



# **First Amendment Questions Concerning Limits on Lobbyist Campaign Finance Activities: Some Preliminary Thoughts**

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# The Goals of Lobbying Reform: Three Alternative Views of the Lobbying “Problem”

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1. *Existing laws preventing corruption of the political process are not adequately enforced.*
2. *Existing laws are too weak to prevent corruption, because they allow lobbyists to legally buy influence or access with Members or Congress or their staffs.*
3. *Existing law are too weak to keep the public's confidence in the democratic process, because they allow lobbyists to legally provide things of value to Members of Congress and their staffs which, even if not actually corrupt, lead to an appearance of corruption.*

## On third point...

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Recent Pew study found 76% in favor of a law which would place stricter limits on the value of gifts that House and Senate Members can accept from lobbyists (down from 79% in 1995)

Of respondents, 45% said such a law would reduce the influence of special interests (52% said it wouldn't make much difference)



# If the Problem is Underenforcement that Prevents Detecting Illegal Behavior

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then we might consider

- more complete and improved disclosure, including disclosure of grassroots lobbying activities, electronic reporting, and a lowering of thresholds for the reporting of certain lobbying activity
- placing the responsibility for ethics investigations into bipartisan or neutral hands, so as to facilitate prompt and thorough investigations of wrongdoing
- increased penalties for corruption under existing law, which raise the expected price of getting caught for violations

# If the Problem is the Sale of Access or Influence Not Adequately Proscribed by Existing Law

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- Limits on the ability of lobbyists to facilitate, pay for, or raise funds for private trips, meals, convention-related activities honoring members, and other activities that allow lobbyists to obtain preferred access to members of Congress
- Limits on the ability of lobbyists to participate in raising campaign contributions for members of Congress (or congressional challengers), such as a ban on (1) lobbyist campaign contributions, (2) lobbyist “bundling” of campaign contributions from clients or others, or (3) lobbyist fundraising for charities closely tied to members of Congress
- Limits on the ability of lobbyists (especially former members of Congress) to gain preferred physical access to certain areas of Congress where members socialize, exercise, or interact...


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- Limits on who may serve as a lobbyist, including limits on spouses or children of members serving as lobbyists, as well as a longer waiting period before former members of Congress (and their staffers) could engage in lobbying activities
  - Limits on the ability of members of Congress to draft legislation behind closed doors, or to include certain special interest provisions, such as “earmarks,” into bills at the behest of lobbyist without the ability for adequate debate and deliberation over the wisdom of the added provisions.



# If the Problem is the a Decline in Public Confidence in the Democratic Process Because of the Appearance of Corruption

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We would likely adopt reforms from  
the first two lists, in order to avoid  
the appearance of corruption, that  
can undermine



If any or all of these changes were adopted by Congress (Ha!), would they violate the First Amendment?

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First Amendment protects rights of speech, association, and right to petition the government for a redress of grievances.

Lots of speech and association cases, only a few cases dealing with the "petition" clause



# Disclosure laws likely constitutional

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*In the U.S. v. Harriss* case (1954), the Supreme Court upheld a federal lobbying law (though read it in a limited way)

In *McConnell v. FEC* (2003), upholding the McCain-Feingold campaign finance law, the Court seemed satisfied that most disclosure laws satisfy the First Amendment.



# Grassroots lobbying

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It remains an open question whether disclosure of contributions funding “grassroots lobbying” (including television and radio campaigns on legislative issues) would be constitutional.

Supreme Court's *McIntyre* (1995) case leaves open possibility some can claim right to anonymity in some campaign-related contexts.

# Most significant constitutional question: ban on lobbyist campaign finance activities

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Recall the suggestion:

- Limits on the ability of lobbyists to participate in raising campaign contributions for members of Congress (or congressional challengers), such as a ban on (1) lobbyist campaign contributions, (2) lobbyist “bundling” of campaign contributions from clients or others, or (3) lobbyist fundraising for charities closely tied to members of Congress


# Some (but not all) lower courts have upheld bans on lobbyists making campaign contributions

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Fourth Circuit (*Bartlett* case) upheld ban on contributions by lobbyists and the PACs employing them during legislative sessions

Federal district court in California upheld ban on lobbyist contributions directed to those whom the lobbyist would lobby

Federal district court in Tennessee struck down the ban as applied to non-incumbent candidates



Supreme Court has not addressed the issue, and the result is unclear

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The New Roberts Court could strike down such a ban as violating the First Amendment.

# Existing Supreme Court precedent

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- *Austin/McConnell*: permissible to limit corporate and union involvement in political process (“corrosive and distorting effects of immense aggregations of wealth accomplished with the corporate form...”)

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- *McConnell*: struck down McCain-Feingold's total ban on campaign contributions by minors:

The court said that the government did not offer enough evidence that the law was needed to prevent evasion of contribution limits by parents, and not narrowly tailored (e.g., counting contributions of minors toward family unit cap)



## Questions:

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Are lobbyists more like corporations or like children?

What is the special nature of “corruption” that lobbyists pose? They don’t pose it because they have preexisting wealth, but because their job is to petition for grievances.



# Limits on lobbyist bundling

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- Are anti-bundling laws constitutional?

Interesting discussion in *Sorrell* case currently before the Supreme Court



## Second Circuit on bundling

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“Vermont has a compelling interest in safeguarding its political process from such contributor dominance, because it corrupts the process for achieving accessibility and accountability of state officials and candidates. ...Where access and influence can be bought, citizens are less willing to believe that the political system represents the electorate, exacerbating cynicism and weakening the legitimacy of government power.”

# Garrett and de Figueiredo

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On President Bush's bundlers:

"Achieving the status of a Pioneer or Ranger was worth more than the right to buy a set of silver cuff links or a belt buckle with the Lone Star of Texas engraved on it; one-fifth of the Pioneers are lobbyist who presumably participated, at least in part, to obtain access to the White House."

# Would the Supreme Court uphold a law that prevented lobbyist bundling?

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Under existing *McConnell* precedent, the law could be justified to prevent the sale of access and evasion, particularly if my reading of *McConnell* as an equality case is correct

But the Supreme Court's jurisprudence could be changing, and a new majority might not see the corrupting problems (think of someone who bundles \$50 contributions: the Cain/Lowenstein/Strauss debate)



# Limits on lobbying activities of family members

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This issue too is an open one in the court.

Does someone lose the right to engage in First Amendment-protected activity because his or her spouse or parent is in Congress?

