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# The Forgotten Law of Lobbying

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## The Forgotten Law of Lobbying

Zephyr Teachout

### ABSTRACT

*For most of American history, until the 1950s, courts treated paid lobbying as a civic wrong, not a protected First Amendment right. Lobbying was presumptively against public policy, and lobbying contracts were not enforced. Paid lobbying threatened the integrity of individuals, legislators, lobbyists, and the integrity of society as a whole. Some states had laws criminalizing lobbying; Georgia had an anti-lobbying provision in its Constitution. Inasmuch as there was a personal right to either petition the government, or share views with officers of the government, this right was not something one could sell—it was not, in the term used by one court, a “vendible”—a sellable item. Line-drawing between illegitimate paid lobbying and legitimate legal services was not easy, but in general courts enforced contracts where the thing being sold was expertise to be shared in a public forum, while refusing to enforce contracts where the thing being sold was personal influence to be shared in private meetings.*

*During the mid-20th century, the practice of not enforcing lobbying contracts fell away. This change came from two things: the growing sanctity of contract, and the professionalization of the lobbying industry. State laws regulated lobbying instead of banning it. At the same time, as a constitutional matter, the law of lobbying occupied something of a no-mans land for many years—paid lobbying was neither explicitly protected by the First Amendment nor explicitly not protected. Supreme Court cases suggested, but did not hold, that paid lobbying was a First Amendment right. Only recently, and without much judicial discussion, has the legal-academic community presumed that there is a unique First Amendment right to pay someone to lobby, or be paid to lobby, grounded in the speech and/or petition clauses of the First Amendment. The scope of that right is unclear.*

*This Article tells the history of the earlier approaches towards lobbying. It explores the lobbying cases of the 19th and early 20th century courts, looking at the logic underpinning them and how courts distinguished between illegitimate lobbying and legitimate hiring of professional lawyers.*

*This Article is largely historical, but has doctrinal implications. First, it shows that as a matter of practice, there is no historical consensus on a First Amendment right to lobby. Second, the length and breadth of the treatment of lobbying as wrong--not a right--is indirect evidence that the First Amendment was not intended to protect paid lobbying. Third, the reasoning of the courts that invalidated lobbying contracts is still relevant to the degree of protection, and the kinds of activities that might be worthy of greater or lesser protection.*

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## Introduction

One of the great debates about lobbying and its role in political society took place in the middle of July at the Georgia Constitutional Convention of 1877. The draft Constitution included a provision criminalizing lobbying. The proponents of the provision argued that the lobbying practice that had taken over their statehouse was corrupting the government. Lobbyists had been paid to use personal influence to pass private legislation, or “private bills”:

[T]he legacy of the public domain...was bartered away to thieves and speculators, who have amassed fortunes in this way, .... These bills were carried through by men who were employed to work in the galleries, at boarding houses, on the streets, in gambling saloons and other disreputable places—and when one thing failed to secure favor another was used. ... I know my good old state is groaning under a debt of millions put upon her by such methods.<sup>1</sup>

The representative body had become a set of auctions for public resources, to be sold to private individuals. However, the concern went further than private bills. Taxes, one proponent argued, are, in their last analysis, “dug from the bowels of the earth,” and the earth is a public trust that should not be stolen by those using influence to shift the largesse of the state to their own pockets. Even public bills could be used, strategically, in an extractive way.

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<sup>1</sup> SAMUEL WHITE SMALL, A STENOGRAPHIC REPORT OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION BY GEORGIA. CONSTITUTIONAL CONVENTION 80-81(July 25, 1877).

The opponents of the provision in the convention pointed out that there are all kinds of worthwhile bills that good men have been paid to explain and translate to the legislators. So many with an interest or idea were “incompetent” to legislate or advocate for legislation. Therefore, they must have a right to “send parties here as their agents, or lobbyists, or whatever you may call them, for the purposes of advancing the interests of their community.”<sup>2</sup> Without such a procedure, people would be unable to communicate their desires. “A lot of our good ideas come from people who ‘have an interest in matters legislated upon, and who come here in that interest.’” Since one couldn’t outlaw self-interest, outlawing lobbying seemed to merely cut out a particular class of self-interest. Many good men were what one might call “lobbyists.” What’s worse, criminalizing lobbying would cast a pall of suspicion over citizens who wanted to push for legislation, or even comes to the halls of the Georgia legislature to watch the procedure. The proponents countered that lobbying is like gambling: good men will do it, but that doesn’t mean it is good for society, and the question is a societal one, not just an individual one. Instead, the practical experience was that lobbyists cost the state money. Of the \$11 million in debt, one proponent argued, a million was currently in the pockets of lobbyists, who had charged money in order to serve private interests.

What is our experience? ... what are the facts? ... Go to the treasury department and see for yourselves!.. Lobbying through the legislature acts injurious to Georgia...It is a matter of disgrace and humiliation to us that Georgians profess to be lobbyists--hang round the halls of legislation--and those who

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<sup>2</sup> *Id.* at 101.

have the money can control even the legislature of Georgia. The people of Georgia have sent us here to put a stop to it and to guard and protect the treasury.<sup>3</sup>

The proponents won. In 1877 Georgia ratified its Constitution with this provision: “Lobbying is declared to be a crime, and the General Assembly shall enforce this provision by suitable penalties.”<sup>4</sup> The next year Georgia passed legislation defined lobbying. It included any personal solicitation that was “not addressed solely to the judgment of the legitimacy of the bill,” or in which there was misrepresentation of the interest of the party pushing the action, *or* in which someone was employed by a party with an interest in the outcome of the legislation. It did not include those services which were “of a character” to “reach the *reasons* of legislators,” such as drafting legislation, drafting bills, taking testimony, collecting facts, preparing arguments and submitting them orally or in writing. The anti-lobbying law was punishable by a prison term of up to five years.<sup>5</sup>

The debate in Georgia reflects how many of the vexing questions surrounding lobbying have stayed largely the same in our nation’s history. Paid lobbying is often constituted by political speech about policy questions of the highest importance. Information and reason related to political matters are among the highest values in the liberal tradition; lobbying is the production and communication of

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<sup>3</sup> Id. at 102.

<sup>4</sup> GA. CONST. of 1877, art. I, § 2, para. 5. .

<sup>5</sup> WILLIAM V. LUNEBURG , THOMAS M. SUSMAN, REBECCA H. GORDON EDS, THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE 15 (ABA 2009, 4th Edition).

information and reasons for political purposes. Lobbying means more information and more reasons for political decisions, and allows ideas held by private citizens to be dug out of the polity and placed in front of decision makers, who need to hear them. Furthermore, any laws restricting paid lobbying might lead to anxiety by citizens, journalists, and activists who--worried that they might skirt the edges of illegality--would stay away from politics altogether.

On the other hand--as the proponents argue--widespread lobbying threatens the political culture and the principle of equal representation that undergirds democracy. Inasmuch as it is effective, the function of paid lobbyists is to make their clients *more* represented than the general public. They are hired as alchemists, to turn money into power through the production of information and the careful use of influence. That they do it within the rhetoric of reason and political power (instead of through brute force) is no special comfort. When lobbying is protected and widespread, those in government are more likely to serve the interests of institutions and individuals with money, instead of representing the public, weighing each citizen's interests equally.

One of the persistent concerns is that lobbying facilitates extractive behavior. The Georgia delegates were worried about the taxes, "dug from the bowels of the earth," owned by the citizens, being given away, as well as more direct land giveaways to railroad companies and land speculators.<sup>6</sup> Lobbyists would grease

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<sup>6</sup> Small, *supra* note 2 at 81.

those giveaways by using persuasion and direct and indirect bribery. That concern persists, albeit in a different form.

Again, these old concerns are pressing now. Lobbying can enable substantial profits, either through laws that subsidize activities or through laws that are not passed. A recent study found that multinational firms received as much as a 22,000% return on investments in lobbying for tax breaks.<sup>7</sup> While other types of lobbying have less extraordinary results, if one uses the hiring of lobbyists as any evidence of their effectiveness, the relentless growth of the lobbying industry in the last 30 years is powerful evidence that the money spent on lobbying “works” for its clients, if not for society.

Lobbying can also lead to more cultural harms, which are as serious if one sees democracy as a fragile and rare political institution. The social community of a political place with many lobbyists becomes saturated with people who use their social connections to push paid ideas (or, as likely to throttle policies that would hurt their clients), encouraging cynicism. Inasmuch as Montesquieu was the fountainhead thinker behind our form of Constitutional government,<sup>8</sup> any practice that undermines the civic, public nature of government and citizenship undermines his theory of government itself, wherein sovereignty--and the obligations of sovereignty--reside in the citizen. Lobbyists also use persuasion, also sometimes

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<sup>7</sup> See RAQUEL ALEXANDER, STEVEN W. MAZZA & SUSAN SCHOLZ, *MEASURING RATES OF RETURN FOR LOBBYING EXPENDITURES: AN EMPIRICAL ANALYSIS UNDER THE AMERICAN JOBS CREATION ACT*, 25 J.L. & POL. 401, 404 (2009).

<sup>8</sup> BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 26, 345 (1992).



backed by implicit promises, including the promise of a job. Staffers and Congress members increasingly become lobbyists after leaving their jobs, leading them to serve future imagined clients while still working for government.

For some modern thinkers, it seems axiomatic that lobbying should be entirely protected by the Constitution.<sup>9</sup> Paid lobbying is arguably protected by four of the pillars of the First Amendment: the speech clause, the association clause, the press clause, and the petition clause.<sup>10</sup> However, there are interests of substantial dimension on both sides of the lobbying question. And even if the possibility of criminalizing lobbying is unlikely at this point, the scope of the right to lobby is unclear. The modern Supreme Court has not directly addressed whether there is a right to hire a lobbyist, or be hired as a lobbyist, and if so, the source of that right, or the scope of that right. This is unlike, say, campaign finance law, where the Court has spent 40 years debating the relative weight of the interest in speech, speakers, and political integrity.

This silence on the right to lobby stands in contrast to the well developed doctrine that arguably persisted for almost a century. In cases from that era, paid lobbying was presumptively not protected. Instead, it was viewed with suspicion, and lobbying contracts were not enforced. Temptation, civic virtue, and political

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<sup>9</sup> See Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL'Y 149 (1993)

<sup>10</sup> See *id.* at 109. He also states that, “lobbying seems to fall squarely within the ambit of the First Amendment right of petition.” *Id.* at 172 (*citing* Buckley v. Valeo, 424 U.S. 1 (1976)).

culture were discussed extensively in lobbying cases, and lobbying was a civic wrong, something to be avoided as a threat to self-government.

In the years to come, the question of the scope and existence of a right to lobby will likely be addressed by the Supreme Court; it is already being addressed by lower courts trying to determine the legitimacy of laws regulating lobbyists. The goal of this article is to ensure that the early law of lobbying is not forgotten in these discussions. Whether one is a strict originalist, someone interested in the meaning of the words of the Constitution as understood and interpreted by those living closer to the time when it was passed, or someone who believes that the Constitution should be interpreted consistent with the contemporary demands of democracy (and democratic theory), the cases I rehearse here are essential reading.

If one is an originalist, the persistence of the earlier doctrine is indirect evidence that lobbying was not intended to be protected by the original First Amendment. The First Amendment was not even implicated in lobbying discussions, for over 150 years.

The cases are also important for non-originalists, who bring a more consequentialist, democracy-enhancing or protecting view of the First Amendment. The cases introduce important democracy-enabling considerations, including the impact of paid influence on civic culture, the dangers of allowing practices that lead to undetectable bribery, and the risk of undermining government itself through systemic corruption. Finally, they suggest some manageable--if difficult--

guideposts for distinguishing between what might be protected activity and unprotected activity.

One of the goals of this Article is to resist a certain fatalism that can creep into modern scholarship about lobbying. For some modern thinkers, it seems axiomatic that lobbying should be entirely protected by the Constitution.<sup>11</sup> Other scholars treat the doctrinal question as settled, for good or ill: paid lobbying is covered by the First Amendment, and so we ought to accept it as a given part of our political landscape, whether or not it threatens the most cherished parts of our democracy. Moreover, given the razing role the First Amendment has played in the Supreme Court's recent treatment of campaign finance regulation, there is a kind of learned helplessness around making any serious claim that lobbying is not protected.

I proceed as follows: In Part I look at the cases of the 19th century and early 20th century, which universally condemned paid lobbying. I explore the different kinds of factors used by courts to distinguish between lobbying and legitimate professional services, and explore the vision of politics that underpinned these cases. In Part II, I review the cases of the early 20th century, which neither condemn nor approve of lobbying, but leave it in a constitutional desert, and then touch on some of the modern cases. In Part III, I suggest some of the doctrinal implications of this history, and argue that we should adopt a view of paid lobby-

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<sup>11</sup> See Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL'Y 149 (1993)

ing that treats it neither as a civic wrong, nor a right. Instead, legislatures should be free to impose non-content based restrictions on paid lobbying—and the choice should be a democratic one, left to state and federal legislatures.

### **Part I. 1830-1920 The Traditional American Political Theory of Lobbying**

≈Throughout the country, the sale of personal influence was treated as civic wrong in the eyes of the law from the early 1830s through the early 1930s. There was no personal right to pay someone else to press ones' legislative agenda. Nor was there a right to be paid to use personal influence for legislation. Paid lobbying was looked down upon, criminalized in some cases, and treated as against public policy. As a practical matter, lobbying was policed almost entirely by civil law. Virtually all of the cases dealing with lobbying were contract cases, with courts deciding whether or not to enforce contracts for “lobbying” services. Typically, there was no investigation into whether the underlying activity was illegal (as a criminal law matter) or not. Courts would simply declare lobbying contracts invalid. As Supreme Court Justice Field wrote “[a]ll agreements for pecuniary considerations to control the...ordinary course of legislation are void as against public policy.”<sup>12</sup> A popular contracts hornbook with repeated publications in the late 19th and early 20<sup>th</sup> century said:

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<sup>12</sup> Tool Co. v. Norris, 69 U.S. 45, 56 (1864).

What are known as "lobbying contracts" ... fall within this class of illegal agreements. Any agreement to render services in procuring legislative action, either by congress or by a state legislature or by a municipal council, by personal solicitation of the legislators or other objectionable means, is contrary to the plainest principles of public policy, and is void.<sup>13</sup>

The First Amendment was never invoked in these cases.

Inasmuch as a right to petition the government was recognized, it was personal, not sellable. One could sell professional services, but as the Supreme Court said in a frequently cited passage, "personal influence . . . is not a vendible article in our system of laws and morals, and the courts of the United States will not lend their aid to the vendor to collect the price of the article."<sup>14</sup> The language sometimes drew on property law, where sellable items are called "alienable," or, in the language of the late 19th and early 20th century, "vendibles."<sup>15</sup> The question of what was and was not vendible was a matter of public policy, determined by the courts in common law. "Personal influence" was a good that any individual can use on their own, but that could not be sold. It was more akin to the right to have children or to vote or to defend oneself—a powerful personal right, but not one that can be sold.<sup>16</sup> Like the modern right to vote, the right to contribute to campaigns, the right to intimate relations, the right to serve on a jury, or the right to

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<sup>13</sup> WILLIAM L. CLARK, JR., *THE HANDBOOK OF THE LAW OF CONTRACTS* 285 (1894).

<sup>14</sup> *Oscayan v. Arms Co.*, 103 U.S. 261, 273 (1880).

<sup>15</sup> Certain financial instruments, debts, or obligations were "not vendible" as a matter of policy. For some examples *see, e.g., J.M. Chisholm v. Andrews*, 57 Miss. 636 (Miss 1880); *Ryan v. Miller*, 236 Mo. 496 (Mo. 1911).

<sup>16</sup> WILLISTON ON CONTRACTS 4TH § 16:23 (2011).

have a child, the right to speak one's mind to Congress could not be personally limited, but was not protected past the personal right.

The key difference between lobbying and not-lobbying was the sale of *influence*. Lobbying, as described in these cases, is “the sale of an individual's *personal influence* to procure the passage of a private law by the legislature.”<sup>17</sup>

Contract-making was treated as a privilege that should not be extended to lobbying, because lobbying would undermine the rule of law that it was using to enforce. For example, when the Vermont Supreme Court wrote about lobby contracts, they wrote that “the law will not concede to any man however honest he may be, the privilege of making a contract, which it would not recognize when made by designing, corrupt men.”<sup>18</sup>

### ***Two Old Men and the Compact Corps of Venal Solicitors***

There are few cases involving payments for political influence in the early American law. Two are from Kentucky, and seem to contradict each other. In the first, in 1932, the court held that any contract to pay another for getting a remission of a forfeiture, after being convicted, was a public wrong.<sup>19</sup> Six years later, a 1938 Kentucky case upheld a \$100 contract, in which one man agreed to get the

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<sup>17</sup> Usher v. McBratney, 28 F. Cas. 853 (CCD Kan. 1874), (citing Rose v. Traux, 21 Barb. 361 (NY Gen. Term 1855)) (italics added)

<sup>18</sup> Powers v. Skinner, 34 Vt. 274, 281 (1861).

<sup>19</sup> McGill's Adm'r v. Burnett, 7 J.J. Marsh 640 (Ky App. 1832).

Kentucky legislature to pass a bill recognizing his divorce and his new marriage.<sup>20</sup> The court in that case struggled. It saw the contract as somewhere in between a legal contract for the price of delivering a petition on horseback, and an illegal contract to get a pardon, as in the earlier case. The principle outlined was that a contract to try to influence the legislators in a non-public forum would be illegal. “The law,” the court stated, “should not help to compel the payment of a fee to any man, whether of great or of little influence, for his personal solicitations in favor of the enactment of any law whatever. Nothing could be more suicidal or unwise than a contrary doctrine.”<sup>21</sup> It upheld the contract, because it appeared to be merely for presenting the bill, preparing the facts and making a public argument. There was no evidence that the payment was for any kind of non-public or personal appeals, or the sale of personal influence. And there was no evidence of a contingency fee.<sup>22</sup> Therefore, on balance, the court concluded that the contract was legal, if on the edge of legality.

These first case in which a court refused to enforce lobby contracts using the language of “lobbying,” was likely *Harris v. Roof*, in 1851.<sup>23</sup> The question as the court put it was the right of a “lobby-agent” to enforce a contract. An old man hired a young man, Matchin (who later married his grand-daughter) to go to Albany and get compensation from the government for an interest he said that he

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<sup>20</sup> Wood v. McCann, 6 Dana 366 (Ky. App. 1838).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Harris v. Roof’s Executors, 10 Barb. 489 (S. Ct., New York Cnty. 1851).

had gotten in land over 50 years earlier. Matchin agreed to try to get the claims in return an agreed upon amount. The two had a falling out, and the young man asked to be paid for the work he'd done. The older man refused. This led to court, and a heated exchange about the value of what had been done. Matchin presented evidence that he'd talked to a committee, met and spoken with members, and spent money on traveling to and from Albany. There were several witnesses who testified to the value of his work, and his presence at the state house. The older man called witnesses to show that he hadn't really gone to Albany, and had been fairly ineffective.

The court, hearing this evidence, decided not to settle the matter on the question presented--whether Matchin had done his job and fulfilled his contract--but on the grounds that the kind of contract itself was outside of public policy. According to the decision, all citizens have a right to petition the legislature, and present documents accompanying that petition. Putting those documents together and planning may cost something, and all citizens have the right to pay for those preparations. However, "all petitions go to a committee through the house."<sup>24</sup>

According to the court, every member of every legislative body has a duty to give the "proper and necessary attention to the business before it, and "always have truth and justice before their eyes."<sup>25</sup> It would interfere with this vision of representative duties to hold that, "...the employment of individuals to visit and importune the members, is necessary to obtain justice. Such practices would have

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<sup>24</sup> *Id.* at 493-94.

<sup>25</sup> *Id.* at 494.



a tendency to prevent free, honorable and correct deliberation and action of this most important branch of sovereignty.”<sup>26</sup>

There was not much in terms of American precedent, so the court recognized it had to improvise. “Very few cases similar to this, or bearing any analogy thereto, are to be found in our law books; and it is to be hoped ever will be, for the best of reasons.”<sup>27</sup> The court drew upon the general rule against champerty<sup>28</sup> for its logic, as well as its sense of political theory. Champerty is when a party to a lawsuit agrees to pay a lawyer a percentage of whatever is won in a lawsuit. In common law this was generally illegal.<sup>29</sup>

That same vision grounded the Supreme Court decision in *Marshall v. Baltimore & Ohio Railroad Co.*, a few years later.<sup>30</sup> Faced with evidence that the plaintiff, Marshall, had been promised a contingent fee if he could secretly secure the votes needed to pass legislation, the Court held that the contract was void as against public policy. It explained itself this way:

Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150 U. Pa. L. Rev. 1297, 1341 (2002)

<sup>30</sup> 57 U.S. 314 (1853)

to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided.<sup>31</sup>

On the one hand, the Court held, there is an “undoubted right” of all persons to make their claims and arguments personally, or through a lawyer, in front of legislative committees.<sup>32</sup> But if an agent was hired, an agent would need to disclose their true incentives. The secrecy surrounding of the contract necessarily invalidated it. Moreover, the lure of high profit combined with secrecy otherwise creates a “direct fraud on the public.”<sup>33</sup> Legislatures had an obligation to the whole, and a court should not subsidize, through the enforcement of contracts, the opportunity for interested and “unscrupulous agents” to influence policy.<sup>34</sup> Furthermore, the practice corrupts the agent himself. The agent is “demoralized”—in the sense of rid of morals—by the lure of profit:

He is soon brought to believe that any means which will produce so beneficial a result to himself are ‘proper means;’ and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or ‘careless’ members in favor of his bill. The use of such means and such agents will have the effect to subject the State governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector. Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union and of every State, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome—‘*omne Romae venale*.’<sup>35</sup>

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<sup>31</sup> *Id.* at 334.

<sup>32</sup> *Id.* at 335.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

Marshall involved a mish-mash of reasons for invalidating the contract—the contingency fee, the commitment in the contracting documents to secrecy among them—and this blend of reasons made it unclear whether contracts for influence would be generally disfavored, or only when these other features existed.

The 1855 New York case of *Rose v. Traux*, which became one of the most-cited authorities for the principle that lobbying contracts should not be enforced, also involved secrecy and a contingency fee.<sup>36</sup> In that case the parties agreed that the lobbyist would “use his influence, efforts and labor in procuring the passage of a law by the said legislature, having for its object relief to the undersigned.” In exchange, he was promised 10% of the amount of money received.<sup>37</sup> The key holding of *Rose*, which made it particularly powerful, regarded the legal elements of the contract. The court held that it was impossible to sift apart the contract and separate the legal from the illegal elements. While there was evidence that some of what the lawyer did in this case was pure professional preparation, work which could have otherwise been lawfully compensated, the agreement to use influence to pass a law rendered the other parts of the agreement entirely void.<sup>38</sup>

The scope and meaning of these cases was clarified in *Trist v. Child*, which made clear that paid personal influence was against public policy even

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<sup>36</sup> *Rose v. Traux*, 21 Barb. 361, (NY Gen.Term 1855).

<sup>37</sup> *Id.* at 362.

<sup>38</sup> *Id.* at 376.

when a lawyer performed the services, when it meant that someone might be without ability to influence, and when it was not done secretly.<sup>39</sup> *Trist* involved a contingency fee, but the court explained that the contingency fee did not decide the case.

In 1866 an old man, too weak to travel to Washington himself, hired a lawyer to go to Congress and demand payment for an 18-year old debt.<sup>40</sup> Mr. Trist claimed that the United States owed him money for helping to negotiate the Treaty of Guadalupe Hidalgo in 1848.<sup>41</sup> He hired Linus Child, a Boston lawyer, to represent him.<sup>42</sup> Trist agreed to pay Child twenty-five percent of whatever he secured.<sup>43</sup> In 1871, after Child and his son and partner, L.M. Child, made visits to Congress and wrote letters and made arguments proving the claim, Congress appropriated the sum of \$14,559 to Trist.<sup>44</sup> After the lawyer successfully persuaded Congress of the value of his claim, the old man's son refused to pay the lawyer. Child sued him for the money owed.<sup>45</sup>

Trist's defense was based on the logic of *Marshall*-- the lobbying contract was void as against public policy. The courts, he argued, had no business in en-

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<sup>39</sup> 88 U.S. 441 (1874)

<sup>40</sup> *Id.* at 441.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 441–42.

<sup>43</sup> *Id.* at 442.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

forcing something so corrupt. This was a more squarely lobbying claim, because unlike *Marshall* or *Rose*, there was no allegation of secrecy. Instead, it seemed like a straightforward, aboveboard claim where a lawyer was hired to do something that an old man could not do.

One could hardly imagine a more sympathetic context for enforcing a lobby contract; this was the constitutional test of the logic of *Harris*. Child had been “open, fair, and honorable.”<sup>46</sup> There was no evidence of anything suspicious: there was no evidence of secret collusion, or payments or promises to members of Congress. The age and inability to travel of the client made it seem he could not prosecute his claim without terrible hardship. If there was any right to petition the government, ought it not extend to the aged, who might need to hire someone on their behalf? Child argued that Trist had a right to personally petition Congress, and that this right must mean the right to hire an agent to petition on his behalf.<sup>47</sup>

The Court sided with Trist. It concluded that the sale of influence itself, whether or not accompanied by payments or suspicious behavior, was a civic wrong. The court addressed the contingent nature of the claim--the “pecuniary interest at stake” made it “contrary to the plainest principles of public policy.”<sup>48</sup> The contingency made it more likely to “inflamm[e]” the avarice, making it a worse problem, but the core problem was the practice of paying someone else to make one’s arguments to people in authority, which threatened to undermine the moral

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<sup>46</sup> *Id.* at 444.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 451.

fabric of civic society. The practice would have the tendency to corrode public ethics indirectly and to enable exchanges.<sup>49</sup> The member of Congress, who might be offered something (directly or indirectly) in exchange for political action, might be more likely to forget his obligations.

The Court was concerned about corrupting citizens, as well. Citizens' virtue is the "foundation of a republic," the Court explained.<sup>50</sup> Citizens have an important public office to fill, as "[t]hey are at once sovereigns and subjects."<sup>51</sup> While public servants are obliged to be "animated in the discharge of their duties solely by considerations of right, justice, and the public good," citizens have a "correlative duty" to "exhibit truth, frankness, and integrity" in their conversations "with those in authority."<sup>52</sup> According to the Court, "Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong."<sup>53</sup>

The citizens in this case are *both* the Child and Trist. The lobbyist's own integrity was threatened by the practice, because the lobbyist is paid to represent political views not held by the lobbyist. This is unlike a lawyer-client relationship, because in general in a lawyer-client relationship, the lawyer has no separate, independent civic relationship to the private matter. In a lobbyist-client relationship,

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 450.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

the lobbyist, by virtue of being a citizen, has a distinct relationship to what he himself might believe. He is selling his own citizenship, or one of the obligations of his own citizenship, for a fee. In this sense, agreeing to work, for pay, on political issues is more akin to selling the personal right to vote than selling legal skills. The lobbyist has a separate and distinct obligation to pursue public ends, and while they may be allowed to express self-interest in the vote, they have, as a citizen, an obligation to honor and love the equality of the political system.

As in *Marshall*, the Court treated lobbying in terms of its general effects--the potential for a “corrupt corps of venal solicitors!”, not just its individual ones.<sup>54</sup> A general acceptance of lobbying would lead to a corrupt culture. Individual paid lobbying could not be allowed because it would lead to corporate paid lobbying:

If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.<sup>55</sup>

Why would the “right-minded man” denounce the practice? Is it because of a quasi-religious sense that this kind of market is morally wrong, or because of something else? The Court emphasized public morality, arguing that “[i]f the instances [of lobbying] were numerous, open, and tolerated, they would be regarded

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<sup>54</sup> See *Marshall v. Baltimore & O.R. Co.*, 57 U.S. 314, 335 (1853).

<sup>55</sup> *Trist*, 88 U.S. at 451.

as measuring the decay of the public morals and the degeneracy of the times.”<sup>56</sup> Since we do not live in the minds of the time, we can only guess what was imagined--that people would start to see government as a place from which resources could be extracted, instead of a source of aggregated interests and beliefs. That such a view would lead to strategic use of public resources, and plunder.

Child unsuccessfully argued that the case should simply be understood as a classic lawyer-client relationship. Civic virtue might be threatened if lobbyists could be hired on bills related to general matters, he argued, but is not when it is simply an old man getting what he is due.<sup>57</sup> However, the court concluded that there was no clear way to regularly distinguish between secret, inappropriate lobbying and appropriate paid lobbying.<sup>58</sup> Furthermore, because small private bills are not known by the public, and the discussions around the bills are often “whispered,” advocacy for private bills creates huge opportunities for advocates to induce legislators to support these bills for the wrong reasons, and, again, for bribery.<sup>59</sup> Instead of engaging in objective fact-finding, “[t]hose whose duty it is to investigate” hear unsupported facts by self-interested parties;<sup>60</sup> without a check on the facts communicated by the self-interested parties, legislators might simply rubber stamp the bill.

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 444-45.

<sup>58</sup> *Id.* at 452.

<sup>59</sup> *Id.* at 451.

<sup>60</sup> *Id.*



*Trist* was cited for many years for its principles. A few years later, in an 1880 case to enforce a contract for influencing the Turkish government's purchase of arms, the Supreme Court reiterated the broad principle, even though the Turkish government, not the American government, was at stake.<sup>61</sup> The defendant in that case sold over \$1 million in arms to the Turkish government in 1870 and 1871--the choice of arms was directly influenced by the plaintiff, a consul for the Turkish government, who then sought a commission, as previously agreed.<sup>62</sup> The consul first "used his influence...to condemn the Spencer gun," and then "brought out a Winchester gun, a sample of which he always kept in his office for the very purpose, whenever opportunity offered, of presenting its claims. It appears, however, that the Bey did not, from the first, like that gun." Therefore, "Oscanyan had to use all his ingenuity and skill and perseverance and patience" to get the Bey to agree to purchase Winchesters.<sup>63</sup>

Such a contract, the Court held, was not valid.

Personal influence to be exercised over an officer of government in the procurement of contracts, as justly observed by counsel, is not a vendible article in our system of laws and morals, and the courts of the United States will not lend their aid to the vendor to collect the price of the article.....This is true when the vendor holds no official relations with the government, though the turpitude of the transaction becomes more glaring when he is also its officer.<sup>64</sup>

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<sup>61</sup> *Oscanyan v. Arms Co.*, 103 US 261 (1880).

<sup>62</sup> *Id.* at 270-71.

<sup>63</sup> *Id.* at 270.

<sup>64</sup> *Id.* at 273.

The *Oscanyan* court distinguished between private vendors and professional services, as the *Trist* court had. The principle doesn't answer the question, though: the Oscanyan Court had to grapple with how to distinguish personal influence from the routine activities of salespeople. In selling goods, contingent fees, or fees based in some way on success, were routine, and those cases were cited for evidence that the court should enforce the contract.<sup>65</sup> Therefore contingency could not be the evil. Instead, the civic wrong was based on the sale of private influence in public procurement decisions.

[W]here, instead of placing before the officers of the government the information which should properly guide their judgments, personal influence is the means used to secure the sales, and is allowed to prevail, the public good is lost sight of, unnecessary expenditures are incurred, and, generally, defective supplies are obtained, producing inefficiency in the public service.<sup>66</sup>

The sale of the *personal* ability to influence was perceived to lead to poor choices by public officers, as they are influenced to make choices for reasons that are pressed by those who have profit, not the public good, behind them.

The fact that Oscayan took money and transformed it into power while using the rhetoric of reason--explaining why the Spencer was defective, pointing out the advantages of the Winchester--makes his activity more disturbing, because the art of lobbying undermines the nature of reason and information itself in a political society.

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<sup>65</sup> *Id.* at 276.

<sup>66</sup> *Id.*

## The Civic Threat

The evil of lobbying comes not from the particular corrupt intent in any particular case--rather, the evil comes from the fact that the “contract tends directly to those results.”<sup>67</sup> The fact one can pay another to get legislative results “furnishes a temptation to the plaintiff, to resort to corrupt means or improper devices, to influence legislative action.” This, in turn, leads to a broad array of “influences” which are both “destructive of the “character” of the legislature and “fatal to public confidence in its action.”<sup>68</sup>

There is a sense that lobbying threatened to lead people to put private interests where public ones should exist. As the early Kentucky case refusing to enforce a contract to get a remission said, someone paid to persuade will be “induced use his influence for the money he is to obtain; when, as a patriot and a citizen, he should only act for the good of his country, and under an impartial sense of justice, tempered with mercy. We can readily imagine the dangers likely to result from the corrupt artifices of mercenary managers in procuring pardons and remissions.”<sup>69</sup> If a commitment to civic virtue is the foundation of the republic, as Montesquieu and the drafters of the Constitution believed,<sup>70</sup> lobbying encourages at least one class of citizens to imagine themselves outside of govern-

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<sup>67</sup> *Mills v. Mills*, 40 N.Y. 543, 546 (1869)

<sup>68</sup> *Id.* at 546.

<sup>69</sup> *McGill’s Adm’r v. Burnett*, 7 J.J. Marsh 640 (Ky App. 1832).

<sup>70</sup> Zephyr Teachout, *The Anti-corruption Principle*, 94 CORNELL L. REV. 341, 350-51 (2009).

ment, bringing neither their own interests, nor the public interest, to the attention of government. Interests that are private are recast in public terms or in private terms that may not be accurate. Those citizens who sell their service are violating their own individual civic promise to the State, by giving up their own responsibility to think of the public good and to use the public privileges they have been given for the public good. A private citizen often plays a public role in political society, as when he or she casts a vote. She has an obligation in the moment of casting the vote to use it in a way consistent with her own beliefs either about public good or about her own private good, or about familial or group interest. But if she sells that vote, she violates her own obligations to the public in the moment of sale. Lobbying legitimates a kind of routine sophistry, and a casual approach towards public argument. It leads people to mistrust the sincerity of public arguments, and weakens their own sense of obligation to the public good.

In these lobbying cases courts filled what they saw as an essential gap, protecting political society from the threat of oligarchic pressures, but also from the threat of a cynical political culture.

### **Protection from Temptation and Bribery**

On a more pedestrian level, lobbying was seen as the gateway to bribery. Bribery does not now, nor has it ever, had neat lines dividing it from acceptable activity. Bribery at common law was, “the offering of any undue reward or remuneration to any public officer or other person intrusted with a public duty,

with a view to influence his behavior in the discharge of his duty.”<sup>71</sup> In the mid-century, many states passed bribery statutes with broad language covering any kind of effort to influence using things of value, but they were rarely enforced.

The language of lobbying was not always neatly separated from the language of bribery: high contingent fees, for example, were referred to as “bribes.”<sup>72</sup> As a matter of association and categorization, lobbying enabled bribery, or, in some cases, *was* bribery. This lumping allows for passages like the following one, that skips between ideas that play distinct roles in modern legal grammar--influence, lobbying, and bribery--as if they are presumptively connected:

A contract for lobby services, for personal influence, for mere importunities to members of the legislature, or other official body, for bribery or corruption, or for seducing or influencing them by any other arguments, persuasions, or inducements than as directly and legitimately bear upon the merits of the pending application, is illegal, and against public policy, and void.<sup>73</sup>

The California Constitution defined lobbying as follows: "Any person who seeks to influence the vote of a member of the legislature by bribery, promise of reward, intimidation, or any other dishonest means, shall be guilty of lobbying, which is hereby declared a felony."<sup>74</sup>

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<sup>71</sup> *State v. Miles*, 89 Me. 142, 36 A. 70, 72 (Me. 1896)

<sup>72</sup> *Marshall v. Baltimore & O. R.d Co* 57 U.S. 314, 336 (1853)

<sup>73</sup> *Brown v. Brown* 34 Barb. 533, 538 (NY Gen. Term 1861).

<sup>74</sup> CAL. CONST. OF 1879, art. IV, § 35 (1879)

Even where lobbying wasn't defined in a way that we might currently define bribery, paid personal influence was seen as the first step towards bribery. The "law forbids the inchoate step," in bribery.<sup>75</sup> Lobbying leads to bribery through temptation--private meetings with money and no one watching make it hard for enough individuals to resist, even if the majority succeed. "If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step."<sup>76</sup> Legal lobbying allows citizens to go and tell other citizens that they can take money and turn it into political power, and once that traffic is legal, they will figure out ways to skirt the law but in fact be engaged in offering value in exchange for influence.

Because lobbying leads to bribery, the job of the courts is to protect against the temptation. Courts routinely held that it was not necessary to find that the parties agreed to some "corrupt" or "secret" action. Instead, the question was whether the "contract tends directly to those results."<sup>77</sup> A contract was problematic when it "furnishes a temptation to the plaintiff to resort to corrupt means or improper devices to influence legislative action." Such a temptation leads to brib-

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<sup>75</sup> *Herrick v. Barzee*, 191 P. 141, 148 (Or. 1920); *Owens v. Wilkinson*, 20 App. D.C. 51, 71 (1902); *Trist v. Child*, 88 U.S. 441, 451 (1874) ;).

<sup>76</sup> *Trist*, 88 U.S. at 452.

<sup>77</sup> *Mills v. Mills*, 40 N.Y. 543, 546 (1869)

ery, which in turn leads to destroy the institution and undermine public confidence.<sup>78</sup>

The role of temptation in lobbying contracts was similar to the role of temptation in conflicts of interest cases. In *McGhee v. Lindsay*, an Alabama case, the court refused to enforce a public contract in which a state-employed supervisor had an interest. The court talked about how no man can serve two masters with conflicting interests.<sup>79</sup> Doing so creates “a temptation perhaps . . . too strong for resistance by men of flexible morals, or hacknied in the common devices of worldly business, ... which would betray them into gross misconduct, and even crime.”<sup>80</sup> The court focused on creating structures where temptations do not exist for men with “flexible morals” or who are steeped in the usual run of business behavior. In fact, there was no evidence of bribery or an incorrect price, but the court adopted the policy of not enforcing these contracts as a “preventive check against such temptations and seductions.”<sup>81</sup>

The Vermont Supreme Court, for instance, held that “the sale by an individual of his personal influence and solicitations, to procure the passage of a public or private law by the legislature, is void as being prejudicial to sound legisla-

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<sup>78</sup> *Id.* Much as the later Supreme Court would describe “appearance of corruption” as being just as important as corruption itself, the courts in these contracts cases were concerned that the public would lose trust in institutions with the growth of lobbying. *See Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

<sup>79</sup> 6 Ala. 16, 20 (1844),

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

tion, manifestly injurious to the interests of the state, and in express and unquestionable contravention of public policy.”<sup>82</sup> It is totally irrelevant to look at whether the sale was effective or not, and whether or not anything improper was done. “The principle of these decisions has no relation to the equities between the parties, but is controlled solely by the tendency of the contract.”<sup>83</sup> A person “cannot with propriety be employed to exert his personal influence, whether it be great or little, with individual members, or to labor privately in any form with them out of the legislative halls, in favor of, or against any act or subject of, legislation.”<sup>84</sup> The court should discourage those practices “if it corrupts or tends to corrupt some, or if it deceives or tends to deceive or mislead some.”<sup>85</sup>

### Contingency Fees

Many of these cases, you may note, involve contingency fees. It is difficult to separate the law of contingent fees and the law of lobbying, because so many of the cases involved contingencies, and contingencies were often a factor. While other factors were worked out more on a case-by-case basis, contingent fee arrangements for political influence were almost always void.<sup>86</sup> In particular,

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<sup>82</sup> *Powers v. Skinner*, 34 Vt. 274, 280-81 (1861)(citing *Clippinger v. Hepbaugh*, 5 Watts S. 315 (Penn. 1843); *Wood v. McCan*, 36 Ky. 366 (1838); *Marshall v. Railroad Co.*, 57 U.S. 314 (1853); *Harris v. Roof's Ex'rs*, 10 Barb. 489 (. Ct., NY Cnty. 1851); *Rose v. Truax*, 21 Barb. 361 (S.Ct. Gen. Term 1855); *Bryan v. Reynolds*, 5 Wis. 200 (1856).

<sup>83</sup> *Powers*, 34 Vt. at 281.

<sup>84</sup> *Id.*

<sup>85</sup> *Clippinger*, 5 Watts S. at 321.

<sup>86</sup> *See, e.g.*, *Foltz v. Cogswell*, 25 P. 60 (Cal. 1890).



payment of the contract was dependent upon the outcome of particular legislation, it would not be enforced. Courts would routinely declare that “[a]ll contracts for a contingent compensation for obtaining legislation...are void by the policy of the law,”<sup>87</sup> or “[a] contract for a contingent compensation...to use personal...influence on legislators is void by the policy of the law.”<sup>88</sup>

The prominent role of contingencies in these cases have led some commentators to see the lobbying cases as a reflection of an attitude towards champerty, and contingencies, not towards lobbying. However, the cases themselves undermine that argument. One of the arguments made by *Trist* was that it was a contingent fee, and therefore illegitimate. However, as the case is reported, this sentence precedes the opinion:

“A good deal was said in the argument on both sides about contingent fees, but in view of the grounds on which the court based its judgment, a report of that part of the argument would be of no pertinence.”<sup>89</sup>

The language of the decisions, even when they were not as clear as *Trist*, emphasized personal influence, not contingencies. Some did not mention contin-

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<sup>87</sup> *Marshall v. Baltimore O. R. Co.*, 57 U.S. 314, 336 (1853) .*See also*, *Clippinger v. Hepbaugh*, 5 Watts S. 315 (Penn. 1843); *Wood v. McCann*, 36 Ky. 366 (1838); *Bryan v. Reynolds*, 5 Wis. 200 (1856).

<sup>88</sup> *Marshall*, 57 U.S. at 336 *See also*, *Clippinger*, 5 Watts S. at 315; *Rose v. Truax*, 21 Barb. 361 (S. Ct. Gen. Term 1855); *Frost v. Belmont*, 88 Mass. 152 (1863).

<sup>89</sup> *Trist v. Child*, 88 U.S. 441 (1874).

gent fees as a factor at all.<sup>90</sup> In a 1905 Nebraska case, *Stroemer v. Van Orsdel*, a lawyer for certain Indian tribes “presented the interests and claims” before the Secretary of the Department of the Interior, who drew up a bill, which the lawyer then advocated for, primarily in public forums--a committee of the Senate and the House of Representatives.<sup>91</sup> The law was passed; the lawyer asked for his money, his client pled illegal contract for lobbying. The client argued, to no avail, that contingent fee arrangements for legislation were per se illegal; relying on the logic of *Trist*, the court instead held that so long as it was a contract for professional services instead of personal influence, the means of payment was irrelevant. The Court rejected its earlier holding that all contingent agreements to secure the passage of a bill are “vicious, illegal, and void.” Instead, the character of the contract, not the “character of the fee,” should control.<sup>92</sup>

Moreover, in a contract in which “it does not appear that they were employed by reason of any personal or political influence,” the fact that it was contingent did not render it void.<sup>93</sup>

### **Personal Influence vs. Professional Services**

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<sup>90</sup> See, e.g., *McBratney v. Chandler*, 22 Kan 692 (Kan. 1879).

<sup>91</sup> 103 N.W. 1053 (Neb. 1905)

<sup>92</sup> *Id.* at 1055-56.

<sup>93</sup> *Barber Asphalt Paving Co. v. Botsford*, 44 P. 3, 5 (Kan. 1896)

The key to the doctrine was the ability to distinguish between illegitimate sale of private influence and legitimate, lawyering-like behavior. Courts would generally invalidate any contracts where someone was paid in order to use their *personal* influence to shape official action. Contracts for personal influence were “not merely voidable, or capable of rescission, but are mala in se, absolutely void, and without effect.”<sup>94</sup> Personal services involved personal visits; professional services involved presenting to committees or in public forums

For instance a contract to help pass legislation was upheld because the plaintiff “was not a lobbyist, and he had no acquaintance or influence with any member of the legislature.... It did not appear that...he asked or solicited any member of the legislature to vote for the bills.”<sup>95</sup>

The popular hornbook that I mentioned above, that stated that lobbying services were generally illegal, added that:

The rule, however, does not apply to an agreement, for purely professional services, such as the drafting of a petition to set forth a claim for presentment to the legislature, attending the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more objectionable.<sup>96</sup>

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<sup>94</sup> Usher v. McBratney, 3 Dill. 385 (C.C.D.Kan., 1874).

<sup>95</sup> Chesebrough v. Conover, 140 N.Y. 382, 387 (New York 1893)

<sup>96</sup> Clark, *supra* note 12 at 356.

Many of the more interesting cases involved this line-drawing. In California, when an attorney "prepared the bill, which afterward became a law, and made arguments in support of it, and caused it to be introduced in both departments of the legislature, appeared and argued the measure before at least one committee of that body, and also before the governor when the bill reached his hands," the contract was valid. There was no evidence that the attorney used any dishonest, secret, or unfair means.<sup>97</sup>

A critical factor in California, and elsewhere, was *where* the arguments were made, and whether or not they were public. If the arguments were made in a committee setting, the services were likely legal. If the lobbyist was drafting or helping create materials for private or secret meetings, it was more like personal influence lobbying, and therefore illegal, whereas public arguments were presumptively legitimate. An individual had an absolute right to privately meet with a representative, but might not pay someone else to do the same. Private persuasion brought a risk of bribery and undermined the system; public persuasion was more akin to arguments in court.

In Oregon, for example, lobbying was defined as meeting with individual legislators, using personal influence to "privately importune" them. Presentations to the entire legislature or to committees, or any group were permissible.<sup>98</sup> In Nebraska, the line was also between public argument and private solicitation. Writ-

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<sup>97</sup> Foltz v. Cogswell, 86 Cal. 542, 548 (1863). *See also* Reclamation Dist. No. 108 v. Hagar, 66 Cal. 54 (1884).

<sup>98</sup> Sweeney v. McLeod, 15 Ore. 330, 335 (1887).

ing a petition or making a public argument before the legislature or a committee thereof was permissible, but using personal influence was prohibited. "It is certainly important... that the legislature be perfectly free from any extraneous influence which may either corrupt or deceive the members of any of them"<sup>99</sup>

In Wisconsin by 1896, lobbying was defined as a corrupt action involving personal influence or solicitation around legislation.<sup>100</sup> The "preparation of petitions, taking of testimony, collecting of facts, preparing of arguments, and submitting them, orally or in writing, to committees or other proper authority, and services of like character, which are intended to reach only the reason of those to be influenced, are legitimate." In Vermont, while it was illegal to sell personal influence, a person could hire someone else to "conduct an application to the legislature" and pay for services related to putting together documents, statements, evidence or arguments related to that application. However, all of the relevant work had to be related to petitions that would go to the legislature itself or a committee of the legislature, not a committee member or individual politician.<sup>101</sup> Relatedly, A representative could not hide his interest in a pending bill's success.<sup>102</sup>

A contract with any taint of private or secret influence would be completely void, not even the part of the contract for public, committee arguments

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<sup>99</sup> Richardson v. Scott's Bluff County, 81 N.W. 309, 312 (Neb. 1899)

<sup>100</sup> Houlton v. Nichol, 67 N.W. 714, 716 (Wis. 1896).

<sup>101</sup> Powers v. Skinner, 34 Vt. 274, 281 (1861).

<sup>102</sup> See, e.g., Sweeney v. McLeod, 15 Ore. 330 (1887) Coquillard's Adm'r v. Bearss, 21 Ind. 479, 481-82 (1863)

could be saved. For example, an Oregon lobbyist was hired by a fishing industry interest group to convince the legislature not to pass a law banning fishing by fish-wheels. The lobbyist submitted information to the legislature and committees and made presentations, but also used his personal influence with legislators and committee members. He did not tell anyone he was representing the fishing interest group. There was no evidence of any money being paid, and the court explicitly noted that what he did might not be severe enough to be criminally punished. Nonetheless, the failure to disclose his interest in the work rendered the entire contract unenforceable.<sup>103</sup>

Contracts involving actual lawyers were difficult, because of the blend of services that were offered and provided. The services to draft a bill, for example, might lead to an attempt to personally influence legislators to support a bill. However, as difficult as lawyer cases were, they made the non-lawyer cases easier. Non-lawyers, couldn't make contracts around legislative services, because it was clear that non-lawyers were not able to provide professional legal services, so the contract would have to be for personal influence. In Wisconsin, two railroad companies agreed not to compete for the same government land grant, and one of the companies offered to help the other procure the grant in exchange for a portion of the land if it were granted. According to the court, a lawyer could contract for compensation for services like drafting bills or presenting evidence and arguing before the legislature or its committees. But a non-lawyer is, "incapable of render-

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<sup>103</sup> Sweeney v. McLeod, 15 Ore. 330 (1887)

ing such services." "What efforts could they make, what aid or assistance could they give, what services could they render, except such as are justly characterized as lobbying?"<sup>104</sup>

The Plains states, where the populists political movements were the strongest, were the least forgiving of any hint of personal influence. In one case, a landowner agreed to pay a lobbyist to procure legislation allowing parties who had settled on land to buy it for a low price. The court held that contracts to procure legislation can be enforced when only fair and honorable means were used, and especially when the legislation results in a public benefit. However, this contract was void because, "that the unavoidable inference [was] that he solicited the personal aid of members of congress in doing all that was necessary or could be done to secure the passage of the law."<sup>105</sup>

There was a small subset of cases involving governments lobbying governments. A county commissioner attended a session of the state board of equalization in the interests of the county: his goal was to induce the board not to raise the amount of assessed property of the county. The board of county commissioners paid him from the salary fund. A taxpayer successfully challenged this as inappropriate lobbying. The court said it was improper because "it is no part of the duty of a commissioner, which is imposed by the law, to visit the state board of equalization in the capacity of a lobbyist in the interests of the county..." For this

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<sup>104</sup> *Chippewa Valley S. R. Co. v. Chicago*, 44 N.W. 17, 24 (Wis. 1889)

<sup>105</sup> *Houlton v. Dunn*, 61 N.W. 898, 900 (Minn. 1895)

case it is not necessary to decide if these services were legal, but it is certain that they can't be paid for from the salary fund.<sup>106</sup>

For example, there was a bill pending before the California legislature that would have required one county, Colusa County, to pay money to another county. The Colusa County Board of Supervisors employed Counsel "to secure, by means of personal solicitation and by means of private interview with members of the legislature of California, and by means of lobbying, the defeat of the bill."<sup>107</sup> The Court said it was permissible for a client to employ counsel to influence the legislature by open and public presentation of facts, arguments, and appeals to reason, but not to secretly approach the members of such a body with a view to influence their action at a time and in a manner that do not allow the presentation of opposite views.<sup>108</sup>

Some would simply void a contract if it sounded at all like lobbying. Lobbying services for one Nebraska court were "corrupt in nature and against public policy." It was not clear what the service was, exactly, though there was some testimony that it was "to pay somebody to keep still, and do as we wanted them to." The court held that "Every consideration of public policy demands that money paid out by a public contractor to induce men to keep still, to make them do as he

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<sup>106</sup> *Hartson v. Dale*, 37 P. 475, 476 (1894)

<sup>107</sup> *Colusa v. Welch*, 122 Cal. 428, 430 (1898).

<sup>108</sup> *Id.* at 431. The distinction between public and private solicitation was not determinative in this case; the contract was void here because influencing legislators is not within the authority of the Board of Supervisors.



wants them to, to lobby to secure him contracts, or to secure the allowance of estimates, should be considered as a corrupt and unlawful expenditure."<sup>109</sup>

### *Part II: Denouement*

In 1890, Massachusetts enacted a lobbying registration law, followed by Wisconsin and Maryland, and several other states. The registration law created a sense that lobbying was itself professional, instead of personal, and made it harder to argue that non-lawyers could not lobby without offering personal services. Moreover, the growing power of the industry, and legitimization of key players within it, likely made it seem less distasteful to courts. Lobbyists recast contracts in terms of professional services that might previously have been cast as contracts for personal influence. The two aspects of the contract that were routinely separated in those years became joined: drafting and publicly presenting a bill, and individual meetings with legislators, both became known as “lobbying.”<sup>110</sup>

However, the lobbying cases were never directly overturned on the basis of the principles that animated them. In terms of the doctrine itself, what we see is a change in the treatment of contract law and the changing role of the First Amendment.

#### *The Change in Contract Law*

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<sup>109</sup> McDonald v. Buckstaff, 76 N.W. 476, 481 (1898)

<sup>110</sup> See *Briffault*, *Anxiety of Influence*: “Today, however, we would certainly view the efforts of a hired agent to draft a bill, explain it to legislators, and seek the bill’s introduction as lobbying.”

The biggest doctrinal change was that courts stopped using contract law as a method for enforcing public policy. As Professor Pettit has demonstrated in his masterful summary of public policy contract cases, 19th Century courts were far more willing to use public policy than current courts.<sup>111</sup> Courts saw it to be their duty not to enforce contracts that might hurt personal morality, the family, or commerce, and so used public policy as a reason not to enforce otherwise legal gambling, prostitution contracts and contracts in restraint of trade.<sup>112</sup> They showed a broad willingness to scrutinize a contract's impact more broadly and its possible effect on the relationship between the society and citizens.<sup>113</sup> The current doctrine of unenforceable contracts for reasons of public policy is very narrow, and largely tracks contracts made in violation of criminal laws, whereas the 19th century courts used the un-enforceability doctrine far more broadly. As this practice changed, courts started enforcing contracts presumptively, not investigating their civic impact. Criminal law, instead of civil law, became the locus of debates about bribery and corruption; states started regulating lobbying instead of banning it, so the question of a right to lobby simply didn't arise.

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<sup>111</sup> Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall"*, 79 B.U. L. REV. 263, 325 (1999).

<sup>112</sup> *Id.* at 300–30.

<sup>113</sup> *See generally id.* (describing 19th Century courts' approach to contract law).

*Herrick v. Barzeme*,<sup>114</sup> a 1920 Oregon case, exemplifies the shifts within the relative value of contract law. In *Herrick*, a man hired a lawyer on a contingent fee to draft and push legislation on his behalf. The Oregon court found the contract valid and enforceable. It was an instance, the court held, of payment for “persuasion” as separate from “influence.”<sup>115</sup> Most of the language tracked the earlier cases discussed above. The service was a professional service; an attorney may draft petitions, collect facts, and prepare and submit arguments to a committee. But at the same time, the obligation of the court to declare contracts void was given a smaller role, and viewed with greater skepticism. Freedom of contract, not public morality, played the central role in the case. According to the court, freedom of contract is so important that agreements won’t be held void as against public policy unless they are “clearly contrary to public policy or manifestly tend to injure the public in some way.”<sup>116</sup> The language placed greater weight on the court’s obligation to enforce contracts, and to find a showing of injury if they void the contract. Likewise, the court rehearsed the idea that in deciding if a contract is void, it should look at the tendency of the agreement and what was contemplated by the parties, not the actions. However, it took that language in a different direction, stating that an agreement would only be void if it contemplates improper action by its express or implied terms: the scope of the tendency argument is se-

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<sup>114</sup> *Herrick v. Barzee*, 190 P. 141 (1920)

<sup>115</sup> *Id.* at 149.

<sup>116</sup> *Id.* at 143.

verely curtailed by this shift.<sup>117</sup> There is a large difference between invalidating all contracts for private influence (prior Oregon practice) and only those which directly or implicitly contemplate a bribe.

The Nebraska case I cited above, for the proposition that contingency fee arrangements to pass laws were not per se illegitimate, is also a transition case in that it narrowed the definition of illegal lobbying to accompany only arrangements with an element of secrecy. While it gave lip service to the illegality of using personal influence, secrecy replaced personal influence as the core danger in that case.<sup>118</sup>

A Supreme Court case that exemplified that shift was the 1927 case in which a stockholder agreed to help get a charter for a railroad company.<sup>119</sup> He agreed to work the local government and secure the enactment of local ordinances approving the construction of a proposed railroad line in a particular location. Without the ordinance change, other elements of the contract made no sense--all of the other agreements about supplying materials and services were meaningless without governmental approval. After the arrangement fell apart, the would-be-political persuader was sued by his would-be-business partner. He defended his refusal to perform his side of the contracts referring to the earlier cases, saying

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<sup>117</sup> *See id.* at 143.

<sup>118</sup> *See Stroemer v. Van Orsdel* 103 N.W. 1053, 1056 (Neb. 1905).

<sup>119</sup> *Steele v. Drummond*, 275 U.S. 199 (1927).

that since part of the contract was in order to get legislative action, the entire contract was void.<sup>120</sup>

The court upheld the contract, distinguishes this case from cases like *Trist*, where “personal influence” was used to effect legislative changes.<sup>121</sup> However, though *Trist* was given lip service, the it was an opinion written by Justice Pierce Butler opinion, who adopted a strong version of the freedom of contract jurisprudence. The case is an expression of Butler’s contracts ideology, not his vision of free speech: it says nothing about lobbying being fundamentally protected, and a great deal about the importance of not disturbing contracts. The court’s own understanding of the difference between it and *Trist* is that there was no paid, professional lobbyist—the person seeking legislative action had a personal property interest in the charter, so he was not prostituting himself, as it were, or represent political views different than his own.<sup>122</sup>

But this case is different. Drummond was not employed by Steele or by the railroad company to secure the passage of the ordinances. He was interested as an owner of property... The mere fact that he owned property that might be favorably affected does not tend to discredit him, or to make evil his undertaking to obtain the ordinances. His interest in having the railroad extended into St. Andrews gave him the right in every legitimate way to urge the passage of appropriate ordinances. There is nothing that tends to indicate that in the promotion or passage of them there was any departure from the best standards of duty to the public. The contention that

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<sup>120</sup> *Id.* at 205.

<sup>121</sup> *Id.* at 206.

<sup>122</sup> *Id.* at 205-206.

Drummond's agreement to secure their passage was contrary to public policy cannot be sustained.<sup>123</sup>

The idea of “influence” as a non-vendible persists in these cases, even as they back away from invalidating the contracts. However, the dissipation of the courts role in policing public morality in contracts cases gradually made room for a different vision of lobbying.

In 1941, in *Textile Mills*, the Supreme Court addressed the constitutional of treasury regulations that stated that “Sums of money expended for lobbying purposes,” are not tax deductible.<sup>124</sup> It did not consider a First Amendment argument, and inasmuch as a policy argument was raised against the differential treatment of lobbying versus other business expenses, the court shrugged it off, citing to *Trist v. Child*. “Contracts to spread such insidious influences through legislative halls have long been condemned.”<sup>125</sup> As with the previous century’s holdings, broad, prophylactic rules were acceptable:

Whether the precise arrangement here in question would violate the rule of those cases is not material...There is no reason why, in absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction.<sup>126</sup>

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<sup>123</sup> *Id.* at 206.

<sup>124</sup> *Textile Mills Sec. Corp. v. C.I.R.*, 314 U.S. 326, 337-38 (1941).

<sup>125</sup> *Id.* at 338.

<sup>126</sup> *Id.* at 339.

Lobbying is still treated as “insidious” and lobbying contracts as those “to which law has given no sanction.” The language in *Textile Mills* provides more evidence that *Drummond* was really a case about the changing role of contract law, not a case about loosening condemnations of the sale of personal influence.

### The Rise of the First Amendment

The next two cases--*United States v. Rumely*<sup>127</sup> and *United States v. Harriss*<sup>128</sup>--signal a more important shift. While they do not directly address the Constitutionality of lobbying, they strongly hint at a Constitutionally protected right. Both cases deal with the scope of the authority of Congress to mandate disclosure by lobbyists, and both come in the wake of the 1946 Federal Regulation of Lobbying Act. In both cases, the Court reads the power of Congress narrowly, in part to avoid Constitutional issues. However, the cases are doctrinally complicated because while they imply that there is some First Amendment right around lobbying, they provide no guidance on the scope of that right, or the logic or reason for that right. Because they don't technically establish a right, they don't have to confront the conflict between the existence of a right and the former cases which clearly treated paid lobbying as outside the scope of Constitutional protection.

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<sup>127</sup> 345 U.S. 41 (1953)

<sup>128</sup> 347 US 612 (1954)

*Rumely* suggested that there were fewer constitutional rights for representations made directly to congress members than member-to-member or –public political activity, because it read the authority of investigation to encompass only the former. It held that Congress had not authorized the investigations of non-lobbying behavior, therefore implicitly creating a First Amendment divide between lobbying behavior and non-lobbying political behavior, with the latter having more protection.<sup>129</sup>

In *Harriss* the Court held that because only a narrower definition held in the FLRA, Congress was within its rights demanding disclosure. In response to a challenge that it was unconstitutionally vague and violated the First Amendment, the Court limited its scope to only those paid lobbyists who have direct interaction with members of Congress on pending legislation, and who are principally interested in influence.<sup>130</sup>

As Richard Briffault argues in this volume *Harriss* is significant because “without expressly saying so, the Court clearly indicated that lobbying is protected by the First Amendment.”<sup>131</sup> Later courts and academics have relied on this indication. Given the context, it *seems* to encompass more than a personal right to bring grievances, but it is also a cautious statutory case of double avoidance—the court is avoiding the Constitutional issue, and in so doing, avoiding having to explain the scope of the Constitutional issue.

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<sup>129</sup> 345 U.S. at 44.

<sup>130</sup> 347 U.S. at 618-19.

<sup>131</sup> *Briffault, Anxiety of Influence*



After *Harriss*, lobbying is presumptively protected in the American legal imagination. In 1959, the Supreme Court addressed whether a treasury regulation denying business expense deductions for political activity was constitutional. It held that it was not unconstitutional, and cited approvingly to *Textile Mills*.<sup>132</sup> A few years later, the Court construed the Sherman Act in a way so that it would not cover publicity campaigns. It held that as a matter of statutory construction, private entities are immune from Sherman Act liability for efforts to influence legislation,<sup>133</sup> and included language indicating that an alternate construction would violate the First Amendment. However, the Court's guidance was again indirect: the activities challenged were largely public campaigns, so the Court never addressed the scope of a right to sell or buy private influence.

Richard Briffault's accompanying paper in this volume nicely summarizes the developments that led to this consensus after *Cammarano*.<sup>134</sup> It is now widely believed among academics that a lobbying ban would be treated as unconstitutional by the current Supreme Court. After *Buckley v. Valeo*, the Supreme Court held that there is a constitutional right to pay for political speech implicit in the right to make political speech.<sup>135</sup> The logic of *Buckley*, applied to lobbying, bolsters the argument that paid lobbying is a protected right.

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<sup>132</sup> *Cammarano v. U.S.*, 358 U.S. 498, 79 S.Ct. 524 (1959)

<sup>133</sup> *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961).

<sup>134</sup> Briffault, *Anxiety of Influence*

<sup>135</sup> Thomas, *supra* note 7 at 178.

### Part III. Doctrinal Implications

The Supreme Court doctrine of lobbying for the last several years is a history of dicta, footnotes, and Constitutional avoidance. In *Harriss*, *Noerr Motor* and *Rumely*, the Court construed statutes in a way that suggested, but did not hold, that there might be a right to pay people (or be paid) for personal influence.<sup>136</sup> Then in *Citizens United*, the Court mentioned in passing that Congress could not outlaw lobbying, saying, “Congress has no power to ban lobbying itself.”<sup>137</sup> However, as a matter of Constitutional doctrine, the Supreme Court has not held that the petition clause gives citizens any greater rights than the Speech clause,<sup>138</sup> nor explained how the speech clause directly relates to lobbying.

However, in the next several years, there are likely to be several challenges to old and new laws that regulate lobbying, including laws that limit lobbyists’ capacity to donate to campaigns, and revolving door rules. The states and Courts of Appeals are split on all aspects of the scope and constitutional basis of the right to lobby.<sup>139</sup> After *Citizens United*, the United States Court of Appeals for the Second Circuit struck down a Connecticut law that banned lobbyists from making campaign contributions or fundraising for candidates.<sup>140</sup> The case assumed, without discussion, that the right to lobby was the same as the right to any other kind of political speech. An Ohio Federal Court struck down a statute that banned former legislators and government em-

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<sup>136</sup> See; 347 US 612 (1954); 365 U.S. 127 (1961); 345 U.S. 41 (1953)

<sup>137</sup> *Citizens United v. FEC*, 558 U.S. 310, 369 (2010).

<sup>138</sup> See *McDonald v. Smith*, 472 U.S. 479 (1985).

<sup>139</sup> See Briffault, *Anxiety of Influence*.

<sup>140</sup> *Green Party v. Garfield*, 616 F.3d 189, 210 (2d Cir. 2010).

ployees from lobbying for a year after leaving their public service.<sup>141</sup> On the other hand, in 1999, the Fourth Circuit upheld a restriction on lobbyists (and their political action committee clients) donating to candidates for office while the assembly was in session. The court held there was an especially high risk of corruption when it came to contacts with lobbyists. They are paid in order to “effectuate particular outcomes.”

The pressure on them to perform mounts as legislation winds its way through the system. If lobbyists are free to contribute to legislators while pet projects sit before them, the temptation to exchange “dollars for political favors” can be powerful.<sup>142</sup>

The court noted the power pressures at play, and concluded that the state did not need to wait for scandal, but could take prophylactic measures.<sup>143</sup> The court did not analyze whether this meant that the right to be paid lobbyist, or to pay lobbyists, was somehow less protected than other political speech—its analysis rested on the assumption that it was First Amendment protected, but that there was a strong countervailing corruption interest. The method the court used to analyze the issue suggests that paid lobbying is not as protected as other forms of political speech. After *Citizens United*, the Fourth Circuit reiterated its approach, upholding North Carolina’s ban on lobbyist contributions.<sup>144</sup>

The forgotten history of the law of lobbying is important for analyzing these cases for five reasons. First, it undermines an originalist, or post-enactment practice argument for a distinct First Amendment right to lobby. Second, for the non-originalist constitutional theorist, it

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<sup>141</sup> *Brinkman v. Budish*, 692 F. Supp. 2d 855, 858 (S.D. Ohio 2010).

<sup>142</sup> *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 715 -716 (4th Cir. 1999)

<sup>143</sup> *Id.* at 716.

<sup>144</sup> *Preston v. Leake*, 660 F.3d 726 (4<sup>th</sup> Cir. 2011).

provides democracy-enhancing reasons to be suspect of a First Amendment right to lobby. It provides persuasive arguments for upholding lobbying limitations. Third, it provides historical support for Deborah Hellman's argument that the right to speak in the political realm does not include the right to spend money on that right. Fourth, the long history of cases treating lobbying as non-protected is important for separating paid lobbying cases from a general political speech analysis. Courts can use this history to make a lobbying-specific, non-derivative, analysis of any right to pay to lobby, or be paid to lobby. Such an analysis will reveal that some of the campaign finance logic does not apply with the same strength in the lobbying arena. Fifth, the earlier cases suggest that it is possible and workable--if not simple--to draw a line between professional activities that are protected and those that are not.

### **Originalism and Post-Enactment Practice**

Modern scholars invoke four Constitutional provisions of the First Amendment in their arguments that there is a right pay lobbyists. The first is the freedom of speech, and the second is the right to petition the government.<sup>145</sup> However, the argument about the existence of a First Amendment right is typically fairly brief. For instance, the First Circuit assumes, citing only to *Harriss*, that there is a first amendment right to lobby grounded in the petition clause. It stated, in passing, that “paid influence” was “protected by the right “to petition the Government for a redress of grievance” guaranteed by the First Amendment of the United States Constitution.<sup>146</sup> This summary reference to the right to lobby shows up throughout Court opinions.<sup>147</sup> A constitutional right to lobby is often recognized without a full discussion of whether it exists.<sup>148</sup>

In one of the few Articles directly explaining the constitutional argument, Andrew Thomas argues that the right to pay a lobbyist, and be paid as a lobbyist, derives from the right to petition.<sup>149</sup> The right to petition pre-existed the Constitution by thousands of years, as a right to submit grievances to those in power. The right, as historically understood, only encompassed the right to submit a complaint (presumably by the mails, or by leaving it at the office of an official),

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<sup>145</sup> See U. S. CONST., amend. I.

<sup>146</sup> *United States v. Sawyer*, 85 F.3d 713, 731, n. 15 (1st Cir. 1996)

<sup>147</sup> See, e.g., *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007)(citing *Noerr Pennington* for broad proposition that there is a first amendment right to lobby, while *Noerr Pennington* found a right to petition the government in a broad public campaign, not the purchase of private influence); *Knology, Inc. v. Insight Communications Co.*, 393 F.3d 656 (6th Cir. 2004); *Firetree, Ltd. v. Fairchild*, 920 A.2d 913 (Pa. Commw. Ct. 2007).

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<sup>148</sup> This volume on lobbying is a welcome and much-needed exception.

<sup>149</sup> See Thomas, *supranote* 2 at 182.

and no right to be heard.<sup>150</sup> Thomas argues that the right to petition necessarily includes the right to pay someone to use personal influence to make a petition more effective. Paid petitioning was widespread at the time of the Constitutional Convention.<sup>151</sup> Thomas chronicles many famous people, including people involved in the Constitutional Convention, who were paid to use their personal influence. This is evidence, he argues, is that the sale of personal influence must have been understood to be protected by the First Amendment. “Since lobbying, even in its most distasteful forms, has always been a popular means of petitioning American government officials, it is almost inconceivable that the Founders did not consider it worthy of First Amendment protection under the rubric of the right of petition.”<sup>152</sup>

Thomas’ logic does not hold. The only evidence such behaviors show is that lobbying was not perceived as unconstitutional. There is no presumption of a “rights”-like status given to all the behaviors of the founding generation; he would need to show evidence of a case in which paid personal influence was condemned and then defended as a Constitutional right.

Additionally, Thomas provides evidence that the use of the petition required the use of the mails, and sometimes required others to deliver grievances to government because they could not deliver the grievance themselves. “The *reductio ad absurdum* to which this conception of the right of petition leads is that the First Amendment does not protect a citizen's mailing a letter to his Congressman because he is paying the Postal Service to deliver the petition.”<sup>153</sup> Here, his ar-

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<sup>150</sup> Gary Lawson and Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 766 (1999)

<sup>151</sup> See Thomas, *supranote* 2 at 182.

<sup>152</sup> *Id.* at 185.

<sup>153</sup> *Id.* at 186.

gument is stronger. Some method of delivery must be allowed for the right to send grievances to mean anything.

However, the right to the most basic method of physical delivery is analytically distinct from the right to pay for personal influence. The former (the mails, or paying an agent to deliver a petition, or even to help draft a petition) is an extension of the right to petition as a matter of course. The right to pay someone to use personal influence is distinct. A court could easily strike down all laws that forbade the use of the mails to mail a grievance, while upholding laws that forbade the sale and purchase of personal influence.

Furthermore, even as a personal matter, there is no right to get a personal audience with decision-makers. The right to send a petition cannot, as a matter of logic, include the right to personal interaction. No government could sustain such a set of obligations.

Since we have no simultaneous court cases with the Constitutional convention, we must look elsewhere for evidence of original intent. One place to look is the general attitude towards the use of money to influence politics that informed the drafters of the Constitution. There is ample evidence that the framers of the constitution were committed to protecting against corruption. Government, according to framers James Madison, George Mason, and Benjamin Franklin, ought to have the power to protect itself against self-interest and that wherever possible, structural restraints against using politics to get wealthy should be put in place.<sup>154</sup> As Pierce Butler said, we needed to protect against the traditions of Britain where “A man takes a seat in parliament to get an office for himself or friends, or both; and this is the great source from which flows its great venality and corruption.”<sup>155</sup> The deep antipathy towards the combination of money and

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<sup>154</sup> Teachout, *supra* note 64 at 376.

<sup>155</sup> *Notes of Yates* (June 22, 1787) in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 346.

politics showed up in the gifts clause of the Constitution, forbidding any kinds of gifts from public officers out of fear it would lead to corruption and temptation. This contemporary effort to separate “the love of money and the love of power”, as Benjamin Franklin put it, seems like it would look suspiciously, not forgivingly, upon the sale of personal influence.<sup>156</sup>

The founders, we know, were particularly anxious about the political corruption that led from people going into elected office in order to take a later job. The "corner-stone" of the new Constitution, according to George Mason, was the provision designed to keep elected officials from going into politics to get lucrative offices for themselves or their friends.<sup>157</sup> The logic of this clause could be used to support bans on Congressmembers or their staffs taking lobbying jobs. As a matter of principle, I think the better argument is that the Constitutional framers weighed anti-corruptionism as the central job of government, and would support a lobbying ban. As a direct matter, the founding era gives us no direct evidence for or against a Constitutional protection matter.

The second place to look for original meanings is the post-enactment practice and treatment of lobbying, which is the orientation of this article. The cases of the last section are strong evidence that the First Amendment was not traditionally seen as a protection of the right to paid lobbying. They undermine an originalist argument for a right to paid lobbying, inasmuch as practices that follow the enactment of the Constitution can at least shed light on the normal, public

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<sup>156</sup> Benjamin Franklin, Dangers of a Salaried Bureaucracy, speech given in the Constitutional Convention, 1787.

<sup>157</sup> See Hon. Robert Yates, The Notes of the Secret Debates of the Federal Convention of 1787 (June 22, 1787), in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 389, 437–38 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 2d ed. 1891) (statement of George Mason) ([link](#))



understandings of clauses at the time.<sup>158</sup> The “concept” of the scope of the First Amendment did not include any protection of lobbying in the first 150 years after adoption. While not as persuasive as cases immediately post-ratification, the 19th century cases make the claim that there is an original “lobbying protection” principle in the Constitution very difficult to make.

### **The Democracy-Enabling First Amendment**

Much First Amendment scholarship, while Originalism-invoking, revolves less around original meaning and more around prudential concerns and a belief in the fundamental political role played by a strong speech protection. It is originalist only in the sense that the hope of representative, limited, government is originalist. The First Amendment is seen as having a broad, democracy-enabling role. Within that view of the First Amendment as an essential, political amendment, there are legion differences, and a cottage industry of First Amendment theories have grown up. Some scholars argue that the First Amendment was designed to promote a robust, democratic polity. This leads them to argue that in some circumstances, governmental abridgments of the technical ability to share words or images, or pay for such sharing, might promote the kind of “speech” the First Amendment is designed to protect. On the other hand, others--sometimes associated with the “absolutist” school--presume that speech and all speech-enabling mechanisms are protected, and make no separate, consequentialist analysis in terms of the impact of protecting speech on political society. Both of these sets of scholars have very dif-

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<sup>158</sup> See John O. McGinnis & Michael Rappaport, *Original Interpretative Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378-79 (2007); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295-97 (2007).

ferent, but equally expansive, views of the First Amendment. Those with an absolutist view of the First Amendment are unlikely to be persuaded by the arguments of the courts of the last generations, because they are deeply consequentialist claims about the impact of lobbying on political society, and because they are generally skeptical of *any* justification for government restrictions on political behavior.

However, any one of the set of scholars who consider speech consequentially--in terms of likely rules' impacts on political society--will find the arguments made in a prior generation important and perhaps influential in determining whether a lobbying activity ought be protected. The modern consequentialist argument is largely that lobbying provides an underproduced public

good--information for decision-makers.<sup>159</sup> Alternatively, lobbying is bad for the market economy,

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<sup>159</sup> Richard Briffault argued in an earlier paper--a view that has since softened--that lobbying is "vital to representative democracy" because it helps "helps elected officials obtain the information they need to develop legislative or regulatory initiatives; to assess how proposals for government action will affect specific interests, industries, constituencies, or society at large; to determine how different groups view particular policy alternatives; and to decide how they will vote on the measures that come before them." Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. POL'Y REV., 105, 107 (2008). Vincent R. Johnson argues that "lobbyists representing individuals or groups can make a valuable contribution to informed and effective government. Lobbyists can direct ideas and opinions to appropriate decision makers and clearly express the views of citizens who have too little time or skill to do so personally. Lobbyists also illuminate the practical consequences of proposed government conduct by ensuring that the insights and professional expertise of a particular business or industry become part of the deliberative process." Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J. L. PUB. POL'Y 1, 9 (2006). See also Stacie L. Fatka, *Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution*, HARV. J. ON LEGIS. 559, 566 (1998) ("Today, if citizens wish to make their voice heard by their legislator, they must exercise their petition right by employing a lobbyist.").

In effect, Briffault and others argue that the information that is needed for decision-making is an under-produced public good. Daniel Farber argues that "Like other widely dispersed public benefits, information is likely not only to be underproduced in the private market, but also to be insufficiently protected by the political system." Daniel A. Farber, *Free Speech without Romance*, 105 HARV. L. REV. 554, 561 (1991) He adds, "Consider, for example, the supply of information about foreign affairs. To the extent that voters seek such information, they can often obtain it secondhand without paying the original producer. The free rider problem is exacerbated in this context because voters also have an incentive to free ride on the activities of other political participants. Because my vote probably will not change the election results, I have little incentive to seek relevant information. Even if the information were only privately available, I would have little incentive to pay for it. Instead, I might as well sit back and let other people participate in politics. I will obtain whatever benefits exist from a good foreign policy regardless of whether I participate. The result is predictably straightforward: although information in general is likely to be underproduced, political information is even more likely to be underproduced, and underproduced to a greater extent. Furthermore, because information producers will capture only a tiny share of the ultimate benefits of their product in the form of better government, their lobbying activities against censorship similarly will be underfinanced. Therefore, the public good argument for protecting speech applies with particular force to political speech." *Id.* at 563. This argument depends upon the view that either there is a scarcity of information about problems and solutions available to decision-makers, or, that there is ample information about problems and solutions but that lobbyists hired in order to influence decision-making play a useful role in sorting the relative value, for the public, of these problems and solutions. Most arguments rely more

because it encourages investment in buying political power instead of improving gadgets. (If one can make up to a 400% return on investment in purchasing lobbyist resources to reduce the tax rate on ball-bearing manufacturers, and a 20% return by building a better ball-bearing, then one is likely to spend money on the lobbying instead of on the ball-bearing improvement. Competitors in the marketplace may be co-lobbyists in the political sphere, making the investment worth even more.)<sup>160</sup>

The cases that I've shared in this article add additional reasons, reasons less grounded in a view of efficiency (though that plays some role) and more associated with the consequences of paid lobbying on political culture and the civic virtues, by separating political reason, logic, and passion from the individual citizen. Paid personal influence, according to these earlier cases, impacts political morality, undermines anti-bribery laws, leads to inefficiency and extractive use of public resources.

### **The relationship between rights and rights to pay**

Furthermore, this history supports the argument, proposed by Deborah Hellman, that a personal Constitutional right does not (as Thomas argued) include a right to spend money.<sup>161</sup> Hellman criticizes the *Buckley-Citizens United* line of cases that held that the right to political expression implied a right to spend money on political expression. She removed the question from its usual arena—"what is the relationship between money and political speech?"—into a

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<sup>160</sup> See Richard L. Hasen, *Lobbying, Rent seeking, and the Constitution*, 64 Stan. L. Rev. 191, 229 (2012)

<sup>161</sup> Deborah Hellman, Money Talks but it Isn't Speech, 95 MINN. L. REV. 953 (2011).

new one—”what is the relationship between money and all constitutionally protected rights?”

Money, she points out, is useful to the exercise of most of our constitutional rights. How it is distributed also creates incentives and disincentives to the actual exercise of all of them. The incentive relationship between the distribution of funds and the exercise of speech does not mean that all laws limiting certain kinds of spending require the strictest constitutional scrutiny. It would be useful to be able to spend money to exercise the right to sexual intimacy, but Congress is free to ban prostitution. It might be useful for states to pay people to exercise the constitutionally protected right to vote, but Congress is free to ban such payments.

Instead, she argues first, that “democratic decisionmakers are free to decide that organs, babies, or citizenship should not be for sale.”<sup>162</sup> This part of her argument shares a great deal with the bulk of the 19th century treatment of lobbying. The courts decided that personal influence, like “babies or citizenship,” was not a vendible.

### **Lobbying and the Right to Be Heard**

Fourth, the earlier cases should at least force courts to *independently* analyze lobbying, and not automatically see a right to lobby as an outgrowth of a right to spend unlimited money in the political context. In other words, even if one adopts the general approach of campaign finance cases since *Buckley v. Valeo*, there is a difference between lobbying and political advertising. The justification of the corporate ability to use the Constitution to defend corporate speech is grounded in *Bellotti*, where the Court held that more speech is better for citizens.<sup>163</sup> *Bellotti* did

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<sup>162</sup> *Id.* at 985.

<sup>163</sup> See *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776 (1978)

not create a corporate speech right, but a public right to hear speech, whatever the source. This is the logic relied on in *Citizens United*. However, the innovative “right to hear” which came from *Bellotti* and is based on a vision of maximizing political information in the public sphere, not in government.

The sale of personal influence is not part of an open market of any kind, but part of a closed market that is only available to office holders by virtue of their official role. Members of government have a different relationship to knowledge in the first place, and it would have to be grounded in a right to receive information in a personal, private forum from paid influencers, because they undoubtedly have a right to receive information from any unpaid influencers, and all forms of information that are not accompanied by a lobbyist.

There is no comparable “press” or other intermediaries that enable a wide ranging discussion. Nor is it like the courtroom. Unlike the right to hire a lawyer, there is no assurance that anyone will show up on the “other side” of an issue, and instead a high likelihood that there will be agreement across many areas between those who can afford to hire permanent lobbyists.

Moreover, the key to the old cases, as we’ve seen, is a separation between personal influence and other forms of persuasion. Following the old case law, a court could determine that there is a right to hire professionals to draft legislation, figure out strategies to get it through, and prepare testimony, but no similar right to hire someone to use personal influence.

## **Line Drawing**

Fourth, the cases show that there were manageable standards that operated successfully for many years, including through the growth of the country in the post-civil war years. The key feature was the distinction between personal and professional services. The Massachusetts court explained, “And the distinction we have said is obvious between the solicitation or personal influence exerted to secure legislation, and legitimate services rendered to enable legislators to understand the merits of the measures which they are called to pass upon.”<sup>164</sup> By the time that court made that claim, in 1920, a similar line had been operational in most states for fifty years.

In retrospect, the line looks almost impossibly difficult to draw, but that is of course true of most of our most important line-drawing exercises. Neither Federalism, nor the Equal Protection clause, nor the modern First Amendment provides easy lines to distinguish between what is and is not protected. Instead, they represent values that are implemented in decisions through a careful, but imprecise use of standards and factors. The resilience of the forgotten law of lobbying is evidence that a doctrine separating protected and unprotected activity is possible.

### **What it doesn't prove**

The desirability of an activity and its constitutionality are frequently conflated. The history in this paper provides a strong rebuttal to the claim that lobbying is protected by the First Amendment, but it makes no similar claim about whether or not lobbying should be banned or highly regulated. Nor does this paper endorse a full-throated return to *Trist v. Child*. There is an

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<sup>164</sup> Adams v. East Boston Co., 127 N.E. 628, 631 (Mass. 1920).

anti-political element to the old cases, just as there is an anti-political element to a “right to lobby” claim. Courts, instead of legislatures, are the regulators of political rules. In the old model, courts would refuse to enforce contracts that they judged to be problematically corrupt, meaning that some lobbying contracts would be legitimate, while others would not. In the new model, courts have the right to overturn legislative judgment that political society is threatened.

Instead, the cases should be used as support for *legislative* experiments, supported by the courts. The nature of money and politics is one of a constant cat and mouse game--one which is sometimes despairingly referred to as the “hydraulics of campaign finance reform.”<sup>165</sup> Whatever rules are passed, those with concentrated power may find ways to get around and find ways to turn money into power in a way that undermines representative government. For democratic self-government to persist, the public must be constantly aware of the use and abuse of rules, and have the flexibility to adapt and adjust rules when they are abused. In a system where those with money are always trying to find access to power, and the hands of the public are tied by the First Amendment, democracy will tend towards oligarchy, whereas in a system where the public is as flexible as the concentrated interests, the possibility of self-government remains.

The fundamental conflicts in money and politics and tradeoffs that cannot be abstractly resolved, but are best resolved by those living inside the political culture, recognizing those tradeoffs. An absolute ban on lobbying has costs that citizens of Montana, for example, might accept, whereas citizens of Connecticut might not. For example, the Consumer Federation of America hires lobbyists, and might actively and persuasively oppose a ban on paid lobbying in Connecticut, arguing that membership groups would be left without a voice, whereas in Montana

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<sup>165</sup> Samuel Issacharoff & Pamela S. Karlen, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705 (1999).



the citizens might decide that membership groups being “without a voice” was a price worth paying (as it were) for getting rid of the culture of paid lobbyists in Missoula. A tax on lobbyists might work in one state, and not another--inasmuch as we are all fumbling towards self-government, with no clear answers, the use of states as democratic laboratories seems particularly important when it comes to the regulation of money for political ends. The aggressive role of the courts in creating lobbying policy, both then and now, strikes me as misguided.

## **Conclusion**

It is not a propitious time for a serious discussion of the scope of the right to pay for personal influence, or to be paid for personal influence. The Supreme Court in *Citizens United* lightly mentioned that laws banning lobbying would be unconstitutional, and most scholars seem to agree. It is unlikely that five members of the current Supreme Court would seriously consider a claim that lobbying bans are Constitutional. However, it is an important time. The scope of paid lobbying protections has taken on a new urgency in the last three years. So long as *Buckley v. Valeo* and *Citizens United* are upheld, the people of the states and of the country have a limited set of ways in which they can structure the relationship between political power and financial power. They can no longer pass laws banning corporate spending around elections. They can no longer pass limits on how much any entity can spend around an election. Given these limits, the most promising route for many people is to pass laws that ban spending or contributions from particular categories of donors, like government contractors, companies with substantial foreign elements, and lobbyists.

The history I have sketched here ideally suggests a new model for thinking about the implications of the right to petition as personal and non vendible. There are many more areas for scholarly development, including the operation of a personal right in a corporate setting, and the relationship of lobbying to the interest group model of politics and to associations and the right to associate. Those issues, I would argue, are consequentialist, not constitutional, concerns, but important to address. Within the constitutional framework, how far could a ban on lobbying extend? Could legislatures ban all kinds of sales of personal influence? Is there a difference between a right to buy and a right to sell personal influence? How could legislatures treat CEOs or heads of companies? Would they simply be allowed to lobby on their own time so long as they were unpaid, for all positions? These cases can't answer these questions, but they suggest certain arguments that could be used in addressing them.

For a good part of our country's history, courts actively scrutinized contracts to influence government and found many of them unenforceable as against public policy. Lobbying was also perceived to lead to use by corporations, which would use their ability to amass capital to wield disproportionate power, and lead to absolute corruption of government. It would undermine public morals. Such behaviors will necessarily occur, the courts recognized, but by giving the imprimatur of law to them, it suggests that civic privileges can be sold, which undermines a general political ethos in which such things are unsellable. There are serious countervailing interests, but all of these concerns still hold, and if anything, are more pressing than ever now.