

# GRIDLOCK, LOBBYING, AND DEMOCRACY

JOSEPH P. TOMAIN†

With the refusal to fill the Supreme Court vacancy left by Antonin Scalia, the Senate adds another layer of gridlock in Washington.<sup>1</sup> In the recent past, congressional gridlock has threatened to shut down the legislative process by such maneuvers as creating a faux debt crisis and by regularly assailing the president and the executive branch over so-called job-killing regulations.<sup>2</sup> Through these efforts, obstructionist Republicans have attempted a gridlock hat-trick by trying to shut down each of the three branches of government—at least as far as the headlines go.<sup>3</sup> The political reality, however, is more nuanced, and gridlock is more complicated than commentators often claim—and not to the public benefit.

Nevertheless, gridlock has pernicious consequences not only for the democratic process but also for political and economic equality. The negative effects of gridlock are manifest through the medium of lobbying, which, as I will develop, is becoming a significant political intermediary directly linking private money with the public laws and regulations that affect our daily lives; lobbying is becoming an institutional force of its own and a key contributor to gridlock in Washington.

This article will begin by briefly addressing the concept of gridlock and its effects on government regulation before explaining the troubling practice and law of lobbying. The concept that a countervailing power is needed to reduce the

---

† Dean Emeritus and the Wilbert & Helen Ziegler Professor of Law, University of Cincinnati College of Law.

1. Robert Schlesinger, *Hat-Trick Gridlock*, U.S. NEWS (Feb. 13, 2016), <http://www.usnews.com/opinion/blogs/robert-schlesinger/articles/2016-02-13/antonin-scalias-death-prompts-irresponsible-gop-vows-of-gridlock>.

2. Martha Burk, *Will Congress Ever Grasp That the Debt Crisis Is Fake?*, MOYERS & COMPANY (Dec. 4, 2013), <http://billmoyers.com/2013/12/04/will-congress-ever-grasp-the-debt-crisis-is-fake>; Amit Narang, *The Myth of Job-Killing Regulations*, THE HILL (Nov. 14, 2013), <http://thehill.com/blogs/congress-blog/economy-budget/190275-the-myth-of-job-killing-regulations>.

3. Schlesinger, *supra* note 1.

influence of lobbying will also be explained. The paper closes with a discussion of the types of reforms that are available and that can serve as a check on lobbying abuses.

As the title of this article indicates, and as the mainstream discussion of Washington often states, it appears that our country is held hostage and, as a result, is experiencing a period of “political gridlock.” Therefore, the first question we must pose is whether or not political gridlock exists. The answer is clearly yes and no. To suggest that the country is not in a period of gridlock may appear inconsistent with daily observation, experience, and political punditry. Surprisingly, perhaps, and unfortunately, there is ample evidence that political gridlock does not exist across the board and that its absence is not an unmitigated good for democracy.

## I. MACRO AND MICRO GRIDLOCK

Recent headlines, such as those about the Republicans’ adamant refusal to hold confirmation hearings or even meet with President Obama’s Supreme Court nominee, Judge Merrick Garland, are clear and troublesome indications of gridlock.<sup>4</sup> This type of do-nothing, or roadblock, gridlock also infects major legislative issues such as immigration, climate change, and comprehensive tax reform.<sup>5</sup> At the macro level, then, political gridlock does exist, as Republicans have tried to hamstring the President at many turns by simply stopping everything even as the country faces significant political and economic challenges.<sup>6</sup>

If there is such a thing as macro-level politics, then, logically there should be micro-level politics. It is at this level, I argue, that gridlock transforms itself into something else. Instead of the do-nothing, macro-level gridlock described above, at the

---

4. See, e.g., Michael D. Shear et al., *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (Mar. 16, 2016), [http://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html?\\_r=0](http://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html?_r=0).

5. See, e.g., JACOB HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010); TRENT LOTT & TOM DASCHLE, CRISIS POINT: HOW WE MUST—AND HOW WE CAN—OVERCOME OUR BROKEN POLITICS IN WASHINGTON AND ACROSS AMERICA (2016); THOMAS E. MANN & NORMAN J. ORENSTEIN, IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2012).

6. See Schlesinger, *supra* note 1.

micro-level, gridlock takes on a different shape and becomes a form of politics-as-usual that is detrimental to the common good and to democracy. This form of micro-level gridlock has more noxious consequences and involves what Democratic presidential candidate Senator Bernie Sanders has called a “rigged economy.”<sup>7</sup>

In micro-level politics, as a direct result of lobbying efforts, legislation is passed for the few and not for the many; neither the common good nor the public interest is served precisely because a large portion of the electorate and the citizenry are effectively locked out of full democratic participation in government. By way of example, Senate Republicans and Democrats alike both support the Energy Policy Modernization Act of 2015.<sup>8</sup> This 350-page piece of legislation does not address a clean energy transition, does not tackle climate change, and does not address United States energy policy in any comprehensive way. Instead, like most legislation, it consists of a series of smaller programs such as R&D, energy storage, water power, grid modernization, and the like.<sup>9</sup> While these provisions are mostly noncontroversial, they all have ardent supporters who stand to gain benefits from the passage of a hodge-podge bill that does not necessarily advance the common good.<sup>10</sup> Whereas macro gridlock represents a standstill between Republicans and Democrats, micro gridlock represents a standstill between wealthy corporate interests with political access and the rest of America.

This point about political inequality can be demonstrated easily enough by briefly examining some amazing math. Quite simply, in the United States and throughout the world, wealth inequality has reached dramatic proportions.<sup>11</sup> According to an

---

7. *A Rigged Economy*, BERNIESANDERS.COM (Nov. 5, 2015), <https://berniesanders.com/a-rigged-economy/>.

8. The Energy Policy Modernization Act, S. 2012, 114th Cong. (2016); Chris Mooney, *The Senate Just Passed—Overwhelmingly—an Actually Bipartisan Energy Bill*, WASH. POST (Apr. 20, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/04/20/the-senate-just-passed-overwhelmingly-an-actually-bipartisan-energy-bill>.

9. Mooney, *supra* note 8.

10. Chris Mooney, *The Surprising Thing Democrats and Republicans Agree On When It Comes to Energy*, WASH. POST (Apr. 19, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/04/19/the-surprising-things-democrats-and-republicans-can-agree-on-when-it-comes-to-energy>.

11. DEBORAH HARDOON ET AL., OXFAM, AN ECONOMY FOR THE 1%: HOW PRIVILEGE AND POWER IN THE ECONOMY DRIVE EXTREME INEQUALITY AND HOW THIS CAN BE STOPPED 2 (2016), [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/bp210-economy-one-percent-tax-havens-180116-en\\_0.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp210-economy-one-percent-tax-havens-180116-en_0.pdf).

Oxfam study, sixty-two billionaires have as much wealth as half of the world population; therefore, 62 > 3.6 billion people.<sup>12</sup> In the United States, six Walton heirs are wealthier than approximately 52.5 million American families.<sup>13</sup> Wealth inequality not only exists in disturbing proportions—it is increasing as wealth moves from the bottom to the top and as it enriches capital at the expense of labor.<sup>14</sup> Inequality has risen even among the poor.<sup>15</sup> Note well, such massive wealth inequalities were not the result of a natural law of meritocracy.<sup>16</sup>

At this point in the argument, a closer connection between economic inequality and political gridlock needs to be made. More specifically, a connection needs to be made between legislation favoring the few at the expense of the many. Before that connection is made, however, we must recognize, and address, a regulatory and legislative paradox—the paradox of expanding government in a time of vocal anti-government sentiment. Most observers, including ordinary citizens, are not surprised at the size and expanse of government intervention into our daily lives, from environmental and labor laws to tax and financial regulations, and to government programs from health care and education to voting and communications. Indeed, the presence of government in our lives seems, and often feels, ubiquitous. That ubiquity is paradoxical in the face of over four decades of neoliberal rhetoric that extolled the virtues of “free markets” and demonized “activist government.”<sup>17</sup> How can it be

---

12. *Id.*

13. See Josh Bivens, *Walton Family Net Worth Is a Case Study Why Growing Wealth Concentration Isn't Just an Academic Worry*, ECON. POL'Y INST. (Oct. 3, 2014), <http://www.epi.org/blog/walton-family-net-worth-case-study-growing>; Tom Kertscher, *Just How Wealthy Is the Wal-Mart Walton Family?*, POLITIFACT WISC. (Dec. 8, 2013, 5:00 AM), <http://www.politifact.com/wisconsin/statements/2013/dec/08/one-wisconsin-now/just-how-wealthy-wal-mart-walton-family>; see also Chuck Collins & Josh Hoxie, *Billionaire Bonanza: The Forbes 400 and the Rest of Us*, INST. FOR POL. STUD. (Dec. 1, 2015), <http://www.ips-dc.org/billionaire-bonanza>.

14. See LANE KENWORTHY & TIMOTHY SMEEDING, GINI, GROWING INEQUALITIES AND THEIR IMPACTS IN THE UNITED STATES 1 (2013), <http://gini-research.org/system/uploads/443/original/US.pdf?1370077377>.

15. Christopher Jencks, *Why the Very Poor Have Become Poorer*, N.Y. REV. BOOKS (June 9, 2016), <http://www.nybooks.com/articles/2016/06/09/why-the-very-poor-have-become-poorer>.

16. Christopher Hayes, *Why Elites Fail*, THE NATION (June 6, 2012), <https://www.the-nation.com/article/why-elites-fail>.

17. See generally SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, *ACHIEVING DEMOCRACY: THE FUTURE OF PROGRESSIVE REGULATION* (2014).

that after four decades of deregulatory actions and talk, government continues to expand? How can government expansion occur in a period of political gridlock? Before those questions are answered, let's examine the expansion of government a bit further.

Although the current 114th Congress and the 113th Congress may be outliers and become two of the least-productive sessions in modern history,<sup>18</sup> legislative activity for over sixty years has demonstrated a remarkable track record. From 1948 to 2011, there was a steady decrease in the number of bills enacted, yet the total number of pages of statutes increased during that same time.<sup>19</sup> More simply, legislation has gotten longer and, correspondingly, more complex.<sup>20</sup> The Affordable Care Act and Dodd-Frank financial reform legislation are both in excess of 2300 pages each, by way of example.<sup>21</sup>

Similarly, the clear trend in regulation demonstrates a persistent increase in the number of pages in the Federal Register from its inception in 1936 to the present.<sup>22</sup> In fact, the Federal Register has expanded over thirty-fold during that time from approximately 2300 pages in 1936 to in excess of 80,000 pages in 2014.<sup>23</sup> Longer legislation also leads to longer regulations implementing that legislation, and both are open to interest group pressures as discussed below.<sup>24</sup> The Federal Energy Regulatory Commission, for example, has been trying to determine how best to assess costs for the construction of the smart grid through a cost allocation rule that is in excess of 1000

---

18. Derek Willis, *A Do-Nothing Congress? Well, Pretty Close*, N.Y. TIMES (May 28, 2014), <http://www.nytimes.com/2014/05/28/upshot/a-do-nothing-congress-well-pretty-close.html>.

19. See *Outrageous Bills: Why Congress Writes Such Long Laws*, THE ECONOMIST (Nov. 23, 2013), <http://www.economist.com/news/united-states/21590368-why-congress-writes-such-long-laws-outrageous-bills>; Raffaella Wakeman et al., *Vital Statistics on Congress Data on the U.S. Congress—A Joint Effort from Brookings and the American Enterprise Institute*, BROOKINGS tbl.6-4, [https://www.brookings.edu/wp-content/uploads/2016/06/Vital-Statistics-Chapter-6-Legislative-Productivity-in-Congress-and-Workload\\_UPDATE.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/Vital-Statistics-Chapter-6-Legislative-Productivity-in-Congress-and-Workload_UPDATE.pdf) (last updated Apr. 18, 2014).

20. *Outrageous Bills: Why Congress Writes Such Long Laws*, *supra* note 19.

21. *Id.*

22. Wakeman et al., *supra* note 19, at tbl.6-5.

23. See *id.*; see also COMM. FOR ECON. DEV., CRONY CAPITALISM: UNHEALTHY RELATIONS BETWEEN BUSINESS AND GOVERNMENT 23 (2015), [https://www.ced.org/pdf/Embargoed\\_Report\\_-\\_Crony\\_Capitalism.pdf](https://www.ced.org/pdf/Embargoed_Report_-_Crony_Capitalism.pdf).

24. See *Outrageous Bills: Why Congress Writes Such Long Laws*, *supra* note 19.

pages.<sup>25</sup> Similarly, the Environmental Protection Agency's Clean Power Plan exceeds 1500 pages, and both rules are based on only a few words in the enabling legislation.<sup>26</sup>

The expansion of legislation and regulations continues even though conservatives and Republicans have been fighting "big government" for over forty years,<sup>27</sup> despite the country's political shift to the right, as well as a business-friendly Supreme Court, which ostensibly favors small government and markets over the aforementioned job-killing regulations and activist government.<sup>28</sup> How, then, can we explain a growing government in the face of a persistent anti-government rhetoric? Or, of more immediate concern, is there a connection between bigger government and economic inequality? My answer is yes; there is a connection between the two, and that connection must now be demonstrated.

First, there is no shortage of supporting authority for the proposition that economic inequality has been expanding in this country.<sup>29</sup> It is equally true that liberal and conservative analyses of economic inequality point to market rules that have created the imbalance.<sup>30</sup> Here is the crucial linkage: those with economic power also exercise political power, and they exercise it to their

25. See FED. ENERGY REGULATORY COMM'N, 136 FERC ¶ 61,051, ORDER NO. 1000, TRANSMISSION PLANNING AND COST ALLOCATION BY TRANSMISSION OWNING AND OPERATING PUBLIC UTILITIES (2011), *order on reh'g*, 139 FERC ¶ 61,132, ORDER NO. 1000-A, *order on reh'g*, 141 FERC ¶ 61,044, ORDER NO. 1000-B (2012), and *aff'd sub nom.* S.C. Pub. Serv. Auth. v. Fed. Energy Regulatory Comm'n, 762 F.3d 411 (D.C. Cir. 2014).

26. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units, 80 Fed. Reg. 64,661 (Oct. 13, 2015) (to be codified at 40 C.F.R. pt. 60).

27. See EAMONN BUTLER, PUBLIC CHOICE—A PRIMER 46–47 (2012); Richard W. Painter, *The Conservative Case for Campaign-Finance Reform*, N.Y. TIMES (Feb. 3, 2016), [http://www.nytimes.com/2016/02/03/opinion/the-conservative-case-forcampaignfinance-ref-orm.html?\\_r=0](http://www.nytimes.com/2016/02/03/opinion/the-conservative-case-forcampaignfinance-ref-orm.html?_r=0); see also JACOB S. HACKER & PAUL PIERSON, AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER 238 (2016).

28. See, e.g., Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1433 (2013); Noam Scheiber, *As Americans Take Up Populism, the Supreme Court Embraces Business*, N.Y. TIMES (Mar. 11, 2016), <http://www.nytimes.com/2016/03/12/business/as-americans-take-up-populism-the-supreme-court-embraces-business.html>.

29. See HARDOON ET AL., *supra* note 11, at 2.

30. See also Robert Kuttner, *The New Inequality Debate*, AM. PROSPECT (Jan. 14, 2016), <http://prospect.org/article/new-inequality-debate-0>. See generally PAUL KRUGMAN, END THIS DEPRESSION NOW! (2012); RICHARD POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009) [hereinafter POSNER, FAILURE]; RICHARD POSNER, THE CRISIS OF CAPITALIST DEMOCRACY (2010) [hereinafter POSNER, CRISIS]; JOSEPH STIGLITZ, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY (2010).

advantage.<sup>31</sup> As Richard Hasen writes, a central problem of money in politics is the creation of a system “in which economic inequalities, inevitable in a free market economy, are transformed into political inequalities that affect both electoral and legislative outcomes.”<sup>32</sup>

More to the point, and most fundamentally, market rules are legislative products; markets in a capitalist economy are not natural phenomena. Today, economists regularly admit that they had underestimated the power of partisan politics to shape markets.<sup>33</sup> Indeed, the most trenchant comment about the failure of American-style capitalism came from Alan Greenspan’s congressional testimony about the Great Recession of 2008, in which he admitted that he was in a “state of shocked disbelief” that the “whole intellectual edifice” of free market ideology collapsed, nearly tanking the United States economy and creating a global economic depression.<sup>34</sup> Lobbyists for the financial industry helped in no small part to create that trillion-dollar economic catastrophe.<sup>35</sup>

Nevertheless, the question about the continuing growth of government persists. How is it that as government expands, economic and political inequalities increase? To no one’s chagrin, the answer is money, and the first culprit is campaign spending. People spend to get what they want, to get the government they want, and, more specifically, to get the benefits the government has to give.

## II. POLITICAL SPENDING

Three points can be emphasized about the recent history of money in politics: First, campaign spending has noticeably

---

31. See Kuttner, *supra* note 30.

32. RICHARD HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 5 (2016).

33. See generally PAUL KRUGMAN, *THE CONSCIENCE OF A LIBERAL* (2007); JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* xix–xx (2012).

34. SHAPIRO & TOMAIN, *supra* note 17, at 67.

35. Deniz Igan & Prachi Mishra, *Wall Street, Capitol Hill, and K Street: Political Influence and Financial Regulation*, 57 J.L. & ECON. 1063, 1066 (2014).

increased over the last few decades<sup>36</sup> with estimates for the 2016 presidential campaign ranging from five to ten billion dollars.<sup>37</sup> Second, large donors contribute a disproportionate amount of campaign money, and those large donors overwhelmingly favor Republicans.<sup>38</sup> And third, the law of campaign finance, indeed one may say the law of democracy, has tilted in favor of the wealthy and corporate donors.<sup>39</sup> Often that tilt has come about through the use of secret money and, as discussed below, with the express support of the United States Supreme Court.<sup>40</sup> As Yale Law Professor Heather Gerken writes, “money makes politicians pay less attention to average, everyday people and more attention to wealthy corporate interest.”<sup>41</sup>

At this point, it must be admitted that the simple fact of increasingly larger political campaign contributions together with significant amounts of money given by a smaller number of donors does not directly translate into favorable legislation—at least not yet. The case still needs to be made that money produces favors, if not exactly on a quid pro quo basis. Indeed, it would be extraordinarily naïve to assume that money leaves no traces and generates no benefits. As Justice John Paul Stevens wrote in *Citizens United v. Federal Election Commission*, “[w]hile American democracy is imperfect, few outside the majority of this Court

---

36. Wakeman et al., *supra* note 19, at tbl.3-1; see also *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, [https://www.opensecrets.org/outside-spending/cycle\\_tots.php](https://www.opensecrets.org/outside-spending/cycle_tots.php) (last visited Sept. 18, 2016).

37. Amie Parnes & Kevin Cirilli, *The \$5 Billion Presidential Campaign?*, THE HILL (Jan. 21, 2015, 4:54 PM), <http://thehill.com/blogs/ballot-box/presidential-races/230318-the-5-billion-campaign>; see also Albert R. Hunt, *How Record Spending Will Affect 2016 Elections*, BLOOMBERG VIEW (Apr. 26, 2015, 10:56 AM), <https://www.bloomberg.com/view/articles/2015-04-26/how-record-spending-will-affect-2016-election>.

38. Nicholas Confessore et al., *Buying Power: Just 158 Families Have Provided Nearly Half of the Early Money for Efforts to Capture the White House*, N.Y. TIMES (Oct. 10, 2015), [http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html?\\_r=0](http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html?_r=0); see also *2016 Top Donors to Outside Spending Groups*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?disp=D> (last visited Oct. 2, 2016).

39. SHAPIRO & TOMAIN, *supra* note 17, at 67.

40. See, e.g., JILL MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2015); MICHAEL WALDMAN, *THE FIGHT TO VOTE* 102–03 (2016); Elizabeth Drew, *How Money Runs Our Politics*, N.Y. REV. BOOKS (June 4, 2015), <http://www.nybooks.com/articles/2015/06/04/how-money-runs-our-politics>. See generally McCutcheon v. Fed. Election Comm’n, 134 S. Ct. 1434, 1480 (2014); *Citizens United v. Fed. Election Comm’n*, 130 U.S. 876, 982 (2010).

41. Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155, 1156 (2011).

would have thought its flaws included a dearth of corporate money in politics.”<sup>42</sup>

Does increased campaign spending solve the problem of ever-expanding government? Not exactly, because that money must find its way into legislation and regulations beneficial to donors, which it often does.<sup>43</sup> Borrowing a phrase, the “hydraulics” of money irresistibly finds its way to benefit donors in the political process.<sup>44</sup> More specifically, a significant portion of campaign funding reaches legislators through lobbyists,<sup>45</sup> and the combination of campaign dollars and lobbying can be toxic. As explained below, lobbyists provide a range of services on both sides of the lobbying transaction. On one side, clients pay lobbyists to further their particular interests.<sup>46</sup> On the other side of the transaction, lobbyists provide useful goods, not the least of which are campaign funds, self-interested information, and jobs to legislators.<sup>47</sup>

Thus, if the first culprit of perpetuating economic and political inequality is campaign spending, then the second culprit is lobbying. More precisely, the *deus ex machina* for that spending is crony capitalism, which has been defined as deals between private interests and government “on the basis of political influence rather than merit.”<sup>48</sup> These deals have been facilitated by, and indeed are the stock-in-trade of, lobbyists as our political process becomes, in Lawrence Lessig’s phrase, “an economy of influence.”<sup>49</sup> Even more problematic, today’s lobbyists have created an intermediary institution that facilitates the flow of money and influence to the detriment of the democratic impulse

---

42. *Citizens United*, 130 U.S. at 979 (Stevens, J., dissenting).

43. See SHAPIRO & TOMAIN, *supra* note 17, at 67.

44. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1707 (1999); Michael Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 148 (2005).

45. *Lobbying Database*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby> (last visited Oct. 2, 2016).

46. *Lobbying Database: Influence & Lobbying*, OPENSECRETS.ORG, <https://www.opensecrets.org/influence> (last visited Oct. 2, 2016).

47. Bill McKibben, *The Koch Brothers’ New Brand*, N.Y. REV. BOOKS (Mar. 10, 2016), <http://www.nybooks.com/articles/2016/03/10/koch-brothers-new-brand/> (reviewing MAYER, *supra* note 40); see also HACKER & PIERSON, *supra* note 27, at 227–37.

48. COMM. FOR ECON. DEV., *supra* note 23, at 5.

49. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 103–05 (2011).

for political and economic equality. Lobbyists have become a political force of their own and have their own trade organization known as the Association of Government Relations Professionals, formerly the American League of Lobbyists.<sup>50</sup>

Importantly, just as we have seen increasing campaign spending over the last decades, we have also experienced significant growth in both the number of lobbyists operating in Washington and in the total amount of money being spent on that activity.<sup>51</sup> By way of example, according to the Senate Office of Public Records, as reported by the Center for Responsive Politics, the total amount of lobbying expenditures increased from \$1.45 billion in 1998 to \$3.2 billion in 2015.<sup>52</sup> It must be noted that this amount has declined slightly from a high of \$3.55 billion in 2010, which can be explained by the increasing use of dark money, i.e., money that enters into politics without disclosure.<sup>53</sup> Also during that period, the number of registered lobbyists increased from 10,405 in 1998 to 11,514 in 2015—also down from a high of 14,824 in 2007.<sup>54</sup> Again, that decline can be explained by an increasing number of people who work for lobbying firms and law firms as government relations specialists rather than registered lobbyists, and some do not bother to register at all.<sup>55</sup>

Growth in the number of lobbyists and spending alone does not explain much. However, we can more clearly understand what lobbying does by examining how lobbying dollars are spent, by whom, and for what. In this way, we will find that the regulatory

---

50. Kate Ackley, *New Group for Lobbyists Moves to Fill Void*, ROLL CALL (Apr. 22, 2016, 1:12 PM), <http://www.rollcall.com/news/policy/new-group-lobbyists-moves-fill-void>.

51. *Lobbying Database*, *supra* note 45.

52. *Id.*

53. Alexander Becker, *Spending on Lobbying is Actually Falling. Or is It?*, WASH. POST (Aug. 19, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/08/19/spending-on-lobbying-is-actually-falling-or-is-it>; see also MAYER, *supra* note 40, at 248; Eliza Newlin Carney, *When Super PACs Go Dark: LLCs Fuel Secret Spending*, AM. PROSPECT (Feb. 25, 2016), <http://prospect.org/g/article/when-super-pacs-go-dark-llcs-fuel-secret-spending>.

54. *Lobbying Database*, *supra* note 45.

55. For example, a 1991 study by the Government Accountability Office found that about 10,000 of the 13,500 individuals and organizations listed as influence peddlers on Capitol Hill were not registered as lobbyists. *Clean Up Washington: History of the Lobbying Disclosure Act*, PUB. CITIZEN, <http://www.cleanupwashington.org/lobbying/page.cfm?pageid=38> (last visited Sept. 15, 2016); see also Dan Auble, *Lobbyists 2012: Out of the Game or Under the Radar?*, OPENSECRETS.ORG (Mar. 20, 2013), <http://www.opensecrets.org/news/2013/03/lobbyists-2012-out-of-the-game-or-u>; Dan Auble, *Waning Influence? Part 1: Tracking the "Unlobbyist,"* OPENSECRETS.ORG (Mar. 18, 2014), <http://www.opensecrets.org/news/2014/03/waning-influence-part-1-tracking-the-unlobbyist>.

paradox of expanding government is actually a big hypocrisy. In other words, although big money and big business routinely rail against big government, they are more than delighted to enjoy its beneficences. Big money may not exactly love big government, but it facilitates it and perpetuates it through lobbying. We might put the same point slightly differently. Big money may not love big government, but lobbyists certainly do because they facilitate the flow of money to legislators with a reciprocal flow of benefits to their clients and to themselves.

Some examples of the use of lobbying dollars indicate the direction not only of money in politics but also the direction of legislation and regulation to select interests in the private sector. Of the \$21.9 billion spent on lobbying from 2001 to 2012, only 10% came from education and civil servants while the remainder came from the finance, healthcare, information, entertainment, and similar industries.<sup>56</sup> Some argue that it is not only corporations that spend on lobbying but labor does too.<sup>57</sup> Put aside, for the moment, that unionized labor has been reduced by two-thirds to a mere 11.1% of the workforce in 2015<sup>58</sup> from a high of over 35% in the mid-1940s<sup>59</sup>—the amount of lobbying money spent by labor is miniscule. In 2015, for example, about \$3.2 billion was spent on lobbying overall.<sup>60</sup> Labor spent \$46 million, or 1.4%, of that total and less than 10% of the amount spent by business, finance, and healthcare each.<sup>61</sup> Those who point to lobbying by unions are making a weak argument with the specific intent to deflect the focus from lobbying by big business. Clearly, more lobbying dollars are spent by corporate America than by citizens and workers.<sup>62</sup> Even though we know the sectors that spend the most on lobbying, what is the money being spent on? At

---

56. COMM. FOR ECON. DEV., *supra* note 23, at 27.

57. *See, e.g., id.* at 8.

58. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, USDL-16-1058, ECONOMIC NEWS RELEASE, UNION MEMBERS—2015 (2016), <http://www.bls.gov/news.release/pdf/union2.pdf>.

59. GERALD MAYER, UNION MEMBERSHIP TRENDS IN THE UNITED STATES, at CRS-11 (2004), [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key_workplace).

60. *Lobbying Database, supra* note 45.

61. *Id.*

62. *Id.*

this point, we should look at “good lobbyists” and “bad lobbyists.”<sup>63</sup>

It is a fundamental tenet of democracy that citizens have a constitutionally protected right to participate in the political process.<sup>64</sup> The First Amendment guarantees the rights of free speech, assembly, and petition.<sup>65</sup> As citizens, our voices must be heard in the halls of Congress for a functional democracy. However, the transaction costs of organizing and traveling to Washington are often prohibitive. Many Americans benefit, to some extent, from lobbyists for education, healthcare, the environment, and the like.<sup>66</sup> Consequently, lobbyists provide a useful service for many of us, and that service can be seen as a public good.<sup>67</sup> In other words, the interests of consumers and workers can be, and are, pursued through lobbying in ways that other private sector actors, such as finance or big business, would prefer to ignore.<sup>68</sup> Banks are not interested in having us understand the costs of our credit cards, and business is not generally interested in expanding consumer safety or protecting the environment. Thus, in the good version of democracy, there is a Hobbesian war of lobbyists versus lobbyists.

The model for the good lobbyist is that a client pays a fee and provides information about his or her particular interest to the lobbyist, who, in turn, brings that information to legislators and their staff so that the legislator can engage in the legislative process and make democracy work.<sup>69</sup> This is a nice story. Like all good stories, the story of the good lobbyist is more fairytale than reality precisely because of the transaction costs mentioned above. Even public interest lobbyists cannot provide services for free for very long; transaction costs must be accounted for in some way. More to the immediate point, though, if there are good lobbyists,

---

63. See, e.g., Gerken, *supra* note 41, at 1159–60; see also Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying*, 13 ELECTION L.J. 160 (2014). But see generally Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1184 (arguing that those First Amendment protections may be overstated).

64. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1440–41 (2014).

65. U.S. CONST. amend. I.

66. See Briffault, *supra* note 63, at 163.

67. *Id.*

68. *Id.*

69. LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* 144 (2015).

then one might suspect that there are bad lobbyists as well. Who are they?

For *House of Cards* fans, the character Remy Danton can easily be characterized as a bad lobbyist who will facilitate any transaction for financial gain.<sup>70</sup> The most recognizable poster child of the bad lobbyist is Jack Abramoff, who went to jail for illegal lobbying activities and now lives to tell about his life as a lobbyist as a cautionary tale.<sup>71</sup>

Curiously, perhaps, those bad boys do not reflect the more ordinary lobbyists working K Street. Instead of the shady characters of Danton and Abramoff, today's lobbyist is yesterday's legislator or legislative staffer.<sup>72</sup> From the 111th and 112th Congresses, for example, 64% of the senators and 73% of the representatives became lobbyists.<sup>73</sup> It should be noted that, as is sometimes said in the academy, those numbers are underdetermined. For example, Newt Gingrich reportedly received between \$1.6 and \$1.8 million from the mortgage agency Freddie Mac for his services as a "historian," not as a lobbyist.<sup>74</sup> In exchange for those payments, he explained the ways of Washington to these quasi-government agencies during the housing collapse.<sup>75</sup> In addition to legislators, bureaucrats and high-level officials, such as those working in national security, leave public life to work for private sector companies such as Apple.<sup>76</sup>

From one perspective, it makes good sense that a former legislator or Hill staffer can best serve as an intermediary between private interests and government. After all, these individuals have a level of expertise, including political and policy knowledge, not available to people outside of government. What could possibly go

---

70. *Remy Danton (Character)*, IMDB, <http://www.imdb.com/character/ch0369187> (last visited Oct. 2, 2016).

71. See JACK ABRAMOFF, *CAPITOL PUNISHMENT: THE HARD TRUTH ABOUT WASHINGTON CORRUPTION FROM AMERICA'S MOST NOTORIOUS LOBBYIST* (2011).

72. *Revolving Door: Former Members*, OPENSECRETS.ORG, <https://www.opensecrets.org/revolving/top.php?display=Z> (last visited Oct. 2, 2016).

73. *Id.*

74. Clea Benson & John McCormick, *Gingrich Said to Be Paid About \$1.6 Million by Freddie Mac*, BLOOMBERG (Nov. 16, 2011, 4:55 PM), <http://www.bloomberg.com/news/articles/2011-11-16/gingrich-said-to-be-paid-at-least-1-6-million-by-freddie-mac>.

75. *Id.*

76. See, e.g., Eric Lichtblau, *Security Czars on Apple's Side in Privacy War*, N.Y. TIMES, Apr. 23, 2016, at A1.

wrong?<sup>7</sup> We can best answer that question by asking: Where do these former legislators and staffers go, and what do they do once they get there?

The short answer is that they go to work for law firms, lobbying firms, and corporate government affairs offices.<sup>77</sup> The websites to such organizations describe the work that they do and announce their sales pitches to potential clients.<sup>78</sup> For example, one law firm says that it can “develop effective strategies to make sure you are heard at the right time, by the right people” because it can “help you assess, in advance or in real time, what government policies could affect your business interests.”<sup>79</sup> Another firm boasts that it is comprised of a “bipartisan team of global public affairs specialists. Always original, never ordinary, we know how to change outcomes.”<sup>80</sup> And, as a final example, another lobbyist group says that it helps clients “constructively engage policymakers and thought leaders to promote good policies and defend against government overreach.”<sup>81</sup>

Aside from the obvious pro-business and anti-government slant, these descriptions of lobbying seem benign so far. Are they? All of these advertisements emphasize the fact that these organizations have expertise that can be used in the service of private clients both foreign and domestic.<sup>82</sup> There is nothing obviously untoward in those sales pitches except for one reality: It would be more truthful and more accurate if each of those website messages instead read “Access Is Our Business” or “We Sell Complexity,” as will be evident once we peek behind those broad statements and examine a lobbying firm’s services more closely.

These firms sell complexity because legislative and regulatory complexity multiplies the opportunities for lobbyists to

---

77. See, e.g., Edward Wyatt, *Regulator Takes Job at Comcast*, N.Y. TIMES, May 12, 2011, at B1 (stating that bureaucrats, such as agency heads, also find their way through the revolving doors of Washington).

78. See, e.g., *Government Relations*, QUINN GILLESPIE & ASSOCIATES, <http://www.qga.com/services> (last visited Oct. 27, 2016); *Public Policy*, SQUIRE PATTON BOGGS, <http://www.squirepattonboggs.com/services/public-policy> (last visited Oct. 2, 2016); *We Are the Podesta Group*, PODESTA GROUP, <http://www.podesta.com> (last visited Oct. 2, 2016).

79. *Public Policy*, *supra* note 78.

80. *We Are the Podesta Group*, *supra* note 78.

81. *Government Relations*, *supra* note 78.

82. See, e.g., *Government Relations*, *supra* note 78; *Public Policy*, *supra* note 78; *We Are the Podesta Group*, *supra* note 78.

deliver goodies to their clients.<sup>83</sup> This complexity, though, comes at a considerable cost because lobbying can reduce overall efficiency and constrain economic growth through rent-seeking behavior.<sup>84</sup> Additionally, lobbying entails unnecessary transaction costs and erects barriers to innovation<sup>85</sup> by, for example, directing R&D to narrow profit streams rather than to innovation more generally,<sup>86</sup> among other economic sins.

Recall that the good lobbyist received a fee and information from a client and provided that information to legislators to educate them about their client's various needs so that the legislators can do their work.<sup>87</sup> However, lobbying firms and their work are not so simply organized and structured. Instead, today's lobbying firm provides a range of services and constitutes its own business entity.<sup>88</sup> Indeed, for any work in Washington to get done, a lobbyist is an essential instrument precisely because he or she serves an intermediary and necessary function between private interests and government.<sup>89</sup>

It is in a lobbying firm's self-interest to: (1) explain government to business persons; (2) mediate the short-term needs of business with the longer-term needs of government; (3) develop special expertise in government relations; (4) design and promote particularistic legislative and regulatory solutions rather than comprehensive ones; and in the process, (5) become an indispensable part of senior corporate management.<sup>90</sup> Through such activities, the lobbyist behaves economically rational by seeking to perpetuate its own existence and by becoming indispensable to the corporate world. This self-perpetuating

---

83. DRUTMAN, *supra* note 69, at 220; *see also* Bruce M. Owen, "To Promote the General Welfare": Addressing Political Corruption in America, 5 BRIT. J. AM. LEGAL STUD. 3, 16–18 (2016).

84. Todd J. Zywicki, *Rent-Seeking, Crony Capitalism, and the Crony Constitution*, 23 SUP. CT. ECON. REV. 77, 78–82 (2016).

85. *See, e.g.*, Steven M. Teles, *Kludgeocracy in America*, 17 NAT'L AFF. 97, 98–100, 107–08 (2013).

86. Margaret E. Blume-Kohout & Neeraj Sood, *Market Size and Innovation: Effects of Medicare Part D on Pharmaceutical Research and Development*, 97 J. PUB. ECON. 327, 335 (2013).

87. DRUTMAN, *supra* note 69, at 144.

88. *Id.* at 134–35, 161–66.

89. *Id.* at 144.

90. *Id.* at 143–45, 151.

behavior has been called “stickiness” by Lee Drutman,<sup>91</sup> and is caused by the services that lobbyists provide.<sup>92</sup>

As distinct from the fee and information model of the so-called good lobbyist, the self-perpetuating bad lobbyist provides legislators with: (1) information about client interests;<sup>93</sup> (2) labor to research and write legislation<sup>94</sup>—also referred to as a “legislative subsidy”;<sup>95</sup> (3) political intelligence about the likelihood of the success or failure of a bill (another legislative subsidy);<sup>96</sup> (4) bundled campaign donations;<sup>97</sup> (5) methods with which “vetoes” on pending or proposed legislation can be used to maintain the status quo and protect incumbency;<sup>98</sup> and (6) lucrative post-government jobs for legislators and staffers.<sup>99</sup> This significant array of services is rarely delivered by a single registered lobbyist. Instead, “a modern lobbying operation is often a joint effort among multiple entities—not only a lobbying firm, but also firms that handle strategy, public relations, polling, coalition building, etc.”<sup>100</sup>

These services do not come for free, nor do they come cheaply because they can be quite valuable.<sup>101</sup> In exchange for those lobbying services, legislators provide a lucrative return on that investment through: (1) legislation; (2) earmarks; (3) carve-outs; (4) exceptions; (5) legislative holds; (6) vetoes; (7) subsidies;

91. *Id.* at 168.

92. Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL'Y REV. 105, 128 (2008).

93. See DRUTMAN, *supra* note 69, at 16.

94. See, e.g., Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 916 (2013).

95. Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 69 (2006).

96. Frank R. Baumgartner et al., *Money, Priorities, and Stalemate: How Lobbying Affects Public Policy*, 13 ELECTION L.J. 194, 203 (2014).

97. Michael Gentithes, *An Aggregated Threat: Campaign Contribution “Bundling” and the Future of Reform*, 30 QUINNIAC L. REV. 587, 589–91 (2012).

98. DRUTMAN, *supra* note 69, at 147–51, 220.

99. See JACK MASKELL, CONG. RESEARCH SERV., POST-EMPLOYMENT, “REVOLVING DOOR,” LAWS FOR FEDERAL PERSONNEL, at i, 5 (2014).

100. RONALD M. LEVIN, ABA SECTION OF ADMIN. LAW & REGULATORY PRACTICE, LOBBYING LAW IN THE SPOTLIGHT: CHALLENGES AND PROPOSED IMPROVEMENTS, at vii (2011).

101. See Laurence Tai, *Harnessing Industry Influence*, 68 ADMIN. L. REV. 1, 1 (2016) (highlighting the value of information in the lobbying process).

tax breaks, grants, etc.; (8) favorable agenda-setting;<sup>102</sup> (9) access; and (10) the appearance of access and influence, perhaps most important to the bottom line.<sup>103</sup> This exchange between lobbyists on behalf of clients and legislators (ostensibly on behalf of the public interest) can be viewed as a contract of sorts<sup>104</sup> and one on which legislators have grown dependent.<sup>105</sup> Another, and more accurate, way to view this exchange is that it constitutes the privatization of legislation<sup>106</sup> through which benefits go to the winners of the legislative game at the expense of the public.<sup>107</sup> The lobbyist, then, appears necessary to private clients to have their interests served and becomes necessary to members of Congress for the lifeblood of their reelection (i.e., campaign donations). Lobbyists also open the golden revolving doors to post-government careers in media, entertainment, pharmaceuticals, banking, telecommunications, and the like.

From an economic perspective, lobbying can also be seen as a prisoner's dilemma for democracy<sup>108</sup> in which a disproportionate amount of money is spent for a disproportionate and narrow range of private interests rather than spent in service of the commonwealth.<sup>109</sup> Those with business interests realize that they are part of the problem but will not give up lobbying; they will not risk giving up a competitive advantage to other business firms. At the same time, they seek benefits for themselves even at

---

102. See RONALD D. UTT, A PRIMER ON LOBBYISTS, EARMARKS, AND CONGRESSIONAL REFORM (2006) (using earmarks to explain the return on investment lobbying firms receive and proposing reforms to address the negative aspects of the lobbyist-legislator relationship).

103. See, e.g., HASEN, *supra* note 32, at 49–52; see also COMM. ON ENERGY & COMMERCE, U.S. HOUSE OF REPRESENTATIVES, THE NATIONAL FOOTBALL LEAGUE'S ATTEMPT TO INFLUENCE FUNDING DECISIONS AT THE NATIONAL INSTITUTES OF HEALTH (2016) (describing a particularly disturbing case involving the National Football League's attempt to influence the selection of National Institutes of Health researchers looking into head, neck, and spine injuries through a \$30 million donation); HACKER & PIERSON, *supra* note 27, at 282–88.

104. FRANK R. BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 8, 22 (2009) (describing the contract-like relationship between decision makers and policy advocates).

105. HACKER & PIERSON, *supra* note 27, at 222–23.

106. LESSIG, *supra* note 49, at 89.

107. Baumgartner et al., *supra* note 96, at 201.

108. See J.R. Clark & Dwight R. Lee, *Leadership, Prisoners' Dilemmas, and Politics*, 25 CATO J. 379, 379–80, 382 (2005) (discussing the prisoners' dilemma as it regards lobbying).

109. Baumgartner et al., *supra* note 96, at 201.

the expense of the economy as a whole and at the expense of their long-term best economic interests.<sup>110</sup> After all, management has only quarterly vision. Under this prevailing view, lobbying is most often nothing more than a game of pay-for-play; those who can afford chips can play and can win, but those without chips cannot.<sup>111</sup>

Consequently, we have a key to understanding the regulatory paradox described above. Government expands because private interests are best served by lobbyists who deliver narrowly-tailored solutions rather than comprehensive legislation designed to solve broad political and economic problems.<sup>112</sup> It follows that legislation and regulation will expand in the service of those narrow client interests rather than for the public good, especially as lobbyists play a larger role in influencing those laws with resulting legislative and regulatory complexities.<sup>113</sup> Most certainly, the successful lobbying firm will represent clients with Republican and Democratic political preferences, competing businesses, foreign governments, and anyone who pays the freight.

### III. ARGUMENTS AGAINST LOBBYING

Arguments against lobbying can be condensed into concerns about the abusive use of private power. As discussed below, these concerns have been with us since the founding. There are four key arguments against the bad sort of lobbying just described: (1) political inequality, (2) corruption, (3) public welfare, and (4) economic inequality. These arguments can best be understood by recognizing that they are derived from the logic of collective action.<sup>114</sup> Most simply, small, narrowly-focused groups generally outwit large, diffuse groups for the simple reason that

---

110. Owen, *supra* note 83, at 22–23.

111. Zephyr Teachout, *Original Intent: How the Founding Fathers Would Clean Up K Street*, 11 DEMOCRACY 44, 46–47 (2009), <http://democracyjournal.org/magazine/11/original-intent>.

112. BUTLER, *supra* note 27, at 61.

113. Nicholas W. Allard, *The Seven Deadly Virtues of Lobbyists: What Lawyer Lobbyists Really Do*, 13 ELECTION L.J. 210, 210, 212, 214–18 (2014) (providing a thorough depiction of lobbyists' role in influencing laws).

114. The following are the classic texts: 3 JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965); DENNIS C. MUELLER, *PUBLIC CHOICE III* (2003).

transaction costs are much lower for a handful of car manufacturers to fight mileage standards or for a handful of oil companies to keep fracking chemicals secret<sup>115</sup> than they are for a large number of consumers to organize and fight back.<sup>116</sup> Concomitantly, groups with focused interests more easily capture the attention of legislators than those with general grievances, especially when those focused interests are backed by large campaign donations.<sup>117</sup>

### A. Political Inequality

Political inequality is a result of the logic of collective action because the small guy rarely gets the ear of a legislator. It is neither reasonable nor economically efficient, nor is it procedurally possible, for every person to have a say in every bill, amendment, appropriation, or regulation issued by government or even those initiatives with which they are directly affected. While the point of a representative democracy is to have legislators carry out the public will, too often lobbyists skew this process. “[L]obbying shifts government attention toward the needs of organizing interests rather than the needs of the broader public.”<sup>118</sup>

The problem, of course, is in determining precisely what that public will is. Additionally, that will can be distorted by a political process in which some interests have access to legislators that is denied to others.<sup>119</sup> Legislative complexity further obfuscates political outcomes to the point that the actual costs and benefits of legislation to the economy as a whole are difficult to determine and, too often, unfairly distributed.<sup>120</sup> One need only contemplate the tax code for a moment to acknowledge this reality.<sup>121</sup> Still, ordinary observation tells us that all voices are not

---

115. See Travis Fain, *FOIA Bill: Fracking Chemicals Can Be Secret*, DAILY PRESS (Jan. 28, 2016, 8:25 PM), <http://www.dailypress.com/news/politics/dp-nws-ga-foia-bills-20160128-story.html>.

116. BUTLER, *supra* note 27, at 59.

117. *Id.*

118. Baumgartner et al., *supra* note 96, at 202.

119. See, e.g., Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 216–17 (2012).

120. Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 18 (1992).

121. *Id.* at 5–6.

heard because some are louder than others and, most often, those voices have money behind them.

Even though consumers sometimes win, such as with the case of the Consumer Financial Protection Bureau,<sup>122</sup> big money tilts the political process in its favor and contributes to political inequality in several ways including gerrymandering, lopsided campaign finance, media bias, and inequality of access, among other evils.<sup>123</sup> This political distortion manifests itself in the undesirable ways as discussed next.

### *B. Corruption and its Appearance*

Corruption, and the appearance of corruption,<sup>124</sup> is an argument often leveled against lobbying. The corruption argument is more troublesome as a result of linking campaign contributions with lobbying activity. It is important to be clear about the concept and the definition of corruption by underscoring two things: First, money does not buy Congress, elections, or legislation directly.<sup>125</sup> Second, outright quid pro quo bribery does not exist except in the rarest of instances.<sup>126</sup> Yet, deals between lobbyists and legislatures come close. In Pennsylvania, for example, the Federal Bureau of Investigation (“FBI”) has engaged in a sting operation aimed at uncovering the illegal funneling of campaign contributions to state lawmakers in exchange for their votes on legislation benefiting only companies established by the FBI itself.<sup>127</sup>

Instead of outright bribes, donors (as well as their recipients) are sophisticated enough to hide such transactions as they develop longer-term beneficial relationships.<sup>128</sup> Quite frankly,

---

122. ROBERT G. KAISER, *ACT OF CONGRESS: HOW AMERICA’S ESSENTIAL INSTITUTION WORKS, AND HOW IT DOESN’T* 173 (2013).

123. See WENDELL POTTER & NICK PENNIMAN, *NATION ON THE TAKE: HOW BIG MONEY CORRUPTS OUR DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 6 (2016).

124. Briffault, *supra* note 92, at 111–12.

125. See generally BAUMGARTNER ET AL., *supra* note 104; Baumgartner et al., *supra* note 96.

126. See generally HASEN, *supra* note 32; LESSIG, *supra* note 49 (stating that it is possible, though unlikely, that professionals make judgments independent of external factors including money).

127. *F.B.I.’s Pennsylvania Sting is Seen as Augury of More Corruption Arrests*, N.Y. TIMES, May 9, 2016, at A13.

128. Lisa Kern Griffin, *The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815, 1840 (2011).

no one believes that direct bribery is rampant.<sup>129</sup> Rather, everyone understands that influence is subtler and more nuanced, but not so subtle or nuanced as to go unnoticed.<sup>130</sup> The chief concern is about undue or improper influence and the appearance of that influence.<sup>131</sup> Today, regulating those sorts of corruption is difficult and is becoming more difficult.<sup>132</sup>

In the first significant campaign finance case, *Buckley v. Valeo*, the Supreme Court held that limits on campaign financing directly implicated First Amendment rights.<sup>133</sup> Still, regulation could be justified to prevent corruption or the appearance of corruption. At the same time, the Court also noted that campaign finance limits cannot be used to promote political equality.<sup>134</sup> The *Buckley* ruling was narrowed in *Citizens United*, decided in 2010, when the Court specifically rejected the idea that favoritism led to improper influence.<sup>135</sup> The Court wrote that “[i]ngratiation and access, in any event, are not corruption,” and “influence over and access to elected officials” does not necessarily mean that those officials had been corrupted.<sup>136</sup>

Later, in a 2014 decision, *McCutcheon v. Federal Election Commission*, the Court further narrowed the definition of corruption to almost requiring a quid pro quo exchange of money for votes before sustaining a regulation.<sup>137</sup> The Court emphasized the idea that money is speech and, as such, money was accorded significant First Amendment protection.<sup>138</sup> In the eyes of the *McCutcheon* Court, legislators who receive that money should be receptive to their donors’ wishes and interests as part of a properly functioning political process.<sup>139</sup> The Supreme Court does not have

---

129. *Id.*

130. *Id.*

131. *Id.* at 1842.

132. *Id.* at 1818.

133. *Buckley v. Valeo*, 424 U.S. 1, 143 (1976).

134. *Id.* at 54.

135. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 359 (2010).

136. *Id.* at 314, 360. Similarly, lower courts also narrowly define what constitutes insider trading, such that securities fraud may not be found unless there is a “meaningfully close personal relationship” that leads to some type of tangible benefit. See Donna M. Nagy, *Beyond Dirks: Gratuitous Tipping and Insider Trading*, 42 J. CORP. L. 1, 3 (forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2665820](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2665820). Such a restrictive definition is tantamount to a quid pro quo transaction.

137. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1441 (2014).

138. *Id.* at 1444.

139. *Id.* at 1441.

a particularly realistic view of the democratic process and the ease with which private money flows to public servants who are receptive to their particular interests.<sup>140</sup>

Defining undue or improper influence is not susceptible to a clean definition. However, to borrow a well-worn phrase from Justice Potter Stewart, we may know it when we see it.<sup>141</sup> While lobbying provides a useful information function for government,<sup>142</sup> relationships between lobbyists (and their clients) and legislators that are too cozy are usually suspect. Gifts, golf trips to Scotland, luxury vacations, and the like may not amount to quid pro quo transactions as such; however, it would be simply naïve to pretend that they have no influence on legislative outcomes at all.<sup>143</sup> Similarly, legislative subsidies such as organizational support, financial resources, and political intelligence enable interested parties to gain the attention of, and access to, lawmakers and policymakers.

Most legislators are clever enough not to take naked bribes, but it is hardly fanciful to call the practice of lobbying a gift economy as Lawrence Lessig has.<sup>144</sup> According to Richard Briffault:

[T]he gifts, honoraria, and entertainment that lobbyists have long sought to provide public officials . . . provide[] valuable private benefits that build social relationships, cement goodwill, and may create a predisposition on the part of the elected beneficiaries to reciprocate by giving special access, or even taking official actions helpful, to their lobbyist benefactors.<sup>145</sup>

---

140. See, e.g., Jeffrey Toobin, *The Supreme Court Gets Ready to Legalize Corruption*, NEW YORKER (May 4, 2016), <http://www.newyorker.com/news/daily-comment/the-supreme-court-gets-ready-to-legalize-corruption>. Indeed, in *McDonnell v. United States*, the Court appeared to continue fighting corruption along very narrow lines. *Id.* (noting the Supreme Court's narrow definition of quid pro quo).

141. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

142. See *Lobbyists Inform and Petition Government Representatives*, OHIO ST. B. ASS'N, <https://www.ohiobar.org/ForPublic/Resources/LawYouCanUse/Pages/LawYouCanUse-382.aspx> (last visited Oct. 2, 2016).

143. See, e.g., Briffault, *supra* note 63, at 160 (noting the use of extraneous influence over the government).

144. See, e.g., LESSIG, *supra* note 49.

145. Briffault, *supra* note 63, at 177.

And, carrying the gift analogy one step further, legislators who do not reciprocate with legislative favors for the campaign gifts given by lobbyists know that additional funds will dry up.<sup>146</sup>

Again, it is not necessarily the case that access leads directly to favorable legislation or regulation; nevertheless, parties that get inside legislative or regulatory doors have a greater likelihood of success than those who do not.<sup>147</sup> Also, at the more understandably human, but nevertheless harmful, level, legislators develop social relationships with lobbyists that can predispose them to answering donor phone calls and attending social and political functions rather than doing other constituency work.<sup>148</sup>

We can identify another form of corruption—institutional corruption.<sup>149</sup> The amount of campaign money needed by legislators demands that they spend half of their time fundraising by becoming telemarketers.<sup>150</sup> As a consequence, politicians and legislation follow the donor class, not the middle class.<sup>151</sup> Thus, the legislative process constitutes a political market failure. Instead of spending time to understand the pros and cons of the complex legislative issues that confront them, legislators routinely court donors.<sup>152</sup> In doing so, they are both distracted from the business of legislation and more narrowly focused on the issues of their donors rather than on the broader public good to which we now turn.<sup>153</sup>

---

146. See, e.g., Matt Friedman, *NJEA Threatens to Stop Donations to Some Democrats Over Pension Amendment*, POLITICO (Aug. 2, 2016, 2:16 PM), <http://www.politico.com/states/new-jersey/story/2016/08/njea-threatens-to-stop-dem-donations-104429>.

147. See BAUMGARTNER ET AL., *supra* note 104, at 194–95; KEN GODWIN ET AL., *LOBBYING AND POLICYMAKING: THE PUBLIC PURSUIT OF PRIVATE INTERESTS* 194–95 (2013).

148. GODWIN ET AL., *supra* note 147, at 226–28.

149. See LESSIG, *supra* note 49, at 195 (implying that special interests of institutions can lead to corruption).

150. Norah O'Donnell, *Are Members of Congress Becoming Telemarketers?*, CBS NEWS (Apr. 24, 2016), <http://www.cbsnews.com/news/60-minutes-are-members-of-congress-becoming-telemarketers>.

151. See, e.g., Michael Lind, *Is There Too Much Democracy in America or Too Little?*, N.Y. TIMES (May 15, 2016), <http://www.nytimes.com/2016/05/15/opinion/campaign-stops/is-there-too-much-democracy-in-america-or-too-little.html>.

152. O'Donnell, *supra* note 150.

153. LESSIG, *supra* note 49, at 88.

### C. Public Welfare

Public welfare suffers because of the rent-seeking behavior of those who can afford lobbying fees and can afford to make campaign contributions that are noticed by legislators.<sup>154</sup> Because of the Supreme Court's narrow interpretation of corruption,<sup>155</sup> coupled with its broad interpretation of the free speech rights of money,<sup>156</sup> Richard Hasen suggests that a more promising avenue to curb the wrongs of lobbying is to promote the country's interest in national economic welfare because the Court is unlikely to entertain the argument that lobbying constitutes political inequality.<sup>157</sup>

There are two dimensions to the public welfare argument. First, rent-seeking activity disproportionately favors capital and the wealthy by creating and capturing unnecessary government transfers for the few rather than for all. Those transfers are captured in the disadvantage of competitors, as well as the disadvantage of consumers.<sup>158</sup> For example, extensions of intellectual property protection, such as giving Walt Disney a virtually perpetual copyright for Mickey Mouse, captures monopoly rents for Disney and retards innovation by new entrants.<sup>159</sup> Further, legislation is skewed through narrow exceptions that subsidize competitive advantages for its proponents rather than address larger problems or increase competition.<sup>160</sup>

Second, the legislative complexity generated by particularistic lobbying imposes unnecessary transaction costs on the administration of government and therefore on the economy.<sup>161</sup> In this way, much of the legislation facilitated by

---

154. *Id.* at 76–78; *see also* Hasen, *supra* note 119, at 194 (“Every piece of major legislation has been influenced by (sometimes portions even written by) lobbyists. Lobbyists are a key means by which interest groups pursue their goals in the political arena.”).

155. *See generally* McDonnell v. United States, 136 S. Ct. 2355 (2016).

156. *See* Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 312 (2010).

157. Hasen, *supra* note 119, at 216.

158. *Id.* at 226–27.

159. *See, e.g., How Mickey Mouse Evades the Public Domain*, PRICEONOMICS (Jan. 7, 2016), <http://priceonomics.com/how-mickey-mouse-evades-the-public-domain>.

160. Hasen, *supra* note 119, at 231.

161. *Id.* at 228–32.

lobbying itself is an inefficient use of government resources.<sup>162</sup> Relatedly, to the extent that lobbyists focus legislators' attention on client issues, those legislators cannot pay more attention to matters of broader public concern.<sup>163</sup> This distortion reduces the value of legislation as a whole.<sup>164</sup>

Hasen characterizes the effect of lobbying on legislation as skewing legislation away from the national welfare.<sup>165</sup> It does so in many, if not most, instances by seeking to preserve the status quo.<sup>166</sup> Blocking legislation through business-government deals almost always benefits incumbents at the expense of new entrants.<sup>167</sup> Similarly, stasis rather than change is the norm as “[d]efenders of the status quo usually win in Washington.”<sup>168</sup> In addition, status quo actors usually get what they want—and what they generally want is no change at all, or a stalemate.<sup>169</sup> Another way to make the point is that gridlock pays. “Gridlock is the greatest friend the global warming skeptic has, because that’s all you really want . . . . There’s no legislation we’re championing. We’re the negative force. We’re just trying to stop stuff.”<sup>170</sup> Finally, legislative outcomes are often affected by inaction. Legislators facing reelection are reluctant to engage in legislative action that may threaten their settled donor interests.<sup>171</sup>

Hasen also reports on the negative impact of lobbying on the economy as a whole.<sup>172</sup> In one instance, corporate clients spent a total of \$282.7 million on lobbying in favor of a tax change that reduced the U.S. Department of the Treasury revenue by \$298 billion.<sup>173</sup> However, those who contributed to the lobbying effort realized tax savings of \$88 billion, which constituted a return on

---

162. *Id.* at 197.

163. *Id.* at 217.

164. *Id.*

165. *Id.*

166. BAUMGARTNER ET AL., *supra* note 104, at 239.

167. COMM. FOR ECON. DEV., *supra* note 23, at 6.

168. BAUMGARTNER ET AL., *supra* note 104, at 239.

169. *Id.* at 241.

170. MAYER, *supra* note 40, at 224–25 (quoting MERCHANTS OF DOUBT (Sony Pictures 2014)).

171. HASEN, *supra* note 32, at 47–48.

172. Hasen, *supra* note 119, at 197.

173. *Id.* at 232–33.

investment of over 30,000%.<sup>174</sup> Similarly, farm subsidies disproportionately go to a minority of large agribusinesses.<sup>175</sup> It is estimated, for example, that 75% of all farm subsidies go to 10% of the recipients.<sup>176</sup> Additionally, government-imposed tariffs and quotas favor domestic sugar producers to the extent that consumers generally pay twice the world price for sugar at an annual cost of approximately \$4 billion.<sup>177</sup> Pharmaceutical costs, for example, are higher than they should be as a result of lobbying efforts.<sup>178</sup> Furthermore, lax banking regulations made big banks “too big to fail.”<sup>179</sup> Such case studies can be multiplied ad nauseam. Simply consider the repeal of Glass-Steagall, its direct contribution to a multi-trillion dollar economic loss due to the housing crisis, and to the preservation of executive compensation and bonuses for the very actors that caused the problem in the first place.<sup>180</sup>

Therefore, lobbying leads to a number of negative effects on public welfare, including: a growing inequality of income and wealth; incumbency bias; a brake on innovation; and unhealthy human and natural environments. Regarding environmental health, consider efforts to overturn the Clean Power Plan, reduce mercury regulations, and resist hydraulic fracturing regulations as examples.<sup>181</sup> And regarding human health, the subsidization of sugar and the continued use of cancerous chemicals in all sorts of products harm all of us.<sup>182</sup>

Academics are not alone in their concern about the negative economic consequences of lobbying. Indeed, business

---

174. Raquel Alexander et al., *Measuring Rates of Return on Lobbying Expenditures: An Empirical Case Study of Tax Breaks for Multinational Corporations*, 25 J.L. & POL. 401, 428 (2009); Hasen, *supra* note 119, at 232–33.

175. COMM. FOR ECON. DEV., *supra* note 23, at 11.

176. *Id.*

177. *Id.* at 11–12.

178. POTTER & PENNIMAN, *supra* note 123, at 101–12.

179. *Id.* at 82, 90–91. See generally ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS—AND THEMSELVES (2009) (providing a detailed discussion of these regulations).

180. See, e.g., SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 175 (2010); BETHANY MCLEAN & JOE NOCERA, ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS 54, 109, 360–61 (2010); SORKIN, *supra* note 179, at 7, 75–77, 532–34.

181. POTTER & PENNIMAN, *supra* note 123, at 125–28.

182. LESSIG, *supra* note 49, at 48; POTTER & PENNIMAN, *supra* note 123, at 158–61.

interests are equally aware of the “growing tendency . . . to try to mute or circumvent market competition by influencing the policymaking process in Washington and in state capitals and local governments around the country.”<sup>183</sup> From this viewpoint, crony capitalism and lobbying have more damaging economic effects than simple rent-seeking; they also contribute to a reduction in competition, which, in turn, constitutes a disincentive for innovation with an overall reduction in efficiency and economic growth.<sup>184</sup>

#### *D. Economic Inequality*

Finally, it does not take a giant leap of faith to recognize that those who lobby get the gains and those who do not suffer the losses, resulting in economic inequality. As noted above, economists all along the political spectrum acknowledge that the growing inequality of wealth and income in this country, as well as in other parts of the world, is a direct result of the laws generated by the political process.<sup>185</sup> Furthermore, as discussed throughout this paper, that political process has been distorted along wealth lines, in no small part, because of lobbying.

If lobbying distorts democratic processes and leads to several bad outcomes, then surely there must be some legal argument against it. Here, then, is the rub. The First Amendment protections mentioned earlier present substantial barriers to lobbying restrictions or reforms.<sup>186</sup> These constitutional rights, together with expansive judicial interpretations of corporate free speech, the concept of money as speech, and an antipathy towards campaign finance regulations combined with a highly restrictive definition of corruption make challenging lobbying difficult.<sup>187</sup>

Throughout United States history, the problem of private power has occupied the thoughts of presidents and scholars with no clear-cut solutions, even though there have been many attempts to reign in that power. Next, a brief history of attempts to regulate private power is discussed, followed by possible reforms.

---

183. COMM. FOR ECON. DEV., *supra* note 23, at 5.

184. *Id.* at 6–7, 29–30.

185. See *supra* notes 182–83 and accompanying text.

186. COMM. FOR ECON. DEV., *supra* note 23, at 25–26.

187. *Id.* at 24–26.

## IV. PRIVATE POWER AND PUBLIC GOOD

The singular purpose for the creation of government has been to control the use of both public and private power.<sup>188</sup> The United States Constitution addresses precisely this issue through the use of structural mechanisms.<sup>189</sup> Bicameralism, federalism, checks and balances, and separation of powers are all constitutional devices intended to diffuse public power rather than have power accumulate and concentrate in one individual or one institution.<sup>190</sup> As James Madison eloquently noted in Federalist No. 51, “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”<sup>191</sup>

In the absence of either situation, government must be able to control the governed, and it is also obliged to govern and control itself. One way to protect against the abuse of public power is through arrangements such as those listed above. Further, a dual party system also diffuses political power to some extent in the United States.<sup>192</sup> The open question, however, is: How can our political system avoid the concentration of private power? The problem becomes more acute once we recognize that private activity is constitutionally protected as noted already.

Historically, there have been two general ways to deal with the problem on concentrated private power—restrict it or counterbalance it.<sup>193</sup> The question that must be answered is whether or not these responses are sufficient and constitutionally acceptable ways to address our contemporary political climate, which suffers not only from political gridlock but also from an economic inequality that begets political inequality.<sup>194</sup>

---

188. See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 100–209 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

189. See generally U.S. CONST. (stating that there should be checks and balances on different branches of government).

190. THE FEDERALIST NO. 51, at 294 (James Madison) (Am. Bar Ass’n 2009).

191. *Id.*

192. *Id.*

193. *Id.* at 295–96.

194. See, e.g., Paul Krugman, *Challenging the Oligarchy*, N.Y. REV. BOOKS (Dec. 17, 2015), <http://www.nybooks.com/articles/2015/12/17/robert-reich-challenging-oligarchy>.

A. *Faction v. Faction and the Use and Abuse of Private Power*

The accumulation and use of private power has plagued governments since their inceptions. The phenomenon of private citizens attempting to co-opt government and bend its rules to their use was not unknown in ancient Greece, Augustan Rome, England at the time of the Magna Carta, Medicean Florence, or any other time.<sup>195</sup> Many of the founders, Thomas Jefferson and Madison among them, were not unaware of history; indeed, their study and understanding of history informed their political outlooks.<sup>196</sup> It is no surprise that Madison, an active player in constitution making, would ruminate about the corrupting influences of private power.<sup>197</sup>

In preparation for the Constitutional Convention, Madison organized his thoughts by considering the weaknesses of the then-existing Articles of Confederation.<sup>198</sup> He drafted a memorandum listing twelve principal vices that needed to be considered while redesigning American government.<sup>199</sup> The ideas contained in this memorandum, shared with Thomas Jefferson and George Washington, eventually became the Virginia Plan, which recommended a strong central government whose power was circumscribed by appropriate checks and balances.<sup>200</sup>

The memorandum concentrated on the dispersion of public power, but it did not ignore its private counterpart.<sup>201</sup> In Item 11, *Injustice of the Laws of the States*, Madison worried that state governments could be too easily influenced by local concerns and therefore could threaten the very existence and effectiveness of a national government.<sup>202</sup> After identifying this threat, Madison asked, “To what causes is this evil to be ascribed?”<sup>203</sup> He found

---

195. Peter Bratsis, *The Construction of Corruption, or Rules of Separation and Illusions of Purity in Bourgeois Societies*, 21 SOC. TEXT 9, 11–14 (2003).

196. JOHN SHARP WILLIAMS, THOMAS JEFFERSON: HIS PERMANENT INFLUENCE ON AMERICAN INSTITUTIONS 49 (1913).

197. THE FEDERALIST NO. 51, *supra* note 190, at 296.

198. JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES (1787), <http://founders.archives.gov/documents/Madison/01-09-02-0187>.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

two. The threat lies “1. in the Representative bodies” and “2. in the people themselves.”<sup>204</sup> In other words, parochial interests could adversely affect good governance.

Madison was neither naïve nor idealistic. He understood human government for what it was, and he rejected the republican idea that government could rely on civic virtue such that citizens could exercise restraint and prudence as “the best security against misrule.”<sup>205</sup> Madison acknowledged that American citizens “were as vulnerable to the sway of self-interest and passions as the subjects of other regimes.”<sup>206</sup> In short, Madison understood that in smaller governments (i.e., the states), the passions of the majority could overtake the rights and liberties of political minorities.<sup>207</sup> The federal government, by contrast, could ameliorate some of the abuses of power concentrated in states because of its broader reach.<sup>208</sup>

After the Constitutional Convention, Madison’s concern about the abusive nature of private power began to gel and develop alongside his concern that smaller state governments could corrupt national initiatives.<sup>209</sup> Thus, the leap from the abuse of factious state power to abusive private power was a short one. The existence of a central government to counteract state injustices, however, does not absolve the central government from its own flaws. Hence, the structural constraints we find in the Constitution are attempts to ameliorate some of the abuses of central power.<sup>210</sup> Those structural constraints, however, did not reach private power. Instead, some other constraint was needed; Madison proposed one version in his famous Federalist No. 10.<sup>211</sup>

In his longtime study of the founding, Stanford University History Professor Jack Rakove recognizes Madison as a prototype

---

204. *Id.*

205. Jack Rakove, *James Madison and the Constitution*, HISTORY NOW, <http://www.gilderlehrman.org/history-by-era/creating-new-government/essays/james-madison-and-constitution> (last visited Oct. 3, 2016).

206. *Id.*

207. THE FEDERALIST NO. 10, at 47 (James Madison) (Am. Bar Ass’n 2009).

208. *Id.*

209. Jack Rakove, *A Biography of Madison’s Notes of Debates* 35–36 (Stanford Pub. Law, Working Paper No. 272913, 2016) (reviewing MARY SARAH BILDER, *MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2015)).

210. Teachout, *supra* note 111, at 49.

211. THE FEDERALIST NO. 10, *supra* note 207, at 46.

game theorist.<sup>212</sup> Madison begins by defining faction as “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”<sup>213</sup>

The key distinction in this definition is between passions and interests. We can all understand the passions of the day: whether to go to war, vote for or oppose a presidential candidate, express concern over the balance between liberty and security, particularly during times of strife, and the like. Interests are different, however. In Madisonian language, interest is equated with self-interest, and self-interest is directly related to wealth and property.<sup>214</sup> Madison understood that there were two ways to control such self-interest.<sup>215</sup> The first would be to reduce the ambit of the expression of those interests.<sup>216</sup> The other way of reducing the influence of self-interest would be to expand its expression and, therefore, multiply factions rather than constrain them.<sup>217</sup>

Madison was aware that passions or interests could hold sway when expressed by either majorities or minorities, and that minorities often have a greater voice in government as a direct consequence of the logic of collective action.<sup>218</sup> In a letter to Jefferson, Madison warned of the dangers of faction.<sup>219</sup> His concern was “not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.”<sup>220</sup>

So, should private power be restricted or counterbalanced? Madison considered both approaches.<sup>221</sup> He began his analysis by considering a fundamental constitutional and democratic value—liberty.<sup>222</sup> He wrote, “[L]iberty is to faction, what air is to fire, an

---

212. JACK RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA* 363 (2010).

213. THE FEDERALIST NO. 10, *supra* note 207, at 46.

214. *Id.* at 44.

215. *Id.* at 43.

216. *Id.*

217. *Id.* at 43–44.

218. *Id.* at 44.

219. Rakove, *supra* note 209, at 27–28.

220. *Id.* at 28.

221. THE FEDERALIST NO. 10, *supra* note 207, at 43.

222. *Id.*

aliment without which it instantly expires.”<sup>223</sup> For Madison, the cost of extinguishing or even restricting faction came at too high a price; it came at the destruction of liberty, a necessary element for a robust political sphere.<sup>224</sup> Madison elaborated that individuals, as well as the citizenry as a whole, hold a diversity of opinions and are driven by a diversity of passions.<sup>225</sup> Such diversity is an advantage to government—not a disadvantage. More importantly, “[t]he protection of these faculties is the first object of Government.”<sup>226</sup>

Madison knew, of course, that diversity of opinion and passion can lead to faction. He further acknowledged that “the most common and durable source of factions, has been the various and unequal distribution of property.”<sup>227</sup> Madison’s concern for unequal distribution of property<sup>228</sup> is a concern that lives with us today. He recognized dramatic differences between property holders and those who held none, and between debtors and creditors, as well as differences among landowners, manufacturers, mercantilists, and financiers.<sup>229</sup>

These were the type of interests that coalesced into conflicting factions and, Madison asserted, that it was the “principal task of modern legislation” to regulate these conflicts.<sup>230</sup> Imagine, he posited, the imposition of taxes or of tariffs and customs.<sup>231</sup> Given the various interests, unanimity on such impositions is impossible.<sup>232</sup> Instead, a powerful faction could “trample on the rules of justice.”<sup>233</sup> The power of faction is so strong that it is simply foolish to assume that even “enlightened statesmen” can ignore such power and make it subservient to the public interest.<sup>234</sup> Instead, it is more realistic to recognize that a faction that imposes a tax or other burden on one faction “is a shilling saved to their own pockets.”<sup>235</sup> Madison’s game theory

---

223. *Id.*

224. *Id.*

225. *Id.* at 44.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 60.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

took rent-seeking into account even before the Constitution was ratified and the first Congress convened.<sup>236</sup>

How, then, is oppressive faction to be controlled? Madison rejects the town hall form of government in which a small number of citizens behave as a pure democracy.<sup>237</sup> His concern, similar to his concern about the smaller governments of the states, was that such a group of citizens could become an oppressive majority and could then impose the “mischiefs of faction.”<sup>238</sup> Such majorities, he feared, are incompatible with both personal security and property rights because those majorities will impose their will on minorities.<sup>239</sup> Instead of pure democracy, Madison preferred a representative form of government in which elected officials are delegated legislative authority.<sup>240</sup> He was well aware that a cabal of factions could infect a small republic, and that threat needed to be guarded against.<sup>241</sup> For Madison, a large number of voters would be more likely to elect someone less beholden to factions, even at the risk that the elected representative may be less familiar with the needs of his electors.<sup>242</sup>

The trade-off between a representative with local knowledge and someone who has some distance from his electors is such that a representative might focus more on national issues.<sup>243</sup> Similarly, as the country grows geographically, interests increase in diversity with a corresponding diminishment of the influence of factions.<sup>244</sup> “Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that the majority of the whole will have a common motive to invade the rights of other citizens.”<sup>245</sup>

Madison revisited the issue of the concentration of power in Federalist No. 51, which addressed separation of powers.<sup>246</sup> In that essay, he also argued that a federal government composed of

---

236. *Id.*

237. *Id.* at 61.

238. *Id.*

239. *Id.* at 62–63.

240. *Id.* at 61.

241. *Id.* at 62.

242. *Id.*

243. *Id.*

244. *Id.* at 63.

245. *Id.*

246. See THE FEDERALIST NO. 51, *supra* note 190.

a multiplicity of interests was superior to smaller state governments and was in a better position to protect liberties enjoyed by the people.<sup>247</sup>

Federalist No. 10 is the iconic statement favoring a multiplicity of factions because such a multiplicity can serve as a countervailing power preventing a single group or small number of them from controlling government.<sup>248</sup> Madison's game theoretic account of an active and vibrant government is good as far as it goes; however, its limitations should not be ignored. The franchise was limited to white males (often to those who owned property), and Federalist No. 10 was concerned mostly about property rather than political liberties as we understand them today.<sup>249</sup> The question becomes whether a model based on a limited franchise with a narrow focus on property can serve as a check on the lobbying abuses discussed above. For the moment, the answer is no. Madison's approach to limiting private power is inadequate to sustain a modern democratic, pluralistic government. This inadequacy was revealed by the industrial concentration experienced from the mid to late nineteenth-century.

### *B. The Birth (and Apparent Death) of Countervailing Power*

In Madison's confined world of the restricted franchise and focus on property, a multiplicity of factions may well have served democracy on such issues as taxes, tariffs, and other financial matters. In such a world, economic equality and social mobility were assumed to be available, at least for the select.<sup>250</sup> Madison's game theory, though, could not account for the unanticipated consequences of the Industrial Revolution. More particularly, the expansion of the power of private capital and the tendency of capital to concentrate added a new wrinkle to democratic politics.<sup>251</sup> Most simply, capital held much more sway over labor, and capital accumulation generated unstable disparities in the

---

247. *See id.*

248. THE FEDERALIST NO. 10, *supra* note 207, at 61.

249. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISON FRAMEWORK AND ITS LEGACY 157–58 (1990).

250. *Id.* at 141.

251. RAKOVE, *supra* note 212, at 362.

distribution of wealth and resources.<sup>252</sup> These inequalities were pronounced at the end of the nineteenth century as a wealthy faction could exercise what Madison called the “vicious arts”<sup>253</sup> and use politics to bend the economy to its benefit.<sup>254</sup>

Between the founding and the Industrial Revolution in America, government went through a profound change. In particular, Jacksonian populism ran against big, centralized government, as best exemplified, to them, by the National Bank.<sup>255</sup> Jackson hated the bank and vetoed its second charter.<sup>256</sup> Jacksonian democracy, however, did not go without its critics, such as, most notably, Henry Clay.<sup>257</sup> Clay’s approach to the political economy became known as the American System, which favored a national bank to provide a sound currency and a stable financial system; tariffs for the growth of domestic manufacturing; and federal spending for infrastructure.<sup>258</sup>

Later, Abraham Lincoln adopted the American System for the purposes of promoting economic development and creating a middle class specifically to improve the lives of ordinary Americans.<sup>259</sup> Lincoln’s approach to the political economy was consistent with his anti-slavery and pro-Union program.<sup>260</sup> Economic opportunity, together with a strong economic state, meant that the Union should stay together and that secession would not be tolerated.<sup>261</sup> In order to achieve these goals, Lincoln promoted an activist government through such legislation as the National Banking Act, the Homestead Act, and the Morrill Act.<sup>262</sup> Such legislation shaped the political economy at a time when the country was also being shaped by immigration, industrialization, urbanization, and migration from the South to the North.<sup>263</sup> These

---

252. *Id.*

253. THE FEDERALIST NO. 10, *supra* note 207, at 49.

254. RAKOVE, *supra* note 212, at 362.

255. Carl McGowan, *The President’s Veto Power: An Important Instrument of Conflict in Our Constitutional System*, 23 SAN DIEGO L. REV. 791, 800 (1986).

256. *Id.*

257. *Id.* at 801–02.

258. HAROLD HOLZER & NORTON GARFINKLE, A JUST AND GENEROUS NATION: ABRAHAM LINCOLN AND THE FIGHT FOR AMERICAN OPPORTUNITY 24 (2015).

259. *Id.* at 25.

260. *Id.* at 24–25; SHAPIRO & TOMAIN, *supra* note 17, at 25.

261. HOLZER & GARFINKLE, *supra* note 258, at 24–25.

262. *Id.* at 77–78; SHAPIRO & TOMAIN, *supra* note 17, at 23.

263. HOLZER & GARFINKLE, *supra* note 258, at 87–90, 169–70.

demographic trends were consistent with Lincoln's hope for an expansive middle-class system.

The American System and Lincoln's view of a positive role for government formed the basis for the Progressive Era, which witnessed new legislation and the creation of new institutions.<sup>264</sup> Progressive Era reforms were designed to govern a changing world and address economic inequalities.<sup>265</sup> The Interstate Commerce Act and the agency that it created, the Interstate Commerce Commission, are emblematic of those reforms.<sup>266</sup> Specifically, the reforms were intended to address market abuses caused by the concentration of power in railroads by checking those abuses through the administration of neutral and objective technical expertise based on sound economic theory.<sup>267</sup>

Published in 1909, Herbert Croly's *The Promise of American Life* analyzed the problem of industrial concentration and recognized that the progressive reforms taking place could be used to improve, if not fully restore, the democratic impulse that he believed was part of the American promise.<sup>268</sup> His book became an intellectual keystone for the Progressive Movement that had been developing since the end of the century.<sup>269</sup> Croly acknowledged that it is in the nature of democracies to encounter various challenges and problems; yet, the "corruption in American politics and lawlessness in American business methods"<sup>270</sup> signaled a "new phase of [the American] political experience."<sup>271</sup> Government regulation, then, was the necessary force to counter those lawless business methods and reduce corruption.

Croly's tract was as much of a historical excursion that contrasted political theories of Hamilton and Jefferson as it was an economic analysis of industrial concentration. At the heart of his discussion of the Founders' political theory was Croly's understanding of the role of individualism in American

---

264. SHAPIRO & TOMAIN, *supra* note 17, at 25–27.

265. HOLZER & GARFINKLE, *supra* note 258, at 89–90; SHAPIRO & TOMAIN, *supra* note 17, at 27.

266. SHAPIRO & TOMAIN, *supra* note 17, at 25; *see* Interstate Commerce Act, ch. 104, Pub. L. No. 49-41, 24 Stat. 379 (1887).

267. *Id.*

268. HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 6–7 (1909).

269. *Id.* at 142.

270. *Id.* at 141.

271. *Id.* at 146.

consciousness.<sup>272</sup> Unbridled individualism gave way to a capitalist ethic about the accumulation of wealth and political power that ran contrary to the national interest.<sup>273</sup> That same individualism contributed to an economic inequality that, in turn, had the perverse effect of restraining the power and ability of individuals to live fulfilling lives in satisfaction of American ideals.<sup>274</sup> Too much private power inhibited an American individualism that, if left free, could contribute to a common good.<sup>275</sup> Croly's solution to the inequities of capital concentration was the establishment of a national government strong enough to regulate corporate power in pursuit of social justice.<sup>276</sup> He understood the need for positive government actions that could be used to rebut the forces of economic inequality.<sup>277</sup>

There is no shortage of recommendations in *The Promise of American Life*.<sup>278</sup> Croly canvases both the types of regulations that were on the books and those that should be adopted.<sup>279</sup> In the concluding chapters of the book, Croly discusses the need for antitrust laws, the regulation of natural monopolies, bank regulations, graduated income and inheritance taxes, the need for labor laws, and for education more broadly.<sup>280</sup> All of these regulations center on two fundamental ideas. First, the American economy had gotten out of control and left too many behind in its wake.<sup>281</sup> The rich prospered at the expense of the ordinary American and also the nation's vitality.<sup>282</sup> Second, strong national government is necessary to correct the economic imbalance that gave way to the Gilded Age that, in his words, constituted "individual bondage."<sup>283</sup> In short, the fundamental theme of

---

272. *Id.* at 32.

273. *Id.* at 409.

274. *Id.* at 99.

275. *Id.* at 414.

276. *Id.* at 23.

277. See ROBERT J. GORDON, *THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR* 288–319 (2016). See generally CROLY, *supra* note 268, at 185–214, 265–88.

278. CROLY, *supra* note 268, at 141–264 (explaining different past reform measures and need for current reform in the American system).

279. *Id.*

280. See *id.* at 315–454.

281. *Id.* at 23.

282. *Id.*

283. *Id.* at 409.

Croly's book was "to regulate the distribution of wealth in the national interest."<sup>284</sup>

*C. Square Deals, New Deals, and Countervailing Power*

Teddy Roosevelt understood Croly's analysis and embraced the Progressive spirit.<sup>285</sup> As Croly described, the Square Deal was a way forward—a way to perform the political and economic reconstruction needed for the purpose of making the country a "more complete democracy in organization and practice . . . [through] an efficient national organization as the necessary agent of the national interest and purpose."<sup>286</sup> Later, Franklin D. Roosevelt's New Deal incorporated this same platform.<sup>287</sup> Elected at the time of the Great Depression, Teddy's cousin Franklin learned those lessons and saw the federal government as the vehicle to stabilize the economy with banking and securities regulations; support the middle class through labor laws and social security; put three million people back to work; and construct an infrastructure that remains to this day by way of the Works Progress Administration and the Civilian Conservation Corps, among other measures.<sup>288</sup>

The New Deal made significant economic gains by rationalizing the economy, creating and sustaining a middle class, and mobilizing for World War II—a war that literally turbocharged the economy.<sup>289</sup> The New Deal made these gains possible, according to Harvard economist John Kenneth Galbraith, precisely because it served as a counterweight to private sector abuses, which he chronicled in his 1952 book *American Capitalism: The Concept of Countervailing Power*.<sup>290</sup>

---

284. *Id.*

285. *Id.* at 167.

286. *Id.* at 169.

287. *See, e.g.*, MICHAEL LIND, *LAND OF PROMISE: AN ECONOMIC HISTORY OF THE UNITED STATES* 269–306 (2013).

288. *See generally* JONATHAN ALTER, *THE DEFINING MOMENT: FDR'S HUNDRED DAYS AND THE TRIUMPH OF HOPE* (2007) (documenting FDR's many New Deal initiatives).

289. *See generally* ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* (Alfred A. Knopf ed., 1995) (explaining the vast impact of New Deal legislation on the American economy and ideology); HACKER & PIERSON, *supra* note 27, at 131–59 (discussing greater government reach through economic means during the New Deal era).

290. JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 111 (1956).

Galbraith noted two extraordinary things about the New Deal and the post-war economy. First, he saw the economy as “opulent” while a new form of consumerism took hold.<sup>291</sup> There was a downside, however, to that opulence. Not only did ordinary citizens gain in the economy, but the economy also experienced a new set of monopolists with a remarkable concentration of economic power in the hands of a few firms.<sup>292</sup> Such a concentration was economically inefficient and needed to be countered.<sup>293</sup> In response to such concentration, Galbraith developed the idea of countervailing power, which he saw as a way of reinvigorating competition—the competition lost by corporate concentration.<sup>294</sup>

Galbraith’s first example of countervailing power was to balance private power with public power.<sup>295</sup> As examples, he pointed to labor unions as a relevant force with which to bargain against management; antitrust laws to check market power; fair trade and competition laws to protect consumers and other competitors against unfair business practices; and agricultural organizations to help maintain reasonable market prices.<sup>296</sup> His mistake was failing to fully incorporate into his theory of countervailing power the laws of collective action favoring small, advantaged groups over large and diffuse disadvantaged groups, even if those large groups were comprised mainly of voters. In each of the instances just cited, citizens and consumers lost more often than not to big business and big finance.<sup>297</sup>

He acknowledged that producer power could not always be countered by consumers because organizing such countervailing power is difficult at best, as the theory of collective action demonstrates.<sup>298</sup> Consequently, “it is not surprising that the assistance of government has repeatedly been sought . . . [as] the provision of state assistance to the development of countervailing power has become a major function of government—perhaps *the*

---

291. *Id.* at 95.

292. *Id.* at 103.

293. *See id.* at 104 (noting that concentration of power distorts use of resources).

294. *Id.* at 111.

295. *Id.*

296. *Id.* at 115.

297. *Id.* at 114–15.

298. *Id.* at 127.

major domestic function of government.”<sup>299</sup> Galbraith noted that this observation explains much of New Deal legislation.<sup>300</sup>

Galbraith also recognized the rampant hypocrisy of the moneyed classes. In his discussion of the relationship between business and government, he pointed out that businessmen are not at all reluctant to seek government favor whether by tariff or tax break; conservative editorial writers are happy to recognize legislation that favors business and earnings; and conservative states’ righters willingly accept agricultural subsidies.<sup>301</sup>

Galbraith believed that countervailing power would be used to promote competition and, therefore, disadvantaged groups would use it because those in a weaker position could “excite public sympathy and, because there are numerous voters involved, [recruit] political support.”<sup>302</sup> Government should intervene in the economy, according to Galbraith, when market power is not sufficiently offset by countervailing forces.<sup>303</sup> Later, such thinkers as Alfred Kahn and Stephen Breyer would consolidate this analysis into a theory of market imperfection as a justification for government regulation.<sup>304</sup>

Galbraith’s theory of countervailing power had both a positive and negative dimension.<sup>305</sup> Its negative force was that countervailing power should be used to reduce the concentration of market power.<sup>306</sup> Its positive force was that government regulation could promote competition and therefore contribute to efficiency and economic growth.<sup>307</sup>

#### *D. Galbraith Redux*

Despite the gains of the New Deal, the sins of the Great Depression visited the children of the Great Recession of the

---

299. *Id.* at 128.

300. *Id.*

301. *Id.* at 135.

302. *Id.* at 136.

303. *Id.* at 138.

304. See STEPHEN BREYER, REGULATION AND ITS REFORM (1982); 2 ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (1976).

305. GALBRAITH, *supra* note 290, at 167.

306. *Id.*

307. *Id.* at 190–92; see also DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 83 (2012).

twenty-first-century.<sup>308</sup> Weak banking laws, under enforcement of financial rules, a mortgage and housing debacle that was aided and abetted by the United States Department of the Treasury and other government agencies, together with the rapacious behavior of private sector bankers of all stripes, contributed to the most severe collapse of the American economy since the 1930s and nearly brought about the death of capitalism as practiced throughout the twentieth century.<sup>309</sup> Unfortunately, American-style capitalism is remarkably resilient and persists with a vengeance. Bank consolidation is at the highest point in history, corporate wealth is at levels unseen before, and income inequality expands rather than contracts.<sup>310</sup> The world of twenty-first-century capitalism needs to revisit Galbraith's concept of countervailing power and improve upon his failure to account for collective action issues.

In 2015, Robert Reich published *Saving Capitalism* and, in the introduction,<sup>311</sup> came to the same conclusion previously reached by Nobel Laureates Joseph Stiglitz and Paul Krugman.<sup>312</sup> In his words, he found that "increasing concentration of political power in a corporate and financial elite . . . has been able to influence the rules by which the economy runs."<sup>313</sup> Each author recognizes the power of politics to organize markets rather than to adhere to the economist's dream in which government plays a supporting role to markets.<sup>314</sup> Government sets rules of property, enforces market transactions, monitors the public fisc, and mediates fluctuations in the macro economy through central banking controls.<sup>315</sup> So ordered, competitive markets can function

---

308. LIND, *supra* note 287, at 363–64.

309. See generally KRUGMAN, *supra* note 30; PAUL KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008 (2009); TIMOTHY NOAH, THE GREAT DIVERGENCE: AMERICA'S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT (2012); POSNER, FAILURE, *supra* note 30; POSNER, CRISIS, *supra* note 30; ROBERT B. REICH, AFTERSHOCK: THE NEXT ECONOMY AND AMERICA'S Future (2010); STIGLITZ, *supra* note 30; STIGLITZ, *supra* note 33.

310. See generally ROBERT B. REICH, SAVING CAPITALISM: FOR THE MANY, NOT THE FEW (2015); JOSEPH E. STIGLITZ, THE GREAT DIVIDE: UNEQUAL SOCIETIES AND WHAT WE CAN DO ABOUT THEM (2015).

311. REICH, *supra* note 310, at xiii.

312. KRUGMAN, *supra* note 33, at 7; STIGLITZ, *supra* note 33, at xix–xx.

313. REICH, *supra* note 310, at xiii; see also HACKER & PIERSON, *supra* note 27, at 92–93.

314. KRUGMAN, *supra* note 33, at 7; STIGLITZ, *supra* note 33, at 119.

315. See REICH, *supra* note 310, at 118 (noting that the government has the power to determine the rules of the economy and manipulate redistribution).

with a minimalist government, and innovation can be encouraged, wealth can be created, and efficiency can flourish. Again, the economist's dream is a nice story; however, it is not the story of our current political economy.

Reich wrote the book, in part, to acknowledge the importance of Galbraith's conception of countervailing power and, in part, to recognize that it has "withered."<sup>316</sup> Labor unions, in particular, and the middle class, more generally, have lost their economic bargaining strength; antitrust laws have been weakened seemingly to extinction; agricultural organization has morphed into agribusiness to the detriment of family farmers; and rent-seeking proliferates to the detriment of consumers and damaging the economy.<sup>317</sup> Simultaneously, the country has experienced an unsustainable increase in the working poor and a historic expansion of the wealth gap.<sup>318</sup> Today, "redistribution" has become a verboten word in contemporary politics unless, of course, the redistribution goes from the bottom to the top.<sup>319</sup> Reich's solution is to craft a new set of countervailing powers.<sup>320</sup>

Reich starts with a proposition that was central to the book that Professor Sidney Shapiro and I wrote entitled *Achieving Democracy*.<sup>321</sup> Quite simply, the neoliberal idea of a "free market" is, to borrow a phrase from Jeremy Bentham, "nonsense upon stilts"<sup>322</sup> precisely because markets cannot exist without government rules.<sup>323</sup> Instead, the neoliberal mantra that extols free markets and demonizes government should be taken for what it is.<sup>324</sup> It is not economics; it is a political preference. And it is a political preference in favor of corporate power and the wealthy to

---

316. *See id.* at xiv.

317. *Id.*

318. *Id.* at 115–42.

319. *Id.* at 118.

320. *Id.* at 183.

321. SHAPIRO & TOMAIN, *supra* note 17, at xii.

322. *Jeremy Bentham*, INTERNET ENCYCLOPEDIA PHIL., <http://www.iep.utm.edu/bentham> (last visited Oct. 3, 2016). Bentham, the father of the utilitarianism so cherished by free market economists today, thought that natural laws and rights theories were nonsense on stilts. *Id.* Instead, the guiding principle of his political philosophy was that individual and public decisions should be made in ways that increased pleasure and reduced pain. *See id.* This formulation of utilitarianism was, then, susceptible to positive analysis (i.e., measurement) and did not rely on non-empirical or testable "values." *See id.*

323. REICH, *supra* note 310, at 8–10; SHAPIRO & TOMAIN, *supra* note 17, at 57–74.

324. SHAPIRO & TOMAIN, *supra* note 17, at xvi.

the disadvantage of consumers and the working poor.<sup>325</sup> Wealth does not trickle down. Instead, miraculously defying gravity, it moves upward away from labor to capital, away from the poor and middle class to the wealthy—to the 1%.<sup>326</sup> As Martin Gilens and Benjamin I. Page have found: “Economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while . . . mass-based interest groups and average citizens have little or no independent influence.”<sup>327</sup>

Reich notes the ascendancy of new monopolists who gained both market and economic power by bending the rules of government.<sup>328</sup> Big Pharma controls drug prices through legislation such as Plan D, which prohibits the government from using its own buying power to negotiate lower drug prices.<sup>329</sup> The expansion of intellectual property protection has prevented competition and ideas that would have been available to the market in years past. Similarly, the ability of telecommunications firms to dominate markets gives United States consumers slower and pricier internet service than elsewhere in the world.<sup>330</sup> In addition to the accumulation of market power through rent-seeking legislation and favorable regulation, corporate America imposes a triple whammy on consumers through legislation that limits their liability for wrongdoing;<sup>331</sup> expands their ability to influence political outcomes;<sup>332</sup> and sustains the gross under-enforcement of laws on the books, particularly for white collar crimes.<sup>333</sup>

---

325. REICH, *supra* note 310, at 15.

326. *See id.* at 118.

327. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 564–65 (2014), [https://scholar.princeton.edu/sites/default/files/mgilens/files/gilens\\_and\\_page\\_2014\\_-testing\\_theories\\_of\\_american\\_politics.doc.pdf](https://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_-testing_theories_of_american_politics.doc.pdf).

328. REICH, *supra* note 310, at 40.

329. Chuch Shih et al., *How Would Government Negotiation of Medicare Part D Drug Prices Work?*, HEALTH AFF. BLOG (Feb. 1, 2016), <http://healthaffairs.org/blog/2016/02/01/how-would-government-negotiation-of-medicare-part-d-drug-prices-work>.

330. REICH, *supra* note 310, at 14.

331. *Id.* at 154–56.

332. *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 301 (2010).

333. *See generally* ALYSON FLOURNOY ET AL., REGULATORY BLOWOUT: HOW REGULATORY FAILURES MADE THE BP DISASTER POSSIBLE, AND HOW THE SYSTEM CAN BE FIXED TO AVOID A RECURRENCE (2010), <http://digitalcommons.law.umaryland.edu/cgi/v>

Given this parade of horrors, Reich attempts to define new forms of countervailing power, and he starts by describing the “necessary role of government in designing, organizing, and enforcing the market to begin with.”<sup>334</sup> The imbalance of wealth in the American economy was accomplished by the ability of the economically advantaged to hijack the political process.<sup>335</sup> To be sure, the redistribution to the top is not advantageous to the citizenry or to the whole economy. Short-term economic thinking is unsustainable and poses a real threat to America, as the Great Recession has amply demonstrated.

Institutions such as labor unions, small banks, and a multiplicity of small retail businesses once served as countervailing powers to management, large financial institutions, and large retailers.<sup>336</sup> Such is no longer the case. Unionized labor has declined; there has been a concentration of large financial institutions since the elimination of Glass-Steagall and even since the notorious bailout,<sup>337</sup> and mom-and-pop retail stores have given way to behemoths such as Walmart.<sup>338</sup>

---

iewcontent; News Release, U.S. Dep’t of Labor, Statement of U.S. Secretary of Labor Hilda S. Solis on the Death of 29 Miners at Upper Big Branch South Mine (Apr. 10, 2010), <https://www.dol.gov/opa/media/press/msha/MSHA20100476.htm>. The environmental tragedies of the BP Horizon disaster in the Gulf of Mexico and the Big Branch Mine explosion were both directly caused by operator negligence and under-enforcement. See FLOURNOY ET AL., *supra*, at 1; see also *A Brief History of Offshore Oil Drilling* (Nat’l Comm’n on the BP Deepwater Horizon Oil Spill & Offshore Drilling, Working Paper No. 1), <http://web.cs.ucdavis.edu/~rogaway/classes/188/materials/bp.pdf>. Additionally, the SEC has notoriously under-reported and under-enforced securities laws. Their failure to catch the multibillion-dollar Ponzi scheme of Bernie Madoff is Exhibit 1 in that catalog of failures. See also JAMES B. STEWART, TANGLED WEBS: HOW FALSE STATEMENTS ARE UNDERMINING AMERICA: FROM MARTHA STEWART TO BERNIE MADOFF 365–66 (2011). See generally OFFICE OF INVESTIGATIONS, U.S. SEC. & EXCH. COMM’N, INVESTIGATION OF THE FAILURE OF THE SEC TO UNCOVER BERNIE MADOFF’S PONZI SCHEME (2009), <https://www.sec.gov/news/studies/2009/oig-509.pdf>; OFFICE OF SENATOR ELIZABETH WARREN, RIGGED JUSTICE: 2016: HOW WEAK ENFORCEMENT LETS CORPORATE OFFENDERS OFF EASY (2016), [https://www.warren.senate.gov/files/document/s/Rigged\\_Justice\\_2016.pdf](https://www.warren.senate.gov/files/document/s/Rigged_Justice_2016.pdf); Jed Rakoff, *The Cure for Corporate Wrongdoing: Class Actions vs. Individual Prosecutions*, N.Y. REV. BOOKS (Nov. 19, 2015), <http://www.nybooks.com/article/s/2015/11/19/cure-corporate-wrongdoing-class-actions> (reviewing JOHN C. COFFEE JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE (2015)).

334. REICH, *supra* note 310, at 154.

335. *Id.* at 150.

336. *Id.* at 157.

337. *Id.* at 172–75.

338. *Id.* at 173.

Reich generates a laundry list of reforms including investing in education, regulating campaign finance, supporting healthy minimum wage, and reviving shareholder participation.<sup>339</sup> Additionally, he recommends controlling the new monopolies by reducing the length of time for intellectual property protection, reinvigorating antitrust law, and reestablishing government enforcement mechanisms.<sup>340</sup> All of his recommendations make sense and all are in the progressive spirit. The open question, however, is whether they truly constitute an effective countervailing power. One place to start is to weaken or break the link between private wealth and public legislation—between money and lawmakers. Let’s start with lobbying.

## V. THE TROUBLED LAW OF LOBBYING

Two paths—republican and realist—are available for addressing lobbying abuses, and both are supported by the political theories just discussed. The virtuous republican path speaks truth to power, whereas on the realist path, power confronts power.<sup>341</sup> The idea behind republican virtue is that individuals are essentially good; they will do the right thing for the right reasons.<sup>342</sup> Sometimes, though, people need to be shown the right way through education about things they cannot do, such as bribe members of Congress. Under this view, restrictions on lobbying are used to limit abuses by forcing lobbyists, their clients, and legislators to do their job—work for the public good rather than for the promise of lucrative post-government employment.<sup>343</sup>

The realist approach is more pragmatic and moves in the opposite direction. Instead of restricting lobbying and trying to force lobbyists to behave, regulations are adopted to counteract

---

339. *Id.* at 193–95.

340. *Id.*

341. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 96 (1998); John J. Mearsheimer, *Structural Realism*, in *INTERNATIONAL RELATIONS THEORIES: DISCIPLINE AND DIVERSITY* 51–65 (Tim Dunne, et al. eds, 4th ed. 2016).

342. See Gordon S. Wood, *Classical Republicanism and the American Revolution*, 66 *CHI-KENT L. REV.* 13, 23 (1990).

343. See H.R. REP. NO. 104-339, pt. 1, at 12 (1995) (stating that restrictions such as “effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of government actions will increase public confidence in the integrity of government”).

the identified abuses.<sup>344</sup> More specifically, regulations are adopted to counteract slanted, interest-based information supplied by lobbyists by expanding the availability of information as a counterbalance to the narrow positions taken by lobbyists and their clients.<sup>345</sup> By expanding information, this approach looks to promote a more open and transparent democratic process.<sup>346</sup>

Political theorists have discussed both paths since the Constitutional Convention.<sup>347</sup> One path, however, is more promising both practically and legally. As Machiavelli taught us, political expedience trumps human virtue at every turn.<sup>348</sup> Consequently, the republican path of attempting to impose behavioral modification regulations on lobbyists is less likely to be effective. That path is also less likely to be constitutional because of the way courts have interpreted First Amendment jurisprudence in this area recently.<sup>349</sup> Therefore, the realist path that opens, and hopefully levels, the political process is more promising. Government funding, which treats lobbying as a public good, is more likely to be efficacious as well as legitimate.

Both approaches generate recommendations for regulatory action that have been used in the past and are used now. The American Bar Association, for example, published a report that emphasized each.<sup>350</sup> One option limits what lobbyists do by separating the “function of urging elected officers of government to take action from the function of raising funds for and transmitting money to those officers.”<sup>351</sup> The second option addresses campaign finance and recommends that lobbyists and other public policy advocates “should work in the open, just as their colleagues who advocate before courts work in the open, on the record.”<sup>352</sup> The first approach attempts to limit the role of lobbyists as conduits for campaign money while the second

---

344. See LEVIN, *supra* note 100, at 2 (discussing the enactment of the Lobbying Disclosure Act of 1995 as an example of an effort to increase regulations and deter lobbyist abuse).

345. *Id.* at 6.

346. *Id.* at iv.

347. William P. Meyers, *Lobbying the Constitution*, 5 JUST. RISING 16 (2012), <http://www.thealliancefordemocracy.org/pdf/AfDJR5316.pdf>.

348. Wood, *supra* note 342, at 33.

349. See Briffault, *supra* note 63, at 173.

350. See LEVIN, *supra* note 100, at iv.

351. *Id.* at vi.

352. *Id.*

promotes transparency and disclosure in an effort to expand the public good purpose of lobbying.<sup>353</sup>

### A. *Limiting Lobbying Power*

Current First Amendment jurisprudence limits the degree to which regulations can burden either campaign or lobbying spending even though these funding sources raise legitimate concerns about improper influence and even corruption.<sup>354</sup> Consistent with the Supreme Court's narrow interpretation of corruption, there is cause for concern about public demoralization and a declining confidence in government because of its appearance—an appearance caused by the pervasive use of private money in politics.<sup>355</sup> Nevertheless, regulations on campaign spending are difficult to sustain.

Lobbying critics continue to decry the close connection between lobbying money and campaign finance.<sup>356</sup> The tight, and growing tighter, connection between lobbying and campaign donations should be susceptible to regulation. It would seem, then, that a restriction separating these two functions makes sense and should be constitutional. Lobbyists could be allowed to make campaign contributions on their own but could well be prohibited from soliciting contributions from clients or their staffs and could be prohibited from bundling altogether.<sup>357</sup> The idea is to break the “monetary connection between lobbyists and elected officials [so that the] lobbyists’ primary role would be an information function, and competition among lobbyists would help to ensure that elected officials and staffers received accurate and helpful information.”<sup>358</sup> By breaking the money connection, the hope is that doing so will enhance the information function of lobbying and reduce government inefficiencies.

Another regulation that should survive a constitutional challenge is enhanced ethics enforcement.<sup>359</sup> Members of

---

353. *See id.*

354. *Id.*

355. Briffault, *supra* note 92, at 108.

356. COMM. FOR ECON. DEV., *supra* note 23, at 6.

357. Hasen, *supra* note 119, at 237.

358. *Id.* at 238.

359. *See* Tai, *supra* note 101, at 13.

Congress, staff, and lobbyists are bound by ethics laws and rules.<sup>360</sup> However, these rules are apparently under-enforced, if enforced at all.<sup>361</sup> Consequently, one lobbying reform that would satisfy a constitutional test would be the nonpartisan enforcement of existing rules. Such an enforcement authority should be independent of party politics and congressional employment, and should be served by professional staff with adequate funding. The ethics office should have the authority to conduct investigations and should be authorized to receive complaints from members of Congress and the general public. Frivolous complaints should be dismissed, and all actions should be publicized. Further, legislators and staffers should be required to make financial disclosures not only about their net worth but also about their sources of income.<sup>362</sup>

Additionally, revolving door restrictions have been used in the past and are generally considered legitimate.<sup>363</sup> The idea is simple: a regulation can limit the time period before which a member of government (legislator, bureaucrat, or staff member) can lobby with regard to matters in which they were previously involved or in which their offices or agencies have been involved.<sup>364</sup> This type of cooling off regulation has been used in the past and should pass constitutional standards.<sup>365</sup>

If the constitutional protection of lobbying is based on the idea of a First Amendment right to petition government, then such petitioning should be done in the sunlight. Disclosure rules can be adopted for the purpose of increasing the availability of information. Again, there is a range of lobbying reforms that can address the problem, if not necessarily eliminate the more notorious abuses. Registration, disclosure, anti-bribery legislation, ethics rules, and revolving door restrictions, as well as restrictions on gifts and travel may help.<sup>366</sup> Under the prevailing Lobbying

---

360. COMM. FOR ECON. DEV., *supra* note 23, at 35.

361. *See id.*

362. *See id.* at 35–36.

363. Briffault, *supra* note 63, at 184.

364. *See generally* Tai, *supra* note 101, at 13.

365. Briffault, *supra* note 63, at 184. *But see* Brinkman v. Budish, 692 F. Supp. 2d 855 (S.D. Ohio 2010) (striking down Ohio's revolving door ban). This decision has been called an outlier that may have misapplied First Amendment doctrine. McKinley, *supra* note 63, at 1195.

366. *See, e.g.*, Brian Griffith, *Lobbying Reform: House-Cleaning or Window Dressing?*, 75 U. CIN. L. REV. 863 (2006).

Disclosure Act<sup>367</sup> and its amendments by the Honest Leadership and Open Government Act,<sup>368</sup> reporting requirements are limited. The ABA recommendations expand reporting requirements to lobbying support staff as well as to lobbyists themselves.<sup>369</sup>

Light should also shine on campaign finance. A recent bipartisan committee emphasizes the need for greater disclosure of political contributions—particularly contributions made to outside and so-called independent campaign groups.<sup>370</sup> Similarly, the recommendations also stress that there should be monetary restrictions on congressional leadership Political Action Committees.<sup>371</sup> All such restrictions limit lobbying activities or force lobbyists down a path that more closely honors democratic political processes. Simultaneously, such regulations also provide useful information, which, as the next section elaborates, is another, more democratic approach to reducing lobbying abuses.

### *B. Expanding Lobbying Democratically*

Regulations that require registration, reporting, and disclosure are likely to pass constitutional standards for the simple reason that such regulations are intended to provide both transparency and information about the political process. Unfortunately, transparency and disclosure rules may constitute a “pretty weak regulatory brew.”<sup>372</sup>

The availability of such lobbying and political information can inform three distinct groups. First, and most importantly, voters should know who has access to their legislators and on which issues.<sup>373</sup> Second, competing interest groups should also have information about how much money is spent by whom and

---

367. Lobbying Disclosure Act, 2 U.S.C. §§ 1601–1614 (2012).

368. Honest Leadership and Open Government Act, Pub. L. No. 110-81, 121 Stat. 735 (2007).

369. LEVIN, *supra* note 100, at vii.

370. BIPARTISAN POLICY CTR. COMM’N ON POLITICAL REFORM, GOVERNING IN A POLARIZED AMERICA: A BIPARTISAN BLUEPRINT TO STRENGTHEN OUR DEMOCRACY 46 (2014), <http://bipartisanpolicy.org/library/governing-polarized-america-bipartisan-blueprint-strengthen-our-democracy>.

371. *Id.*

372. Heather K. Gerken & Alex Tausanovitch, *A Public Finance Model for Lobbying: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 ELECTION L.J. 75, 85 (2014).

373. *See, e.g.,* Tai, *supra* note 101, at 15.

on which issues.<sup>374</sup> For example, to the extent that environmental interest groups know how much money is being spent on climate change denial, they may be motivated to provide accurate scientific information about the consequences of climate change.<sup>375</sup> And third, the general public will have a sense of the political direction of the country based upon who is funding whom.<sup>376</sup>

Rather than impose restrictions on lobbying, another approach is an attempt to level the political playing field (with the hoped-for intent of reducing economic inequality) by taking Madison seriously. Madison, a realist, recognized that the “interests” would always find their way to decision makers.<sup>377</sup> Again, the hydraulics of politics makes money flow easily between private interests and their government representatives. Restricting interest-lawmaker interactions, to him, was an impermissible restriction on liberty.<sup>378</sup> Therefore, expand information rather than contract it. To Madison, that meant promoting interest group participation and furthering democracy.<sup>379</sup>

The contemporary analogue regarding lobbying regulation would be to increase the information flow to legislators by treating such information as a public good instead of as a private resource to be used to shape the public interest to private benefit. Heather Gerken and Alex Tausanovitch have proposed a public finance model for lobbying in which legislators are provided with “policy research consultants” from which they can get information to help shape legislation without excessive reliance on the narrow interests of private lobbyists.<sup>380</sup>

Recall that lobbyists have an array of products that they can provide to legislators. In addition to information about client interests, other legislative subsidies include political intelligence; electoral data; narrow, issue-specific data with which to draft

---

374. See COMM. FOR ECON. DEV., *supra* note 23, at 27 (describing the spending power of modern interest groups).

375. See generally Robert J. Brulle, *Institutionalizing Delay: Foundation Funding in the Creation of U.S. Climate Change Counter-Movement Organizations*, 122 CLIMATE CHANGE 681 (2014).

376. Gerken & Tausanovitch, *supra* note 372, at 115–19.

377. THE FEDERALIST NO. 51, *supra* note 190, at 49.

378. THE FEDERALIST NO. 10, *supra* note 207, at 43.

379. *Id.*

380. Gerken & Tausanovitch, *supra* note 372, at 76.

legislation; policy information; and research capabilities.<sup>381</sup> These valuable resources may be unavailable to legislators with limited staffs and budgets. Unfortunately, these legislative subsidies can narrow legislators' focus by restricting the ambit of information that is provided.<sup>382</sup> As reported, lobbyists understand their job, at least in part, as focusing their efforts in the legislative process by understanding "how to get enough key players to pay attention, how to get enough support to move legislation forward, or how to mobilize participation to kill a bill."<sup>383</sup> After all, there is economic value not only in getting favorable legislation but also by killing potentially harmful bills.<sup>384</sup>

For convenience, all of these subsidies can be put under the heading of information. If information is too narrowly provided, then widen its availability and increase its depth. One legitimate response to campaign finance reform is not to restrict money for elections; rather, it is to make public funds available.<sup>385</sup> Similarly, "[t]he alternative to lobbying isn't no information; it's publicly funded information."<sup>386</sup> Indeed, there are several avenues for the public financing of information. Legislators can receive increased funding for more staff and more expertise; the budgets for nonpartisan legislative offices such as the Congressional Research Service and the Congressional Budget Office can be increased; House and Senate Legislative Counsel Offices can be expanded; or legislators can be given actual money or vouchers to hire their own (presumably independent) lobbyists for the legislative assistance that they so sorely need.<sup>387</sup> True public interest law firms, research consultants, universities, and the like can counterbalance the tilted information provided by private lobbyists.<sup>388</sup>

Similar reforms include the creation of an Office of Public Lobbying, funded by the government, that can form a group of public lobbyists to represent public interest clients for the public

---

381. *Id.*

382. *Id.* at 80–83.

383. BAUMGARTNER ET AL., *supra* note 104, at 50.

384. FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 61 (1997).

385. Gerken & Tausanovitch, *supra* note 372, at 75.

386. *Id.* at 83.

387. *Id.*

388. *Id.* at 87–90.

interest points that are less likely to be heard.<sup>389</sup> Another reform proposal would be the passage of a Congressional Lobbying Procedure Act that would require lobbying activities, such as draft legislation, reports, and position papers, to be identified on a searchable website so that the issues involved can be more widely known and understood.<sup>390</sup> In short, the old idea that sunshine is the best disinfectant<sup>391</sup> can be adapted to serve as a countervailing power against lobbying as it is presently conducted.

## VI. CONCLUSION

Because of the constitutional protections afforded to lobbying, reforms are hard to come by. Clearly, some limits can be imposed, such as restricting bundling, vigorously enforcing ethics laws, and making information funding available. Still, even the critics of bad lobbyists, based on Supreme Court decisions, believe that a political inequality argument cannot pass judicial scrutiny. I prefer to argue that we should not give up on the political inequality argument too soon. Indeed, some of the reforms suggested above, such as public finance for elections and lobbying, have the meritorious advantage of increasing information and, therefore, should encounter no First Amendment prohibitions.<sup>392</sup>

The political inequality argument is important as a matter of social justice and is equally important as a matter of democratic values. Those democratic values are embedded in American culture and in constitutional norms. Specifically, these values embrace liberty,<sup>393</sup> equality,<sup>394</sup> and fairness,<sup>395</sup> and are expressed through participation in the political process.<sup>396</sup>

---

389. DRUTMAN, *supra* note 69, at 230; Teachout, *supra* note 111.

390. DRUTMAN, *supra* note 69, at 231.

391. Sunlight Intern, *Brandeis and the History of Transparency*, SUNLIGHT FOUND. (May 26, 2009, 10:47 AM), <https://sunlightfoundation.com/blog/2009/05/26/brandeis-and-the-history-of-transparency>.

392. HASEN, *supra* note 32, at 87–90.

393. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 3* (2005).

394. RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 184–85 (2000); LESSIG, *supra* note 49, at 4–6.

395. JOHN RAWLS, *A THEORY OF JUSTICE* 259 (1971); JOHN RAWLS, *JUSTICE AS FARNNESS: A RESTATEMENT* 39 (2001).

396. Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 NW. U. L. REV. (forthcoming 2017), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2766717](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766717).

These values are embedded in American history and culture, American law and politics, and American constitutional law and democratic theory. They express the democratic yearning for participation in the political and economic processes available for making fulfilling lives for all.<sup>397</sup> Economic participation requires distributive fairness and a reduction in wealth and income inequalities. Political participation also requires fairness by expanding rather than contracting the right to vote.<sup>398</sup> Further, it also requires fairness of access and voice—a voice that too often goes wanting when the few can use their wealth to gain influence at the cost of the many.

Too often, it is too easy for legal analysts and practitioners to fall victim too readily to a formalism and a legalism that values and prioritizes procedure and precedent as puzzles to be solved; meanwhile, they avoid discussing or advocating more specific norms of substantive justice of the sort that we not only hold dear, but that we can easily recognize and name.

For present purposes, it is normatively wrong when the rules of either the political or economic game distort access and generate political and economic imbalances that threaten progress and civic improvement. The common good is not some ephemeral concept of the public interest. Rather, it is easily measured by an increase or decrease of democratic participation in American politics and in economic processes and markets. The political inequality argument against bad lobbying is neither dead nor dormant; it just must be made more forcefully. There is a counter-narrative to the neoliberal rhetoric that has held sway for over four decades that sanctifies markets and demonizes government.<sup>399</sup> That counter-narrative is one that is grounded in democracy, political equality, and economic opportunity that are found in constitutional values.<sup>400</sup> By pursuing lobbying reforms on the basis of political equality, those values can be honored.

---

397. See WALDMAN, *supra* note 40, at 263–64.

398. MYRNA PÉREZ, BRENNAN CTR. FOR JUSTICE, ELECTION INTEGRITY: A PRO-VOTER AGENDA 3 (2016); WALDMAN, *supra* note 40, at 264.

399. See SHAPIRO & TOMAIN, *supra* note 17, at 57.

400. See also THOMAS O. MCGARITY, FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL 30–31 (2013); POTTER & PENNIMAN, *supra* note 123, at 192–93, 195; SHAPIRO & TOMAIN, *supra* note 17, 91.