

Corporate Influence

Exploring the Relationship Between
Lobbying and Corporate Power

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About the Critical Corporate Theory Collection

The Critical Corporate Theory Collection is part of the *Systemic Justice Journal*, published by the Systemic Justice Project at Harvard Law School. The Collection is comprised of papers that analyze the role of corporate law in systemic injustices. The authors are Harvard Law students who were enrolled in Professor Jon Hanson's Corporations course in the spring of 2021.

The Collection addresses the premise that corporate law is a core underlying cause of most systemic injustices and social problems we face today. Each article explores how corporate law facilitates the creation and maintenance of institutions with tremendous wealth and power and provides those institutions a shared, single interest in capturing institutions, policies, lawmakers, and norms, which in turn further enhance that power and legitimates its unjust effects in producing systems of oppression and exploitation.

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ABSTRACT

Lobbying is a widely accepted practice through which companies have influenced the process of lawmaking. In recent years, corporate activity has faced some crises of legitimacy. However, lobbying has remained outside of those debates and still enjoys curious health. This work explores the reasons why that is so. It also analyzes the ideas behind lobbying that have contributed to its success. The work finally shifts toward a critical assessment of lobbying as a practice and explores some alternatives to our current system.

Corporate Influence

Exploring the Relationship Between Lobbying and Corporate Power

PART 1: PROBLEM DESCRIPTION

Corporate lobbying is a deeply entrenched feature of American culture and a characteristic piece of democracy as we know it. As a society, we have become used to big corporations influencing how laws come to existence. Before delving deeper into the topic, we should ask what lobbying exactly is. In simple terms, it is the practice through which people hired by corporations –lobbyists – influence government decisions. Those lobbyists approach politicians, usually legislators, to influence the outcomes of the bills. Negotiations take place behind doors.¹ It is a natural part of the process that corporate lobbyists advocate for rules that benefit the businesses they serve. And the outcome is that laws produced that way do not pursue the general welfare but businesses' interests.

It is not surprising that the biggest and most powerful actors usually have a greater scope of influence. Those kinds of corporations are distinctly skilled at preserving their dominance, and lobbying is one tool they use to do so. However, lobbying is not only used to retain power but is also employed to increase it.

We live in an era where we accept corporate influence and power in our political system without asking many questions. However, during the last few years, corporate activity did not escape public debate. Some areas faced a legitimacy crisis, and public opinion raised its voice. We can track one example at the upsurge of the Black Lives Matter movement. Plenty of corporations issued statements in favor of the campaign. However, public opinion perceived that as a public relationships' move and heavily criticized companies for not adopting material policies that supported those statements.² Somehow, lobbying has managed to escape from that criticism.

Even when the manifestations of lobbying are pervasive, we still do not critically assess it. We can track one of its most harmful expressions if we go back to the 1980s. It is no coincidence that some detrimental effects of lobbying happened during the upsurge of the neoliberal model. At that time, insuring companies lobbied the states' legislatures to push them to modify the concept of insurable interest.³ In the insurance industry, you need to hold some stake to purchase a policy. At that time, workers were not deemed as a valid insurable interest for corporations. If employees or their families wanted, they could have personally purchased a policy for themselves. But businesses could not obtain analogous insurances that would benefit themselves because they had no legally relevant interest that permitted that. They thus advocated for an expansion, which allowed them to purchase insurance to cover all their employees. Before that, they could only do so with workers essential to their activity, usually senior executives and managers. Naturally, companies would benefit from those policies once the worker dies. Their families would only receive a small portion of it if any. Frequently, corporations purchased those policies without telling their employees and kept them even after workers abandoned the companies. All that was possible because lobbyists were successful enough to influence states' legislatures. In recent times, corporations have also spent considerable sums of money to lobby the creation of more felonies. Their intention behind that is to keep the new private prisons they own full and make more money.⁴ Notwithstanding the harmful effects of the practices just described, public opinion did not raise its voice as it did with other issues.

What makes lobbying particularly dangerous is how it operates. Since negotiations happen behind doors, public opinion is not always aware of all that occurs. Thus, most of the practice occurs without people even noticing it. Lobbyists act behind the scenes, which makes their activity less risky for them. It is also more effective for advancing corporate interests. Only those interested in it will seek to know more about it, but that is only a reduced number of people. Given the current state of things, the tool serves corporations to preserve and increase their power without significant drawbacks. That is what makes it such an intriguing phenomenon to study. As we advance with its analysis, we should be mindful of the risks lobbying poses.

PART 2: CURRENT DOMINANT NARRATIVES

The lack of questioning is only half of the story. Besides that, there are plenty of arguments in favor of corporate lobbying. Current narratives

endorsing the practice emanate from beliefs and conceptions about the purposes of the state. Two basic ideas support the account. First, there is this notion that regulations do not contribute to the general welfare. Second, and as a solution to the problem just mentioned, corporations should perform their activity freely as long as they play by the rules. We cover each of those issues separately.

A. Markets are good, regulations are bad

The point of departure has to do with acknowledging that legislation does not contribute to the general welfare. That phenomenon is not merely circumstantial but an inherent feature of our system. Accordingly, the meta-script is that we should not seek to find the solution in legislation and let the markets perform their magic.⁵ Thus, we should reject regulation and let markets take care of things for us. They are efficient and function well; hence we should let them take charge and abandon the pursuit of better legislation. The thought emanates from a tradition that sees the state as a risk and promotes economic freedom. The logic they follow is that governments could only dream about being as efficient as markets.

As with other corporate law matters, paradoxes and contradictions arise. In this case, the departure point of those advocating for lobbying is deregulation. If you give it a thought, it is puzzling that the denial of legislation leads to claims of more corporate influence in the democratic process. The logic proceeds as follows. As a first step, those in favor of lobbying activities say we should reject the legislation. However, as we move toward a macro-level, the idea is that we should let corporations influence the outcomes of law. There is a necessary contradiction between those two issues, but that does not seem to be a problem.

B. Freedom to act as long as they obey the law

Another contradiction lies in the belief that the purpose of corporations is to maximize shareholder value by playing by the rules.⁶ If companies follow norms, we cannot question corporate activity. What else can we demand from a subject than to obey the rules? The problem that logic overlooks is that corporations have a say in how those laws come to existence. Thus, the illusion is that corporations play according to rules as any other subject. The ignored difference is that companies have a great deal of power in creating the laws that regulate them.

C. Critics and hurdles that reinforce the narratives

The dominant narratives open the door for some critics and allow those against lobbying to unmask the illegitimacy it carries. However, it is not as simple as that. Despite its contradictions, the practice enjoys widespread popularity, and its final justification lies in constitutional rights. In general, corporate power is very good at self-preservation. Whenever corporations face a crisis of legitimacy and people start demanding more equality, they grant the minimum and continue performing their activity. They carry non-substantial reforms that keep people happy for a while without facing systemic changes. An example may serve to clarify the point. During recent years, there has been an upsurge of critical voices against corporate activity. Two issues boosted the movement: environmental and inequality concerns. The response corporations adopted has been to embrace those challenges as if they were their own claims. The Business Roundtable, an organization whose members are CEOs of major American companies, issued a statement in 2019. In that document, it claimed that the purpose of corporations should be to serve all their stakeholders. This last class comprises consumers, workers, suppliers, the community, and shareholders.⁷ Do you imagine that there has been some substantial change since that moment?

Through reforms that seem significant but actually do not promote substantial change, corporations achieve two critical objectives. First, they recover legitimacy, which allows them to keep on performing their activity without significant challenges and disputes. Second, and more importantly, they preserve and increase their power. Every time they recover legitimacy through some non-substantial reform, they are not in the same position they were before. Each time, they face a situation in which their power increases.

Those general considerations have a particular application when dealing with lobbying. As things currently are, the practice does not face a legitimacy crisis. Thus, it is more efficient at contributing to the preservation and creation of corporate power. Besides that problem, it is likely that even if it faces public questioning, the tools will still be efficient. And that is because of the phenomenon above described. When corporations face a legitimacy crisis, they tend to assume the lead to solve the problem. They purport to address the situation they have created. That tool is efficient as a way of claiming to have undergone substantial change while leaving the status quo unaltered. Again, the Business Roundtable Statement serves as an example of those

proceedings.

Further, according to the dominant narrative, lobbying is not only harmless. It is also a desirable and valuable tool. Since our system produces rules that do not contribute to the general welfare, the solution is to allow corporations to influence the process. Through those means, our system will create better rules than those that would come into existence without this practice. Current narratives do not cast doubts over lobbying. Contrarily, they promote it and defend it. Now would be the right moment to assess if those accounts are accurate, given widespread concerns associated with other manifestations of corporate power.

PART III: ANALYSIS OF THE ROLE OF CORPORATE POWER (AND, BENEATH THAT, CORPORATE LAW) IN CREATING HARM THROUGH THE PROBLEM

Most public opinion would agree that regulations usually do not contribute to the general welfare of society.⁸ People often disagree on the solution to that problem. A more radical and extremist view would seek to reform the system and create a more participative democracy that produces better laws. In this case, the idea is to address the causes that generate the problem. The thesis is that, by removing the sources of the problem and not merely the consequences, the new system would produce laws that contribute to the general welfare. Surprisingly, that theory is not very popular and has not widespread acceptance. In the next section, we will explore the reasons for its lack of acceptance in more depth.

On the other hand, another way of addressing the problem is by assuming that it is impossible to produce laws that benefit the public in general. We should thus reject any attempt to do so. Instead, we should let the market take care of things. Further, as we will never achieve those kinds of laws, we should allow corporations to intervene in the process. Since those entities operate under market rules, the outcomes of their influence will be better than those that arise without their intervention.

One ignored consequence is the effect of regulations created after lobbyists' intervention. It is not simply that those rules do not contribute

to the general welfare of society. They also benefit those who advocate for them. The concept of capture has plenty of application when talking about lobbying. Corporations fight for laws that will advance their interests and create significant power through that mechanism. Law is usually the result of a dispute of power, and the winners gain the right to impose their views.⁹ With lobbying, corporations advance laws that, in the end, will benefit them. The underlying corporate logic is deficient. According to it, if we empower the state, we will get laws contrary to the general welfare. Instead of advocating for a systemic change, the solution would be to empower private actors to influence the political process. Even when the outcomes of those influences would also not advance the general welfare, their results will be preferable.

What the previous paragraph's logic ignores are the risks surrounding those practices. Lobbying allows corporations to advocate for the creation of laws that significantly increase their power. The powerful narrative that underlies that logic is that businesses themselves are a desirable social good. Hence, we should create a system that favors them instead of trying to regulate their activity. If we do the latter, they will relocate in places more benign toward their interests. It is not only that the state has given up its power to regulate businesses but also that it allows them to produce laws that most suit their interests.

That has not always been the case. Some centuries ago, people, especially those related to the law field, resisted corporations. Some suspicions surrounded those entities. It is not entirely clear what had triggered those feelings, but corporations did not enjoy widespread support. Silently and without almost no one noticing, those entities conquered new rights and gained legitimacy. In the second half of the 19th century, a Supreme Court case stated that corporations should have the same constitutional guarantees that natural persons had.¹⁰ Compare that fact with the struggle other collectives, such as African-Americans or women, undergone to conquer the same rights.

After gaining new rights, the corporate institution became a valuable one, and governments changed their attitudes toward them. The former opprobrium people held faded away, and the authorities stopped seeking to control them. The plan was then to please them and grant them whatever they deemed necessary to perform their activity. Attracting businesses became the rule. The state resigned part of its power and transferred it to corporations to achieve that goal.

Corporate power usually contributes to the creation of an unequal society. Public opinion does not completely ignore that fact. Historical

accounts show that people's attitudes toward corporations have varied. When levels of inequality increase, public opinion reacts and pushes for some changes. An example is the outbreak of the 20th century. At that point, the industrialist Andrew Carnegie and the business magnate John D. Rockefeller were at the apogee of creating large fortunes through corporate activity. Levels of inequality reached a peak and led to public reaction. People began to perceive the system as unfair. Workers organized and demanded more rights and better labor conditions for an upsurging working industrial class. That forced the system to adopt some changes for self-preservation. Corporations adjusted their policies without undergoing substantial change and kept on performing their activity. One example was Henry Ford's policy to increase its workers' salaries above legal minimums. While it was a good policy, it was also an isolated measure. In the end, it helped the system to regain legitimacy and continue operating without facing substantial reform.

Something similar happened after the 2007-2008 financial crisis. We are now experiencing a comparable moment with similar claims, which have led to the enactment of the Business Roundtable Statement. But as we have already seen, corporations are skilled at regaining legitimacy through non-substantial changes that appear to advance significant change. And they are also skillful at self-preserving their power. If necessary, they will adopt some minimum changes that will increase their legitimacy. Through those means, they avoid substantial reforms.

One of the most powerful tools to preserve and generate power is lobbying. Through it, corporations conquer new rights that favor their interests. It is their way to legalize their privileges, and after that, they have all the tools to enforce them.

At this point, an interesting question is how corporations have managed to maintain such a complex system of influence without undergoing major criticism. One possible explanation is the illusion surrounding the practice. It is not that businesses openly say that lobbying means securing their interests. Their strategy is to identify corporate goals with societal welfare. The narrative of businesses as socially desirable entities plays a crucial role in that. Companies claim that, by advancing regulation in their favor, they also contribute to the community.

Corporate influence has reached new levels after the Supreme Court of the United States decided *Citizens United*.¹¹ After it, corporations can endorse or criticize political candidates, make political campaigns, and financially support candidates with almost no restrictions. That says a

lot about the relationships corporations will have with those in charge of issuing rules. If we add in lobbying, the account is scary. The system not only accepts that corporations influence legislation. It also allows them to advocate for the election of certain people. If we see those issues separately, we may find some problems that apply to each of them. If we see them together, the risks exponentially increase. Corporations support candidates that will become officers, which makes corporate lobbying much more effective. The people lobbyists endorse then become legislators and thus are in charge of enacting laws. It is not far-fetched to believe how they would behave when in office. Do you find that striking?

The previous account shows that, under the pro-market script, corporations have succeeded in capturing laws, public opinion, and even politicians. That means that they have managed to sell their version of the story to those other centers of interest previously mentioned. And by those means, they have secured and promoted their corporate stakes. One tool used to ensure their success has been to finance think tanks that promote the interests corporations defend. The strategy has proven to be efficient.¹² Capture reaches different levels according to the case. With public opinion, it appears to be deep since no major questions surround the lobbying practice. With politicians and laws, it usually depends on the context. Frequently, the former would be shallow since politicians will also seek to pursue their own interests. While the latter would likely be deep since regulations will advance the interests of powerful groups instead of the general welfare.

While all those powerful narratives persist, there are various alternatives we might want to consider to combat corporate capture. One possibility could be to increase the scope of influence of groups that represent different people. Those groups would be able to advocate for better legislation for the collectives they represent. As an example, unions could advocate for better laws for workers. However, this idea presents several risks and concerns. First, as previously mentioned, the law is usually the result of a dispute of power. If we allow other collectives to intervene in legislation, it would be impossible to pass a law that will please them all. By definition, laws benefit someone while harming others. It is impossible to create something that will be beneficial to everybody. Making everyone better-off, without making anybody worse-off, only happens in ideal models, not in the real world. Whenever we grant something to someone, we are taking it from another person. The underlying story is that those negative impacts are legitimate because there is no way to avoid them. One could seek to diminish their detrimental effects but could never eradicate them. And

the fact that their existence is impossible to prevent validates them. In simple terms, a law punishing people who murder damages them. There is some consensus in society that this is legitimate. As it will be impossible to benefit all the groups involved with a law, a dispute of power will arise. Those with more leverage will likely prevail. Thus, while formally more subjects will intervene in the process, the outcomes will not vary substantially. The claim is not that the mechanism would not produce any change. We could argue that things may improve. However, it will not lead to a substantial change and be another way of validating minimum reforms that tend to preserve the health of the status quo. If there is no other option, we may end accepting this path, but that should not be a compromise to make at this moment. Consider also our next point.

Due to the structural inequalities in our society, different collectives will be underrepresented. In those cases, they would not be able to exercise even a formal representation. They will not be involved in the dispute of power. While being part of the discussion is not a game-changer, we should be mindful that an efficient alternative system should also serve the interests of those minorities.

Another alternative would be to ban corporate lobbying. However, implementing that as an isolated policy without substantial reforms would not significantly improve the current situation.¹³ Corporate power has a variety of manifestations, and it is very creative. We have seen that one of them is endorsing political candidates. And it would not be surprising that in the future new ways emerge. Banning lobby as an individual policy will not affect the system.¹⁴ Other groups of people will still be underrepresented and will not have the tools to defend their interests. Corporations will find their way to preserve and increase their power if they operate under the same rules. An isolated prohibition on lobbying could be as harmful as leaving things exactly as they are now.¹⁵

There is also the possibility to regulate the practice, setting some strict limits and rules. However, the same considerations as those that apply to the previous case are valid. It is unlikely that a policy like that will have a significant impact on our current system. Isolated measures will not achieve the goal of improving the current state of affairs.

While we have explored various suggestions to improve the current state of lobbying practices and corporate influence, each of these measures presents objections to different degrees. This paper's thesis is that all those individual measures would likely fail. The vision this work advances is also objectionable. However, it holds the virtue of being one

that seeks to promote substantial and significant change. This article claims that the problem is not just corporate lobbying but lobbying in the current context. Hence, without disputing the idea that regulations rarely advance the general welfare, there is little room for different solutions. For those advocating for deregulation, laws could never be good for society as a whole. If we abandon that conception, at least theoretically, the panorama changes. An opposing view, which this paper upholds, is that if circumstances change, having laws that promote general welfare could be the norm and not the exception. The thesis is not that laws will benefit everybody since, by definition, that is impossible. This paper claims that it is possible to create regulations beneficial for society as a whole instead of a reduced and privileged group. It would not be easy, but it would also not be impossible. For that to happen, a systemic reform should be advanced. We can link the issue to the basis of democracy. A society in which that could happen would put in place a more participative democracy. Individuals and groups of people would have a significant influence on the political process. However, a necessary condition for that to happen would be a fair and equal society. Without those premises, the system's destiny is to fail.

Note that the proposed alternative applies some of the tools of other proposals we have rejected before. And that is because the problem does not lie in the remedies. Conversely, it lies in how those purported solutions are applied. Denying the relevance of the context or situation may endanger the success of such a program. Thus, a necessary first step would be to modify those conditions that have led to the consolidation of corporate power. It is a herculean task, and it is hard to be optimistic about its achievement. However, we do not lose anything trying. And if someday we reach that point, many of the ideas this paper has rejected may work better in that different context.

For some, the ideas might appear extremely idealistic and radical. However, two caveats would probably make them more tolerable. First, we tend to see human creation as a given, and it is difficult for us to think about alternatives. We tend to believe that our system is the system we have always had and that it is impossible to change it. We should be mindful that as we managed to create those systems, we can also substitute them with alternatives. A second point to highlight is that the option this paper portrays represents the ideal scenario. Many times, it is not feasible to reach it. However, it inspires us, moves us to action, and pushes us to believe that a better possibility exists. As a metaphor, we can mention Rudolph Stammler's concept of justice as a pole star that guides our way. We might never reach it, but it inspires us and guides us through the course. We could say the same about

searching for alternatives to our system. We might never reach them, but that should not discourage us. Setting a goal and moving toward it is tremendously relevant.

CONCLUSION

Corporate lobbying is a deeply entrenched practice in our society. There are plenty of dominant narratives that justify it and even advocate for it. We have covered them through the paper by pointing out the main features that give them strength. We have also analyzed the topic with critical lenses, intending to unmask the illusions behind corporate lobbying. We have pointed out the differences of the practice and illustrated why the accounts around it are still so powerful. Finally, we have covered several alternatives to it. We also critically analyzed them, issuing a judgment about their feasibility and capability of solving the current problems.

The goal has never been to provide a definitive answer but to question some of the things we take for granted. Usually, posing the right questions is even more important than answering them. Despite the legitimacy crisis that corporate activity has faced during the last years, corporate lobbying still enjoys curious health. The goal of this paper was to cast doubts over it by portraying some of its illegitimate effects. Our task will be incomplete if we do not come up with a feasible alternative. The paper has also included such an alternative, with some caveats related to its effects. In today's world, it is hard to be optimistic. However, it is also not advisable to be pessimistic. Rather than solving all our problems, coming up with an alternative has the effect of bringing us some hope. It is not that we will overcome the situation with it. But we will have something to pursue that will guide our way and will boost our optimism. In some contexts, that is as important as finding a definitive solution. The necessary departure point to achieve the latter is to have a pole star that guides our way. That was the goal of this work: providing a drop of hope in a desert of injustice.

ENDNOTES

¹ For more context and information about the practice, *see* Tamasin Cave and Andy Rowell, “The truth about lobbying: 10 ways big business controls government,” *The Guardian*, March 12th, 2014.

² *See* Tracy Jan, Jena McGregor, Renae Merle & Nitasha Tikku, “As big corporations say ‘black lives matter,’ their track records raise skepticism”, *The Washington Post*, June 13, 2020.

³ Michael Sandel, *What Money Can’t Buy: The Moral Limits of Markets*, ch. 4.

⁴ *See* Michael Cohen, “How for-profit prisons have become the biggest lobby no one is talking about”, *The Washington Post*, April 28, 2015.

⁵ George J. Stigler, *The Theory of Economic Regulation*, *Bell J. Econ. & Mgmt. Sci.* 3 (1971).

⁶ We can find an illustration of this reasoning in Friedman, “The Social Responsibility of Business is to Increase Its Profits,” *The New York Times Magazine*, September 1970.

⁷ Business Roundtable, *Business Roundtable Redefines the Purpose of a Corporation to Promote “An Economy That Serves All Americans”* (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans/>

⁸ *See* Susan Dudley et al., “Government Regulation: The Good, The Bad, & The Ugly”, *Regulatory Transparency Project*, June 12, 2017.

⁹ *See* Stone, Seidman, Sunstein, Tushnet & Karlan, *Constitutional Law* (8th ed., 2018) (Wolters Kluwer), at 758.

¹⁰ *Santa Clara v. Southern Pacific* – 118 U.S. 394 (1886).

¹¹ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

¹² *See* Eric Lipton & Brooke Williams, “How Think Tanks Amplify Corporate America’s Influence”, *The New York Times*, August 7, 2016.

¹³ *See* note 9.

¹⁴ *Id.*

¹⁵ *Id.*