁵⁷ As one administrator I interviewed suggested, the Commissioner's office should have a research mandate. The office could pursue, commission, and publish different investigations into lobbying and its relationship to the government and democracy.²¹⁵⁸ This could help shed light on the state of lobbying, thereby engaging the public, the media, academics and other experts. The office could publish reports and guides for future reform, and thereby pressure the rest of government to be more thoughtful about how it can engage with lobbying.

Enforcement

There should be independent, well-funded, and impartial enforcement of the legislation.²¹⁵⁹ The enforcement powers should reside within the body responsible for overseeing lobbying regulations. The positions should be long-term, and there should be no revolving door movement from the office to employment as lobbyists. The process of enforcement and penalties should be transparent. The oversight should be designed and run so officials feel involved, heard, and are willing participants.

Countries should encourage organisational leadership to foster a culture of integrity and openness in public organisations and mandate formal reporting or audit of implementation and compliance.²¹⁶⁰

As previously discussed, avoiding registration must not be a way to avoid the regulations and oversight.²¹⁶¹ Lobbyists who fail to register should still face all the same repercussions for violating the lobbying regulations, plus additional penalties for their failure to register.

²¹⁵⁷ It would make sense to place these reports under the aspects of another department or branch of the department, so there is a greater likelihood of an objective evaluation of the office's performance.

²¹⁵⁸ These could include reports on the effects of lobbying on democracy or governance; the ongoing impacts of lobbying on the alignment between voters and official policy-decisions; where lobbying is improving or harming official decision-making; the veracity of the information provided by lobbyists; the power balance between the citizen and business interest group lobbying; the impact of lobbying on the disadvantaged and their access to influence through lobbying; the compliance and avoidance of the regulations by lobbyists, interest groups and officials; the short-comings in the lobbying oversight and regulations; the lessons from lobbying legislation in other jurisdictions; the alignment between lobbying regulations at different levels of government, and how reporting systems could be unified; analysis of historic and recent lobbying scandals, where the rules failed and proposals for reform; and whether the lobbying regulations are fulfilling the principles of lobbying reform.

²¹⁵⁹ For example, it is seems that the Office of the Commissioner of Lobbying is in need of more staff and resources. A. Paul Pross, *supra* note 2 at 200.

²¹⁶⁰ OECD, *supra* note 2108 at 5.

²¹⁶¹ For example, in B.C., as of 2017, enforcement only applied to those lobbyists who registered. There was no investigation for lobbyists who did not register, only the lobbyists' self-registered information was inspected.

The oversight body should have access to a wide variety of penalties, from simple corrective directions for minor and first time infractions, to a range of administrative and penal fines, to criminal charges for repeat offenders and flagrant violations. There should also be access to alternative penalties, such as mandatory training, compliance agreements, publication of wrong-doing, and temporary and permanent lobbying bans.²¹⁶²

Visible and proportional sanctions should combine innovative approaches, such as public reporting of confirmed breaches, with traditional financial or administrative sanctions, such as debarment, and criminal prosecution as appropriate.²¹⁶³

Where appropriate, the oversight body should be able to reach past the individual lobbyist to the interest being represented and the directors of that organization. The rules should prevent directors from avoiding punishment via delegation, or diffusing blame and intention through clever use of the organization's structure. There should be strict liability on the directors for flagrant or repeated breaches of the lobbying law. This should apply in cases where there is a history of repeated wrongdoing by the organizations, or where they have instructed their lobbyists to violate the law. The regulations should not allow repeat or flagrant violators to avoid penalties or only pay repeated low fines. The office should have the authority to refer an investigation directly to prosecution, without having to go through the police or another department. The legislation should not limit the source of criminal prosecution to this department, though. The Department of Justice or equivalent should be able to bring charges for criminal level activity, in case the lobbying oversight is failing in its duty to prosecute lobbying violations.²¹⁶⁴

The oversight should include investigatory and audit powers. There should be random compliance audits, particularly for the large organizations most involved in lobbying.²¹⁶⁵ The office

²¹⁶² "As the next statutory five-year review of the Lobbying Act could be launched in 2017, I recommend that Parliament consider providing a range of enforcement options with tools such as compliance agreements, administrative monetary penalties, and expanded authority to prohibit those who breach the Act or the Code from lobbying for a period of time." Office of the Commissioner of Lobbying, *supra* note 151 at 2. In Quebec lobbyists can be prohibited from lobbying for a year.

²¹⁶³ OECD, *supra* note 2108 at 5.

²¹⁶⁴ Montana also allows citizens to bring actions to enforce the lobbying rules if state officials fail to do so. Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 106; Vincent R. Johnson, "Regulating Lobbyists", *supra* note 616 ss 50 & 55.

²¹⁶⁵ It could be modelled on the successful FEC audits from the late 1970s.

"The audits were conducted from March 1977 to March 1978. Audit results were not published and revealed to the public until December 1977 to June 1978. Ultimately, for nearly half of those incumbents who were audited, the FEC found \$10,000s or more of illegal contributions from corporations and unions, excessive contributions from individuals and groups, failure to disclose contributions, mis-statements about contributions, and other instances of concealing records. ... The audits were an extensive investigation into the campaigns of legislative candidates chosen for the audits. Teams of auditors spent "a week or ten days" in campaign offices randomly assigned to be audited. The auditors had access to all records and finances, and followed up with additional questions and requests for documents in

should actively search for lobbyists who fail to register. It should provide information and training for officials throughout the government. The office should also have the ability to levee reprimands and penalties on officials who deliberately violate the lobbying laws.

Ideally, the oversight body should not see its roles as facilitating lobbying, but rather overseeing it and enforcing the rules according to a set of principles that conform (more or less) to those expounded in this chapter. The oversight body should consider its stakeholders to be citizens and the public, not the lobbyists. Recently, the Canadian Commissioner of Lobbying has made a few rulings – allowing lobbyists to make donations and sponsor travel for officials – which appear to be too friendly to lobbying as it is practiced, instead of setting a standard of how it should be practiced.²¹⁶⁶

Oversight Must be Free to Evolve

Lobbying is a dynamic system. The means and modes of influence are always evolving, and the matching oversight must evolve as well.

The lesson for anyone who would implement [lobbying regulations] ... is to draft the regulations with care so as to minimize the potential for evasion. As with campaign finance regulation, a kind of whack-a-mole dynamic could emerge, raising the possibility that effective lobbying regulation will require periodic adjustment to deal with attempts to circumvent the rules.²¹⁶⁷

To keep the regulations cohesive, they should be designed with change and evolution in mind. The regulatory body must have the authority to make some degree of change to these regulations, provided the new rules are justifiable for maintaining the cohesiveness of the regulation and the drafting process

conducting the audits. The legislator was fully aware that the FEC auditors were conducting the audit – indeed, the campaign had arranged a mutually convenient time for the auditors to come to the campaign office. Upon concluding the audit at the end of the week, the FEC auditors held an exit meeting with the campaign to alert them to any violations they found.”

Abby Wood & Christian Grose, “Campaign Finance Transparency Affects Legislators’ Election Outcomes and Behavior” (2018) Univ South Calif Leg Stud Work Pap Ser, online: <<http://law.bepress.com/usclwps-lss/270>> at 11.

²¹⁶⁶ The Commissioner expressed concern about constitutional issues, and the standards set in other parts of the government, but in both cases she could have set a higher standard and the Court would probably have sided with her. Her acceptance of the standard seems to embrace the acceptance of dependency corruption.

“Given that parliamentarians are expressly allowed by their respective ethics regimes to accept sponsored travel that arises from or relates to their positions as parliamentarians, lobbyists do not, in my view, divide parliamentarians’ loyalties by providing sponsored travel they are allowed to accept. This view is reinforced when ordinary definitions of “improper” are taken into account. The Canadian Oxford Dictionary, 2nd ed. defines “improper” as “not in accordance with accepted rules of behaviour”. Seen in this light, lobbyists do not depart from accepted standards of conduct by providing parliamentarians with sponsored travel that relates to their positions as parliamentarians.”

Office of the Commissioner of Lobbying, *supra* note 108; Office of the Commissioner of Lobbying, *supra* note 121.

²¹⁶⁷ Richard L. Hasen, *supra* note 1405 at 249.

is transparent. The reform process could involve citizen engagement – such as citizen juries – to ensure that lobbyists (and officials) do not dominate the process.²¹⁶⁸

Lobbying regulations need to be broadly conceived to contain and channel the hydraulic pressure of private influence. Chari *et al.* point out that the mere act of having lobbyists register their activities can reduce lobbying corruption.²¹⁶⁹ They find that even lobbyists themselves come to appreciate the advantages of the level playing field provided by mandatory regulations with medium to high standards.²¹⁷⁰ Regulations can help ensure that all lobbyists are competing on a level playing field. They can also help politicians avoid future lobbying scandals, but setting stricter codes of behaviour, so politicians do not wander semi-consciously into scandal.²¹⁷¹ The social, democratic and anti-corruption benefits of reform can only be reaped if the lobbying rules apply to all lobbyists.

Principle 2: Enhance Democracy

Lobbying legislation is often treated as a narrow tool used to shed a little sunlight on the pressure exerted by special interest groups. It can and should be much more than this. Lobbying operates at the core of democratic decision-making. Recognizing this, good lobbying regulations are an opportunity to change things for the better. Lobbying legislation should be designed to enhance

²¹⁶⁸ Citizen juries use random selection to create a group of citizens that can engage in policy-making decisions. The idea for citizen juries is discussed in depth in Lyn Carson & Brian Martin, *Random Selection in Politics* (Greenwood Publishing Group, 1999).

²¹⁶⁹ Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 6. They reason that the disclosure makes lobbying more visible, and raises the possibility that someone might investigate the registry. The potential publicity and oversight helps deter more egregious corruption.

²¹⁷⁰ These advantages include the public legitimization of lobbying, political legitimacy for politicians who meet with lobbyists, information about the actions of rival lobbying groups and third party evidence for their clients to show that they are indeed lobbying the government. *Ibid* at 131.

²¹⁷¹ For example, as of the summer of 2020, it is unclear whether the WE Charity controversy is a lobbying scandal, some other form of corruption, or simply bad optics. It is unclear if the charity was lobbying for the project or was approached by the government to oversee the program. The WE Charity was going to be responsible for administering a \$900 million student volunteer program during the Covid pandemic, for which it would receive \$43 million in administration fees. It appears that the program was proposed by the civil service, not Prime Trudeau. However, his mother and brother have received \$312,000 and \$40,000 respectively from the charity in speaking fees. Meanwhile, the decision to pursue a sole-source contract, and the failure of the Prime Minister to recuse himself from the discussion to hire the charity for the program, all raise reasonable concerns about corruption, and perhaps lobbying corruption. Finance Minister Morneau, who also has family connections to the charity, reimbursed the charity \$41,000 in travel fees, aptly demonstrating why sponsored travel from lobbyists should be banned (although Ministers and parliamentary secretaries are prohibited from accepting sponsored travel by the Prime Minister's guidance document). The entire scandal is also a demonstration of the trouble with mixing business and state, and emphasizing privatization as a preferred means of governance, as discussed in Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: The Separation of Business and State, p. 361. Hannah Jackson, "What is the WE Charity scandal and Who are the Kielburger brothers?", (29 July 2020), online: *Glob News* <<https://globalnews.ca/news/7227035/kielburger-brothers-explainer/>>; *Annual List of Sponsored Travel 2018 released*, News Release, by Office of the Conflict of Interest and Ethics Commissioner, News Release (Ottawa, Canada: Office of the Conflict of Interest and Ethics Commissioner, 2019).

democratic alignment; increased political participation; build faith in democratic institutions; set higher standards of lobbyist behaviour; and deter the astroturfing of democracy.

Enhance Democratic Alignment

Lobbying legislation should be designed to structure the lobbying process to enhance democratic alignment. This goal is an expression of the constitutional principles of effective representation and substantive democracy.²¹⁷² The Court has stated that there is a democratic right “to play a meaningful role in the election of elected representatives who, in turn, will be responsible for making decisions”²¹⁷³. This right is premised on the assumption that the politicians’ decisions will align with the preferences of the voters.²¹⁷⁴ If the policies enacted by elected representatives consistently diverge from the preferences of the median voter, it is good evidence that private influence is damaging the representative system.²¹⁷⁵ This misalignment is particularly visible in the U.S., where “politicians’ policy positions reflect the preferences of their donors but do not correspond with the preferences of the public at large.”²¹⁷⁶

The public is aware that lobbying tends to break the alignment between politicians and citizens.

Whether because of the ‘revolving door’ or because of lobbyists’ other close personal connections, the public perceives that lobbyists receive special face time with elected officials. Irrespective of where that face time occurs ... it creates opportunities for lobbyists to persuade elected officials of their clients’ positions – opportunities that ordinary citizens do not have. In other words, the public’s concern is not just that elected officials will engage in blatant vote selling to lobbyists but, more subtly, that they will become partial to the causes of lobbyists’ clients because they spend a lot of time in lobbyists’ company.²¹⁷⁷

Effective lobbying regulations should seek to – and succeed at – increasing representative alignment, particularly in policy outcomes.

²¹⁷² *Reference re Secession of Quebec*, *supra* note 1079 at para 64.

²¹⁷³ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 69; See also *Haig v. Canada (Chief Electoral Officer)*, *supra* note 1877 at 1031.

²¹⁷⁴ Alignment marks how close the views and preferences of the representatives are to those of the public. There can be alignment between the politician and the public’s partisan preferences, the public’s policy preferences, or the policy outcomes. See Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern II: Misalignment with Popular Opinions, p. 153. Nicholas Stephanopoulos, Eric McGhee & Steven Rogers, *supra* note 695 at 771.

²¹⁷⁵ “The integration of economic and political systems, with all power slighted towards the economic system, can no longer be assumed to be anchored in democratic principles and can no longer be expected to represent the people who elected the polity.” Bruce A. Kibler & Kathleen V. Kibler, *supra* note 34 at 112. Kolimar and Koen argue that corporate lobbying has become a tool to suppress democracy, and the intimacy between business lobbying and government can easily descend into corruption. Laura Kollmar & Raymond Koen, *supra* note 1590 at 16.

²¹⁷⁶ Yasmin Dawood, *supra* note 489 at 337.

²¹⁷⁷ Anita S. Krishnakumar, *supra* note 493 at 524.

Some of the better lobbying regulations, including Canada's, have loosely touched on this idea of enhancing democratic alignment, but none have fully adopted it. Lobbyists employ vetogates and policy drift to maintain the status quo. The principle of enhancing democratic alignment should not be confused with a principle that locks in or opposes the status quo. Instead, it should be viewed as a principle that seeks to maintain a connection between the policy preferences of the citizens and their representatives. The more the lobbying process strengthens the connection between citizens and their representatives, the more it fits with democracy; the more it breaks the connection, the more it undermines it.

Increase Political Involvement

It is a constitutional principle that the law must leave an open path for all types of political participation, including running for office, expressing political options, volunteering for a campaign, acting as an activist, and voting.²¹⁷⁸ Democratic society should not only welcome participation, it should go further, and push towards greater democracy and enfranchisement.²¹⁷⁹ Lobbying legislation should embrace this principle.

The legislation should be designed to foster citizen involvement in the political process. It should incentivize civic engagement. Encouraging civic engagement is fundamentally different from allowing unfettered lobbying. Government should be open to the people, but it should not be a conduit for business interests seeking private returns. The encouragement to lobby must be filtered through the other principles discussed throughout this chapter, so that it supports the goals of lobbying reform. Civic openness should make room for new lobbying groups, and room for citizens to participate in the formal structures of decision-making (such as public committee meetings) on a substantive and not just formalized basis.²¹⁸⁰ This principle requires that officials gauge the inputs of lobbyists and citizens based on the quality of the information and opinions provided, not based on their connections and social status.

Rebuild Faith in Democratic Institutions

Rebuilding faith in democratic institutions is a sub-principle that spans many lobbying reform principles. Among others, it is a component of enhancing democracy, preventing corruption, preventing the appearance of corruption, advantaging citizen groups, separating business and state, and empowering the disadvantaged. Maintaining and increasing faith in public institutions is a key component of democracy.²¹⁸¹ The crisis of faith in civic institutions is a deep problem, tied to the decay in democracy visible in the U.S., Brazil, Hungary, Turkey, and other countries.²¹⁸² Rebuilding faith in institutions will be difficult, but lobbying reform can be part of the process. By making lobbying actions visible, and deterring abuse of the process, some faith in government can be restored. Increased

²¹⁷⁸ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 69.

²¹⁷⁹ *Frank v. Canada (Attorney General)*, *supra* note 1707 at para 2.

²¹⁸⁰ Fred Thompson & W. T. Stanbury, *supra* note 2 at 131.

²¹⁸¹ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 1880 at 181 i.

²¹⁸² Freedom House, *supra* note 5 at 2.

democratic alignment is a fundamental part of this process and principle. The alignment of policy outcomes affect the people’s faith in democracy.²¹⁸³ As policy results align closer to public preferences, the public trust that elected government is working on their behalf will grow.

Regulations Should Set Increasing Standards of Behaviour

Good law can set expectations and standards of behaviour for society. Regulatory regimes can do the same within the more narrow confines of the field being regulated. As a principle, lobbying regulation can and should be used to create a ratcheting standard of good behaviour for lobbyists, interests groups, and officials. It should raise them away from deceptive lobbying practices, and towards an ever-increasing reliance on type v (rational discourse) influence.²¹⁸⁴ The legislative design should seek to establish norms of compliance and ethical lobbying, so that those involved are not inclined to go around the rules.

Chari *et al.* found that politicians, administrators and lobbyists operating in high regulation jurisdictions believe that the lobbying register and regulations promoted accountability and transparency.²¹⁸⁵ Chari *et al.* argue “respondents from more highly regulated jurisdictions were more likely to believe that an official list did lead to more effective accountability.”²¹⁸⁶ My interviews found the same thing. The regulations themselves set the norms for politicians, administrators and lobbyists. The current regulations represent a minimum standard of good behaviour, preventing a race to the bottom that many decent lobbyists and officials would like to avoid. Stronger regulations, if wisely designed, could and should raise this standard.

Canadian lobbying law already sets some norms by establishing the binding *Code of Conduct* for lobbyists. It is not clear that the Commissioner of Lobbying initially envisioned the *Code of Conduct* as enforceable; it appears that it was originally intended more as a statement of preferred conduct. Regardless of the initial intentions, the Court has made the *Lobbyists’ Code of Conduct* legally binding.²¹⁸⁷ This is a good start, but the Commissioner and additional legislation could do much more. The increasing standards of behaviour should apply to both lobbyists and officials.

Countries should provide principles, rules, standards and procedures that give public officials clear directions on how they are permitted to engage with lobbyists. Public

²¹⁸³ see note 699. R. S. Foa *et al.*, *supra* note 5 at 10; Klaus Armingeon & Kai Guthmann, “Democracy in crisis?”, *supra* note 699 at 17.

²¹⁸⁴ The types of influence are: (i) influence based on obligation, including authority and respect; (ii) influence based on the decision-maker’s desire to please, such as friendship and benevolence; (iii) influence based on changing the perceived alternatives open to the decision-maker, but not through reasoning; and (iv) influence based on positive or negative inducement to change the decision-maker’s behaviour, like bribery, threats, and leverage from political secrets. See Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Four Pressures Approach: Direct Power and Influence, p. 114.

²¹⁸⁵ Raj Chari, John Hogan & Gary Murphy, *supra* note 2 at 122.

²¹⁸⁶ *Ibid.*

²¹⁸⁷ *Makhija v. Canada (Attorney General)*, *supra* note 119 at 89; *Makhija v. Canada (Attorney General)*, *supra* note 1703 at paras 2 & 7.

officials should conduct their communication with lobbyists in line with relevant rules, standards and guidelines in a way that bears the closest public scrutiny. In particular, they should cast no doubt on their impartiality to promote the public interest, share only authorised information and not misuse ‘confidential information’, disclose relevant private interests and avoid conflict of interest. Decision makers should set an example by their personal conduct in their relationship with lobbyists.²¹⁸⁸

Higher standards of behaviour are difficult at first, but can become the norm.

Deter the Astroturfing of Democracy

Lobbying regulations should work against the astroturfing of democracy. As we discussed in Chapter 3 and Chapter 6, there has been an increasing encroachment of the private sphere into the public space. Success in the private marketplace has been replacing public goods and actions as the arbiter of the good life.²¹⁸⁹ This trend is visible in the use of astroturf lobbying and corporate speech to replace the direct connection between voters and politicians. Civic groups often need corporate allies to make their lobbying case convincing. All too often, corporations funnel citizens’ concerns to politicians, astroturfing the representative process.²¹⁹⁰ Business interests create fake citizen groups to lobby government, pay actors to act like concerned citizens at public hearings, and internet sockpuppetry is rampant.²¹⁹¹ Lobbying regulations can and should be designed to counteract this process.

The reform of lobbying regulation should be conceived as part of a broader plan to revitalize democracy and rebuild civic culture. By taking corporate concerns out of the core of lobbying as much as possible, and rebalancing it towards citizen public concerns, a reformed lobbying regulatory regime can act to enhance civic democracy. Lobbying rules should prevent corporations from being a prime conduit for civic action, prevent civic organizations from becoming masks for corporate actions, and enhance the participation and civic organizations. No one should be lobbying with a mask on. The public and officials should always know what interest groups are being represented.

There is a personal moral component to this. As Teachout argues, current lobbying practices damage the personality of the lobbyist, encouraging them to replace civic engagement and bonds of friendship with manipulation, marketing, and exploitation of relationships for personal gain.²¹⁹² By the

²¹⁸⁸ OECD, *supra* note 2108 at 4.

²¹⁸⁹ Private goods have little benefits for anyone other than the person who receives them, e.g. a tax break. Public goods have widespread benefits beyond the receiver, e.g. a new park. Both might be pursued for self-interested reasons, but the latter has knock-on effects that benefit the wider public.

²¹⁹⁰ For example, see Edward Walker, “How business funded the anti-soda tax coalition”, *Wash Post* (24 November 2014), online: <<http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/11/24/how-business-funded-the-anti-soda-tax-coalition/>>.

²¹⁹¹ Union of Concerned Scientists, *supra* note 809; Victor Zapanta, *supra* note 456; Andrew Higgins, *supra* note 463; Natasha Bertrand, *supra* note 463; Michael Isaac Stein, *supra* note 1808.

²¹⁹² Zephyr Teachout, *supra* note 988 at 248.

same token it damages the personality of the officials, who can never be sure that those reaching out to them are motivated by civic engagement and friendship, or are instead motivated by personal profit. This is another aspect of the astroturfing of democracy; motivations become hidden and convoluted, and personal morality suffers. Good lobbying legislation could help prevent this by banning astroturf activities, focusing lobbying on public concerns, and reinforcing rational discourse.

Principle 3: Prevent Corruption

Lobbying legislation and regulation must be designed to prevent corruption. Retnasaba denotes the costs corruption places on society.

First, corruption transfers wealth from society to the corrupt... This allows only a small fraction of each government dollar to be spent on bettering society. Second, corruption causes mismanagement. ... It is estimated that for every \$1 of corruption, society incurs a cost of \$1.67 due to the mismanagement effect. ... And left untreated, corruption is contagious. Once corruption takes root in one area, unnoticed or unpunished, it gains acceptance. This creates a greater likelihood it will increase, spread, and intensify. Further, corruption is self-entrenching. Once in power, corrupt incumbents can raise more funds than honest challengers, leaving challengers at a disadvantage.²¹⁹³

Corruption destroys our social bonds, our trust in each other, our social institutions, and ultimately democracy itself.²¹⁹⁴ The rule of law is integral to democracy. It is incompatible with a corrupt system. The Supreme Court has repeatedly stated that preventing both corruption and the appearance of corruption is a fundamental constitutional principle.²¹⁹⁵ Even those who subscribe to the disclosure heuristic believe that lobbying legislation should prevent blatant corruption. This is even more important if one accepts the corruption heuristic. As covered in Chapter 3, there is good reason to believe that lobbying as it is currently practiced is corrupting.²¹⁹⁶

²¹⁹³ “Gajan Retnasaba, *supra* note 278 at 2. “There is a widespread understanding of the adverse effects of corruption on morale, societal solidarity, and the functioning of the economy. But increasingly, inequality in the U.S. is viewed as unfair, arising out of a corrupt political and economic system.” Joseph E. Stiglitz, *supra* note 24 at 12.

²¹⁹⁴ Bo Rothstein & Eric M. Uslaner, “All for All”, *supra* note 1569 at 54; Transparency International, *supra* note 907 at 1.

²¹⁹⁵ See *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 41; *Reference re Secession of Quebec*, *supra* note 1079 at para 64. See also A. Paul Pross, *supra* note 2 at 197.

²¹⁹⁶ Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern VI: Lobbying Corrupts Democracy, p. 194. Retnasaba found evidence of corruption from the combination of campaign contributions and lobbying. Gajan Retnasaba, *supra* note 278 at 11; Teachout argues that lobbying used to be seen as corrupting, and that this legal history has been ignored to the American people’s disadvantage. Zephyr Teachout, *supra* note 988 at 169; Lessig argues that the flow of money and lobbying into government has formed a systematic dependency corruption that pushes representatives to favour the preferences of wealthy donors over the rest of the citizenry. Lawrence Lessig, *supra* note 273 at 89; Milyo found limited evidence that lobbying brings abnormal returns to a corporation’s stock value, and that it is linked to the use of trust networks, which

Lobbying legislation must account for systematic corruption, venal corruption, quid pro quo corruption, circumspect corruption, and most important for modern governance, dependency corruption.²¹⁹⁷ The legislation must separate officials from private financial rewards. These rewards could be direct bribery, circumspect bribery, jobs and job offers, travel and vacation stays²¹⁹⁸, other indirect payments, political and party donations, or funds extorted from lobbyists, donors and citizens.

corresponds to the discussion of a social gift economy in chapter 2; Jeffrey Milyo, “Corporate Influence and Political Corruption”, *supra* note 916 at 13; Hasen discusses how lobbying imposes rent-seeking costs. Even more damaging, it is likely to lead to inefficient legislation. In one case, the return on lobbying was found to be 30,000%, which imposes a high cost on the public. Lobbying has been linked to the cause of the financial crisis, while firms that lobbied more behaved with more risk and were more exposed to the crash. Richard L. Hasen, *supra* note 1405 at 231; Drutman found that lobbying suffers from a balance of power problem, with corporations spending 34 times more than citizen groups and unions combined; that the asymmetry of information allows corporate lobbyists to take advantage of officials; and that corporations are focused on narrow, rent-seeking outcomes and their lobbying influence allows them to dominate the public agenda, crowding out the capacity of the system to address larger problems. Lee Drutman, *supra* note 172 at 228; Kolimar and Koen argue that corporate lobbying has become a tool to suppress democracy, and the intimacy between business lobbying and government can easily descend into corruption. Laura Kollmar & Raymond Koen, *supra* note 1590 at 17; Godwin et al found that interest groups exercise a great deal of influence in low salience areas, and that resource advantages pay off in this type of lobbying. “Interest organizations lobbying for private benefits are less likely to face countervailing powers, and private goods are rarely the types of issues that political parties place in their platforms or that are salient to voters.” R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60; Richter et al found that “on average firms with higher lobbying expenditures in one year pay lower effective tax rates in the following year”. This reduce tax rate comes at a competitive disadvantage to non-lobbying businesses, and to the public, that has to make up the difference. Brian Kelleher Richter, *supra* note 594 at 907; Corporations have lobbied against transparency, to pollute more at great cost to the public’s health, and to outlaw protests against their activities. Congress members who become lobbyists increase their salaries by 15 times on average. Paul Blumenthal, *supra* note 237; Charlie May, *supra* note 827; Lee Fang, *supra* note 55; Lee Fang, *supra* note 113. See Appendix: Lobbying Examples, p. 648 for a list of lobbying examples, many of which include scandals and corruption.

²¹⁹⁷ For a full description of the types of corruption, see Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Disclosure versus Corruption Approach: The Corruption Heuristic, p. 112. *Venal corruption* is corruption where the economic elites manipulate the political system for ultimately economic ends. This is the corruption where the rich buy politicians. *Dependency corruption* is a type of endemic corruption, where the structures of the system require that politicians engage in the corruption in order to participate in office. The corruption is the result of widespread built-in political and economic structures and incentives. “Dependence corruption is not the aggregate of many smaller cases of quid pro quo corruption. The two may overlap, but they are not coextensive. To solve the one is not to solve the other. To regulate one is certainly not to regulate the other.” Lawrence Lessig, *supra* note 273 at 231. *Circumspect corruption/bribery* is akin to quid pro quo corruption, but the payment for the bribery is masked and removed through a legitimate channel, so that it is exceedingly difficult to prove that the official is being bribed.

²¹⁹⁸ The Commissioner of Lobbying has ruled that since parliamentarians are expressly allowed to accept sponsored travel under the Conflict of Interest Code for members of the House of Commons and the Senate, sponsored travel must be acceptable. Moreover, she ruled that the *Code of Conduct* rules do not require lobbyists to refrain from lobbying those they have given sponsored travel to, even on the sponsored trip. The lobbyists are not required to disclose the gift of the sponsored travel or when lobbying occurred during a sponsored trip. This is an unfortunate ruling in many ways. It would be far better to ban the sponsored travel and provide a budget for fact finding humanitarian trips. Office of the Commissioner of Lobbying, *supra* note 108 at 12; Beatrice Britneff, “Paid trips given to MPs in 2017 reignite scrutiny of ambiguous lobbying rules”, (31 March 2018), online: *iPolitics* <<https://ipolitics.ca/2018/03/31/paid-trips-given-to-mps-in-2017-reignite-scrutiny-of-ambiguous-lobbying-rules/>>.

In the U.S., 69% of the public believe that most politicians are corrupt, 28% do not. In Canada, it is “only” 48% of the population that believes most politicians are corrupt, and 51% who do not.²¹⁹⁹

Social Exchange and Phishing

There is strong evidence that politicians’ decision-making is heavily influenced by the gifts they receive from lobbyists and special interests.²²⁰⁰ As social exchange and gift economy theory predict, even when the gifts have little monetary value they can be corrupting, granting social influential over officials.²²⁰¹ It is reasonable to err on the side of defending against corruption. The legislation should include a ban on all gifts from lobbyists and special interests organizations.²²⁰² It should also ban lobbying by family members, close friends and by those who donated to, or played a key role in the politician’s election campaign.²²⁰³ The Commissioner of Lobbying has guided that it is acceptable to lobby politicians that one has donated to, possibly out of an abundance of concern about infringing the lobbyist’s right to freedom of expression.²²⁰⁴ This is unnecessary. One can always donate to the political party to express political support. The legislation should try to discourage officials and lobbyists from socializing. This would include events that lobbyists often use as a means of additional social contact with officials, including galas, fundraiser, charity events and trips. This type of social contact is an unfair advantage for those who have it, and forms social bonds that can be unduly influencing.

Gift ban resolutions similarly address only the quid pro quo problem but not the purchase of access to elected officials: Although they bar lobbyists from paying for officials’ meals or travel expenses, the resolutions cannot and do not ban elected officials from socializing with lobbyists (e.g., at charity golf or skiing events organized by lobbyists to benefit causes supported by elected officials). Nor do the gift ban resolutions forbid lobbyists from inviting elected officials to speak at events that they host. Thus, the resolutions do not eliminate moneyed interests’ special access to legislators; they only limit such interests’ ability to shower small favors upon legislators.²²⁰⁵

The theory of phishing presents the key insight that deception, fraud and corruption are natural aspects of the market – components that must be contained. The same is true for governance. Any

²¹⁹⁹ Richard Wike, Laura Silver & Alexandra Castillo, *supra* note 1281.

²²⁰⁰ Gerry Kristianson, *supra* note 154 at 202.

²²⁰¹ Gajan Retnasaba, *supra* note 278 s 1.2.

²²⁰² “As one editorial lamented, a law that requires disclosure of gifts and campaign money, rather than banning them entirely, is the equivalent of posting of “price lists for the cost of doing business” with law makers. Another commentator remarked that, “disclosure laws have ‘legitimized a form of official corruption’ [through publication].”” Vincent R. Johnson, “Regulating Lobbyists”, *supra* note 616 at para 56.

²²⁰³ This has the added benefit of further breaking the connection between lobbying and campaign donations, eliminating one conduit for private influence into politics.

²²⁰⁴ Office of the Commissioner of Lobbying, *supra* note 121.

²²⁰⁵ Anita S. Krishnakumar, *supra* note 493 at 527.

system of governance that allows unrestrained lobbying will inevitably induce corruption. Lobbyists will come to use wealth to get their way, and officials will come to alter their decisions for personal gain. The system of government must be actively designed to prevent this, through rules, independent oversight and transparency. Although other legislation bans bribes and sets codes of behaviour for officials, it would be good practice to include such restrictions in the lobbying legislation as well – to clarify how these rules apply to lobbyists and interest groups.

Regulatory Capture

As part of preventing corruption the law must prevent regulatory capture.²²⁰⁶ Regulatory capture impairs the rule of law and sabotages the alignment of representatives to voters, since regulatory outcomes do not match public preferences.²²⁰⁷ It is largely futile to have politicians faithfully fulfill the preferences of the populace in legislation, if companies can then bypass the rules by controlling the regulators. The lobbying legislation should bring the interests of the regulators in line with those of the public. It should emphasize the mental model that the regulators exist to support the public, not the industry they regulate. The lobbying regulations could require that officials enact processes to protect their agency from regulatory capture by special interests.²²⁰⁸ For example, Akerlof and Shiller recommend institutionalizing “devil advocate” programs within agencies, and that regulators be pressured to cultivate and consult diverse and independent experts.²²⁰⁹ Similarly, the citizen and consumer representation could reside in an external agency. Drutman and Teachout recommend that there be an office of public lobbying with public interest lobbyists that “represent different public interest clients before the government.”²²¹⁰ They envision this office actively intervening in legislative debates, but it could also intervene in regulatory debates, to ensure that lobbyists do not have the only

²²⁰⁶ “The regulatory system should be reformed to improve accountability and avoid both “agency capture” and the centralized and bureaucratic tendencies of current and past regimes.” Joel Bakan, *supra* note 50 at 162.

²²⁰⁷ Bakan proposes a number of ways regulations could be made more effective. Simply staffing agencies properly and paying good wages to lower level employees would go a long way.

“Regulations should be made more effective by staffing enforcement agencies at realistic levels, setting fines sufficiently high to deter corporations from committing crimes, strengthening the liability of top directors and managers for their corporations’ illegal behaviors, barring repeat offender corporations from government contracts, and suspending the charters of corporations that flagrantly and persistently violate the public interest.”

Ibid.

²²⁰⁸ Kibler and Kibler argue that the issue is not just that the revolving door subjects regulators to regulatory capture, but that since officials come to rely more on business and lobbyists for their money and information, it creates a general confusion. Officials are incapable of seeing business as an adversary, or even a party to be supervised, when they are so reliant on it. Officials cannot proceed with a clear plan of action, as they are divided about how to approach business oversight, with many feeling loyalty to the source of the funds and information. This leaves the officials unable to concentrate their efforts. “This gives the regulated company and or industry free reign, and although it is not distinguishable as ‘agency capture’, it certainly has the same effect.” Bruce A. Kibler & Kathleen V. Kibler, *supra* note 34 at 109.

²²⁰⁹ George A. Akerlof & Robert J. Shiller, *supra* note 52 at 227.

²²¹⁰ Lee Drutman, *supra* note 172 at 201.

say.²²¹¹ It is an interesting idea worthy of more study; but it is difficult to envision how the office would determine what issues are deserving of lobbying, and garner the necessary expertise and public support on the issue to lobby effectively. It would also face the risk of being captured itself. However, the Consumer Financial Protection Bureau in the U.S. was designed to be resistant to lobbying and has been relatively successful. It might make a good model.²²¹² With careful legislative design and protected funding, an office like this might function relatively well. Still, it is probably simpler to run an office that funds citizen groups so they can afford to lobby, as discussed in Chapter 10.²²¹³

Cooling-off Period

There must be a strict separation of lobbyists from governance. Where there is not, lobbyists will take advantage. American states have found the need for rules explicitly preventing lobbyists from serving as state commissioners or as government employees; being present on the floor for voting; serving as fundraisers, advisors or part of a politician's political campaign; trading reciprocal favours; lobbying officials they are dating, married to, or otherwise related to; and introducing legislation so that they can secure future employment supporting or opposing that legislation.²²¹⁴ Likewise, a cooling-off period of at least one term (4-5 years) is a necessity to prevent corruption.²²¹⁵ This cooling-off period should stop former officials from becoming lobbyists, or for negotiating for salaries working for lobbying firms while still in office.²²¹⁶ This practice has become common in the U.S., and the large pay increases raise reasonable questions of whether the officials are working for the interests of the public or for the lobbying firms planning to employ them.²²¹⁷ Any organization that lobbies and hires an official during

²²¹¹ Citizen juries, can also be employed as advocates or decision-makers in the regulatory process, to break the cozy relationship between some regulators and lobbyists, particularly in areas of governance that are prone to this corruption.

²²¹² The bureau was quite successful until the Trump government set out to neutralize it. It has been less effective since then, but few agencies can flourish when the executive is actively undermining them.

²²¹³ Chapter 10 – Specific Reforms and Conclusion: Publicly Support Citizen Lobbying, p. 579.

²²¹⁴ Vincent R. Johnson, "Regulating Lobbyists", *supra* note 616 ss 43–46.

²²¹⁵ It might makes sense to make all job offers to officials (designated office holders) public, for the first year after they leave office. This clause was in the first draft of the U.S. the *Honest Leadership and Open Government Act* of 2007. Isaac Arnsdorf, *supra* note 107.

²²¹⁶ In the U.S., "Republic Report's investigation found that lawmakers increased their salary by 1452 percent on average from the last year they were in office to the latest publicly available disclosure". A number of officials negotiate for jobs with lobbyists while still in office. For example, "Shuler, a leader of the Blue Dog caucus of big business-friendly Democrats, announced that this term will be his last a few short months ago ... he is already talking to lobbying firms that may want to hire him as an influence peddler". Lee Fang, *supra* note 113; Lee Fang, "Bribery By Another Name: While Still In Office, Congressman [sic] Heath Shuler (D-NC) Already Negotiating With K Street To Become A Lobbyist", (12 March 2012), online: *Repub Rep* <<https://www.republicreport.org/2012/heath-shuler-selling-himself/>>.

²²¹⁷ The problem with the revolving door to lobbying is apparent in other countries as well. An egregious example occurred in Germany.

"As Chancellor, Schrbder had supported vigorously the Baltic Sea Gas Pipeline project, to supply Russian natural gas to Germany via the Baltic Sea. The pipeline is owned by Nord Stream AG, in which Gazprom, the Russian state-owned gas company, holds a 51% stake. In September 2005 the agreement governing the pipeline project was concluded and signed in the presence of Schrbder and Vladimir Putin ... And less than a month after his withdrawal from politics, Schrbder was inducted as chairman of the supervisory body of the Nord Stream AG consortium responsible for constructing the pipeline. It is a position which

her cooling-off period should have verifiable policies that prevent her from being directly or indirectly involved in the lobbying. In conjunction with the cooling-off period, it might make sense to set a lower threshold for lobbying for organizations that employ former officials.²²¹⁸ This would prevent officials from breaking the cooling-off period by carefully staying just below the threshold. Former officials employed as lobbyists have too much influence over the decision-making of those still in office, through the social economy of past favours, emotional connections, and type i to iv influence. The cooling-off period helps push lobbying into the realm of rational discourse and the provision of useful information. It also reduces the power imbalance that favours the wealthier organizations who can afford to hire former officials, when other lobbying groups cannot.²²¹⁹

The legislation should make current officials responsible for knowingly meeting with lobbyists who are breaking the cooling-off period²²²⁰ “If we really want to slow the revolving door, we ought to hold government officials democratically accountable for their part in the relationship as well.”²²²¹

There should also be a cooling-off period for regulators going to work in an industry they were overseeing, and for lobbyists going to regulate businesses they worked for.²²²² Former regulators can bring useful experience to an industry, and former industry personnel can bring good experience to government. There might be insights that lead to useful information and mutually beneficial lobbying. However, this only works if the regulator’s loyalty is to the public, and not to the industry. Scott Pruitt and Andrew Wheeler’s terms in the EPA are good examples of the harm that can occur to the public when regulators maintain their loyalty to the industry.²²²³ It makes sense from the perspective of good

earns him €250 000 a year. ... [A]fter he had lost the 2005 elections ... but before the end of his term, Schröder [had also] planned to provide a state guarantee for a loan of €1 billion that Gazprom had obtained from Die Deutsche Bank to finance the Baltic Sea pipeline.”

Laura Kollmar & Raymond Koen, *supra* note 1590 at 22. See also, Jack Abramoff, *supra* note 1 c 6.

²²¹⁸ The exact composition of who counts as a former-official can vary depending on the political system. Essentially it should count those who have decision-making authority, or high influence or status with decision-makers. Canada’s list of designated office holders is a reasonable approach. The government posts a list at <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00884.html>.

²²¹⁹ Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 4.

²²²⁰ *Ibid* at 21. “[M]embers of Congress, White House staff and bureaucrats ought to publicly disclose contact with previous employees and colleagues if the contact is official in nature, or face ethics penalties.”

²²²¹ *Ibid*.

²²²² Joel Bakan, *supra* note 50 at 162. In the private sector non-compete clauses have become widespread to avoid employees misusing information or working in favour of the subsequent job offer. Their use might be excessive, but surely this equivalent concern is all the more reasonable and important when applied to the regulators in the public sector.

²²²³ As of May 2020, the Trump administration has rolled back 64 environmental protection rules and is in the process of rolling back 34 more. In an expression of dark irony and an indication of regulatory capture, the majority have been rolled back by the EPA. Michelle Lewis, “Climate Crisis Weekly: Trump has rolled back 98 environmental rules”, (9 May 2020), online: *Electrek* <<https://electrek.co/2020/05/09/climate-crisis-weekly-trump-rolled-back-98-environmental-rules-new-york-times-montana/>>. As covered in Chapter 3, p. 199, Scott Pruitt filed a legal plan to repeal rules curbing pollution in waterways; delayed implementing a rule preventing explosions and spills at chemical plants; reversed a ban on a pesticide that damage children’s nervous systems; met with agriculture lobbyists who wanted to repeal a rule restricting fertilizers use near waterways, then drafted a plan to repeal the rule; met with the board of directors of the American Petroleum Institute who wanted to repeal a rule restricting

governance, anti-corruption, and appearance of anti-corruption to maintain a cooling-off period between working as a regulator and working in that industry. This would help align the regulators' self-interest with doing their job well, rather than a future lucrative position in industry. This would also help set an expected standard of behaviour.

Good lobbying legislation should be instituted proactively as one of many tools to reduce corruption.

Principle 4: Prevent the Appearance of Corruption

Lobbying regulation has to not only prevent corruption; it has to prevent the appearance of corruption. In campaign finance cases, the Canadian Supreme Court has emphasized that preventing the appearance of corruption is a fundamental constitutional principle.²²²⁴ Lobbying regulations should set standards of behaviour for lobbyists, interest groups and officials that keep their activities a clear step away from corruption.

The OECD's lobbying principles places some of this burden on lobbyists.

To maintain trust in public decision-making, in-house and consultant lobbyists should also promote principles of good governance. In particular, they should conduct their contact with public officials with integrity and honesty, provide reliable and accurate information, and avoid conflict of interest in relation to both public officials and the clients they represent, for example by not representing conflicting or competing interests.²²²⁵

Lobbying oversight needs the social standing and structure to protect it from the influence and backlash of powerful interests. It should be particularly designed to take on the activities of the most powerful interests and their lobbyists, and do so publicly and consistently. This will help convince the public that the rules are being fairly applied, and fight the appearance of corruption.

Lessig argues that politicians should be treated more like judges, and there should be little reason to suspect they favour one position over another for personal gain.²²²⁶ Politics is not the courtroom, but it would behove us to raise it to a higher standard of behaviour. In the U.S. we are seeing the opposite, where partisanship has become more important to many than setting standards of behaviour for politicians. This is not a good approach to governing. A judge must recuse herself if she has a personal connection to a plaintiff, has a financial stake in the outcome, and cannot accept gifts. Specifically, a judge must recuse himself if a reasonable person properly informed would apprehend that

methane leaks from drilling wells, and then filed to delay the rule by two years, regardless of its disproportionate effect on children. Nichols, *supra* note 33; Coral Davenport, *supra* note 946.

²²²⁴ See *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 41; *Reference re Secession of Quebec*, *supra* note 1079 at para 64. See also A. Paul Pross, *supra* note 2 at 197.

²²²⁵ OECD, *supra* note 2108 at 4.

²²²⁶ Lawrence Lessig, *supra* note 273 at 131.

there was conscious or unconscious bias on the part of the judge.²²²⁷ The same rules could and should apply to politicians and other officials regarding lobbyists and the businesses they regulate. Following this reasoning, officials should be required to sell any individual stocks and transfer their investments to a publicly managed general mutual fund or equivalent.²²²⁸ If they retain a private business, it should be small, and unrelated to any area they oversee. Lobbyists should be prohibited from frequenting the business.

Like raising any standard of behaviour, passing lobbying reform will be hard work. The current Commissioner of Lobbying has made some important inroads, but does not see her role as substantively reforming lobbying.²²²⁹ It is unlikely change will come from within. It will not happen without a consistent demand for improvement to push against those benefiting from the current system. It will require a movement to push for change, and electing politicians who have committed to prioritizing the issue.

²²²⁷ The Court cited Lord Hewart C.J.'s aphorism, that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." *Wewaykum Indian Band v Canada*, [2003] 2 SCR 259 at para 66. The same sentiment should be an applicable standard for lobbying and political representation: it should be of fundamental importance that the people are not only fairly represented, but should manifestly and undoubtedly be seen to be fairly represented without bias towards lobbying interests.

²²²⁸ In the U.S., there is evidence that legislators continue to manipulate their so-called blind trusts for substantial profit, as their portfolios seem to consistently outperform the market. Evidently, more separation is needed. R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 64; Jeffrey Milyo, "Corporate Influence and Political Corruption", *supra* note 916 at 31. Canada recently had its own scandal involving the finance minister's failure to put his personal assets in a blind trust. Cases of family businesses are more complicated, but the rules should err on the side of strict separation of politicians from ways they can profit their business. President Trump's ongoing connection to his business is notably corrupting. In slightly over three years President Trump reached 3,000 conflicts of interest – roughly three a day. This included 117 events held by special interest groups at Trump properties and 134 foreign officials visiting Trump businesses. The government directly paid Trump businesses roughly \$500,000 between January 2017 and April 2018.

"President Trump has established his private businesses as an extension of his White House – by visiting them and rewarding their customers with access to, and sometimes jobs within, his administration. Meanwhile, the Trump Organization has embraced the image, and as a result, patronizing the president's businesses has become an unregulated and unaccountable tool of influence for special interests and foreign governments seeking to influence the White House."

Citizens for Responsibility and Ethics in Washington, *supra* note 827. President Trump's time in office has opened the door to some of the key methods of normalizing organizational corruption. These include complicit leadership, a permissive climate, denials of responsibility, short-term thinking, the refocusing attention away from the corruption, and appeals to group loyalty. It would be far preferable to deter people unwilling to give their ties to business from running, than to allow them to corrupt public office out of a misguided sense of fairness. Blake E Ashforth & Vikas Anand, "The Normalization Of Corruption In Organizations" (2003) 25 Res Organ Behav 1–52 at 18–25.

²²²⁹ For example, see the sponsored travel ruling. Office of the Commissioner of Lobbying, *supra* note 121; Office of the Commissioner of Lobbying, *supra* note 108.

A Fence around Corruption

As we have covered, in Jewish tradition there is a concept called *khumra*, that when a vital law is at stake, one goes a little further for safety's sake, and creates a fence around it.²²³⁰ The fence acts as a psychological barrier, emphasizes the importance of the law. Additionally, if the fence is transgressed, the wrong-doing might still leave the core rule untouched. We can apply a similar concept of fencing to lobbying to guard against the corruption of government decision-making. Setting the legislative goal of preventing the appearance of corruption creates a fence around actual corruption. By creating rules that keep lobbyists, interest groups and officials on the right side of this fence, and making the fence comprehensive, the public can be reassured that there is less chance of actual corruption. This also supports the secondary principle of rebuilding faith in governing institutions.²²³¹ By separating officials from financial rewards, personal gain, and social ties with lobbyists and businesses, regulations can build a fence against the appearance of corruption. By setting the goal of preventing the appearance of corruption, the law is more likely to take the entire governance structure into account, and establish standards that properly channel the hydraulic pressure of private influence.

An example of this principle in use is the Canadian ban on contingency fees for lobbying. This ban is based on the reasonable premise that success cannot be promised, and it might tempt lobbyists to behave unethically to ensure they get the policy decisions they prefer.²²³² Johnson supports this ban, arguing the fear of corruption is well-founded.²²³³ Akerlof and Shiller propose that the government could expand internal and external reviews to include agency inaction as well as agency action.²²³⁴ This would help reveal where lobbyists have too much influence and are reinforcing the status quo bias. The idea of the consumer advocacy program or the office of public lobbying might also apply. These could operate

²²³⁰ Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern VI: Lobbying Corrupts Democracy: Lobbying Creates the Appearance of Corruption and Unfairness: A Fence around Decision-Making, p. 205. See the note 962 Eruvim 100b.

²²³¹ In contrast, the American system has done the opposite, discarding the concept of the appearance of corruption in campaign finance law, and weakening the standard of corruption in general. Michael S. Kang, *supra* note 1042 at 21; Zephyr Teachout, *supra* note 988 at 238. This seems to have increased corruption and further eroded the public's trust that their leaders will represent their constituents over the interests of donors and lobbyists.

²²³² Contingency fees in law are different from contingency fees in lobbying due to structural differences. Lawyers work in a highly structured environment where the process is overseen by a judge, who controls all aspects of the case, and there is an opposing lawyer ready to point out any ethical lapses caused by the contingency fees. If the contingency fee induces a lawyer to work harder, it has a reasonable chance of impacting the outcome of the case. In contrast, in many situations, even if a lobbyist works harder, it will have no impact on the policy outcome. It thereby incentivizes the lobbyist to resort to illegitimate influence to earn the contingency fee. Moreover, lawyers are always expected to advocate zealously for their client, on the assumption that the system is structured for it. The contingency fees allow an otherwise poor client or class access to the court. In contrast, these factors do not exist in lobbying. The possibilities and methods of corruption are much broader, and the oversight weaker. It is widely argued that contingency fees in lobbying are more likely to lead to corruption and bribery. Lacking evidence to the contrary, it is reasonable to prohibit contingency fees in lobbying. Unlike contingency fees in law, contingency fees in lobbying are unlikely to lead to the service of under protected communities, or of holding the powerful to account.

²²³³ Vincent R. Johnson, "Regulating Lobbyists", *supra* note 616 s 37.

²²³⁴ These proposals were intended to improve general regulatory oversight, but they would also help prevent the appearance of corruption in lobbying. George A. Akerlof & Robert J. Shiller, *supra* note 52 at 227.

inside or outside of regulatory bodies, intervene where oversight is weak, and advocate on behalf of citizens.²²³⁵ More study is needed on the effectiveness of these programs.

The regulations could benefit from considering Banfield’s categories of influence, preventing lobbyists from exploiting them as much as possible.²²³⁶ The legislation should encourage rational discourse – (type v influence) and deter the other four types of influence, as a good means of setting up the fence around corruption.²²³⁷ For example, building a fence around corruption would justify a detailed investigation of the practice of high speaking fees, both for top-ranked officials and their relatives. The sky-high speaking fees raise legitimate concerns about the appearance of corruption, corruption and circumspect bribery.²²³⁸

The lobbying rules should help build a culture where civil servants and politicians will launch complaints against lobbying infringements. Officials should feel the moral and political obligation to do this – not as a facet of increased bureaucracy, but as a facet of ethical conduct. They are the ones who will witness any illegitimate lobbying. It would be ideal if they felt the obligation to prevent and report it. This culture would help act as a fence around corruption, preventing even the appearance of corruption.

Principle 5: Improve the Quality of Information

One key benefit of lobbying is that it provides the government with information it lacks and brings new concerns to its attention. It is essential that lobbying reform prioritize improving the quality of information provided by lobbying. This is how robust lobbying regulations can actually improve lobbying itself, while addressing its disadvantages. Officials are making policy decisions based on information provided by lobbyists, and when that information is of low quality, it will result in low quality decisions; garbage in, garbage out.²²³⁹ Lobbying legislation and regulations should be designed to elicit high quality information and prevent garbage information from coming in.

²²³⁵ *Ibid.*

²²³⁶ See Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Four Pressures Approach: Direct Power and Influence, p. 114. David Lowery, “Lobbying influence”, *supra* note 497 at 5.

²²³⁷ The Federal Court of Appeal has supported the importance of avoiding conflicts of interest and deterring non-rational influence in lobbying, arguing that “the rule against conflicts of interest is a rule against the possibility that a public office holder may prefer his or her private interests to the public interest. Where the lobbyist's effectiveness depends upon the decision maker's personal sense of obligation to the lobbyist, or on some other private interest created or facilitated by the lobbyist, the line between legitimate lobbying and illegitimate lobbying has been crossed.” *Democracy Watch v Campbell*, *supra* note 118 at para 48.

²²³⁸ For example, high speaking fees are at the heart of the WE Charity controversy. Prime Minister Trudeau’s mother and brother have received \$312,000 and \$40,000 respectively from the WE Charity in speaking fees. This type of payment is extremely common in politics. Hannah Jackson, *supra* note 2171.

²²³⁹ See Chapter 8 – Canadian *Charter* Section 3: Structural Democratic Rights Paradigm: Structural Rights – Pal: Four Components of Competition Approach – Pal: 3: Electoral Competition Maintains Electoral Accountability, p. 472.

As we discussed in Chapter 7, The Court has held that “the right to meaningful participation in the electoral process includes a citizen’s right to exercise her vote in an informed manner”²²⁴⁰. As corollary of this right, meaningful participation could also include the right for politicians to make informed decisions once they are elected to office.²²⁴¹ For democracy to function officials must have access to useful and truthful information. Lobbying legislation should be designed to support this need. To do this, the legislation should remove undue influence, invite in more sources of information, deter deceit and low quality information, and increase officials’ access to high quality information.

Remove Undue Influence

One method of improving the quality of information is to break the connection between lobbying and undue influence. Further preventing lobbyists from using donations, gifts, favours and types i to iv influence would push them towards competing in providing rational arguments and better information. Limiting the methods that bypass the need for convincing data will increase the quality of information available to officials.

By breaking the ties between money or personal connections and legislative outcomes, lobbying reform aims at a merit based system in which the most useful information rises to the top.²²⁴²

Lobbying businesses will still benefit from providing officials with information, but they will not be able to use shortcuts to convince officials to adopt their policy preferences. Instead, their self-interest should align with providing officials with high quality information on the subject. By the same token, officials’ self-interest will align more with making high quality decisions that satisfy their constituents, since it is less likely to be short-circuited by the immediate pressure of undue influence.

Introduce More Viewpoints and Sources of Information

Lobbying regulations should open the process for more points of view. This should improve the quality of information, and fulfill the constitutional principle of accommodating a wide variety of beliefs.²²⁴³ It is essential for good decision-making to hear from a wide variety of viewpoints, and thereby avoid groupthink and a pre-framed process. This is all the more essential in democracy, where citizens should be able to impart their knowledge and preferences to government, so it can make informed decisions on their behalf. An administrator in my interviews stressed this solution, arguing that that the government should reach out to solicit a wider range of divergent views. As covered in Chapter 3 and Chapter 6, current lobbying is too heavily weighted towards the elites and business interests.

Legal scholarship on the subject of group polarization suggests that if an elected official consults with a homogenous set of interest groups representing only one side of an issue – whether because those interests contributed to his campaign or

²²⁴⁰ *Harper v. Canada (Attorney General)*, *supra* note 53 at para 130.

²²⁴¹ See Chapter 7 – Canadian Charter Section 2: Principles from *Harper and Libman: Hearing all Points of View* (principle 7), p. 423.

²²⁴² Richard L. Hasen, *supra* note 1405 at 239.

²²⁴³ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 1880 at 181 i.

because those interests share the official's political ideology – then the public policy generated by that official will become polarized, or skewed in an extreme direction, because the official is hearing from a “limited argument pool” whose ideas tend to feed off each other and push the official to an extreme position. Lobbying by coalitions of like-minded interest groups, a growing phenomenon, only makes this problem worse.²²⁴⁴

A lobbying process that takes in more points of view will make better decisions. It is less likely to be captured or led astray by low quality information.

When elected officials, or the staff who make policy recommendations to such officials, receive information from and hear the concerns of interests on both sides of an issue, their policy positions are likely to become tempered, balanced, and more informed-rather than polarized.²²⁴⁵

One way to improve the process is to use more open consultations methods. The OECD argues that guidelines on lobbying “should particularly consider constitutional principles and established democratic practices, such as public hearings or institutionalised consultation processes.”²²⁴⁶ The increase in forums should allow more voices to express themselves to government. Introducing more viewpoints, and contact with a large variety of citizen groups can be an effective tool to balance against officials’ tendency to favour social elites. Public processes, like committee submissions, can also pressure lobbyists into making higher quality contributions, since their statements are publicly visible and open to counter-responses.

These public processes need rules to ensure the government takes the submissions seriously. The process must not be political theater intended to come to a pre-determined conclusion. There also needs to be rules preventing monopolization and exploitation of the process by powerful interest groups. The rules should set clear rules against astroturfing (and sockpuppetry), and the process should have a method to enforce these rules.

Additional Sources of Information

Along with opening the lobbying process to more voices, the regulations should also channel the lobbying process so it is open to more sources of information. The officials might not have the time or wherewithal to seek additional information. They might not know that the information the lobbyists provide is incomplete. The lobbying legislation should be designed to foster additional sources of

²²⁴⁴ Anita S. Krishnakumar, *supra* note 493 at 540.

²²⁴⁵ *Ibid* at 541.

²²⁴⁶ OECD, *supra* note 2108 at 3.

information to counter this risk.²²⁴⁷ If the process is designed to provide additional sources of information, it would create a better marketplace of ideas, where the truth has a better chance of rising to the top. Additionally, the lobbyists will be incentivized to provide the best information they have, knowing that their information will be held up against information provided by alternative sources.

Ideally, the legislation should also attempt to introduce more neutral sources of information. For example, the regulations could require officials to demonstrate they had confirmed the source and quality of the lobbyist's information, and checked it against any readily available relevant information on the topic from academic and other sources.

Fostering additional sources of information will help prevent framing by the organizations with the resources to lobby. Experts on the subject, as well as those who disagree with the lobbyist's policy perspective, will have more opportunity to furnish key information. Lobbyist will still have an incentive to provide information; but their information will not be the only information considered. No process is perfect, and doubtless officials and lobbyists will continue to operate with bias and pre-framed ideas and preferences. By opening the process to more viewpoints and sources of information, it increases the chance that false frames will be cracked open, and officials will act on higher quality information.

Deter Deceit, Lies and Low Quality Information

Along with increasing the viewpoints and sources of information, the regulations should be drafted to actively deter low quality information. Lobbyists can and will try to exploit cognitive biases, such as confirmation bias, the availability heuristic, status quo bias, emotional phishing, the sunk cost fallacy, tribalism, in-group bias, and groupthink. Humans being what they are, some officials will fall into these cognitive traps, and some may favour information from those perceived to be in-group members. Active oversight by non-partial regulators and proper regulations designed with skepticism of the honesty of self-interested lobbying will reduce this risk.

Lobbyists have incentive to deceive decision-makers.²²⁴⁸ As discussed in Chapter 6, the profitability of phishing in the political marketplace of lobbying mimics the profitability of phishing in an unregulated marketplace. Business interests often use consultant lobbyists, astroturf organizations, and trade associations to lobby for private gains that would damage their public image. By these means, they can deceive, proffer low quality information, and provide mis-frame narratives to officials with little direct repercussions.

²²⁴⁷ "[T]he best way to counteract the growth of corporate lobbying is to increase the policy capacity of the government and make the political fights fairer, channeling politics to solve political problems." Lee Drutman, *supra* note 172 at 21.

²²⁴⁸ "In promoting products, many firms have felt few qualms about providing distorted information—or even lying. Thus the cigarette companies succeeded in casting doubt on the scientific evidence of the health hazards of smoking, even though they had in their own possession evidence to the contrary. Similarly, Exxon exhibited no compunction in supporting so-called think tanks casting doubt on the scientific evidence on the risks of global warming—even though there was overwhelming evidence to the contrary. Truth-in-advertising laws try to circumscribe firm behavior, but in promoting ideas and policies, there is no such thing" Joseph E. Stiglitz, *supra* note 38 c 6, s Shaping perceptions about policies. See also, John Cook et al, *supra* note 30 at 4.

No one doubts that lobbyists and their clients present facts in the light most favorable to their policy interests; thus, the political, economic, or other agendas of those interest groups whose hired lobbyists succeed in securing the ear of elected officials (and their aides) inevitably affect the shape of the public policy that is enacted.²²⁴⁹

Lobbyists and special interest groups have repeatedly shown themselves willing to use biased experts to bolster their position.²²⁵⁰ To support the passage of legislation they have drafted, special interests have “so-called experts who aren't neutral. They go around the country and testify about those bills as if they're good for that state”²²⁵¹. Witnesses have also masked their role working for the lobbying organization.²²⁵² Since moments for political action are fleeting, deception at the right time can delay or push action at a key moment, and ensure years of future profits.²²⁵³ Generally, the reputation risk, even if it is tracked back to the originating business, is minimal. There is rarely any direct penalty for the deception. The previously deceived politicians and officials might not even be in power when a key issue arises again.

There should be regulatory or publication penalties for lobbyists who deceive officials with false information, false expertise, false claims of neutrality, false claims about the content of legislation, false claims about the repercussions of a decision, and other false claims that impact decision-making.²²⁵⁴ To avoid abuse, the bar for deception will need to be set relatively high.

²²⁴⁹ Anita S. Krishnakumar, *supra* note 493 at 540.

²²⁵⁰ Rob O'Dell & Nick Penzenstadler, *supra* note 758.

²²⁵¹ *Ibid.*

²²⁵² “UCLA scientist Martin Cline hid behind attorney-client privilege when testifying as an expert witness, claiming not to work for the tobacco industry, but for a law firm.” Naomi Oreskes & Erik M. Conway, *supra* note 35 at 140.

²²⁵³ For example, a binding climate change treaty almost passed at the Noordwijk meeting in 1989, but was sabotaged by a U.S. change of heart, with the acquiescence of Britain, Japan and the Soviet Union. This delayed international agreement for action to combat climate change for a decade (or more), and gave the oil-and-gas industry time to start spinning up their climate change denial lobbying and publicity campaigns.

“The mustache-twirling depravity of these campaigns has left the impression that the oil-and-gas industry always operated thus; while the Exxon scientists and American Petroleum Institute clerics of the '70s and '80s were hardly good Samaritans, they did not start multimillion-dollar disinformation campaigns, pay scientists to distort the truth or try to brainwash children in elementary schools, as their successors would. It was James Hansen's testimony before Congress in 1988 that, for the first time since the “Changing Climate” report, made oil-and-gas executives begin to consider the issue's potential to hurt their profits. Exxon, as ever, led the field. Six weeks after Hansen's testimony, Exxon's manager of science and strategy development, Duane LeVine, prepared an internal strategy paper urging the company to “emphasize the uncertainty in scientific conclusions.” This shortly became the default position of the entire sector. LeVine, it so happened, served as chairman of the global petroleum industry's Working Group on Global Climate Change, created the same year, which adopted Exxon's position as its own.”

Nathaniel Rich, “Losing Earth: The Decade We Almost Stopped Climate Change”, *N Y Times* (1 August 2018), online: <<https://www.nytimes.com/interactive/2018/08/01/magazine/climate-change-losing-earth.html>>. See also, John Cook et al, *supra* note 30 at 4.

²²⁵⁴ Ackerman refers to this as “truth in lobbying”. Ackerman is particularly concerned that lobbyists be forced to record in their disclosure what policies and positions they are advocating for on a given bill or report. Sybil

There is a basic requirement for accuracy and factual information in the *Lobbyists' Code of Conduct*, but it should be made stronger and clearer with specific standards and penalties. The legislation and enforcement should be designed so that there is a high chance of getting caught when providing deceptive information to officials, but with low penalties. Studies show that the chance of being caught is more important for deterrence than the severity of the punishment.²²⁵⁵

The lobbying regulations should include methods of confirming the validity of expert's provided information and bona fides. They might also need to include a method of publicizing the information provided by lobbyists, perhaps with a limited exception or time delay for confidential information. This concept is relatively radical, but the current status quo is defective. More study is needed on processes to increase truth and deter deceptive lobbying, and what models from other areas of legislation might be useful to this end.²²⁵⁶

Increase Officials' Access to High Quality Information

In the U.S. there has been a deliberate decline in the government's (non-military) informational provision capacity, particularly in Congress. This has led to a great reliance on information provided by lobbyists. In Canada, the story is more mixed, but it appears that legislative and governmental research and information services have not kept up with the growing need for complex information. For example, Prime Minister Harper was actively engaged in stifling and hiding information about climate change and environmental problems. He also defunded and closed some of the independent and related information services of the government.²²⁵⁷ This decline weakens officials' access to neutral information, and places decision-making within the frame provided by lobbyists. It biases the outcome towards results that favour private gains for lobbying interests.

The government should foster additional sources of information and improve its ability to gather high quality information.²²⁵⁸ A complete rebuild of governmental expertise, research, and information generating capacity is a challenge far beyond the scope of lobbying legislation. However, the legislation should be designed to increase officials' access to high quality information, and pressure them to use this access. This could include processes that help officials access internal government expertise that exists in other levels or branches, academic experts, experts in evidence-based think tanks (not ideological ones), experts who have no pecuniary stake in the matter, and other independent sources of information. For example, budgets for informational tools and legislative aides could be increased. Legislatures could also receive some budget for local polling, to decrease the reliance on lobbyist polling.

Ackerman, "What Are Lobbyists Saying on Capitol Hill - Climate Change Legislation as a Case Study for Reform Essay" (2007) 37 *Environ Law* 137–150 at 189.

²²⁵⁵ Daniel S Nagin, "Deterrence in the Twenty-First Century" (2013) 42:1 *Crime Justice* 199–263 at 215.

²²⁵⁶ For a good summary of false advertising cases, see *Maritime Travel Inc v Go Travel Direct Inc*, [2008] 265 NSR (2d) 369 (upheld on appeal).

²²⁵⁷ Carol Linnitt, "Harper's attack on science: No science, no evidence, no truth, no democracy" *Acad Matters* (30 May 2013), online: <<http://academicmatters.ca/2013/05/harpers-attack-on-science-no-science-no-evidence-no-truth-no-democracy/>>.

²²⁵⁸ Lee Drutman, *supra* note 172 at 204.

Government should foster experimentation with tools to increase democratic involvement, feedback, and public submissions of high quality information. The government could form formal partnerships with universities and colleges, and provide access to academics with expertise in the fields in question, using simple electronic tools. Stiglitz recommends establishing publicly-funded independent think tanks, “to ensure a more balanced debate about the wisdom of alternative policies.”²²⁵⁹ The lobbying office could also maintain a reliability rating of the quality of information sources.²²⁶⁰ By insisting on more neutral sources of information – with no personal connection or financial gain at stake – the law would help prevent framing bias and improve officials’ decision-making. In the long-term, the demand might also pressure the government to develop more internal sources of information and re-establish the informational capacity that it has outsourced to lobbying interests.

Principle 6: Maintain Political Neutrality

Lobbying regulations should be politically impartial. They should not favour one particular political party, or one set of political views. This aligns with the constitutional principle that Canada should accommodate a wide variety of beliefs.²²⁶¹ Political impartiality is an essential component of both Rawls’ and Dworkin’s theories of liberal democracy.²²⁶² Liberal democracy must be open to multiple political beliefs and religions. This does not include political movements that attempt to destroy democracy, fundamental rights, others’ freedom of belief, or threaten others’ lives. Political neutrality does not mean that political speech cannot be regulated. Dworkin states we can regulate political speech as long as,

such legislation does not keep information or argument from the public that would otherwise be available to it, when it is not designed to favor government or to favor any party or ideology or policy over any other, when it does not reflect any assumption about the truth, falsity, danger or offensiveness of any message or display, and when it is likely to improve the democratic character of public political discourse by making participation available to more citizens on an equal footing or by improving the quality of public discourse or both.²²⁶³

²²⁵⁹ Joseph E. Stiglitz, *supra* note 38 c 10, s The political reform agenda. Drutman makes a similar recommendation. Lee Drutman, *supra* note 172 at 234.

²²⁶⁰ This is already done casually, most serious thinkers know that a paper by the RAND corporation deserves more weight than one by the Heritage Foundation. However, it could be done formally. It could include documented evidence of high and low quality information provided by the institution or researcher in question, their independence, and the likelihood of correcting past errors.

²²⁶¹ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 1880 at 181 i.

²²⁶² In Rawls’ conception, impartiality is tied in a complex fashion to overlapping conceptions of justice, neutrality of procedure and neutrality of aims. Ronald Dworkin, *Sovereign Virtue* (Cambridge, Massachusetts: Harvard University Press, 2002) at 6; John Rawls, *supra* note 1378 at xxi, 54, 192.

²²⁶³ Ronald Dworkin, *supra* note 80 at 381. Dworkin’s view would seem to allow hate speech as a form of freedom of speech. This is an American approach to hate speech that does not fit with Canadian practices. The restriction of hate speech is justifiable in a democracy, see note 2266.

Political neutrality is compatible with campaign finance restrictions, and by the mirror principle, lobbying regulation.

The lobbying legislation should not favour one political party, allow politicians to control lobbying organizations,²²⁶⁴ force lobbyists to favour one political party,²²⁶⁵ or pressure officials to favour one group of citizens. This principle of political neutrality operates within the confines of democratic liberalism, and the deep constitutional principles of Canadian democracy, including minority rights. It does not trump the values of political, racial, sexual and religious equality. Policies that alleviate inequality are not a form of inequality and do not infringe neutrality. Nor do policies that deter intolerance and limit the speech of hate and fascist groups infringe political neutrality.²²⁶⁶ Some lobbying regulations might have an incidental or secondary effect, for example, one party or another might initially benefit from rules that boost citizen lobbying. As long as the rule is otherwise beneficial to democracy, then these secondary effects are acceptable, provided the main intention was not to sabotage political neutrality. The other political parties are always free to adapt themselves to the new situation.

Political neutrality is not infringed by lobbying regulations that restrict business lobbying as discussed at the end of the chapter. As discussed in Chapter 7 and Chapter 8, businesses and corporations are not citizens. They do not have democratic rights or a right to participate in the political process.²²⁶⁷ It would contradict political neutrality to limit the lobbying of particular businesses due to their associations with a particular political party or ideology. It is no contradiction of neutrality to

²²⁶⁴ For example, the U.S. *Lobbying Disclosure Act* contains rules protecting the hiring decisions of private organizations, such as lobbying groups, from political government pressure. This is in response to actions like the K-Street Project, where Congressional Republicans pressured lobbying firms to only hire Republican lobbyists. See Lawrence Lessig, *supra* note 273 at 236.

²²⁶⁵ Malvern discusses a number of cases where Canadian governments selected between pressure groups, using patronage or providing funding to support those that were supportive of that government, and indirectly damaging and weakening the competing pressure groups that were not. On occasion the governments would also cut the funds to groups that were seen as supporting another political party. Paul Malvern, *supra* note 2 at 28, 190–196. See also, A. Paul Pross, *supra* note 2 at 19.

²²⁶⁶ Hate speech is tightly linked to anti-democratic pro-authoritarian beliefs. It is linked to harm to human dignity, verbal violence, violence, terrorism, oppression, war, and genocide. Hate speech brings nothing to political discourse and reveals no truth, except that we are able to despise each other. It is aimed at destroying the rights of others, and a threat to democracy. Democratic countries are increasingly enacting laws to prohibit hate speech (with the exception of the U.S.). Hate speech hypocritically uses the right to free speech as a sword against others' rights. If they attain power, hate groups will overturn the right to free speech as soon as they can. They will seek to strip their victims of all rights. Stephanie Farrior, "Molding the Matrix", *supra* note 1404 at 97; John C. Knechtel, *supra* note 1404 at 541; Alexander Tsesis, *Destructive Messages: How Hate Speech Paves the Way For Harmful Social Movements* (NYU Press, 2002) c 10; William A Schabas, "Hate Speech in Rwanda: The Road to Genocide International Conference/Conference Internationale" (2000) 46:1 McGill Law J 141–172 at 144; Wiktor Soral, Michał Bilewicz & Mikołaj Winiewski, "Exposure to hate speech increases prejudice through desensitization" (2018) 44:2 Aggress Behav 136–146 s 8.

²²⁶⁷ Chapter 7 – Canadian *Charter* Section 2: S. 2(b) – Freedom of Expression, p. 415. Chapter 8 – Canadian *Charter* Section 3: Deep Democratic Principles. S. 3 Principles: S. 3 Principles: Right to Meaningful Participation: Citizen versus Corporate Political Participation, p. 455.

equally limit the lobbying of all businesses, or to advantage citizen lobbying.²²⁶⁸ It might infringe freedom of expression, but that would likely be justified under s. 1 of the *Charter*.²²⁶⁹ Similarly, it is acceptable to limit and control the lobbying of foreign governments and foreign corporations. They are outside of the polity and have no right to political access. The lobbying of foreign agents should be carefully monitored, and they should face strict lobbying restrictions.²²⁷⁰

The principle of political neutrality might conflict to some degree with advantaging collective goods and empowering the disadvantaged. Despite the loose hierarchy proposed for these principles, in cases of conflict political neutrality should not always triumph. For practical, democratic and equality purposes, advantaging collective goods and empowering the disadvantaged should probably triumph over political neutrality in the limited cases where they conflict. These principles are not intended to favour a particular group or ideology, and hence they are a minor and valid infringement of political neutrality. Everyone benefits from a system that elevates the lobbying for public goods over private gain. According to Rawls' veil of ignorance, any individual might start life advantaged, or conversely weak and disadvantaged.²²⁷¹ It is not an infringement of political neutrality to require government to help these people, and ensure that they have a voice in lobbying.

Prevent Incumbent and Interest Entrenchment

Politicians will often be tempted to change the rules to increase their chances of holding onto power.²²⁷² Lobbying regulations should prevent incumbent and interest entrenchment. The rules should not favour the incumbency of politicians, officials, political parties, or lobbyists.

Similarly, the rules should be designed to discourage lobbyist entrenchment.²²⁷³ A detailed treatment of potential rules to accomplish this is beyond our scope here, but a few thoughts may be helpful. Ideally, we should see churn in the prominence of different lobbying groups, just as there is churn in political positions over time if there are competitive elections. Lobbying groups should rise and fall in prominence as new issues, political parties, officials, agendas, and supporting organizations rise and fall. This would indicate competition in the marketplace of lobbying, and that new ideas are being expressed. Currently, the top lobbying groups appear too stable. Certain prominent organizations and industries seem to dominate the lobbying agenda. Long-term entrenchment in lobbying could indicate an unhealthy favouring of certain voices in the lobbying process, leading to a bias in policy outcomes.²²⁷⁴

²²⁶⁸ See Chapter 8 – Canadian *Charter* Section 3: Deep Democratic Principles: S. 3 Principles: S. 3 Principles: Right to Meaningful Participation: Problem with the Code of Conduct Prohibiting Conflicts of Interest, p. 454.

²²⁶⁹ See Chapter 7 – Canadian *Charter* Section 2: Conclusion – Chapter 7, p. 439.

²²⁷⁰ This would not apply to diplomats operating through normal diplomatic channels.

²²⁷¹ John Rawls, *supra* note 1378 at 24.

²²⁷² Michael Pal, *supra* note 2014 at 331.

²²⁷³ As covered in Chapter 7, such restrictions are unlikely to infringe freedom of association, but might be held to infringe freedom of expression. It is likely that the infringement of freedom of expression would be upheld under s. 1. Chapter 7 – Canadian *Charter* Section 2: Conclusion – Chapter 7, p. 439. See *Harper v. Canada (Attorney General)*, *supra* note 53 at paras 126 & 146.

²²⁷⁴ Any rules to encourage more churn in the prominence of different lobbying interests should apply primarily to business interests – considering how they are favoured in the policy process. Insofar as certain business interests

More study of the relative prominence of different lobbying groups over time will be needed to determine whether this stickiness is the problem in Canadian lobbying it appears to be. This issue is worth investigating both as a potential measurement tool of the health of the lobbying system, and to help design regulations that could encourage dynamic change in the lobbying system. Using the market analogy, just as antitrust rules are essential to a healthy market place, antitrust of lobbying dominance could also be contributory to a healthy marketplace of lobbying.²²⁷⁵ Rules to encourage more churn and competition in lobbying might be able to piggyback on the reforms intended to restore equality in lobbying. For example, the rules that restrict total business lobbying – covered in depth in Chapter 10 – could be a way to introduce more competition into the lobbying process by giving smaller organizations more chances to compete. Detailed study of the potential rules and the likelihood of effective piggybacking will be needed to determine if this would work.

Principle 7: Enhance Political Equality

Political equality is a basic democratic principle and a deep value of the Canadian *Charter*.²²⁷⁶ Lobbying legislation should be reimagined to support this fundamental principle. Dworkin maintains that political equality is essential to democracy.²²⁷⁷ Dawood argues that the egalitarian approach to democracy requires we prevent the most affluent from disproportionately dominating the electoral process.²²⁷⁸ The same argument applies to the lobbying process. Lobbying legislation should support a substantive political equality of lobbying, where the voices of all citizens are represented. As covered in Chapter 3 and Chapter 6, to do this, lobbying legislation will need to be designed to curtail the political inequality that some interests can afford substantive lobbying, and other voices are drowned out.²²⁷⁹ Again, one way to accomplish this is to impose lobbying limits and boost the lobbying of (smaller) citizen groups, as is discussed in Chapter 10.

remain entrenched, we would expect the balancing citizen groups to remain important players. If the oil and gas lobby remains prominent, it would be unreasonable to judge anti-climate change groups for remaining prominent in their lobbying against fossil fuel usage.

²²⁷⁵ Such rules would require careful calibration and consideration. A good place to start may be consideration of how actual concentration of marketplace power can lead to a concentration of lobbying power. Raghuram Rajan and Luigi Zingales have argued “for a ‘political version of antitrust law – one that prevents a firm from growing big enough to have the clout in domestic politics to eventually suppress market forces.’” Lawrence Lessig, *supra* note 273 at 178. This would move the consideration of lobbying dominance into the anti-trust market evaluation. The political antitrust law relies on breaking up businesses to prevent their political dominance; lobbying regulation relies on rules to prevent the economic dominance from becoming political dominance. Rajan and Zingales’ approach could compliment lobbying reform. More investigation is merited of which is a better and more viable approach, or if both should be pursued simultaneously.

²²⁷⁶ Yasmin Dawood, “The Senate Reference”, *supra* note 2137 at 747. See *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 41; *Reference re Secession of Quebec*, *supra* note 1079 at para 64.

²²⁷⁷ The exact expression of the political equality can vary, and including different expressions of symbolic, agency, and communal participation. Ronald Dworkin, *supra* note 2262 at 187, 200.

²²⁷⁸ Yasmin Dawood, “Democracy and the Right to Vote”, *supra* note 933 at 282. See *Harper v. Canada (Attorney General)*, *supra* note 53; *Libman v. Quebec (Attorney General)*, *supra* note 1706.

²²⁷⁹ *Reference re Secession of Quebec*, *supra* note 1079 at para 32.

Rawls argues that citizens should “have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply.”²²⁸⁰ Rawls, in his veil of ignorance theory, sets out three principles of equality: equality of basic liberties; equality of opportunities; and the difference principle.²²⁸¹ Lobbying, and the present regulations that guide it, currently fail to uphold all three principles of equality. Equality of basic liberty is upheld in theory, but undermined in practice. Equality of opportunities and the difference principle are undercut directly. We will consider Rawls’ three principles of equality; the practical dangers of inequality; that lobbying legislation should resist inequality; and restoring political equality to lobbying.

Rawls Principles of Equality: Basic Political Liberties

In theory, anyone can lobby. This appears to fulfill the Rawlsian requirement of equal basic liberties. However, the wealthy elites and their business interests have substantial advantages in lobbying, and there is nothing in the lobbying regulations to rebalance this power.²²⁸² Lobbying is so integral to the political system that this disproportionate influence of the elites undermines political equality in practice. It misaligns the politicians with their voters, and leads to outcomes that favour the wealthy.²²⁸³ Equality in theory is sabotaged in reality. Large business interests have been developing their expertise and expanding their dominance of lobbying for decades. Officials have limited time and attention. Those with the most lobbying expenditures and expertise speak with the loudest voices, generally drowning others out, particularly in the areas of low salience. The wealthy and business elites disproportionately control lobbying, giving them influence over officials that average citizens lack. There is no equality of political liberty in lobbying.

Rawls Principles of Equality: Equality of Opportunity

Similarly, it cannot be said that there is an equality of opportunity where some have their interests strongly represented by lobbyists, and most others do not. There is unequal opportunity to lobby and this leads to an inequality of general opportunity. Lobbying legislation should account for this issue. The wealthy can use lobbying to tilt the system to their favour, taking advantage of political

²²⁸⁰ John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: Harvard University Press, 1999) at 221.

²²⁸¹ The difference principle states that wealth inequalities are only justifiable to the extent that their presence works to the advantage of the worst-off group. See Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: Rawls and Dworkin on Political Equality: Rawls, p. 337. *Ibid* at 6.

²²⁸² This is similar to how a political system that awarded votes according to the amount one donated to their preferred politician would be equal in the theory that everyone was free to donate, but unequal in the reality that some can afford to donate vastly more than others.

²²⁸³ This pattern of wealthy influence is particularly visible when studied in combination with the lax campaign finance rules of the U.S. At the state level wealthy interests have shown an amazing ability to take control of local politics. The takeover has been so rapid in the last few decades that many have not yet grasped the impact of billionaire donors and their associated lobbying organizations. Even at the federal level, where small donors have more opportunity to pool their resources and compete, the dominance of wealthy donors and candidates is visible. As discussed on p. 280, in February 2020, there were more billionaires running to be the next president than candidates worth less than \$1 million. This pattern of wealthy dominance of the electoral machinery is more visible than the wealthy dominance of the lobbying machinery, where there is less public scrutiny. Benjamin I Page, Jason Seawright & Matthew J Lacombe, *Billionaires and Stealth Politics*, first edition ed (Chicago ; London: University of Chicago Press, 2018) at 107.

opportunities that arise, and passing political, wealth, and educational opportunity on to their children. This pattern is replicated at the community level. Less wealthy communities lack lobbying influence, and partly as a result, get less political attention and fewer resources. Their neighbourhoods are more dangerous, have fewer amenities, and offer lower quality schools. These communities have less influence to ensure businesses do not pollute their nearby environment, and less government attention to clean up the amassed pollution to their air, land and water. Their children are exposed to more hazardous materials, with long-term physical and mental health effects, further damaging their future opportunities.²²⁸⁴

Rawls Principles of Equality: The Difference Principle

Lobbying is intimately tied to the difference principle and economic inequality; and lobbying regulations should address this. Rawls' difference principle holds that significant wealth inequality in a democracy is only justifiable if its presence works to advantage the worst-off groups.²²⁸⁵ Some inequality is necessary to make a market function, which in turn will boost the standard of living for the poor. Yet Canada's inequalities cannot be justified by the difference principle. It is hard to conceive of any case where the existence of billionaires advantages the worst-off groups, especially as the billionaires' economic power can be used through lobbying to garner political power, and this political power is then often used to resist wealth redistribution to the poor.²²⁸⁶

Dworkin also believes there should be only limited economic inequality in liberal democracy. He suggests a progressive tax as a good method to keep the inequality in check and account for the effects of differential talents.²²⁸⁷ Both Rawls and Dworkin provide strong theoretical reasons supporting policies that reduce inequality.

Practical Dangers of Inequality

On a practical level, there is a substantive need to control inequality. Income and wealth equality is associated with happiness. Inequality increases social unhappiness, even for the wealthy 'winners', decreases opportunity, decreases economic growth, decreases health outcomes and is linked

²²⁸⁴ "There is a two-way relationship between inequality and the environment... The poor are often more dependent on the natural environment than the rich, and thus environmental degradation, including climate change, has particularly adverse effects on them. ... In both developing and developed countries, the poor are more likely to live in areas where they are exposed to higher levels of pollution and toxicity. Indeed, not only does environmental degradation affect the poor, it creates poverty. Farmers who might otherwise have eked out a living above the poverty threshold can no longer do so. Those who live surrounded by pollution and toxicity and likely to be less healthy. They will perform more poorly at school, and their lifetime productivity will be lower." Joseph E. Stiglitz, *supra* note 24 at 16.

²²⁸⁵ John Rawls, *supra* note 2280 at 6.

²²⁸⁶ It is likely that any country where some own personal crewed yachts and others are homeless has failed to live up to the difference principle.

²²⁸⁷ Ronald Dworkin, *supra* note 2262 at 90. It is worth noting that although progressive in the lower to high income levels, the U.S. federal tax system is now regressive when it comes to the top 0.001%. The 400 richest Americans are now taxed at a rate of ~23%, which is lower than the bottom half of U.S. households, who are taxed at a rate of ~25%. Emmanuel Saez & Gabriel Zucman, *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay* (W. W. Norton & Company, 2019) at 9.

to multiple other social ills.²²⁸⁸ Income inequality eventually leads to political inequality and instability.²²⁸⁹ As covered in Chapter 3 and Chapter 6, we seem to be seeing an inequality spiral in the U.S.²²⁹⁰ Those with massive wealth are using it to gain more political power – through campaign donations and lobbying – and then using that political power gain more wealth, pushing the country towards plutocracy.²²⁹¹ As this wealth inequality feeds into political inequality, it becomes a form of systematic dependency corruption. Canada may not be as far along in this process, but it is not immune to it either. At the heart of it, wealth inequality is a result of political decisions and political inequality.²²⁹² Market meritocracy, opportunity, and shared economic growth cannot last without government intervention pushing those at the top and bottom back towards the middle. The government is needed to ensure that the economic growth and productivity gains raise everyone's standard of living. The American, Canadian and U.K. governments have reduced their roles in managing the economy towards this goal, reducing the taxes that would contain the power of the wealthy, and decreasing other policies that helped raise up the bottom and give them a share of the productivity growth.²²⁹³ In, the U.S., there are indicators that the standard of living is falling based partly on this increase in inequality.²²⁹⁴ There are many reasons for this change in government behaviour. The growth of the lobbying power of the wealthy and the business interests they control is a key factor.

²²⁸⁸ Shigehiro Oishi, Selin Kesebir & Ed Diener, "Income Inequality and Happiness" (2011) 22:9 Psychol Sci 1095–1100 at 1099; Jordi Quoidbach et al, "Money Giveth, Money Taketh Away: The Dual Effect of Wealth on Happiness" (2010) 21:6 Psychol Sci 759–763 at 762; Chuck Collins, *supra* note 208 at 36; See also, Richard Wilkinson & Kate Pickett, *supra* note 856. Those who support trickle-down economics argue, "[g]iving more to the rich leads to a larger pie, so though the poor and middle get a smaller share of the pie, the piece of pie they get is enlarged. I wish that were so, but it's not. In fact, it's the opposite: as we noted, in the period of increasing inequality, growth has been slower—and the size of the slice given to most Americans has been diminishing."

Joseph E. Stiglitz, *supra* note 38 c 1, s Trickle-down economics.

²²⁸⁹ "This view has now become mainstream, and the IMF has produced research supporting it, and endorsed it. Thus, the IMF finds that countries with greater inequality tend to be marked by lower growth and greater instability." Joseph E. Stiglitz, *supra* note 24 at 10.

²²⁹⁰ "While inequalities in parental income and education translate directly into inequalities of educational opportunity, inequalities of opportunity begin even before school—in the conditions that poor people face immediately before and after birth, differences in nutrition and the exposure to environmental pollutants that can have lifelong effects. So difficult is it for those born into poverty to escape that economists refer to the situation as a "poverty trap."" Joseph E. Stiglitz, *supra* note 38 c 1, s Opportunity.

²²⁹¹ Adam Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (New York: Viking, 2018) at 214.

²²⁹² David Jacobs & Lindsey Myers, *supra* note 681 at 753.

²²⁹³ For example, Canada and the U.S. have cut the taxes on capital gains substantially. This is an important factor in the increase in inequality. Because of the vast inequality in capital gains income, these tax cuts were tax breaks for the very wealthy. Joseph E. Stiglitz, *supra* note 38 c 2, s Role of government in redistribution.

²²⁹⁴ Stiglitz argues that the standard of living of most Americans is in decline. He notes income, job security, health security, life expectancy, infant mortality, the need for younger parents to live at home, the decline in leisure hours and increase in working hours, a large fraction of the population in prison, and a decline in opportunity. He does not include the decline in community connections, increase in addictions, increase in debt, increase in suicides, increase in gun massacres, increase in environmental pollution, increase in species extinction, and acceleration of climate change. *Ibid* c 1, s A standard of living in decline. To these one might add the double hit of the 2008 financial crisis and the Covid-19 economic shutdown.

Lobbying Legislation Should Resist Inequality

As covered in Chapter 6, lobbying is an integral component of the inequality spiral, and lobbying regulations should take this into account. Lobbying legislation should be structured to resist inequality and push towards economic and political equality. The lobbying policies attempting to roll back inequality should account for Kuhner’s ideas of interest and passion.²²⁹⁵ Interest is the direct rewards that the wealthy reap by lobbying for rules that increase their political and economic power. Passion is the mental approaches and frameworks that are used to justify the use of lobbying to increase political and economic inequality.²²⁹⁶ Rules that push towards more political equality in lobbying, and reduce the power of the wealthy to dominate the lobbying process, will help address the issue of direct interest. The issue of passion can be addressed by acknowledging the problems with lobbying, a public process to establish new rules, public engagement from the Lobbying Commissioner, citizen activism, academic theories, think tank studies, and other tools that build social support for a fairer more equal lobbying process.

Restoring Political Equality to Lobbying

It is fatal to democracy if a small group can dominate the electoral process. Canada has restructured campaign finance law to increase political equality, and we can do the same with lobbying law. As in campaign finance law, lobbying law should prevent those with the most money from dominating the process. Creating political equality in lobbying will require rules and mechanisms that boost the voices and reach of average citizens. It will also require rules that curb the lobbying strength of the wealthy. This will be an essential component of deep lobbying reform.

It will not be easy to rebalance lobbying to favour political equality and prevent the inequality spiral. The idea is relatively new and it will face strong resistance. However, if lobbying rules are improved, the public will begin to experience a more equal lobbying process that is less dominated by large business interests. Political equality is likely to increase, breaking the inequality spiral, which is good for almost everyone. Over time, this should help build confidence in the cleanliness and reliability of the democratic institutions, the same way it has for Canadian elections.

Principle 8: Advantage Citizen Groups

Lobbying regulations should rebalance the power of business versus citizen interest groups. As covered in Chapter 2, business lobbyists have significant advantages, and dominate lobbying.²²⁹⁷ A

²²⁹⁵ Timothy K. Kuhner, *supra* note 51 at 2355.

²²⁹⁶ “When there are large inequalities of income, those at the top can buy privileges for their children that are not available to others, and they often come to believe that it is their right and obligation to do so. And, of course, without equality of opportunity, those born in the bottom of the distribution are likely to end up there: inequalities of outcomes perpetuate themselves.” Joseph E. Stiglitz, *supra* note 24 at 5.

²²⁹⁷ For example, in Boucher’s 2018 analysis of 51,527 Canadian federal lobbying reports, corporations and trade associations dominated over citizen groups and unions, 64% to 15% respectively. Boucher lists many studies that come to the conclusion that businesses dominate lobbying: “(Olson 1965; Wilson 1980; Schlozman and Tierney 1986; Baumgartner and Leech 2001; Beyers 2002 & 2004; Yackee and Yackee 2006; McKay 2011a; Boehmke, Gailmard and Patty 2013; Binderkrantz, Christiansen and Pedersen 2014; Schlozman, Verba, and Brady 2012).” Maxime Boucher, *supra* note 2 at 319.

number of my interview subjects also emphasized this imbalance in the current lobbying system in favour of business interests. To rebalance lobbying, the legislation will have to be designed to advantage citizen groups over business interests.²²⁹⁸ Two direct ways of doing this are to limit business lobbying, and provide funding for citizens groups, which are discussed in Chapter 10. Additionally, the legislation should institute approaches to favour citizen groups; set standards to qualify as citizen groups; embrace wider changes to restore social networks and countervailing pressures; consider how to treat unions and other levels of government; and account for low salience areas of regulation.

Rebalancing lobbying to favour citizens over businesses will not be easy, and is unlikely to happen without making it a specific goal of the lobbying legislation. As discussed previously, favouring citizen groups would not infringe political neutrality.²²⁹⁹ The concern about and recognition of the dominance of business interests in lobbying goes back over a century (at least), and it is clear this will not be solved without active steps taken to address the issue.

House and Senate reports studying the lobbying process also reveal a congressional concern about the unequal access obtained by big business versus less affluent interests. A House Select Committee Report on Lobbying published in 1950, for example, acknowledged that "the advantage in lobbying would always lie with those interests which [are] best organized, best financed, and had the easiest access to mass media of communication" and that, for this reason, "[o]rganized business has always gained the most from lobbying."²³⁰⁰

There is a need to restore countervailing pressures against business interests.²³⁰¹ Advantaging citizen groups should improve political equality, income equality, and basic fairness. Countering the strength of business lobbying would reduce lobbying's status quo bias and would increase democratic alignment.

Favour Citizen Groups

Besides limiting non-citizen lobbying and funding citizen lobbying, there are a number of broad direct approaches that could be included in lobbying rules to favour citizen lobbying. The policy-making processes could be altered to favour citizen groups. This is just as important as providing funding for them. Decision-making processes can be designed to include (more) space for citizen input and concerns; and their input could be weighed more than business input. Open forums should be employed as much as possible. "Some researchers have come to the conclusion that public forums are the most

²²⁹⁸ Doing so also matches better with the democratic role of government as a representative of citizens, as discussed in Chapter 6 and Chapter 8.

²²⁹⁹ See Chapter 8: Deep Democratic Principles: S. 3 Principles: S. 3 Principles: Right to Meaningful Participation: Citizen versus Corporate Political Participation, p. 455 for more detail.

²³⁰⁰ Anita S. Krishnakumar, *supra* note 493 at 533.

²³⁰¹ "[T]he overpowering force of the market and its financial power and players is not counterbalanced via any other institution. The U.S. and its theoretical system of checks and balances on systemic power did not foresee the financial power that markets would achieve and have not developed any counter mechanisms." Bruce A. Kibler & Kathleen V. Kibler, *supra* note 34 at 113.

effective means of lobbying the government for change.”²³⁰² Digital forums which specifically invite citizens to participate can be used.²³⁰³ Rules could require officials to meet with citizen groups a certain percentage of the time, granting them more time than business interests. Government might actively seek out citizen input and participation through other methods, using mechanisms like citizen assemblies and citizen juries. There could be additional paths for citizens and outsider groups to express their concerns to officials on topics that are new or fall outside the traditional categories of bureaucratic regimentation. Increased transparency in the lobbying process could help citizen groups by allowing them to more easily determine where their efforts are needed. Establishing rules and structures that encourage high quality information and discourage framing would be a substantial benefit to citizen lobbying. This would counter the pro-business default framing currently in place.

Standards to Qualify as Citizen Groups

Legislation that favours citizen lobbying will need to set standards to determine which groups qualify as citizen organizations. This might include a positive obligation for citizen organizations to show they are not beholden to or controlled by another organization or individual. The legislation could consider standards of independence, collective participation, bottom-up leadership, citizen funding, use of independent experts/expertise where appropriate, separation from business interests, and the pursuit of collective goods instead of private benefits. Citizen groups should be barred from lobbying on behalf of any business interests that funded them.²³⁰⁴ This is not to say that a citizen group cannot advocate for its own self-interest; it should do so vehemently.²³⁰⁵ However, there should be clear separation between the interests of the organization and that of any business that donates money, the same as there is supposed to be for charity donations.

The rules setting this threshold should be clear, concise, and relatively strict. They should force organizations into one category or the other, rather than allow corporations to slip through using novel

²³⁰² Robyn E Hastie & Anita Kothari, *supra* note 449 at 4.

²³⁰³ As democratic governance moves online, we are going to need to develop more robust means of distinguishing real organizations and citizens from astroturf organizations and sockpuppets. The use of registration, encryption keys, and other robust systems might help, but they might also raise the bar to participation, causing another form of indirect harm to our democracy. The government might need to create a secure online identity system.

²³⁰⁴ Marianne Bertrand *et al.* conclude that firms use their charitable foundations (in part) as a method to generate influence through tax-exempt (and taxpayer subsidized) donations to charities favoured by key political figures.

“For firms in our sample, the implied scale of politically-motivated charity is higher than PAC giving, since total charitable giving per congressional district (\$15,078) is so much higher than average per district PAC contributions (\$368). If we assume that 7.1 percent of the \$18 billion in total corporate charitable contributions made in 2014 is politically motivated, the implied dollar value of political charitable giving is about \$1.3 billion in that year, 280 percent higher than annual PAC contributions made to candidates in the 2013-14 cycle, and about 40 percent of total annual lobbying expenditures in 2014.”

Tax-Exempt Lobbying: Corporate Philanthropy as a Tool for Political Influence, Working Paper, by Marianne Bertrand et al, National Bureau of Economic Research, Working Paper 24451 (National Bureau of Economic Research, 2018) at 6.

²³⁰⁵ For example, a jazz festival organization might lobby for more funding for the arts, more lenient rules for festivals, a dedicated parking tax to support the festival, more support for music schools, stricter copyright restrictions on bootleg recordings, or a myriad of other positions. However, they should not be advocating for reducing the age to vape or decreasing banks leverage ratios on behalf of their donors.

forms of astroturfing. This will require transparent non-partisan oversight. There is some risk of abuse of this system, and some risk that mostly legitimate citizen groups could find themselves on the wrong side of the threshold. However, that risk is far smaller than the damage inflicted by the current business-friendly lobbying system.

Restore Social Networks and Countervailing Pressures

Changing lobbying regulations to favour citizen groups would be the most direct method to help rebalance lobbying; but changes to restore countervailing pressure would also make a big difference. There has been a general decline in participation in social groups and unions in Canada and the U.S.²³⁰⁶ Part of the prominence of business groups in lobbying is due to this collapse of countervailing pressure. This is not an accident. Business groups used their increasing lobbying clout to push for measures that suppress unions, specifically to reduce their countervailing pressure. Canada would benefit from a broader plan to reinvest in civic organizations, particularly unions.

Building up civil society networks is particularly useful for creating the necessary conditions for asserting and realizing justice. These networks have the ability to represent the voice of disadvantaged groups and disseminate their plight widely across various social platforms. This method of dissemination may also uncover injustices and protect private spaces from invasion by the state and market. Finally, civil society networks are crucial for lobbying for policy changes by pressuring, or collaborating with, the legal and political systems.²³⁰⁷

Building the capacity of civil society networks will require changes that are outside the scope of lobbying legislation; but were such changes to occur, it would have a large positive impact on lobbying.²³⁰⁸ Democracy does better when there are a myriad of legitimate overlapping citizen groups, religious groups, and social networks binding us together.

Precisely because supercapitalism is so efficient and dynamic, citizen needs are arguably greater than they were before. As companies drop health insurance and pension coverage, for example, public provision of them becomes more important.

²³⁰⁶ There has been a slow decline in union membership in Canada. According to the OECD, it has declined from 28.2% in 2001 to 26.3% in 2017. The situation is much worse in the U.S., where membership rates fell from 12.9% in 2001 to 10.3% in 2017. Social capital in Canada has remained relatively stable during a similar time period (2003 to 2013). Americans continue to participate in more group activities or meetings than Canadian. ~65% of Americans attend a community organization at least monthly, whereas 48% of Canadians do so. OECD, “Trade Unions and Collective Bargaining”, (16 March 2019), online: *OECD Stat* <<https://stats.oecd.org/Index.aspx?DataSetCode=TUD>>; *Trends in Social Capital in Canada*, Statistics Canada, by Martin Turcotte, Open WorldCat, Statistics Canada (Minister of Industry, 2015) at 18.

²³⁰⁷ Joseph Asomah, “The Importance of Social Activism to a Fuller Concept of Law” (2015) 6:1 West J Leg Stud, online: <<https://commentary.canlii.org/w/canlii/2015CanLIIDocs371>> at 14.

²³⁰⁸ In the U.S., the existence of multiple overlapping citizen groups and strong unions used to form countervailing power, which spread the benefits of economic growth more widely (although many were still excluded from the economic gains due to racism). Robert B. Reich, *supra* note 26 at 184.

As jobs and incomes grow less secure, public safety nets become more essential. As companies are pressured to show profits, tougher measures are needed to guard public health, safety, the environment, and human rights against the possibility that executives may feel compelled to cut corners.²³⁰⁹

As more of living is subsumed into the marketplace of work and consumerism, these other non-market social groups and community organizations become more important. Social trust is an essential part of democracy, and these institutions are essential components of building that trust. They are the living breathing cells of democracy. We should be doing what we can, where we can, to foster and empower them.

Unions

As discussed in Chapter 6, unions have more in common with citizen groups than businesses, and it is reasonable to treat them as citizen groups – provided that their internal management is democratic, and they are not beholden to another organization. Politically, it might be easier to treat unions as akin to businesses and regulate their lobbying the same way. This would be reasonable, and an improvement on the current situation for unions, where they are significantly out-lobbied by business interests.

Unions are funded by their workers, and less likely to advocate for narrow elite interests like businesses do.²³¹⁰ They might still advocate for policies that help their employers, but they are likely to do so in a more inclusive manner, and the advocating would actually be linked to the preferences of a group of citizens.²³¹¹ Unions have been key advocates for public goods and citizen rights, and a source of countervailing pressure against business interests.²³¹²

The roles of trade unions and other workers' associations in monitoring and regulating the behavior of corporations should be protected and enhanced, as

²³⁰⁹ Robert B. Reich, *supra* note 224 at 162.

²³¹⁰ For example, the Public Service Alliance of Canada trade union created the Social Justice Fund to support initiatives in broad priority areas, including anti-poverty initiative in Canada, humanitarian assistance around the world, and international labour development.

“Unions have played a prominent role in the enactment of a broad range of labor laws and regulations covering areas as diverse as overtime pay, minimum wage, the treatment of immigrant workers, health and retirement coverage, civil rights, unemployment insurance and workers’ compensation, and leave for care of newborns and sick family members. Common to all of these rules is a desire to provide protections for workers either by regulating the behavior of employers or by giving workers access to certain benefits in times of need. Over the years, these rules have become mainstays of the American workplace experience, constituting expressions of cherished public values.”

Lawrence Mishel & Matthew Walters, *supra* note 1407 at 11; See, PSAC, “Programs - Social Justice Fund”, (November 2019), online: *Soc Justice Fund* <<http://psac-sjf.org/programs>>.

²³¹¹ This is not to say every union will make the right advocacy choice, or that unions will not engage in unethical or exploitative behaviour. They are run by humans; they will do wrong. However, on the whole, their incentives and structure encourage more inclusive considerations and advocacy for policy that benefit wider segments of the population. Their self-interested behaviour is motivated to consider the interests of far more people.

²³¹² Henry S. Farber et al, “Unions and Inequality Over the Twentieth Century”, *supra* note 1408 at 6.

should those of environmental, consumer, human rights, and other organizations that represent interests and constituencies affected by what corporations do.²³¹³

The Court has expressed strong support for the existence of unions, the need for them to be able to lobby for their political preferences when businesses can do so, and the constitutional right to collective bargaining.²³¹⁴ The decline of unions is tied to increasing inequality and stagnant wages.²³¹⁵ The more healthy, independent law-abiding power structures there are in society, the better it is for democracy. Increasing the number of citizen groups using lobbying, while ensuring that the competition is roughly equal, could offer a means of resolving political conflict with some degree of fairness.

In theory, lobbying could be a method to balance the competing and connected forces of multiple small intertwined social groups within the society – forming a majority of minorities²³¹⁶.

Stronger unions would benefit Canada, and the lobbying rules should recognize this. However, the rules should also include individual lobbying limits for citizen groups and unions, so a few large unions and citizen groups cannot dominate citizen lobbying.

Other Levels of Government

Other levels and branches of government, and tribal councils and bands, should only be required to register their lobbying if they are using consultant lobbyists or non-standard methods of

²³¹³ Joel Bakan, *supra* note 50 at 162.

²³¹⁴ The Canadian Supreme Court recognized that prohibiting unions from engaging in political spending but continuing to allow corporations to do so would place unions in a disadvantaged position, leading to long-term decline. Wilson J. quoted Professor Tribe's argument for how the political spending limitations have hurt unions in the U.S.

"When unions speak out on political matters, for example, they must (upon request) refund to dissenting members the prorated cost of such activity. Corporations do not have this problem; corporations may speak out on political subjects in spite of shareholder dissent. Corporations also speak with a far louder voice, heavily outspending labor on the dissemination of their views. Indeed, the proof of this imbalance of power can be seen in the results: "the failure of labor to pass any legislation affecting the basic structure of private sector bargaining since 1935," and the decline in the rate of union representation of American workers from 35 percent in the 1940s to barely 20 percent in 1980."

Lavigne v Ontario Public Service Employees Union, [1991] 2 SCR 211 at 300, 303, 342, 351; *Mounted Police Association of Ontario v Canada (Attorney General)*, 1 SCR 3 at paras 42, 183; See also, B Jamie Cameron, "The Second Labour Trilogy: A comment on R. v. Advance Cutting, Dunmore v. Ontario, and R.W.D.S.U. v. Pepsi-Cola" (2002) 16 Supreme Court Law Rev 67–102 at 71. "We have concluded that s. 2(d) protects the right of employees to associate for the purpose of meaningfully pursuing collective workplace goals. The government therefore cannot enact laws or impose a labour relations process that substantially interferes with that right." *Mounted Police Association of Ontario v. Canada (Attorney General)*, *supra* note at para 81.

²³¹⁵ Peter Fisher, Greg LeRoy & Philip Mattera, *supra* note 806 at 23; Henry S. Farber et al, "Unions and Inequality Over the Twentieth Century", *supra* note 1408 at 6.

²³¹⁶ This theory was proposed by the political scientist David Truman in 1951. Reich cites the example that the U.S. GI Bill of 1944 was the result of the American Legion, which had chapters across the U.S., pressuring the political representatives. Robert B. Reich, *supra* note 26 at 184.'

lobbying with the other areas of government.²³¹⁷ Considering the inherent democratic legitimacy of the branches and levels of government, there is little reason that their direct lobbying needs to be limited. Consultant lobbyists and non-standard lobbying methods should still be disclosed on the registry, and might need to be limited if they are dominating the lobbying agenda.

The lobbying of semi-public institutions is a complicated question, which probably varies by case. In general, it might make sense to make a rule according to whether the institution is run to make a profit, the degree of private influence exercised by top shareholders, and the rewards available for management. With these institutions, there is the second question of whether the institution has the right to spend public money on lobbying, the right to lobby outside of its oversight structure, and any specific restrictions contained in its charter.

Low Salience Areas of Legislation and Regulation

Any attempt to rebalance lobbying will need to account for low salience areas of legislation and regulation. These decisions sometimes have little large scale impact, and will be of little concern to citizens. However, many of these decisions will have significant long-term impacts. There will be citizens who would be concerned if they knew about the proposed changes. It is difficult for citizen groups to monitor and respond to policy proposals in low salient areas.²³¹⁸ Lobbying regulations should include methods and tools that account for this.

Here again, Akerlof and Shiller, Drutman, and Teachout's idea of an office of public lobbying or a citizen representative agency might apply. The office could intervene in negotiations between regulators and the regulated industry, to add a citizen voice to the process. A detailed examination of this proposal is beyond the scope of this thesis, but it could help in low salience areas, help advantage collective goods, and help separate business and state. Similarly, breaking the revolving door between regulators and lobbying, and encouraging experts in low salience areas to work long-term as regulators could yield substantial public benefits. More research is warranted in to establishing tools and lobbying regulations that could apply to low salience areas to encourage better information provision and decision-making.

Principle 9: Advantage Collective Goods over Private Goods

As discussed, it is contended throughout this thesis that there has been a decline in the overall health of democracy, and it is tied to lobbying and its tendency to prioritize private gain while imposing

²³¹⁷ In Canada, when acting in their official capacity the following are exempt from registration: members of the legislature of a province or their staff; provincial government employees; members of municipal councils or their staff, as well as municipal employees; members of a council of an Indian band or their staff, as well as band council employees; members of an aboriginal government or their staff; diplomatic agents, consular officers or official representatives of a foreign government, officials of the United Nations or other international organizations that have been granted privileges and immunities. Volunteers and private citizens are also not required to register because they are not paid, but this exception is not ideal.

²³¹⁸ George A. Akerlof & Robert J. Shiller, *supra* note 52 at 227.

social costs.²³¹⁹ Lobbying would be greatly improved if we could introduce more collective concerns into public decision-making. Ideally, the lobbying system would advantage the pursuit of public goods over that of private goods, encouraging the former and discouraging the latter. Officials should tend to prefer outcomes that benefit the public instead of imposing costs on it. For example, if a pesticide causes brain damage in children and its usage will lead to unsafe levels in the water supply, officials should come down on the side that does not lead to more brain-damaged children.²³²⁰

We cannot regulate good intentions, but we can seek out tools and processes that encourage more publicly-minded solutions. This is one way of understanding democracy; it is a system that encourages political leaders to take the concerns of their citizens seriously, and seek out decisions that will tend towards the public well-being.

Similarly, it might be possible to structure lobbying regulations to encourage more publicly responsible outcomes. People will pursue their self-interest. The question is how this self-interest is filtered through the lobbying system, and what types of information, arguments and policy conclusions are incentivized. Designing lobbying regulations to favour more publicly-minded outcomes is a complicated endeavour. More research and bold proposals are needed in this area. However, it seems likely that advantaging citizen groups, separating business and state, improving disclosure and the quality of information, and deterring corruption and deterring the appearance of corruption should all help weaken the connection between lobbying and private gain.

The Most Contentious Principle

This principle of advantaging collective goods over private goods is likely the most contentious of the twelve principles, and the most tricky to implement. What one might see as a collective good, another might see as a private gain. Stiglitz argues that in his time in government,

I never heard an industry supplicant looking for a subsidy ask for it simply because it would enrich his coffers. Instead, the supplicants expressed their requests in the language of fairness—and the benefits that would be conferred on others (more jobs, high tax payments).²³²¹

In many cases it is hard to tell if a policy change promotes a collective good or a private good; it might depend on which side of the policy debate one already favours. Since it is difficult to set out a bright line between the two, it is tempting to abandon the distinction, and try to use the other principles to curtail the worst outcomes of lobbying.

²³¹⁹ Kollmar & Raymond Koen argue that the private sector has come to routinely dominate public policy, leading to a hollowing out of democracy, and policies that favour the interests of the elites. Laura Kollmar & Raymond Koen, *supra* note 1590 at 15.

²³²⁰ This is not the decision that the Trump administration came to, despite the evaluations of the EPA's scientists. Alex Formuzis & Sonya Lunder, "Thanks to Scott Pruitt, 30 Million Pounds of Brain-Damaging Pesticide Will Be Sprayed on Crops in Next 5 Years", (29 March 2018), online: *EWG* <<https://www.ewg.org/news-and-analysis/2018/03/thanks-scott-pruitt-30-million-pounds-brain-damaging-pesticide-will-be>>.

²³²¹ Joseph E. Stiglitz, *supra* note 38 c 6, s Perceptions of fairness and the politics of inequality.

There is merit in this argument, but it lets us off too easily. Private gain with social costs wins too often in the lobbying system, particularly in low salience areas. Private gain from lobbying is the source for the temptation towards corruption in the system. Unchecked, it acts as the energy that feeds the inequality spiral into plutocracy. Government decision-making is a giant category, lobbying influences a huge number of decisions, and it is almost impossible to determine if the decision-making is good or bad overall. It is likely that the strength of this principle relies on how much one thinks that Canadian government is making good decisions in low salience areas.²³²² It is opined that Canada's tepid response to the coming crisis of climate change is an enormous sign of systematic failure in government decision-making, overly favouring private gains at disastrous long-term costs.²³²³ These costs, which will be primarily borne by the poor and disadvantaged, show that change to the decision-making process is needed.²³²⁴

²³²² Certainly, a number of general statistics are better in Canada than in the U.S., although worse than in most of the rest of the OECD. Inequality in Canada has increased. The younger Canadian generations seem to be struggling against a number of disadvantages not faced by the older generation, including problems related to debt, employment opportunity and security, generational income inequality, housing costs, absolute income mobility, and environmental decay. Overall, Canada has terrible environmental policies for a developed country, and it is likely this is partially a result of lobbying – judged by how extraction, industry and oil production companies dominate the lobbying system. For a complete examination of Canada's environmental shortcomings see, David R. Boyd, *supra* note 45; For other points see, Facundo Alvaredo et al, *supra* note 867 at 5; Martin Turcotte, *supra* note 2306; Armine Yalnizyan, *supra* note 846 at 12; Daniel Cayley-Daoust & Richard Girard, *supra* note 2 at 11; Maclean's, *supra* note 42.

²³²³ The failure to reduce greenhouse gas emissions over the last twenties years means that an almost 30% decline in output is necessary by 2030 to meet Canada's somewhat weak Paris commitments. This assumes that a Conservative government does not come into power before then and undo the current carbon reducing policies, which is very likely to happen. Moreover, Canada will need to continue to decarbonize at an astounding rate to reach net zero by 2050, which appears to be necessary to avoid catastrophe. That decarbonisation will likely have to happen even sooner, in light of other accelerating forces pushing carbon into the atmosphere; including methane leaks from already existing and abandoned wells, increased forest fires, decreased ocean absorption rates, the risk of methane thaws, and potential tipping events. The government's plans do not come close to matching this reality. The government continues to push for the expansion of the oil sands and its connected pipelines. Investing in new pipelines and oil extraction is a form of madness – one where the best result is a wasted investment in stranded and abandoned assets and a sudden wave of unemployment, and the worst result is that it creates increased pressure to continue to expand fossil fuel production and use, even as we cook ourselves towards extinction.

"Many countries appear to be banking on export markets to justify major increases in production (e.g., the United States, Russia, and Canada) while others are seeking to limit or largely end imports through scaled up production (e.g., India and China). The net result could be significant over-investment, increasing the risk of stranded assets, workers, and communities, as well as locking in a higher emissions trajectory."

SEI, IISD, ODI, Climate Analytics, CICERO, and UNEP, *supra* note 23 at 5; *Canadian environmental sustainability indicators: Progress towards Canada's greenhouse gas emissions reduction target*, by Environment and Climate Change Canada, Open WorldCat (200 Sacré-Coeur boul. Gatineau, QC, K1A 0H: Environment and Climate Change Canada, 2019) at 5.

²³²⁴ "While it is gradually being recognized that a rich country ... will be very seriously hurt by climate change, it is the poor in poor countries especially in the tropics that are likely to suffer the most." Joseph E. Stiglitz, *supra* note 24 at 16.

Tools to Make Lobbying Work for Collective Goods

As discussed in Chapter 6, businesses have incentives to externalize their costs, and as covered in Chapter 3, the current lobbying system is strongly tilted towards providing private goods to businesses, especially in low salience areas.²³²⁵ It would be a great benefit to our society, democracy, environment and economy if we could transform lobbying into a tool that favoured public goods over private goods. Consumer activities tend towards self-interested impulses. In contrast, public activity opens up the space for people to advocate for non-commercial aspirations and set standards for business and social behaviour. We should aspire to make lobbying a healthier part of the public sphere.

To make elections work as tools of representation, we needed the universal franchise, rules against vote buying, the secret ballot, campaign funding controls, social trust, and the widespread belief that politicians should work for the good of their constituents. Likewise, we would benefit from equivalent tools in the area of lobbying. Ideally, we would seek out some simple structural changes – akin to the secret ballot and universal franchise – that guide lobbying towards outcomes that put more emphasis on public goods. We cannot remove private gain from lobbying, nor would we want to. People need to be able to advocate for their own interests, and often in doing so they will be motivated to push for policies with collective benefits.²³²⁶ What we need is a widespread belief that lobbying should be a tool to encourage public goods over private goods, and we need rules that help make this happen. Designing specific policies and regulations to fulfill this principle will be difficult. Detailed rules will take a lot of deep thought and empirical research.

It is plausible that the practice of advantaging collective goods will become stronger and easier when supported with rules that limit business lobbying and boost citizen lobbying, as discussed in Chapter 10.

Principle 10: Separate Business and State

In light of the dominance of business interests in lobbying, Kuhner’s principle of the separation of business and state should be applied to the design of lobbying legislation.²³²⁷ This principle is discussed in detail in Chapter 6.²³²⁸ His principle is that the business and state should be separated as

²³²⁵ Chapter 3 – The Six Concerns about Lobbying– Understanding Lobbying in Canada and the U.S.: Concern V: Lobbying Favours the Legislative Status Quo: The Narrow Status Quo in Low Salience Areas, p. 191. R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 280.

²³²⁶ For example, solar companies lobbying for clean energy subsidies would receive substantial private benefits from the subsidies. The subsidies would also help transition society away from more polluting and harmful forms of energy generation, and greatly increase health, environmental and climate change outcomes. They provide private gains and large collective benefits.

²³²⁷ Timothy K. Kuhner, *supra* note 51.

²³²⁸ Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: The Separation of Business and State, p. 361.

much as possible, on both a practical and a philosophical level.²³²⁹ It is analogous to the separation of powers, and the separation of church and state.

The separation of business and state will never be complete; issues of overlap will always arise. Nevertheless, the principle sets a mindset and goal.

Drutman lays out some of the fundamental problems associated with business lobbying. It suffers from a balance of power problem, with corporations spending thirty-four times more than citizen groups and unions combined; the asymmetry of information allows corporate lobbyists to take advantage of officials; and corporations are focused on narrow, rent-seeking outcomes and their lobbying influence allows them to dominate the public agenda, crowding out the capacity of the system to address larger problems.²³³⁰ The twelve principles are a general attempt to overcome these problems. More specifically, instituting a separation of business and state should help lessen these issues.

There are two sides to separating business and state; the first is that government should not be interfering in the marketplace to favour or punish particular companies. This policy is widely accepted in principle, but often violated when it comes to bankruptcies, mega-projects and special tax breaks for the relocation of large businesses.²³³¹ This policy does not prevent the government from regulating the markets, managing monopolies, boosting innovation, subsidizing socially-beneficial businesses or setting industrial policy. The second side of the separation is that business should not be interfering with government decision-making through campaign donations, lobbying, or other exercises of private influence. This value appears to be widely accepted by citizens, who support the corruption heuristic, but disputed by many business leaders and officials, who support the disclosure heuristic and benefit from the interference.

While the public views lobbyists as soulless mercenaries, skilled at arm-twisting and bribing legislators into appeasing their clients' interests at the expense of the public good, members of Congress, for the most part, view lobbyists as invaluable policy experts who provide elected officials with useful information about the underlying subjects of proposed legislation. Broadly speaking, the public seems to have adopted a “pluralist” view of the lobbying process in which interest groups-through their hired lobbyists-barter in the political marketplace to obtain the best possible package of goods and services for themselves with little thought for the broader public

²³²⁹ Kibler and Kibler also argue that the U.S. would benefit from a separation of business and state akin to the separation between church and state. They argue this would help governance and improve corporate governance. Bruce A. Kibler & Kathleen V. Kibler, *supra* note 34 at 112 & 104.

²³³⁰ Lee Drutman, *supra* note 172 at 228.

²³³¹ The impact of these events makes political interference likely, but well-designed rules and regulations can set standards that minimize the likelihood of political interference.

interest. Congress, by contrast, seems to subscribe to a “deliberative” model of the legislative process in which lobbyists, motivated by their clients' best interests, present specialized information to elected officials who take that information into account when debating various policy proposals and then come to their own conclusions about how best to serve the public good.²³³²

It would seem that the citizens are closer to the truth; lobbying legislation should attempt to curtail this type of interference into governmental policy-making.

Lobbying regulations should attempt to separate business and state, with clear guidelines to restrain business influence on governance. The legislation can also act on an ideological level by indicating there is a legal restriction separating the two areas. To make a complete philosophical change in society separating business and state – one that affects popular passions and approaches – will require steps far beyond a single piece of legislation, but lobbying legislation is a good place to start.

The principle of separating business and state meshes with the lobbying principles of enhancing democracy, preventing the appearance of corruption, advantaging citizen groups and advantaging collective goods. It would help prevent the inequality spiral, since business lobbying is a key part of the spiral. It would also help break lobbying's reinforcement of legislative stasis. Business lobbying is a key pressure for maintaining the current status quo, although the pressure is weaker in the Canadian system than the American one. In light of phishing theory, and what we have established from Bakan's view of the corporation's psychopathic personality and goals, separating business from state also reinforces the rule of law.²³³³ Corporations are designed to leverage externalities for profit. This grants market advantage, but it is a trait we should strive to keep out of democratic governance.

In discussing the separation of business and lobbying, it is helpful to discuss how businesses are loci of power; how this would help break the connection between wealth and political power; the limitations of ethical lobbying; the patterns of deregulation and business involvement in government decision-making; the expanding practice of businesses acting in governance roles; and the idea of requiring shareholder and worker approval for corporate lobbying.

Loci of Power

Corporations are loci of power, not just a neutral nexus of contracts as some have posited. They have goals, they store wealth, and they exercise power. In many ways, they are tools and piggy banks of the wealthy. Cutting their taxes, deregulating them, and granting them more say in governmental decision-making is not a politically neutral act. It is a decision to transfer resources and power out of the public's hands into the hands of the top managers and top shareholders. This is a transfer of power and

²³³² Anita S. Krishnakumar, *supra* note 493 at 530.

²³³³ Timothy K. Kuhner, *supra* note 51.

wealth to the 1%.²³³⁴ Businesses have natural lobbying advantages, and the more power that is transferred to them, the more these advantages grow into additional political power. Their growing power weakens representative alignment and democracy.

Break the Connection between Wealth and Political Power

In the long-term, to reverse inequality and strengthen democracy, we will need to curtail the income and influence of the wealthy and the businesses they control. However, this will be a long slow process, and it will be almost impossible without reducing their direct political power. One of the most effective things to do will be to break the connection between wealth and political power.

Though corporations have a place in representing their concerns to government and cooperating with government on policy initiatives, the special status they currently enjoy as “partners” with government endangers the democratic process. At a minimum, their influence should be scaled back to a degree more commensurate with that of other organizations, such as unions, environmental and consumer groups, and human rights advocates.²³³⁵

This is where the separation of business and state can be so effective. This principle directly addresses the undue political influence of business interests, and provides a means and justification to carve it out of the lobbying process. Lobbying regulations should be designed to deter excesses in corporate lobbying, encouraging businesses to compete in the marketplace. It should be more advantageous to focus on innovation for returns rather than leverage their political power for market advantages over competitors, employees and customers.²³³⁶ Much of lobbying is for market manipulation, the establishment of monopoly power, the avoidance of pollution controls, the protection from responsibility for the harms inflicted upon others, and tax exemptions. It is difficult to say what percentage of lobbying activities are directed towards these kinds of anti-competitive and socially damaging activities, but judging from the reports and successes of businesses to alter key regulations, it is quite substantial.²³³⁷ If business influence was reduced these anti-competitive advantages would decline, which should lead to a faster growing, healthier, more innovative economy.

²³³⁴ Approximately 80% of corporate tax cuts go to the wealthy shareholders directly (60%) or indirectly (20%). James R. Nunns, *supra* note 866 at 15.

²³³⁵ Joel Bakan, *supra* note 50 c 6.

²³³⁶ Lee Drutman, *supra* note 172 at 42.

²³³⁷ See Chapter 2 – Understanding Lobbying in Canada and the U.S.: The Effectiveness of Lobbying, p. 134. The impact of lobbying in these areas in the U.S. is substantial. “Altogether, the thirty corporations made nearly \$164 billion in U.S. profits, but paid negative \$10.6 billion in corporate income taxes (meaning they collectively received rebates totaling that amount) from 2008 through 2010. Meanwhile, they spent close to half a billion dollars to lobby Congress on issues including tax policy.” Blair Bowie et al, *supra* note 619 at 4; “[T]he average firm that increases its lobbying expenditure by 1% realizes a 0.5 to 1.6 percentage point drop in its effective tax rate..... An increase of lobbying expenditures by 1% only costs the mean firm \$7,799 over its prior year lobbying expenditures; the tax benefits it receives range from \$4.8M to \$16M. Taking into account the initial lobbying investment, for each additional \$1 spent on lobbying the mean firm receives somewhere in the range of \$6 to \$20 of tax benefits.”

The Limitations of Ethical Lobbying

Hamilton and Hoch make the counter-argument that business lobbying can be a socially responsible activity. It is true that business often provides key information, and that social organizations (including businesses) need pathways to raise concerns with officials. However, their argument is

Brian Kelleher Richter, *supra* note 594 at 906; “Although the tobacco industry was ultimately unsuccessful in preventing a smoking ban on passenger aircraft, it managed to delay effective regulation for nearly two decades. Only a few of the industry’s strategies to mislead policy makers were exposed, mostly near the end of the 20-year policy process” Peggy Loperpero, Dorie E. Apollonio & Lisa A. Bero, “Interest Groups, Lobbying, and Deception”, *supra* note 802 at 654; “Between 2007 and 2012, 200 of America’s most politically active corporations spent a combined \$5.8 billion on federal lobbying and campaign contributions. A year-long analysis by the Sunlight Foundation suggests, however, that what they gave pales compared to what those same corporations got: \$4.4 trillion in federal business and support.” Bill Allison & Sarah Harkins, *supra* note 999; “Monsanto has the distinction of spending more on lobbying—nearly \$7 million in 2013 alone—than any other big agribusiness. And Monsanto’s former (and future) employees frequently inhabit top posts at the Food and Drug Administration and the Agriculture Department, they staff congressional committees that deal with agriculture policy, and they become advisors to congressional leaders and at the White House. Two Monsanto lobbyists are former congressman Vic Fazio and former senator Blanche Lincoln. Even Supreme Court justice Clarence Thomas was at one time an attorney for Monsanto. Monsanto, like any new monopoly, has strategically used its economic power to gain political power and used its political power to entrench its market power.” Robert B. Reich, *supra* note 26 at 19; As an indication of the effects of ALEC’s lobbying, “[t]he more ‘competitive’ a state was according to ALEC, the less its per capita income grew... The story repeats itself when we consider state poverty rates. The more a state followed the Alec-Laffer policies, the higher its poverty rate, every year from 2007 to 2011.” Peter Fisher, Greg LeRoy & Philip Mattera, *supra* note 806 at 3; “San Antonio’s power company has a largely unused fiber-optic network that local government offices have been using for high-speed Internet service for years, but a Texas law prevents the city from using the network to give low-cost service to consumers.... The Texas state Legislature, doing the bidding of local telecom firms, says no. It can’t.” Matthew Yglesias, “The Lobbyists and Legislators Who Kill Municipal Broadband in America” *Slate* (30 December 2013), online: <http://www.slate.com/blogs/moneybox/2013/12/30/municipal_broadband_s_death_by_lobbyist_san_antonio_has_the_fiber_they_should.html>; “Environmental Protection Agency administrator Scott Pruitt has only held the job for four months, but he has already made regulatory rollback’s ‘larger in scope than any other over so short a time in the agency’s 47-year history,’ Pruitt has largely relied on ‘a small network of political appointees’ which includes industry lobbyists, according to the Times. In May, Pruitt fired five scientists on the agency’s Board of Science Counselors — they were replaced with fossil fuel industry insiders. “It amounts to a corporate takeover of the agency, in its decision- and policy-making functions...” Charlie May, *supra* note 827; “Because of their extremely high fees, many people end up paying far more in loan charges than they originally borrowed; and because of strong-arm collection tactics, payments to these predatory lenders often take priority over rent, utilities and other necessities. Lobbying expenditures and campaign contributions are part of what the industry uses to influence regulators and lawmakers (and regulators through lawmakers) as decisions are made both about the enforcement of existing rules and the development of new rules against abusive lending.” *Payday Pay-to-Play*, by Americans for Financial Reform (Americans for Financial Reform, 2015) at 4; “Cleaning up the Alberta oilpatch could cost an estimated \$260 billion, internal regulatory documents warn. The government, meanwhile, has only collected \$1.6 billion in liability security from companies.” Mike De Souza et al, *supra* note 2046; “A two-year investigation ... reveals for the first time the extent to which special interests have infiltrated state legislatures using model legislation. USA TODAY and the Republic found at least 10,000 bills almost entirely copied from model legislation were introduced nationwide in the past eight years, and more than 2,100 of those bills were signed into law.” This includes deceptive legislation and lobbying. “The Asbestos Transparency Act didn’t help people exposed to asbestos. It was written by corporations who wanted to make it harder for victims to recoup money.” Rob O’Dell & Nick Penzenstadler, *supra* note 758; See also, Rui Kaneya & Pratheek Rebala, *supra* note 758; Lawrence Lessig, *supra* note 273 at 178.

intended to provide a deeper ethical justification for business lobbying. Their approach is interesting, but it relies on specific caveats, which do not hold up under scrutiny. Their approach ultimately shows the limitations of relying on corporate ethical lobbying as a justification for corporate involvement in lobbying.

Their first caveat is that there are criteria that justify business lobbying.

[W]hen they possess “local knowledge” of a problem, have some “level of responsibility” to act, can point to a “shared consensus among corporate stakeholders” in favor of involvement, and that these three criteria have some “relationship to financial performance” of the corporation.²³³⁸

They cite the example of timber companies having specialized information about how to most effectively manage forest lands, and that if a corporation was a cause of the problem, it is obligated to participate in the debate about the solution.²³³⁹ This assumes a level of good faith and social responsibility from the corporation. Otherwise, the business might shirk its responsibility, or participate with the intention of derailing the debate and avoiding any costs. It also fails to justify much of lobbying, which is not local and for which the corporations bear no specific responsibility.

The second caveat is that their principle is based on the premise, that society grants legitimacy and power to businesses and those who wield it irresponsibly tend to lose it. Thus corporations which seek to influence the making of public policy must do so in legitimate ways or society may withdraw the franchise of businesses to influence the legislative and regulatory processes.²³⁴⁰

By this reasoning the business franchise to lobby should be withdrawn according to the issues we covered in this chapter, and in Chapter 3 and Chapter 6.

Hamilton and Hoch argue that business’ participation in the political process is contingent on the lobbying being ethical.²³⁴¹ If there is an ethical justification, the lobbying is legitimate, regardless of whether it is for a private good or a public good. This leads to the third caveat, which is that self-interested lobbying is illegitimate when it profits at the expense of others or the general good, without taking proper account of the benefits, costs, or rights of others. “In other words, self-interested lobbying becomes selfish lobbying when it violates the ethical norms which society has established to govern

²³³⁸ This is a restatement of Pava and Krausz’s criteria. J Brooke Hamilton & David Hoch, “Ethical Standards for Business Lobbying: Some Practical Suggestions” (1997) 7:3 Bus Ethics Q 117–129 at 118.

²³³⁹ This position is reasonable when the corporation is acting in good faith. However, many corporations participate in social debates in bad faith, with the goal of imposing (or continuing to impose) costs and harm on others.

²³⁴⁰ J. Brooke Hamilton & David Hoch, “Ethical Standards for Business Lobbying”, *supra* note 2338 at 119.

²³⁴¹ *Ibid* at 120.

commerce among its members.”²³⁴² This concept of self-interested lobbying becoming selfish lobbying is a useful device to enlighten our considerations of self-interested lobbying. Yet, we should expect that most corporate lobbying is selfish. As covered in Chapter 6, there are simply too many factors pushing corporations towards selfish lobbying. These include: the inherent corporate personality; the profit advantage of offloading the cost and harm of externalities onto others; the natural presence of phishing in the marketplace; the advantages reaped by businesses who engage in unethical lobbying; and the increased pressures from globalization, rising demands for short-term shareholder returns and the winner-take-all economy.²³⁴³

Hamilton and Hoch propose eight rules for ethical lobbying:

1. Maximize good and minimize harm for those affected.
2. Don’t make exceptions for yourself. (This rule prevents the use of astroturf organizations.)
3. Let others make their own choices.
4. Use the publicity test. (What would be the public reaction if the lobbying activities and goals were publicized).
5. Respect human rights.
6. Insure a fair distribution of benefits and burdens. (Those who get the benefits should also bear the burdens).
7. Honor the social contract.
8. Act in accordance with your character and the company’s reputation.²³⁴⁴

These rules are a good guide for ethical lobbying. Yet they run straight into the fourth caveat, which is that Hamilton and Hoch do not have a clear plan to instill ethical lobbying into corporate decision-making. They argue that revelations of unethical lobbying can lead to shareholder pressure. They also recommend that socially responsible shareholders could instill it through the use of proxy proposals, proxy mailings, and shareholder resolutions. Corporations have been resistant to disclosing their lobbying activities to shareholders, which indicates this could be a pressure point to inspire change. But, it is highly unlikely a few embarrassing mailings or shareholder resolutions on their own (if they even pass) could effectively install a complex set of ethics into the detailed daily decisions about corporate lobbying. Later in the chapter we will cover why shareholder democracy is unlikely to be able to change corporate lobbying practices.

A deeper problem with Hamilton and Hoch’s approach is that it relies on a hoped-for ethical dialogue inside and outside of corporations that has not taken hold. Corporate social responsibility has not become the deep component of corporate governance that they – and many others – hoped it would. Business seems more willing to disregard ethical norms than in the 1990s, particularly in regards to its lobbying. It is the rare corporation that foregoes lobbying for the more profitable outcome

²³⁴² *Ibid.*

²³⁴³ George A. Akerlof & Robert J. Shiller, *supra* note 52; Christopher Hayes, *supra* note 748 at 252; Robert B. Reich, *supra* note 224 at 91; Joel Bakan, *supra* note 50 at 37.

²³⁴⁴ J. Brooke Hamilton & David Hoch, “Ethical Standards for Business Lobbying”, *supra* note 2338 at 122.

because of consideration about the costs borne by others.²³⁴⁵ Selfish lobbying has become normalized. This case should not be overstated; reform is hard, and the failure to improve does not mean it is a mistake to call for improvement. The problem is that Hamilton and Hoch seem to expect the reforms to come from within the world of corporate governance and finances, and that is unlikely. There is too much incentive for businesses to have things continue as they are. It will take citizen engagement pressuring government intervention for change, through lobbying reform or changes to business law. Corporations will need an external pressure that balances the competitive disadvantage of more ethical lobbying and sets a floor for fair competition. This is one reason actual regulatory change will be necessary.

Hamilton and Hoch’s rules of ethical lobbying could be incorporated as part of regulatory change. Businesses could be required to have procedures that show their lobbying takes into account the impact of their policy preferences. Some consultation with those who might be impacted could be required in their process. This will have more or less of an impact depending on the business and how faithfully it attempts to set an ethical bar on its lobbying. However, over time, it should lead to some improvement in lobbying behaviour. Ethical lobbying could be included as part of a more extensive and reformed *Code of Conduct*. A detailed evaluation of the proposal is beyond our purposes here. It warrants serious consideration, research, and legal evaluation.

The final caveat to ethical business lobbying is that it does not fix the power balance between different parties, and their differing priorities.²³⁴⁶ Imposing ethical considerations should “temper corporate lobbying and mitigate the undertaking of self-interested acts that harm others”²³⁴⁷. But it would not account for many of the other problems with lobbying: that it advantages businesses, favours the policy preferences of the wealthy, causes a misalignment of representation, creates an informational framing bias, and favours the status quo. Ethical corporate lobbying should be less likely to increase inequality and to corrupt democracy. Businesses would be speaking more thoughtfully, but they would still be speaking louder than anyone else. Introducing ethical considerations into corporate lobbying would improve the situation, it would be a large benefit to society, but it is not enough on its own. Broader lobbying reform, including the separation of business and state, is still necessary.

Deregulation and Self-Regulation and Involvement in Governmental Decision-Making

Separating business and state runs against the current practice of inviting corporations into government decision-making. This is necessary. The neo-liberal approach of inviting corporations into government decision-making has been a devil’s bargain.²³⁴⁸ It has provided short-term savings and

²³⁴⁵ Certainly, in the industries of banking, pharmaceuticals, military industries, guns, cigarettes, alcohol, mining, chemicals, pesticides, automobiles, oil and gas extraction and refining, and coal extraction regularly lobby for legislative and regulatory changes that will impose significant harm on others.

²³⁴⁶ Vincent R. Johnson, “Regulating Lobbyists”, *supra* note 616 at 127.

²³⁴⁷ *Ibid* at 125.

²³⁴⁸ “The question is never whether the state regulates corporations – it always does – but how, and in whose interests, it does so.” Joel Bakan, *supra* note 50 c 6. Stiglitz argues that one facet of deregulation has been an increase in costly lawsuits, as lawyers act as a countervailing pressure on business interests in both the courts and lobbying. This is better than having no legal recourse, but worse than well-written regulations. Of course, this only

efficiency, but at a significant cost to governmental capability that created long-term instabilities that outweighed these gains.²³⁴⁹ The reliance on deregulation and self-governance was premised on a false assumption about the stability of the market, corporate norms, and the polity.²³⁵⁰ It discounted how self-governance opens the marketplace up to phishing, how corporate norms of honest business dealings succumb to the pressure for short-term profit with the lack of external policing, and how politics would begin to collapse when people were treated as disposable human resources with little protection and little life stability.²³⁵¹ The failure of self-regulation can be seen in the 2008 financial crisis. It wiped out a decade of economic growth while damaging social stability. This exceeds the small economic efficiency gains from self-regulation over the preceding decades by an order of magnitude.²³⁵² We are still reeling from the damage to democracy and rise of authoritarianism the 2008 financial crisis has left in its wake. Considering the economic repercussions of the coronavirus and the new pressures from the social and migration impacts of increasingly severe climate change, democracy might not recover to its former levels.

The business-government partnership also created a long-term deficit in democracy and government capability.²³⁵³ The government's ability to regulate corporate power and market activity

works until so-called tort reform takes away the lawyers' ability to fulfill this role. Joseph E. Stiglitz, *supra* note 38 c 4, s A distorted economy—rent seeking and financialization—and a less well-regulated economy.

²³⁴⁹ Akerlof and Shiller argue that governments should not rely on industry self-oversight, particularly where harm to others is at stake (e.g. safety, health, and pollution). This is even more important when that harm is hard to track, hard to causally prove after the fact, or hard to undo. George A. Akerlof & Robert J. Shiller, *supra* note 52 at 227.

²³⁵⁰ "There is a simple reason for the failure of liberalization: when social returns and private rewards are misaligned, all economic activity gets distorted, including innovation. The innovation of the financial sector was directed not to improving the well-being of Americans but to improving the well-being of bankers. At least for a time, it succeeded in doing that; but it failed miserably in improving the plight of the ordinary American or even spurring growth in the American economy as a whole." Joseph E. Stiglitz, *supra* note 38 c 6, s Liberalization and privatization.

²³⁵¹ "With extreme inequality, the nature of society changes in fundamental ways. Those at the top come to believe that they are entitled to what they have. And this can lead to behaviors which themselves undermine the cohesiveness of society. Those excluded from prosperity begin to expect the worst from their governments and leaders. Trust is eroded, along with civic engagement and a sense of common purpose." Joseph E. Stiglitz, *supra* note 24 at 13.

²³⁵² Using a simplified measure, the cost of the financial crisis across the OECD is between 3% to 10% of GDP. No scheme of self-regulations or privatization could come anywhere close to a fraction of that. The financial crisis' damage to social and political stability must also be included in the damage tally of the deregulation.

"[T]he sheer waste of resources brought on by this crisis caused by the private sector—a shortfall of trillions of dollars between what the economy could have produced and what it has produced—is greater than the waste of any democratic government, ever. ... Even if the financial sector had led to a quarter percent higher growth for three decades—a claim that is beyond that of even the most exaggerated supporters of the sector—it would barely have made up for the losses that its misbehavior precipitated."

Joseph E. Stiglitz, *supra* note 38 c 4, s Deregulation; ch 2, s. General principles; Tooze, *supra* note 2291 at 211; Chuck Collins, *supra* note 208 at 42; David Turner & Patrice Ollivaud, "The output cost of the global financial crisis", (7 December 2018), online: *OECD Ecoscope* <<https://oecdecoscope.blog/2018/12/07/the-output-cost-of-the-global-financial-crisis-2/>>.

²³⁵³ "[W]hile there may be underlying economic forces at play, politics have shaped the market, and shaped it in ways that advantage the top at the expense of the rest. Any economic system has to have rules and regulations; it

appears to be eroding.²³⁵⁴ It appears to be losing the will to pass laws that maintain competition and redirect increased productivity into widespread rising standards of living. In general, the move towards deregulation and the rise in corporate influence over governmental decision-making appear to be connected to a decline in market competition, a decline in corporate taxes, a decline in corporate communal ties, a rise in corporate wrongdoing, a rise in inequality, a decline in real wages, a rise in personal debt, and a decline in the government's ability to handle accelerating ecological collapse.²³⁵⁵ It is not a sustainable approach.

Businesses Acting in Governance Roles

The separation of business and state is becoming even more necessary as corporations become larger, more multi-national, and more driven by their stock value (and the demands of authoritarian governments). Their interests are further diverging from those of citizens. Business and the market must be subordinate to the government, carefully contained by the rule of law.²³⁵⁶ For this reason, there is an essential difference between lobbying for particular policies and lobbying for powers that take on or supplant the government's role in decision-making.

Business interests are now pushing to take on the powers of governance. An astonishing portion of the American "democratic process has been outsourced to special interests".²³⁵⁷ For example, business interests are using their campaign donation and lobbying influence to submit identical pre-

has to operate within a legal framework. ... The economic elite have pushed for a framework that benefits them at the expense of the rest, but it is an economic system that is neither efficient nor fair." Joseph E. Stiglitz, *supra* note 38 c preface, s Failure of political system.

²³⁵⁴ For example, as covered in the Introduction, the Deepwater Horizon catastrophe happened while the U.S. oil offshore oil industry was regulated by the Minerals Management Service. It had a history of siding with the industry, suppressing science and discounting environmental impacts to speed the construction of new oil projects. It had granted the Deepwater Horizon a "categorical exclusion" from the National Environmental Policy Act, exempting it from a detailed environmental impact statement. It had recognized the increased risks of blowouts in deep water, but did not implement any safety requirements regarding the drilling practices, because the oil companies did not want them. The Minerals Management Service displayed all the signs of regulatory capture. It had gradually shifted the drafting, implementation and oversight of safety regulations over to the industry. The safety record of these self-regulated off-shore drilling platforms compared unfavourably to other major oil producing countries. Bruce A. Kibler & Kathleen V. Kibler, *supra* note 34 at 110; *The Minerals Management Service: Bad Science in the Name of Private Interests*, by Union of Concerned Scientists, Scientific Integrity Program (Union of Concerned Scientists, 2010). See Introduction: Inspiration – Climate Change: Example: U.S.: Oil Industry & Deepwater Horizon, p. 8.

²³⁵⁵ See Chapter 3 and Chapter 6.

"If markets had actually delivered on the promises of improving the standards of living of most citizens, then all of the sins of corporations, all the seeming social injustices, the insults to our environment, the exploitation of the poor, might have been forgiven. But ... capitalism is failing to produce what was promised, but is delivering on what was not promised—inequality, pollution, unemployment, and, most important of all, the degradation of values to the point where everything is acceptable and no one is accountable."

Joseph E. Stiglitz, *supra* note 38 c preface, s Is our market system eroding fundamental values?

²³⁵⁶ Joel Bakan, *supra* note 50 at 108.

²³⁵⁷ Rob O'Dell & Nick Penzenstadler, *supra* note 758.

modelled legislation to receptive state and local governments across the U.S.²³⁵⁸ This is likely also happening in Canada. A 2019 investigative study by USA Today, the Arizona Republic and the Center for Public Integrity found that “more than 4,000 bills benefiting industry were introduced nationwide during the eight years it reviewed.”²³⁵⁹ This study was only of copycat bills, it did not attempt to measure the non-copycat bills that favoured industry. The copycat bills were all written by business special interest groups and then introduced, generally verbatim, into U.S. state and local legislatures.

More than 80 of those bills limit the public's ability to sue corporations, including limiting class-action lawsuits, a plaintiff's ability to offer expert testimony, and cap punitive damages for corporate wrongdoing.... Many of the bills ... copied from models written by special interests were couched in unremarkable or technical language that obscured their impact. Bans on raising the local minimum wage were dubbed "uniform minimum wage" laws. Changes to civil court rules to shield companies from lawsuits were described as "congruity" or reforms to make laws consistent. Repealing business regulations was disguised under the term "rescission."²³⁶⁰

This step into governance benefits business interests at a cost to consumers and citizens. We know that corporations are selfish entities, structured to transfer the costs and risks to others. Given power, they will push for laws that allow them to transfer more of these harms. Business lobbying has also been moving further into acts of governance by lobbying of one level of government to limit the powers of other levels of government where they have less influence.

Model-legislation factories have increasingly proposed what are known as "preemption" bills. These laws, in effect, allow state legislators to dictate to city councils and county governing boards what they can and cannot do within their jurisdiction—including preventing them from raising the minimum wage, banning plastic grocery bags, and destroying guns.²³⁶¹

Lobbying regulations should prohibit business lobbyists from submitting draft or model legislation; it usurps the government's proper role into private hands, breaks the separation of business and state, and pre-empts fair and informed input into the legislation. If legislators lack the resources to prepare legislation, the solution is to provide them with these resources, not to rely on self-interested

²³⁵⁸ “Special interests give lawmakers fully conceived bills they can put their names on and take credit for. And those special interests can become dependable donors to their campaigns.” *Ibid.*

²³⁵⁹ *Ibid.*

²³⁶⁰ *Ibid.*

²³⁶¹ *Ibid.*

business lobbyists to do it.²³⁶² Otherwise, we should not be surprised as business interests use their lobbying influence to usurp more and more governmental decision-making authority, leaving the public with less and less.

The legislation should be designed to deter lobbying on areas of general governance. Lobbyists should never have government decision-making authority, including the ability to award contracts.²³⁶³ In general, the more lobbying a business group does, the more say it has in government decision-making, and the more risk there is that it will take illegitimate steps into the government's role.

Shareholder and Worker Approval for Corporate Lobbying

A number of experts have suggested that businesses should require more buy-in from their employees and shareholders for their political activities. In particular, there should be legal requirements for shareholder or worker approval of lobbying campaigns, as a means to improve corporate lobbying.²³⁶⁴ For instance, corporations could be required to have a majority of shareholders approve any lobbying and political campaign expenditures.²³⁶⁵ In theory, this would empower state and union pension funds. These funds could set policies for any business they invested in that favoured lobbying for collective goods and prevented lobbying for publicly damaging policies.²³⁶⁶ Sachs and Reich suggest that those shareholders who disagree with the lobbying can opt out of the expenses, reducing the amounts that the corporation is allowed to spend on the lobbying.²³⁶⁷

There has been much advocacy for more democracy in corporate governance, often focusing on increased shareholder democracy. Increased shareholder democracy has been linked to increased firm and economic performance.²³⁶⁸ It also appears to provide some benefit to diversity.²³⁶⁹ By this metric big

²³⁶² A semi-radical proposal: jurisdictions that adequately fund their legislators to draft bills could spend a little more to prepare pre-modelled legislation for jurisdictions that underfund their government. This would provide the underfunded jurisdictions with an alternative to the pre-modelled legislation created by business interests (as citizen groups are often unable to do so).

²³⁶³ If necessary there could be an exception for very small contracts, e.g. under \$5,000.

²³⁶⁴ Yasmin Dawood, *supra* note 489 at 339; For a discussion of increased transparency to shareholders of Canadian corporate political activity see, *Dollars, democracy and disclosure: Should investors demand better disclosure from Canadian corporations on political spending?*, discussion paper, by Kevin Thomas, discussion paper (Shareholder Association for Research & Education, 2015).

²³⁶⁵ Yasmin Dawood, *supra* note 489 at 339; Robert B. Reich, *supra* note 224 at 11. Senator Elizabeth Warren has proposed requiring 75% stockholder support for political lobbying. This might limit lobbying to areas shareholders widely agree are of key concern to the corporation. It should reduce top management's use of corporate lobbying to further its own particular political views and ideology.

²³⁶⁶ For example, the lobbying might have to align with climate change goals, or not have repercussions that are harmful to the community, employees or good governance.

²³⁶⁷ Yasmin Dawood, *supra* note 489 at 339; Robert B. Reich, *supra* note 224 at 279.

²³⁶⁸ Randall Morck, *Shareholder Democracy in Canada* (Working Paper 16558, National Bureau of Economic Research, 2010) at 2.

²³⁶⁹ Yixi Ning, Zhiwen Xiao & Jaesub Lee, "Shareholders and managers: Who care more about corporate diversity and employee benefits?" (2017) 21:1 J Manag Gov 93–118.

businesses in Canada have less shareholder democracy than their peers in other countries and might actually be declining in shareholder democracy overall.²³⁷⁰

Hypothetically, increasing shareholder democracy and requiring shareholder approval of political activities might help reduce corporate lobbying, because some shareholders will be resistant to certain lobbying strategies or goals. Hamilton and Hoch argue that shareholder democracy could be a way to introduce a higher standard of corporate lobbying ethics that includes wider social impact considerations.²³⁷¹ However, it seems likely that increased shareholder democracy will only have a minimal effect on corporate political activity. Retail shareholders generally take a passive position on corporate governance, which would leave large shareholders and institutional shareholders to dominate the lobbying decisions of the business. Since shareholders generally focus on profit, it seems unlikely this will lead to substantially different lobbying policies.

Although some funds have set social investment policies, including divesting from the fossil fuel industry, such policies remain in the minority.²³⁷² The widespread campaigns are generally aimed at more motivating issues than the details of corporate lobbying.²³⁷³ In theory, socially-responsible fund managers might decide their pledge justifies pushing corporations they invest to lobby with more social responsibility. However, this appears unlikely. Ivanova found that UK-based institutional investors face difficulty in actively managing the businesses they invest in, especially when it involves increasing the business' social responsibility. These challenges include incentives and pressures for fund managers to make short-term decisions; the fund's client's low priority on social responsibility; lack of transparency regarding the firm's behaviour; reliance on the firm's framing of the information it provides about itself; lack of experience in directing firms to socially responsible goals, fear of alienating management; co-ordination problems between different investors; investments spread across diffuse portfolios; free-rider issues; and internal conflict between the investor's social responsibility department and its equities

²³⁷⁰ Randall Morck, *supra* note 2368 at 2.

²³⁷¹ J. Brooke Hamilton & David Hoch, "Ethical Standards for Business Lobbying", *supra* note 2338 at 126.

²³⁷² In 2014, in the U.S., assets with some form of social investing requirements represent 16% of total assets under professional management. There have been larger pledges to divest from fossil fuels, investors holding assets worth \$11 trillion (~16% of the total global equity markets) are committing to drop fossil fuel investments. However, they have yet to fulfill these pledges. It seems unlikely that the pledges will translate to a general stance on corporate lobbying against regulations intended to prevent climate change. *New Developments in Social Investing by Public Pensions*, by Alicia H Munnell & Anqi Chen, Zotero, State and Local Pension Plans 53 (Center for Retirement Research at Boston College, 2016) at 2; Agence France-Presse, "Investors with \$11 trillion in assets pledge shift from fossil fuels, report says", *Jpn Times Online* (10 September 2019), online: <<https://www.japantimes.co.jp/news/2019/09/10/business/investors-11-trillion-assets-pledge-shift-fossil-fuels-report/>>.

²³⁷³ There has been some pressure on corporations relating to their connection with trade associations that lobby against climate change action. This is particularly evident for corporations that have sought to present themselves as environmentally responsible and concerned about preventing climate catastrophe. There has been some shareholder activism aimed at reducing animal cruelty. For example, I witnessed activists repeatedly requesting a vegan animal-free interior option from Tesla at the annual shareholders' meeting. It eventually offered an animal-free interior, included a leather-free steering wheel.

department.²³⁷⁴ All of these difficulties would apply to stockholder say on lobbying activities, which management often shrouds in secrecy.²³⁷⁵ Moreover, quite a number of businesses and large corporations are not controlled by public stock. In these cases, requiring shareholder approval for political activities like lobbying is unlikely to have any notable effect.

Beyond shareholder democracy, there has also been growing interest in worker democracy and in benefit corporations. Benefit corporations are explicitly mandated to take into account the needs of all stakeholders, including employees, the local community, and the environment in their decision-making process. Stiglitz argues that there is some evidence that worker-owned firms are less narrowly focused on (short-sighted) shareholder returns and do better, having laid off fewer workers during the 2008 financial crisis.²³⁷⁶ Individual case studies do find better performance for businesses that incorporate more aspects of workplace democracy, but these are far from determinative.²³⁷⁷ Timming and Summers find that increased workplace democracy is strongly positively associated with increased interest in politics, trust in democratic institutions and commitment to democracy; it could be a component of a rebuilding of local democracy.²³⁷⁸ Kickstarter is a notable example of how these corporations might approach lobbying. It re-certified itself as a benefit corporation in 2015, turning down millions or more for the founders. Included in its charter were rules about lobbying.

Kickstarter will not lobby or campaign for public policies unless they align with its mission and values, regardless of possible economic benefits to the company.²³⁷⁹

²³⁷⁴ Mila R Ivanova, “Institutional investors as stewards of the corporation: Exploring the challenges to the monitoring hypothesis” (2017) 26:2 Bus Ethics Eur Rev 175–188 at 182.

²³⁷⁵ As discussed in Chapter 2, note 237, companies have actively resisted internal and external pressure to disclose their lobbying activities. For example, the Chamber of Commerce has lobbied against lobbying spending disclosure measures, while asking its members to resist internal shareholders efforts at lobbying disclosure. Doubtlessly, this is because these measures would imperil corporate funding and support for the Chamber. Paul Blumenthal, *supra* note 237; Press, *supra* note 237; Blake Dodge, *supra* note 237; Nathan Layne, *supra* note 237; Open Secrets, *supra* note 237.

²³⁷⁶ Joseph E. Stiglitz, *supra* note 38 cs 4, s. Stronger anti-trust legislation and enforcement might also help deter and weaken business lobbying, but that is beyond the scope of lobbying legislation.

²³⁷⁷ Russell Lansbury, “Workplace Democracy and the Global Financial Crisis” (2009) 51:5 J Ind Relat 599–616 at 611.

²³⁷⁸ Andrew Timming & Juliette Summers, “Is workplace democracy associated with wider pro-democracy affect? A structural equation model” (2018) Econ Ind Democr 0143831X17744028 at 12.

²³⁷⁹ The following two clauses are also interesting:

“2D. Kickstarter will not use loopholes or other esoteric but legal tax management strategies to reduce its tax burden. Kickstarter will be transparent in reporting the percentage of taxes it pays and explaining the many factors that affect its tax calculation.

2E. Kickstarter will seek to limit environmental impact. It will invest in green infrastructure, support green commuting methods, and factor environmental impact when choosing vendors. Additionally, Kickstarter will provide recommendations and resources that help creators make environmentally conscious decisions on tasks, like shipping and packaging, that are common to the use of its services.”

If these principles became mainstream there would be significant social benefit in via increased tax revenue and decreased environmental harm. Kickstarter, “Kickstarter is a Benefit Corporation”, (2018), online: *Kickstarter* <<https://www.kickstarter.com/charter>> s 2C.

If the goal is to alter the practice of corporate lobbying, it would make sense to go beyond shareholder approval for political activity, and require employee approval of the corporation's political activities.²³⁸⁰ A focus on worker democracy and benefit corporations will likely yield better results.²³⁸¹ Requiring worker buy-in to political activities would prevent corporations from lobbying for policies that are opposed by the majority of the stakeholders in the business.²³⁸² This should lead to somewhat more socially responsible lobbying, which is more likely to support collective goods. It might also help direct the lobbying towards the interests of the corporation as a whole – and more ethical positions – rather than the more limited interests of the top management. In theory, businesses with more workplace democracy and beneficial corporations will adopt a higher standard of lobbying ethics.²³⁸³

Benefit and democratically run corporations remain a tiny component of the marketplace. It remains to be seen if this type of corporation will flourish in the long-term, and spread to the point that they make up a notable part of the economy.

It will be extremely difficult to institute tangible policies and rules that separate business and state. It will be quite difficult to institute regulations that help restructure business lobbying. But neither is impossible. We have mostly learned that it is wise to separate state and religion. Hopefully, we can learn this about business and state too. The concept of limiting business lobbying, discussed in Chapter 10, would help enforce the separation between business and state. To increase the separation from the state, the threshold to qualify as lobbying should also be lowered for business interests.²³⁸⁴ This is not enough. Business lobbying related to taking over or affecting the government's role in governing is a gross overturning of the democratic process, and should explicitly be prevented.

²³⁸⁰ "It shouldn't be just left to the top managers, who have used their power not merely to pay themselves outside rewards but then also to use their power to maintain a system that allows them to do so." Joseph E. Stiglitz, *supra* note 38 c 5, s Reforming our political process.

²³⁸¹ There are significant benefits to workplace democracy to the employees. Among other benefits, are greater equity, greater self-actualization, that it gives workers more of a voice in their workplace, and that it allows for the pursuit of worthy causes and greater responsibility. It is also connected to greater political and social engagement by workers, which strengthens communities and democracy. David Butcher & Martin Clarke, "Organizational Politics: The Cornerstone for Organizational Democracy" (2002) 31:1 *Organ Dyn* 35–46 at 44; Lansbury, *supra* note 2377 at 600.

²³⁸² This policy would be strengthened adopting co-determination, so that workers could directly elect a significant (33% to 66%) number of the corporate board's members. This policy would likely improve corporate governance, introduce some measure of democracy into corporate life, help connect corporations to communities, and make corporate more considerate of the needs of broader stakeholders.

²³⁸³ Hamilton and Hoch believe embarrassment at the social implications of the lobbying and bad publicity can be a useful tool to support higher ethics in lobbying. This would appear to work internally in corporations that require more buy-in from more stakeholders for the lobbying priorities. In such a business there will be more eyes on the lobbying plan, serving as a sort of immediate semi-publicity that should encourage more ethical approaches. There will also be more different types of people involved, and it is more likely that some will speak out if the plan is unethical. See, J. Brooke Hamilton & David Hoch, "Ethical Standards for Business Lobbying", *supra* note 2338 at 126.

²³⁸⁴ This threshold and limits should include everyone employed by or hired by the business, including agents, directors, lawyers, subsidiaries, franchises, consultant lobbyists, trade associations, and outside groups.

The alternative, of allowing business interests more and more influence over government, is a drunken night walk along a narrow path down the side of a cliff. We will end up at the bottom, in plutocracy or kakistocracy. The only question is whether we get there gradually or gradually then suddenly.

Principle 11: Empower the Disadvantaged

Lobbying regulations should include components designed to help the disadvantaged. These disadvantaged groups might include first nations and indigenous peoples, minority communities, the homeless, the chronically unemployed, the working poor, lower income single parents, troubled rural or urban communities, recent immigrants, the chronically ill, people with disabilities, LGBTQ+, and those with multiple overlapping disadvantaged identities.²³⁸⁵ A society can be judged on how it treats its most vulnerable. Canada has much room to improve, and one way to do so is to build these components into the structure of lobbying. This would be a tangible expression of the constitutional principle of respect for minorities.²³⁸⁶ It would be a tangible expression of our best selves. We will consider the positive repercussions of making lobbying a tool to help the disadvantaged; some lobbying policies designed to help the disadvantaged; cultural capture; and direct lobbying support for the disadvantaged.

Positive Repercussions of Helping the Disadvantaged

Making lobbying a tool to help the disadvantaged would help push considerations of their needs into governmental decision-making. This should ultimately cause positive repercussions throughout society. Helping the vulnerable raise themselves up is a democratic, social, economic, religious, and moral good.

As discussed in Chapter 6, maintaining a healthy middle class and reducing inequality requires lifting up those on the economic bottom as well as restraining those on top. Giving the disadvantaged more opportunity to lobby for their needs will pressure government to enact policies more favourable for those who are vulnerable, impoverished, or otherwise excluded from consideration by those in power. This would help prevent the lock in of entrenched interests by providing countervailing pressure from those who currently lack the means and organization to lobby. It should increase equality; and over the long-term, more egalitarian societies are safer, happier, healthier, more democratic and have better economic growth.²³⁸⁷

²³⁸⁵ See Parliamentary Internet Parlementaire: <http://www.parl.gc.ca>, *Federal Poverty Reduction Plan: Working In Partnership Towards Reducing Poverty In Canada*, by Candice Hoepfner, Zoter, Seventh Report (Ottawa, Canada K1A 0S9: The Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, 2010) at 20.

²³⁸⁶ *Reference re Secession of Quebec*, *supra* note 1079 at para 32.

²³⁸⁷ "Since before the French Revolution, the idea that inequality is divisive and socially corrosive has been widespread. Now that we have sufficient data to compare inequality – as measured by income differences between rich and poor – in each country, it has become clear that this intuition is empathetically correct, perhaps more so than we ever imagined. Rather than a private hunch, it has – as hundreds of studies now show – become an objectively demonstrated truth. Richard Wilkinson & Kate Pickett, *supra* note 856 c This is not a selfhelp book. See also, Lawrence Ezrow, *supra* note 856; Larry M. Bartels, *supra* note 738; Joseph E. Stiglitz, *supra* note 38 cs 5,

Lobbying Policies Designed to Help the Disadvantaged

At present, lobbying is a tool of the powerful, and a key input in democratic decision-making. Too often the powerful neglect the interests of the disadvantaged. By including components designed to help the disadvantaged lobby, the legislation would decrease this power imbalance. It could be used by the disadvantaged to lobby for policies that would help lift them up.²³⁸⁸ For example, the legislation could include programs to help build social networks designed to encourage justice for the disadvantaged. It could provide structure, funding and aid for groups that lobby and represent disadvantaged communities. It might have salaries and leadership training so members of the disadvantaged community can form their own lobbying groups. The legislation could establish an office of public lobbying, as previously discussed, or provide direct support for public interest lobbying groups tasked with fighting for the interests of disadvantaged groups, as will be discussed in Chapter 10.²³⁸⁹

Lobbying by Charities

The *Income Tax Act*²³⁹⁰ was recently changed to allow charities to lobby, provided their advocacy is non-partisan.²³⁹¹ There are a number of great charities that represent the interests of the disadvantaged, and who will lobby faithfully on their behalf. In some cases, charities are the only

The evisceration of our democracy; Richard Wilkinson & Kate Pickett, *supra* note 856 c The misconception of meritocracy.

²³⁸⁸ Lifting up those on the bottom should not be confused with simply favouring subsidies for job creation and educational support. Too often, government and public policy narrows all concerns about the well-being of the poor and disadvantaged into these two categories, possibly because they fulfill their ideological inclinations of minimal government intervention and business-friendly solutions. Subsidies for job creation discount other options for transferring wealth and building up local economic activity. They give business control over the wealth distribution, and can be a form of rent-seeking where companies are subsidized far beyond the costs/benefits of the jobs. Similarly, education is often a form of government subsidized training. Additionally, it is often built on educational loans, which shifts the costs onto the population being helped. The loans can leave the students vulnerable to future changes in the market, and be a drag on future economic growth (while favouring of those who currently have wealth). These two approaches fail to address issues such as health care, dental care, prescription costs, mental health services, the prevalence of unhealthy foods, parental leave, day care, child support, the need for welfare and other direct assistance to the poor, control over work hours, unpaid overtime, direct and indirect exploitation by employers, the need for a living wage, inadequate insurance, physical and mental abuse, affordable rent and housing, reliable public transportation, access and mobility issues, exploitive loans, cycles of indebtedness, under-investment in local communities, bias in loans and employment, widespread pollution, a lack of green spaces, biases in policing, addiction pandemics, unchecked white collar crimes and phishing, language and communication problems, differences in life expectancy, the need for meaning and dignity, and other issues that disadvantaged communities might prioritize. Giving actual lobbying power to the disadvantaged gives them the ability to express their real concerns, and press for the policy solutions they prefer.

²³⁸⁹ Lee Drutman, *supra* note 172 at 201. See Chapter 10 – Specific Reforms and Conclusion: Publicly Support Citizen Lobbying, p. 579.

²³⁹⁰ *Income Tax Act* (Last amended on January 1, 2020), R.S.C. 1985, c. 1 (5th Supp.) s 49.1(6.1) & (6.2).

²³⁹¹ Charitable activities now include public policy dialogue and development activities that support the charitable purpose, which involve seeking to influence the laws, policies, or decision of a government. They cannot oppose or support any party or candidate. They must report these activities, and must be constituted solely for the charitable purpose. Canada Revenue Agency, *Public policy dialogue and development activities by charities - Guidance* (2019), Last Modified: 2019-01-24; *Income Tax Act*, *supra* note 2390 s 49.1(6.1) & (6.2). One of my interview subjects had suggested that charities should be allowed to lobby.

organizations attempting to help a vulnerable group. However, a substantial number of charities represent the concerns of their wealthy donors. A lot of money spent is on “charities” that do little for the disadvantaged. For example, charities related to top universities, art institutions, and medical research are not intended to help disadvantaged. At most, they might offer indirect benefits for a few on the bottom rungs of society. Moreover, there is the risk that lobbying organizations and large businesses will exploit the rule to create charities that are essentially a tax deductible method of astroturf lobbying.²³⁹² It is not clear that the government has adequately addressed these concerns.

Cultural Capture

Instituting policies to help the disadvantaged might not turn lobbying around completely. They would not account for cultural capture. It is likely that officials will tend to embrace the opinions of lobbyists and interest groups from the same economic, social and educational background; and most officials do not come from disadvantaged communities. Still, the principle would introduce more diverse opinions and more consideration of the needs of the disadvantaged into the lobbying process. This would be a marked improvement over the current system. As a bonus, it might encourage more spending on the disadvantaged. Compared to the trend of giving income and tax breaks to businesses and the upper classes, this would be far a better way of growing the economy.²³⁹³

Direct Lobbying Support for the Disadvantaged

As discussed in Chapter 2, Canada has a history of government created lobbying groups, particularly in areas where bureaucratic departments were seeking stakeholders to liaison with. When they could find no such organized stakeholders, they often went on to create the organizations, often by convincing an industry to form a trade association.²³⁹⁴

Canada used to fund a number of citizen lobbying groups. It discontinued much of this funding in more recent years. For instance, the Canadian advocacy programs related to poverty and women’s issues have largely been abandoned since the 1970s, with a loss of political will, cost cutting, and changes in governing philosophy.²³⁹⁵ The Canadian government continues to provide funding for

²³⁹² There is evidence that U.S. businesses already use their foundations and charity donations to garner political influence. Marianne Bertrand et al, *supra* note 2304 at 5.

²³⁹³ Stiglitz presents numerous examples showing how tax cuts for the wealthy generally produce little long-term economic growth. Joseph E. Stiglitz, *supra* note 38 cs 2, *The History of the Deficits*.

²³⁹⁴ Fred Thompson & W. T. Stanbury, *supra* note 2 at 42.

²³⁹⁵ For example, the National Action Committee on the Status of Women, was a relatively successful lobby group for women’s issues, until the government stopped funding them. Cheryl Collier, “Not Quite the Death of Organized Feminism in Canada: Understanding the Demise of the National Action Committee on the Status of Women” (2014) 8:2 *Can Polit Sci Rev* 17–33 at 23. See also, Paul Malvern, *supra* note 2 at 28, 190–196. I have been unable to determine how much lobbying is pursued by groups working to alleviate poverty who receive funding from the government. It appears to be quite small from the description of activities on their websites, but they have a good incentive not to publicize lobbying activities if they receive public funds. Until 2018, charities that advocated too much could run afoul of CRA standards for political activism. The law now allows charities to spend money on political advocacy, provided it is non-partisan and related to their core issue. Canada Without Poverty is an example of poverty advocacy and public funding overlap. It has been unusually politically active. It receives \$24,999 a year in government funds, which equals 6% of its funding. *Canada Without Poverty Annual Report 2018-*

language groups and indigenous communities, some of which is then spent on advocacy and lobbying.²³⁹⁶ Overall, only a small portion of this government-provided funding appears to go to lobbying activities, and only by a small fraction of these groups. This funding towards advocacy seems to have been helpful. These groups have made significant gains, aided by their lobbying activities.

In contrast, the government has shown little interest in reintroducing lobbying support in other areas. For example, Canada has recently embarked on an ambitious anti-poverty plan.²³⁹⁷ The plan established specific poverty reduction goals, and a National Advisory Council on Poverty committee to advise the government on poverty reduction and submit a yearly progress report to Parliament. The plan includes consultation between the Council and many of the disadvantaged and impoverished groups. However, the plan does not appear to include any funding for these groups to lobby other parts of the government.²³⁹⁸ This type of funding could be used to raise their concerns with departments and levels of government less swayed by the priorities of poverty alleviation. We will return to the idea of a public funding for citizen lobbying in Chapter 10.²³⁹⁹

Instituting regulation that empowered the lobbying of the disadvantaged on a more consistent and widespread basis would be a significant change to the existing system. It is, however, morally justified. On a theoretical basis it should better uphold Canadian values and foster better governmental decision-making by encouraging more and higher quality input from disadvantaged groups. More research is needed to determine the practical effects of such reform, but if history is a guide, the increased advocacy would lead to more government attention to the concerns of the disadvantaged.

Principle 12: Promote Strong Disclosure and Transparency

It is a widely accepted principle that lobbying legislation should promote disclosure and transparency. Governmental transparency is a fundamental principle of democracy.²⁴⁰⁰ Lobbying disclosure regulations “provide useful information to citizens and legitimize the political process”²⁴⁰¹. They enhance the exercise of the vote and effective representation, by increasing citizen access to information and official accountability, fulfilling these principles of s. 3.²⁴⁰² In essence lobbying disclosure should,

2019, by Canada Without Poverty, V 2.6 (251 Bank Street, 5th Floor Ottawa, Ontario K2P 1X3: Canada Without Poverty, 2019) at 8.

²³⁹⁶ The Assembly of First Nations, the Congress of Aboriginal Peoples, the Metis National Council and the Inuit Tapirisat Kanatami regularly lobby the Canadian government. Christopher Curtis, *supra* note 528; Deloitte LLP, *supra* note 528.

²³⁹⁷ *Opportunity for All: Canada’s First Poverty Reduction Plan* (Employment and Social Development Canada, 2018) at 7.

²³⁹⁸ See, note 2397.

²³⁹⁹ See Chapter 10 – Specific Reforms and Conclusion: Publicly Support Citizen Lobbying, p. 579.

²⁴⁰⁰ See *Libman v. Quebec (Attorney General)*, *supra* note 1706 at para 41; *Reference re Secession of Quebec*, *supra* note 1079 at para 64. See also A. Paul Pross, *supra* note 2 at 197.

²⁴⁰¹ Anita S. Krishnakumar, *supra* note 493 at 536.

²⁴⁰² *Harper v. Canada (Attorney General)*, *supra* note 53 at para 140.

elicit information on in-house and consultant lobbyists, capture the objective of lobbying activity, identify its beneficiaries, in particular the ordering party, and point to those public offices that are its targets.²⁴⁰³

Canadian lobbying laws contain better lobbying disclosure rules and oversight than most jurisdictions, but there is much room for improvement.

We will discuss multiple facets of strong disclosure and transparency, covering: the Madisonian competition of interests; disclosure requirements; astroturf and grassroots organizations; interest groups; officials; open government; the disclosure of information sources; more ambitious and radical transparency; and the blackout of confidential information.

Madisonian Competition of Interests

Disclosure can act as a method to encourage opposing lobbying groups to police and control each other, in a sort of Madisonian competition of interests. Interest groups regularly use disclosure to track the activity of their competitors, allowing them to oppose the other interests more effectively, and publicize unpopular actions to officials and the public.

[L]obbying regulations should be designed to ensure that opposing interests get the kind of information that will help them to counterbalance each other as well as encourage them to bring their competitors' disclosures to the public's attention i.e., lobbying regulations should produce information not only about which lobbyists competing interests hire, or how much those lobbyists are paid, but also about the amount of access that those lobbyists obtain vis-à-vis specific elected officials.²⁴⁰⁴

Krishnakumar argues this Madisonian competition of interests can lead to an improvement in public decision-making.²⁴⁰⁵ However, the potential policing effect should not be overstated, because much lobbying is in low salience areas, unopposed, or intended to subtly lock in the status quo. Moreover, powerful interest groups tend to share many of the same values and policy preferences, and cannot be expected to oppose each other on these topics (even if their policy goals differ from those of the public). This is one of the many problems with the dominance of business interests. Lobbying regulations cannot rely on lobbyists to police each other via a Madisonian competition of interests, but the rules should provide the information that could make it possible.

Disclosure Requirements

Disclosure and transparency should allow a citizen to understand what is happening in the lobbying process. It should accurately convey the actions, means and goals of the interest groups. "Lobby disclosure reforms will withstand the test of time only if the law reflects an in-depth

²⁴⁰³ OECD, *supra* note 2108 at 4.

²⁴⁰⁴ Anita S. Krishnakumar, *supra* note 493 at 542.

²⁴⁰⁵ *Ibid* at 544.

understanding of the behavior of industries and interest groups.”²⁴⁰⁶ It must contain enough information to be useful, but not turn into an unmanageable swamp of information that lobbyists can use to hide their intentions.²⁴⁰⁷ There should be penalties for disclosure structured to hide activities.

Lobbying disclosure should be mandatory and unavoidable. It must clearly and broadly define who must register as a lobbyist and what information they must provide.²⁴⁰⁸ Lobbyists should not be able to avoid registering and disclosing their activities.²⁴⁰⁹ The lobbying registry that contains the disclosure needs to be accurate, useful, timely, centralized, comprehensive, easy to submit to, easy to use, and easy to understand. It should clearly report the position a lobbyist took on an issue, and the policies they lobby for (the current registry often falls short on these factors). It should be online, accept digital submissions, and contain search and summary features. It must contain everyone paid or employed to lobby. It should include private citizens and unpaid volunteers who devote a significant amount of time to lobbying, particularly if they are otherwise paid to lobby for employment, or advocating on behalf of a business from which they will eventually profit. Disclosure should be made as close to real time as possible; and publicly accessible video recordings of lobbying meetings and conversations should be strongly considered. Paperwork should be as minimal as possible; it should be easy to fill out, and automated where feasible with auto-complete self-propagating features. The registry should convey who is lobbying and who they are lobbying. The disclosure should include the lobbyist’s goals. It should list the officials, lobbyists, and everyone else involved in the lobbying. This should include everyone paying for the lobbying, and include the directors and board members of the interest groups. The disclosure should convey the interest group behind the lobbying, and not stop at the consultant lobbyists, or innocuous shell organization masking the true source of the lobbying.²⁴¹⁰ The reports should be required regardless of communication type, time of day or location. They should not be limited to in-person meetings, at government offices, during business hours. Ideally, the registry should cover all branches of government, and all levels of government. Where that is not possible by the structure of federalism, it should link to the related databases and co-ordinate across them as much as possible. It should cover lobbying by international entities, as well as local lobbying. It should not exempt a particular group, organization, or interest from registering their lobbying, although it could reduce some reporting burdens for small legitimately independent citizen organizations.

This gap in transparency could be addressed by amending the existing reporting requirements to include any additional information that the Commissioner of

²⁴⁰⁶ Sybil Ackerman, *supra* note 2254 at 138.

²⁴⁰⁷ The registry could contain summaries, layers of detail, and other methods to aid in understanding.

²⁴⁰⁸ Craig Holman & William Luneburg, “Lobbying and transparency”, *supra* note 96 at 99.

²⁴⁰⁹ In the U.S., “in the year immediately after the passage of Honest Leadership and Open Government Act, when a number of previously registered lobbyists ‘de-registered’ to avoid disclosing certain campaign donations under new disclosure requirements (Center for Responsive Politics, 2010).” Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 10.

²⁴¹⁰ It is far too easy to abuse shell corporations and trusts in Canada. Canada was rated the lowest in the OECD on financial transparency of its trusts and corporations. Canada scored a 13% total transparency rating of beneficial ownership by Transparency International; only China scored lower among the 19 countries surveyed. Transparency International, *supra* note 1625 at 1, and see 2015 BO data.

Lobbying considers relevant to a full understanding of the context in which lobbying occurred. Such additional information could include, for example, that lobbying occurred during sponsored travel or that a lobbyist had previously provided sponsored travel to a public office holder. Requiring this type of relevant contextual information to be reported in the Registry would serve to enhance the transparency of the federal lobbying regime and further the fundamental purposes of the Act.²⁴¹¹

Former officials should be required to disclose their previous government position, even after the cooling-off period has lapsed.²⁴¹² Transparency requirements should also include advising organizations and lobbyists on lobbying strategy. Many of my interview subjects stated that former officials avoid the cooling-off period on lobbying by advising others on how to lobby and who to contact, rather than by doing it directly. This is better than allowing them to lobby directly, but these activities should be at least disclosed, if not prevented.

The disclosure should include how much is being expended on lobbying.²⁴¹³ Without this key piece of information, disclosure remains incomplete. This is a shortfall in the Canadian *Lobbying Act*. The disclosure should include expenditures on all forms of lobbying and funds provided to other organizations that lobby on the organization's behalf, including consultant lobbyists, public relations firms, and trade organizations. Lobbying organizations should be required to disclose the source of the funds. Disclosure will likely need to apply to all the parties involved in the lobbying, particularly if lobbying limits are instituted.²⁴¹⁴ It should also include any campaign donations, financing, fund-raising, speaking fees, third-party political advertising, gifts, and other aid to the politicians being lobbied or to other members of their party. It should be possible to follow the money to uncover corruption.²⁴¹⁵

²⁴¹¹ Office of the Commissioner of Lobbying, *supra* note 108 at 16.

²⁴¹² There do not appear to be any studies of how many Canadian lobbyists disclose their former official status, but it appears to not be as chronic a problem as it is in the U.S. "Only 29.7 per cent of [U.S.] lobbyists report their covered official status, although 51.7 per cent of the sample was found to have held a position in government. Of the roughly half of lobbyists who were found to have worked in the government, two in three (67 per cent) chose not to report that information. When we extrapolate to the full 2008 population, we estimate that approximately 3948 (±2.3 per cent margin of error) registered lobbyists chose not to disclose their previous government employment in 2008." Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 10.

²⁴¹³ "Nevertheless, the lobbying that engulfs any important public decision is now so extensive that its cost is in itself a matter of public concern. An ordinary member of the public can be forgiven for feeling that industries that are prepared to spend very large sums of money in order to secure favourable public policies may well be expecting to recoup their expenditures at the expense of the taxpayer and consumer. Knowing something of the cost of those campaigns not only alerts the public to the stakes involved, but suggests that some effort should be expended, by the public service and relevant advocacy groups, in giving comparable weight to alternatives to those put forward through well financed lobbying campaigns." A. Paul Pross, *supra* note 2 at 197.

²⁴¹⁴ The disclosure from each organization involved in the lobbying will help ensure the accuracy of the disclosure. It allows for the comparison of information and the finding of inconsistencies during an audit.

²⁴¹⁵ Craig Holman & William Luneburg, "Lobbying and transparency", *supra* note 96 at 100.

One interview subject suggested that meetings with lobbyists could be recorded and streamed online, to increase transparency. Other administrators were resistant to the idea, opposing what they considered to be excessive oversight or an invasion of their work life privacy. Certainly the use of recordings and speech to text technology does make it plausible to publish transcripts of conversations, which would be a less intrusive approach. There is a difficult balance here between the chance of this type of transparency improving governance, as opposed to it chilling frank conversation and exploding little accidental phrases into weaponized unjustified tabloid scandals.

Lobbying regulations have generally exempted participation in regular processes from the disclosure requirements. These include public hearings, committee hearings, contract bids, application for tax credits, and consultations initiated by government.²⁴¹⁶ This is justified on the basis that these are already on public record, part of an established procedure, or required by the government. It is argued that these exemptions reduce the reporting burden on the lobbyists, eliminate the collection of unnecessary information into the registrar that may be replicated elsewhere, and help government and outside groups work in partnership to meet policy challenges.²⁴¹⁷ These exemptions should be reconsidered insofar as some of the participation in regular processes might be an essential component of a lobbying campaign.²⁴¹⁸ The exemptions might leave vital information lacking from the disclosure. At the same time, unnecessary reporting burdens and a flood of redundant information in the lobbying registrar does no one any good.²⁴¹⁹ Perhaps the disclosures should include a basic summary of the participation in the regular process, when it is related to the lobbying activities.

Astroturf and Grassroots Organizations

The lobbying reports should be comprehensive, and include whether trade organizations, consultant lobbyists, other organizations, media campaigns, grassroots groups, or astroturf groups are being used.²⁴²⁰ As LaPira and Thomas argue, lobbying transparency should be enhanced “by expanding the statutory definitions of lobbying activities”²⁴²¹.

Lobbying disclosure that omits grassroots efforts is, therefore, seriously incomplete assuming, as most commentators do, that it can contribute significantly to the success of lobbying campaigns.²⁴²²

²⁴¹⁶ “Definitions should also clearly specify the type of communications with public officials that are not considered ‘lobbying’ under the rules and guidelines. These include, for example, communication that is already on public record – such as formal presentations to legislative committees, public hearings and established consultation mechanisms.” OECD, *supra* note 2108 at 3.

²⁴¹⁷ A. Paul Pross, *supra* note 2 at 170.

²⁴¹⁸ *Ibid* at 196.

²⁴¹⁹ “At some point, the amount of information can mount to the point that it operates more as a burden rather than an aid to understanding.” Craig Holman & William Luneburg, “Lobbying and transparency”, *supra* note 96 at 79.

²⁴²⁰ Ideally the legislation should prevent astroturf lobbying; but if it does not, it should at least require it be reported.

²⁴²¹ Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 21.

²⁴²² William V. Luneburg, *supra* note 1739 at 19.

There is a line between a genuine grassroots movement co-operating with a lobbyists and an astroturf organization. An astroturf campaign is always part of a lobbying campaign, and it should at a minimum be disclosed, and, ideally, banned by revised lobbying legislation. The co-operation with a genuine grassroots movement is more complicated. Luneburg argues that there is a distinction between the use of a grassroots movement as part of a lobbying campaign, and a more general political campaign that is distinct from the lobbying.²⁴²³ When the lobbyist directs the grassroots movement or specifically reaches out to members to contact officials, it is an extension of lobbying and needs to be disclosed. If the political campaign is more general and simply asks the general public or a particular sector to contact their representative, and does not contact individuals or give them instructions, it would be outside of the lobbying disclosure.²⁴²⁴ The Canadian Lobbying Commissioner has taken a broad approach, stating that even when an office holder is not approached by a lobbyist directly, “any combination of strategic and operational activities constitutes significant involvement in grass-roots lobbying and requires registration.”²⁴²⁵ There could be other ways of drawing this distinction, but these methods offer a reasonable approach.

Transparency Should Apply to Interest Groups

Lobbying transparency should allow citizens and the media to gather a complete picture of the process. The OECD states that disclosure should,

capture the objective of lobbying activity, identify its beneficiaries, in particular the ordering party, and point to those public offices that are its targets. Any supplementary disclosure requirements should take into consideration the legitimate information needs of key players in the public decision-making process. Supplementary disclosure requirements might shed light on where lobbying pressures and funding come from.²⁴²⁶

This type of picture will not be complete if interest groups are not required to disclose on their end. Lobbying is a public act. If a business is involved, its involvement should be public as well. Businesses should be required to disclose lobbying (and electoral involvement) to their employees, shareholders, and the wider public. The disclosure should include the amounts spent on lobbying as well as the issues and positions they took. This information should be published both within the company and submitted to the lobbying registrar. The information should be easily retrievable and understandable.

²⁴²³ *Ibid* at 20.

²⁴²⁴ *Ibid*.

²⁴²⁵ This includes websites and digital campaigns. Office of the Commissioner of Lobbying, *supra* note 102.

²⁴²⁶ OECD, *supra* note 2108 at 4.

Publicizing this information would give employees, shareholders, consumers and the public more insight into the lobbying practices of the companies they are connected to. It might provide some additional pressure to deter companies from lobbying for policies that are too contrary to their public image, or too obviously damaging to the public wellbeing.

NGOs, charities, non-profits, and other citizen groups should be under a similar requirement to disclose their lobbying efforts to their members and the public. The rules should not allow businesses to mask their lobbying activities by using citizen groups. By the same token, the legislation must not let businesses avoid the disclosure through trade associations, shell companies, consultant lobbyists, and other intermediaries.²⁴²⁷

Disclosure Should Also Apply to Officials

As previously discussed, disclosure requirements should apply to officials as well as lobbyists.²⁴²⁸ The register is more likely to accurately capture the scope of lobbyists' activities by requiring two sets of inputs. This could allow regulators and those using the database to compare a lobbyist's disclosure with the official's disclosure, and more easily find mistaken and deceitful disclosure. It would aid in disclosure, clarity, audits, and enforcement.

The basic problem with existing lobbying regulations – and with all of the reforms currently under consideration by Congress – is that they focus on disclosure by lobbyists alone, leaving the elected officials whom lobbyists target, and the interest groups behind the lobbyists, essentially unregulated.²⁴²⁹

Requiring officials to report lobbying disclosure would ensure that officials operate within the lobbying regulations. It would deter corruption and the appearance of corruption both among officials and lobbyists. LaPira and Thomas agree with this goal, but are aware of the difficulty of it.

[D]isclosure regulations ought to shift at least some of the reporting burden to government personnel, though we expect this option to be least palatable to the very politicians who would need to change the law.²⁴³⁰

Officials are often reluctant to place any burden on themselves, even if it would result in a significant improvement in transparency.²⁴³¹ Perhaps a digital system could be designed to propagate

²⁴²⁷ Businesses have legitimate uses for trade association lobbying, but should be required to disclose their connection to this lobbying, include their share of the lobbying spending by these associations.

²⁴²⁸ "A Treasury Board policy [for all officials] should require that all public office holders, senior officials, political figures and program officers, as a matter of routine, establish the lobbyist status of individuals communicating with them. This would be done by direct question and by verification through the Registry. It is currently possible to verify a registration electronically and there is no reason why such a practice could not become widespread and routine." A. Paul Pross, *supra* note 2 at 210.

²⁴²⁹ Anita S. Krishnakumar, *supra* note 493 at 513.

²⁴³⁰ Timothy M. LaPira & Herschel F. Thomas, *supra* note 105 at 21.

much of the information automatically. In combination with this, it could be designed so that the lobbyists were required to enter most of the information, and the officials simply needed to confirm that the details were correct. This could be linked to making officials' calendars public to some degree to increase transparency, and as an extra method to confirm that the lobbying is properly disclosed.²⁴³²

Open Government

We can apply Halberstam's concept of transparency as open government to the principle of promoting disclosure and transparency.²⁴³³ Open government is a step beyond the scope and ambition of current lobbying regulations that can be reached by providing data in a way that is both useful and engaging to the citizens. If data and summaries in the lobbying registry are presented in a simple, appealing and accessible format, for the public and the media, it could become a regular source of useful information. Summaries of influence sent out to the media could become a method to help hold officials and lobbyists accountable. The open government principles could also be applied to the information provided by the lobbyists, which could be widely disseminated so it could be used by other levels of government and the public (provided there was a system to check it for validity).²⁴³⁴ The information could be repacked, essentially, as a public good. Halberstam argues that,

information is valuable as a public good and that information sharing by all levels of government unlocks the value of a large store of information that is sitting unused. Information is a public good; one that can be put to multiple uses not contemplated by the original producer of the information.²⁴³⁵

Transparency should be useful. It should reach out to include the community. There are possible benefits of better disclosure of which we do not currently conceive.²⁴³⁶ These could include fueling academic studies and healthy activism, and revealing new ways to curtail and channel lobbying for public benefit. If nothing else, more open disclosure can help citizens make their voting decisions. Krishnakumar argues that,

²⁴³¹ "[D]espite their central role in the lobbying process, legislators distanced themselves from the LDA's [*Lobbying Disclosure Act*] regulatory burdens, instead placing the entire onus of the Act's disclosure requirements on lobbyists." Anita S. Krishnakumar, *supra* note 493 at 534. In Slovenia, public officials are required to register the lobbying when they are contacted, but unfortunately they do not reliably do so. Craig Holman & William Luneburg, "Lobbying and transparency", *supra* note 96 at 94.

²⁴³² B.C. has ordered for the cabinet's calendars and travel receipts to be made public. Justine Hunter, "B.C. cabinet's travel receipts, calendars to automatically be made public", *Globe Mail* (9 May 2016), online: <<http://www.theglobeandmail.com/news/british-columbia/bc-cabinets-travel-receipts-calendars-to-automatically-be-made-public/article29948259/>>.

²⁴³³ See Chapter 2 – Understanding Lobbying in Canada and the U.S.: Transparency and Lobbying: Four Levels of Transparency, p. 129. Michael Halberstam, "Beyond Transparency", *supra* note 557 at 1022.

²⁴³⁴ *Ibid* at 1029.

²⁴³⁵ *Ibid* at 1069.

²⁴³⁶ *Ibid* at 1070.

it is imperative that lobbying regulations be designed to provide voters with "the information most crucial to improving their ability to vote consistently with their preferences' and to do so in a format that readily translates into a voting cue. Current lobbying regulations provide information in a decidedly non-voter-friendly manner"²⁴³⁷

It is unlikely that any one incident revealed in the lobbying registry will directly affect a voter's decision, which is likely made based on a complex web of ideology, identity, policy preferences, communal belonging, affinity for key politicians, and social-economy status. However, the disclosure might be used by activists or party members, helping them to bring change to their political party or community.

Disclosure of Information Sources

Disclosure should include details about the information submitted. Reich argues that, expert witnesses, academics, and inhabitants of think tanks [should] ... be required to disclose any and all sources of outside funding for testimony, books, papers, or studies that are put in the public domain. That way, if an "expert" funded by Koch Industries asserts that humans have no part in climate change, for example, or a professor funded by the National Retail Federation finds that raising the minimum wage leads to less employment, the public would have a means of evaluating the neutrality of such claims.²⁴³⁸

Making the submissions public would allow a wider evaluation of the information submitted. This would encourage better information. There would be a chance that experts, other officials, opposing lobbyists or the media might view the submissions. They could then contradict false or misleading information. The record of submissions would make it easier to verify the veracity of a lobbyist's claims, giving regulators an additional tool to deter phishing and unethical lobbying. It would discourage lobbyists from submitting information that contradicts the represented interest group's public stance, reducing the chances of misleading the public or lobbied officials. As a sub-benefit, as with open government, this approach might help disseminate the useful information provided by lobbyists, allowing others to use it in the future.

More Ambitious and Radical Transparency

A more ambitious form of transparency, but even more useful for the public, would be a system that kept track of changes that come from lobbyists.²⁴³⁹ Bassett argues that disclosures "should also include the contacts made by lobbyists on behalf of the beneficiary of the earmarks or the lobbyist

²⁴³⁷ Anita S. Krishnakumar, *supra* note 493 at 539.

²⁴³⁸ Robert B. Reich, *supra* note 26 at 206.

²⁴³⁹ Wisconsin and Rhode Island kept records of how every registered lobbyist and interest groups lobbied on every bill under consideration.

employed by the beneficiary of the earmark.”²⁴⁴⁰ Her proposal would cover earmarks and those directly profiting from lobbying. The OECD proposes a similar but more ambitious form of this idea.

Government should also consider facilitating public scrutiny by indicating who has sought to influence legislative or policy-making processes, for example by disclosing a 'legislative footprint' that indicates the lobbyists consulted in the development of legislative initiatives. Ensuring timely access to such information enables the inclusion of diverse views of society and business to provide balanced information in the development and implementation of public decisions.²⁴⁴¹

The registrar could be designed to track all changes across government connected to lobbying. It is an ambitious idea which would require extensive digital infrastructure.²⁴⁴² This disclosure would include policy, personnel, legislation, funding and regulatory adjustments in real time.²⁴⁴³ Essentially, when an adjustment was made to policy, personnel, legislation or regulations, it would include a record of the source and justification for the change, related papers and submissions, the lobbyists involved, and the arguments they made.²⁴⁴⁴ This would provide real transparency to government decision-making and policy. The media and the public would be able to inspect any decision of their government to determine the impact of any lobbyists involved in the process, and read any submission or information the lobbyist relied upon. This might ultimately offer big improvements in transparency, oversight, and citizen involvement. Only some people, academics, lawyers, courts, and organizations will have the time and means to investigate this record, but it could provide great benefits when they do.

²⁴⁴⁰ Elisabeth Bassett, *supra* note 979 at 1080.

²⁴⁴¹ OECD, *supra* note 2108 at 4.

²⁴⁴² This sort of tracking is already taking place in private industry. For example, some automobile companies now track every component in the car, including not only the exact part number and what vehicle it was installed in, but also every instance, alteration, service and reference to each component and subpart from then on.

²⁴⁴³ Drutman makes a similar proposal.

“What if Congress passed a *Congressional Lobbying Procedure Act* that created a set of uniform processes for congressional lobbying? Such a system could take advantage of modern technology and require that any advocacy be posted within 48 hours on a central website. Each report would contain a short summary of the meeting, who attended, and what was advocated for. Any white papers, draft legislation, or other leave-behinds would need to be posted in electronic form as well. The website would also serve as a repository for all arguments and advocacy. A series of clicks would take any interested member of the public to a corpus of arguments for or against particular public policies, creating a central clearinghouse.”

Lee Drutman, *supra* note 172 at 202.

²⁴⁴⁴ To reap the most benefit from this proposal, the government could institute a system of meta-data so there was a record that traveled both with the department/legislation/politicians in question, as well as residing in the lobbying registrar. The meta-data could be more extensive, including the reasons and documentation related to all the alterations to the legislation. Unlike combing through Parliamentary debate, the data would explicitly attach the change in question. This proposal is far beyond the traditional scope of a lobbying registrar, but would fit neatly into the concept of open government. It would provide a clear record and justification of change. Legislators, courts, politicians, bureaucrats, the media, lobbyists, the public and activists could all make use of this information to track and understand changes to policy and governance. This type of tracking is regularly used in computer code design, and it could be gradually applied to government decision-making, starting in the area of lobbying inputs. Although burdensome to set up, this type of meta-data would become extremely useful over time, leading to transparency in policy and better government decision-making.

Blackout of Confidential Information

Any system that collects lobbying submissions will need to have some system to protect confidential information.

[Disclosure] should be carefully balanced with considerations of legitimate exemptions, in particular the need to preserve confidential information in the public interest or to protect market-sensitive information when necessary.²⁴⁴⁵

The registrar or the lobbyists submitting the information will need to be able to flag or black out parts of submissions that contain confidential or private information.²⁴⁴⁶ There also needs to be a relatively automated means to restore that information once the need for confidentiality has passed.

The blackout exception should be designed to discourage its use, encouraging transparency. There should be retrospective evaluation of the initial justification for the blackout, to ensure the system is not being abused. Too often governments and institutions claim data is confidential as a means of hiding it from the public, avoiding accountability, and sheltering incompetence and corruption. Lobbyists and special interest groups will have the incentive to abuse the blackout exception, so it will need to be carefully designed and policed.

Conclusion – Chapter 9

This chapter has proposed twelve principles of lobbying reform. In the next chapter we will consider two specific reforms that fit within these principles: setting limits on business lobbying and providing support for citizen lobbying.

²⁴⁴⁵ OECD, *supra* note 2108 at 3.

²⁴⁴⁶ For example, in Quebec the Commissioner can make some lobbying disclosure confidential, generally for a limited time period, but it is renewable, for when the disclosure would damage the lobbyist's interest.

Chapter 10 – Specific Reforms and Conclusion

Introduction – Chapter 10.....	572
Ban Astroturf Organizations	572
Limit Business Lobbying	573
Three Types of Lobbying Limits.....	574
Accounting for Trade Associations and Subsidiaries	575
Enforcing the Limits	576
Impact on Officials	576
Hypothetical Ban on Corporate Lobbying.....	577
Freedom of Association and Expression	578
Publicly Support Citizen Lobbying.....	579
Approaches to Funding Citizen Groups.....	579
Political Control in Canada’s History of Funding Citizen Lobbying	581
The Example of the Court Challenge Program.....	581
Questions for Further Study	583
Conclusion – Conclusion	583

Introduction – Chapter 10

In this chapter we will consider some specific lobbying reform ideas in depth. One way to understand the goal of lobbying reform is that it is an attempt to redirect self-interest. Businesses have multiple projects and opportunities they could be pursuing to generate profit. As covered in Chapter 2, as spending on lobbying has increased, it has become institutionalized within a growing number of businesses. It might be profitable, but much of lobbying involves rent-seeking, reducing taxes, and shifting externalities to others.²⁴⁴⁷ Business lobbying generates profit, but society would be better off if corporations were to redirect their efforts towards other ways of making money. Well-structured lobbying regulations would change the incentive structures, so that businesses found lobbying to be a less desirable (and necessary) pursuit.

Job opportunities and large salaries in lobbying are encouraging more and more U.S. officials to become lobbyists upon leaving office, and to make decisions in office with the potential repercussions for future lobbying jobs in mind. Officials face multiple incentives and ways their self-interest and altruism can express itself. They might seek satisfaction from doing their job well, from the high status of office, from accomplishments, from helping people, from their salary, or from popularity with their constituents (for politicians). Robust lobbying regulations should focus their self-interest on these aspects of their job, rather than on the favours, benefits, and job offers they can receive from lobbyists.

Lobbying reform is not about breaking self-interest, but about realigning the rules so that self-interest is more likely to align with broader considerations of the preferences of general public. In this section we will consider two reforms that might help serve this purpose. Since we used the specific reforms proposed in this chapter as the basis of our investigation in Chapter 7 and Chapter 8 of s. 2 and s. 3, we have already determined that these reforms would likely pass *Charter* review. Our proposed reforms are to limit the lobbying of business interests; and to publicly support the lobbying of citizen groups. For these two reforms to work, it is essential that the government ban lobbying by astroturf organizations.

Ban Astroturf Organizations

It is essential that there are clear strict rules that prevent astroturfing, prevent citizen groups from being a paid front for business interests (or individual billionaires), and otherwise prevent companies from misrepresenting their lobbyists as representatives of citizen groups. This is necessary to prevent organizations from spinning off astroturf groups in order to avoid lobbying limits, or to deceitfully exploit public funding for citizen groups. Organizations lobbying government should be

²⁴⁴⁷ Lee Drutman, *supra* note 172 at 228. The rent seeking lobbying also has costs to the corporation itself. Kibler and Kibler argue that lobbying has “resulted in continued degradation of corporate governance”. Bruce A. Kibler & Kathleen V. Kibler, *supra* note 34 at 104. It allows a company to profit by focusing on legal manipulation. This might give good returns, but over time it risks degrading the company’s efficiency and innovation. If there is a shock, new market entrant, or change that threatens its ability to lobby effectively, it might find itself suddenly uncompetitive, inefficient and vulnerable.

required to disclose all their funding sources. Astroturf restrictions should apply to direct lobbying and attendance at all open meetings, town halls, hearings, and other public and government processes.²⁴⁴⁸

Astroturf groups can provide some limited social benefits. For example, there might be a legitimately widespread public concern, but no citizen group that can effectively lobby on the issue. An astroturf group could pick up the slack. This advantage is massively outweighed by the negatives of astroturf organizations: that officials and citizens cannot tell real concerns from fake ones, that business interests use them to mask their involvement and avoid negative repercussions, and that the lack of transparency and hidden motives sabotages accountability, good decision-making and, ultimately, democracy. As we previously discussed, astroturfing is a fundamental danger to democracy, and should be banned. Both those directing the astroturf organizations and those that employ them should face stiff penalties.²⁴⁴⁹ The office overseeing lobbying should track and name these organizations in the registry, so that officials and citizens are aware of them. This would set a standard for lobbying, and deter astroturfing. It would improve enforcement, because officials would know which groups are not legitimate and could refuse to meet with them. If an official continued to meet with a named astroturf group (likely in order to disguise her support for the business behind the group) then she could be held to account. More study is warranted on the idea of banning astroturf groups.

Limit Business Lobbying

A key principle from campaign finance law is that the actions and reach of a few must be curtailed to make room for the many to participate. Similarly, there cannot be fairness in lobbying without limiting the lobbying activities of some. It is not enough to raise the bottom up. In lobbying, the top now has so much power, resource and experience – magnitudes more – that it needs to be restrained in order to restore some form of equity.²⁴⁵⁰ In the next section we will discuss the funding of citizen lobbying groups. They might be able to accomplish much with a smaller budget by motivating volunteers; but ultimately lobbying is a sport of counter-pressures. The government will never provide citizen groups with enough funding to match the lobbying budget of the corporate sector. Businesses will always be able to raise their lobbying expenditure to overcome any increase in citizen lobbying.²⁴⁵¹ Any serious attempt at rebalancing lobbying will need to restrict business lobbying in some way.

²⁴⁴⁸ Organizations must be banned from hiring actors to astroturf their agenda by posing as concerned citizens at town halls, meetings and public consultations. Multiple companies have been caught doing this, and the practice appears to have become wide spread. One company employs 20,000 paid actors (who must sign non-disclosure agreements) to sway city officials across the U.S. UCLA professor Edward Walker estimates about 40% of fortune 500 businesses hire such firms. Michael Isaac Stein, *supra* note 1808; Marin Austin, *supra* note 1808.

²⁴⁴⁹ Astroturf groups should be treated like the deceptive organizations they are, and banned from portraying themselves as anything else. Their purpose is to deceive government and subvert democratic policy.

²⁴⁵⁰ See Chapter 6 – A Normative Framework for Evaluating Lobbying Regulations: Inequality and Lobbying, p. 375. For a discussion of this issue in regards to income inequality, see Chuck Collins, *supra* note 208 at 52.

²⁴⁵¹ In the U.S., lobbying spending reaches \$3.4 billion in 2018. It would be astounding if the government was willing to fund 3% of that. Karl Evers-Hillstrom, “Lobbying spending reaches \$3.4 billion in 2018, highest in 8 years”, (25 January 2019), online: *OpenSecrets News* <<https://www.opensecrets.org/news/2019/01/lobbying-spending-reaches-3-4-billion-in-18/>>.

The goals of the limits are to enhance the voice of citizens, increase the ratio of citizen to business lobbying, and prevent wealthy interests from dominating the lobbying process and framing the government's decision-making. It should provide numerous knock-on benefits that support the twelve principles that we have previously covered.

We will discuss three types of lobbying limits; trade associations and subsidiaries; enforcing the limits; the impact on officials; a hypothetical ban on corporate lobbying; and touch upon freedom of association and expression.

Three Types of Lobbying Limits

The lobbying limits could take many forms, but three primary ones are worth considering: limiting the amount spent on lobbying (directly and indirectly); limiting the time spent on lobbying; or limiting the ratio of business lobbying for a given official, department, or issue.²⁴⁵² The ratio of business lobbying would set a maximum ratio of business to citizen groups. The officials and departments would be allowed to meet with fewer business lobbyists than the ratio set, but not more. Ideally, the limits would use several of these metrics to prevent the exploitation of loopholes. The limits should mirror the design of campaign expenditures, setting both a yearly total limit on lobbying and local limits of lobbying that can be directed at any one department or official (including legislators).

Spending limits will require that the amounts spent on lobbying be tracked and disclosed. Time limits will work better if officials track who is lobbying them, so that there is confirmation of the time spent lobbying and of when a business is reaching its limits. Ratio limits will require that officials limit business lobbying to restore the ratio or actively encourage citizen lobbying. This might end up being tied to the funding of citizen groups to keep the ratio in balance.

It is most useful to implement a monetary limit on lobbying; since money is how much of economic practices are measured. However, setting a time limit would help prevent business lobbying from monopolizing lobbying when doing so is not particularly expensive. It would also force government to recognize and quantitatively acknowledge how much it is catering to the lobbying concerns of business interests. This would form a natural means for citizens to use the lobbying registry to evaluate the government's approach to lobbying. Lastly, imposing a mandatory ratio in lobbying, for example 40-60 (businesses to citizen organizations), would make sure officials are meeting with citizens, and that business lobbyists are not bypassing the other limits through clever accounting or other loopholes.

As discussed elsewhere, unions could be treated as businesses for the purpose of these limits, if it is necessary to sell it politically. However, considering the role of unions in social reform, it would

²⁴⁵² These limits could take the alternative form of a tax/fee on business lobbying that increased progressively to quite high levels according to the amount spent on lobbying. Senator Warren suggested such a tax as part of her 2019 Presidential campaign platform. Absolute limits are more likely to be effective, since they limit the activity of lobbying, instead of simply raising its cost. Elizabeth Warren, *supra* note 1882.

make more sense and give better results to treat them as akin to citizen groups, or to set them up with their limit somewhere between that of business and of citizens.

Each limit will pose its own type of challenge. Spending limits risk businesses under-reporting the amounts spent on lobbying, and will require some sort of audit system to enforce. Tracking the spending will also raise costs for the organizations, although it is likely that many organizations already track expenditures on lobbying for internal accounting and tax reasons.²⁴⁵³ Time limits are subject to verification problems and are harder to audit after the fact. They will probably require that all officials report when they are lobbied and for how long. Officials will be resistant to this as an additional burden and perhaps an indication of distrust or micro-management. Automated time tracking tools will be necessary for this to work. Lobbying ratios that limit business lobbying to a certain percentage of lobbying will also require officials to track their time. In low salience areas it might be difficult to maintain a ratio that favoured citizen groups, as business groups might be the only ones interested enough to lobby. Official might be pressured into forming citizen groups to lobby in these low salience areas. There is the risk that they will create yes-groups, designed to support the department or industry lobbyists.

More study will be needed to determine the appropriate monetary, time and ratio limits on business lobbying, but it should err towards the lower side, with a goal to reduce total business lobbying substantially.

Accounting for Trade Associations and Subsidiaries

The law setting limits on business lobbying should also be as broad and simple as possible. The limits must take into account lobbying done directly, and that funded indirectly through membership in trade associations and other organizations. The rules will need to clearly account for the various methods businesses use to lobby officials, and the ways they might bypass the limits. These include lobbying via consultant lobbyists; trade groups; business partners, subsidiaries; shell companies; cut-outs; astroturf organizations; shadow political parties; public relations firms; law firms; corporate-controlled unions; and via collaboration or favours from citizen groups, charities and non-profits.²⁴⁵⁴ The law should also account for lobbying that is tied to campaign finance donations, including lobbying tied to direct donations, fundraising galas, and third-party campaign spending.

In restricting business lobbying, one must account for a business' ability to create subsidiaries, work in strategic partnerships, and belong to multiple trade associations. A limit cannot be effective if a business can simply create a myriad of numbered corporations to lobby in its place. The same holds true for membership in multiple trade organizations. At the same time, trade associations are useful for communicating with government, particularly for smaller businesses that cannot do so easily on their

²⁴⁵³ There is no inherent difficulty to this. Employees who work in-house on lobbying can have the appropriate percentage of their salaries counted as part of the calculation.

²⁴⁵⁴ For example, in 2005, Exxon paid 21 groups to lobby and advocate on behalf of a climate change denial campaign. Kevin Grandia, *supra* note 35. Reich gives the figures of 39 denial groups and \$2.9 million for 2005. Robert B. Reich, *supra* note 224 at 208. See also, John Cook et al, *supra* note 30 at 4.

own. In campaign finance law there is a natural limit for third parties. Spin-off organizations would need to be created for a short election period, and it is generally not worth it considering their spending limits and the limited time frame of the electoral period. However, lobbying is ongoing, so there is more incentive to create multiple subsidiaries and trade groups to permanently bypass any individual lobbying limit.

One solution is to account for any resources a parent organization or trade group member gives to the funded organizations as part of the parent organization's limit. This can be calculated according to the parent organization's percentage of funding and control of the subsidiary. For example, a gas extraction company has a lobbying limit of \$150,000 a year, and is a member who provides 10% of a trade group's funding. That trade group then spends \$150,000 on lobbying (its limit). 10% (\$15,000) of the amount spent on lobbying by the trade group would apply to the gas extraction company's own lobbying limit. This would apply both to the total limit, and to the smaller local limits to specific targets of lobbying (e.g. the Ministry of Innovation, Science and Industry). The regulator will need the authority to rule on the transfer of these limits, and the relationship between different business organizations.

Enforcing the Limits

Companies will have a high incentive to under-count the amount spent on lobbying, so they can stay below the limits. The oversight will need the right to audit lobbying businesses. It might be necessary to make adhering to limits on corporate political lobbying a fiduciary duty.²⁴⁵⁵ The mis-accounting of lobbying expenditures will have to be a serious infraction, potentially criminal if it is extreme enough. But the chance of being caught is more important than the penalty.²⁴⁵⁶ The regulator will need an adequate budget to fund the audits. The regulator does have a potential advantage, if officials being lobbied are required to report it, the government can compare the reports and be assured that the amounts submitted by industry were correct. The oversight will need to be designed so that its mission includes rigidly enforcing the limits.

Some large organizations will run into these limits. This is necessary. If businesses never feel constrained, then the limits are not really limits. These organizations will be forced to prioritize, and to scale back their lobbying commitments so that business lobbying no longer dominates citizen lobbying.

Impact on Officials

Even with reduced business lobbying, government departments will continue to pay attention to business "stakeholders", and politicians will continue to care about jobs, development, and the opinions of the wealthy. Business will still have a say, but it will not be such an outsized say. The limits would

²⁴⁵⁵ As previously discussed, these limits must be enforced with real teeth so that the fines exceed the costs of doing business and the (potentially enormous) profits from breaking the lobbying laws. The penalties should be able to scale to match the gain. The enforcement should also be able to apply strict liability and penalties directly on the directors, board members and management, to balance the high potential financial rewards from illegal lobbying.

²⁴⁵⁶ In general, "certainty of apprehension is a more effective deterrent than the severity of the ensuing legal consequence". Daniel S. Nagin, *supra* note 2255 at 215.

change the systematic incentives business lobbying places on officials.²⁴⁵⁷ Some officials will take the opportunity to broaden the scope of who they listen to.

There will be officials and politicians who will be predisposed to favour the voices of business interests regardless. These officials might simply choose to meet with fewer lobbyists, or treat their meetings with citizen groups in a perfunctory fashion. However, at least these officials will have an equal opportunity to hear what the opposition is saying. It is impossible to remove all bias, but we can build structures that deter it.

As covered in Chapter 3 and Chapter 6, when one lobbying party gets too much say they can frame the conversation, and the information provided will no longer be reliable. In these cases, reducing the input of that party – of the business interests – will actually improve the quality of the information and the subsequent decision-making. Even if officials continue to favour business lobbying, decreased business lobbying also opens the government up to other issues and priorities, reducing businesses' overall ability to set government priorities.

Hypothetical Ban on Corporate Lobbying

Raskin and Bonifaz argue that all lobbying should be publicly-funded, and no privately funded lobbying should be allowed.²⁴⁵⁸ This approach may infringe businesses' freedom of expression, and might not survive the s. 1 test based on the precedent of *Libman v. Quebec (Attorney General)*²⁴⁵⁹. In *Libman*, the Court struck down the law which prevented individuals from making any third-party expenditures during the Quebec sovereignty referendum. The law required that all political expenditures flow through the yes or no campaigns, or an affiliate. The Court held that this was too extensive a restriction on freedom of expression, and some independent spending needed to be allowed.²⁴⁶⁰ By analogous reasoning and the mirror principle, a complete ban on private lobbying spending might fail Court scrutiny. This would be especially likely if the publicly-funded lobbying methods failed to cover some approaches or issues, or force a strategy of affiliation on an interest group to which the group objected. However, it is likely that a strategy of making most lobbying publicly-funded and allowing very limited private lobbying (and even more limited business lobbying) would pass muster.²⁴⁶¹

Libman applied to an individual citizen, expressing his political beliefs. A business lobbying ban is different in that businesses are generally expressing themselves to government for commercial gain. It is possible the courts would weight this difference in assessing the constitutionality of restrictions, or a

²⁴⁵⁷ Thompson and Stanbury stress the importance of strengthening the representation of broadly shared interests, and reducing the weight to private interests in Canadian governance. Fred Thompson & W. T. Stanbury, *supra* note 2 at 23.

²⁴⁵⁸ Yasmin Dawood, *supra* note 489 at 337.

²⁴⁵⁹ *Libman v. Quebec (Attorney General)*, *supra* note 1706.

²⁴⁶⁰ *Ibid* at para 81.

²⁴⁶¹ By the precedent in *Harper* and the mirror principle, such restrictions are likely to be allowed. See Chapter 7 and Chapter 8. *Harper v. Canada (Attorney General)*, *supra* note 53 at para 121.

ban, on business lobbying. This position can also be supported by Gee’s argument that petitioning the government is essentially a non-transferrable democratic right (like voting) that belongs to citizens as moral agents.²⁴⁶² By his reasoning legislating business lobbying should be evaluated on the purely practical level of whether the legislation will bring better democratic and social results.²⁴⁶³

It is worth considering whether such an outright ban should apply to particularly large business associations, like the Business Roundtable. Hamilton and Hoch argue that providing local knowledge or detailed information particular to the governance and regulations of an industry are essential criteria for justifying business lobbying.²⁴⁶⁴ Large cross-industry business lobbies do not meet these criteria. Their interests are by nature wide in scope and political, having to do with the general governance of the country. They appear to exist so that businesses as a whole can pre-empt policies that the general population prefers. Considering this, the justification for their lobbying is tenuous. More study is needed on this question. Do these associations provide value to government? Are they inherently anti-democratic? Can a clear delineation be made between them and more reasonably sized lobbying organizations? Are they acceptable if they are large but only represent a single industry? Would it be practical and beneficial to ban business organizations of this size from lobbying? Is this sort of size a constitutionally valid distinction – does the difference in scale become a difference in kind?

Freedom of Association and Expression

Returning to the business lobbying limits proposed in this section, it is worth reminding ourselves of their constitutionality. As covered in Chapter 7, these limits are unlikely to infringe freedom of association. In *Harper v. Canada*²⁴⁶⁵ the Court in held that campaign spending limits do not infringe freedom of association, because they prevent expression, not an association of people.²⁴⁶⁶ By the mirror principle, the same result should apply to lobbying. The lobbying limits are more likely to infringe freedom of expression.²⁴⁶⁷ As covered in depth in our investigation in Chapter 7, such lobbying restrictions are likely to be upheld as justified in the s. 1 review.

There will be substantial resistance to limiting business lobbying. People and organizations rarely give up power voluntarily. There will also be substantial complications to establishing and overseeing the lobbying limits. These will be similar to those faced by electoral campaign law, but there

²⁴⁶² Organizations like corporations are “not entitled to the same moral rights and considerations of persons. While there may be reasons to accord group agents specific rights for expedient purposes that may relate to the moral rights of persons, the right to petition cannot be one of them. To that extent, group agents [e.g. corporations] have no moral right to engage in lobbying the government.” Quentin Gee, *supra* note 1751 at 407. See notes 1752, 1753 & 1951.

²⁴⁶³ He concludes that this practical basis fails, because corporate lobbying misaligns representation, damages democratic equality, and because most citizens do not support corporate lobbying. Thus corporations have no right to lobby, and corporate lobbying can be regulated as the government sees fit. *Ibid.* See notes 1752, 1753 & 1951.

²⁴⁶⁴ J. Brooke Hamilton & David Hoch, “Ethical Standards for Business Lobbying”, *supra* note 2338 at 118.

²⁴⁶⁵ *Harper v. Canada (Attorney General)*, *supra* note 53.

²⁴⁶⁶ *Ibid* at para 126.

²⁴⁶⁷ *Ibid.*

is greater money and more embedded patterns of governance involved. The resistance to change will be greater and the issues more entangled. A long series of regulatory and court rulings will be necessary. Ideally the regulators and courts will keep the relevant twelve principles in mind while making these rulings, particularly the need to control the hydraulic pressure of private influence. Despite the complications they face, campaign finance limits have shown their worth over time. So would lobbying limits. The economy as a whole does better, business as a whole does better, when business and state are more separate, rent-seeking is reduced, and democracy strengthened.²⁴⁶⁸ Collectively, businesses would benefit over the long-term from a more democratic society with a more balanced lobbying system. Democracy will always be messy and outcomes will rarely be ideal. It is no simple thing to channel the conflict of powerful interests into non-violent constructive solutions. Yet, better processes and rules make a big difference over time.

Publicly Support Citizen Lobbying

The use of public funding as a means to balance the power of wealthy interests in political campaigns has become the norm in many jurisdictions. By the mirror principle, this could be a partial solution in lobbying. The government could provide funds to citizen groups to balance against business lobbying. These funds would allow the citizen groups to lobby more effectively and extensively. Better funded citizen groups could also generate more useful information for officials, making their lobbying more appealing and valuable. This idea was supported by a majority of my interview subjects.²⁴⁶⁹

We will discuss approaches to funding citizen organizations; political control in Canada's history of funding citizen lobbying; and the example of the Court Challenge Program; and some questions deserving of further study.

Approaches to Funding Citizen Groups

Gerkin and Hasen, among others, have embraced the idea of public funding for citizen lobbying.²⁴⁷⁰ Drutman provides a detailed proposal.

First, an under-represented perspective would have to gain threshold number of signatures (perhaps 25,000) and advocates of the perspective would need to demonstrate that they were being outspent by at least a threshold ratio (perhaps 4 to 1), and that a diffuse group of citizens were affected. Then, that perspective could be included in a regularly occurring poll that the government conducts to test for widespread support in the country. If a threshold percentage of citizens agreed with the perspective (perhaps 25 percent), a federal subsidy would be awarded so

²⁴⁶⁸ Norman Eisen et al, *supra* note 751 at 37.

²⁴⁶⁹ Chapter 5 – Interview Results: My Questions: 14. What do you think of the idea of providing public funding for citizen lobbying groups, so they can afford to bring their concerns to the government?, p. 321.

²⁴⁷⁰ Heather Gerken, "Lobbying as the New Campaign Finance", *supra* note 514; Richard L. Hasen, *supra* note 1405 at 208.

advocates of that position could hire a lobbyist. Subsidies could be awarded based on the level of support, and the ratio by which advocates for that position were being outspent by powerful interests. A more aggressive version of this proposal would require well-funded interests on the other side to fund their opposition in order to guarantee a fair fight.²⁴⁷¹

As mentioned in Chapter 9, Drutman, and Teachout have recommended something like an office of public lobbying, which would operate like public defenders, advocating for citizen groups and positions.²⁴⁷² This role could be taken by the Commissioner of Lobbying, or by a separate organization, perhaps with a formula that assured a certain amount of funding. Ideally the funding would be relatively generous and available for any citizen group. As a less expensive alternative, or as a trial program, the funding could be more targeted to disadvantaged groups, to help them lobby.²⁴⁷³ Other public funding methods could include tax breaks, tax deductions/rebates for donations, or matching donations for funds individuals donate to citizen lobbying groups. Thompson and Stanbury propose that citizens could allocate their portion of the public funding to their preferred organization on their tax forms.²⁴⁷⁴ Since so many people rely on professionals to fill out their taxes, this would have to be designed in a way that prevented professional tax filers from becoming the arbiters of which citizen lobbying groups receive public funding.

Another approach would be to mimic the campaign funding vouchers programs some cities have started to use. The government could provide lobbying vouchers to citizens (perhaps \$400 per year in \$100 vouchers²⁴⁷⁵). Each citizen could assign their vouchers to the citizen lobbying groups they support, who would then receive those funds from the government. Funding could also take the form of support, training and expertise to help build and expand citizen organizations, thereby indirectly growing their lobbying abilities.

The funding could and probably should be tied to other methods to favour citizen groups, such as giving them preference in setting meetings, input opportunities not available to businesses, or requiring officials to devote at least half of their time meeting with lobbyists to citizen groups (although such rules will need to be planned to accommodate low salience issues). This would leverage the public

²⁴⁷¹ Lee Drutman, *supra* note 172 at 201. See Chapter 9 – Reform Principles: Principle 11: Empower the Disadvantaged: Lobbying Policies Designed to Help the Disadvantaged, p. 558.

²⁴⁷² *Ibid.*

²⁴⁷³ A good place to form the list of disadvantaged groups might be to look at the smaller groups protected by the *Charter* and then add the populations considered vulnerable for poverty. “These groups include children; lone-parent families (particularly female lone-parent families); women; unattached individuals; seniors; Aboriginal people; people with disabilities; recent immigrants and visible minorities; and low-wage workers.” One can add those already in poverty, the homeless, those targeted by hate crimes, and those suffering from extreme addiction. Candice Hoepfner, *supra* note 2385 at 20.

²⁴⁷⁴ Fred Thompson & W. T. Stanbury, *supra* note 2 at 132.

²⁴⁷⁵ Since many citizens will not end up using their vouchers, the vouchers can be relatively generous.

funds, allowing the groups to accomplish more without increasing the public outlay from the government.

There are legitimate corruption and governance issues when organizations receiving public funds using those funds to lobby the government. The funding will need clear standards and impartial oversight.²⁴⁷⁶ The Zed Committee recommended that organizations that receive funding for lobbying should be required to report it in the registry.²⁴⁷⁷

Political Control in Canada's History of Funding Citizen Lobbying

As previously discussed, Canada has experimented with funding and supporting lobbying by citizen groups.²⁴⁷⁸ This funding appears to have been successful in helping groups push their concerns onto the government's agenda.²⁴⁷⁹ Doubtless, some of these funds have also been lost to waste and corruption. Being tied to politics and lobbying, public funding has also been manipulated for the political purposes of the government in power.²⁴⁸⁰ Some governments also appears to have withdrawn the funding as a punishment for groups that would not comply with its agenda. This type of political control runs counter to the purpose of giving the citizen groups a voice in the first place.²⁴⁸¹

The Example of the Court Challenge Program

The discretion in political control is a fundamental flaw in the current funding regimes. The other difficulties include: how to prevent government from forming yes-groups designed to support industry or department positions, who decides which groups and individuals get funding, what keeps these groups honest, and how do you balance deterring fraud with encouraging legitimate participation?

²⁴⁷⁶ The lobbying registrar and officials' calendars could be used to confirm that the funded groups are actually lobbying.

²⁴⁷⁷ A. Paul Pross, *supra* note 2 at 173.

²⁴⁷⁸ Cheryl Collier, *supra* note 2395 at 23. See also, Paul Malvern, *supra* note 2 at 28, 190–196.

²⁴⁷⁹ Paul Malvern, *supra* note 2 at 28, 190–196; Cheryl Collier, *supra* note 2395 at 23. In B.C., the BC Office of the Seniors Advocate practices public interest lobbying on behalf of British Columbia seniors on issues such as income, independence, health care, housing, and mobility. It has the authority to hire staff, retain experts, and commission research. Nicolas Graham, William K Carroll & David Chen, *supra* note 2 at 7.

²⁴⁸⁰ The government might have pressured some of the French language groups into supporting national unity during the 1995 Quebec secession referendum. See also, Paul Malvern, *supra* note 2.

²⁴⁸¹ The National Action Committee on the Status of Women appears to have suffered their major funding cut under Mulroney because they took an active role in opposing his position on the Meech Lake Accord. There is good evidence that the committee opposed the accord, it is more difficult to establish that this was the reason for the funding cuts. The cuts increased under the subsequent Liberal government, until all government funding was ended. These later cuts appears to have been part of a roll-back as a result of a new philosophy that the government should support fewer advocacy groups, rather than malice directed at the organization itself. Judy Rebeck, "The Political Impact of the Charter" (2005) 29 Supreme Court Law Rev Osgoode's Annu Const Cases Conf 9 at 87; Cheryl Collier, *supra* note 2395 at 26. See also, Paul Malvern, *supra* note 2 at 28, 190–196; A. Paul Pross, *supra* note 2 at 19.

The use of lobbying vouchers might be one method to solve some of these problems. Officials would not have to decide which citizen organizations deserve support. Instead, they could set minimum criteria of accountability and efficiency, and let citizens choose which qualifying organizations deserve funding.²⁴⁸² Another approach could be found in the Court Challenges Program. The program is intended to provide funding for important court cases advancing language and equality rights that are (or should be) protected under the Constitution. The Court Challenges Program has been killed and resurrected under a number of governments. It is not lobbying in the sense covered in this paper, but it is similar. It appears to be generally respected by the legal community. With its \$5 million yearly budget, it has played a significant role in clarifying a number of *Charter* rights.²⁴⁸³ It is currently administered by the University of Ottawa and overseen by an independent panel of experts. This type of structure could prove to be a good model for a program aimed at encouraging more equality in lobbying. If the funding is inadequate for generalized funding, the program could provide funding for important lobbying activities, based on human rights, health, climate change, the environment, poverty, or some other criteria.

The *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada* report contains a number of findings about funding grants and public subsidies for charities. These lessons are equally applicable to the funding of citizen lobbying organizations. The report found that the administrative burdens of writing grant applications and proving results, especially when the funding is uncertain, can be a heavy burden (as any academic knows). This burden is proportionately larger for smaller organizations.

The Committee was told that community non-profit organizations spend far too much time applying for funding, writing proposals and reporting results. Witnesses felt that the resources devoted to these activities would be better spent providing support to clients. The application process is burdensome, both in terms of the frequency with which applications must be made and the quantity of information that must be supplied to support proposals. Moreover, we were told that organizations are competing with one another for limited funding, which in our opinion is an inefficient use of limited resources in organizations which are already overburdened.²⁴⁸⁴

The report recognized the importance of protecting taxpayer money, but also that this must be achieved more efficiently with fewer burdens.

²⁴⁸² Lobbying limits could prevent a few popular citizen groups from receiving all the vouchers and dominating citizen lobbying.

²⁴⁸³ These *Charter* cases include language rights related to ss. 2, 16 & 23; and equality rights related to ss. 15 & 28. *Summary report on the Court Challenges Program consultations, March-April 2016* (Canada: Canadian Heritage, 2016) at 6.

²⁴⁸⁴ Candice Hoeppner, *supra* note 2385 at 112.

In this respect, federal departments need to become more flexible in their administration of grant and contribution programs, especially in terms of their application to community non-profit organizations, many of which are small, under-resourced and well known in the communities they serve. Furthermore, members of the Committee think that these organizations should be encouraged to and rewarded for developing initiatives that pool resources across organizations.²⁴⁸⁵

The report also recommended that funding be made multi-year, to make planning easier for organizations.²⁴⁸⁶ Given that the funding for citizen groups would be to encourage political participation and that there is a need for more citizen lobbying, the oversight should err towards trusting the citizens.

Questions for Further Study

There are a number of questions that remain regarding public funding for citizen lobbying organizations. Would the disadvantaged group use the resources effectively? Would the government remain open to the lobbying, or would it adopt other mechanisms over time to favour the input of business interests? Would it allocate the funding fairly, and how could it be prevented from exercising political influence over the groups receiving the funding? Would the public support the reform, and would it continue to support the reform in the face of inevitable mistakes, fraud, political interference, and fund misallocations? The Court Challenge Program, with its repeated demise and resurrection, is a possible example of the upsides, risks, controversies, and downsides of this type of program.

Public funding for citizen groups offers a decent way to help rebalance lobbying, especially considering it might face less political resistance than other approaches.²⁴⁸⁷ The program will raise some controversy, since it will be connected to contested political issues and clashing interest groups. Still, if the funding was widely and fairly distributed, it would allow more people to better advocate for themselves. This would give citizens a more equal voice, and help them provide better information to officials. In campaign financing the value of small donations by citizens are multiplied by tax deductions and public reimbursement funds to help foster a healthy election system. A similar multiplication of the power of citizen groups through public support can and should be enacted to help foster a healthy lobbying system.

Conclusion – Conclusion

Citizens realize that lobbying is sabotaging the alignment between politicians and voters. In the U.S., lobbying has been feeding an inequality spiral down into plutocracy, and Canada is not immune to this pattern. If lobbying continues to gather power and citizens continue to lose it, then other reforms will not be enough to maintain the health of the democracy. Currently, the process of business lobbying

²⁴⁸⁵ *Ibid* at 113.

²⁴⁸⁶ *Ibid* at 114.

²⁴⁸⁷ It is likely that the political resistance will be roughly proportional to the power that the vested interests perceive themselves to be losing. So lobbying changes that are easy to pass will tend to be less impactful.

is easy enough, the rules open enough, the chances of being caught for mis-framing low enough, and the rewards high enough that it would be foolish for a self-interested business not to invest in lobbying. As with phishing and rent-seeking, the profit can be enormous if one is not concerned with the ethics of the activities. So it is that increasing amounts of private influence continues to flow into the political system, and democracy is damaged bit by bit. In order to reverse this spiral, we will need to address lobbying directly, and change the rules of the process.

We have discussed six major concerns about lobbying: that it disproportionately advantages business organizations; it favours the policy preferences of the wealthy and causes a misalignment of representation; it creates an information framing bias; it increases inequality; it favours the status quo; and it otherwise corrupts democracy. We have investigated the principles that can help remedy these concerns: (1) control the hydraulic pressure of private influence, (2) enhance democracy, (3) prevent corruption, (4) prevent the appearance of corruption, (5) improve the quality of information, (6) maintain political neutrality, (7) enhance political equality, (8) advantage citizen groups, (9) advantage collective goods, (10) separate business and state, (11) empower the disadvantaged, and (12) promote strong transparency. All these principles are compatible with and express deep Canadian *Charter* values.

Currently, citizens are on the losing side of lobbying activities and democracy is in decline.²⁴⁸⁸ It will not be easy to turn this around. Lobbying reform will be teeth-shatteringly hard. Change will require the alignment and wise use of the four pressures to influence government decision-making: direct influence from supportive politicians, pressure from citizen lobbying organizations and activists, the use of the right political moment, and the building of widespread public support.²⁴⁸⁹ Lobbying scandals are so common that finding the right political moment will not be hard, and since the public subscribes the corruption heuristic it will not be hard to get widespread public support. The key is to build the activism and intellectual framework, recruit favourable politicians, and publicize the reform ideas. Canada has enacted structural reform to the democratic process throughout its history, from the enfranchisement of the vote, to the establishment of the *Charter*, from the use of redistricting commissions, to the enactment of campaign finance restrictions. Deep lobbying reform would be another transformational moment in Canadian democracy. Changing the practices of lobbying is not outside of our reach. If we embrace the idea that lobbying can be altered into a pro-democratic force through deep reform, we can turn the system around.

Whether we succeed or fail at reform, knowing it is necessary, we are obligated to try. To quote the ancient sage Rabbi Tarfon, “It is not incumbent upon you to finish the task, but neither are you free to absolve yourself from it.”²⁴⁹⁰

If lobbying oversight becomes stricter, the control over the hydraulic pressure of private influence more cohesive, the protections against corruption stronger, the fence around the appearance

²⁴⁸⁸ Freedom House, *supra* note 5 at 2, 11 & 15; R. S. Foa et al, *supra* note 5 at 3.

²⁴⁸⁹ See Chapter 2 – Understanding Lobbying in Canada and the U.S.: Four Approaches to Understanding Lobbying: The Four Pressures Approach, p. 114.

²⁴⁹⁰ *Pirkei Avot - Ethics of the Fathers* c 2.

of corruption higher, the separation between business and state deeper, the process more favourable to citizen groups, more open to the voices of disadvantaged groups, more conducive to public concerns and less conducive to private interests, then business lobbying for private gain will become less tempting. Less private influence will flow into the system, and it will become easier to contain it. Lobbying will shift towards citizen concerns, and political decision-making should align more with voter preferences. As the system becomes cleaner and more law abiding, it will become more open to change, and the positive reforms could become self-reinforcing. A virtuous cycle is a real possibility of deep lobbying reform.

I hope this thesis has convinced you that we can work for this change together.

- Dan Gold

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Appendix: Glossary / List of Theories

Absolute Income Mobility	632
Alignment & Responsiveness	632
Astroturf Lobbying	632
Businesses Pursue Private Goods & Citizen Groups Pursue Collective Goods	632
Corporate Lobbying Advantages.....	632
Corporations are Loci of Power	633
Corporations' Inherent (Psychopathic) Personality	633
Corruption: Systematic Corruption, Venal Corruption, <i>Quid Pro Quo</i> Corruption, Circumspect Corruption/Bribery, and Dependency Corruption.....	633
Deliberate Decline in Governmental Capacity (Information Gathering & Oversight)	634
Disclosure vs. Corruption Heuristic.....	634
Dworkin's Hypothetical Insurance Market	634
Echo chamber approach to advocacy	635
Evidence-Based Think Tanks versus Ideologically-Based Think Tanks.....	635
Fence Around Decision-Making Related to Lobbying	635
Five Types of Influence	635
Four Levels of Transparency	636
Four Pressures.....	636
Friction Model of Legislating.....	637
Hydraulic Force of Political Influence	637
Independent Officers/Agents of Parliament.....	637
Inequality Spiral (Spiral into Inequality).....	638
Insider vs. Outsider Approach.....	638
Iron Law of Meritocracy.....	638
Kludgeocracy.....	638
Lobbying Is Easier in Low Salience Areas.....	639
Lobbying as Social Exchange & Gift Economy.....	639
Mirror Principle of Lobbying & Campaign Financing	639
Neo-Pluralist Model vs. Exchange Model	639
Phishing.....	640
Policy Drift.....	640
Porter Hypothesis	640
Proportional Regulatory Duration	640
Rawls' Veil of Ignorance.....	641
Rawls' Three Principles of Equality	641
Right to Petition as a Non-Transferable Democratic Right.....	641
Separation of Business & State.....	642
Shrinking of the Public Sphere & Decline of Civic Virtue	642
Six Concerns about Lobbying	642
Six Concerns about Unregulated Campaign Financing	642
Structural Democratic Rights Paradigm.....	643
Sockpuppet	643
Three Prime Justifications for Lobbying.....	643
Vetogates	644
Winner Take All Society/Economy.....	644

Absolute Income Mobility

An inter-generational approach to income mobility that considers the chance that children will be better off than their parents.²⁴⁹¹ Chetty *et al.* argue that absolute income mobility better captures what people mean when they seek the “American dream”. It is intended to help explain why people can be discontent with their economic prospects, even when they are employed and well-off.

Alignment & Responsiveness

A theory and measurement advocated by Stephanopoulos, which proposes that the views of the median voter and the views and enacted policies of representatives should match.²⁴⁹² It can be used to assess legislative skew and the effectiveness of campaign finance regulations.²⁴⁹³ I contend that it can also be applied to the legislative skew and effectiveness of lobbying regulations.

- 1) Alignment: How close the policy is to the public’s views. There are three types of alignment: partisan, policy preference, and actual policy outcome. All three types of alignment can be measured at the district level and the national level.
- 2) Responsiveness: How fast the views of representatives change to match the changes in the public’s views.

Astroturf Lobbying

This is lobbying that involves organizations that disguise themselves as grassroots. They are fake grassroots, so they are “astroturf”. It is a common means lobbyists use to create the perception of popular support.

Businesses Pursue Private Goods & Citizen Groups Pursue Collective Goods

The theory that corporations primarily lobby for private goods intended to benefit a small number of organizations. The theory holds that citizen lobbying groups are generally organized to seek collective goods intended to benefit a wide portion of the population, even though the goods do “not selectively and materially benefit the membership or activists of the organization”²⁴⁹⁴.

Corporate Lobbying Advantages

Corporate lobbying advantages include: the ability to profit from their investment in lobbying through their taxes and business practices, cohesive management with little need for widespread buy-in, high

²⁴⁹¹ Raj Chetty et al, “The fading American dream”, *supra* note 1543 at 1.

²⁴⁹² Nicholas Stephanopoulos, Eric McGhee & Steven Rogers, *supra* note 695 at 771.

²⁴⁹³ Yasmin Dawood, *supra* note 489 at 337.

²⁴⁹⁴ Ken Kollman, *supra* note 427 at 15.

status, recognition as important actors by government, large resources to expend on lobbying, little accountability, eternal life, and institutional memory.

Corporations are Loci of Power

The theory that corporations are more than their occasional bloodless description of being a nexus of contracts suggests. I contend that large corporations are significant loci of power that maintain and wield wealth and political influence. This power is used according to their own internal social norms, managerial decisions with varying degrees of shareholder input, and the laws that govern their structure and goals.

Corporations' Inherent (Psychopathic) Personality

Bakan theorizes that the corporate personality is inherently psychopathic, due to the institution's overriding goal of profit over all else, and its lack of moral concern for the repercussions of its actions. This is due to the innate structure of corporations, the pressures of the marketplace, the legal forces that push corporations to prioritize shareholder returns, and the way legal responsibility falls on the corporation, not the decision-makers within it. He points out that this institutional personality that cares only about profit (and morality only if it affects profit) would be abhorrent and psychopathic in a human being.²⁴⁹⁵

Corruption: Systematic Corruption, Venal Corruption, *Quid Pro Quo* Corruption, Circumspect Corruption/Bribery, and Dependency Corruption

Different forms of corruption.

- a) Systematic corruption: The corruption in which the politicians manipulate the economy for political or personal ends. For example, a politician might force a company to put a well-paid friend on the board of an oil company to get a needed license.
- b) Venal corruption: The corruption in which the economic elites manipulate the political system for economic ends. For example they might bribe a politician to bypass a license requirement.
- c) *Quid pro quo* corruption: The active corrupt acts by politicians for personal reward or gain. This standard is often used as the basis for understanding corruption. It looks for a specific *quid pro quo* corrupt act outside of the norms of politics as it is practiced. For example, police might find bags of cash in a politician's freezer, received to arrange the government approval of business deals.
- d) Circumspect Corruption/Bribery: A type of corruption I propose that is akin to *quid pro quo* corruption, but the payment for the bribery is masked and removed through legitimate

²⁴⁹⁵ Joel Bakan, *supra* note 50 at 28.

- seeming deals. It is difficult to prove that the official is being bribed, because the acts look like the normal course of business. For example, circumspect bribery could take the form of ordering label printing from a company owned by the politician, buying ads at a media station owed by the politician's wife, an expensive golf membership at the politician's son's resort, or a fast-tracking of a politician's daughter's stalled trademark.
- e) Dependency corruption: A corruption that results from the built-in political and economic structures and incentives. Unlike *quid pro quo* corruption, there may be no *mens rea* for those involved in dependency corruption. The practices are considered a necessary part of doing business, even if they run contrary to the stated goals of the institution or would be considered corrupting by an outside observer.

Deliberate Decline in Governmental Capacity (Information Gathering & Oversight)

This is the theory that there has been a deliberate decline in governmental capacity via cost cutting and the shedding of expertise. The theory holds that some leaders have deliberately cut governmental capacity in order to make parts of the government more compliant or more reliant on information sources that the leadership favours. The theory holds that the capacity decline has left officials more reliant on lobbyists to provide needed information and institutional memory.

Disclosure vs. Corruption Heuristic

These are two different heuristics camps people tend to subscribe to concerning the proper role of lobbying regulations.

- 1) Disclosure heuristic: This heuristic holds that the important thing is that lobbying should be disclosed. It is important that lobbying regulations encourage transparency, but there is little need for other regulations. The public can make up its mind about how officials respond to lobbying at the ballot box.
- 2) Corruption heuristic: This heuristic holds that lobbying is inherently corrupting, so it should be carefully regulated and curtailed.

Dworkin's Hypothetical Insurance Market

Dworkin's hypothesizes a theoretical insurance market for those who would found society (in an imagined state of nature), to make up for the inequality of society due to potential differences in luck and skill. This theoretical insurance can be enacted in practice via a progressive tax system.²⁴⁹⁶ Progressive taxes help make up for the luck and inborn talents that lead to greater success in life, by taxing those with more to support those with less. By this argument, a progressive tax system (or equivalent) is a fundamental tenant of equality.

²⁴⁹⁶ Ronald Dworkin, *supra* note 80 at 106.

Echo chamber approach to advocacy

This is an effective advocacy technique that involves making a chosen corporate message emanate from virtually all the legislator's sources of influence and information. This might include their constituents and lobbyists, colleagues and opinion leaders, local and national media, donors and fundraisers, and think tanks and advertisers. This is convincing because the same message comes from all those the legislator considers credible, creating an illusion of social unanimity. Part of what makes astroturf groups advantageous is their reliability as a component of the echo chamber. See also *Astroturf Lobbying*.

Evidence-Based Think Tanks versus Ideologically-Based Think Tanks

A distinction I propose between two broad categories or approaches to running think tanks. Others have made similar distinctions.

- 1) Evidence-based think tanks: These think tanks follow standards similar to good academic work, laying out arguments that are honestly supported by the evidence and literature.
- 2) Ideologically-based think tanks: These think tanks support specific policy goals regardless of the intellectual veracity of the evidence. Their purpose is to provide support for lobbying and specific policy goals, and have little concern for the truth of their arguments.

Fence Around Decision-Making Related to Lobbying

A proposal I make based on a practice of Jewish law, where when a vital law is at stake, one goes a little further for safety's sake, and creates a fence around it. According to this approach, the rules regulating lobbying (and other aspects core to democratic decision-making) should create a fence of good practices to prevent government corruption and the appearance of corruption.

Five Types of Influence

Banfield breaks influence down into five types.²⁴⁹⁷ Ideally policy should be made in response to lobbying based on type v influence (rational discourse).

- i) Influence based on obligation, including authority and respect.
- ii) Influence based on the decision-maker's desire to please, such as friendship and benevolence.
- iii) Influence based on changing the perceived alternatives open to the decision-maker, but not through reasoning, for example, innuendo, selling, deception and fraud.
- iv) Influence based on positive or negative inducement to change the decision-maker's behaviour, like bribery and threats.

²⁴⁹⁷ David Lowery, "Lobbying influence", *supra* note 497 at 5.

- v) Influence that works through providing better reasoning or information, essentially rational persuasion.

Four Levels of Transparency

Halberstam distinguishes four levels of transparency that apply within the concept of governmental openness.²⁴⁹⁸

- 1) Transparency as the right to know: This is the right to access information about the activities of government. This form of transparency is generally based on one on one interaction, and requires that the citizen actively seek out the information, requesting information from the government about the government. An example of this type of transparency is an access to information request.
- 2) Transparency as regulation: This is regulation that requires public disclosure of information. For example, corporations are required to make public filings when they make an initial public offering of their stocks. He argues that this form of transparency is rooted in public welfare rather than individual rights.
- 3) Transparency in regulation: This is the concept that the public should be allowed to see and comment on rules as they are being crafted. This participation is not only a right, but also a means to improve the process and results.
- 4) Transparency as open government: This is a higher ideal of transparency, where the government deliberately pursues the open and widespread dissemination of accurate information in a way that is useful to people. It is intended to invite their participation through the use of decentralized networked information. Open government invites public and private involvement in government problem solving.

Four Pressures

An approach I propose to understand lobbying; that it occurs within a four-sided structure which applies pressure to government decision-making. Lobbyists must operate within the constraints of these pressures, while also employing or highlighting them as a means to get favourable government decisions. When the lobbyists on one side of an issue have an advantage harnessing one of these pressures, the other side might respond by using one of the other pressures where they have an advantage, rather than competing within the same pressure area.

- i) Direct power and influence: This is the direct power and influence lobbyists have over officials. See also *Five Types of Influence*.
- ii) Political context: Whether the political context favours the change, for example after a related scandal or an election where the issue featured prominently.

²⁴⁹⁸ Michael Halberstam, "Beyond Transparency", *supra* note 557 at 1022.

- iii) Public passion: How much the public who support or oppose the change care. Whether they pay attention to the issue, and are motivated to act on it. The public might express their passion by donating, joining pressure groups, single issue voting, and otherwise prioritizing the issue.
- iv) Public popularity: How popular a change is perceived to be among the general public (or a key subset) by the decision-makers.

Friction Model of Legislating

Baumgartner, Berry, and Hojnacki propose this theory of how legislation changes. Passing legislation is hard, and the status quo is sticky, like friction, so legislative change only occurs in fits and starts. Change requires hard work to overcome the friction, so coalitions are needed, and it is easier to defend the status quo than change it. Since change is difficult, requiring that pressure build up and push against the friction of the status quo, and legislators are busy, they rarely want to revisit the same issue. So, adjustments to passed legislation are relatively infrequent, even if the adjustment would be minor.

Hydraulic Force of Political Influence

The theory that private political influence acts like water under pressure, and it will try to seep through or around any blocks or rules in the way. Like damming a river, any attempt to control private political influence must be cohesive and comprehensive. The hydraulic force position should not be overstated; there are disparities between different political systems in how easily private influence works its way into public decision-making. The social norms make a difference.

Independent Officers/Agents of Parliament

These agents are independent, have statutory existence, are appointed for terms longer than an electoral cycle, report directly to Parliament, and cannot be removed without cause. The officers of Parliament are designed to be independent, outside the daily political reach, in order to police the political process. They include, the (1) Commissioner of Lobbying, (2) Commissioner of Official Languages, (3) Privacy Commissioner, (4) Information Commissioner, (5) Chief Electoral Officer, (6) Auditor General, (7) Parliamentary Budget Officer, (8) Commissioner of Public Sector Integrity, (9) Senate Ethics Officer, and (10) Conflict of Interest and Ethics Commissioner. The President of the Public Service Commission and the Chief Commissioner of the Human Rights Commission might fall into this category. The Commissioner for the Environment and Sustainable Development and the Commissioner of Canada Elections are not appointed by Parliament, but do have special terms, statutory existence, authorities, reporting duties and protections.

Inequality Spiral (Spiral into Inequality)

The inequality spiral is the situation where the wealthy use their wealth to gain more political power, and use that political power to gain a larger share of the economy, and so on. If this becomes entrenched, the society can spiral down into growing inequality and plutocracy. See also *Absolute Income Mobility*, *Iron Law of Meritocracy*, and *Winner Take All Society/Economy*.

Insider vs. Outsider Approach

These are two approaches organizations can take to lobbying.

- a) The insider approach: In this approach, the lobbying organization speaks and meets with government officials directly, and keeps a low public profile.
- b) The outsider approach: In this approach, the lobbying group uses visible stunts, protests, media outlets, and other public methods to pressure officials.

Iron Law of Meritocracy

Hayes theorizes that any meritocracy destroys itself over time, unless it is periodically reset.²⁴⁹⁹ Accordingly, over time meritocracy will lead to inequality and a lock-up of social mobility. This is because children in next generation inherit the advantageous or disadvantageous position that their parents earned through merit, so are no longer competing on a level playing field. This problem is compounded if the wealthy can use their influence to establish political dominance and alter the rules of the marketplace to further entrench themselves. Hayes argues that the great upheavals, new technologies, and legal changes of the 1930s to '60s acted as a reset point. This established a new rough equality and allowed more people to compete on their merit. This created a mid-century American flourishing based on merit, but it has since succumbed to the iron law of meritocracy. See also *Winner Take All Society/Economy*.

Kludgeocracy

Steven Teles theorizes that as public policy is increasingly full of self-defeating complexity, many governments have become “kludgeocracies” characterized by the messy complexity of their governance. He argues these governments have adopted jerry-rigged, opaque and complicated policy responses, due to the pressures of special interests. The legislation operates poorly and wastefully. The complexity makes it easy for private organizations to profit off the public.²⁵⁰⁰ See also *Policy Drift*.

²⁴⁹⁹ Christopher Hayes, *supra* note 748 at 59.

²⁵⁰⁰ Lee Drutman, *supra* note 172 at 36.

Lobbying Is Easier in Low Salience Areas

This theory posits that it is easier to lobby and exercise political influence in low salience areas, where people pay less attention. This is because there is less awareness of the activities, less public push-back, and officials often lack strong preferences about the outcomes of low salience policies. Most regulatory decisions take place in such low salience areas.

Lobbying as Social Exchange & Gift Economy

These two theories hold that lobbying interacts with a marketplace based on trust, not money.

- a) Social exchange: Lux *et al.* argues that exchanges for lobbying fit better with social exchange theory, rather than the more traditional economic exchange models.²⁵⁰¹ The lobbyists and officials act within an economy built on social trust. See also, *Neo-Pluralist Model vs. Exchange Model*).
- b) Gift economy: Lessig argues that lobbyists and officials act within a gift economy. This form of a social exchange economy both expresses and further builds the trust relationships through gift giving to form social obligations.²⁵⁰²

Mirror Principle of Lobbying & Campaign Financing

I propose that lobbying and campaign financing are inherently similar; being the two legal methods special interests use to achieve political influence in a democracy. They are mirrors of each other. Lessons from one area can be applied to the other area. Accordingly, jurisprudence and principles from campaign finance law can be applied to lobbying law.

Neo-Pluralist Model vs. Exchange Model

- 1) Neo-pluralist model: The neo-pluralist model, proposed by David B. Truman in 1951²⁵⁰³, posits that officials and lobbyists work in a policy environment with different interests pulling in different directions, like an ever-changing tug of war in which the status quo acts as an anchor opposing change. When the sides are balanced there is stability in policy.
- 2) Exchange model: The exchange model posits that those involved in the political process make exchanges that increase their economic, social or political welfare. It is akin to a huge bazaar where lobbyists and politicians are both buyers and sellers.

²⁵⁰¹ Sean Lux, T. Russell Crook & David J. Woehr, "Mixing business with politics", *supra* note 213 at 242.

²⁵⁰² Lawrence Lessig, *supra* note 273 at 110.

²⁵⁰³ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 49.

Phishing

Akerlof and Shiller argue that deception and fraud are an inherent part of the free market, because market participants are inherently susceptible to manipulation. They are open to being *phished* – a term they borrow from a type of online scamming that hides malicious intentions behind the disguise of a trustworthy entity. Being a phool (someone who falls for phishing), at least some of the time, is unavoidable, because there are simply too many ways humans are open to manipulation. They apply this theory to the political marketplace by looking at voting and campaign donations. I propose this theory can be applied to the marketplace of lobbying, indicating that lobbyists will deceive legislators when they can get away with it. There are two main ways human weaknesses are exploited in the marketplace.

- 1) Informational phools: Informational phools act on information that is deceptive, such as fake “evidence” that climate change is not real.
- 2) Psychological phools: Psychological phools act on emotions that override their common sense, or that exploit cognitive biases.

Policy Drift

Hacker and Pierson’s theorize that policy drifts as a result of officials failing to update legislation and practices to match the realities on the ground.²⁵⁰⁴ A certain amount of policy drift is inevitable, but Hacker and Pierson argue that too much drift is a sign that the government is no longer acting effectively. Policy drift can result in long-term harm, high governmental costs, and decreasing public trust in government. See also *Kludgeocracy*.

Porter Hypothesis

Porter hypothesizes that beyond the benefits to the environment, environmental regulations can also be directly beneficial to the market place, economy, and businesses being regulated. The theory is the regulations force the businesses to innovate and use resources more efficiently. The firm is pressured to find dynamic efficiencies, and these benefits compensate for the costs of complying with environmental restrictions. By this reasoning, the regulations can improve the economy while also reducing negative externalities and the harmful effects of pollution.

Proportional Regulatory Duration

This is an approach I propose to the jurisprudence that states that third-party campaign finance spending limits cannot extend outside of the election period.²⁵⁰⁵ One interpretation of this jurisprudence is that such limits can only temporarily in place. The *proportional regulatory duration* offers a different interpretation: that the relevant issue is the duration of the legislative restriction as compared to the

²⁵⁰⁴ Lee Drutman, *supra* note 172 at 45.

²⁵⁰⁵ See *Reference re Election Act (BC)*, *supra* note 1810.

duration of the democratic decision-making period. It does not matter if the legislation takes effect for a relatively short period, a long period, or perpetually. What matters is that the restrictions do not extend beyond the period of the democratic decision-making. For example, the decision-making period for an election is the election period (and the pre-election period), so the third-party campaign spending restrictions should only be in place then. In contrast, lobbying continuously affects political decision-making. Therefore, by this principle, lobbying restrictions can be perpetually in force without infringing this jurisprudence. See also, Mirror Principle of Lobbying & Campaign Financing.

Rawls' Veil of Ignorance

Rawls imagines an abstract state of nature hidden behind a veil of ignorance. People know what form society will take, but not which position they will occupy in that society.²⁵⁰⁶ He argues that since people would not know what status they would occupy in this society, they would seek to establish a society that was just and relatively equal, because they could end up in any position in the society.

Rawls' Three Principles of Equality

In support of his theory of a just society, Rawls proposes three principles of equality, built on the basis of the fundamental political equality of all people.

- 1) Equality of basic liberties: The principle that regardless of wealth or status, everyone must have a fair opportunity to hold public office and to influence the outcome of political decisions.
- 2) Equality of opportunities: The principle that everyone should have relatively equal opportunity in life.
- 3) The difference principle: This principle posits that divergences from strict equality are justifiable if the resulting inequalities make the least advantaged better off as compared to how they would be under strict equality.

Right to Petition as a Non-Transferable Democratic Right

Gee argues that like the right to vote, the right to petition is non-transferrable democratic right. The right to petition is innately bound to the person of the polity (the citizen).²⁵⁰⁷ By his theory, corporations cannot have a fundamental right to petition.

²⁵⁰⁶ John Rawls, *supra* note 1370 at 22.

²⁵⁰⁷ Quentin Gee, *supra* note 1751 at 402–407.

Separation of Business & State

Kuhner theorizes that there should be a separation between business and state analogous to the separation of church and state, and to the separation of powers within government. The government should oversee the market, but not participate in it; and businesses should participate in the market, but not have power of governmental decision-making. He argues that the separation should be both conceptual and practical, referring to these as passion and interest respectively.

- a) Passion: This is the spirit with which the game is played. It is the conceptual understanding of the world.
- b) Interest: These are the tangible benefits and specific rules that influence the political and market systems.

Shrinking of the Public Sphere & Decline of Civic Virtue

This theory posits that there has been a continual encroachment of the private sphere into the public sphere, and a decline of the idea of civic public life.²⁵⁰⁸ These practical and legal changes that enabled this change have been matched with a change in prevailing ideological that prioritizes private action and marketplaces, and devalues public goods and actions. See also *Policy Drift* and *Deliberate Decline in Governmental Capacity (Information Gathering & Oversight)*.

Six Concerns about Lobbying

I contend that there are six fundamental issues with lobbying that well-designed regulations should seek to address.

- 1) It disproportionately advantages business organizations.
- 2) It favours the policy preferences of the wealthy and causes a misalignment of representation.
- 3) It creates an information framing bias.
- 4) It increases inequality.
- 5) It favours the status quo.
- 6) It otherwise corrupts democracy.

Six Concerns about Unregulated Campaign Financing

I contend that there are six key concerns about the effects of unrestrained private campaign financing.

- 1) It favours the wealthy and business organizations.
- 2) It increases inequality.

²⁵⁰⁸ For example see, George A. Akerlof & Robert J. Shiller, *supra* note 52; Joseph E. Stiglitz, *supra* note 38; Joel Bakan, *supra* note 50; Lawrence Lessig, *supra* note 273; Lee Drutman, *supra* note 172; Robert B. Reich, *supra* note 224; Robert B. Reich, *supra* note 26.

- 3) It misaligns democratic representation.
- 4) It favours the status quo.
- 5) It creates political and framing biases.
- 6) It otherwise corrupts democracy.

Structural Democratic Rights Paradigm

Pal and Dawood each propose a structural approach for the Court to take when evaluating democratic issues instead of the more traditional individual rights approach. These approaches advocate for taking structural issues into account.

- a) Pal: Pal's view of structural rights focuses primarily on the issue of democratic competition. There are four aspects to his approach. (1) The state is subject to capture; (2) the real concerns to be addressed are systemic harms; (3) electoral competition maintains electoral accountability; and (4) democracy requires the peaceful transfer of power.²⁵⁰⁹
- b) Dawood: Dawood embraces a structural rights-bundle of rights paradigm. She argues that the Court should use system-wide solutions to resolve democratic problems that cause little harm to any given individual, but deep structural harm to democratic representation. She maintains that the Court can use individual rights as the basis to resolve these structural problems.²⁵¹⁰

See also, *Hydraulic Force of Political Influence*.

Sockpuppet

A sockpuppet is a disguised internet identity that is used to hide the real voice behind an opinion. Sockpuppets are often used because the message would not be convincing if one knew its actual source. They can also act as a crowd, echoing a message to make an opinion seem more popular than it is. Sockpuppets are often used by large organizations to disguise their actions by creating thousands of fake identities to echo a message or opinion.

Three Prime Justifications for Lobbying

Three prime justifications for allowing the practice of lobbying.

- 1) Tradition: Lobbying has been practiced since the emergence of the democratic nation-state.
- 2) The right to access government: Citizens and residents have the right to approach and petition their government.
- 3) The provision of information: Lobbyists supply information to officials that they cannot otherwise easily acquire. This includes expertise in substance, process, and people.²⁵¹¹

²⁵⁰⁹ Michael Pal, *supra* note 2014 at 333.

²⁵¹⁰ Yasmin Dawood, "Democracy and the Right to Vote", *supra* note 933 at 255.

²⁵¹¹ R. Kenneth Godwin, Scott Ainsworth & Erik K. Godwin, *supra* note 60 at 301.

Vetogates

This is McNollgast's term for the key points in a political system where different political actors can veto a change in policy or legislation. The more vetogates there are, the harder it is to pass legislation or enact policy.

Winner Take All Society/Economy

Hayes contends that America has become a winner take all society, where those few who rise to the very top reap most of the economic rewards. His theory is that the disproportionate economic rewards have pushed competition earlier and earlier in life. Since every advantage or failure is magnified, there is great temptation to give one's kids the best advantages, and to cheat when necessary.²⁵¹² The winner take all economy also leaves less room for normal levels of success, as there is less chance of supporting one's family on a middle class income. See also *Iron Law of Meritocracy*.

²⁵¹² Christopher Hayes, *supra* note 748.

Appendix: Astroturf Examples

This is a short list of some examples of astroturf lobbying organizations.²⁵¹³ These examples are gathered from a number of sources, books, reports, newspapers and online blogs. They are not meant to be authoritative, or as a denunciation of the corporations that use them. The list is meant to demonstrate that the use of astroturf organizations has become a standard publicity and lobbying tool employed by almost every industry.

Astroturf Group	Actual Organization	Issue
American Coalition for Clean Coal Electricity	Coal industry (since renamed America's Power and no longer acting as an astroturf group, now openly a trade organization)	Against environmental legislation, and legislation targeting climate change.
Americans Tired of Lawsuit Abuse	American Tort Reform Association, started by engineering firm now includes more than 300 businesses, corporations, municipalities, associations, and professional firms	Run attack ads against Washington State Supreme Court Chief Justice Gerry Alexander, and support his challenger, John Groen (a more industry-friendly judge).
California Drivers Alliance; Washington Consumers for Sound Fuel Policy	Western States Petroleum Association, the top lobbyist for the oil industry in the western United States; members include BP, Shell, ExxonMobil, Chevron, and Occidental	Use these fabricated organizations to fake grassroots opposition to climate change mitigation policies and clean technologies policies.
Canada's Energy Citizens	the Canadian Association of Petroleum Producers	In favour of increased oil and gas extraction and transportation (pipelines and tankers). Against climate change and pro-environmental regulations.
Canada School of Energy and Environment	Bruce Carson, political ties to oil industry; was a legitimate research institute until Bruce Carson was appointed as chair	Think tank intended to support the tar sands and rebrand them as sustainable.
CHANGE PAC; VOTINGFORJUDGES.ORG	Building Industry Association of Washington	Run attack ads against Washington State Supreme Court Chief Justice Gerry Alexander, and support his challenger, John Groen. Run supposedly neutral "information resource" for voters.
Citizens for Health	Primary funders are sugar companies	Stricter labelling on food that contains high-fructose corn syrup. Encourage consumers to reduce high-fructose corn syrup intake.
Citizens for Judicial Integrity	Constitution First PAC; in turn funded by a number of lumber supply, storage and other industry groups.	Run attack ads against Washington state Supreme Court Justice Tom Chambers and back challenger Jeanette Burrage.

²⁵¹³ Astroturf organizations are organizations that pose as ground-up citizen groups, but are in actuality run by another organization, usually a PR firm or trade association.

Astroturf Group	Actual Organization	Issue
Citizens for the Republic	Shirley and Banister Public Affairs PR, likely on behalf of utility companies, and maybe oil companies	Against clean energy tax credits, against rooftop solar, and against Tesla and Elon Musk's companies.
Citizens for State Power	Shirley and Banister Public Affairs PR, on behalf of utility companies	Fought deregulation of utilities, on behalf of utility companies.
Center for Consumer Freedom	Richard Berman, a Washington lobbyist	Nonprofit group used for corporate messaging, pro-corn syrup.
Center for Democracy and Technology	Tech sector, including Amazon, Verizon, and Google	Weaken privacy standards.
Center on Education Policy; Alliance for Excellent Education; Education Equality Project; Educators for Excellence; the Education Trust; Teach Plus; Stand for Children	Bill & Melinda Gates Foundation; organizations might be semi-independent	Accused of challenging teachers' unions. Accused of advocating for charter schools.
Coalition for an Affordable City	American Beverage Association	Block soda tax ballot initiatives in California
Coalition for Health Insurance Choices	Health Insurance Association of America	Defeat the Clinton administration's proposed health care reform.
Consumers for Cable Choice; Consumers for Competitive Choice	Bob Johnson, lawyer who represents telecom firms, including Verizon Communications and AT&T; group later changed to Consumers for Competitive Choice and expanded its pro-industry issue	Telecom and cable issues. Oppose federal renewable energy standards, defend the use of phthalates in plastics, oppose public health insurance expansion, and oppose legislation to improve mileage standards in vehicles.
Consumer Energy Alliance	Trade group with connections to energy lobbyists	Submitted a petition Wisconsin Public Service Commission claiming support from 2,500 Wisconsin residents to raise rates
Energy in Depth	The American Petroleum Institute, the Independent Petroleum Association of America, and other related industry groups	Prevent anti-fracking legislation. Paint grassroots opposition to fracking as part of a conspiracy. Act against local opposition to fracking.
George C. Marshall Institute; CO2 Coalition	Oil industry	Provided fake inconclusive science denying climate change and other environmental problems.
GrassrootsFreedom.com	Richard Art Viguerie, Direct-mailer & Conservative activist	Astroturf organization created to prevent lobbying legislation cracking down on astroturf organizations. (Deceived people into thinking the legislation targeted legitimate voices, not PR firms operating on behalf of paying clients.)
Keep It Local New Jersey	Cable companies, New Jersey Telecommunications Associates; which includes Time Warner Cable and Cablevision Systems	Various issues in related to telecom and cable, including preventing phone companies from providing TV services. Has run website pointing out phone companies' astroturf organizations.

Astroturf Group	Actual Organization	Issue
National Smokers Alliance	Burson-Marsteller, PR Tobacco companies (Philip Morris, and others)	Block U.S. anti-smoking legislation.
New Millennium Research Council	Issue Dynamics, PR; working for telecom companies	Against municipal-provided broadband.
Oregon Institute of Science and Medicine	Unknown funders; Mercer Family Foundation	"Research institute" that provides fake evidence and deceptive arguments denying man-made climate change is real.
Rx Partners	Beckel Cowan, PR	Defeat the Clinton administration's proposed health care reform.
Pretended to be a number of Virginia-based minority groups, like the Charlottesville NAACP and Creciendo Juntas (letters written on fake stationery)	Bonner & Associates, PR; working for American Coalition for Clean Coal Electricity (a coal industry front group)	Oppose Waxman-Markey Climate Bill. The PR firm was caught forging letters to Representative Tom Perriello, Kathy Dahlkemper and Chris Carney, saying they were from state level minority groups. Kathy Dahlkemper and Chris Carney voted against the bill.
Vaughan Working Families,	Vaughan Health Campus of Care, a development group for a defunct hospital expansion plan, run by Developer Michael DeGasperis, who has deep ties to the governing party.	Oppose Ontario teacher strikes, apparently to curry favour for development deal with government involving a proposed highway.
Wise Use Movement	Resource extraction industries, manufacturing and cattle ranching (Amoco, British Petroleum, Chevron, Exxon, Marathon Oils, Dupont, Yamaha, General Electric, General Motors, National Cattlemen's Association, the American Farm Bureau, and the National Rifle Association)	Oppose environmental protection. Expand private use for profit of public land; expand resource extraction on public lands.

Appendix: Lobbying Examples

This list of lobbying examples is far from comprehensive. It is intended to convey some small sense of the range of issues at play, the sheer amount of lobbying, and the scandals that arise.²⁵¹⁴ There are also a handful of examples related to campaign financing. All the examples are quoted from the original source. Canadian sources are indicated.

2008 Financial Crisis & Lobbying.....	650
Abramoff Scandal.....	650
American Petroleum Institute Lobbying.....	651
Anti-Tesla & Clean Energy Attacks.....	651
Anti-Tort Lobbying by Big Business.....	652
Astroturf Groups Used in Struggle between Sugar & Corn Syrup Industries	652
Billionaire gave \$430,000 to Alberta PC Party	653
Bots (Sockpuppets) Commented on FCC Net Neutrality Rule Change	654
Canada Food Guide Altered After Lobbying by Agro-Business.....	654
Canadian Corporations Donating & Lobbying in the U.S.	655
Canadian Steel Company Lobbies U.S. Government	655
Car Dealers Block Tesla Sales	656
Car Makers Key Opponents of Climate Action.....	656
Chemical Plant Explosion – Occupational Safety & Health Administration.....	657
Clinton Pardon	658
Closure of the National Guideline Clearinghouse.....	658
Companies Hire Actors to Pretend to be Concerned Citizens at Public Meetings	658
Congresswoman Sets Up Lobbying Business While She is Still a Member of Congress	659
Coronavirus Pandemic & Senate Stimulus Package.....	659
Corporations Secretly Lobbying for Kavanaugh’s Appointment to the Supreme Court.....	660
Cunningham Scandal.....	661
Defense Contractors & War with Syria	661
Eco-Terrorism Caused No Deaths but Became No. 1 Domestic Terrorism Threat	661
Exploitive Financial Products Aimed at the Poor	662
F-35 Joint Strike Fighter’s Second Unnecessary Engine.....	663
Fed-Ex Pays \$0 in Taxes – Lobbying Success.....	663
Former Harper aide Bruce Carson Guilty of Influence-Peddling	664
Former Laval Mayor at Heart of Corruption Scandal.....	664
Former Tory aide fined for unregistered lobbying	665
Homeowners Subsidies & Lack of Renter Subsidies & Real Estate Lobby	665
Gun Manufacturer Liability Shield	666
IRS Enforcement.....	666
IRS & H&R Block Lobbying & the EITC.....	667
Lawmakers Opinion Pieces Secretly Written by Lobbyists	667
Low Public Prices for Extracting Resources.....	668
Marijuana Legalizing & Lobbying	668
McConnell Blocks Effort to Stop Russia Investment after Lobbying by Former Staffers.....	669

²⁵¹⁴ A worthwhile future project would be to build a database of lobbying examples. An even more ambitious project would be to cross-reference the database with the lobbying registry (registries).

Michael Cohen – Hotel in Russia & Trump	669
Michael Cohen – Illegal Campaign Contributions	670
Michael Flynn – Illegal Lobbying	670
Mississippi Lawmakers Funnel Millions to Pet Vendors	671
Model Bills & Lobbying	671
Non-Negotiated Drug Prices in Medicare Part D	672
Nuclear Plants	673
Ocean Spray	673
Oil Industry & BC Natural Gas Rules Changes	673
Oil Industry & Climate Change Denial	674
Oil Industry & Deepwater Horizon	674
Oil Industry & Kinder Morgan Pipeline	675
Oil Industry & PR Firm Recommendations on TransCanada Pipeline	676
Oil Industry Gets Protests Criminalized	677
Oil Industry Spends \$47 million to Kill Ballot Initiatives that Would Prevent Climate Change	677
Oil Industry Spent \$1 Billion on Anti-Climate Change Lobbying Since the Paris Accord	678
Oil Industry Targets Ontario Provincial Ridings	678
Ontario – Ford Endorses Companies that Have Donated to His Party	678
Ontario – Ford Government & Liquor Sales	679
Ontario – Lobbyists Fear Losing Access Unless They Sell Ford Fundraiser Tickets	679
Ontario – Parents’ Group is an Astroturf Org. by Developer Lobbying about a Highway	680
Radioactive Waste Disposal Facility	681
Saudi-Funded Lobbyist Paid for 500 Rooms at Trump’s Hotel & Astroturf Lobbying of Veterans	681
Savings & Loans Scandal and Lobbying	682
SNC-Lavalin Scandal	682
SNC-Lavalin Scandal – Timeline	683
SNC-Lavalin Scandal – Illegal Campaign Finance Donations	685
SNC-Lavalin Scandal – Illegal Campaign Finance Donations Quebec	685
SNC-Lavalin Scandal – Quebec Recoups Cash Lost to Corruption	686
Soda Tax, Astroturf Lobbying & Short Term Civic Engagement	686
Tech Startups Urge Ottawa Not to Raise Taxes On Stock Options Over \$100,000	687
Trump Administration Appoints Corrupt Lobbyist to EPA	687
Trump Administration Appoints Corrupt Lobbyist to Head Interior Department to Replace Lobbyist Appointed to Head Interior Department Removed for Corruption	688
Trump Administration Appoints DeVry Official to Lead College Enforcement Unit	691
Trump Administration Following Oil & Gas Industry on Environmental Protections	691
TV Industry Prevents Rules Granting Free Advertising for Political Campaigns	692
Under-enforcement of Food Safety Rules Due to Lobbying	693
U.S. House Majority Whip & Lobbyist Approval of Staff	693
Volkswagen Threatening to Lave Lobbying Group	693
Wall Street & Dodd-Frank Rules on Future Values of Commodities	694

2008 Financial Crisis & Lobbying

Source: Book

These passages discuss the connection between bank lobbying and financial crises, particularly the 2008 financial crisis.

“Good financial regulation helped the United States – and the world – avoid a major crisis for four decades after the Great Depression. Deregulation in the 1980s led to scores of financial crises in the succeeding three decades, of which America’s crisis in 2008–09 was only the worst. But those governmental failures were no accident: the financial sector used its political muscle to make sure that the market failures were not corrected, and that the sector’s private rewards remained well in excess of their social contributions—one of the factors contributing to the bloated financial sector and to the high levels of inequality at the top.”²⁵¹⁵

“[A]fter [the] passage of the Dodd-Frank financial reform law, Wall Street made sure that government agencies charged with implementing it did not have the funds to do the job. As a result, fully six years after the near meltdown of Wall Street, some of Dodd-Frank including much of the so-called Volcker Rule restrictions on the kind of derivatives trading that got the Street into trouble in the first place—was still on the drawing board. When an industry doesn’t want a law enacted but fears a public backlash if it openly opposes the proposed law, it quietly makes sure that there aren’t enough funds to enforce it.”²⁵¹⁶

Abramoff Scandal

Source: Book

This passage discusses the Abramoff lobbying scandal. After his 6 year sentence, Abramoff recently returned to lobbying.²⁵¹⁷

“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. 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). ... 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 nonpolitical 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. Many lobbyists were quick to characterize Abramoff as a rogue outlier, but friends like Representative Dana Rohrabacher (R-Calif.) suggested otherwise, saying, “Words like bribery are being used to describe things that happened every day in Washington and are not bribes.””²⁵¹⁸

²⁵¹⁵ Joseph E. Stiglitz, *supra* note 38 c 2, s Adam Smith’s invisible hand and inequality.

²⁵¹⁶ Robert B. Reich, *supra* note 26 at 85.

²⁵¹⁷ Ginger Gibson, *supra* note 299.

²⁵¹⁸ Dorie Apollonio, Bruce E. Cain & Lee Drutman, “Access and Lobbying”, *supra* note 303 at 16.

American Petroleum Institute Lobbying

Source: Journal Article

This passage gives an example of the scale of corporate lobbying, and the size of some of the trade organizations.

“The American Petroleum Institute, for example, has about 270 staff and an annual budget of \$42 million. All these people are not lobbyists, of course, and the budget goes for many things, to be sure, but the Institute deals only with petroleum issues. When the issue shifts to nuclear energy, the Nuclear Energy Institute, with 125 staff members and a budget of \$34 million, may get involved. Electrical generation in general? The Edison Electric Institute will be there, with its 200 staff and \$50 million annual budget.”²⁵¹⁹

Anti-Tesla & Clean Energy Attacks

Source: News

This passage provides some sense of how astroturf organizations and lobbying can be used as business tactics against competitors, particularly if the competitor is in a slightly different industry. It also conveys some of the difficulty of knowing who is behind a particular astroturf group, even after determining that the groups is not grassroots.

“The lobbyists behind the Tesla + CEO Elon Musk attack website StopElonFromFailingAgain.com have reportedly been identified. While it was already public knowledge that the group “Citizens for the Republic” was backing the website, it wasn’t clear that board members Craig Shirley and Diane Banister are integral parts of the public relations firm Shirley and Banister Public Affairs. The Shirley and Banister Public Affairs PR firm is known for previous work with groups such as the NRA... and major utilities. With regard to Elon Musk and Tesla, the Citizens for the Republic website focuses primarily on “clean energy tax credits” and it claims to be representing average taxpayer interests.

The Drive provides more: “Craig Shirley is well known within the Beltway for lobbying on behalf of Republican causes, and in fact registered as a lobbyist for Citizens for State Power (CSP) — a group that actively fought deregulation of utilities — in the years 1999, 2000, and 2001. CSP was later revealed by the Washington Post to be secretly funded by utility companies, which spent millions lobbying Congress through the group.”

As anyone following solar news knows, utilities have been threatened by and attacking rooftop solar for years, and SolarCity (just acquired by Tesla Motors, but which Elon Musk was chairman of previously anyway) is the largest rooftop solar power company in the country.

“The CSP is not the only lobbying group funded by Big Energy with ties to Shirley and his powerhouse PR firm. Shirley was a board member of the United Seniors Association (USA), and in 2000, according to consumer advocacy group Public Citizen, the USA lobbied to promote the GOP’s energy bill, which focused heavily on deregulation. The USA was one of 10 members of the 21st Century Energy Project, which ... was funded by corporate clients of lobbyist Edward Gillespie, who is known for representing energy clients such as the now-defunct Enron, and had close ties to George W. Bush’s administration.”

...

Presumably, funding is coming from someone, or some people, involved in businesses being hurt by the success of Tesla, SolarCity, and/or SpaceX, but who knows the specifics? Notably, Bloomberg queried Banister on the subject of possible oil industry contributions to the campaign and she replied: “We reached out to them (for donations), but they haven’t responded.”²⁵²⁰

²⁵¹⁹ Richard L. Hasen, *supra* note 1405 at 227.

²⁵²⁰ James Ayre, *supra* note 455.

Anti-Tort Lobbying by Big Business

Source: Report

This passage provides an example of the amounts spent on lobbying related to tort reform, and how many businesses have pursued it as a means of reducing their liability risks and costs.

“The cash from big tobacco and other corporations helped to found lobbying groups and think tanks to push statutory limits on liability. Corporate interests poured money into the campaigns of legislators who supported bills that made it harder to hold corporate wrongdoers accountable. “In 1999, the insurance industry spent \$85.6 million for lobbying, while the health care industry spent \$197 million,” according to Haltom and McCann. The Akron Beacon Journal reported that corporate interest groups in Ohio spent “more than \$1 million” on lobbying, in addition to direct contributions to legislators, to push a 1996 state law that limited damages. Since the late 1990s corporate front groups such as the American Legislative Exchange Council, or ALEC, have emerged as powerful forces in pushing for limits on liability. State legislatures across the country passed laws that limited damages in medical malpractice, products liability, or all personal-injury lawsuits.

Nearly all states have passed some version of tort reform. The American Tort Reform Association says that 33 states have limited punitive damages and 23 states have limited noneconomic damages such as pain and suffering. A 2006 law-review article found that limits on noneconomic damages vary widely but generally range from \$250,000 to \$500,000. Some states go even further and limit both economic and noneconomic damages in medical-malpractice actions. Many state legislatures have passed strict statutes of limitations and statutes of repose, which bar lawsuits after a certain number of years regardless of when the injured person learned of the injury. Most states have altered the rules for holding certain defendants responsible in cases with multiple wrongdoers. The U.S. Supreme Court has created constitutional limits on punitive damages. All of these laws can make it harder to collect damages for those who are injured through a manufacturer’s negligence, maimed by medical malpractice, or defrauded by an insurance company.”²⁵²¹

Astroturf Groups Used in Struggle between Sugar & Corn Syrup Industries

Source: News

This passage conveys some of the interesting intricacies of lobbying as it relates to an ongoing struggle between different industries and their public messaging. It also shows how these industries use astroturf organizations as part of their messaging and lobbying war.

“A group called Citizens for Health recently began a campaign to encourage consumers to reduce high-fructose corn syrup in their diets, filing a petition with the Food and Drug Administration demanding stricter labeling on food items containing the sweetener. Yet the petition did not disclose that the organization, which bills itself as the “voice of the natural-health consumer,” received the bulk of its money at the time from sugar companies, which view corn syrup as a threat to their profits. Since 2011, the organization has received at least \$500,000 from the industry.

Sugar companies’ investments in this nonprofit group, detailed in newly released internal documents, are part of a growing strategy used by corporate interests seeking to influence Washington policymaking. No longer content to rely on traditional lobbyists, companies are investing in other messengers, such as nonprofit groups or academicians, that can provide expert testimony, shape news media coverage and change public opinion in ways that ultimately affect decisions in the nation’s capital. The new approach lacks the transparency that comes from traditional lobbyist registration rules that provide a visible trail of corporate contact with lawmakers and regulators. Nonprofit organizations, now playing an increasing role in lobbying and electoral politics, are not required to publicly reveal their donors. ...

The new documents lay out in striking detail the extent to which two large and competing industry groups — the Sugar Association and the Corn Refiners Association — made use of these alternative

²⁵²¹ Billy Corriher, *supra* note 1151 at 8.

influence tactics as they jockeyed to protect their positions in a health-conscious food market. ... The new documents were released as part of a lawsuit in which the sugar industry contends that the corn refiners engaged in a “sinister conspiracy” to get the public to falsely believe that corn syrup is “natural corn sugar” effectively indistinguishable from table sugar. ...

One prominent Florida doctor specializing in health and nutrition has received \$10 million since 2008 from the corn-refining industry for research that continues to show that corn syrup is no less healthful than table sugar. The researcher, James Rippe, a Harvard-trained cardiologist who runs the Rippe Lifestyle Institute, presented 30 peer-reviewed studies showing that there is no nutritional difference between sugar and corn syrup. “Our research debunks the vilification of high fructose corn syrup,” Rippe said in a statement accompanying one of his recently published studies. In an interview, he said that in addition to the research funding paid to his institute, he personally receives a consulting fee of \$500,000 a year from the corn refiners. To further bolster their case with lawmakers and the public, the refiners sent an additional \$3.2 million over two years to a nonprofit group called the Center for Consumer Freedom, which subsequently began a television, newspaper and online campaign to defend corn syrup safety and undermine critics.

Initially, industry officials sought to conceal their role in the campaign. A September 2009 e-mail from Audrae Erickson, then the chief executive of the Corn Refiners Association, detailed a plan to keep the industry’s role secret. ...

A year-in-review document from April 2004 boasts that the sugar group already had “fed the media with the science to help fuel the public concern and debate on High Fructose Corn Syrup.” ... Yet internal e-mails and other documents suggest that industry officials were willing to tout what some of their top officials once thought were bad data. ... Nonetheless, the association and its allies later cited the study’s findings repeatedly. ...

The debate intensified in 2010, when the corn refiners asked the Food and Drug Administration to allow high-fructose corn syrup to be renamed “corn sugar,” a move that the Sugar Association blasted as “a blatant attempt to steal sugar’s identity and goodwill.”²⁵²²

Billionaire gave \$430,000 to Alberta PC Party

Source: News

Canadian

This passage hints at the overlap between campaign finance donations and lobbying. It demonstrates how unregulated campaign donations can grow proportionately large, even on the provincial level.

“Billionaire entrepreneur and Edmonton Oilers owner Daryl Katz gave Alberta’s Progressive Conservatives nearly half a million dollars – almost one-third of the party’s total fundraising in a single donation – as Premier Alison Redford’s cash-strapped campaign was staring down defeat at the ballot box in the spring election. Documents made public by Elections Alberta on Wednesday record \$300,000 in donations from Mr. Katz, his company, his family and business associates.

But a source close to the campaign told The Globe and Mail that Mr. Katz provided a cheque for \$430,000 to the PCs, a donation that was broken up into smaller pieces. The documents released on Wednesday show \$150,000 in donations from five members of the Katz family, at \$30,000 apiece: Daryl; his wife, Renee; his mother, Ida; his father, Barry; and his company, Katz Group. The disclosure also listed another \$150,000 from four of Mr. Katz’s top employees and their companies: Paul Marcaccio, Bob Black, John Karvellas and James Low. Mr. Katz had not previously been a significant contributor to

²⁵²² Tom Hamburger, “‘Soft lobbying’ war between sugar, corn syrup shows new tactics in Washington influence”, *Wash Post* (12 February 2014), online: <http://www.washingtonpost.com/politics/soft-lobbying-war-between-sugar-corn-syrup-shows-new-tactics-in-washington-influence/2014/02/12/8123da00-90dd-11e3-b46a-5a3d0d2130da_story.html>.

Alberta politics. His wealth – he is worth more than \$3-billion and is among the richest people in Canada – comes from his Rexall drugstores and real estate.

He also owns the Edmonton Oilers, his hometown hockey team, which is trying to close a \$450-million deal to build a new hockey arena with the City of Edmonton.”²⁵²³

Bots (Sockpuppets) Commented on FCC Net Neutrality Rule Change

Source: News

This passage shows one of the ways sockpuppets can be used to influence public policy. It demonstrates the difficulty of distinguishing citizen versus corporate input into online public policy. It suggests that there is a need for better controls on public input and rules preventing the use of sockpuppets.

“On a single day in late May, hundreds of thousands of public comments poured into the Federal Communications Commission regarding its plans to roll back net neutrality protections. A week and a half later, on June 3, hundreds of thousands more followed. ... According to multiple researchers, more than one million of the record 22 million comments the FCC received were from bots that used natural language generation to artificially amplify the call to repeal net neutrality protections. That number may only represent a fraction of the actual bot submissions. ... But while reports so far have focused on bad actors flooding the FCC with phony content, some of those same techniques also allowed legitimate groups, like the Electronic Frontier Foundation, to tell their members to click a button and send an auto-generated—albeit earnest—comment to the FCC, creating a groundswell of activism among actual humans. The result: A net neutrality comment period that garnered more input from the public than all previous comment periods across all government agencies—combined.

“It makes it easier for people to speak out, but much more difficult for them to be heard,” says Zach Schloss, an account manager at FiscalNote, a government relationship management company that’s been analyzing the FCC’s comments.”²⁵²⁴

Canada Food Guide Altered After Lobbying by Agro-Business

Source: News

Canadian

This passage demonstrates how government agencies often work with industry and lobbying groups. It shows how different departments can work at cross-purposes, depending on how they interpret their purpose, and react to the influence of the lobbyists.

“[E]-mails and materials obtained by The Globe through Access to Information legislation show that government officials at Agriculture and Agri-Food Canada (AAFC), have been lobbying their colleagues at Health Canada on the industry’s behalf, after an invitation to submit input. Materials from the last food guide revision from 2007, meanwhile, appear to show that such lobbying efforts have been successful in the past. “Messages that encourage a shift toward plant-based sources of protein would have negative implications for the meat and dairy industries,” AAFC officials wrote in an internal memo marked “secret” and dated June, 2017. “Changes to the way in which foods are represented in the national food guide will have a significant influence on consumer demand for food.” The memos outline a variety of AAFC efforts to influence Health Canada – including at least one written submission and multiple meetings over the course of at least a year. Together, the documents highlight the minefield that Health Canada are having to navigate in creating a new food guide that balances new research on issues such

²⁵²³ David Ebner & Dawn Walton, *supra* note 236.

²⁵²⁴ Issie Lapowsky, “How Bots Broke the FCC’s Public Comment System”, (28 November 2017), online: *WIRED* <<https://www.wired.com/story/bots-broke-fcc-public-comment-system/>>.

as obesity and diet-related chronic disease, while taking into account competing government priorities. The 2017 federal budget, for example, specifically identified the agriculture industry as a priority for economic growth. "It will be important for the two departments to maintain a whole-of-government perspective on all food-related policy," one AAFC memo says. At another point, AAFC staffers expressed concerns that encouraging consumers to avoid processed foods high in sodium, sugar or saturated fat "could imply that all processed foods should be avoided."²⁵²⁵

Canadian Corporations Donating & Lobbying in the U.S.

Source: News

Canadian

This passage shows how Canadian companies are heavily involved in American lobbying and campaign funding, even while, as foreign corporations, they are not allowed to donate to American politicians.

"Companies such as TransCanada Corp., Encana Corp., Barrick Gold Corp., the Royal Bank of Canada and Power Corp. of Canada are actively engaged in political financing and lobbying at the federal and state level, records show."²⁵²⁶

Canadian Steel Company Lobbies U.S. Government

Source: News

Canadian

This quote demonstrates how campaign donations overlap with lobbying. It also indicates how foreign companies regularly make political donations.

"Zekelman Industries made political donations in the United States — skirting or possibly violating a ban on contributions by foreigners — including \$1.75 million last year to a group supporting President Trump. That lobbying effort was how he and his wife found themselves being ushered into a private dining room at the Trump International Hotel in Washington last spring for a small dinner with the president and his son Donald Trump Jr. Mr. Zekelman said they discussed quotas the United States was about to impose on imports of steel from competitors in South Korea. ... Mr. Zekelman's effort amounts to a case study in how to gain and employ access in Mr. Trump's Washington, where an ideological commitment to aiding business meets an open door to lobbyists, interest groups and donors — especially those from industries, like oil and gas, chemicals, casinos and steel, that are strong supporters of Mr. Trump.

"The United States government has put the industry in charge of trade policy on steel," said Julie C. Mendoza, a lawyer whose clients include Borusan Mannesmann, a manufacturer of steel tube whose imports to the United States from Turkey have prompted Zekelman Industries to lodge protests with the administration. ...

The lobbying campaign has, at times, come close to the edge of the federal rules, including the law that prohibits foreigners from donating to election campaigns, an examination by The New York Times found. But it has also proved highly successful in encouraging actions that have benefited Mr. Zekelman's company's bottom line and his American employees. The administration has ruled in favor

²⁵²⁵ Ann Hui, "'Secret' memos reveal efforts to influence Canada's Food Guide", *Globe Mail* (26 October 2017), online: <<https://www.theglobeandmail.com/news/national/secret-memos-reveal-efforts-to-influence-canadas-food-guide/article36725482/>>.

²⁵²⁶ Shawn McCarthy, "How Canadian corporations are tipping the scales in U.S. politics", (29 October 2014), online: *Globe Mail* <<http://www.theglobeandmail.com/report-on-business/international-business/how-canadian-corporations-are-tipping-the-scales-in-us-politics/article21357759/>>.

of Zekelman Industries on a series of claims the company has made against foreign competitors. Sales and profits have surged at the privately held company, which has annual revenues of nearly \$3 billion. Employment at the company's 14 plants in the United States — in Illinois, Pennsylvania, California, Ohio and other states, which operate under names including Wheatland Tube, Sharon Tube and Atlas Tube — has increased by 600, and he hopes to add another 500 jobs this year.

"In the 33 years I have been in business, I have never been more encouraged," said Mr. Zekelman, who took over the business at 19, when his father died.

On Friday, the administration reached a deal to eliminate the 25 percent tariffs on steel imports from Canada and Mexico, while leaving them in place for most of the rest of the world. The decision will benefit Mr. Zekelman, whose biggest manufacturing plant is in Harrow, Ontario, meaning the company will now be able to ship Canadian-made pipe into the United States tariff free, even as Mr. Zekelman advocates protection for his United States plants. The success of his tactics has not gone unnoticed by competitors. The American-Turkish Council, whose sponsors include Borusan Mannesmann, moved its annual meeting from the Ritz-Carlton hotel to the Trump International Hotel in Washington. Among the guests at the event last month were Mr. Ross, the commerce secretary.

"What else are you going to do?" said Ms. Mendoza, the lawyer who has represented Borusan. "Everybody is trying to play the game."²⁵²⁷

Car Dealers Block Tesla Sales

Source: Report

This article discusses how businesses use lobbying to help control the market and limit their competition.

"One clear case of modern rent-seeking is car dealers' attempts to prevent Tesla, the maker of premium electric vehicles, from entering local markets. This has occurred through car dealers and their lobbyists seeking to enact or strengthen state laws that require cars to be sold through dealerships rather than directly from manufacturers.

Car dealers claim that these regulations allow for easier comparison shopping and protect consumers in ways that a car manufacturer would not. Car dealers in New Jersey partnered this argument with nearly \$700,000 in campaign contributions to New Jersey lawmakers from 2003 to 2009, with another \$155,000 spent on lobbying in 2013 alone. Unfortunately for Tesla, their business model does not currently include independent car dealers. Instead, Tesla sells cars directly to customers, cutting out an intermediary that the company believes will not sell their cars as effectively.

Incumbent car dealers, through their lobbying efforts, are both protecting their place in the car market and raising the costs of a new competitor. For a new firm such as Tesla to enter a market, it would either have to go through an incumbent dealership that it does not trust to sell its cars—considering the profits dealerships make offering service of gas vehicles—or it would have to support new franchises, which would involve a significant cost for Tesla. Commentators have argued that the behavior of incumbent car dealers constitutes rent-seeking that hurts consumers and solidifies inefficiencies in the car market."²⁵²⁸

Car Makers Key Opponents of Climate Action

Source: News

²⁵²⁷ Eric Lipton, "He's One of the Biggest Backers of Trump's Push to Protect American Steel. And He's Canadian.", *N Y Times* (20 May 2019), online: <<https://www.nytimes.com/2019/05/20/us/politics/hes-one-of-the-biggest-backers-of-trumps-push-to-protect-american-steel-and-hes-canadian.html>>.

²⁵²⁸ *How Campaign Contributions and Lobbying Can Lead to Inefficient Economic Policy*, by John Craig & David Madl (Center for American Progress, 2014).

This quote shows an example of the connection between lobbying and the slow action on climate change.

“Global carmakers are among the leading opponents of action on the climate crisis, according to exclusive analysis of the way major corporations frustrate or undermine initiatives to cut greenhouse gases. The research for the Guardian reveals that while the automotive industry releases public statements that support climate initiatives, such as increased electrification, it has been pouring millions of dollars through industry bodies into lobbying efforts to challenge attempts to tackle global heating in the past four years. This is despite repeated warnings that the planet is in the grip of a global climate emergency. ...

The evidence was gathered by assessing each company’s size and lobbying activities. Researchers assessed tens of thousands of statements, policy announcements and lobbying campaigns by the 250 biggest investor-owned industrial corporations and trade associations. ... InfluenceMap identified 33 corporations as the strongest opponents of action to reduce climate change. Six of them were car companies, and the rest primarily oil and gas companies as well as energy firms. ...

The influence exerted by the car companies is fronted and aided by industry groups including the US-based Automotive Alliance, as well as Europe’s ACEA (European Automobile Manufacturers’ Association) and the VDA (German Association of the Automotive Industry). These groups all have senior figures from the big car companies on their boards of directors. Fiat Chrysler was ranked most oppositional to climate change regulations and initiatives, Collins said. The company is a “key player” in the industry’s efforts to weaken US clean car standards, known as CAFE standards, set by Barack Obama, which would almost double the fuel economy of vehicles to an average of 54 miles per gallon by 2025. Fiat Chrysler has supported a review of the CAFE standards being considered by the president, Donald Trump. Its late CEO, Sergio Marchionne, said last year he was “fully supportive” of the administration’s efforts to revise the standards. General Motors and Ford have also been key lobbyists through the industry group pushing back against the CAFE standards, while putting out the message in public that they are signed up to the transport transformation required, the report says.

In Europe, the car industry, through the ACEA and the VDA, has continually pushed against new CO2 emissions standards for new vehicles by 2021, and from 2021 to 2030, under the EU clean mobility package. Average emissions of cars produced by manufacturers must be 95g/km by 2021, with penalties of €95 per g/km, per car, for companies not meeting those targets. But data from the EU environment watchdog the EEA shows that the car industry is far off the target. CO2 emissions of new cars increased in 2018 by 1.6% to 120.4g/km. This rise coincided with soaring sales in Europe of SUVs, which emit higher emissions. SUVs account for a third of new cars sold in Europe, an increase from 7% in 2008. Car industry lobbying in Europe through ACEA successfully shelved a proposed EU mandate on sales of electric cars by 2025 similar to those that operate in California and China.”²⁵²⁹

Chemical Plant Explosion – Occupational Safety & Health Administration

Source: Book

This passage shows how industry influence can affect regulatory oversight, via lobbying.

“Another technique used by moneyed interests to squelch a law they dislike is to ensure Congress does not appropriate enough funds to enforce it. For example, the West, Texas, chemical and fertilizer plant that exploded in April 2013, killing fourteen and injuring more than two hundred, had not been fully inspected for almost three decades. The Occupational Safety and Health Administration (OSHA) and its state partners had only 2,200 inspectors charged with protecting the safety of 130 million workers in more than eight million workplaces. That came to about one inspector for every 59,000 workers. Over

²⁵²⁹ Sandra Laville, “Exclusive: carmakers among key opponents of climate action”, *The Guardian* (10 October 2019), online: <<https://www.theguardian.com/environment/2019/oct/10/exclusive-carmakers-opponents-climate-action-us-europe-emissions>>.

the years, congressional appropriations to OSHA had dropped. The agency had been systematically hollowed out.”²⁵³⁰

Clinton Pardon

Source: Journal Article

This passage demonstrates how donations can be linked to corruption.

“Senator Francis Case’s revelation in 1956 that he was offered a \$2,500 campaign contribution [\$23,723 in 2020 dollars] to influence his vote on a pending natural gas bill and President Clinton’s 2001 pardon of fugitive commodities trader Marc Rich amidst disclosures that Rich’s wife, who lobbied for the pardon, had contributed heavily to Clinton’s library foundation.”²⁵³¹

Closure of the National Guideline Clearinghouse

Source: Blog

This passage demonstrates how lobbying can be used to attack public institutions.

“The Trump Administration is planning to eliminate a vast trove of medical guidelines that for nearly 20 years has been a critical resource for doctors, researchers and others in the medical community. Maintained by the Agency for Healthcare Research and Quality [AHRQ], part of the Department of Health and Human Services, the database is known as the National Guideline Clearinghouse [NGC], and it’s scheduled to “go dark,” in the words of an official there, on July 16.

“Guideline.gov was our go-to source, and there is nothing else like it in the world,” [Valerie] King said, referring to the URL at which the database is hosted, which the agency says receives about 200,000 visitors per month. “It is a singular resource,” King added.

AHRQ said it’s looking for a partner that can carry on the work of NGC, but that effort hasn’t panned out yet.... The operating budget for the NGC last year was \$1.2 million, Hunt said, and reductions in funding forced the agency’s hand. In 1994, the agency (then known as the Agency for Health Care Policy and Research) dared to publish a back pain guideline that suggested that there was little role for surgery in most patients. As later documented in Health Affairs, this act raised the hackles of back surgeons with powerful allies in Congress who were already annoyed by the agency’s association with the failed Clinton health-reform plan. The agency’s budget was zeroed out by the House of Representatives and narrowly restored by the Senate in 1995, ...

There’s only one reason for such a sustained assault on an agency that’s literally a rounding error in the HHS budget: because people with money don’t want it around. And it looks like this time they finally won.”²⁵³²

Companies Hire Actors to Pretend to be Concerned Citizens at Public Meetings

Source: News

This excerpt shows how astroturf techniques are regularly used in public meetings to create the illusion of public support.

²⁵³⁰ Robert B. Reich, *supra* note 26 at 84.

²⁵³¹ Anita S. Krishnakumar, *supra* note 493 at 523.

²⁵³² Kevin Drum, “Republicans finally kill off valuable medical database their donors hate”, (13 July 2018), online: *Mother Jones* <<https://www.motherjones.com/kevin-drum/2018/07/republicans-finally-kill-off-valuable-medical-database-their-donors-hate/>>.

"[A]bout 50 people in bright orange shirts filed into City Hall for a public hearing on Entergy's request to build a \$210 million power plant in eastern New Orleans. Their shirts read, "Clean Energy. Good Jobs. Reliable Power." The purpose of the hearing was to gauge community support for the power plant. But for some of those in the crowd, it was just another acting gig. At least four of the people in orange shirts were professional actors. One actor said he recognized 10 to 15 others who work in the local film industry. They were paid \$60 each time they wore the orange shirts to meetings in October and February. Some got \$200 for a "speaking role," which required them to deliver a prewritten speech, according to interviews with the actors and screenshots of Facebook messages provided to The Lens.

It's not unusual for organizations to arrange grass-roots support or opposition at government meetings. Groups often drive people to meetings, pass out statements and coach them on talking points. It is less usual for people to be paid to weigh in on an issue they may have no knowledge or opinion about. However, "astroturf" lobbying may be more common than many think. Crowds on Demand is one of the few companies that advertise this kind of work.

But UCLA professor Edward Walker, who wrote a book about the phenomenon called "Grassroots for Hire," said many other crowd services operate under the radar. "There are hundreds of such firms across the country," he told CNN in January. "By my estimate, around 40 percent of the Fortune 500 (companies) appear on the client list of at least one such firm."²⁵³³

Congresswoman Sets Up Lobbying Business While She is Still a Member of Congress

Source: News

This passage shows how quickly politicians rotate into lobbying if the rules do not effectively prevent it. It raises questions about the how meticulously the politician is representing the public's interest while still in office.

"Lynn Jenkins hasn't left Congress yet, but the Kansas Republican has already launched a new lobbying firm. Jenkins' term in the U.S. House doesn't officially end until the first week of January and she still faces major votes on the farm bill, homeland security budget and other legislation. But her new business, LJ Strategies, LLC, has already registered with the state of Kansas. Ethics watchdogs say the situation makes a mockery of the rules restricting lawmakers from working as lobbyists until they've been out of office for at least one year. ... Jenkins' office said in a statement that the congresswoman consulted with the House Ethics Committee before forming the business."²⁵³⁴

Coronavirus Pandemic & Senate Stimulus Package

Source: News

This article shows how much lobbying is integrated into U.S. government decision-making, and how the Covid-19 coronavirus stimulus plan led to massive lobbying.

"Senate Republicans raced this week to introduce a trillion-dollar coronavirus stimulus package. Lobbyists for industries left reeling by the pandemic were hustling just as hard to shape it. The bill's unveiling on Thursday capped an extraordinary week on K Street in which trade group after trade group asked Congress for sums that would have been unfathomable just a few weeks ago: \$1.4 trillion to shore up the manufacturing sector, \$4 billion for museums, \$100 billion for doctors, nurses and hospitals. The Senate's breakneck work to craft relief legislation this week has driven a frantic effort from industries crippled by measures taken to slow the spread of the virus as well those who have suffered less harm.

"The Hill appears to be overwhelmed with people advocating for why they're uniquely affected by the coronavirus epidemic," said Sean Kennedy, the top lobbyist for the National Restaurant Association,

²⁵³³ Michael Isaac Stein, *supra* note 1808.

²⁵³⁴ Bryan Lowry & Jonathan Shorman, *supra* note 113.

which asked Congress for more than \$300 million in relief this week. The restaurant association has mobilized its members to make tens of thousands of phone calls to their lawmakers. With many restaurants shuttered to slow the virus' spread, their proprietors have had plenty of free time to become armchair lobbyists, Kennedy said. ...

Some lobbyists for industries hit hard by the restrictions imposed by coronavirus were underwhelmed by what they got in McConnell's bill: \$58 billion in loans and loan guarantees for the airlines and another \$150 billion for other "severely distressed sectors" of the economy, as well as nearly \$300 billion in loans for small businesses. ...

The hotel and travel industries personally pleaded their cases to President Donald Trump and Vice President Mike Pence in a meeting at the White House on Tuesday, warning that the industry could shed millions of jobs in the coming weeks without significant help. The hotels asked for \$150 billion in grants, along another \$100 billion for the broader travel industry. ...

The airlines, which asked for \$59 billion in cash, loans and loan guarantees, got \$58 billion in loans. Nick Calio, head of Airlines for America, the industry's trade group, said the money will keep the airlines going for five to six more months. ... The National Retail Federation, meanwhile, secured a tweak to the Republican tax law that it had been pressing for since shortly after its passage in 2017. The fix would return an estimated \$15 billion to \$30 billion to hotels, restaurants and retailers that have upgraded their properties over the past two years but haven't gotten a tax break for it, according to the trade group. David French, the National Retail Federation's top lobbyist, said it was harder to lobby for the provision because he couldn't meet with senators or their staffers in person, with the Hill mostly closed to visitors. "It's working, but it's certainly not like in the old days," he said. Lobbyists' inability to meet with lawmakers and administration officials face to face hasn't stopped them from trying to cash in on their connections. ... "Regardless of whether the coronavirus is prominent, our lineup is strong," he said.²⁵³⁵

Corporations Secretly Lobbying for Kavanaugh's Appointment to the Supreme Court

Source: News

This article demonstrates how much lobbying there is behind the scenes for judicial appointments, particularly for high-level court positions.

"Business groups with interests before the U.S. Supreme Court have orchestrated a multifaceted campaign to pressure the Senate to swiftly confirm Judge Brett Kavanaugh to the nation's highest court. The advocacy reaches across the influence economy of Washington, D.C., with the largest corporate lobbying groups and billionaires working in concert with Republican operatives to elevate Kavanaugh to a lifetime posting atop the judiciary. Few businesses, however, have stamped their names on the effort. Most major corporations and wealthy donors are instead using 501(c) nonprofit groups that do not require donor transparency to air upward of \$15 million in reported advertising spending in order to convince the public to support Kavanaugh's nomination. Other conservative groups contributing to the ad war have not disclosed how much they are spending, likely bringing the total much higher. ...

While the particular funders of pro-Kavanaugh campaigns are obscured, the goals of the groups behind the effort are far from hidden. The interests backing Kavanaugh are hoping that his confirmation will tilt the court and undercut potentially dozens of government policies on clean elections, environmental regulations, bank regulations, and predatory lending, in addition to weakening organized labor.

Even for a Supreme Court nominee chosen by a Republican president, Kavanaugh has compiled a uniquely pro-business record. Take, for instance, the famous SeaWorld case: After a trainer was eaten by a killer whale at SeaWorld, Kavanaugh wrote a dissenting opinion at the D.C. Court of Appeals against new safety regulations, calling such measures "paternalistically" motivated. On environmental regulations, he ruled multiple times to overturn Clean Air Act regulations on cross-state pollution and climate change, in both cases arguing that the Environmental Protection Agency acted beyond its

²⁵³⁵ Theodor Meyer, "Lobbyists make a mad dash to shape coronavirus stimulus package", (20 March 2020), online: *POLITICO* <<https://www.politico.com/news/2020/03/20/lobbyists-coronavirus-stimulus-package-138519>>.

statutory bounds. When it comes to corporations' ability to affect elections, too, Kavanaugh has reliably sided with business interests. As *The Intercept* reported, Kavanaugh authored a pivotal decision in 2009 that helped clear the way for the infamous *Citizens United* ruling, which unleashed unlimited corporate spending in political campaigns the following year. In addition, Kavanaugh has ruled against consumer rights, against labor organizers, and against class action lawsuits — a record that places him squarely in the Fortune 500's corner. The Constitutional Accountability Center, after analyzing key rulings on workers rights, corporate regulations, and multinational corporate liability, found that Kavanaugh "has sided with corporate and business interests even when consumers, workers, and regulatory agencies had the text of the law and precedent on their side." ...

Corporate lobby groups seized on the opportunity that Kavanaugh's nomination represents. Business lobby groups have leaned on President Donald Trump not only to repeal as many of the previous administration's regulations as possible, but to appoint judges who will overturn the *Chevron* deference standard — a move that could eviscerate a range of government policies that exist today, while also tying the hands of any future Democratic president."²⁵³⁶

Cunningham Scandal

Source: Journal Article

This brief quote shows one form of connection between corruption, bribery, lobbying and military contracts.

"Randall Duke Cunningham, former member of the U.S. House of Representatives pled guilty in 2005 to taking \$2.4 million in bribes, fraud, and tax evasion. 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. 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."²⁵³⁷

Defense Contractors & War with Syria

Source: News

This brief excerpt discusses the direction of defence contract lobbying and its ties to foreign conflicts.

"A group formed this year by executives and lobbyists for the defense contracting industry is taking credit for "driving the national debate on foreign policy during the 2016 presidential election," and in particular for getting Republican presidential candidates to call for escalating military action in Syria."²⁵³⁸

Eco-Terrorism Caused No Deaths but Became No. 1 Domestic Terrorism Threat

Source: News

The passage shows how lobbying was involved in focusing the Justice Department on "eco-terrorism", instead of more dangerous groups.

²⁵³⁶ Lee Fang, *supra* note 1146.

²⁵³⁷ Dorie Apollonio, Bruce E. Cain & Lee Drutman, "Access and Lobbying", *supra* note 303 at 16.

²⁵³⁸ Lee Fang, "Defense Contractors Laud Themselves for Steering Candidates Toward Militarism", (11 December 2015), online: *The Intercept* <<https://theintercept.com/2015/12/11/defense-contractors-laud-themselves-for-steering-candidates-toward-militarism/>>.

“While the arsons [by the Animal Liberation Front of factory slaughter houses, timber mills, government facilities and a ski resort], which never hurt or killed anyone, largely took place in the late 1990s, the wave of arrests known as the “Green Scare” came in the post-9/11 era, when terrorism was the FBI’s prevailing obsession. The fur and biomedical industries had spent years lobbying the Justice Department and lawmakers to go after eco-activists, who had damaged their property, held audacious demonstrations decrying their business activities, and cost them millions of dollars. When the planes hit the twin towers, industry groups seized on the opportunity to push legislation, and federal law enforcement ramped up pursuit of radical activists in the name of counterterrorism.

So-called eco-terrorism became the Justice Department’s No. 1 domestic terror concern — “over the likes of white supremacists, militias, and anti-abortion groups,” as one senator pointed out at the time. Operation Backfire, ... was the climax of the crackdown. “There was money, there was administrative support, there was management support,” said Jane Quimby, a retired FBI agent who worked on Backfire. The results were “an affirmation that given the resources that you need, and the support that you need, you can really make these things work.”

In 2009, when a Department of Homeland Security intelligence report raised alarms about the rising threat of right-wing extremist violence, it provoked a very different response. After outcry from conservative groups, DHS backtracked on the report and later disbanded the domestic terrorism unit that produced it.

Daryl Johnson, a former domestic terrorism analyst at DHS, says there’s a reason law enforcement took a less aggressive approach to right-wing white supremacists and anti-government attackers. In the case of the eco-extremists, the government had a powerful ally: industry. “You don’t have a bunch of companies coming forward saying I wish you’d do something about these right-wing extremists,” said Johnson, who left his position in 2010, after his warnings about right-wing violence were dismissed. “If enough people lobbied congresspeople about white nationalists and how it’s affecting their business activity, then I’m sure you’ll get legislation.” ...

Of 70 federal prosecutions of radical environmentalists and animal rights activists identified by *The Intercept*, 52 did not result in charges under anti-terrorism laws. Yet the defendants were repeatedly called terrorists by the Justice Department in public statements and internal communications. The designation opened up additional resources and gave the government powerful leverage in the form of terrorism sentencing enhancements, which prosecutors sought in more than 20 cases.

Journalist and civil liberties advocate Will Potter, whose book “Green Is the New Red” exposed industry influence over Green Scare-style prosecutions, argues that the federal focus on animal rights activists over right-wing extremists was driven by more than corporate lobbying. “Beliefs that motivate [animal rights] activists were presented as this ideological threat to core concepts that underpin what some people think it means to be an American — defense of capitalism, a religiously aligned state, defense of industry, the belief that humans are exceptional.”²⁵³⁹

Exploitive Financial Products Aimed at the Poor

Source: Book

The excerpt discusses the connection between lobbying and exploitive financial products that take advantage of the poor.

“[T]he form of rent seeking that is most egregious – and that has been most perfected in recent years – has been the ability of those in the financial sector to take advantage of the poor and uninformed, as they made enormous amounts of money by preying upon these groups with predatory lending and abusive credit card practices. Each poor person might have only a little, but there are so many poor that a little from each amounts to a great deal. Any sense of social justice—or any concern about overall efficiency—would have led government to prohibit these activities. ... But government didn’t put an end

²⁵³⁹ Alleen Brown, “The Green Scare: How a Movement That Never Killed Anyone Became the FBI’s No. 1 Domestic Terrorism Threat”, (23 March 2019), online: *The Intercept* <<https://theintercept.com/2019/03/23/ecoterrorism-fbi-animal-rights/>>.

to these kind of activities, not even when, around 2007, it became increasingly apparent what was going on. The reason was obvious. The financial sector had invested heavily in lobbying and campaign contributions, and the investments had paid off.”²⁵⁴⁰

F-35 Joint Strike Fighter’s Second Unnecessary Engine

Source: Book

This passage discusses the connection between lobbying and military procurement contracts, and the enormous sums involved in this process.

“The F-35 Joint Strike Fighter is a military plane slated to replace a host of aging military jets currently in use. The Pentagon plans to purchase over 2400 of the Lockheed Martin fighters, at a cost of about \$382 billion. The main engine for the F-35 is manufactured by Pratt & Whitney, while an alternative is being jointly developed by General Electric (GE) and Rolls-Royce.

Since the 1990s the military has planned to develop two engines for the F-35 and to hold yearly competitions between the two manufacturers. In 2006, however, the Pentagon announced that it no longer believed the alternative engine was necessary... In 2009, the Senate voted to remove fiscal year 2010’s funding for the engine, but the House version including funding prevailed. The House again inserted funding for the alternative engine in the 2011 budget, while a Senate panel again recommended against funding. Competition between the two manufacturers, proponents argue, will force suppliers to lower prices, thereby saving taxpayers an estimated \$20 billion. Opponents, including Obama and Gates, argue that the additional cost to develop the alternative—potentially \$450 million in fiscal year 2011 alone, and \$4.2 billion overall—is wasteful and better spent elsewhere. The total cost of the engine is expected to reach \$100 billion.

The lobbying on both sides has been fierce. “[T]here are 75 lobbyists working on defense issues at the firms engaged in the second engine showdown, of whom at least 56—or 75 percent—are former congressional staffers or executive branch officials. Of those, at least 33 are registered to work on the engine issue specifically.” Rolls-Royce’s lobbying efforts did not begin in earnest until 2007. In 2006, the company spent only \$40,000 on lobbying. In 2007, that figure skyrocketed to \$826,000, and to over \$1.3 million in 2008 and 2009. ...

Because of the size of GE’s lobbying operation, it is difficult to discern specific figures for the amounts spent on the F-35 issue. In 2007, GE spent over \$17 million on lobbying, reaching \$25.5 million in 2009. GE’s in-house and external lobbyists count among their ranks former Senators Trent Lott, John Breaux, and Don Nickles; former House Majority Leader Dick Gephardt; and Thurgood Marshall, Jr.”²⁵⁴¹

Fed-Ex Pays \$0 in Taxes – Lobbying Success

Source: News

This passage is about the overlap between lobbying and tax cuts. It also demonstrates how corporations that benefitted from tax cuts did not use these tax cuts to reinvest in their businesses. This is one of the most straightforward ways that lobbying can lead to financial returns.

“In the 2017 fiscal year, FedEx owed more than \$1.5 billion in taxes. The next year, it owed nothing. What changed was the Trump administration’s tax cut — for which the company had lobbied hard. ... President Trump signed into law the \$1.5 trillion tax cut that became his signature legislative achievement. FedEx reaped big savings, bringing its effective tax rate from 34 percent in fiscal year 2017 to less than zero in fiscal year 2018, meaning that, overall, the government technically owed it money. But it did not increase investment in new equipment and other assets in the fiscal year that followed, as Mr. Smith said businesses like his would. Nearly two years after the tax law passed, the windfall to

²⁵⁴⁰ Joseph E. Stiglitz, *supra* note 38 c 2, s Moving money from the bottom of the pyramid to the top.

²⁵⁴¹ Richard L. Hasen, *supra* note 1405 at 244.

corporations like FedEx is becoming clear. A New York Times analysis of data compiled by Capital IQ shows no statistically meaningful relationship between the size of the tax cut that companies and industries received and the investments they made. If anything, the companies that received the biggest tax cuts increased their capital investment by less, on average, than companies that got smaller cuts.

FedEx's use of its tax savings is representative of corporate America. Companies have already saved upward of \$100 billion more on their taxes than analysts predicted when the law was passed. Companies that make up the S&P 500 index had an average effective tax rate of 18.1 percent in 2018, down from 25.9 percent in 2016, according to an analysis of securities filings. More than 200 of those companies saw their effective tax rates fall by 10 points or more. Nearly three dozen, including FedEx, saw their tax rates fall to zero or reported that tax authorities owed them money. From the first quarter of 2018, when the law fully took effect, companies have spent nearly three times as much on additional dividends and stock buybacks, which boost a company's stock price and market value, than on increased investment. ... Overall business investment during Mr. Trump's tenure has now grown more slowly since the tax cuts were passed than before."²⁵⁴²

Former Harper aide Bruce Carson Guilty of Influence-Peddling

Source: News

Canadian

This excerpt discusses a Canadian instance of influence peddling.

"A one-time top aide to former prime minister Stephen Harper was convicted of criminal influence-peddling by Ontario's highest court on Friday. ... Carson, a senior adviser to Harper from the time the Conservatives took office in 2006 until 2008 and briefly in 2009, was charged in connection with attempts to promote the sale of water-purification systems for First Nations communities by a company known as H2O Pros and H2O Global. H2O had hired his former girlfriend, Michele McPherson, with whom he developed a romantic relationship in February 2010. Evidence was that Carson admitted demanding a benefit for McPherson from H2O in exchange for using his government contacts on the company's behalf."²⁵⁴³

Former Laval Mayor at Heart of Corruption Scandal

Source: News

Canadian

This quote shows how illegal donations and corruption are often connected.

"Vaillancourt, 77, was Laval mayor between 1989 and 2012. He was arrested in May 2013 by Quebec's anti-corruption unit and accused of taking part in a scheme under which the City of Laval awarded municipal contracts in exchange for bribes and illegal donations from construction contractors. Under a joint Crown-defence agreement, Vaillancourt was sentenced in December 2016 to just under six years in prison. He also had to reimburse the city about \$8.6 million, the parole board document says. The parole board imposed several conditions on his release. He is banned from participating in any paid or volunteer political activities. He cannot be responsible for the finances or investments of individuals, companies or charities. And he will have to disclose his financial records to his parole officer."²⁵⁴⁴

²⁵⁴² Jim Tankersley, Peter Eavis & Ben Casselman, "How FedEx Cut Its Tax Bill to \$0", *N Y Times* (17 November 2019), online: <<https://www.nytimes.com/2019/11/17/business/how-fedex-cut-its-tax-bill-to-0.html>>.

²⁵⁴³ Colin Perkel, *supra* note 538.

²⁵⁴⁴ News Staff, "Former Laval mayor at heart of corruption scandal granted full parole", (6 December 2018), online: *CityNews* <<https://toronto.citynews.ca/2018/12/06/former-laval-mayor-at-heart-of-corruption-scandal-granted-full-parole/>>.

Former Tory aide fined for unregistered lobbying

Source: News

Canadian

This passage reports on an aide fined for unregistered lobbying. This is evidence that unregistered lobbying is happening and lobbyists are being caught for it. It is worth noting that the lobbying was for a socially beneficial goal.

“Former Conservative aide turned advocate-for-hire Andrew Skaling has been slapped with a \$7,500 fine after pleading guilty to having failed to file the necessary paperwork after he was brought on board to help a non-profit group seeking federal funding for its smoke cessation programme in 2010.”²⁵⁴⁵

Homeowners Subsidies & Lack of Renter Subsidies & Real Estate Lobby

Source: News

This is an interesting example of how lobbying at one point can plant a seed for a latter government program, and these programs can persist for decades after, bringing ongoing benefits to the industry. It is also an example of how lobbying can lead to programs that benefit the wealthy.

“[T]he [U.S.] federal government lets homeowners write off interest payments on mortgages of up to \$1 million. It also lets them write off interest payments on home equity loans of up to \$100,000. ... Through the federal secondary mortgage market, it buys mortgage loans that are originated by private lenders, bundles them together into mortgage-backed securities, and then sells them to investors, along with a guarantee against borrowers’ defaults. It also insures home mortgages through programs like the Federal Housing Administration and Veterans Affairs Department’s mortgage programs. ...

Public subsidies for home ownership disproportionately benefit the wealthy and those who build, finance and sell private homes for profit. They do relatively little to help middle-income and working families, let alone the working poor.

Perhaps unsurprisingly, these ideas originated with the organized business interests whom they benefit the most. In the early decades of the 20th century, the dominant view in the United States was that the government should stay out of the housing market altogether. But in 1917, members of the newly professionalized real estate industry launched what they called the “Own Your Own Home” campaign. This massive public relations and advertising initiative peddled the message that home ownership was a critical part of what it means to be — to quote one “Own Your Own Home” ad — “a real American.” At the same time, industry elites began to petition the state for financial support for private, profit-driven development.

At first, few were convinced. But the stock market crash of 1929 and the Great Depression that followed persuaded political leaders like Herbert Hoover and Franklin Delano Roosevelt that the state should intervene to help buoy the failing U.S. housing market. In December 1931, when Hoover convened his White House Conference on Home Building and Home Ownership, he cited approvingly the real estate agents’ narrative of what it means to be an American. ... Hoover’s conference yielded a series of recommendations that strongly influenced the New Deal housing legislation of the 1930s. The National Housing Act of 1934, for example, marked a critical turn in the American state’s involvement in the market of privately owned housing. Crucially, it created the FHA, which massively expanded private home ownership for middle-class whites. ...

In 1933, the National Industrial Recovery Act established the Public Works Administration (PWA), which over the next three years constructed 22,000 units of rental housing that were affordable for working

²⁵⁴⁵ Kady O’Malley, “Former Tory Aide Fined \$7,500 for Unregistered Lobbying -”, (1 August 2013), online: *Polit Blog* <<http://www.cbc.ca/newsblogs/politics/inside-politics-blog/2013/08/former-tory-aide-fined-7500-for-unregistered-lobbying.html>>.

people. Predictably, the real estate lobby objected. “GOVERNMENT HOUSING IS NOT FREE,” declared a billboard ad it distributed as part of its anti-PWA campaign. “All government revenue comes from you, the tax payer. Can you honestly afford to pay a portion of your neighbor’s rent through increased taxes and still pay for your own housing expenses?” These questions may seem odd coming from a group agitating for the use of public funds to subsidize profit-oriented housing development. But the real estate lobby was powerful. It helped mold the United States Housing Act of 1937, which ended once and for all the federal government’s role in building subsidized rental housing. The 1937 act also introduced draconian regulations to govern local housing authorities. Eligible tenants, it declared, had to be poor: at least 20 percent below the income bracket that could afford the cheapest private housing in the area in which they lived. And construction expenditures had to be minimal.

Subsidized housing for low-income Americans, after 1937, was scarce, low-cost and low-quality. But the United States continued to subsidize consumers and producers of private housing, especially those at the upper end of the income distribution. Today the mortgage interest tax subsidy for the wealthiest 10 percent of Americans is larger than the entire federal subsidy for affordable housing for low- and moderate-income people.”²⁵⁴⁶

Gun Manufacturer Liability Shield

Source: Book

This excerpt demonstrates how the gun industry used lobbying to procure a liability exemption.

“Gun manufacturers are also shielded from liability for any mayhem the use of their products creates. In 2004, after a court awarded the relatives of eight people shot by a sniper near Washington, D.C., \$2.5 million from the maker and seller of the rifle used in the shootings, the National Rifle Association went into action. In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act, which sharply limited the liability of gun manufacturers, distributors, and dealers for any harm caused by the guns they sold. Not all industries have been as successful. Decades ago, the automobile industry dubbed cars safe and seat belts unnecessary, and the tobacco industry promoted the alleged health benefits of cigarettes. After tens of thousands of deaths and hundreds of millions of dollars in damage awards to victims, both industries began changing their tunes. Today, cars are safer, and fewer Americans smoke.”²⁵⁴⁷

IRS Enforcement

Source: Book

This passage demonstrates how political decisions on the funding of tax enforcement have benefited the wealthy. This is likely the result of lobbying.

“The Internal Revenue Service (IRS) has also been hollowed out. Despite an increasing number of wealthy individuals and big corporations using every tax dodge imaginable- laundering money through phantom corporations and tax havens and shifting profits abroad to where they’d be taxed least-the IRS budget by 2014 was 7 percent lower than it had been as recently as 2010. During the same period, the IRS lost more than ten thousand staff – an 11 percent reduction in personnel. This budget stinginess didn’t save the government money. To the contrary, less IRS enforcement means less revenue. For every dollar that goes into IRS enforcement, an estimated \$200 is recovered of taxes that have gone unpaid. Less enforcement does, however, reduce the likelihood that wealthy individuals and big corporations would be audited.”²⁵⁴⁸

²⁵⁴⁶ Clarissa Hayward, “Why does the U.S. use public revenue to support private home ownership?”, *Wash Post* (15 April 2015), online: <<http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/04/15/why-does-the-u-s-use-public-revenue-to-support-private-home-ownership/>>.

²⁵⁴⁷ Robert B. Reich, *supra* note 26 at 82.

²⁵⁴⁸ *Ibid* at 85.

IRS & H&R Block Lobbying & the EITC

Source: News

This example shows another way that lobbying has been used to protect a market for industry incumbents – in this case, those who make tax filing software.

“H&R Block's entire business model is premised on taxes being confusing and hard to file. So, naturally, the tax preparation company has become — along with Intuit, the company behind TurboTax — one of the loudest voices on Capitol Hill arguing against measures that make it easier to pay taxes. For example, the Obama administration has pushed for automatic tax filing, in which the IRS uses income information it already has to fill out your tax return for you. That would save millions of Americans considerable time and energy every year, but the idea has gone nowhere. The main reason? Lobbying from H&R Block and Intuit.

But H&R Block's latest lobbying effort is even more loathsome than its opposition to automatic filing. At the company's instigation, the Senate Appropriations Committee has passed a funding bill covering the IRS whose accompanying report instructs the agency to at least quadruple the length of the form that taxpayers fill out to get the Earned Income Tax Credit [EITC].

It is hard to adequately express how despicable this is. The EITC is one of America's premier anti-poverty programs. It targets poor families specifically, and because you have to work to get it, countless studies have found it encourages single mothers and other people without much connection to the labor market to enter the workforce. The Census Bureau estimates that it and the related Child Tax Credit keep 9.4 million people out of poverty every year, and recent research suggests that when you take into account the people the EITC brings into the workforce, the real number is probably twice that. If that weren't enough, it also boosts test scores for kids in families receiving it and improves both parents' and children's health. The only possible reason to change the form, then, is to confuse taxpayers enough that even more of them will pay companies like H&R Block to prepare their returns. Other low-income families will just not bother to claim the credit at all if this policy takes effect.”²⁵⁴⁹

Lawmakers Opinion Pieces Secretly Written by Lobbyists

Source: News

This passage is another piece of evidence in how influential lobbying has become. It demonstrates that politicians are letting lobbyists decide their position on issues. One of the politicians' key roles is to present their policy views to the public. If they are outsourcing this role to lobbyists, one can reasonably wonder whether these politicians are allowing influential lobbyists complete control over the policy agenda.

“Lobbyists either helped draft or made extensive revisions to opinion columns published by three state lawmakers in a way that suggested Medicare-for-all and other government involvement in health care posed dangers, according to emails obtained by The Washington Post. ... None of the lawmakers' columns discloses that they were written with the help of a lobbyist. The emails show how, even at the state and local levels, lobbyists are trying to bend public opinion away from an idea that has seized much of the debate during the current Democratic presidential primary. Two candidates, Sens. Elizabeth Warren (Mass.) and Bernie Sanders (Vt.), have proposed a massive redesign of the health-care system that would place all Americans on a single government health insurer. ... The emails raise troubling ethical implications about the undisclosed involvement of private interests in lawmakers' public statements, said Larry Noble, who served as general counsel for the Campaign Legal Center and the Federal Election Commission. “It's disturbing,” Noble said. “I think there's a certain ethical obligation to

²⁵⁴⁹ Dylan Matthews, *supra* note 620.

be upfront about who wrote the editorial.” The emails appear to show extensive outside involvement in the Montana lawmakers’ op-eds. In a Microsoft Word document, MacDonald removed three paragraphs from a draft of Kelker’s op-ed that pointed out that the United States “clearly spends significantly more on health care per capita than other developed nations.” He also deleted a table from the lawmaker’s original draft showing that the United States has higher health-care spending per capita than France, Germany, Norway and Switzerland.”²⁵⁵⁰

Low Public Prices for Extracting Resources

Source: Book

The excerpt discusses how mining lobbying successfully prevented the U.S. government from charging proper royalty rates for mineral and gas resources. The lower rates can be understood as a form of subsidy.

“Today, the government doesn’t typically give away its resources; more often it requires a payment, but a payment that is far less than it should be. This is just a less transparent way of giving away money. If the value of the oil under a particular piece of land is \$100 million after paying the extraction costs, and the government requires a payment of only \$50 million, the government has, in effect, given away \$50 million. It doesn’t have to be this way, but powerful interests ensure that it is. In the Clinton administration, we tried to make the mining companies pay more for the resources they take out of public lands than the nominal amounts that they do. Not surprisingly, the mining companies—and the congressmen to whom they make generous contributions—opposed these measures, and successfully so. They argued that the policy would impede growth. But the fact of the matter is that, with an auction, companies will bid to get the mining rights so long as the value of the resources is greater than the cost of extraction, and if they win the bid, they will extract the resources. Auctions don’t impede growth; they just make sure that the public gets paid appropriately for what is theirs. Modern auction theory has shown how changing the design of the auction can generate much more revenue for the government. These theories were tested out in the auction of the spectrum used for telecommunications beginning in the 1990s, and they worked remarkably well, generating billions for the government.”²⁵⁵¹

Marijuana Legalizing & Lobbying

Source: News

Canadian

This passage demonstrates how lobbying continues at fundraisers, despite political parties’ claiming that this is not the case.

“Prime Minister Justin Trudeau’s point person on legalizing recreational pot was the prize guest at a Liberal Party fundraiser attended by a marijuana lobbying group at a Toronto law office that advises clients in the cannabis business. The event last spring, which featured Bill Blair, the parliamentary secretary to the Justice Minister, appears to violate Liberal Party rules on political fundraisers and Mr. Trudeau’s ethics guidelines that direct cabinet ministers and parliamentary secretaries to avoid an “appearance of preferential access.” The Liberal Party told The Globe and Mail on Monday night it will refund donations from representatives of the Cannabis Friendly Business Association (CFBA), although it denied any ethical breaches.”²⁵⁵²

²⁵⁵⁰ Jeff Stein, “State lawmakers acknowledge lobbyists helped craft their op-eds attacking Medicare-for-all”, *Wash Post* (2 December 2019), online: <<https://www.washingtonpost.com/business/2019/12/02/state-lawmakers-acknowledge-lobbyists-helped-craft-their-op-eds-attacking-medicare-for-all/>>.

²⁵⁵¹ Joseph E. Stiglitz, *supra* note 38 c 2, s Government munificence.

²⁵⁵² Robert Fife & Steven Chase, *supra* note 1293.

McConnell Blocks Effort to Stop Russia Investment after Lobbying by Former Staffers

Source: News

This report demonstrates the influence that former staffers seem to wield when lobbying.

“Two former top staffers to Senate Majority Leader Mitch McConnell have lobbied Congress and the Treasury Department on the development of a new Kentucky aluminum mill backed by the Russian aluminum giant Rusal, according to a new lobbying disclosure. The disclosure comes as Democrats are pushing the Trump administration to review Rusal’s \$200 million investment in the Kentucky project — concerned that the mill will supply the Defense Department — and as McConnell weathers criticism for helping block a congressional effort to stop the investment.”²⁵⁵³

Michael Cohen – Hotel in Russia & Trump

Source: News

This passage is a demonstration of the complicated interplay between lobbying, political campaigns, foreign powers and private business interests. It shows the risk of how lobbying can interact with the private business interests of an official and generate corruption and the appearance of corruption.

“Donald J. Trump was more involved in discussions over a potential Russian business deal during the presidential campaign than previously known, his former lawyer Michael D. Cohen said Thursday in pleading guilty to lying to Congress. Mr. Trump’s associates pursued the project as the Kremlin was escalating its election sabotage effort meant to help him win the presidency.

Mr. Trump’s participation in discussions about building a grand skyscraper in Moscow showed how the interests of his business empire were enmeshed with his political ambitions as he was closing in on the Republican nomination for president. During the early months of 2016, when the business discussions were taking place, he was publicly pressing for warmer relations between the United States and Russia and an end to economic sanctions imposed by the Obama administration, policy positions that might have benefited his family business.

The Trump Tower discussions were occurring as Russia ramped up its sabotage campaign, the information provided on Thursday by Mr. Cohen showed, though the documents do not say whether any of Mr. Trump’s advisers were aware of the Russian disruption effort. According to a grand jury indictment made public this year, Russian intelligence operatives hacked the emails of Hillary Clinton’s campaign chairman in March 2016. That same month, an obscure professor whom Mr. Mueller’s team has identified as a likely cutout for Russian intelligence began courting a Trump campaign aide, George Papadopoulos.

Mr. Cohen admitted that the discussions about Trump Tower Moscow went on for at least six months after he had told Congress they had ended. They lasted until at least June 14, 2016, when Mr. Cohen met in New York with an associate who had been trying to arrange his trip to Russia, and told him he would not be traveling “at that time,” court documents said. Mr. Cohen also discussed the deal in a 20-minute phone call with a Russian government employee.

Mr. Cohen said on Thursday that he discussed the status of the project with Mr. Trump on more than the three occasions he had previously acknowledged and briefed Mr. Trump’s family members about it. Some of those exchanges, which continued until January 2016, included the president’s children Ivanka Trump and Donald Trump Jr., both of whom are executives at the Trump Organization, according to three people familiar with the documents that the company turned over to Mr. Mueller’s team. In one

²⁵⁵³ Natasha Bertr & Theodor Meyer, “Ex-McConnell staffers lobbied on Russian-backed Kentucky project”, (31 July 2019), online: *POLITICO* <<https://politi.co/2GC9Ns4>>.

email exchange in 2015, Ms. Trump made a suggestion about the architecture, according to two of the people familiar with the messages. Donald Trump Jr. appeared to have replied to only one message, saying “Cool” in response to an update about the project, the people said. Mr. Trump and Mr. Cohen discussed Mr. Trump himself traveling to Russia after the Republican National Convention, though that trip never materialized.

Mr. Trump defended his role in the Trump Tower Moscow discussions, brushing aside concerns that he was advancing his business interests at the time he was hoping to become president. “There was a good chance that I wouldn’t have won, in which case I would have gotten back into the business, and why should I lose lots of opportunities?” he said to reporters as he left Washington for the Group of 20 meeting in Buenos Aires.”²⁵⁵⁴

Michael Cohen – Illegal Campaign Contributions

Source: News

This article discusses the illegal campaign contributions of Mr. Michael Cohen and the involvement of the National Enquirer. It shows some range of the scandals that occur in campaign financing. There is no simple solution to prevent this sort of campaign activity, but firm rules, strong norms and healthy oversight will help. Unfortunately, these three factors seem to be on the decline in the U.S.

“[T]he combative Mr. Cohen, a former vice president at the Trump Organization, was accused of violating laws that involved his taxi business, his financial dealings with at least three banks and — it was the headline allegation — his secretive efforts to influence the 2016 presidential election. He admitted joining forces with the nation’s best-known supermarket tabloid to buy the silence of at least two women who claimed they had affairs with Mr. Trump. ...

President Trump’s former lawyer Michael Cohen has been sentenced to prison for offenses, including paying women for their silence during the 2016 election. ...

According to the government, in October 2016 — one month before the presidential election — Ms. Clifford, who has a second career as an exotic dancer, reached out through her agent to the National Enquirer, the gossip magazine owned by David J. Pecker, a longtime friend and supporter of Mr. Trump. She had what she believed was a hot story, the government said: the tale of her alleged affair with Mr. Trump. Court papers say Mr. Pecker and an editor at the National Enquirer then reached out to Mr. Cohen, putting him in touch with Keith Davidson, a Los Angeles lawyer who was representing Ms. Clifford. Over the next few days, the papers claim, Mr. Cohen negotiated a deal to pay Ms. Clifford \$130,000 to keep her silent about the affair. ... The very next day, the government said, Mr. Cohen withdrew \$131,000 from the fraudulent home-equity loan he had gotten that year and placed it into the account of a shell company he had created, Essential Consultants LLC. Then, on Oct. 27, in an effort to influence the 2016 presidential election, prosecutors say, he wired \$130,000 to Ms. Clifford’s lawyer, Mr. Davidson, apparently keeping the extra \$1,000 for himself.”²⁵⁵⁵

Michael Flynn – Illegal Lobbying

Source: News

²⁵⁵⁴ Mark Mazzetti et al, “Cohen Pleads Guilty and Details Trump’s Involvement in Moscow Tower Project”, *N Y Times* (29 November 2018), online: <<https://www.nytimes.com/2018/11/29/nyregion/michael-cohen-trump-russia-mueller.html>>.

²⁵⁵⁵ Alan Feuer, “6 Takeaways From Michael Cohen’s Guilty Plea”, *N Y Times* (21 August 2018), online: <<https://www.nytimes.com/2018/08/21/nyregion/michael-cohen-guilty-plea-trump-takeaways.html>>.

This report discusses illegal lobbying. It shows how quickly such activities can take place in a new administration when there is little lobbying oversight.

"A federal judge suggested during a sentencing hearing Tuesday that Michael Flynn, President Trump's former national security adviser and a retired three-star general, sold out his country. ...

When he pleaded guilty, he also admitted that some of his lobbying work was done on behalf of the Turkish government, which he had long denied.... Though he admitted to violating lobbying laws by failing to register as a foreign agent on behalf of Turkey for hundreds of thousands of dollars of consulting work, Flynn was not charged for those crimes and has attempted to receive leniency from the Mueller investigation by offering extensive cooperation. Two of his former business associates have now been indicted for their work on Turkey.

On Election Day in 2016, Flynn wrote an op-ed in *The Hill* criticizing cleric Fethullah Gulen, an enemy of Turkey's president living in self-imposed exile in Pennsylvania, as a "radical Islamist" and "shady Islamic mullah." *The Wall Street Journal* later reported that Flynn and his son twice met with Turkish representatives to discuss kidnapping Gulen and forcibly extraditing him to Turkey."²⁵⁵⁶

Mississippi Lawmakers Funnel Millions to Pet Vendors

Source: News

This excerpt demonstrates how effective lobbying can be on the state level.

"Top lawmakers carve out millions of dollars for handpicked education vendors and pet projects each year, bypassing state bid laws and steering money to companies that know the right people or hire the right lobbyists. A *Clarion Ledger* analysis of education appropriations for the last four years uncovered millions of dollars in earmarks for select vendors — most of them represented by three lobbying firms. In at least four cases, key lawmakers received campaign contributions from vendors who received those earmarks. Lawmakers are effectively exempting these vendors from the bid process normally required for state agencies to select the best provider for the least amount of money. ...

Since 2016, eight education companies and nonprofit groups have sunk nearly \$800,000 into lobbying efforts. These entities have received a cumulative \$9 million as a result of their lobbying investment. At least four companies made campaign donations to lawmakers who were instrumental in their obtaining earmarks. While nonprofits are prohibited from making campaign contributions, those receiving earmarks often employed lobbyists who made contributions to key lawmakers."²⁵⁵⁷

Model Bills & Lobbying

Source: News

The passage on model legislation is a powerful indictment of how much influence lobbyists have gathered. Business lobbyists appear to be increasingly infringing on this core governmental function of enacting legislation.

"Each year, state lawmakers across the U.S. introduce thousands of bills dreamed up and written by corporations, industry groups and think tanks. Disguised as the work of lawmakers, these so-called

²⁵⁵⁶ Dave Lawler, "Here's what Michael Flynn has admitted", (18 December 2018), online: *Axios* <<https://www.axios.com/michael-flynn-guilty-plea-kislyak-russia-turkey-8d185a76-980c-4d6b-8fe6-daa712b3da78.html>>.

²⁵⁵⁷ Bracey Harris & Giacomo Bologna, "How Mississippi lawmakers quietly funnel millions of education dollars to pet vendors", (9 May 2019), online: *Clarion Ledger* <<https://www.clarionledger.com/story/news/politics/2019/05/09/mississippi-education-lawmakers-teachers-spending-lobbyists-vendor/3621521002/>>.

“model” bills get copied in one state Capitol after another, quietly advancing the agenda of the people who write them. A two-year investigation by USA TODAY, The Arizona Republic and the Center for Public Integrity reveals for the first time the extent to which special interests have infiltrated state legislatures using model legislation. USA TODAY and the Republic found at least 10,000 bills almost entirely copied from model legislation were introduced nationwide in the past eight years, and more than 2,100 of those bills were signed into law.

The investigation reveals that fill-in-the-blank bills have in some states supplanted the traditional approach of writing legislation from scratch. They have become so intertwined with the lawmaking process that the nation’s top sponsor of copycat legislation, a member of the Pennsylvania General Assembly, claimed to have signed on to 72 such bills without knowing or questioning their origin. For lawmakers, copying model legislation is an easy way to get fully formed bills to put their names on, while building relationships with lobbyists and other potential campaign donors. For special interests seeking to stay under the radar, model legislation also offers distinct advantages. Copycat bills don’t appear on expense reports, or campaign finance forms. They don’t require someone to register as a lobbyist or sign in at committee hearings. But once injected into the lawmaking process, they can go viral, spreading state to state, executing an agenda to the letter.

Models are drafted with deceptive titles and descriptions to disguise their true intent. The Asbestos Transparency Act didn’t help people exposed to asbestos. It was written by corporations who wanted to make it harder for victims to recoup money. The “HOPE Act,” introduced in nine states, was written by a conservative advocacy group to make it more difficult for people to get food stamps.

Special interests sometimes work to create the illusion of expert endorsements, public consensus or grassroots support. One man testified as an expert in 13 states to support a bill that makes it more difficult to sue for asbestos exposure. In several states, lawmakers weren’t told that he was a member of the organization that wrote the model legislation on behalf of the asbestos industry, the American Legislative Exchange Council.

Bills copied from model legislation have been used to override the will of local voters and their elected leaders. Cities and counties have raised their minimum wage, banned plastic bags and destroyed seized guns, only to have industry groups that oppose such measures make them illegal with model bills passed in state legislatures. Among them: Airbnb has supported the conservative Arizona-based Goldwater Institute, which pushed model bills to strike down local laws limiting short-term rentals in residential neighborhoods in four states.

Industry groups have had extraordinary success pushing copycat bills that benefit themselves. More than 4,000 such measures were introduced during the period analyzed by USA TODAY/Arizona Republic. One that passed in Wisconsin limited pain-and-suffering compensation for injured nursing-home residents, restricting payouts to lost wages, which the elderly residents don’t have.”²⁵⁵⁸

Non-Negotiated Drug Prices in Medicare Part D

Source: Book

This excerpt demonstrates how lobbying for the right relatively small change to a piece of legislation can have a large impact and return on investment.

“A little-noticed change in legislation, for example, can reap billions of dollars. This was the case when the government extended a much-needed Medicare drug benefit in 2003. A provision in the law that prohibited government from bargaining for prices on drugs was, in effect, a gift of some \$50 billion or more per year to the pharmaceutical companies.”²⁵⁵⁹

²⁵⁵⁸ Rob O’Dell & Nick Penzenstadler, *supra* note 758.

²⁵⁵⁹ Joseph E. Stiglitz, *supra* note 38 c 2, s Government munificence.

Nuclear Plants

Source: Book

This quote posits that lobbying is responsible for the continued use of an unsafe nuclear reactor design, which poses obvious enormous risks should something go wrong.

"Long before Japan's Fukushima Daiichi plant contaminated a large swath of the Pacific Ocean with radioactive material in 2011, for example, General Electric marketed the Mark 1 boiling water reactor used in the plant (as well as in sixteen American nuclear plants), a cheaper alternative to competing reactors because it used a smaller and less expensive containment structure. Yet the dangers associated with the Mark 1 reactor were well known. In the mid-1980s, Harold Den an official with the Nuclear Regulatory Commission, warned that Mark 1 reactors had a 90 percent probability of bursting if their fuel rods overheated and melted in an accident. A follow-up report from a study group convened by the commission found that "Mark 1 failure within the first few hours following core melt would appear rather likely." Why hasn't the commission required General Electric to improve the safety of its Mark 1 reactors? One factor may be General Electric's formidable political and legal clout. In the presidential election year of 2012, for example, its executives and PACs contributed almost \$4 million to political campaigns (putting it sixty-third out of 20,766 companies), and it spent almost \$19 million lobbying (the fifth-highest lobbying tab of 4,372 companies). Moreover, 104 of its 144 lobbyists had previously held government posts."²⁵⁶⁰

Ocean Spray

Source: Book

This small excerpt shows how lobbying for small low salience regulatory changes can be quite important for a business. It also demonstrates how deeply campaign donations and lobbying are tied together in exercising influence on political decisions. It hints that the honoraria for speaking engagements may not be too different from simply paying a politician for favours.

"During the Reagan administration the Food and Drug Administration threatened to require cranberry juice to be labeled as 75 percent water. Ocean Spray turned to Cassidy for advice. A handful of congressmen were given speaking engagements with honoraria of \$2,000 and \$4,000; \$375,000 of PAC contributions were also distributed. Prohibition against any regulation requiring disclosure of fruit-juice content was, with no fanfare, slipped into an appropriations bill. Mission accomplished. The gains to Ocean Spray were huge: by 2005, U.S. sales of cranberry juice had topped \$750 million. The costs of lobbying, in contrast, were minuscule."²⁵⁶¹

Oil Industry & BC Natural Gas Rules Changes

Source: News

Canadian

This quote discusses one indication of the influence of the oil and gas lobbying.

"In January of this year, the Canadian Association of Petroleum Producers made a presentation to high-ranking officials in British Columbia's Environment Ministry, outlining changes they wanted to environmental review rules for natural gas projects. Those changes became law on April 14, but they didn't stay that way for long. An outcry from First Nations organizations forced an about-face from Environment Minister Mary Polak, who rescinded the revisions two days after they were passed by order-in-council.

²⁵⁶⁰ Robert B. Reich, *supra* note 26 at 82.

²⁵⁶¹ George A. Akerlof & Robert J. Shiller, *supra* note 52 at 81.

Internal government documents obtained by The Canadian Press show 25 to 45 new natural gas plants will be needed to meet the government's hopes for liquefied natural gas and that the industry wanted regulatory changes expedited so they could make investment decisions. The Environment Ministry says Polak met with "various industry and environmental organizations" to discuss the regulation change, but the documents don't make a single mention of any meetings other than with the petroleum producers' association."²⁵⁶²

Oil Industry & Climate Change Denial

Source: Report

This passage discusses the oil and gas industry's climate change denial campaign. It demonstrates the influence of the lobbying, and the use of astroturf groups. The denial campaign has been quite successful, much to the detriment of the rest of the world.

"Over the past few decades, the fossil fuel industry has subjected the American public to a well-funded, well-orchestrated disinformation campaign about the reality and severity of human-caused climate change. The purpose of this web of denial has been to confuse the public and decision-makers in order to delay climate action and thereby protect fossil fuel business interests and defend libertarian, free-market conservative ideologies. The fossil fuel industry's denial and delay tactics come straight out of Big Tobacco's playbook. As a result, the American public have been denied the right to be accurately informed about climate change, just as they were denied the right to be informed about the risks of smoking by the tobacco industry. While fossil fuel companies attacked the science and called on politicians to "reset the alarm," climate-catalyzed damages worsened, including increased storm intensities, droughts, forest damage and wildfires, all at substantial loss of life and cost to the American people. Climate disinformation has had many negative effects. It reduces public understanding of climate change, lowers support for climate action, cancels out accurate information, polarizes the public along political lines, and reinforces climate silence—the lack of public dialogue and private conversation about climate change. Climate deniers directly impact the scientific community—and, in turn, its ability to serve the public good—by forcing climate scientists to respond to bad-faith demands and arguably causing a chilling effect pressuring scientists to underplay scientific results."²⁵⁶³

Oil Industry & Deepwater Horizon

Source: Book

This passage covers the link between lobbying and the Deepwater Horizon disaster. It shows how lobbying can impact low salience regulations, even after a disaster caused by a lax oversight of these very oversight.

"[T]he national commission appointed to investigate the giant oil spill in the Gulf of Mexico in 2010 found that BP failed to adequately supervise Halliburton Company's installation of the deep-water oil well even though BP knew Halliburton lacked experience in testing cement to prevent blowouts and hadn't performed adequately before on a similar job. In short, neither company had bothered to spend enough to ensure adequate testing of the cement. Meanwhile, the Minerals Management Service of the Department of the Interior (now renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement) had not adequately overseen the oil and oil-service companies under its watch because it had developed cozy relationships with them. The revolving door between the regulator and the companies it was responsible for overseeing was well oiled."²⁵⁶⁴

²⁵⁶² The Canadian Press, *supra* note 623.

²⁵⁶³ John Cook et al, *supra* note 30 at 4; See also, Naomi Oreskes & Erik M. Conway, *supra* note 35; Shannon Hall, *supra* note 35; Kevin Grandia, *supra* note 35.

²⁵⁶⁴ Robert B. Reich, *supra* note 26 at 83.

While most of the spill's acute effects—oil soaked birds, beaches slick with crude—have dissipated, Boesch says some contamination persists. "Areas in the deep water near the site of the blowout still have some level of contamination of oil in the sediment," he says. "It just takes a long time, once that material is in the sediment, to degrade because of the lack of oxygen." That lingering pollution has consequences near the site of the spill, particularly on the delicate microbiomes that are the building blocks of ocean life. A 2018 study led by a microbial ecologist at the University of Southern Mississippi found that biodiversity had been reduced in areas that had been affected by the spill, compared with areas that had not been exposed to the oil. A relatively small amount of the spilled oil washed onshore. But in fragile coastline areas in Louisiana and Mississippi, oil killed off the plants that had been holding the wetlands together. In 2016, scientists from the US Geological Survey published work showing how petroleum exposure from the BP spill increased the recession of the shoreline as vegetation died at the roots. "There are wetland areas that were oiled and died and they aren't recovering and they just won't recover," Boesch says.

And for long-lived marine animal populations, the oil spill has been deadly. Up to 167,600 turtles from five endangered species were estimated to have been killed as a result of the spill, according to an assessment by the National Oceanic and Atmospheric Administration. The contamination contributed to the Gulf of Mexico's largest and longest dolphin die-off, and research points to lasting reproductive issues among the region's population.

Additional changes to federal regulations would roll back protections put in place in the aftermath of the Deepwater Horizon disaster. Revisions to the Well Control Rule, implemented in 2016, would loosen third-party oversight of safety mechanisms like blowout preventers, which automatically seal leaking undersea wells. In the Deepwater Horizon explosion, a design flaw in its blowout preventer prevented it from working as intended."²⁵⁶⁵

Oil Industry & Kinder Morgan Pipeline

Source: Report

Canadian

The excerpt is an example of the influence of the lobbying of the oil and gas industry on the federal government. It also shows how lobbying can have a substantial impact on the policy-making process.

"From January 4, 2011 to January 30, 2018, 11,452 lobbying contacts (just over six contacts per working day) were recorded between the fossil fuel industry and [Canadian] federal government officials. The level of access to public office holders enjoyed by the industry is unparalleled. Oil and gas industry associations, which are central to the network of lobbyists, are far more active in lobbying federally than other resource and manufacturing associations while the amount of lobbying by environmental non-governmental organizations (ENGOS) pales in comparison. The bulk of these lobbying efforts, moreover, are carried out by a few large corporations (and industry associations representing the major players) that control much of this economic sector and therefore have the resources for permanent campaigns. The concentration in lobbying closely mirrors the ongoing concentration of fossil capital. Likewise, a handful of state organizations and state officials are the target of most lobbying by the fossil fuel industry. Therefore, the network, at its core, amounts to a "small world" of intense interaction among relatively few lobbyists/organizations and the designated public office holders in select centres of state power who are their targets."²⁵⁶⁶

²⁵⁶⁵ Annie Ma, *supra* note 27.

²⁵⁶⁶ Nicolas Graham, William K Carroll & David Chen, *supra* note 2 at 50.

"The NEB eventually approved the [Kinder Morgan] pipeline, on May 29, 2016, while Prime Minister Justin Trudeau gave the green light on November 29, 2016. In the lead-up to these 2016 decisions we find comparatively lower, but still extensive, lobbying contacts. In the year prior to Trudeau's announcement, Kinder Morgan Canada initiated 54 lobbying contacts with ministry representatives. ...

Documents obtained through freedom of information as well as interviews with public officials allowed De Souza to reveal that at an internal government meeting in Vancouver on October 27—more than a month before the final decision on the pipeline was announced—Erin O'Gorman, associate deputy minister of natural resources, instructed government bureaucrats to "give cabinet a legally sound basis for saying 'yes'" to the Trans Mountain project. In the meantime, Trudeau's government continued to claim that they had yet to come to a final decision and were consulting in good faith with First Nations. As Gutstein also reports, Kinder Morgan lobbied O'Gorman four times over the year, including one contact two weeks before the meeting in Vancouver, while her boss, deputy minister Bob Hamilton, was lobbied by the oil giant six times."²⁵⁶⁷

Oil Industry & PR Firm Recommendations on TransCanada Pipeline

Source: News

Canadian

This passage discusses some of the approaches large PR firms consider when working for industry groups on projects that are connected to lobbying and the use of astroturf tactics.

"The advice from a top American public relations firm was simple: A Canadian pipeline company should take aim at its opposition. In detailed proposals submitted in May and August, the public relations firm Edelman outlined a plan to investigate groups that had opposed Energy East, a pipeline in development by TransCanada. Edelman urged TransCanada to develop its own sympathetic supporters and spread any unflattering findings about the opposition.

"We cannot allow opponents to have a free pass," Edelman advised TransCanada, according to five documents that were obtained by Greenpeace, the environmental group. "To make an informed decision on this project, Canadians need to have a true picture of the motivations not only of the project proponents, but of its opponents as well." ...

In its proposal, Edelman proposed "a perpetual campaign to protect and enhance the value of the Energy East Pipeline and to help inoculate TransCanada from potential attacks in any arena," according to the documents. The language, at times, invoked a military battle, one that would "add layers of difficulty for our opponents, distracting them from their mission and causing them to redirect their resources."

Edelman declined to comment on the documents, which were confirmed by TransCanada. James Millar, a spokesman for TransCanada, said that the documents reflected recommendations from Edelman, which began working on the pipeline campaign in February. Mr. Millar said TransCanada did investigate opponents and their claims. He confirmed that the company had followed Edelman's advice to create a network of allies. But Mr. Millar said TransCanada had rejected Edelman's recommendation of using third parties in a campaign against opponents. ...

Ben Powless, the antipipeline campaigner at Ecology Ottawa, said he was somewhat surprised that Edelman, the largest independent public relations firm based on revenues, would be concerned about his small group's influence. Ecology Ottawa has about nine paid employees and mainly relies on volunteers who tend to be students and retirees. "To me, it's a smear campaign really trying to shut down the voices of local people who have legitimate concerns," Mr. Powless said. ...

The documents indicate that Edelman's efforts for TransCanada are being led by Mike Krempasky, the co-founder of the conservative blog RedState.com who joined Edelman in 2005. In the past, Mr. Krempasky has recruited bloggers and online commenters to post favorable comments about Walmart's business and labor practices. ...

²⁵⁶⁷ *Ibid* at 48.

TransCanada will continue working with Edelman, he [Mr. Miller} added. “They’ve done a good job for us,” Mr. Millar said.”²⁵⁶⁸

Oil Industry Gets Protests Criminalized

Source: News

This news article discusses one way lobbying is often used to attack other peoples’ freedom of speech: by seeking to have the government declare certain types of protests illegal.

“The American Fuel & Petrochemical Manufacturers, a powerful lobbying group that represents major chemical plants and oil refineries, including Valero Energy, Koch Industries, Chevron, ExxonMobil, and Marathon Petroleum, has flexed its muscle over environmental and energy policy for decades. The group is now leveraging its political power to criminalize protests of oil and gas infrastructure. In an audio recording obtained by The Intercept, the group concedes that it has been playing a role behind the scenes in crafting laws recently passed in states across the country to criminalize oil and gas pipeline protests, in response to protests over the Dakota Access pipeline. The laws make it a crime to trespass on public land used for “critical infrastructure,” impose a fine or prison time for violators, and hold protesters responsible for damage incurred during the protest. Many of the laws also carry heavy fines to groups and individuals who support such demonstrations.”²⁵⁶⁹

Oil Industry Spends \$47 million to Kill Ballot Initiatives that Would Prevent Climate Change

Source: News

This excerpt covers two incidents where the oil and gas industry worked to kill climate change mitigation ballot initiatives. It demonstrates how openly the fossil fuel industry will act to stop this legislation. It shows the vast wealth the industry can mobilize to accomplish these anti-social goals. If the industry is so willing to act directly, it is clear that it has little compunctions about exploiting any lobbying strategy that furthers its own wealth.

“In those states [Washington and Colorado], citizens who are tired of waiting for their elected officials to act are resorting to direct democracy: with ballot initiatives, up for votes on November 6, that would directly take on fossil fuels. (Washington’s would put a price on carbon emissions; Colorado’s would radically reduce oil and gas drilling.) According to their public records, in just those two states, just this year, oil and gas — both directly and through PACs — has dumped \$47 million into efforts to crush the initiatives. That number could easily top \$50 million by the time of the election. On two underdog state initiatives! Climate hawks often debate whether it works to frame Big Oil as the villain in the climate fight. But it’s not really a “messaging” question here. In these state fights over fossil fuels, Big Oil is playing the villain in a very non-metaphorical, non-symbolic way, in the form of spending outrageous amounts of money to fight off climate action.

Ballot initiatives are always an uphill climb, but Big Oil is taking no chances. As of this writing, the No on 1631 campaign has raised \$26.2 million. That is more money than has ever been marshaled for an initiative campaign, ever, in Washington history. (The previous record-holder was \$22.45 million spent by opponents of a GMO food-labeling initiative in 2013.) And almost all of that money is coming from oil companies outside the state. ... Meanwhile, Clean Air Clean Energy WA, the group backing 1631, has not quite reached \$15 million, mostly from state environmental groups and civic-minded billionaires like Michael Bloomberg and Bill Gates.”²⁵⁷⁰

²⁵⁶⁸ Ian Austen, “P.R. Firm Urges TransCanada to Target Opponents of Its Energy East Pipeline”, *N Y Times* (17 November 2014), online: <<http://www.nytimes.com/2014/11/18/business/pr-firm-urges-transcanada-to-target-opponents-of-its-energy-east-pipeline.html>>.

²⁵⁶⁹ Lee Fang, *supra* note 55.

²⁵⁷⁰ David Roberts, *supra* note 29.

Oil Industry Spent \$1 Billion on Anti-Climate Change Lobbying Since the Paris Accord

Source: News

This article demonstrates the immense sums spent on climate change denial campaigns and lobbying in favour of climate change, and against policies intended to save the planet.

“Major oil companies have spent \$1 billion on climate lobbying that is “overwhelmingly in conflict” with the Paris Agreement, according to one new report. And another report reveals oil execs laughing about their newfound access within the Trump administration.

While many oil companies have made a public show of their green energy investments, InfluenceMap reports that ExxonMobil, Royal Dutch Shell, Chevron, BP and Total have used more than \$1 billion in shareholder funds since the Paris Agreement on “misleading climate-related branding and lobbying.” These efforts are “designed to maintain the social and legal license to operate and expand fossil fuel operations.””²⁵⁷¹

Oil Industry Targets Ontario Provincial Ridings

Source: News

Canadian

This excerpt shows how lobbying and electoral campaigning overlap in Canadian politics. It also indicates that fossil fuel lobbying in Canada might be increasing and entering new phases.

“Canada’s largest oil and gas lobby group targeted voters in 13 Ontario “swing ridings” with rallies, billboards in “high visibility locations” in the Toronto area, and 400,000 pieces of pro-pipeline literature... The Canadian Association of Petroleum Producers (CAPP) conducted the advertising campaign between April 8 and May 29 — the period in which the federal government was deciding on the fate of the Trans Mountain pipeline. It included 13 rallies across the country and 24,000 letters sent to “key decision makers” including B.C. Premier John Horgan, Alberta Premier Rachel Notley and federal National Resources Minister Jim Carr, a leaked CAPP document reads.

“I’ve never seen the oil industry lobby like this before,” says Keith Stewart, senior strategist with Greenpeace. “What is absolutely unprecedented, as far as I know, is deliberately targeting swing ridings in order to impact the makeup of the government.”²⁵⁷²

Ontario – Ford Endorses Companies that Have Donated to His Party

Source: News

Canadian

This article hints at the influence campaign finance donations continue to wield, at least at the provincial level.

“After public donation records revealed that Doug Ford was endorsing Pelee Winery while receiving political donations from the company, Queen’s Park Today found that other businesses have had similar relationships with the provincial party. Their analysis discovered four other Ontario businesses whose

²⁵⁷¹ Phil Dzikiy, “Big oil pumps \$1 billion into climate change lobbying, execs laugh about Trump access”, (25 March 2019), online: *Electrek* <<https://electrek.co/2019/03/25/big-oil-climate-lobbying/>>. See also, Robert J. Brulle, *supra* note 30 at 295. See also, John Cook et al, *supra* note 30 at 4.

²⁵⁷² Robert Cribb, *supra* note 623 at 13.

executives have donated to the party and were featured on PC-operated Ontario News Now. The promotional videos are similar to one another in nature. Ford advocates for small businesses, often in relation to a policy he supports, and he tours their facilities with executives. On July 26, ONN featured a similar video to the Pelee Winery promo. Ford toured a factory, “identifying ways that our government can reduce red tape” for small businesses like Curtainsider Inc., trailer manufacturer and Dutch Mill Gardens flower farms.”²⁵⁷³

Ontario – Ford Government & Liquor Sales

Source: News

Canadian

This quote is an example of the relationship between lobbying and government policy at the provincial level in Canada. It shows how government policy is often tied tightly enough to lobbying that it can be difficult to determine whether the policy goal originated in government or the industry.

“The Progressive Conservatives are working closely with lobbyists and industry associations to promote expanded beer and wine sales — and internal government emails reveal an alliance was in place months ago. As the Tories strive to keep Premier Doug Ford’s campaign pledge to sell beer in corner stores, they have been co-ordinating efforts with the Ontario Convenience Stores Association (OSCA), the Retail Council of Canada, and other lobby groups. That has manifested itself in an unusual new website, choiceandfairness.ca, to boost the case for breaking a 10-year deal with the Beer Store signed in 2015 that limits where beer can be sold. Under the terms of that master framework agreement, the province could be forced to compensate the brewers for \$100 million already spent on infrastructure improvements, lost profits during a two-year price freeze in the contract, and other costs. If ultimately the 7,000-employee retailer is forced to wind down, taxpayers could be on the hook for severance payments, pension liabilities, and broken lease penalties, inflating the potential price-tag to \$1 billion.”²⁵⁷⁴

Ontario – Lobbyists Fear Losing Access Unless They Sell Ford Fundraiser Tickets

Source: News

Canadian

This article indicates that lobbying and campaign donations are still intertwined to some degree in Canada, at least at the provincial level. It shows how politicians can pressure lobbyists to provide campaign funds, if not prevented from doing so.

“Ontario’s Progressive Conservative Party has asked registered lobbyists to help sell tickets to Premier Doug Ford’s coming fundraising dinner, an event that companies and industry groups say they feel pressure to attend to maintain high-level access to the government. The \$1,250-a-person dinner is being billed as the largest fundraiser in party history and marks the first sizable event since the Ford government rolled back some of the campaign-finance reforms implemented by the former Liberal government after a cash-for-access scandal.

However, lagging ticket sales for the Feb. 27 event have prompted intense efforts to push people to attend and, in some cases, help persuade others to do so, according to multiple sources in business, government relations and the PC Party. The sources were granted anonymity by The Globe and Mail because of fears of negative professional consequences. Several people helping sell tickets, both in the lobbying and industry worlds, said they are under heavy pressure — including through repeated phone

²⁵⁷³ Hannah Alberga, “Four other companies Doug Ford endorsed have donated to his party”, (1 August 2019), online: *blogTO* <<https://www.blogto.com/city/2019/07/doug-ford-campaign-donations-ontario/>>.

²⁵⁷⁴ Robert Benzie, *supra* note 67.

calls and reminders of sales targets by party fundraisers – to fill the room amid concerns about their continued ability to get meetings with key decision-makers. ...

Mr. Ford recently encouraged Bay Street bankers at a private meeting to buy tickets to the dinner if they wanted to get to know him better, according to a source who attended the gathering. Asked about the comment, the Premier's spokesman, Simon Jefferies, said Mr. Ford "is continuing to motivate grassroots supporters to contribute to and support the party." The PC Party is hoping to raise at least \$2-million at the dinner, according to sources. Mr. Mattinson said the party is "on track for ticket sales" and "excited at the overwhelming support of this event." ...

Under new rules that took effect on Jan. 1, the government scrapped a ban that prevented the Premier, cabinet ministers and MPPs from attending fundraising events. The government also removed a requirement that all contributors fill out a form certifying that the donation was "from my own personal funds and I will not be reimbursed for it." As well, the province raised the maximum political contribution to \$1,600 a year from \$1,222. The Liberal rules were prompted by controversy over Ms. Wynne's party trading access for large donations, which involved some of the same players now helping Mr. Ford raise money."²⁵⁷⁵

Ontario – Parents' Group is an Astroturf Org. by Developer Lobbying about a Highway

Source: News

Canadian

This is an example of a Canadian astroturf organization operating at the provincial level. It shows the sometimes complicated overlap between astroturf activities and the goal of the organization.

"A development company with links to a fake parents' group lobbied Doug Ford's government shortly after the group's ads attacking school teachers [for their ongoing strike against increased class size] ran in three of Canada's biggest newspapers.

Earlier this month, a mysterious group calling itself "Vaughan Working Families" took out full-page ads attacking teachers in the Toronto Star, National Post and Globe and Mail, despite few signs the parents' group truly exists. ... In fact, the angry mother presented as the public face of the group turned out to be a Polish stock photo model whose husband insists she has no opinions about Ontario politics. ... The Toronto Star traced the "Vaughan Working Families" back to an advocacy group called "Vaughan Health Campus of Care." That organization previously registered as a third party advertiser and has a history of running partisan attack ads.

PressProgress later reported that millionaire developer Michael DeGasperis, who is well-connected in conservative circles, chairs the "Vaughan Health Campus of Care." DeGasperis is also on familiar terms with Education Minister Stephen Lecce. Last fall, Lecce's riding association held a \$1,000 per plate fundraiser at the developer's private golf club, which also happened to be the location of the education minister's 2020 New Year's Eve party last month. DeGasperis identifies himself as CEO of Arista Homes and Vice President of the TACC Group of Companies. Corporate records show he is also a director of TACC Developments, a subsidiary of the TACC Group of Companies. Lobbying records published by the Office of the Integrity Commissioner show a lobbyist working on behalf of TACC Developments had a rendez-vous with Ford's government on Valentine's Day — two weeks after "Vaughan Working Families" ran its controversial anti-teacher attack ads.

Peter Van Loan, a former federal Conservative MP and Leader of the Government in the House of Commons under Stephen Harper, lobbied several ministerial offices on behalf of TACC Developments on February 14. The lobbying communications report indicates TACC Developments targeted the offices of the Attorney General of Ontario, the Minister of Economic Development, Job Creation and Trade, the Associate Minister of Small Business and Red Tape Reduction, the Minister of Municipal Affairs and

²⁵⁷⁵ Jill Mahoney & Adam Radwanski, "Ontario lobbyists fear loss of access unless they sell Ford fundraiser tickets", *Globe Mail* (21 February 2019), online: <<https://www.theglobeandmail.com/canada/article-ontario-pcs-enlist-lobbyists-to-sell-1250-tickets-to-ford-fundraiser/>>.

Housing as well as the Minister of Transportation. The lobbying record states Van Loan lobbied the Ford government to influence the “impact of a proposed highway on Client’s lands.” ...

TACC Construction is a top stakeholder in the Lakeview Community Partners, a consortium of developers who bought the former OPG site in 2018. That communication report notes TACC lobbied the government through a different lobbyist named Amir Remtulla — who previously served as Rob Ford’s chief of staff. According to Maclean’s, Remtulla is a key lobbyist firms look to for access to the Ford government, representing mostly developers including those pushing for changes to laws around the greenbelt.”²⁵⁷⁶

Radioactive Waste Disposal Facility

Source: Book

The excerpt exposes some of the harm and special favours that can be linked to lobbying and campaign finance donations.

“Most prominently, Simmons owned a waste management firm, Waste Control Specialists, that for decades had sought—but failed—to get permission to build a low-level radioactive waste facility in Texas. ... Finally, in 2003—a year in which Simmons infused more than \$200,000 into Texas politics—the Texas legislature opened an unusually brief one-month window in which private companies could apply for permits to dispose of waste. Simmons’s firm submitted the only application, and ultimately built the facility. (Other firms may have simply been unable to put together a competitive proposal in such a short period of time. Or they may have figured that the project was a done deal for insider Simmons.)⁹² The opening of a short application window was not the only state or local government favor to Simmons. In 2007, three members of the Texas Commission on Environmental Quality (TCEQ) resigned in frustration with the subsequent licensing process. One of them told a journalist that he felt it was inevitable that Simmons’s company would receive a license to build and operate the facility, regardless of its potential environmental effects—including the potential for contamination of groundwater due to the site’s particular geological properties. ... Moreover, in March 2009, the commissioners of Andrews County hastily added a bond measure to the May 2009 ballot to help Waste Control Specialists finance construction. The bond measure subsequently passed by a mere three-vote margin over the protests of numerous community members...”²⁵⁷⁷

Saudi-Funded Lobbyist Paid for 500 Rooms at Trump’s Hotel & Astroturf Lobbying of Veterans

Source: News

This passage demonstrates one form of the overlap between lobbying, circumspect bribery and the corruption risk of an official running a private business. It also demonstrates how interests can manipulate individuals to essentially form an astroturf organization.

“Lobbyists representing the Saudi government reserved blocks of rooms at President Trump’s Washington, D.C., hotel within a month of Trump’s election in 2016 — paying for an estimated 500 nights at the luxury hotel in just three months, according to organizers of the trips and documents obtained by The Washington Post. At the time, these lobbyists were reserving large numbers of D.C.-area hotel rooms as part of an unorthodox campaign that offered U.S. military veterans a free trip to Washington — then sent them to Capitol Hill to lobby against a law the Saudis opposed, according to veterans and organizers.

²⁵⁷⁶ Pressprogress, “Developer With Links to Fake Parents’ Group Lobbied Ford Government Following Anti-Teacher Attack Ads”, (21 February 2020), online: *PressProgress* <<https://pressprogress.ca/developer-with-links-to-fake-parents-group-lobbied-ford-government-following-anti-teacher-attack-ads/>>.

²⁵⁷⁷ Benjamin I. Page, Jason Seawright & Matthew J. Lacombe, *supra* note 2283 at 120.

At first, lobbyists for the Saudis put the veterans up in Northern Virginia. Then, in December 2016, they switched most of their business to the Trump International Hotel in downtown Washington. In all, the lobbyists spent more than \$270,000 to house six groups of visiting veterans at the Trump hotel, which Trump still owns. Those bookings have fueled a pair of federal lawsuits alleging Trump violated the Constitution by taking improper payments from foreign governments. During this period, records show, the average nightly rate at the hotel was \$768. The lobbyists who ran the trips say they chose Trump's hotel strictly because it offered a discount from that rate and had rooms available, not to curry favor with Trump. ...

"I said, 'Oh, we were just used to give Trump money,' " Garcia said. ...

Veterans said they were told that the new law might cause other countries to retaliate and might lead to U.S. veterans being prosecuted overseas for what their units had done in war. They were given a few fact sheets — including one with small print at the bottom, reading "This is distributed by Qorvis MSLGROUP on behalf of the Royal Embassy of Saudi Arabia." But they said they weren't given detailed briefings about how the law ought to be amended, or policy briefings to leave behind for legislators to study. ...

"We'd walk in there, and they'd go, 'Are you the veterans that are getting bribed?' " Suesakul said."²⁵⁷⁸

Savings & Loans Scandal and Lobbying

Source: Book

This excerpt discusses how campaign donations and lobbying exacerbated the savings and loans scandal.

"[T]he court case against Charles Keating, the owner of Lincoln Savings and Loan, revealed some estimates of the relationship between campaign contributions and taxpayer losses. As a partial return on Keating's \$1.4 million of campaign donations, five U.S. senators browbeat the regulators who had begun to investigate him. Those senators met with the regulators; and they pointedly said they wanted to be sure that the Federal Home Loan Bank Board would not "injure a constituent." This and similar roadblocks Keating tossed in the way of the investigations were responsible for an estimated \$1 billion of the \$2 billion to \$3 billion total cost of resolving his bankrupt savings and loan."²⁵⁷⁹

SNC-Lavalin Scandal

Source: News

Canadian

The passage shows how lobbying was likely connected to the Canadian SNC-Lavalin scandal.

"Prime Minister Justin Trudeau found himself in the opposition's crosshairs Thursday following a report that he pressed former Justice Minister Jody Wilson-Raybould to intervene in the prosecution of construction giant SNC-Lavalin on charges of fraud and corruption. ... Guy Caron, parliamentary leader for the New Democratic Party, drew a link between the allegations and illegal political donations the company has made in the past. "SNC-Lavalin illegally gave more than \$110,000 to the Liberal Party and its (riding) associations. Today, SNC-Lavalin needs a helping hand because they are in trouble," Caron said, pointing out that the company had lobbied the government more than 50 times in the past two

²⁵⁷⁸ David A Fahrenthold & Jonathan O'Connell, "Saudi-funded lobbyist paid for 500 rooms at Trump's hotel after 2016 election", *Wash Post* (5 December 2018), online: <https://www.washingtonpost.com/politics/saudi-funded-lobbyist-paid-for-500-rooms-at-trumps-hotel-after-2016-election/2018/12/05/29603a64-f417-11e8-bc79-68604ed88993_story.html>.

²⁵⁷⁹ George A. Akerlof & Robert J. Shiller, *supra* note 52 at 82.

years. “The justice minister was fired and everybody asked why. Was she fired because the bottom line is a friend is a friend?””²⁵⁸⁰

SNC-Lavalin Scandal – Timeline

Source: News

Canadian

This excerpt covers the timeline of the SNC-Lavalin scandal, and provides more evidence that lobbying was a key factor in the development of the scandal.

“Feb. 19, 2015 — RCMP charges SNC-Lavalin and two of its subsidiaries — SNC-Lavalin Construction Inc. and SNC-Lavalin International Inc. — with one count of fraud and one count of corruption. Police allege that, between 2001 and 2011, SNC-Lavalin bribed officials in Libya to the tune of nearly \$47.7 million, and that the company defrauded various Libyan organizations of about \$129.8 million. SNC-Lavalin later pleads not guilty.

Feb. 11, 2016 — Less than four months after the Liberals’ win power, SNC-Lavalin starts lobbying Justin Trudeau’s Prime Minister’s Office on the subject of “justice and law enforcement.” There were 18 interactions between PMO staff and SNC-Lavalin on the subject over the next three years, according to the federal lobbyist registry. The company also lobbied six Liberal cabinet ministers and dozens more government officials on the subject over that timespan.

Sept. 25, 2017 — The federal government starts public consultations about introducing remediation agreements — also called “deferred prosecution agreements” — to the Canadian justice system. Like plea deals involving individuals, these agreements suspend criminal prosecutions if the corporation agrees to pay fines and co-operate with authorities. A criminal conviction would bar SNC-Lavalin from bidding on Canadian federal contracts for 10 years.

March 27, 2018 — The Liberal government tables a 582-page omnibus bill that includes the introduction of remediation agreements. After the agreements are briefly discussed at the House of Commons finance committee, the bill passes and becomes law as Parliament breaks for the summer. ...

Sept. 17, 2018 — Trudeau speaks with Jody Wilson-Raybould about SNC-Lavalin. Trudeau later says most of their discussion is a matter of cabinet confidentiality but she asked him “if I was directing her or giving her instructions in relation to this decision” about the company’s criminal case. The prime minister denies he was pushing her to offer SNC a remediation deal. “I told her, ‘no, assuredly not. It’s your decision to take.’” Michael Wernick, Clerk of the Privy Council, attended the meeting. He says Wilson-Raybould

Sept. 18, 2018 — Wernick meets with SNC-Lavalin CEO Neil Bruce and two other company officials. SNC-Lavalin also meets with Finance Minister Bill Morneau and Ben Chin, and deputy finance minister Paul Rochon. The Globe and Mail later reports SNC-Lavalin warned on Sept. 18 that the Montreal-based company might have to move to Britain or that could face a takeover bid if it was not able to enter a remediation agreement with prosecutors.

Oct. 9, 2018 — The federal public prosecutor’s office writes to SNC-Lavalin, informing the company that no mediation deal will be offered. In a press release the next day, SNC-Lavalin says it “strongly disagrees” with the decision and vows to keep pushing for remediation. The company later asks a federal court judge to force prosecutors to reconsider.

Oct. 10, 2018 — Quebec Premier François Legault raises his concerns with Trudeau at the Francophonie summit in Armenia, asking Trudeau “to make sure this situation is settled as quickly as possible,” according to Legault’s office.

²⁵⁸⁰ Elizabeth Thompson, “Trudeau under fire over claim he pressured justice minister to intervene in SNC-Lavalin fraud case”, (7 February 2019), online: CBC <<https://www.cbc.ca/news/politics/trudeau-snc-lavalin-fraud-corruption-1.5009578>>.

Oct. 15, 2018 — Trudeau receives a letter from SNC-Lavalin chief executive Neil Bruce, in which he raises concerns about the remediation agreements.

Oct. 29, 2018 — The preliminary inquiry into bribery and fraud charges against SNC-Lavalin begins.

Nov. 11, 2018 — SNC-Lavalin CEO Neil Bruce meets with Ben Chin, chief of staff to Finance Minister Bill Morneau, and with PMO policy advisor Mathieu Bouchard

Dec. 5, 2018 — Gerald Butts, Trudeau's principal secretary, meets with Wilson-Raybould. She brings up SNC-Lavalin and Butts tells her to discuss the matter with Privy Council Clerk Wernick, according to Trudeau's spokesperson Cameron Ahmad.

Dec. 6, 2018 — Trudeau responds to the SNC-Lavalin executive's Oct. 15 letter. Trudeau said he passed his concerns to Wilson-Raybould, then the justice minister and attorney general, because the issues he raised deal with matters that are being dealt with in court. Trudeau also sends a letter to Wilson-Raybould, informing her of the Oct. 15 letter about SNC-Lavalin's concerns. ...

Dec. 19, 2018 — Wernick has lunch with Trudeau, and calls Wilson-Raybould in the afternoon to "check in" on the SNC-Lavalin case. He testified he wanted to convey "the consequences" of her decision on whether to intervene in the SNC-Lavalin case. These include the impacts of the business closing or moving abroad on "innocent" shareholders, workers, pensioners, contractors and others, he says. Wernick denies this means he applied "inappropriate pressure" on Wilson-Raybould to intervene in the case.

Jan. 6-7, 2018 — Trudeau begins discussions with cabinet members about a pending shuffle, according to Wernick. ...

Jan. 14, 2019 — Trudeau shuffles his cabinet. He moves Wilson-Raybould out of justice and into veterans' affairs, an assignment widely seen as a demotion. Later in the day, the Vancouver MP publishes an unusual 2,000-word statement underscoring her achievements and how she strove to be independent from partisan considerations as Canada's attorney general. "It is a pillar of democracy that our system of justice be free from even the perception of political interference," she writes. ...

Feb. 7, 2019 — The Globe and Mail publishes a bombshell report citing unnamed sources who allege officials in Trudeau's office pressured Wilson-Raybould to overrule federal prosecutors by offering a remediation agreement to SNC-Lavalin. Trudeau denies any political interference whatsoever. Wilson-Raybould refuses to confirm or deny the allegations, and refuses to publicly back the prime minister's version, citing solicitor-client privilege. ...

Feb. 12, 2019 — Wilson-Raybould releases her resignation letter to the public. Trudeau in Winnipeg says he is "surprised and disappointed" and that she failed to flag to him any concerns about undue pressure or political interference. He said she had an obligation as attorney-general to raise it with him and never did, choosing instead to remain in his cabinet. Trudeau holds emergency conference call to reassure his MPs no political pressure was put on her. ...

Feb. 13, 2019 — Liberal MPs block the Opposition effort to call Wilson-Raybould to testify about the affair at the House of Commons justice committee. ...

Feb. 18, 2019 — Trudeau's principal secretary, Butts, resigns from the PMO. He denies that he or anyone in the PMO "pressured Ms. Wilson-Raybould" to make a decision about the SNC-Lavalin prosecution.

Feb. 19, 2019 — One week after she resigns from cabinet, Wilson-Raybould attends the Liberal government's cabinet meeting in Ottawa. Hours later, the Liberal-controlled justice committee agrees to invite Wilson-Raybould to testify at the committee. She tells reporters she is still working with her lawyer to determine what she can say publicly.

Feb. 20, 2019 — Almost all Liberal MPs in the House of Commons defeat an NDP motion to launch a public inquiry and call on Trudeau to waive solicitor-client privilege so that Wilson-Raybould is free to speak publicly. During the vote, Wilson-Raybould tells the Commons that she wants her chance to "speak my truth." ...

Feb. 27, 2019 — Trudeau defends the remaining restrictions on Wilson-Raybould and says she'll be able to tell her story to the ethics committee and the justice committee which are looking into "whether or

not the attorney general underwent pressure or inappropriate pressure.” Wilson-Raybould testifies at the justice committee.”²⁵⁸¹

SNC-Lavalin Scandal – Illegal Campaign Finance Donations

Source: News

Canadian

This passage discusses one of the Canadian campaign finance scandals.

“Canadians may never know the details of an elaborate scheme orchestrated by engineering giant SNC Lavalin to funnel more than \$117,000 to two federal political parties after one of the key players quietly pleaded guilty a few weeks ago. Normand Morin, the 76-year-old former vice-president of the company, took advantage of a routine court appearance in late November to plead guilty to two of five charges of contravening Canada's election financing rules. The prosecution dropped the remaining three charges. Morin was given 60 days to pay \$2,000 in fines. ...

"He has a fairly strong sense of frustration. He doesn't understand why him and not the others. According to the evidence, they attribute a certain role to him but he was certainly not the person who personally profited from the advantages that were perhaps derived from that contribution."

A compliance agreement signed by SNC Lavalin in 2016 refers to a system that involved "certain former senior executives" of the company. Employees were encouraged to donate to federal political parties, then were reimbursed by the company through "false refunds for personal expenses or payment of fictitious bonuses." Under federal election financing laws, companies are not allowed to contribute to parties or candidates.

The scheme allowed SNC Lavalin to circumvent the law by making political donations indirectly through its employees. The vast majority of the money contributed between 2004 and 2011 went to the federal Liberal Party. According to a 2016 compliance agreement with SNC Lavalin, the Liberal Party of Canada received \$83,534 while various Liberal riding associations received \$13,552. Contestants in the Liberal Party's 2006 leadership race got \$12,529. ... The Conservative Party of Canada netted far less as a result of the scheme. The party received \$3,137, while various Conservative Party riding associations and candidates were given \$5,050. Again, there is no mention of which candidates, riding associations or fundraisers were involved.”²⁵⁸²

SNC-Lavalin Scandal – Illegal Campaign Finance Donations Quebec

Source: News

Canadian

This excerpt discusses another campaign funding scandal involving SNC-Lavalin.

“Yves Cadotte, SNC-Lavalin’s general vice-president, told the province’s corruption inquiry the Quebec Liberal Party (PLQ) and the Parti Québécois (PQ) asked for money from the company on an annual basis. Managers at SNC-Lavalin donated more than \$1 million, which was divided almost evenly between both parties, between 1998 and 2010, the inquiry heard. It is illegal for corporations to donate to political parties in Quebec. The firm’s vice-president said political parties wanted set amounts of donations and expected them to be delivered.

"There are still parties in power and it's the market that is important to us," said Cadotte. "We want to make sure we can take part in our activities and agree to the demands that are made [by the parties]."

²⁵⁸¹ Tonda MacCharles & Alex Ballingall, “SNC-Lavalin: What happened and when”, (15 February 2019), online: *The Star* <<https://www.thestar.com/politics/federal/2019/02/15/snc-lavalin-what-happened-and-when.html>>.

²⁵⁸² Elizabeth Thompson, “Key figure in illegal election financing scheme quietly pleads guilty”, (19 January 2019), online: *CBC* <<https://www.cbc.ca/news/politics/trudeau-snc-lavalin-fraud-corruption-1.5009578>>.

Cadotte alleged that Normand Morin, Pierre Anctil and Riadh Ben Aïssa – who all served as executive vice-president at SNC-Lavalin – were involved in asking employees to write donation cheques to the Liberal Party and the PQ. During his testimony, Cadotte said about 50 employees and some of their spouses had agreed to lend their names for party donations, a violation of Quebec's law limiting political fundraising. He said the employees were free to decide which party they wished to support and SNC-Lavalin would reimburse them through year-end bonuses.”²⁵⁸³

SNC-Lavalin Scandal – Quebec Recoups Cash Lost to Corruption

Source: News

Canadian

This excerpt discusses another political scandal involving SNC-Lavalin. The pattern raises question about whether more oversight over SNC-Lavalin's political activities is needed.

“Quebec has reached deals to get \$95 million in a voluntary redemption program aimed at recouping cash lost to corruption, collusion or bid rigging in the awarding of public contracts. A report released Wednesday said \$75 million has already been repaid and that agreements have been reached with 31 individuals and businesses. The program began in November 2015 and was created in the wake of Quebec's corruption inquiry, known as the Charbonneau Commission. The program ran until December 2017 and was designed to enable municipalities, school boards or Quebec government departments or agencies to be repaid money they were overcharged over 20 years. It did not extend to federal government contracts. Quebec Justice Minister Stephanie Vallée says participants who concluded repayment deals included SNC-Lavalin, Cima+ and Dessau.”²⁵⁸⁴

Soda Tax, Astroturf Lobbying & Short Term Civic Engagement

Source: News

This article covers the use of astroturf organizations that involve citizens, and how such use of astroturf organizations diminishes democracy and leads to shallow civic engagement.

“[There are] hundreds of consulting shops across the U.S. that work for a diverse range of clients on public issues ranging from immigration reform to intellectual property laws. And their work is large-scale, with the leading campaign by an average public affairs consulting firm targeting over 750,000 Americans for participation, in turn facilitating the participation of millions of Americans every year. This is not the kind of participation that proponents of deliberative democracy might envision. Instead, it's short-term and transactional. In many ways it's changing the face of civic engagement across the U.S.

There's a reason for this: consultants are being paid by their clients to win public policy battles, not to strengthen democracy and generate the long term relationships that integrate local community members and build bridges across social divides. ... They are much less likely to engage in meaningful organization building. It's civic engagement from the perspective of the war room.

Take the recent “soda tax” battles in San Francisco and Berkeley. The Nov. 4 ballots in both of these Bay Area cities had propositions asking voters whether they wanted new taxes on sugary drinks within their municipalities. ... The beverage industry and its associated interests fiercely resisted these proposals. But the battle over soda taxes galvanized short term actions, not long-term organizing efforts that would enhance the capacity of communities. The beverage industry, with the support of consultants

²⁵⁸³ CBC News · Posted: Mar 14, 2013 6:58 PM ET | Last Updated: March 15 & 2013, “SNC-Lavalin exec admits to illegal party financing in Quebec | CBC News”, online: CBC <<https://www.cbc.ca/news/canada/montreal/snc-lavalin-exec-admits-to-illegal-party-financing-in-quebec-1.1323059>>.

²⁵⁸⁴ The Canadian Press, “Quebec to get back \$95M lost through corruption and bid rigging | CBC News”, (13 June 2018), online: CBC <<https://www.cbc.ca/news/canada/montreal/corruption-bid-rigging-compensation-1.4705040>>.

worked through a front group called the Coalition for an Affordable City (CAC) ... the coalition was focused on one (and only one) issue: shooting down soda taxes. While the American Beverage Association's sponsorship of the group was disclosed plainly, an ABC Nightline report found evidence that protesters were being recruited for pay on Craigslist, and many local businesses listed as supporters of the campaign were unaware of their supposed involvement. ...

Cases like this – other examples involve the regulation of for-profit colleges, telecom firms, and “sharing economy” companies like AirBnb – see business trying to win on specific issues. The result is that civic participation is more and more ‘transactional.’ New data-driven targeting strategies only make this worse. ...

Moreover, because those likely-to-participate citizens that consultants target are already over-represented in the political system – those with a history of political activism, the highly partisan, and the more educated – business strategies to mobilize civic engagement tend to make participation even more unequal, by getting those who are already involved in politics to participate more, rather than drawing in people who are less engaged with the political system.”²⁵⁸⁵

Tech Startups Urge Ottawa Not to Raise Taxes On Stock Options Over \$100,000

Source: News

This quote shows an example of standard Canadian lobbying.

“A group of leading Canadian tech entrepreneurs has told the Liberal government they need help recruiting top foreign talent and finding customers – not handouts – if they are to replace BlackBerry and Nortel Networks as Canadian-based tech giants. Their first ask: that the government back down on an election pledge to increase taxation of stock options. ... The CCI is hoping to influence the government's innovation agenda at a time when the tech sector has emerged as one of the few bright spots in the country's sluggish, resources-dependent economy. Mr. Balsillie and Mr. Ruffolo mobilized the CCI's charter members to join forces after telling them at a private gathering this fall that global tech giants do a far better job lobbying Ottawa than startups do, implying they risk being left behind when governments set policies. ...

“We are not asking for special treatment, preferential access or any favours,” he said. ... CCI members zeroed in at the meeting on a pledge by the government to fully tax individual stock-options gains exceeding \$100,000.”²⁵⁸⁶

Trump Administration Appoints Corrupt Lobbyist to EPA

Source: News

This excerpt demonstrates the damaging impact of appointing industry lobbyists to regulatory oversight positions.

“In the four months since he took office as the Environmental Protection Agency's administrator, Scott Pruitt has moved to undo, delay or otherwise block more than 30 environmental rules, a regulatory rollback larger in scope than any other over so short a time in the agency's 47-year history, according to experts in environmental law. ...

Since February, Mr. Pruitt has filed a proposal of intent to undo or weaken Mr. Obama's climate change regulations, known as the Clean Power Plan. In late June, he filed a legal plan to repeal an Obama-era rule curbing pollution in the nation's waterways. He delayed a rule that would require fossil fuel companies to rein in leaks of methane, a potent greenhouse gas, from oil and gas wells. He delayed the

²⁵⁸⁵ Edward Walker, *supra* note 2190.

²⁵⁸⁶ Sean Silcoff, “Tech startups urge Ottawa not to raise taxes on stock options”, *Globe Mail* (30 December 2015), online: <<http://www.theglobeandmail.com/report-on-business/small-business/talent/tech-startups-urge-ottawa-not-to-raise-taxes-on-stock-options/article27968089/>>.

date by which companies must comply with a rule to prevent explosions and spills at chemical plants. And he reversed a ban on the use of a pesticide that the E.P.A.'s own scientists have said is linked to damage of children's nervous systems. ...

And he is doing all this largely without the input of the 15,000 career employees at the agency he heads, according to interviews with over 20 current and former E.P.A. senior career staff members.

"I have been consistently informed by multiple career people at E.P.A. that Administrator Pruitt is not meeting with them ahead of making decisions like rolling back these major regulations," said James J. Jones, who had worked at the agency...

Instead, Mr. Pruitt has outsourced crucial work to a network of lawyers, lobbyists and other allies, especially Republican state attorneys general, a network he worked with closely as the head of the Republican Attorneys General Association. Since 2013, the group has collected \$4.2 million from fossil fuel-related companies like Exxon Mobil, Koch Industries, Murray Energy and Southern Company, businesses that also worked closely with Mr. Pruitt in many of the 14 lawsuits he filed against the E.P.A. Within the agency, Mr. Pruitt relies on the counsel of a small network of political appointees, including a number of former lobbyists and senior industry officials. For example, he tapped Nancy Beck, previously a policy director for the American Chemistry Council, which lobbies on behalf of companies such as Dow and DuPont, to oversee the E.P.A. office charged with enforcing regulations on hazardous chemicals.

"It amounts to a corporate takeover of the agency, in its decision- and policy-making functions," said Robert Weissman, the president of Public Citizen, a government watchdog group.

But Mr. Pruitt's main source of counsel on industry regulations appears to be the industries he regulates. An excerpt from his calendar for Feb. 21 to March 31, acquired through the Freedom of Information Act by the energy trade publication E & E News, details multiple meetings with chief executives and lobbyists from oil, gas, chemical, agribusiness and other industries regulated by the E.P.A., as well as with Mr. Pruitt's personally appointed political staff — but few meetings with career employees or environmental groups. ...

Dow Chemical Company had pushed the E.P.A. to reconsider an Obama-era ban on the use of chlorpyrifos, a pesticide that the E.P.A.'s scientists have concluded causes developmental damage in children. On March 30, Mr. Pruitt reversed the ban.

On March 13, Mr. Pruitt met with agriculture lobbyists, including Dale Moore, executive director of the American Farm Bureau Federation, which has lobbied heavily for the repeal of an Obama-era regulation that could restrict the use of fertilizers near waterways. Last month, Mr. Pruitt filed a draft plan to repeal the Waters of the United States Rule.

On March 22, he had dinner at the Trump International Hotel in Washington with 45 members of the board of directors of the American Petroleum Institute, a body composed largely of chief executive officers of the oil and gas industry. At the time, oil and gas companies were pushing the E.P.A. to roll back a set of rules on methane leaks from drilling wells, which the industry estimates could cost it over \$170 million.

On June 13, Mr. Pruitt filed a proposal to delay those regulations by two years, and the agency is expected to rewrite them. In the filing, he noted that the E.P.A. had concluded that a delay of the pollution rules "may have a disproportionate effect on children." But he also said the rules would come at a significant cost to the oil and gas industry."²⁵⁸⁷

Trump Administration Appoints Corrupt Lobbyist to Head Interior Department to Replace Lobbyist Appointed to Head Interior Department Removed for Corruption

Source: News

These passages aptly demonstrate the corruption risk of appointing lobbyists to regulatory positions.

²⁵⁸⁷ Coral Davenport, *supra* note 946.

"Interior Secretary Ryan Zinke will step down by the end of this year, President Donald Trump announced Saturday, making him the latest Trump administration Cabinet official forced to resign amid scandal. ... His impending exit will make him the most recent in line of Trump administration officials to leave under a cloud of ethical scandals, including former EPA Administrator Scott Pruitt and former HHS Secretary Tom Price. ... The Interior department's internal watchdog had been investigating Zinke for his ties to a Montana land deal backed by Dave Lesar, chairman of the giant oil services company Halliburton, an issue first reported by POLITICO in June. The inspector also was examining whether he was doing favors for lobbyists when Interior blocked two American Indian tribes in Connecticut from receiving a casino license, an issue POLITICO revealed in February.

"Secretary Zinke has been a shameless handmaiden for the special interests," House Democratic leader Nancy Pelosi said in a statement. "His staggering ethical abuses have delivered a serious and lasting blow to America's public lands, environment, clean air and clean water."

The high turnover rate at the Cabinet level flows directly from President Donald Trump's own mixing of business and politics, said Walter Shaub, who stepped down as director of the Office of Government Ethics in July 2017 and is now a senior adviser at Citizens for Responsibility and Ethics in Washington.

"My experience with them was they said, 'Show me the exact rule that says you have to do exactly what you're saying,' and of course there's never an exact rule that says don't get into a land deal in Montana with an oil company," Shaub said.

Zinke also drew scrutiny for his mixing of politics and official business during taxpayer-funded travels such as trips to the U.S. Virgin Islands, a Montana ski resort and an Alaska steakhouse; his use of government helicopters to help him attend events such as a horseback ride with Vice President Mike Pence; and his relationships with political operatives whom other conservatives have accused of misleading donors to so-called "scam PACs."

Environmental and conservation groups who had fought with Zinke during his tenure did not relish having to deal with his replacement, however. Bernhardt brought its own baggage, his critics have said, as his lobbyist and legal work for companies involved in mining, water rights and oil and gas production have laden him with potential conflicts of interest at Interior. Bernhardt worked at Interior as solicitor during the George W. Bush administration, a time when the department had also been rocked by scandal over its division overseeing energy leases. He then went to lobbyist firm Brownstein Hyatt Farber Schreck, where he worked for a client seeking to pump water from the Mojave Desert to Southern California. Bernhardt has already been Interior's point person for congressional negotiations around the department's proposal to reorganize its regional districts around watersheds instead of state borders. He has also been instrumental in weakening Interior's role in administering the Endangered Species Act, a move that environmental groups have said would allow more oil and gas drilling in ecologically sensitive areas.²⁵⁸⁸

"Former U.S. Interior Secretary Ryan Zinke is quickly parlaying his time in President Donald Trump's cabinet into a lucrative private career. He's landed a more than \$100,000-a-year post at a Nevada mining company and is pursuing involvement in natural gas exports that have surged under Trump, Zinke told The Associated Press Tuesday. The rapid transition from the highest levels of the executive branch to the corporate boardroom is raising questions about possible conflicts of interest. It comes fewer than four months after Zinke left a Cabinet position overseeing the country's oil and gas, coal and other natural resources and those companies that profit off their extraction.

During Zinke's time at Interior, the agency's inspector general investigated his decision to stop a major study into the health effects of coal mining, as well as his travel and other issues. Former industry lobbyist David Bernhardt was confirmed to succeed Zinke as Interior secretary last week. On Monday,

²⁵⁸⁸ Ben Lefebvre, "Zinke to leave Interior amid scandals", (15 December 2018), online: *POLITICO* <<https://politi.co/2rDJWsc>>.

the agency's inspector general revealed Bernhardt was under investigation for possible conflicts of interest after allegedly involving himself in deliberations involving former clients."²⁵⁸⁹

"Only a few short weeks after President Donald Trump nominated David Bernhardt, a former oil and agriculture industry lobbyist, to run the Interior Department, the agency is facing a slew of new allegations that top officials violated federal ethics rules by keeping cozy ties to their former employers.

A lengthy ethics complaint filed Wednesday by the Campaign Legal Center, a Washington, D.C.-based watchdog group, outlines "a disturbing pattern of misconduct" at the scandal-plagued Interior Department, including meetings that violate the White House's own ethical pledge and good governance standards. The Campaign Legal Center used public records, some of which were first obtained by The Intercept, to lodge the complaint against six top Interior Department officials, including Benjamin Cassidy, a top official at the department's external affairs office and former National Rifle Association lobbyist; Assistant Secretary for Insular Affairs Douglas Domenech; White House liaison Lori Mashburn, a former Heritage Foundation staffer; and others.

The officials are among a little-known but powerful group of Department of Interior political appointees — many of whom joined the agency after careers with fossil fuel groups or conservative lobbying organizations. Amid an environment of persistent ethics issues at the Interior Department, these officials are responsible for the Trump administration's ongoing campaign to roll back environmental protections and open public lands to extractive industry interests. Even as they've succeeded at this effort, however, several of these appointees have struggled to comply with federal ethics rules governing conflicts of interest, drawing intense and unwanted criticism from environmentalists, government watchdog groups, and the general public.

Among other allegations, the Campaign Legal Center contends that some of these officials have apparently used their government positions to provide their former private employers with access and insight into the Interior Department's activities. Under the White House's own ethics pledge, executive branch officials are explicitly prohibited for a period of two years from the date of their appointment from meeting or communicating with previous employers to discuss specific policy matters.

"Based on what we know, it appears that top Interior Department officials have violated both the ethics pledge and the requirement that public officials avoid even the appearance of impropriety," says Delaney Marsco, a legal counsel specializing in ethics at the Campaign Legal Center. "This is a big deal. It not only reveals a pattern of indifference toward ethics at Interior's highest levels, but it also calls into question the true motives of our public servants tasked with the immense responsibility of managing the country's natural resources." ...

Some top officials at the department have been caught in apparent violation of federal ethics rules. Others have interfered with scientific research that the department funds or oversees. Still others have spent their time in office bending government policy to benefit industry lobbyists and conservative operatives.

"The Interior Department's culture of corruption under President Trump didn't start or end with Ryan Zinke," wrote Rep. Raúl Grijalva, D-Ariz., the chair of the committee, in an emailed statement. "These complaints need to be taken seriously, and this administration needs to stop filling our federal agencies with polluter industry loyalists. As Chairman I have no intention of looking the other way when Trump officials violate their ethics pledges or sell out the public trust."²⁵⁹⁰

²⁵⁸⁹ The Associated Press, "Correction: Zinke-Gold Mining Job story", (24 April 2019), online: *Financ Post* <<https://business.financialpost.com/pmn/business-pmn/correction-zinke-gold-mining-job-story>>. The mining company received approval for an extensive Plan of Operations / Reclamation permit on previously out-of-limits public land from Zinke's interior department on Sept. 17, 2018, shortly before he left office. U S Gold Corp, "U.S. Gold Corp. Receives Keystone Environmental Assessment / Plan of Operations Approval", (7 September 2018), online: *Cision* <<https://www.newswire.ca/news-releases/us-gold-corp-receives-keystone-environmental-assessment--plan-of-operations-approval-693462361.html>>.

²⁵⁹⁰ Jimmy Tobias & Jesse Coleman, *supra* note 33.

"The law and lobbying firm that previously employed President Trump's pick to run the Interior Department [David Bernhardt] saw a surge in revenue from clients hoping to influence the agency after he left for its upper ranks in 2017. Over the past three years, according to federal records, acting interior secretary David Bernhardt's former firm Brownstein Hyatt Farber Schreck has quadrupled its business related to Interior."²⁵⁹¹

Trump Administration Appoints DeVry Official to Lead College Enforcement Unit

Source: News

This quote also demonstrates the impact of appointing industry lobbyists to regulatory oversight positions.

"The Trump administration has tapped a former for-profit college official to lead the Education Department unit that polices fraud in higher education. ... DeVry's parent company, which has since rebranded as Adtalem Global Education, last year agreed to pay \$100 million to resolve allegations by the Federal Trade Commission that the for-profit college company misled students about their job and salary prospects. The company also separately reached a settlement with the Education Department over similar allegations. Obama administration officials cited those cases against DeVry as they announced the formation of the Student Aid Unit last year. The unit Schmoke will oversee is also responsible for processing debt relief claims filed by federal student loan borrowers who say they've been defrauded by their college. DeVry students had 1,872 "borrower defense to repayment" claims pending before the department, according to a July 7 letter from acting Undersecretary of Education James Manning. The Trump administration has stopped approving new "borrower defense" claims, but DeVos has said she'll honor the claims previously approved by the Obama Education Department.

Johnson ... also announced the hiring of several other top officials for his office: Michael Dean, the chief financial officer at First Performance Global, the payment technology company that Johnson founded and previously led, will become the chief enterprise risk officer of the Federal Student Aid office. Chris Greene, the former communications director of FSA who most recently worked at The College Board, will re-join the Education Department as its chief customer experience officer. Charles Patterson, the vice president for research and economic development at Georgia Southern University, will become a senior adviser for "executive-level outreach," which is a new position. Laura Shuler is senior adviser for business processes. Shuler "most recently supported the marketing activities in the launch of a private student loan refinance company," Johnson said in his email. According to her LinkedIn profile, Shuler worked at Reunion Financial Services, where Johnson was previously the chief executive officer."²⁵⁹²

Trump Administration Following Oil & Gas Industry on Environmental Protections

Source: News

These passages cover the deep involvement of industry lobbying in setting U.S. environmental policy under the Trump administration. This lobbying is inflicting great harm in low salient areas.

"Eric Lipton and Hiroko Tabuchi at the New York Times reported over the weekend about the lengths the federal government under President Donald Trump has gone to in order to make drilling and fracking easier for oil and gas developers. It's offering up thousands of drilling permits and parcels of land to companies such as Chesapeake Energy and Chevron. More than 12.8 million acres were offered during the last fiscal year ending in September, a huge jump from previous years.

²⁵⁹¹ Dino Grandoni & Juliet Eliperin, "The firm that once employed Trump's pick to run Interior is making millions lobbying it", (3 April 2019), online: *Wash Post* <<https://www.washingtonpost.com/climate-environment/2019/04/03/firm-that-once-employed-trumps-pick-run-interior-is-making-millions-lobbying-it/>>.

²⁵⁹² Michael Stratford, *supra* note 830.

Here's how they're doing it: Regulators are weakening protections for wildlife, air quality, and groundwater supplies, often by following what the Times describes as "detailed industry scripts" for rollbacks. ... But they have also come at a cost. The Trump administration watered down Obama-era rules meant to curb methane flaring or venting, which according to the Times is 30 times more potent than carbon dioxide. Energy companies are now flaring and venting methane at much higher rates than just two years ago. ...

The Times report describes how a pair of oil and gas industry lobbyists and a ConocoPhillips executive reached out to the Interior Department about Obama-era rules regarding the mating grounds used by the sage grouse, a species of bird. Those regulations said that drilling could not take place within 3.1 miles of where the male birds gather for mating season ... [Samantha McDonald, a lobbyist for the Independent Petroleum Association of America] followed up the next month, asking Timothy Williams, a senior official at the Interior Department, if the bureau had "been able to resolve this map discrepancy in Wyoming yet?" Two minutes later, he responded, "We are working on it. I have let the secretary know as well." Last summer, Mr. Zinke proposed a new policy that reflected the change the oil companies had requested. A final action is expected soon."²⁵⁹³

"A separate report on the influence of Big Oil comes from Reveal, which obtained a recording of a private meeting between oil executives from June 2017. On the recording, Dan Naatz, political director of the oil and gas lobbying group Independent Petroleum Association of America, spoke about former oil industry lobbyist and attorney David Bernhardt being appointed at the Department of the Interior. Naatz said,

"We know him very well, and we have direct access to him, have conversations with him about issues ranging from federal land access to endangered species, to a lot of issues."

IPAA CEO Barry Russell was heard on the recording describing a meeting he had with former EPA head Scott Pruitt, the Trump appointee who was so besieged by scandals that he actually had to resign — a seeming impossibility in the recent political climate.

Russell said EPA staffers were writing down what Russell had to say about air pollution regulations, as other executives began laughing. "So it's really a new world for us and very, very helpful," Russell said. Reveal notes that since the IPAA created its "wish list," the Interior Department has granted nearly all its requests, including: Rescinding fracking rules meant to control water pollution; Withdrawing rules that limit climate change-causing methane gas releases; Abandoning environmental restoration of public land damaged by oil development; Ending long-standing protections for migratory birds."²⁵⁹⁴

TV Industry Prevents Rules Granting Free Advertising for Political Campaigns

Source: Book

A large percentage of campaign expenses have to do with TV ads. This example discusses the attempt to change the law so that TV stations need to provide free air time to political parties. Had the rules passed, it might have helped reduced politician's need for (large) campaign donations.

"When I was chair of the Council of Economic Advisers, the Clinton administration made a valiant effort to curb the need for campaign finance. The public owns the airwaves that the TV stations use. Rather than giving these away to the TV stations without restriction—a blatant form of corporate welfare—we should sell access to them; and we could sell it with the condition that a certain amount of airtime be made available for campaign advertising. With free advertising politicians would need less money, and we could constrain those accepting the free advertising in the amount and nature of campaign contributions that they accepted. But the TV stations that make such money from campaign

²⁵⁹³ Emily Stewart, "The Trump administration is reportedly following industry 'scripts' in rolling back oil and gas drilling restrictions", (28 October 2018), online: Vox <<https://www.vox.com/policy-and-politics/2018/10/28/18034390/trump-oil-gas-drilling-fracking-ryan-zinke>>.

²⁵⁹⁴ Phil Dzikij, *supra* note 2571.

advertising—and from their free gifts of spectrum—vehemently and successfully opposed the reform.”²⁵⁹⁵

Under-enforcement of Food Safety Rules Due to Lobbying

Source: Book

This quote discusses how business can use lobbying to sabotage a program through budget allocation, so that there is little publicity against the program.

“When an industry doesn’t want a law enacted but fears a public backlash if it openly opposes the proposed law, it quietly makes sure that there aren’t enough funds to enforce it. This was the case when the food industry went along with the Food Safety Modernization Act, which became law in 2011, after thousands of people were sickened by tainted food.

Subsequently, the industry successfully lobbied Congress to appropriate so little to enforce it that it has been barely implemented. Defanging laws by hollowing out the agencies charged with implementing them works because the public doesn’t know it’s happening.”²⁵⁹⁶

U.S. House Majority Whip & Lobbyist Approval of Staff

Source: News

This passage demonstrates the increasing influence of lobbyists in American politics.

“House Majority Whip Steve Scalise got some help interviewing potential new hires for his press shop from an unlikely source: a federal lobbyist. Quinn Gillespie & Associates’ John Feehery sat in on and participated in multiple official interviews with job candidates last month for the new majority whip’s press operation. Scalise has not yet announced who he will name as his communications director. Sometimes lawmakers rely on lobbyists for strategic advice. But inviting a lobbyist into an interview is highly unusual. Several ethics lawyers and current and former leadership aides said they have never heard of a similar arrangement. That’s not illegal, and as best as I can tell, it doesn’t violate ethics rules, but it does reinforce the impression that corporate lobbyists have a direct role in helping run the place in the Republican-led House. It’s an impression obviously rooted in fact. As we talked about a couple of years ago, when Congress worked on a jobs bill in 2010, the House Republican leadership huddled with corporate lobbyists. When work on Wall Street reform got underway, John Boehner and the GOP huddled with industry lobbyists. When Congress worked on health care reform, Boehner and the GOP huddled with insurance lobbyists. When an energy/climate bill started advancing, the GOP huddled with energy lobbyists. In 2012, when the STOCK Act was being considered, the GOP huddled with financial industry lobbyists. Now lobbyists are even sitting in on congressional job interviews.”²⁵⁹⁷

Volkswagen Threatening to Leave Lobbying Group

Source: News

This excerpt shows how the lobbying goals of a trade association can differ from those of some of its members.

“Volkswagen is amongst the legacy automakers now most invested in electric vehicles and they now threaten to exit an important automaker lobbying group over their policies regarding electric vehicles.

²⁵⁹⁵ Joseph E. Stiglitz, *supra* note 38 c 5, s Reforming our political process.

²⁵⁹⁶ Robert B. Reich, *supra* note 26 at 85.

²⁵⁹⁷ Steve Benen, *supra* note 7.

Automakers have promoted policies to slow down the adoption of electric vehicles through lobbying groups for years. Most recently, automakers associations have pushed against efforts to increase average fuel economy, which would have forced EVs to be built in higher volume. Interestingly, several automakers were claiming to be 'all-in on electric cars' while indirectly supporting those lobbying efforts.

Now, Volkswagen appears to be recognizing this issue and is pressuring the Association of the German Automotive Industry (VDA), a powerful lobbying group in Germany, to promote electric vehicles.... In short, VW wants the association to stop pushing "alternative fuel" vehicles and focus on battery-electric vehicles. ... When GM was announcing their plan to go "all-in on electric vehicles", a lobbying group they supported was pressuring the EPA and the Trump administration to walk back Obama-era fuel consumption requirements that would have forced them to make more EVs."²⁵⁹⁸

Wall Street & Dodd-Frank Rules on Future Values of Commodities

Source: Book

These excerpts discuss the connection between Wall Street banks and regulators. Part of this pattern is likely related to the revolving door between industry and regulators.

"[C]onsider the New York branch of the Federal Reserve Board, which has lead responsibility to monitor Wall Street banks. Even after the Street's near meltdown, the banks' legal prowess and political clout reduced the ardor of examiners from the New York Federal Reserve Bank. Senior Fed officials instructed lower-level regulators to go easy on the big banks and not pry too deeply. In one meeting that came to light in 2014, a banker at Goldman Sachs allegedly told Fed regulators that "once clients are wealthy enough certain consumer laws don't apply to them." Afterward, when one of the regulators who attended the meeting shared with a more senior colleague her concern about the comment, the senior colleague told her, "You didn't hear that."²⁵⁹⁹

....

"An even quieter means of rescinding laws is to riddle them with so many loopholes and exceptions that they become almost impossible to enforce. Typically, such holes are drilled when agencies attempt, through rule making, to define what the laws mean or prohibit. Consider, for example, the portion of the Dodd-Frank law designed to limit bets on the future values of commodities. For years Wall Street has profitably speculated in futures markets-food, oil, copper, other commodities. The speculation has caused prices to fluctuate wildly. The Street makes bundles from these gyrations by betting, usually correctly, which way prices will go, but they have raised costs for consumers- another hidden redistribution from the middle class and poor to the wealthy. Dodd-Frank instructed the Commodity Futures Trading Commission (CFTC) to come up with a detailed rule reducing such betting. The commission thereafter considered fifteen thousand comments, largely generated by and from the Street. The agency also undertook numerous economic and policy analyses, carefully weighing the benefits to the public of any such regulation against its costs to the Street. After several years, the commission issued its proposed rule, including some of the loopholes and exceptions the Street sought. But Wall Street still wasn't satisfied. So the commission agreed to delay enforcement of the new rule for at least a year, allowing the Street more time to voice its objections.

Even this wasn't enough for the big banks. Its lawyers then filed a lawsuit in the federal courts, seeking to overturn the rule that the commission's cost-benefit analysis wasn't adequate. It was a clever ploy, since costs and benefits are difficult to measure. And putting the question into the laps of federal judges gave the Street a significant tactical advantage because the banks had almost infinite funds to hire so called experts (many of them academics who'd say just about anything for the right price) using elaborate methodologies to show the CFTC had exaggerated the benefits and underestimated the costs.

²⁵⁹⁸ Fred Lambert, "VW threatens to exit important automaker lobbying group over electric vehicle policies", (18 March 2019), online: *Electrek* <<https://electrek.co/2019/03/18/vw-threatens-exit-automaker-lobbying-electric-vehicle-policies/>>.

²⁵⁹⁹ Robert B. Reich, *supra* note 26 at 83.

It was not the first time the big banks had used this ploy. In 2010, when the Securities and Exchange Commission tried to implement a Dodd-Frank requirement making it easier for shareholders to nominate company directors, Wall Street sued the SEC. It alleged that the commission's cost-benefit analysis for the new rule was inadequate. A federal appeals court - inundated by the banks' lawyers and hired "experts" - agreed. That put an end to Congress's effort to give shareholders more power in nominating company directors, at least temporarily. Obviously, government should weigh the costs and benefits of every significant action it takes. But big corporations and large banks have an inherent advantage in the weighing: They can afford to pay for experts and consultants whose studies will invariably measure costs and benefits in the way big corporations and large banks want them to be measured. ...

Wall Street's shenanigans have convinced a large portion of America that the economic game is rigged. Capitalism, alas, depends on trust. Without trust, people avoid even sensible economic risks. They also begin thinking that if the big guys can get away with cheating in big ways, small guys like them should be able to get away with cheating in small ways- causing even more people to distrust the economic system. Moreover, people who believe the game is rigged are easy prey for political demagogues with fast tongues and dumb ideas."²⁶⁰⁰

²⁶⁰⁰ *Ibid* at 86.

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