Georgia State University Law Review

Volume 27
Issue 4 *Summer 2011*

Article 11

3-13-2012

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Recommended Citation
Gerken, Heather (2010) "Keynote Address: Lobbying as the New Campaign Finance," *Georgia State University Law Review*: Vol. 27: Iss. 4, Article 11.
Available at: http://scholarworks.gsu.edu/gsulr/vol27/iss4/11

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KEYNOTE ADDRESS: LOBBYING AS THE NEW CAMPAIGN FINANCE

Heather Gerken*

NOVEMBER 12, 2011

Thank you very much for having me. The conference organizers asked me to provide you with a little food for thought to go along with the more traditional sustenance that they've provided. I may repeat a few things said in the earlier panels. This will be short and sweet, in large part because I left my house this morning at 3:45 A.M. and the caffeine runs out in about twenty-five minutes.

I want to talk a little bit about the future of campaign finance reform and the future of campaign finance scholarship in the wake of *Citizens United*. Here I am going to draw upon my own work and the work of some of the folks in this room, including Richard Briffault and Rick Hasen, so please imagine a properly footnoted law review article scrolling behind me.

I want to make three points. First, I will argue that *Citizens United* has cut off most of the traditional pathways for campaign finance reform. Second, I want to talk about the new directions in which this development will push us; I will talk very briefly about future reform proposals in the campaign finance context, some of which we have already talked about today. Finally, I will talk about where I think campaign finance should go. Here I'll argue that, just as brown is the new black, lobbying is the new campaign finance. I want to talk a little bit about why I think these two areas are going to be tied closely together in practice and in theory. I'll even kick in new a policy proposal at the end by way of a party favor: a public finance analog for lobbying reform.

* What follows is a modestly edited transcript of Professor Gerken's speech.

A. The Dead End for Reform: Taking Money Out of Politics

Let me start with the basic premise of campaign finance reform and why I think we may be leaving it behind. The instinct that has long undergirded campaign finance reform is to get money out of politics. It's a perfectly sensible idea if you think that money distorts political incentives. By that I simply mean that money makes politicians pay less attention to average, everyday people and more attention to wealthy corporate interests. While I subscribe to this perfectly sensible idea, I get off the boat when reformers start to make a list of the problems that they associate with money, including thirty-second advertisements, special interest groups, and the end of deliberation. These lists lead me to suspect that some reform supporters just don't like democracy. What bothers them is not money in democracy—it is democracy in democracy. But even if you like politics and think elections are ugly and kind of fantastic, you can still get on board with the idea that money can distort political incentives.

Whatever you think about the goal of taking money out of politics, *Citizens United* provides the latest, and perhaps the best, evidence that this goal is a dead end for reform, at least in the short term. While it may be possible to hold onto what exists now (contribution limits in particular), reformers are not going to be able to build a new McCain-Feingold regime, let alone find *more* muscular ways to take money out of politics, without running headlong into an exceedingly skeptical Supreme Court. While I think that McCain-Feingold was overall a good development, I think we should admit that the results of the "take money out of politics" approach have been underwhelming. That is not to say that it is theoretically impossible to take money out of politics. But in a system like ours—where elections are privately funded, where reform is piecemeal, and where public finance is generally not a realistic option—money hasn't been taken out of politics. Donors simply find new, less transparent ways to gain influence in the process. Whether you blame that on *Buckley v. Valeo* (the field's first blockbuster case) or *Citizens United*, there is no place to go.

When academics teach students about the history of campaign finance, they always start with *Buckley*. It is the snake in the garden of campaign finance Eden. The story we tell is that when the Court drew a distinction between expenditures and contributions, it created a world in which politicians' appetite for money would be limitless, but their ability to get that money would not be. Political interests inevitably looked for loopholes, they inevitably found loopholes, and they inevitably drove big trucks of money through those loopholes. As a result, the entire reform game became focused on closing those loopholes—engaging in the regulatory equivalent of whack-a-mole. Either money gets driven into dark corners, where it is hard to track, or efforts to regulate start to tread on First Amendment interests—interests that would be salient even to someone who thinks that much of campaign finance regulation is constitutional.

Now, others will say that it is not *Buckley v. Valeo* that is the problem; it is what the current Court has been doing of late. On this view, McCain-Feingold was going to work and in the long term we would have been able to close most of the loopholes. Here I do think that reformers have a point—although it is not the point that they are constantly flogging with the press. Every time you see reformers up in front of the press, they say that *Citizens United* unleashed the floodgates of corporate money, that the Supreme Court's overruling of *Austin*—which is the one case where the Supreme Court invoked the equality rational in talking about campaign finance—was the end of the world. Here I am with some of the earlier folks on the panel. I'm a little skeptical that the ruling on independent corporate expenditures is the end of the world. I do think that transparency is important, and I would like to see some efforts to fix that problem. But we don't really know whether *Citizens United* has opened the corporate floodgates. And I certainly would have to agree with one of the earlier panelists that the parties will find a way to even things out. I would be stunned if the Democrats don't catch up substantially on this front next year.

I do think that *Citizens United* will be seen as a pivotal point in campaign finance, however, because of what it said about the corruption rational—a point that Richard Briffault talked about

earlier and that I've written about in the past. As we all know, when Congress regulates in this area, the Constitution requires it to have a good reason in order to survive First Amendment scrutiny. *Citizens United* seems to have dramatically cut back on what constitutes a good reason for regulation. That is because it substantially narrowed the definition of corruption, the rationale that is regularly invoked when Congress wants to pass reform. Indeed, while reformers have mourned the court's rejection of *Austin* and the equality rational, in my view the most important line in *Citizens United* was not the one overruling *Austin*. It is this one: "Ingratiation and access are not corruption."

For many years before *Citizens United*, the liberals on the Court had gradually expanded the corruption rational to extend well beyond quid pro quo corruption (I give you dollars, you give me votes). The Court had licensed Congress to regulate even when the threat was simply that large donors had better access to politicians or that politicians seemed to be too compliant with their wishes. At times, the Court even went so far as to say that regulation could be premised even on the perception of undue influence or the "cynical assumption that large donors called the tune." *That* was enough to justify regulation before *Citizens United*. Ingratiation and access *were* corruption, as far as the Court was concerned. This extremely broad definition of corruption was very easy to satisfy and very easy to invoke when regulating campaign finance. What this meant in practice was that you could get almost everything you wanted in the campaign finance world without having to invoke *Austin*, without having to use the word equality. Congress need only rely on concerns about corruption.

But Justice Kennedy is not a fool. He was well aware of what his colleagues on the Court were doing with the corruption rational, and he did everything he could in *Citizens United* to put a stop to it. Kennedy did not say that the Court was overruling these cases, but I think under a fair reading of the cases it was. In my view, that part of the opinion doesn't just raise questions about regulations on independent corporate expenditures; it raises questions about lots of other types of campaign finance regulation, as has been made clear

by the lower court decisions that have followed in the wake of *Citizens United*. Richard Briffault has talked about the soft money ban. I, too, am a little bit worried that *Citizens United* might put the soft money ban in jeopardy. At the very least, though, I think it is fair to say that *Citizens United*'s ruling on corruption means that it will be very hard to pass much more legislation that pursues the traditional goal in campaign finance: taking money out of politics.

B. New Directions in Campaign Finance Reform

So, where do we go from here now that it is clear that the traditional paths of reform are blocked? You might just throw in the towel. But the two groups who care most about reform tend to be academics (who are paid for life, so we will just keep writing about this stuff) and reformers. Reformers are the world's biggest optimists. They have to be, because election reform is the hardest kind of reform. Reformers have to convince people that process shapes substance. It is incredibly hard to do and, worst of all, the people you are trying to convince are usually self-interested politicians. The odd thing about election reform is that the people who know the most about reform, who care the most about reform, are the politicians who oppose the reform and have the power not to pass it.

So, what are reformers and academics going to do in the wake of *Citizens United*? Rather than focusing on taking money out of politics, it seems to me that pragmatic reformers and academics will move in new directions. The most promising avenues will involve thinking about reform in a different way. That is, rather than trying to resist existing political incentives, maybe it is time to figure out how to *harness* them. Harnessing politics to fix politics would require us to recognize that money will *always* be part of the system and to use money's attractions to create the right kind of incentives for politicians. The obvious and popular example of this strategy is matching rules, which take a twenty dollar donation and turn it into, say, a hundred or two hundred dollar donation. While campaign finance has always tried to level down by restricting the ability of moneyed interests to influence the process, matching rules try to level

up by making small donations and small donors worth more in the eyes of politicians. They give politicians a reason to reach out to middle-class and working-class voters. That strikes me as the right kind of way to think about incentives.

Disclosure and disclaimer rules are also a way of harnessing politics to fix politics. Even if we can't pull money out of politics, perhaps we can make it visible in a way that improves our politics. I take seriously Richard Briffault's skepticism about disclosure rules that focus on small donors, which may provide too much information at too high a price (a point he makes in an unpublished paper entitled "Campaign Finance 2.0"). But here I have in mind the kind of disclosure rules that would trace large donations and large expenditures. Consider a rule that would require any political advertisement to identify the top donors for the advertisement. You can see that this type of reform works with political incentives, not against them. Having big business on your side is usually an advantage in an election. But having big business on your side is not an advantage in a campaign advertisement. That's because big business types may be the only people who are less popular than politicians themselves.

We all know why shortcuts like disclaimers matter; we are familiar with the problem of the low-information voter. We all know that voters do not know a huge amount about the fine-grained details of policy proposals. So what do they do? They rely on shortcuts—like the words "Democrat" or "Republican"—which stand in, in a pretty sensible way, for a larger set of policy positions. Shortcuts are what enable voters to make sensible policy decisions when they vote. And disclaimers and disclosures are shortcuts. They offer a signal to the voter about how to process the information in question. As I said, the American people do not have that much affection for American companies. An advertisement that is very helpful when it is run by the Coalition for Clean Energy or the Workplace Safety Consortium is not likely to be as helpful when it is sponsored by British Petroleum or Massey Coal.

One of today's earlier speakers said that, in his view, oil companies had an expressive interest: a First Amendment right to

send out these ads secretly and not to be held accountable for what they say. That seems inconsistent with what eight justices on the Supreme Court think that the First Amendment requires. The way that the First Amendment works is that people get to push back if you say something with which they disagree. It is one thing to say that if there is a threat of violence—if someone is going to slash your company's trucks' tires or throw a brick through your store windows—that you are entitled not to have your expenditures disclosed. But it's not clear that it's a cognizable injury under the First Amendment if someone stops buying your company's product.

I should say that neither of the ideas that I have talked about thus far are new in the world of campaign finance. But I do think it is fair to say that, although there has been a small minority of reformers that do work in this direction, mostly these have not been the dominant way of thinking about reform. In the wake of *Citizens United*, however, these strategies will not just be the dominant game, they may be the only game in town (at least until the personnel on the Supreme Court changes).

C. Lobbying as the New Campaign Finance

If one future direction for reform is to think about channeling money in useful political directions rather than trying to pull it out of the system entirely, the other may be lobbying. Let me just say a few words about why I think that lobbying may be the new campaign finance.

Lobbying is strangely neglected by election law scholars. We don't actually write much about lobbying. There is a small and varied group doing it, but the subject is largely neglected by the field. Most people in the field write regularly about districting, campaign finance, and the like, but most of us—myself included—have not said a word about lobbying. I can't remember the last time I saw a lobbying panel at an election law conference. It doesn't even appear in one of the two major textbooks that we use to teach our students, although Rick Hasen, I am sure, would like me to mention that *his* text book mentions it. I think Richard Briffault may be the only one

in our field who has written in depth about the relationship between the two areas (in an excellent article in the *Stanford Law Review*).

What's strange about election law's neglect of lobbying is that the relationship between the two is so close in the real world. Lobbying and campaign finance work in tandem with one another as interests seek political influence. We neglect lobbying even though we routinely repeat the mantra, made famous by Sam Issacharoff and Pam Karlan, that "money is a hydraulic force and it will always find an outlet."

I myself prefer the way Michael Kang formulates this problem in a piece in the *Iowa Law Review*. There he argues that it's *politics* that exercises a hydraulic force. Money is just a visible symptom of the hydraulics of political influence. If we think about campaign finance in these terms, it is hard to imagine why anyone would neglect lobbying. It is the other natural means of seeking political influence. As long as lobbying and campaign finance work in tandem with one another, we should not study one without studying the other. Both are simply different means to achieve the same set of political ends. They are not isolated systems that are separate from one another.

Why, then, do election law scholars spend an inordinate amount of time writing about campaign finance, but not lobbying? It can't be because lobbying is not important. We are all familiar with the ability of lobbyists to put loopholes into a bill and to soften regulation behind the scenes. The market, at least, confirms the importance of lobbying. For example, federal reports suggest that federal spending on lobbying in 2008 was 3.47 billion dollars—which, you will note, was more than the 3.2 billion campaign dollars spent in what was a record-breaking election season in 2008. If that doesn't give you a sense of where the smart money goes, I don't know what will.

We also can't explain the neglect of lobbying by asserting that the subject isn't interesting. Indeed, I would argue that it raises exactly the same kinds of conceptual questions as does campaign finance. Election law is a field that takes the pristine principals of constitutional law—the First Amendment, Equal Protection—and throws them into the down-and-dirty world of politics. Lobbying fits perfectly in such a field.

Although lobbying and campaign finance do look to different kinds of questions, there are many important similarities. Both campaign finance and lobbying regulations are designed to deal with the problem of political influence. Both involve similar regulatory challenges. It is not just that both regimes raise serious constitutional questions, as the First Amendment looms large in both areas. Both require us to regulate a *shape shifter*. In his *Iowa Law Review* piece, Michael Kang has pointed out that in politics we are rarely regulating stable legal entities. Instead, what we are trying to regulate is really just a loose collection of interests that can take different forms as circumstances dictate. Each time the courts and the legislature try to regulate one kind of political institution, political entrepreneurs find a new way to recreate that institution. Party donors become supporters of 527s, and then supporters of 527s become supporters of 501(c)(4)s and 501(c)(6)s. You can just see where the trail of money goes as the same interests take on different forms. The same thing happens in lobbying. When Congress and Obama put some modest lobby reform in place, a bunch of lobbyists just deregistered. They are shape shifters. We see it in campaign finance, and we see it in lobbying.

Maybe the reason we neglect lobbying is that, while the problems are the same, the plausible solutions are not. As Richard Briffault has argued in the *Stanford Law Review*, campaign finance reform has long had a strong egalitarian element to it; we have long tried to imagine campaign finance as having an equalizing influence. This is not what we do in lobbying. We do not try to ensure that every American gets a lobbyist. Lobbying reform, then, focuses almost entirely on questions of disclosure and transparency.

I think that Richard's description is correct in describing what we have seen so far. But he wrote that piece before *Citizens United*. I think that by the time the Court is done with its work in campaign finance, his observation may not apply anymore. It may be that, going forward, most of the work on campaign finance will also be largely confined to disclosure and transparency. The regulatory questions will then look even more alike than they do now.

In fact, we may be there already. After all, the justifications for disclosure rules now focus less on the need for congressional

representatives to know what is going on with lobbyists—the old rational for lobbying—and more on the kind of public-oriented justifications that we see in campaign finance. Maybe the convergence has already occurred.

The last reason we haven't written about lobbying may be that there is nothing left to say. I just think that cannot be right. No academic ever thinks that there is *nothing* left to say. At the very least we can repeat things that other people have said. To be sure, in the lobbying context, we don't have what is a great gift to academics—the annual release of a badly written Supreme Court decision to kick around. The Supreme Court gives us lots to write about every year. But surely we don't need the Supreme Court to signal that something is important.

Moreover, lobbying plays to the strengths of the field. We spend a lot of time thinking about structural problems like this. We spend a lot of time thinking about how to translate those pristine principals of constitutional law into the down-and-dirty realm of politics. We are comfortable with the dilemmas of regulation in this area. We already know what happens when foxes guard the henhouse—when you have to ask self-interested politicians to reform themselves. We know about the risk that partisans will use their public power as legislators to pursue private interests—the risk that they will wage war with the other party or even within their own party, all the while calling it reform. We also know about the risks involved when partisans don't use regulation as a partisan weapon—when all the incumbents can agree that what is good for incumbents is good for the world. Indeed, the reason that we have bipartisan gerrymanders, where everyone gets protected, is probably similar to the reasons why we don't have a lot of work on the lobbying front: the one thing that politicians can always agree on is preserving the status quo.

As I noted before, we are all aware of the challenges involved in regulating shape shifters like political parties, special interest groups, or lobbyists. We might even imagine pursuing similar solutions in these areas of the law. I think this is especially true as disclosure and disclaimer rules take on an increasingly prominent role in campaign finance. It may be that we can learn something from developments in

the lobbying context in thinking about disclosures and disclaimers in campaign finance and vice versa.

Let me just give you two examples. Bruce Cain has already offered one such lesson in an edited volume entitled *Race, Reform, and Regulation of the Electoral Process*. There he draws on the lessons of campaign finance and makes a suggestion about lobbying reform. He says that the usual move for lobbying reform is to give the lobbyists who represent moneyed interests *less* voice. It is a solution that levels things down. Cain says that the solution may be to give people *more* voice, to pull people up. It is exactly the kind of solution you see for campaign donation matching rules—to give people who are neglected more power. Cain suggests that if you are a public interest group that meets a certain membership requirement, then your guys will automatically become lobbyists and be allowed to work on bills in Congress.

D. The Lobbying Analog to Public Finance

I want to pitch another idea. This one is at such an early stage that I am a bit nervous about doing it, but my co-author Alex Tausanovitch and I are in the midst of writing it up. The idea is in the "does this dog hunt?" stage—our question is whether this article writes.

Alex and I have been trying to imagine the public finance analog to lobbying. Our paper begins with a simple question: what exactly is it that congressional representatives and legislators get from lobbyists? Most assume it's money. That is where most of the energy in lobbying reform goes, so most people worry about the lobbyists who bundle. But, as Richard Briffault has pointed out, that is not really the problem. Lobbyists are just channeling special interest money. It is not the lobbyists' own money or even the elicit steak dinners and baseball tickets that we worry most about. The money we really worry about is the money donated by special interest groups. On this view, the real problem is the special interest groups, not the lobbyists who bundle for them.

But lobbyists do more for legislators than just channel money. They provide information. Indeed, some believe that the information-providing function is more important than the money providing function. According to political scientists, there are three kinds of things that lobbyists will give you: (1) political information (how likely is it that this legislation will pass?); (2) electoral information (if you vote for this bill, is your constituency going to vote you out the next time around?); and (3) policy information (what happens when we pass this bill and is there any alternative?).

How does it work? Because lobbyists can give politicians these three crucial kinds of information, they can move their bills forward more quickly than bills where this information is not provided. Think of it this way: if you are a member of Congress trying to determine what bills to pass in the limited time that you have, you will probably pass the bills for which you have all of the information that you need to pass—where you don't have to figure out what to do to get the legislation drafted.

Put differently, legislators will take the prefab option. The lobbyists provide McLegislation, McTalking Points, and the McResearch neatly packaged in a nice bag, along with the equivalent of a Happy Meal toy—the all-too-helpful polling research that will tell you how things will go in the future. What would you do? You would take the McDonalds option. You would take the prefab option. Richard Hall and Alan Deardoff call the help lobbyists provide a "legislative subsidy." They say that subsidy often explains why bills move forward.

So, here is the public finance analog. It is very difficult to *eliminate* legislative subsidies; you would run into huge First Amendment problems if you tried to stop lobbying of this sort. But you can imagine leveling up. You can imagine providing a legislative subsidy for those issues where well-heeled lobbyists aren't there to provide that helping hand—where staffers and bosses need the McLegislation, the McResearch and McTalking Points, but they don't have them because the well-funded interests are not there to provide them.

There are lots of ways to level up. You could just tell Congress to hire more staffers. While that sounds like a great option for congressional representatives, you can just imagine the problem. Staffers are fungible, and congressional members could just take that money and put it into more support for constituent services and the like. Moreover, the problem with added staffers is that they are not guaranteed to be experts on the relevant subjects, so you might not have the right person there at the right time.

You might try to expand the Congressional Research Service. The problem is that while you avoid the diversion of resources problem, you will violate the organization's norm of nonpartisanship, something we should value pretty highly. CRS staff members can provide certain kinds of information, but not political intelligence. As a legislator, however, you need that kind of information to move forward.

Finally, as Alex and I propose, you could fund policy research consultants—the people to provide the McLegislation, the McResearch and McTalking Points, plus all the politically relevant advice a congressional representative could possibly want. We already see a ramshackle version of it happening today. I recently testified in front of Congress. I was (willingly) being used by congressional representatives—doing research for them and providing advice on the bill. That is what all academics do. We are like unpaid research assistants. That's the ramshackle version. Staffers find the experts in the field, and experts submit testimony. But that isn't really going to do the trick here. Lobbyists provide something that is much more far-reaching and much more helpful. What we have in mind are researchers who have a more permanent status—people who can provide information during the major stages of decision-making as well as during the period in which the bill is amended.

If we imagine a market-based solution for funding the legislative subsidy—allowing individual members to hire whomever they want—we would avoid the really hard constitutional question involved here. Often times there is an impulse among academics and reformers to want to sort the "good lobbyists" from the "bad

lobbyists" or the "public interests lobbyists" from the "corporate lobbyists." I just don't think that, as a constitutional matter, that is a particularly safe thing to do. I'm not even sure if it is the right thing to do. Our proposal is just to let congressional representatives hire whomever they want. If they want to hire from the oil industry, they can hire from the oil industry.

But why would they? The oil industry is already very happy to provide its own legislative assistance to Congress. In fact, I think oil executives would far prefer that congressional members consult with their guys rather than some independent person that congressional members have hired. We think it is quite likely that congressional representatives will do what we hope they will do—that they will look for expertise where it is *not* being supplied.

As I said, the idea is in the kicking around stage and I would welcome any solid kicks during the question and answer period. But before I close, let me link our proposal back to the larger point here. *Citizens United*, the decisions that preceded it, and the decisions that will follow it will block off many of the traditional paths of campaign finance reform. That means that campaign finance reform needs to move in new directions—with a greater emphasis placed on leveling up rather than leveling down, directing money into politically useful channels instead of attempting to take money out of politics. This will be particularly true as disclosure and transparency become the constitutionally safe options for reformers. I think that campaign finance and lobbying, which have long been connected in practice, will also grow together in theory and in policy. There has long been a reason to study the two together. *Citizens United* simply makes that fact much more obvious. Thank you very much.