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Jill E. Fisch

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How Do Corporations Play Politics?: The FedEx Story

*Jill E. Fisch**

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*Alpin J. Cameron Professor of Law and Director, Center for Corporate, Securities and Financial Law, Fordham Law School. Portions of this article were written while the author was serving as Sloan Visiting Professor of Law, Georgetown University Law Center. 2005 Jill E. Fisch. I am grateful to Fordham University, the Sloan Foundation and Georgetown University Law Center for providing financial support for this research. I am also grateful to Bill Bratton, Steve Choi, John Conley, Mitu Gulati, Ed Kitch, Kim Krawiec, Donald Langevoort, Paul Miller, Dan Ortiz, Gideon Parchomovsky, Warren Schwartz, Rob Sitkoff, Jim Snyder, and Fred Tung, and to participants in the University of Pennsylvania Institute for Law and Economics, the Georgetown-Sloan Project on Business Institutions Conference on Field Study Methodology, the Eugene P. and Delia S. Murphy Conference on Corporate Law at Fordham Law School, the Corporate and Securities seminar at the University of Virginia School of Law, and faculty workshops at Georgetown Law Center and the University of North Carolina School of Law for helpful comments on earlier drafts.

INTRODUCTION

Corporate political activity has been the subject of federal regulation since 1907,¹ and the restrictions on corporate campaign contributions and other political expenditures continue to increase.² Most recently, Congress banned soft money donations in the Bipartisan Campaign Reform Act of 2002 ("BCRA"),³ a ban upheld by the Supreme Court in *McConnell v. FEC*.⁴ Significantly, although the omnibus BCRA clearly was not directed exclusively at corporations, the Supreme Court began its lengthy opinion in *McConnell* by referencing and endorsing the efforts of Elihu Root, more than a century ago, to prohibit corporate political contributions.⁵ Repeatedly,

1. The Tillman Act made it unlawful "for any national bank or corporation . . . to make a money contribution in connection with any election to any political office." Ch. 420, 34 Stat. 864 (1907) (codified at 18 U.S.C. § 610 (1948) (repealed 1976)). The Federal Corrupt Practices Act extended the prohibition to "in kind" contributions. Ch. 368, § 302, 43 Stat. 1070 (1925). The Taft-Hartley Act broadened the ban to include expenditures in addition to contributions. Ch. 120, § 304, 61 Stat. 136, 159-60 (1947). In 1976, the Federal Election Campaign Act ("FECA") was amended to incorporate these restrictions. The FECA currently prohibits "any corporation whatever" from making a contribution or expenditure in connection with an election for federal office. Federal Election Campaign Act of 1971, 2 U.S.C. § 441b (2005) (codified as amended). Corporate lobbying has been regulated by federal law since 1946. The Federal Regulation of Lobbying Act of 1946 required lobbyists to register and disclose their activities to Congress, although the Act contained many loopholes. The Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 2 U.S.C. §§ 1601 *et seq.* (2005), replaced the 1946 statute and some related regulations with broader registration and disclosure requirements. The Act requires lobbyists to register, report the issues on which they lobby, and disclose the names of their clients along with their receipts and expenditures. *See generally* Frank J. Connors, *Complying With the Lobbying Disclosure Act of 1995*, 45 PRAC. LAW. 15 (1999) (explaining requirements of the Lobbying Disclosure Act). Corporations must register the lobbyists they employ and report the issues on which they lobby with an estimate of the total lobbying expenses incurred. *Id.*

2. The nature, extent and regulation of corporate political activity varies dramatically across countries. *Compare* Control of Political Donations, New Part XA, Companies Act, 1985 (Eng.) (adopted as schedule 19 to the Political Parties, Elections and Referendums Act 2000) (adopting a new requirement of prior shareholder approval for corporate political contributions), *with* Michael Baume, *Donated Dollars Make Business Sense*, AUST. L. FIN. REV., Feb. 7, 2005, at 63 (arguing that corporate failure to donate to political parties is "an abrogation of responsibility") *and* Australian Election Commission, Summary of Donations Reported by Donors, <http://fadar.aec.gov.au/> (last visited Oct. 28, 2005) (reporting corporate donations as high as AUD 800,000 for the 2003-2004 election year). This Article, by necessity, focuses on the U.S. experience.

3. Pub. L. No. 107-155, 116 Stat. 81 ("BCRA") (2002) (codified at 2 U.S.C. §§ 431 *et seq.*). The BCRA also reduces corporate ability to engage in "issue advocacy" by broadening the definition of electioneering communications and prohibiting corporations from making such communications except through segregated funds.

4. 540 U.S. 93, 132-73 (2003).

5. *Id.* at 115.

within the broad context of campaign finance regulation, corporate contributions have been singled out as particularly problematic.⁶

The federal regulatory scheme is based, in part, on the perception that corporations are able to use their substantial economic resources to influence public policy and thus distort the political process.⁷ At the same time, political activity is widely viewed as an illegitimate expenditure of corporate funds. Thus, again in the first few lines of the *McConnell* decision, the Court quoted President Theodore Roosevelt's statement that "directors should not be permitted to use stockholders' money for political purposes."⁸ Similarly, the Court had previously characterized general corporate treasury funds spent on politics as being "diverted" from their proper use, indicating that political activity is not a legitimate business expenditure.⁹

Media reports about corporate corruption of the political process have fed these concerns. The press, for example, described Enron as buying legislative favors in exchange for political contributions.¹⁰ Studies claim that corporate donors use campaign contributions to purchase political influence.¹¹ The media often structures these reports of corporate and other special interest political expenditures to produce heightened impact. For example, the

6. See, e.g., *id.* at 205 (identifying "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation") (citations omitted); *id.* at 206 (observing that "unusually important interests underlie the regulation of corporations' campaign-related speech").

7. See *FEC v. Beaumont*, 539 U.S. 146, 152 (2003) (describing ability of corporations to exert a potentially "deleterious" influence on political elections) (citation omitted); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990) ("the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures."). See generally Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1108-23 (2002) (identifying and criticizing many of the traditional justifications for special regulation of corporate political activity).

8. *McConnell*, 540 U.S. at 115 (internal quotations omitted).

9. See, e.g., *Austin*, 494 U.S. at 670-71 ("We thus adopted the 'underlying theory' of FECA 'that substantial general purpose treasuries should not be diverted to political purposes'") (quoting 117 Cong. Rec. 43381 (1971) (statement of Rep. Hansen)); see also *Beaumont*, 539 U.S. at 163 (describing the use of corporate funds for political influence as a "temptation . . . quite possibly at odds with the sentiments of some shareholders or members").

10. See, e.g., Albert R. Hunt, *Enron's One Good Return: Political Investments*, WALL ST. J., Jan. 31, 2002, at A19 (describing Enron as receiving, in exchange for \$6 million of political contributions "legislative favors, a lax oversight of its risky financial derivatives, tax breaks, unsurpassed input into the Cheney energy legislation drafting process and most of what it wanted, and reportedly even veto authority over regulatory appointees").

11. See, e.g., Thomas Stratmann, *What do Campaign Contributions Buy? Deciphering Causal Effects of Money and Votes*, 57 S. ECON. J. 606, 615 (1991) (finding that interest groups in the sugar industry were able to use political contributions to purchase legislative subsidies).

Wall Street Journal reported that 80% of the \$314 million raised for the 2000 Bush presidential campaign came from “corporations and individuals employed by them.”¹² In contrast, John de Figueiredo and Elizabeth Garrett reported that only 22% of the money contributed to the federal political campaigns in 2000 came from corporations, unions, and other interest groups and that the remaining vast majority came from small donations by individuals.¹³

Despite the widespread reports of corruption, the empirical evidence is inconclusive. Although some studies show a relationship between political contributions and legislative voting records, their findings demonstrate, at best, a correlation between contributions and voting patterns, rather than a causal relationship. Many studies fail to find even a correlation. A recent paper reviewing the results of approximately three dozen such studies reported that “[i]n three out of four instances, campaign contributions had no statistically significant effects on legislation or had the ‘wrong’ sign – suggesting that more contributions lead to less support.”¹⁴

Additionally, the existing empirical research is methodologically limited. Virtually all the studies use a large-scale “top down” approach that measures the correlation between corporate campaign contributions and particular policy decisions. As I demonstrate in more detail in another work,¹⁵ this approach has the effect of excluding major components of corporate political activity, including expenditures that do not take the form of traditional campaign contributions as well as investments in corporate reputation and political relationships. The empirical approach also diminishes the significance of corporate political capital as an intangible asset that provides corporations with long term value extending beyond an isolated policy issue. More generally, the methodology does not allow researchers to look inside the black box to examine both the process by which corporations participate in the political process and the factors

12. Tom Hamburger et al., *Influence Market: Industries that Backed Bush Are Now Seeking Return on Investment*, WALL ST. J., March 6, 2001, at A1. The Journal itself acknowledged that this figure may be somewhat misleading in implying a relationship between corporations and corporate employees because the vast majority of individual contributors are employed by corporations. *Id.*

13. John de Figueiredo & Elizabeth Garrett, *Paying for Politics* 11, 19 (USC Law & Public Policy Research Paper No. 04-19, 2004; Princeton Law and Public Affairs Paper No. 04-016, 2004; and USC Law & Econ. Research Paper No. 04-19, 2004), available at <http://ssrn.com/abstract=578304>.

14. Stephen Ansolabehere et al., *Why Is There so Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 113-14 (2003).

15. Jill E. Fisch, *Measuring Corporate Investments in Politics: The Political Capital Index* (2005) (unnumbered working paper, on file with author).

that influence whether such participation is effective. Thus, notwithstanding the insights available through large-scale empirical research, the studies offer only a partial view of the corporate role in political decisionmaking.¹⁶

This Article addresses these limitations by employing a different approach. Responding to David Hart's call for increased study of individual firms,¹⁷ the Article uses a case study methodology to examine the political activity of a single firm, Federal Express ("FedEx"), over a forty-year period. Focusing primarily on the federal legislative process, the Article considers the business context surrounding FedEx's political activity, the details of the legislative process, and the significant interest group participants, as well as traditional campaign finance materials. An analysis of FedEx's involvement in legislative policymaking reveals that corporate participation in politics extends beyond the purchase of political favors in a spot market. The Article also demonstrates the relationship between FedEx's political activity and its business operations. In particular, it explores the manner in which FedEx has used its political influence to shape legislation and, in turn, the extent to which FedEx's political successes have shaped its business strategy.¹⁸

Despite regulators' attempts to control corporate participation in politics, corporate political activity continues to increase.¹⁹ Corporations appear increasingly aware of the importance of politics, and some corporations have found political naiveté to be commercially costly.²⁰ Moreover, regulatory restrictions on one type of participation

16. In addition to their other limitations, the studies do not explore differences among individual firms in their quantity or type of political activity. See *infra* Part III (describing differences among firms).

17. David M. Hart, *Business is Not an Interest Group (And, By the Way, There's No Such Thing as "Business")*: On the Study of Companies in American National Politics, 2004 ANN. REV. POLIT. SCI. 47, 47 (2004).

18. The selection of FedEx represents a conscious choice – FedEx is relatively more active and arguably more successful than many of its peers. See Neil A. Lewis, *A Lobby Effort That Delivers the Big Votes; Federal Express Knows its Way Around Capital*, N.Y. TIMES, Oct. 12, 1996, at 37 (describing FedEx as "one of the most formidable and successful corporate lobbies in the capital").

19. Soft money donations, for example, increased from \$86 million in 1992 to \$495 million during the 2000 election campaign. Tom Hamburger, *Broad Legal Attack May Undo Reform of Political Fund Raising*, WALL ST. J., Nov. 6, 2002, at A1. Edwin Epstein argues that restricting corporate political activity "has been ineffective because it disregards certain facts of life: the financial needs of the parties and candidates, and the political interests of business firms and the men who manage them." EDWIN M. EPSTEIN, CORPORATIONS, CONTRIBUTIONS, AND POLITICAL CAMPAIGNS: FEDERAL REGULATION IN PERSPECTIVE 7 (1968).

20. For example, some commentators have attributed Microsoft's antitrust problems, in part, to its lack of political participation. See John Simons & John Harwood, *Gates Opening: For the Tech Industry, Market in Washington Is Toughest to Crack*, WALL ST. J., Mar. 4, 1998, at A1

simply channel corporate expenditures elsewhere.²¹ The growth in the use of soft money donations, for example, was a reaction to restrictions on other forms of corporate political expenditures.²² Similarly, commentators predict that corporations will respond to the soft money ban by making greater use of lobbyists and Political Action Committee ("PAC") donations.²³ Early responses appear consistent with this prediction. Indeed, two days after the Supreme Court upheld the BCRA, Fannie Mae established a PAC, explicitly stating that its creation was a response to the soft money ban.²⁴

This Article argues that corporate demand for political activity is a natural response to the effect of legal rules on business operations.²⁵ As a result, regulatory restrictions are more likely to restructure corporate political activity than to eliminate it. Nonetheless, commentators, without a full understanding of how and why corporations participate in politics,²⁶ continue to propose new regulations.²⁷ This Article takes the initial steps toward developing that understanding.

(reporting that Congressman W.J. "Billy" Tauzin warned Microsoft CEO Bill Gates that he had to be "more active" in Washington"); Hart, *supra* note 17, at 41-42 (stating that Microsoft "deliberately eschewed" political activity until the Justice Department's 1998 lawsuit, which "finally prompted the firm to engage intensively with Washington"). Other firms have viewed the Microsoft experience as an indication to increase their levels of political activity. See, e.g., Greg Hitt, *Cisco's Chambers Revs Up Political-Contribution Engine*, WALL ST. J., June 8, 2000, at A26 (explaining how Cisco's effort to build relationships with Washington politicians is "part of a corporate strategy aimed at keeping the maker of computer-networking products out of the sort of trouble now ensnaring Microsoft Corp., which a federal judge ordered split into two companies").

21. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 165 (2003) (describing Congress as "[h]aving been taught the hard lesson of circumvention by the entire history of campaign finance regulation").

22. See *id.* at 650 (explaining that "[t]he solicitation, transfer, and use of soft money . . . enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections").

23. See, e.g., Alexander Bolton, *Reform Changes the Balance of Power on K Street*, THE HILL, March 20, 2002, at 37 (predicting that corporations will shift their expenditures to PAC donations and lobbying); Lawrence Noble, *Looking at New Campaign Finance Landscape*, THE HILL, March 20, 2002, at 41 (identifying a hard money alternative and speculating about other possible loopholes to evade new restrictions); Jill E. Fisch, *Questioning Philanthropy from a Corporate Governance Perspective*, 41 N.Y. L. SCH. L. REV. 1091, 1101-02 (1997) (explaining how corporations may use charitable donations as a substitute for political contributions).

24. *Fannie Mae Sets Up PAC*, WASH. POST, Dec. 29, 2003, at E02.

25. See Stephen Ansolabehere & James M. Snyder, Jr., *Money and Institutional Power*, 77 TEX. L. REV. 1673, 1703 (1999) (observing that regulatory limits create a disequilibrium between the demand and supply for political activity, and lead participants to respond to unmet demand either by evading the law or by packaging political activity in new ways).

26. Hart, *supra* note 17, at 43-45 (concluding that corporate political participation is poorly understood and proposing an agenda for future research).

27. See, e.g., de Figueiredo & Garrett, *supra* note 13, at 3-5 (advocating the adoption of an individual tax credit to stimulate individual political contributions as a counter to interest group

In Part I, this Article provides an overview of FedEx and describes how it has developed and applied its political capital. In so doing, it reveals the range of mechanisms through which corporations can participate in the political process. Part II presents a detailed case study of FedEx's political participation in connection with several major regulatory changes, focusing on the business context in which FedEx's activity was situated, the form of FedEx's participation, and the consequences of FedEx's political involvement. Part III moves beyond the FedEx case to consider the broader implications of the case study for regulatory policy. In particular, the Article concludes that political activity is not a dispersion of shareholder funds, but an integral and necessary part of a corporation's operating strategy. As a result, rather than trying to eliminate corporate political activity, reformers should focus on structuring regulation to increase the transparency and efficiency of corporate political expenditures.

Several caveats are appropriate. First, the political process is difficult to study. There is little objective evidence as to the basis on which political actors make their decisions, and there are substantial reasons to question the proffered justifications for political actions. Where possible, this Article uses interviews with participants in the political process to supplement the media accounts and the recorded legislative history and to obtain a more complete understanding of the political process.²⁸ The information obtained from these interviews, which were conducted on a nonattribution basis, is of course subject to the standard criticisms. Accordingly, any effort to discern causal relationships from the material in this Article is necessarily constrained.

Second, even if it were possible to identify accurately the motives of the relevant political actors, legal change is the product of multiple factors; the impact of any individual factor is difficult to isolate.²⁹ Economic factors, changes in social norms, shifts in the

influence); David S. Gamage, *Taxing Political Donations: The Case for Corrective Taxes in Campaign Finance*, 113 YALE L.J. 1283, 1287 (2004) (proposing corrective taxes to reduce donor incentives to divert their political spending into "regulatory loopholes").

28. During my tenure as Sloan Visiting Professor at Georgetown Law Center for the 2001-2002 academic year, I conducted a series of interviews with current and former legislative staffers, lobbyists, and public officials. I have relied on these interviews primarily for background and to provide me with direction in identifying and understanding publicly available documentation. In some cases, specific interviews have included interesting characterizations or conclusions that I have referenced in this Article, employing the following citation form: "Hill Interview x, date."

29. See, e.g., Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POLIT. SCI. REV. 1094, 1095 (1985) (proposing a broader causal view of regulatory performance that integrates relationships with other political institutions, the economic environment, constituency relationships, and internal organizational factors).

balance of political power, international developments, and prominent current events contribute to regulatory change and affect the ability of a political participant or interest group to achieve its objectives.³⁰ The magnitude of the problem increases with the length of time involved in securing legal change, because of the resulting increase in the number of factors that may play a role.³¹

Finally, this Article characterizes the corporation as an entity and makes the simplifying assumption that corporations engage in political activity in order to further corporate objectives.³² Specifically, the Article does not address corporate political activity that results from management self-dealing. As Roberta Romano observed, casual empiricism supports the argument that corporate political activity is primarily directed to profit maximization.³³ Moreover, although corporate decisionmakers may engage in political activity designed to further their personal interests instead of the interests of the corporation,³⁴ this agency problem is not unique to political activity but rather is common to all corporate decisionmaking.³⁵

30. Thus, for example, it is difficult to determine the extent to which the decline in the takeover market in the early 1990s was due to regulatory changes that made takeovers more difficult as opposed to changes in the economic climate. See, e.g., Roberta Romano, *A Guide to Takeovers: Theory, Evidence, and Regulation*, 9 YALE J. ON REG. 119, 178 (1992) (observing that the "collapse of the junk bond market and the corresponding credit crunch, caused by banking and financial services sector weakness and new government policies restricting financial institutions' holding of high yield debt, surely contributed to the decline in takeovers").

31. See Hart, *supra* note 17, at 21 (explaining the problems associated with predicting the results of political activity because "[p]olitics is notoriously fickle").

32. Moreover, it is unnecessary, for purposes of this article to address the normative debate between shareholder primacy, which typically accepts profit maximization as the sole legitimate corporate objective, and the competing progressive view which advocates greater emphasis on the interests of nonshareholder constituencies, even if such emphasis sacrifices corporate profits. See, e.g., D. Gordon Smith, *The Shareholder Primacy Norm*, 23 IOWA J. CORP. L. 277, 280-82 (1998) (describing the shareholder primacy norm and contrasting it with the progressive view).

33. Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 995-96 (1984); see also *id.* at 994-95 (rejecting agency cost justifications for restricting corporate political activity).

34. See generally Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235 (1981) (identifying agency problems in corporate political action and arguing that managers will pursue their political interests at the expense of the shareholders).

35. See, e.g., ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) (describing separation of ownership and control and the resulting agency costs created by the empowerment of management relative to shareholders); Jill E. Fisch, *Teaching Corporate Governance Through Shareholder Litigation*, 34 GA. L. REV. 745, 747 (2000) (describing corporate governance mechanisms addressed to agency problems caused by the separation between ownership and control). I have argued elsewhere that corporate law should be used to address agency problems associated with corporate political activity. See generally Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587 (1991) (arguing that corporate political activity should be addressed through corporate law rather than campaign finance law).

I. FEDEX AND THE DEVELOPMENT OF POLITICAL CAPITAL

FedEx is a well-known corporate success story. Founder Frederick ("Fred") Smith initially developed the concept of bringing a new methodology to the historically unprofitable air cargo industry as a college project at Yale,³⁶ for which he reportedly, albeit inaccurately, received a grade of "C".³⁷ Formed in 1971, FedEx's first day of service was April 17, 1973, on which it operated ten planes that carried eighteen packages.³⁸ Since that time, FedEx has grown to a company with annual revenues of \$24.7 billion³⁹ and 245,000 employees worldwide.⁴⁰ Less than ten years after its formation, FedEx was recognized as the dominant player in the overnight delivery business, surpassing larger and more established competitors, such as UPS.⁴¹ Today, FedEx is the largest and most successful global transportation company in the world.⁴²

At the same time, FedEx has developed a reputation as an active and successful participant in the political process. This Part provides an overview of some of the ways that FedEx has developed its political capital. The list is illustrative, not exhaustive; the discussion in this Part is intended to demonstrate the range of activities, beyond campaign contributions, that have contributed to FedEx's reputation as a political player. Although FedEx's level of political participation is high, its efforts are not unique—corporations commonly use these types of actions to build political capital.

FedEx's reputation is based, in part, on its political expenditures. In campaign contributions alone, FedEx consistently places near the top of the list of donors.⁴³ In recent years, FedEx's soft

36. Stuart Auerbach, *Big Delivery Firms Maneuver for Position; Companies Striving For Bigger Share of Busy Washington Market*, WASH. POST, Jan. 18, 1988, at F1.

37. *Id.* In a recent interview, Smith explained that the myth surrounding the original project has become exaggerated and that, in fact, he does not remember the precise grade that he received on the paper. See Dean Foust, *No Overnight Success; Frederick Smith's FedEx Sparked a Revolution in Just-in-time Delivery*, BUS. WK., Sept. 20, 2004 (quoting Smith as explaining that his efforts to correct the story have been unsuccessful).

38. Carol Shifrin, *No Passenger Service Seen by Air Carrier*, WASH. POST, June 25, 1980, at E5.

39. FedEx, Annual Report, at 7 (2004), available at <http://www.fedex.com/us/investorrelations/financialinfo/2004annualreport/> [hereinafter FedEx Annual Report].

40. Today's FedEx, <http://www.fedex.com/us/about/today/index.html> (last visited Oct. 30, 2005).

41. Shifrin, *supra* note 38.

42. *FedEx Chairman Undergoes Successful Bypass Surgery; Prognosis for Frederick W. Smith is Excellent*, BUS. WIRE, Nov. 25, 2000.

43. For example, statistics from the Center for Responsive Politics place FedEx 29th in the list of top overall donors in the 2000 election cycle, and 55th in 2002. Center for Responsive Politics, <http://www.opensecrets.org/bigpicture/topcontribs.asp?Cycle=2000&Bkdn=DemRep> and

money, PAC, and lobbying expenditures totaled more than \$6 million per election cycle.⁴⁴

FedEx 1999-2000 Soft Money	1,327,600 ⁴⁵
FedEx PAC 1999-2000 Disbursements	2,065,598 ⁴⁶
FedEx Corp. Lobbying 2000 Expenditures	3,320,000 ⁴⁷

FedEx's investment in political capital extends beyond monetary donations.⁴⁸ FedEx has carefully developed its reputation in Washington. Founder and CEO Fred Smith has maintained an active presence in Washington politics since founding the company; he travels to Washington once a month to meet with political officials and testifies regularly before Congress.⁴⁹ As early as 1976, Smith testified before Congress on at least five separate occasions within a six month

<http://www.opensecrets.org/bigpicture/topcontribs.asp?cycle=2002> (last visited Oct. 30, 2005). According to the Federal Election Commission's website, FedExPac ranked 30th in contributions to candidates and 39th in overall disbursements in the 1999-2000 election cycle, and 36th in contributions to candidates and 39th in overall disbursements in the 1997-98 election cycle. Federal Election Commission, <http://www.fec.gov/> (last visited Oct. 30, 2005); see also Nancy Zuckerbrod, *FedEx Tops Slate of State Soft Money Donors*, COM. APPEAL, Mar. 12, 2000, at A10 (reporting that FedEx ranked first among Tennessee soft money donors).

44. The dollar amounts indicated in the table understate FedEx's political expenditures for various reasons. For instance, corporations are not required to quantify the costs of lobbying by in-house personnel. FedEx has a Washington office which, in 2000, was staffed by five full-time personnel who engaged primarily in lobbying. Other FedEx personnel, including CEO Fred Smith, devoted substantial time to political participation. Also not included in the figures is the approximately \$77,000 of contributions made by individual FedEx officers and employees during the 2000 election cycle. Center for Responsive Politics, <http://www.opensecrets.org/bigpicture/topcontribs.asp?Bkdn=Source&Cycle=2000> (last visited Oct. 30, 2005).

45. Center for Responsive Politics, <http://www.opensecrets.org/softmoney/softcomp1.asp?txtName=fedex> (last visited Oct. 30, 2005).

46. Center for Responsive Politics, <http://opensecrets.org/pacs/lookup2.asp?strid=C00068692&cycle=2000> (last visited Nov. 3, 2005). PAC expenditures for subsequent years have increased. *Id.* at <http://opensecrets.org/pacs/lookup2.asp?strid=C00068692&cycle=2002> and <http://opensecrets.org/pacs/lookup2.asp?strid=C00068692&cycle=2004> (reporting PAC disbursements of \$2,935,330 for 2001-2002, and \$2,832,787 for 2003-2004 through Oct. 13, 2004).

47. Center for Responsive Politics, <http://www.opensecrets.org/pubs/lobby00/topind09.asp> (last visited Oct. 30, 2005). Importantly, FedEx conducts a substantial percentage of its lobbying through the use of in-house lobbyists – those expenditures need not be quantified and are not included in the reported total. See *id.* (providing a detailed breakdown of FedEx's 2000 lobbying expenditures).

48. See generally John M. de Figueiredo & Emerson H. Tiller, *The Structure and Conduct of Corporate Lobbying: How Firms Lobby the Federal Communications Commission*, 10 J. ECON. & MGMT. STRAT. 91 (2001) (recognizing that PAC contributions are a poor proxy for a firm's political activity and instead measuring lobbying by identifying the number of contacts made by a firm or trade association with the targeted government agency).

49. Dave Hirschman, *Air Express, Two Companies' Political Donations Zoom*, COM. APPEAL, Oct. 30, 1994, at 1C.

period in connection with legislative proposals to deregulate the air cargo industry.⁵⁰ Washington insiders identify Smith's reputation and interest in politics as a substantial factor in FedEx's political success.⁵¹

FedEx has also cultivated relationships with Washington insiders. Smith's ties to prominent political figures are extensive.⁵² Smith is reportedly on a first name basis with many members of Congress⁵³ and has enjoyed strong ties with several presidents.⁵⁴ Smith's relationship with Bill Clinton led Clinton to include Smith in the official delegation on a trade mission to China.⁵⁵ At the same time, Smith continues to maintain his relationship with fraternity

50. *Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 94th Cong. 548 (1976) (Statement of Frederick W. Smith); *Aviation Economics: Joint Hearings Before the Subcomm. on Investigations and Review and the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 94th Cong. 391 (1976) (statement of Frederick W. Smith); *Reform of the Economic Regulation of Air Carriers: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 94th Cong. 949 (1976) (testimony of Frederick W. Smith); *Amend the Federal Aviation Act of 1958, Relating to Granting Relief by Exemption: Hearing Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 94th Cong. 8 (1976) (statement of Frederick W. Smith); *To Broaden the Power of the Civil Aeronautics Board to Grant Relief by Exemption in Certain Cases: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 94th Cong. 44 (1976) (Testimony of Frederick W. Smith); see also James W. Brosnan & Anna Davis, *FedEx Powers Up for Fight in Congress, Postal Service a Major Target*, COM. APPEAL, Dec. 28, 1996, at 1A (noting that Smith usually testifies before Congress at least once per year).

51. See Hill Interview I, Jan. 31, 2002, *supra* note 28 (describing Fred Smith as a "big piece" of FedEx's success); Hill Interview II, Jan. 31, 2002, *supra* note 28 (explaining that Fred Smith had credibility in Washington starting from his involvement in air cargo deregulation when he "did what he said he would do"); Hill Interview IV, Apr. 12, 2002, *supra* note 28 (describing Smith as "the best lobbying tool that FedEx has").

52. The personal involvement of a firm's CEO appears to be a significant factor in conveying the importance of policy issues to political officials. In comparison to Smith, who has testified regularly before Congress, the testimony of UPS Chairman Kent Nelson before a House subcommittee in 1996 marked the first appearance before Congress of a UPS chairman in the company's 89 year history. *Postal Service Reform: Hearing of the Postal Service Subcomm. of the House Government Reform and Oversight Comm.*, 104th Cong. (1996) (Testimony of Ken C. "Oz" Nelson). UPS's chairmen also lacked the same public visibility as Fred Smith because Fred Smith had been FedEx's chairman since the company's inception, whereas UPS changed CEOs frequently. Hill Interview IV, Apr. 12, 2002, *supra* note 28. Similarly, CEO Kenneth Lay's political experience and involvement was likely a major factor in Enron's political effectiveness. Tim Fleck & Brian Wallstin, *Enron's End Run, To Make a Mess as Big as the Enron Debacle, You Need Some Friends in High Places—Texas Senator Phil Gramm and His Wife, for Instance*, DALLAS OBSERVER, Feb. 7, 2002; see also Hill Interview II, Jan. 31, 2002, *supra* note 28 (describing Lay as actively engaged in Washington politics).

53. See, e.g., *Yankee Haylift 'Not Cost Effective'*; UPI, July 24, 1986, AM cycle [hereinafter *Yankee Haylift*] (describing Smith as a "friend" of then Massachusetts Senator John Kerry); see also Hill Interview IV, Apr. 12, 2002, *supra* note 28 (explaining that Smith established good relationships with many members of Congress over the years).

54. Michael Steel & Richard H.P. Sia, *FedEx Flies High*, 33 Nat. J. 554 (2001).

55. *Id.*

brother George W. Bush.⁵⁶ Smith joined former Senator Bob Dole as co-chairman of the National World War II Memorial Campaign in 1997.⁵⁷

Other examples of Smith's efforts to build relationships with political leaders include his sponsorship of a Congressional Black Caucus Foundation reception to honor Congressman Harold Ford Jr.,⁵⁸ serving as campaign chairman for Tennessee Senator James Sasser's, albeit unsuccessful, re-election bid,⁵⁹ and his work for former Tennessee Governor Don Sundquist's 1994 gubernatorial campaign.⁶⁰ Most recently, as the BCRA imposed new limits on FedEx's ability to make soft money contributions, Smith has increased his leadership role to include personally hosting fundraising events.⁶¹ The 2004 Bush-Cheney campaign designated Smith as a "Pioneer" due to his success in raising campaign funds by "bundling" the contributions of individual donors.⁶²

The company maintains a six person office in Washington, D.C., expressly dedicated to government affairs.⁶³ Specifically, FedEx staffs this office with Washington insiders who have experience in key areas of lawmaking interest to the company, thus extending the scope of the company's relationships.⁶⁴ A. Doyle Cloud, FedEx's Vice President for Government Affairs, headed the Washington, D.C. office for a considerable period of time.⁶⁵ The office also includes David H.

56. *Id.*

57. *World War II Memorial Campaign: Hearing before the Subcomm. on National Security, Veterans Affairs and International Relations of the House Comm. on Government Reform*, 105th Cong. (2000) (Prepared Testimony of Major General John P. Herrling, USA (Ret) Secretary American Battle Monuments Comm'n) [hereinafter *Herrling Testimony*]. The memorial was completed in 2004. Bartholomew Sullivan, *Better Late Than Never - Emotional Ceremony Crowns WWII Memorial*, COM. APPEAL, May 30, 2004, at A1. Through Smith's efforts, the campaign raised \$100 million. Steel & Sia, *supra* note 54. FedEx led the corporate donors with a \$2 million pledge. *Herrling Testimony, supra*.

58. James W. Brosnan, *Political Backs Get FedEx Scratch*, COM.APPEAL, Sept. 28, 2003, at A1.

59. Hirschman, *supra* note 49. Sasser subsequently became ambassador to China.

60. James W. Brosnan & Anna Davis, *Lott Grips Despite Party's Slice of Business PAC Pie, GOP Gets Two-thirds of Funds from Memphis Firms*, COM. APPEAL, Dec. 27, 1996, at A1.

61. See *id.* (reporting on Smith's co-hosting of a \$2000 per person fund-raiser for President Bush with Vice President Cheney).

62. Oliver Staley, *That's a Bundle - 1 Ranger Can Deliver Many Checks*, COM. APPEAL, Aug. 27, 2004, at A1.

63. Paul Page, *High-Stakes Lobbying Game Launched both Pro and Con US Air-BA Pact*, TRAFFIC WORLD, Sept. 7, 1992, at 9.

64. In contrast, positions at some corporate government affairs offices are sinecures for senior officials who are nearing retirement.

65. See Steel & Sia, *supra* note 54. Cloud joined former Tennessee governor Don Sundquist and former Senator David Pryor, with whom Smith and FedEx had longstanding ties, to start a new DC lobbying firm. *Personnel News*, THE BULLETIN'S FRONTRUNNER, July 16, 2003. Among

Pryor Jr., the son of former Senator and FedEx consultant David H. Pryor, D-Ark.⁶⁶ In 2002, FedEx hired Gina Adams, formerly a nine-year Transportation Department counsel-advisor, to be vice president of the office.⁶⁷

In addition, FedEx values political expertise outside its Washington office. Political leaders have consistently served on the board of directors, including Howard Baker, former senator;⁶⁸ Charles Manatt, Washington lawyer and former Democratic Party national chairman;⁶⁹ George Mitchell, former Senate Majority Leader;⁷⁰ and Shirley Jackson, RPI President and former member of the Nuclear Regulatory Commission.⁷¹ It is logical for FedEx to place a premium on political experience in selecting its board members; directors oversee a corporation's strategic planning, and, for FedEx, the applicable regulatory environment has always been tied closely to the company's business strategy.⁷²

FedEx supplements the efforts of its in-house personnel by making extensive use of outside lobbying firms.⁷³ For example, FedEx has repeatedly hired the services of outside lobbyist Ann Eppard, longtime chief of staff to former House Transportation and Infrastructure Committee Chairman Bud Shuster.⁷⁴ Other FedEx lobbyists have included G. Stewart Hall, former legislative director for Senator Richard C. Shelby, R-Ala. (chairman of the Appropriations Committee's transportation panel), and Haley Barbour, former

the firm's first clients was the City of Columbus, to lobby for federal transportation money. Bonna de la Cruz, *D.C. lobbying firm taps Sundquist as partner*, TENNESSEAN, July 9, 2003, at 2A.

66. Steel & Sia, *supra* note 54. Pryor's brother Mark was elected to the Senate from Arkansas in 2002.

67. Simeon Booker, *Ticker Tape*, JET, Nov. 25, 2002, at 10.

68. Hirschman, *supra* note 49. Baker was also chief of staff for President Reagan. He served on the FedEx board from 1988 through 1997. *Id.*

69. *Id.* Manatt served on the FedEx board from 1989 through 1999, at which time he left to serve as U.S. Ambassador to the Dominican Republic; he rejoined the FedEx board in 2004. *FedEx Corp. Elects New Director; Annual Election of Directors Also Approved by Shareholders*, BUS. WIRE, Sept. 27, 2004.

70. Mitchell has served on the board from 1995 through the present. FedEx Annual Report, *supra* note 39, at 78.

71. Michael Lollar, *Barksdale, High Tech Expert, Joins FDX Board*, COM. APPEAL, Sept. 28, 1999, at B5.

72. See, e.g., Anup Agrawal & Charles R. Knoeber, *Do Some Outside Directors Play a Political Role?* 44 J. L. & ECON. 179, 179-80, 190 (2001) (identifying importance of political role of directors and demonstrating that corporations for which politics is more important are more likely to use directors who are adept at politics).

73. See Steel & Sia, *supra* note 54 (describing K street lobbying firms employed by FedEx).

74. *Id.*

Republican National Committee Chairman.⁷⁵ FedEx regularly sends members of its government affairs office and other employees to meet with political leaders. FedEx's executives and lobbyists have strong reputations in Washington for being "well informed" and "very accessible."⁷⁶

FedEx engages in a variety of activities to strengthen its relationships with political officials. One important example is FedEx's lawful practice of regularly making its corporate jets available to members of Congress so they can enjoy greater privacy and convenience while traveling, in many cases, to fundraising events.⁷⁷ Another example is FedEx's \$205 million purchase of the naming rights for FedEx field—the Washington Redskins' football stadium.⁷⁸ Although a Memphis-based corporation would seemingly have little reason to identify itself publicly with a football team located in Washington, D.C., the transaction is rational as a massive lobbying expenditure.⁷⁹ As Redskins vice president Pepper Rodgers stated, FedEx field is "where the majority of lobbying is done for Federal Express."⁸⁰ For the many politicians and political staffers who attend Redskins games, the FedEx name is regularly and visibly associated with the impressive new stadium, although presumably not with the somewhat erratic Washington Redskins.⁸¹

FedEx has a reputation for going beyond mere advocacy in its political efforts. FedEx regularly drafts legislation and provides research and other supporting information for government officials.⁸² Additionally, FedEx is known for its ability to build coalitions within the industry.⁸³ FedEx has built "rent chains," enlisting constituencies

75. *Id.*

76. *See, e.g., id.* (quoting Wendell Moore, chief of staff to Tennessee Gov. Don Sundquist, who worked in Washington when Sundquist was a member of Congress); *accord* Hill Interview I, Jan. 31, 2002, *supra* note 28.

77. Lewis, *supra* note 18; *see* Hill Interview III, Apr. 12, 2002, *supra* note 28 (describing these trips, in which politicians are accompanied by FedEx officials, as an important way of building relationships and goodwill).

78. Eric Fisher, *FedEx's Pitch One of Most Expensive*, WASH. TIMES, Oct. 29, 1999, at B1.

79. *Id.*

80. Brosnan & Davis, *supra* note 60.

81. Recently, FedEx also lent its skybox at the field to Senate Majority Leader Bill Frist for a fund-raiser. Brosnan, *supra*, note 58.

82. A corporation may be most effective in influencing legislative policy by presenting issue papers that inform a legislator on nonsalient political issues. Gerald D. Keim & Carl P. Zeithaml, *Corporate Political Strategy and Legislative Decision Making: A Review and Contingency Approach*, 11 ACAD. MGMT. REV. 828, 840 (1986).

83. *See id.* (arguing that lobbying and PAC contributions are likely to be of limited effectiveness unless the corporation supports its efforts through coalition and constituency building).

such as customers and employees to demonstrate broader support for its initiatives.⁸⁴

FedEx is politically active, both as an individual firm and as a member of industry groups.⁸⁵ FedEx has been an active participant in the powerful Air Transport Association (“ATA”),⁸⁶ “the only trade organization for the principal U.S. airlines.”⁸⁷ The ATA has influenced a variety of industry regulatory issues and spends over \$1 million a year on lobbying.⁸⁸ Smith was elected to the ATA Board of Governors in 1991⁸⁹ and chaired the ATA’s executive committee.⁹⁰ Smith also spent a number of years on the Board of Governors for the International Air Transport Association,⁹¹ serving as Chairman of the Board from 1997-98.⁹² By participating in politics through trade groups, FedEx has been able to play a leadership role while reducing the visibility of its participation.⁹³

FedEx further enhances its reputation through a broad program of high profile charitable activities. In 1986, FedEx donated the use of its jets to airlift hay to drought stricken South Carolina, earning the long term loyalty of South Carolina Democratic Senator

84. See DAVID P. BARON, *BUSINESS AND ITS ENVIRONMENT* 223 (3d ed. 2000) (explaining the concept of “rent chains” and applying it to FedEx); see also Thomas P. Lyon & John W. Maxwell, *Astroturf: Interest Group Lobbying and Corporate Strategy*, 13 J. ECON. & MGMT. STRAT. 561, 563-65 (2004) (describing other nonmarket strategies through which corporations can influence the lobbying behavior of other interest groups, thereby increasing the effectiveness of their own lobbying).

85. Campaign finance literature notes that corporations can participate in politics both individually and collectively. See, e.g., de Figueiredo & Tiller, *supra* note 48 (identifying the failure of existing literature to address decisions by firms as to whether to organize their lobbying through a collective body such as a trade association).

86. *Air Transport; Shortlines*, AVIATION WK. & SPACE TECH., Nov. 29, 1982, at 33.

87. Air Transport Association, What is the ATA?, <http://www.airlines.org/about/d.aspx?nid=978> (last visited Oct. 30, 2005). The ATA “represent[s] the industry on major aviation issues before Congress, federal agencies, state legislatures, and other governmental bodies.” *Id.*

88. Center for Responsive Politics, Lobbyist Spending: Air Transport, <http://www.opensecrets.org/lobbyists/indusclient.asp?code=M01&year=2000> (last visited Oct. 30, 2005).

89. *Names in Aviation, Organizations*, 306 AVIATION DAILY 515, Dec. 23, 1991.

90. The International Air Cargo Association, Frederick W. Smith: Founder and Chairman of Federal Express, http://www.tiaca.org/content/inductees/Fred_W_Smith.asp (last visited Oct. 30, 2005).

91. The IATA is a trade association that brings together approximately 270 airlines from around the world. IATA, About Us, <http://www.iata.org/about/index> (last visited Oct. 30, 2005).

92. IATA, Annual Report (1998), available at <http://www.iata.org/NR/ContentConnector/CS2000/Interface/sites/about/file/ar98.pdf>. Smith was the first executive from a cargo carrier to hold the position. *FedEx's Taylor Resigns*, TRAFFIC WORLD, Nov. 18, 1996, at 64.

93. See de Figueiredo & Tiller, *supra* note 48 (observing that large firms may effectively reduce freeriding by lobbying through trade associations when there are shared interests among association members).

Ernest F. ("Fritz") Hollings.⁹⁴ The drought, which stretched across eight southern states, was the worst since the 1930s and threatened the agricultural industry with \$2 billion in losses.⁹⁵ Although the drought drew a response from volunteers around the country, FedEx's actions gained particular salience when the company was publicly portrayed as solving a serious problem created by political squabbling. Senator Hollings publicly stated that FedEx responded when the White House refused to authorize the use of military planes to transport hay donations arranged by Democratic lawmakers.⁹⁶

In 1987, FedEx delivered sophisticated drilling equipment to Midland, Texas, to help save eighteen-month-old Jessica McClure after she fell down a well.⁹⁷ In 1995, FedEx and the American Red Cross created a strategic alliance which, in addition to involving substantial monetary gifts by FedEx to the Red Cross, involved the use of FedEx transport services to assist Red Cross relief efforts in connection with disasters and national emergencies.⁹⁸ Although FedEx's activities in connection with this program are too numerous to list, examples include FedEx's donation of its aircraft to transport clothing and supplies to earthquake victims in El Salvador in 2001,⁹⁹ and its assistance to flood victims in Florida and tornado survivors in the South in 2000.¹⁰⁰ FedEx also volunteered its jets in December 2000, to fly celebrity panda bears, Tian Tian and Mei Xiang, from China to the National Zoo in Washington.¹⁰¹

Beyond philanthropy, FedEx has built a reputation as a good corporate citizen. The company regularly appears in listings such as Fortune's "100 Best Companies to Work For."¹⁰² FedEx provides a

94. Robert Novak, *Senate Democrats' Betrayal of Labor is Telling Tale of how Washington Works*, BUFFALO NEWS, Oct. 17, 1996, at 3B.

95. Keith Schneider, *Farm Loss is Put at Over \$2 Billion in Drought Region*, N.Y. TIMES, July 26, 1986, at A1.

96. *Id.*; see *Yankee Haylift*, *supra*, note 53 (reporting that President Reagan refused to provide military planes because "it wouldn't be efficient").

97. Mede Nix, *Midland Responds to Jessica's Need*, UPI, Oct. 18, 1987, AM Cycle.

98. *Federal Express and the American Red Cross Announce Strategic Community-Oriented Alliance: FedEx Kicks Off Relationship with Special Valentine's Gift to the American Red Cross*, BUS. WIRE, Feb. 14, 1995.

99. Christopher Barton, *Help is on the Way: Nike, FedEx Workers Supply Quake Victims*, COM. APPEAL, Feb. 3, 2001, at C1. FedEx also donated employee services and money to the relief effort. *Id.*

100. See Steel & Sia, *supra* note 54.

101. *FedEx to Handle China-U.S. Panda Lift*, J. COM., Nov. 22, 2000 (describing how FedEx transported the pandas and paid for special containers for the trip). FedEx also renamed its transporting plane "FedEx PandaOne." *Id.*

102. See Robert Levering & Milton Moskowitz, *The 100 Best Companies To Work For in America*, FORTUNE, Jan. 12, 2000, at 82 (reporting FedEx as ranking 59th in 1999 and 79th in 1998); *FedEx High On Fortune's 'Best'*, COM. APPEAL, Dec. 20, 1997, at B3 (reporting FedEx

variety of benefits to employees including “free trips on FedEx planes . . . no-layoff[s], promotion-from-within and tuition-assistance policies, a universal profit-sharing plan and an open-door grievance system.”¹⁰³ FedEx consistently ranks high in customer satisfaction as well.¹⁰⁴

II. FEDEX AND REGULATORY CHANGE: THE NATURE AND ROLE OF POLITICAL ACTIVITY

This Part analyzes FedEx’s political participation in a series of major regulatory reforms. Obviously, large public corporations are affected by many legal issues; this Article focuses on how FedEx participated in the creation of several pieces of federal legislation that were of key importance to its business activities. FedEx has been involved in lawmaking efforts beyond the scope of this case study, including its participation in state regulatory change (in addition to trucking deregulation which is discussed in Section III.B *infra*) and activities directed at the Executive Department. With respect to the latter, FedEx’s efforts to obtain greater access to foreign routes have been of particular importance.¹⁰⁵ A corporation’s litigation strategy also relates to its role in legislative lawmaking. This Part highlights several such connections but does not evaluate FedEx’s litigation activities independently.

For each issue examined in this case study, the Article considers the nature of the regulatory changes sought by FedEx, the relationship between the applicable legal rules and FedEx’s business operations, the methods employed by FedEx to obtain the change, the result of these efforts, and the significance of the issue for the company. In particular, the Article considers the role of money in the

placed 18th on Fortune’s Inaugural List of the 100 Best Companies to work for). Kevin McKenzie, *FedEx in Top 10 for Information Systems Positions*, COM. APPEAL, May 30, 1998, at B3 (noting that FedEx is a leading employer in the transportation industry and describing a new Computerworld survey ranking the company as one of the 10 best places to work in information systems).

103. Mary Deibel, *But Some Companies are Finding; Happy Workers Cheer Bottom Line*, PLAIN DEALER, Jan. 23, 2000, at 2H.

104. See, e.g., *Mail Center Miscellany*, MAIL CENTER MGMT. REP., July 2001, at 8 (reporting that FedEx ranked first among express carriers in customer satisfaction according to the American Customer Satisfaction Index produced by the National Quality Research Center at the University of Michigan Business School).

105. See, e.g., David E. Sanger, *Clinton Met Campaign Donor to Discuss a Trade Dispute*, N.Y. TIMES, Aug. 22, 1997, at A19 (describing meeting between FedEx CEO Smith and President Clinton regarding Japan’s restrictions on air cargo flights). Because these efforts include processes such as international trade and treaty negotiation, they differ in several ways from the regulatory issues considered in this Article.

process, the participation of significant interest groups, and the importance of the other types of political participation described in Part I above.

A. Air Cargo Deregulation

Any analysis of FedEx's political activity must start with air cargo deregulation because this development was critical for FedEx to operate as a viable business. When Smith founded FedEx in 1971, the airline industry was extensively regulated.¹⁰⁶ Most commercial airlines were subject to the restrictive regulations of the Civil Aeronautics Board ("CAB") which made rates and routes subject to CAB approval.¹⁰⁷ New entrants had to undergo burdensome certification procedures, after which they were subject to CAB regulation.¹⁰⁸ Critics charged that the CAB generally kept rates unreasonably low and routinely refused requests by carriers to expand into new markets.¹⁰⁹ Initially, FedEx was able to avoid these regulations by carrying cargo in small Falcon jets under an exemption designed to permit air taxi operations.¹¹⁰ Using small aircraft to deliver cargo was inefficient,¹¹¹ however, and FedEx hovered near bankruptcy for its first few years of operation.¹¹² Indeed, Smith

106. Stephen A. Alterman, *Safety in the All-Cargo Air Carrier Industry*, 25 TRANSP. L. J. 153, 153-54 (1998).

107. *Id.* at 154.

108. See, e.g., *Amend the Federal Aviation Act of 1958, Relating to Granting Relief by Exemption: Hearing Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 94th Cong. 57 (1976) (Statement of Leo Seybold, Vice President, Federal Affairs, Air Transport Assoc. of America) [hereinafter *Seybold Testimony*] (describing burdens associated with the certification process, including the need for the applicant to meet the burden "of showing that the public convenience and necessity require the certification").

109. See Rush Loving, Jr., *A Tiger with Air Cargo by the Tail*, FORTUNE, June 19, 1978, at 116 (explaining how CAB's restrictions over rates and expansion into new markets crippled growth of the air cargo industry and prevented carriers from operating freight shipping profitably).

110. Alterman, *supra* note 106, at 154 n.3. Even for this first step, Smith had to persuade the government to increase the permitted payload for air taxis. See Dave Hirschman, *Air Express Firms have Opposing Approaches, but Same Political Goal*, COM. APPEAL, Oct. 30, 1994 at 4C (describing Smith's success in obtaining this change in 1972).

111. See *Why Airlines Fear the "Federal Express Bill,"* BUS. WK., Sept. 13, 1976, at 116 [hereinafter *Why Airlines Fear the FedEx Bill*] (stating that, between 1965 and 1975, the nation's three all cargo airlines had accumulated \$210 million in pretax losses).

112. See *Good Ideas And Big Money Aren't All You Need*, FORBES, Nov. 15, 1975, at 30 (stating that FedEx suffered through \$29 million in operating losses and was near bankruptcy twice in its first 3 1/2 years of operation).

reported that he flew to Las Vegas in 1973 to play blackjack in an effort to generate the cash to keep the company solvent.¹¹³

When the CAB denied FedEx's request to extend the exemption to bigger planes, Smith went to Washington.¹¹⁴ He lobbied extensively¹¹⁵ and testified before Congress,¹¹⁶ seeking modification of the law so as to enable FedEx to operate larger aircraft and to expand into new markets. Some reports describe air cargo deregulation as an easy political battle.¹¹⁷ Smith found several strong allies for his cause, including CAB Chair Alfred Kahn, who viewed the Cargo Act as the first step in his effort to deregulate the airline industry, and the National Industrial Traffic League—the most prestigious association of shippers.¹¹⁸ Many academics also supported airline deregulation.¹¹⁹

Nonetheless, air cargo deregulation was not without opponents. The natural foes to deregulation were the large combination carriers that transported both cargo and passengers; in 1977, these carriers transported more than 80% of the air cargo. Some of these carriers opposed the legislation, arguing that without CAB regulation freight operations would be unprofitable.¹²⁰ In addition, airlines feared that air cargo deregulation might set a dangerous precedent for the entry of new airlines without CAB approval.¹²¹ These concerns were reflected in the position of the ATA, which “strongly oppose[d]” the proposed legislation.¹²² ATA Director of Cargo Services G. J. Godbout

113. Foust, *supra* note 37. Smith was successful; “he wired the \$27,000 he won back to FedEx.” *Id.*

114. Rosalind K. Ellingsworth, *Two Cargo Carriers Back Deregulation*, AVIATION WK. & SPACE TECH., May 3, 1976, at 27.

115. *See id.* (describing Smith's heavy lobbying in favor of the bill).

116. Smith testified on several occasions in connection with air cargo deregulation. *See supra* note 50 (citing testimony).

117. *See Why Airlines Fear the FedEx Bill*, *supra* note 111 (describing “Most of Capitol Hill” as agreeing with Smith regarding the need for air cargo deregulation).

118. *See id.* (describing support of CAB and National Industrial Traffic League for deregulation).

119. *See, e.g.*, STEPHEN G. BREYER, REGULATION AND ITS REFORM 317-18 (1982) (describing academic studies demonstrating the anti-competitive effects of airline regulation). *See generally* G. DOUGLAS & J. MILLER, ECONOMIC REGULATION OF DOMESTIC AIR TRANSPORT: THEORY AND POLICY (1974) (supporting deregulation).

120. *Deregulation Arrives for Cargo Flights*, BUS. WK., Nov. 21, 1977, at 55 [hereinafter *Deregulation Arrives*]. For most combination carriers, however, air cargo represented a very small portion of their business and was not economically significant. *See* MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 17-18 (1985) (explaining that several major carriers found cargo so unprofitable that they had ceased to carry it by the mid 1970s and that other combination carriers were “indifferent to cargo deregulation”).

121. *Why Airlines Fear the FedEx Bill*, *supra* note 111.

122. *See Seybold Testimony*, *supra* note 108, at 56.

warned that the legislation "could tear down the whole air cargo system."¹²³

A potentially more substantial obstacle was the Flying Tiger Line, Inc., which at the time was the world's largest all-cargo airline.¹²⁴ Unlike FedEx, Flying Tiger decided to fly bigger aircraft. As a result, it obtained certification and was subject to CAB rate and route regulation.¹²⁵ Although Flying Tiger acknowledged that the CAB approval process was often inefficient,¹²⁶ it opposed FedEx's efforts to evade the existing regulatory hurdles by pressing for deregulation. As Flying Tiger President Robert W. Prescott testified, "We want them to go through the stresses and strains of certification the same as the rest of us. We do not believe they are privileged characters straight out of Heaven."¹²⁷ Smith's first legislative proposal died in the House Subcommittee on Aviation, which was chaired by Representative Glenn Anderson from Southern California—the location of Flying Tiger's headquarters.¹²⁸

FedEx also battled the perception that air cargo deregulation was special interest legislation. Whatever the public interest value of deregulation might have been, participants in the political process recognized that the legislation was promoted by and principally designed to benefit FedEx, so much so that the bill was widely known in Washington as the "Federal Express Act."¹²⁹ Robert Prescott described the bill to Congress as "an insurance policy that covered a man only if he were riding a one-eyed buffalo over the Brooklyn Bridge at high noon on the Fourth of July."¹³⁰

123. See *Why Airlines Fear the FedEx Bill*, *supra* note 111.

124. *Shipping Giant Claims Mail Carrier Overstepping Bounds*, BUS. WK., Nov. 21, 1977 at 55.

125. *Id.*

126. See, e.g., *To Broaden the Power of the Civil Aeronautics Board to Grant Relief by Exemption in Certain Cases: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 94th Cong. 100, 116 (1976) (testimony of Robert W. Prescott) [hereinafter *Prescott Testimony*] (explaining that Flying Tiger was flying with wasted space from Chicago to Anchorage due to the CAB's refusal to authorize it to serve Anchorage).

127. *Id.* at 120; see *id.* at 103 ("Nor do we believe that a case has been made for an immediate and partial deregulation limited to domestic airfreight"); see also Hill Interview III, Apr. 12, 2002, *supra* note 28 (describing Flying Tiger's opposition to deregulation because it already had the authority to fly larger aircraft).

128. Robert J. Flaherty, *Breathing Under Water*, FORBES, Mar. 1, 1977, at 36.

129. See, e.g., William K. Ris, Jr., *The ICC and the Transportation Deregulation Statutes*, 16 TRANSP. L. J. 125 (1987) (explaining the appellation as based on both "the speed by which it flew through Capitol Hill and the identity of its principal sponsor").

130. *Prescott Testimony*, *supra* note 126, at 118.

Despite these obstacles, FedEx's efforts to obtain legal change were successful.¹³¹ In 1977, Congress enacted and President Carter signed the Air Cargo Deregulation Act ("ACDA").¹³² The statute created substantial new opportunities for the development of the air cargo industry through deregulation by broadly facilitating competition within the industry. In particular, the statute granted certified carriers—those recognized by the CAB as "fit, willing and able"—complete freedom to enter domestic markets and to charge any nonpredatory rates.¹³³

The legislation also provided specific benefits tailored to FedEx. As an existing air cargo company, FedEx immediately received nationwide cargo operating authority, including freedom from CAB regulation. Moreover, the statute gave existing air cargo companies advantages over new entrants, including a one-year window during which they could enter new markets without competition.¹³⁴

FedEx quickly used its new ability to fly larger aircraft to expand its operations.¹³⁵ By 1980, the regulatory changes had enabled FedEx to grow to a company with gross revenues of \$415.4 million and net income of \$38.7 million. At the same time, the ACDA spawned the growth of an entire industry. The success of the overnight express industry led one commentator to describe the Act as "an example of deregulation at its best."¹³⁶ In the twenty years after deregulation, the industry grew from essentially nothing "to the point where annual industry revenues exceed \$30 billion, over 500,000 full-time equivalent workers are employed worldwide and over 800 large jet aircraft operate daily."¹³⁷

How did FedEx accomplish this regulatory change? FedEx's sustained lobbying efforts were clearly a factor.¹³⁸ Smith personally testified before congressional committees on more than a dozen

131. Commentators noted the speed with which Smith pushed the legislation through Congress. *See Deregulation Arrives*, *supra* note 120 (observing that "the cargo bill sailed through both houses of Congress by voice vote").

132. Pub. L. No. 95-163, 91 Stat. 1278 (1977) (codified in scattered sections of 49 U.S.C.).

133. *Id.*

134. Paul Stephen Dempsey, *The State of the Airline, Airport & Aviation Industries*, 21 *TRANSP. L. J.* 129, 148 (1992).

135. *See* Dave Higdon, *What Air Deregulation Has Meant*, *J. COM.*, Oct. 24, 1988, at 1A (explaining that FedEx "really surged into the overnight delivery business" in 1978 when it moved into larger aircraft).

136. Alterman, *supra* note 106, at 154.

137. *Id.* (observing, further, that the industry's safety record has been excellent).

138. *See Why Airlines Fear the FedEx Bill*, *supra* note 111 (describing heavy lobbying by FedEx).

occasions, and a variety of FedEx officials participated in the deregulation efforts. FedEx also recognized the importance of professional lobbyists and enlisted their efforts in its campaign.¹³⁹ Congressional staff members observed that FedEx did "an outstanding job" presenting its case to Congress.¹⁴⁰ These efforts were supported by the relationships that FedEx already had begun to build with members of the congressional subcommittees on Aviation, whom FedEx recognized would continue to play an important role in evaluating regulatory changes that would affect its future.¹⁴¹

Flying Tiger's change in position also helped the success of the legislation.¹⁴² Although Flying Tiger initially opposed deregulation, shortly before Congress enacted the legislation, Flying Tiger officials testified in favor of the proposed statute, stating that "air cargo cannot be effectively regulated."¹⁴³ There are at least three possible explanations for this change in position. First, Flying Tiger may have recognized that it was facing increasing competitive pressure from noncertificated carriers, such as FedEx, that were not subject to CAB restrictions.¹⁴⁴ Second, Flying Tiger experienced a shift in leadership during this time period, as Executive Vice President and Chief Executive Officer Joseph Healy increasingly assumed responsibilities

139. See *FedEx Challenges Postal Service Role; Shipping Giant Claims Mail Carrier Overstepping Bounds*, KNOXVILLE NEWS-SENTINEL, Jan. 4, 1997 (stating that since its beginning FedEx has employed a substantial staff of lobbyists).

140. David R. Griffiths, *Price, Service, Capacity Gains Forecast in Cargo Deregulation*, AVIATION WK. & SPACE TECH., Dec. 19, 1977, at 29 (quoting David Heymsfeld, assistant counsel, aviation, for the House Committee on Public works and transportation).

141. For example, Smith hosted members of the House Aviation Subcommittee and their staff for an evening at FedEx company headquarters, introducing the legislators to the company's operations, and, presumably, enlisting their support. See *Aviation Regulatory Reform: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 95th Cong. 1254 (1977) (statement of Rep. Milford, Member, House Subcomm. on Aviation) [hereinafter *Aviation Regulatory Reform*] (describing the committee's visit to FedEx headquarters in Memphis). Congressman Milford further indicated his interest in encouraging FedEx to expand its operations to Forth Worth, Texas.

142. Significantly, when Flying Tiger changed its position, it further enlisted the support of its shipping customers. See *id.* at 1255, 1257 (Testimony of Joseph J. Healy, CEO, Flying Tiger Line, Inc.) ("[W]e have talked about deregulation to our customers, we have talked to our employees, we have talked to the unions that represent those employees, we have talked to our investors, and they all agree that deregulation will have a very positive impact on Flying Tigers Line, and totally support our efforts before Congress in this regard."); *Regulatory Reform in Air Transportation, Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong. 499 (1977) (statement of J.W. Rosenthal, Counsel for Flying Tiger Line, Inc.) [hereinafter *Regulatory Reform in Air Transportation*] (describing Flying Tiger's submission of over 240 letters from its customers, including air freight forwarders, supporting deregulation).

143. *Aviation Regulatory Reform*, *supra* note 141, at 1255 (testimony of Joseph J. Healy).

144. See *id.* at 1256 (describing Flying Tiger as "tak[ing] exception to . . . our inability to compete with [less regulated] service").

formerly exercised by President and Founder Robert Prescott.¹⁴⁵ Healy's research suggested that Prescott's view of Flying Tiger's ability to prosper under continued CAB regulation may have been misguided.¹⁴⁶ Third, and perhaps most important, prior to the summer of 1977, FedEx and Flying Tiger decided to work together to draft proposed legislation that would be acceptable to both companies.¹⁴⁷ The product was subsequently submitted to the relevant congressional committees and provided the basic structure for the eventual legislation.¹⁴⁸ In particular, the joint proposal was the source of the special protection provided to existing carriers against competition from new entrants.¹⁴⁹

In addition, FedEx seemingly was able to overcome the legislation's characterization as special interest by enlisting the support of Flying Tiger and others.¹⁵⁰ In particular, FedEx demonstrated a public interest need for the regulation that extended beyond its own frustration with CAB regulation by building a broad coalition in support of deregulation. The support of other interest groups lent credibility and political clout to FedEx's proposal.

What about the role of campaign contributions? FedEx recognized the importance of political expenditures early in its history. In 1977, it established a PAC that, for the year 1977-78 made expenditures of \$8,985.¹⁵¹ Because FedEx was initially unsuccessful in

145. See *Underachiever*, FORBES, Sept. 1, 1977, at 48 (describing leadership and gradual assumption of management by Healy); *Regulatory Reform in Air Transportation*, *supra* note 142, at 499 (statement of Joseph J. Healy) (noting that it was Healy's first appearance before the committee).

146. *Regulatory Reform in Air Transportation*, *supra* note 142, at 497-98 (testimony of Joseph J. Healy).

147. *Aviation Regulatory Reform*, *supra* note 141, at 724, 727 (testimony of Joseph J. Healy); *Regulatory Reform in Air Transportation*, *supra* note 142, at 493 (statement of Frederick W. Smith).

148. *Aviation Regulatory Reform*, *supra* note 141, at 724, 727 (testimony of Joseph J. Healy); *Regulatory Reform in Air Transportation*, *supra* note 142, at 493 (statement of Frederick W. Smith).

149. See *Aviation Regulatory Reform*, *supra* note 141, at 734 (testimony of Joseph J. Healy) (defending an initial form of the provision that would have granted a three year head start to existing carriers Seaboard, Air Lift, FedEx and Flying Tiger). The provision was reduced to one year in the final statute. It appears that FedEx also agreed to support Flying Tiger's efforts to extend deregulation to surface transport of air cargo as part of the joint proposal. *Regulatory Reform in Air Transportation*, *supra* note 142, at 493 (statement of Frederick W. Smith).

150. By gaining the support of Flying Tiger, FedEx was able to obtain Flying Tiger's assistance with enlisting the support of its shippers. See *supra* note 142.

151. EDWARD ZUCKERMAN, *THE ALMANAC OF FEDERAL PACS* (1992). FedEx seems to have been one of the first industry participants to recognize the value of PAC expenditures. Flying Tiger made no PAC expenditures in 1977-78; of the passenger airlines, only United and Delta made PAC expenditures. *Id.* By 1979-80, following general airline deregulation, industry PAC expenditures had increased dramatically. *Id.*

obtaining relief from the regulatory restrictions of the CAB in 1975 and 1976 but then, after establishing its PAC, was immediately successful in 1977, an empirical analysis of the role of money in the lawmaking process might conclude that FedEx's decision to make political contributions was an important factor in its success. As indicated above, it is precisely this type of analysis—focusing solely on monetary contributions and omitting the factors described above—that leads to the conclusion that corporations are able to purchase favorable legislation. Indeed, it is difficult to believe that FedEx's contribution of less than \$9,000 was a critical factor in the process.

One might argue that FedEx's contributions enabled it to obtain access. The record, including Smith's testimony, his role in drafting proposed legislation, and so forth, clearly reflects FedEx's extensive access to the relevant congressional subcommittees. On the other hand, the record reveals similar access for Flying Tiger which did not make any PAC expenditures during 1977-78, or anytime thereafter.¹⁵² Consequently it seems simplistic to view FedEx's monetary donations as a key factor in deregulation.

B. Trucking Deregulation

In latter stages of air cargo deregulation, FedEx and Flying Tiger raised the issue of trucking deregulation. As with air transportation, trucking was extensively regulated in the 1970s. This regulation affected FedEx's ability to transport packages to and from its aircraft. Consequently, after air cargo deregulation, FedEx turned its attention to trucking deregulation. Trucking deregulation occurred in two separate steps. Initial deregulation of interstate trucking, step one, followed closely upon the heels of airline deregulation. Two years after the Federal Express Act was signed into law, Congress passed, and President Carter signed, the Motor Carrier Act of 1980 ("MCA").¹⁵³ The MCA did not eliminate state authority to regulate intrastate trucking. Full deregulation of intrastate trucking, step two, did not occur until 1995.¹⁵⁴

152. *Id.* Flying Tiger officials testified on numerous occasions before the same subcommittees and worked together with FedEx in drafting proposed legislation. There are indications that Flying Tiger's support for deregulation was a key factor in enabling the bill to move forward.

153. Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified as amended in scattered sections of 49 U.S.C. (1982)).

154. Full deregulation was implemented as part of the Federal Aviation Administration Authorization Act of 1994, Pub.L. 103-305 (Mar. 1995), which became effective on Jan. 1, 1995.

1. The Motor Carrier Act of 1980

Trucking deregulation was a major issue for FedEx and Flying Tiger.¹⁵⁵ Although pickup and delivery services incidental to air cargo transportation were supposedly exempt from the regulatory jurisdiction of the Interstate Commerce Commission ("ICC") under the Interstate Commerce Act, the ICC claimed the authority to determine the scope of that exemption.¹⁵⁶ For many years, the ICC interpreted the exemption according to a twenty-five mile rule—jointly developed by the CAB and the ICC—which exempted pickup and delivery service within twenty-five miles of the airport or the city served by the airport.¹⁵⁷ In June 1979, the ICC adopted new rules extending the exempt region to a thirty-five mile plus thirty-five mile formula, which essentially created seventy mile service zones.¹⁵⁸ The air terminal exemption zones provided air cargo carriers with some operational freedom, but their limitations severely obstructed service to a substantial part of the country.¹⁵⁹

Significantly, if FedEx wanted to provide service to a town or city outside the exempt zone, it could only do so at substantial additional cost by hiring an ICC certificated carrier.¹⁶⁰ Perhaps more importantly, by preventing FedEx from using ground shippers or trucks that were within the company's control, the requirement led to

155. See, e.g., *Oversight of Freight Rate Competition in the Motor Carrier Industry: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 95th Cong. 1467 (statement of Wayne M. Hoffman, CEO, the Flying Tiger Line, Inc.) (advocating trucking deregulation); *Examining Current Conditions in the Trucking Industry and the Possible Necessity for Change in the Manner and Scope of Its Regulations: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 96th Cong. 1009 (1980) (testimony of Frederick W. Smith) [hereinafter *Examining Current Conditions*] (describing existing trucking regulations as "absurd").

156. See, e.g., *Examining Current Conditions*, *supra* note 155, at 960 (statement of S. Tucker Taylor, Senior VP, Federal Express Corp.) (arguing that the ICC was improperly regulating air transportation by claiming the authority to adopt rules specifying the scope of the exempt zone).

157. *Motor Transportation of Property Incidental to Transportation by Aircraft*, 112 M.C.C. 1, 16 (1970) (stating that any departure from the 25 mile rule "must be supported by compelling reasons").

158. See *Examining Current Conditions*, *supra* note 155, at 960 (statement of S. Tucker Taylor) (describing expanded exempt zone).

159. See *id.* at 961 (explaining how FedEx could not provide service to Allentown, PA from Harrisburg, PA because the two cities are 72 miles apart).

160. See *Regulation of Air Cargo Freight Transportation: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 96th Cong. 80 (1979) (statement of Frederick W. Smith) (explaining that, for "countless examples of shippers who are a few hundred yards, in some cases, or a mile or two outside the limit" that FedEx could legally serve, the use of a certificated carrier was required); see also *Examining Current Conditions*, *supra* note 155, at 972-73 (statement of S. Tucker Taylor) (explaining the costs associated with using certificated carriers to provide trucking service).

a lack of predictability in operations that was inconsistent with the time sensitive nature of FedEx's product. As S. Tucker Taylor, FedEx senior vice president, stated, local truckers were not structured to provide service within FedEx's normal time frames and the need to use a certificated carrier would add two or three days to the delivery time for a shipment.¹⁶¹ The alternative was for FedEx and other carriers to adopt inefficient mechanisms for transporting packages, such as using smaller aircraft and multiple flights instead of serving a number of localities out of key cities.¹⁶²

FedEx again sought legislative relief. FedEx's regulatory problem did not require full scale trucking deregulation; it was sufficient, for FedEx's immediate purpose, to obtain a legislative extension of the ICC terminal exemption that would essentially eliminate ICC jurisdiction and provide a complete regulatory exemption for all ground transportation shipments that were incidental to air transportation. Full deregulation, however, would give FedEx increased flexibility in that FedEx would no longer be required to transport all shipments by air.¹⁶³

Several other groups joined FedEx in its efforts. Leading business groups, including the National Association of Manufacturers and the National Federation of Independent Businesses, supported trucking deregulation, arguing that increased competition would reduce shipping costs.¹⁶⁴ Sears, Roebuck & Company, which relied heavily on shipping by truck, pushed for deregulation.¹⁶⁵ Small trucking firms supported the increased entry that deregulation would provide.¹⁶⁶ Indeed, the Independent Truckers Association strongly supported deregulation.¹⁶⁷

161. See *Examining Current Conditions*, *supra* note 155, at 972-76 (statement of S. Tucker Taylor) (comparing the time and cost of delivering diagnostic equipment to two hospitals located five miles apart and observing that, for the hospital outside the exempt zone, "the incremental cost for these last 5 miles is another \$12 and another 2 days").

162. See *id.* at 976-77 (explaining that, but for ICC restrictions, FedEx could reduce the number of flights to Pennsylvania while maintaining the same level of service).

163. See, e.g., Loving, *supra* note 109 (describing increased flexibility that trucking deregulation would provide to air cargo carriers).

164. See *Truck Deregulation Bill May be in for a Long Haul in Congress*, CHEM. WK., Jan. 31, 1979, at 20 [hereinafter *Long Haul*] (describing the support of these "leading business groups").

165. *Trucking Deregulation is Moving Fast*, BUS. WK., Nov. 27, 1978 at 62 [hereinafter *Trucking Deregulation is Moving Fast*].

166. *Id.*

167. *Id.* The Independent Truckers Association represented independent owner-operators. See also Carole Shifrin, *Backers of Reform Hope Trucking Influence Melting, ATA, Teamsters Unhappy*, WASH. POST, Mar. 4, 1980, at D6 (describing support of Sears, independent truckers and minority truckers for deregulation).

Trucking deregulation was also part of President Carter's economic agenda in the late 1970s. Carter first proposed substantial deregulation at a town meeting in the spring of 1977.¹⁶⁸ In late 1977, the White House produced an options paper developing a strategy for deregulation, but that strategy was never implemented. Instead, trucking deregulation was pushed to the back burner in favor of airline deregulation. In late 1978, a White House task force on trucking deregulation prepared a new strategy paper.¹⁶⁹ This paper too failed to command substantial attention. Indeed, by May 1979, commentators questioned whether legislation was likely, suggesting that "the Administration may have missed its chance on trucking deregulation."¹⁷⁰

One reason for the delay was that trucking deregulation was a political hot potato.¹⁷¹ Two powerful interest groups opposed trucking deregulation: the American Trucking Association and the Teamsters. The American Trucking Association was an active opponent of deregulation and spent over \$1 million, directly and through its PAC—the Truck Operator's Non-Partisan Committee—on political activity.¹⁷² In addition to spending money, the American Trucking Association effectively mobilized its constituency to convey opposition to deregulation.¹⁷³ While the Senate Commerce Committee considered the deregulation act, its staff received three hundred calls per day from truckers who, in the opinion of one staffer, seemed to be "reading from a prepared script."¹⁷⁴ As a committee aide observed, "the ATA is an extremely efficient lobbying organization in terms of mail and phone calls."¹⁷⁵ The American Trucking Association hired top-level

168. Lawrence Mosher, *Trucking Deregulation – An Idea Whose Time has Almost Gone?*, 11 NAT. J. 817 (May 19, 1979).

169. *Id.*

170. *Id.*

171. See *id.* (citing statement by Senate aide "that trucking deregulation faces a far tougher political fight than airline deregulation ever did").

172. John P. Frendreis & Richard W. Waterman, *PAC Contributions and Legislative Behavior: Senate Voting on Trucking Deregulation*, 66 SOC. SCI. Q. 401, 404 (1985). Of this amount, only \$250,000 constituted PAC contributions. *Id.* The remainder was presumably spent on the American Trucking Association's lobbying and advertising campaigns.

173. Mosher cites the response to a Boston public television show debate on trucking deregulation in which the ATA mobilized a massive vote in against deregulation as an example of the effectiveness of the American Trucking Association's "political punch." Mosher, *supra* note 168.

174. Michael R. Gordon, *Deregulation of the Trucking Industry Could be Just Around the Corner*, 17 NAT. J. 668, Apr. 26, 1980 (describing the American Trucking Association's lobbying efforts).

175. Mosher, *supra* note 168.

Washington lobbyists.¹⁷⁶ It also reached out to the public, buying newspaper and magazine ads in which it warned that trucking deregulation would increase the cost of everything from Halloween candy to Christmas toys.¹⁷⁷ Despite the huge profits enjoyed by the industry due to regulation,¹⁷⁸ the American Trucking Association was able to refocus the debate over continued regulation, arguing that deregulation would reduce services to small communities, create unemployment and industry chaos, and produce safety problems.¹⁷⁹

The Teamsters, one of the most powerful and politically effective interest groups in Washington, also opposed deregulation, primarily out of a concern for jobs and wages.¹⁸⁰ The Teamsters were concerned that deregulation would facilitate the operations of nonunion companies, impeding union efforts to organize and bargain.¹⁸¹ In response, the Teamsters organized active and bitter opposition to trucking deregulation. Indeed, the Carter Administration was so concerned about the Teamsters that it attempted to use the issue as a bargaining chip in negotiations with the union over its national freight contract.¹⁸² The Teamsters' efforts to block deregulation extended beyond lobbying and advertising. Former Teamsters president Roy L. Williams was convicted, along with four other men, of attempting to bribe Senate Commerce Committee Chairman Howard W. Cannon in an effort to stall or block trucking deregulation legislation.¹⁸³

176. See *Trucking Deregulation Gets Caught in a Jam*, BUS. WK., Mar. 5, 1979, at 25 (describing the American Trucking Association's decision to hire lobbyist Hill & Knowlton, Inc.).

177. See Carole M. Shifrin, *High Stakes in Trucking Deregulation; Trucking Industry Profits Protected by ICC Regulations*, WASH. POST., Mar. 5, 1980, at D7 (describing the American Trucking Association's advertising campaigns).

178. *Id.* (describing "handsome profits" enjoyed by the trucking industry).

179. See *Trucking Deregulation is Moving Fast*, *supra* note 165, at 62 (summarizing the American Trucking Association's arguments against deregulation).

180. This opposition appears to have been well founded. The union reportedly "lost more than 100,000 trucking-related jobs since the Motor Carrier Act of 1980." John D. Schulz, *Deregulation Interests Plan Big Push in Clinton Presidency's First 100 days*, TRAFFIC WORLD, Nov. 23, 1992, at 8.

181. William Serrin, *Teamster Open Convention with Reagan Message*, N.Y. TIMES, June 2, 1981, at 7.

182. Mosher, *supra* note 168 (describing Administration official Alfred E. Kahn's effort to trade deregulation concessions for reductions in wage and benefit increases in the Teamsters' contract).

183. See Ben A. Franklin, *Teamsters' President and 4 Others Convicted of Plot to Bridge Senator*, N.Y. TIMES, Dec. 16, 1982, at A1 (reporting convictions). Although the FBI investigated Cannon's role, that investigation was subsequently dropped by the Justice Department and referred to the Senate Ethics Committee. See George Lardner Jr., *FBI Is Probing Teamster Link To Sen. Cannon; Teamster Link to Cannon Is Subject of FBI Probe*, WASH. POST, Feb. 6, 1980, at A1 (describing FBI investigation). Charles R. Babcock, *Justice Dept. Drops Probe of Cannon; Justice Dept. Drops Sen. Cannon Probe; Case referred for Senate Ethics Panel Review*, WASH.

Trucking deregulation had limited support on Capitol Hill.¹⁸⁴ Many politicians seemed to fear the visible opposition of the American Trucking Association and the Teamsters. This opposition, coupled with the absence of an identifiable constituency favoring deregulation, resulted in scant legislative support.¹⁸⁵ As James Cook explained in *Forbes* magazine, the general public favored airline deregulation, but had little interest in trucking.¹⁸⁶

Despite the “controversial” nature of the legislation,¹⁸⁷ in July 1980, Congress enacted and President Carter signed MCA.¹⁸⁸ The MCA took the initial steps toward deregulation of the trucking industry. The Act “significantly reduced regulatory restrictions on entry, gave motor carriers greater pricing flexibility and set limitations on collective ratemaking activities.”¹⁸⁹ Importantly, the MCA reflected a compromise on the scope of deregulation.¹⁹⁰ Although the Act substantially reduced regulation of interstate trucking, it left economic regulation of intrastate trucking to individual states, which retained the right to impose entry restrictions and regulate rates. In addition, the MCA empowered the ICC to control the implementation of deregulation.¹⁹¹ Although proposals to eliminate the remaining

POST, Dec. 19, 1980, at A1 (reporting termination of Justice Department inquiry). Senator Cannon denied any impropriety. *Id.*

184. A notable exception was Senator Kennedy, who sought to organize opposition to the truckers and Teamsters by building a coalition of farmers, businesses, and consumers. Mosher, *supra* note 168.

185. *Id.* (stating that “few politicians on Capitol Hill are clamoring to deregulate the trucking industry right now”); *Long Haul*, *supra* note 164 (describing limited support for deregulation, despite Senator Kennedy’s claims).

186. James Cook, *Transportation*, FORBES, Jan. 8, 1979, at 55.

187. See Carole Shifrin, *Carter, Kennedy Send Trucking Bill to Congress; Legislation to Deregulate Trucking Industry Sent to Hill*, WASH. POST, June 22, 1979, at C8 (quoting Senate Commerce Committee Chairman Howard D. Cannon’s description of bill); Kathryn L. Moore, *State and Local Taxation: When Will Congress Intervene?* 23 J. LEGIS. 171, 190 n.162 (1997) (observing that “[t]he hearings on the Motor Carrier Act of 1980 numbered more than 3,600 pages and filled three separate volumes”).

188. Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified as amended in scattered sections of 49 U.S.C. (1982)).

189. Rene Sacasas & Nicholas A. Glaskowsky, Jr., *Motor Carrier Deregulation: A Decade of Legal and Economic Conflict*, 18 TRANSP. L. J. 189, 210 (1990).

190. See Paul Stephen Dempsey, *The Interstate Commerce Commission – Disintegration of an American Legal Institution*, 34 AM. U. L. REV. 1, 6 (1984) (describing the Motor Carrier Act as “the culmination of a process of legislative compromise”). Dempsey also observes that the Act reflected the adoption of the more conservative House proposal rather than the Senate’s more liberal deregulatory effort). *Id.*

191. This result became significant when, after President Reagan succeeded President Carter, he replaced the chair of the agency with Reese Taylor, who, according to a report issued by the Joint Economic Committee, adopted a policy of reversing the progress toward deregulation. Carole Shifrin, *Panel Charges ICC Isn’t Deregulating Trucking Industry*, WASH. POST, Feb. 4, 1982, at D10.

federal oversight of interstate trucking were repeatedly considered on the Hill,¹⁹² complete deregulation of trucking did not occur until 1995.¹⁹³

What factors enabled FedEx and other supporters of deregulation to prevail over the opposition of formidable interest groups and obtain the adoption of the Motor Carrier Act? One substantial factor may have been that the initial steps to deregulate the industry were taken administratively, through actions of the ICC under Carter appointee A. Daniel O'Neal.¹⁹⁴ The ICC reduced entry requirements, expanded unregulated zones, and increased competition for return trips.¹⁹⁵ The ICC also imposed economic pressure on the industry by shifting to a more burdensome standard in its review of rate increase requests.¹⁹⁶ These actions prompted two influential members of the House of Representatives, Harold T. Johnson, chair of the House Public Works and Transportation Committee and James J. Howard, head of its Surface Transportation Subcommittee, to request that the ICC stop its efforts to deregulate in the absence of legislation.¹⁹⁷

The ICC's efforts appear to have played a key part in spurring legislative deregulation. Opponents of deregulation saw a legislative compromise as the best way to curtail the ICC's aggressive administrative deregulation.¹⁹⁸ The trucking industry believed the

192. See, e.g., Douglas B. Feaver, *Hill Gets Trucking Deregulation Bill; ICC's Role Would End; Consumer Protection Would Be FTC's Job*, WASH. POST., Sept. 13, 1985, at A14 (describing as "long-delayed" the proposal to end federal oversight of interstate trucking and eliminate the ICC delivered to Capitol Hill in Sept. 1985).

193. ICC Termination Act of 1995, Pub. L. No. 104-88, Title III, § 337, 109 Stat. 803, 954 (1995).

194. John and Rui de Figueiredo have argued that interest groups may allocate resources and coordinate strategies between legislatures, courts and administrative agencies in pursuing regulatory change and have modeled the potential interaction between different lawmaking institutions. The effect of agency efforts to deregulate on Congress' decision to adopt deregulatory legislation supports their hypothesis and is consistent with their model. See John M.P. de Figueiredo & Rui J. de Figueiredo, Jr., *The Allocation of Resources by Interest Groups: Lobbying, Litigation and Administrative Regulation*, 4 BUS. & POLITICS 161 (2002).

195. See *Trucking Deregulation is Moving Fast*, *supra* note 165, at 62; Mosher, *supra* note 168 (describing the ICC's deregulatory approach under O'Neal).

196. See Mosher, *supra* note 168 (describing the ICC's decision to shift to a more restrictive methodology for evaluating rate increase requests).

197. *Long Haul*, *supra* note 164.

198. See H.R. REP. NO. 96-1069, at 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2283, 2285; S. REP. NO. 96-641, at 1-2 (1980) ("The bill represents a middle ground between continuing the status quo, on the one hand, and total deregulation on the other hand."); Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1368 (1998) (describing supporters of continued regulation as acquiescing in the Motor Carrier Act, "which they regarded as a kind of backfire designed to keep the reform effort from getting out of hand").

MCA would achieve this objective.¹⁹⁹ Indeed, the American Trucking Association itself was responsible for introducing into Congress the Motor Carrier Regulatory Improvement Act of 1979, the predecessor of the 1980 legislation.²⁰⁰

These hopes proved to be unfounded. As a practical matter, despite paper limits on its scope, the MCA largely deregulated the industry.²⁰¹ Entry and competition increased dramatically,²⁰² substantially reducing profits for truckers.²⁰³ For the Teamsters, the MCA resulted in a loss in membership and a reduction in its power due to increased competition by nonunion operations.²⁰⁴

From FedEx's perspective, the effects of the MCA were more favorable. The statute contained a provision that provided FedEx with precisely the regulatory relief that it had sought initially: a specific exemption to federal regulation for motor carrier transportation incidental to air transportation.²⁰⁵ Ironically, although the MCA, as adopted, reflected the more conservative House approach to regulation, the incidental to air exemption was based on the more liberal legislation that was proposed in the Senate.²⁰⁶ The provision eliminated the geographic limitations imposed by the ICC as well as the distinction between exempt pickup and delivery services and line haul transportation. These provisions, which allowed FedEx to use its own trucks and eliminated the need to contract with certificated carriers, substantially increased FedEx's ability to expand pickup and

199. Joan M. Feldman, *Clinging to Life ...: The Interstate Commerce Commission, HANDLING & SHIPPING MGMT.*, Sept. 1983.

200. *Railroad Deregulation Act of 1979: Hearings Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science and Transportation*, 96th Cong. 1005 (1979) [hereinafter *Railroad Deregulation Hearings*] (Statement of Jerry Wheeler, South Dakota Trucking Assn.).

201. Feldman, *supra* note 199.

202. David A. Vise, *Truckers Find Deregulation a Rough Road*, WASH. POST, July 6, 1982, at D7.

203. *Id.*

204. *Id.* (explaining how, with the elimination of collective rate setting, nonunion carriers with lower labor costs were able to undercut union truckers).

205. See Motor Carrier Act of 1980, § 7(b), Pub. L. No. 96-296, 1980 Stat. 2245 (1980) (codified at 49 U.S.C. § 10526(a)(8) ("Section 10526(a)(8) of title 49, United States Code [providing exemptions from ICC regulation], is amended to read as follows: '... (B) transportation of property (including baggage) by motor vehicle as part of a continuous movement which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier ...').").

206. See *Examining Current Conditions*, *supra* note 155, at 1000-01 (statement of Peter E. Hubbard, VP, Flying Tiger Line, Inc.) (advocating adoption of incidental to air exemption as reflected in Stat. 2245 and proposing specific amendment to House bill).

delivery services.²⁰⁷ Thus, despite the mixed results of the process for many of the participants, FedEx was largely successful in achieving its objectives.

The history of the Motor Carrier Act of 1980 reveals a controversial political issue that generated strong interest group activity on both sides and that resulted in legislation reflecting a political compromise. It therefore offers an interesting opportunity to examine the political process. Indeed, two scholars, John Frendreis and Richard Waterman, have studied the adoption of the MCA, using empirical analysis to evaluate the effect of PAC contributions on the voting decisions of Senate members by measuring the relationship between dollar contributions by the American Trucking Association to individual senators and the voting scores of those senators on deregulation.²⁰⁸ Frendreis and Waterman found a strong correlation between PAC contributions and voting decisions, particularly with respect to those senators who were up for re-election in 1980. They concluded these results demonstrated that "legislative votes are subject to the influence of campaign contributions," at least for particular kinds of issues, such as trucking deregulation, both because of its limited salience and the fact that it was not strongly associated with partisanship or ideology.²⁰⁹

The analysis in this Article suggests several reasons to question both Frendreis and Waterman's methodology and their conclusions. First, Frendreis and Waterman considered only the PAC contributions of the American Trucking Association. Their rationale was that the American Trucking Association was the only organization which "[a] had a strong interest in the bill; (b) donated appreciable amounts of money to many legislators, and (c) did not possess a large and diverse legislative agenda."²¹⁰ As this Article has demonstrated, however, the legislation was highly controversial and generated both strong support and opposition by a variety of interest groups. Indeed, the Teamsters thought the issue was sufficiently important to attempt to bribe a senator.²¹¹ Accordingly, it seems

207. See *Federal Express Rides the Small-Package Boom*, BUS. WK., Mar. 31, 1980 (describing how Smith anticipated that deregulation would enable FedEx to double its productivity by introducing specially designed delivery trucks).

208. Frendreis & Waterman, *supra* note 172.

209. *Id.* at 410.

210. *Id.* at 405-06.

211. Frendreis and Waterman explain their decision to exclude the Teamsters because of the organization's "extensive legislative agenda." *Id.* at 406 n.6. The breadth of the Teamsters' agenda did not, however, reduce their focus on trucking deregulation. Moreover, the magnitude of political contributions by the Teamsters dwarfed the American Trucking Association's PAC contributions. See, e.g., Morton Mintz, *Election '80 was Record Year for PACs, Especially Those*

necessary, at a minimum, to consider the extent of political contributions made by other interest groups. Even if senators' votes are correlated with PAC contributions, it is hard to see why the contributions of a single interest group should be decisive.

In addition, contrary to the study's stated conclusion, its findings seem to refute the conclusion that money buys votes. Apart from the American Trucking Association and the Teamsters, few big money donors appear to have focused on deregulation.²¹² In particular, there was a striking absence of powerful, big-money support for deregulation. FedEx was one of the few donors who supported deregulation, and its PAC contributions in the 1979-1980 election cycle totaled approximately \$42,000. Despite the fact that big-money opposed deregulation, Congress adopted the Motor Carrier Act. This outcome is difficult to explain in terms of the vote-buying model.

Part of the problem may stem from the fact that the Frendreis and Waterman study imperfectly captured the position of the American Trucking Association (and other interest groups that opposed deregulation) with respect to the MCA. Although the American Trucking Association opposed deregulation, as indicated above, it viewed the MCA as a political compromise. At the time, opponents of deregulation considered some type of legislation necessary in order to halt the ICC's progress in implementing deregulation administratively.²¹³ Indeed, as mentioned above, the American Trucking Association itself was responsible for introducing the Motor Carrier Regulatory Improvement Act of 1979, the predecessor of the 1980 legislation, into Congress.²¹⁴ Moreover, the 1980 legislation, as adopted, reflected the approach of the conservative House bill, rather than the more liberal Senate bill that had generated most of the American Trucking Association's opposition.²¹⁵ Accordingly, adoption of the MCA cannot fairly be characterized as a ratification of the free market position. In light of the American Trucking Association's support for the predecessor legislation, it is

on Right, WASH. POST, Jan. 27, 1981, at A4 (describing 1980 PAC expenditures by the Ohio branch of the Teamsters alone as totaling \$245,368 and listing the AFL-CIO as among the top 10 PACs in terms of direct contributions to political candidates, with \$718,052 in such contributions).

212. See Mintz, *supra* note 211 (listing substantial PAC donors in the 1980 election).

213. See Gordon, *supra* note 174, at 668 (explaining that the ATA took "the position that compared to the proposed ICC reforms, some sort of limited legislation is the lesser of two evils").

214. *Railroad Deregulation Hearings*, *supra* note 200, at 1005 (statement of Jerry Wheeler, South Dakota Trucking Assn.).

215. See, e.g., Gordon, *supra* note 174, at 668 (explaining that ATA's opposition was focused on the liberal Senate bill which proposed "substantial deregulation").

unclear why American Trucking Association contributions should have led to negative votes.²¹⁶

Analysis of the Frendreis and Waterman study demonstrates that it may be difficult to characterize an interest group's position on a proposed regulatory change for the purposes of empirical analysis, particularly when that regulatory change results from a lawmaking process that extends over a long period of time. The difficulty may be exacerbated in the case of corporations and other business entities because the political objectives of businesses shift over time in response to a variety of nonpolitical factors.²¹⁷

Additionally, Frendreis and Waterman's study highlights a further, and seemingly unexplored, problem with using empirical analysis to assess the impact of political contributions—the weight that should be given to a legislator's dissenting vote on a bill. Since the MCA reflected a legislative compromise that at the time of its adoption faced little opposition, it may not be appropriate to characterize negative votes as reflecting the political influence of interest groups that opposed the legislation. Seemingly, a legislator who predicts that his or her vote will have no effect on the outcome could use the voting process as a low cost way to signal receptiveness to a targeted interest group, even if the legislator approves of the legislation.²¹⁸ In such a case, a negative vote would provide little evidence of the effectiveness of the interest group's political expenditures.

2. Intrastate Trucking Deregulation

After the adoption of the MCA, federal regulation of trucking was reduced, increasing rate competition and entry.²¹⁹ The Motor Carrier Act, however, explicitly preserved state authority to regulate

216. Indeed, although it was unlikely, a vote against the compromise proposal might have indicated a senator's rejection of the watered down form of deregulation reflected in the ATA sponsored compromise rather than opposition to deregulation.

217. See Hart, *supra* note 17, at 14 (arguing that, consequently, corporations cannot be evaluated according to standard interest group analysis).

218. In a similar vein, the House of Representatives recently voted on a constitutional amendment banning gay marriage, despite the fact that a previous defeat of the measure by the Senate precluded the amendment from being sent to the states for ratification. *Nations Briefs*, *NEWSDAY*, Oct. 1, 2004, at A32. Accordingly, members were able to make a political gesture without policy consequences by voting in favor of the proposal.

219. See, e.g., *Legislation to Increase the Efficiency of the Movement of Express Shipments: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 103rd Cong. (1994) (statement of Frank E. Kruesi, Assist. Sec. for Transport. Pol'y, U.S. DOT) [hereinafter *Legislation to Increase the Efficiency Hearings*] (describing increased competition resulting from the Motor Carrier Act).

intrastate trucking.²²⁰ As a result, state regulation of intrastate trucking remained extensive.²²¹ As of 1986, approximately forty states continued to regulate intrastate trucking.²²² The regulations varied, but most included entry controls, tariff filing and rate regulation, restrictions on operations, and grants of antitrust immunity for carriers to set rates collectively.²²³

These numerous and diverse state regulations significantly burdened national carriers. For example, it took UPS almost twenty years to obtain authority to operate in Texas.²²⁴ Powerful state incumbents often impeded the operation of new entrants.²²⁵ Many states required state approval of rate changes for ground deliveries; as a result, rate changes by a national company could be blocked by individual states.²²⁶ In some cases, regulatory approvals could be held up by a single customer.²²⁷

In addition to purely economic regulations,²²⁸ states often imposed registration and reporting requirements under the guise of regulating safety. The U.S. Department of Transportation estimated

220. Pamela B. Williams, Note, *Federal Express v. California Public Utilities Commission: The Ninth Circuit Court of Appeals, the Airline Deregulation Act and State Regulation of Intrastate Trucking*, 21 TRANSP. L. J. 303, 321 (1992).

221. See Robert E. McFarland, *The Preemption of Tort and Other Common Causes of Action Against Air, Motor, and Rail Carriers*, 24 TRANSP. L. J. 155, 169 n.87 (1997) ("Prior to 1980, 48 states had in place some form of economic regulation for their motor carrier industry. Seven states, between January 1, 1980 and January 1, 1995, elected to deregulate economically, through the exercise of state sovereignty.").

222. James L. Gattuso, *Time to Complete Trucking Deregulation*, HERITAGE FOUND. REPS., Jan. 16, 1986.

223. See, e.g., Evan D. White, *Economic Regulation of Oregon Intrastate Trucking: A Policy Evaluation*, 17 TRANSP. L. J. 179, 180 (1989) (summarizing scope of intrastate trucking regulation in 1988).

224. See Bob Lowry, *Financial*, UPI, Feb. 24, 1986 (reporting on January 1985 decision granting UPS intrastate operating authority after a "20-year legal struggle"); *Legislation to Increase the Efficiency Hearings*, *supra* note 219 (statement of Frank E. Kruesi) (same).

225. See Lowry, *supra* note 224 (explaining that UPS's efforts to obtain intrastate operating authority in Texas had been opposed by Texas freight and bus companies that feared competition). As DOT Assistant Transportation Secretary Frank E. Kruesi testified: "In many States, such as Michigan, entry into any meaningful trucking operation is difficult because incumbent carriers are in the powerful position to argue before State regulators that new carriers are not needed and should not be permitted." *Legislation to Increase the Efficiency Hearings*, *supra* note 219 (statement of Frank E. Kruesi).

226. See Lowry, *supra* note 224 (explaining the burden imposed by state tariff regulations on "carriers such as UPS and FedEx, which conduct interstate operations at the national level and have a uniform pricing scheme").

227. Daniel Pearl & Robert Frank, *Trucking Firms Face a Problem With Congress*, WALL ST. J., April 8, 1994, (describing how a single objection from one of UPS's 19,000 customers in Colorado was sufficient to block UPS's nationwide rate increase).

228. See Consumer Cost of Continued State Motor Carrier Regulation, H.R. 101-813 (1990) (citing DOT testimony estimating the costs of state economic regulation).

the cost of paperwork associated with complying with state regulations was somewhere between \$1 billion and \$3.2 billion per year over and above the underlying fees and taxes imposed by the states.²²⁹ A study commissioned by FedEx estimated that preemption of intrastate regulation would have saved the air express industry almost \$100 million in 1987 alone.²³⁰ Carriers typically responded to the regulations through interstate routing, which allowed them to avoid state regulation, but created unnecessary expense and inefficiency. For example, FedEx could avoid local regulations by flying shipments through its air hub in Memphis rather than delivering them locally by truck.²³¹

FedEx appeared to have little interest in intrastate trucking deregulation until it became the focus of enforcement efforts by state regulators. Ironically, the first such efforts were made by regulators in FedEx's home state of Tennessee.²³² In July 1986, the Tennessee Public Service Commission entered a Show Cause Order against FedEx, seeking to require FedEx to obtain authorization to operate within the state, and, in 1987, the Commission ordered FedEx to apply for a Certificate of Convenience and Necessity for its Tennessee trucking operations.²³³ FedEx challenged the decision in federal court, arguing that, as an air courier, it was exempt from state regulation under the Federal Aviation Act.²³⁴ The district court thwarted FedEx's efforts to obtain a favorable forum in which to litigate its claim of preemption, concluding that it should abstain and allow the issue to be litigated in state court.²³⁵ The Sixth Circuit affirmed.²³⁶

229. *Id.*

230. *Consumer Cost of Continued State Motor Carrier Regulation: Hearing Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations*, 101st Cong. 110 (1990) (statement of A. Doyle Cloud, Jr., VP, Gov. and Reg. Affairs, Federal Express Corp.) [hereinafter *Consumer Cost Hearings*] (citing study prepared by Gellman Research Assocs. Inc.).

231. *Id.* at 96-97 (explaining the inefficiency of routing shipments through the Memphis hub in order to avoid state trucking regulations).

232. The dispute appears to have been the result of a complaint by competitor Purolator Courier Corp. which had obtained authority to operate within the state and sought to have the same rules applied to FedEx. Phil Serafino, *Federal Express Sues to Avoid State Regulation*, UPI, Aug. 7, 1987. Notably, FedEx's intrastate shipping within Tennessee amounted to approximately .01% of the company's national volume. *Economic Regulation of the Motor Carrier Industry: Hearing Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 100th Cong. 232 (1988) [hereinafter *Economic Regulation Hearings*] (testimony of Frederick W. Smith).

233. Serafino, *supra* note 232.

234. *Id.*

235. *Fed. Express Corp. v. Tennessee Pub. Serv. Comm'n*, 693 F. Supp. 598 (M.D. Tenn. 1988). In addition, the district court permitted Purolator Courier to intervene as a defendant to defend the Tennessee legislation. *Id.* at 601.

Facts revealed in the Tennessee litigation led to an investigation by the California Public Utilities Commission ("CPUC").²³⁷ Upon learning that FedEx was not complying with certain California state licensing requirements, reporting obligations, and tariffs, the CPUC imposed fines and threatened penalties.²³⁸ FedEx then filed suit in federal district court in California, claiming that the California regulations were preempted by federal law.²³⁹ FedEx challenged the requirement that it pay fees to the state for packages transmitted by ground.²⁴⁰ It also claimed that state regulations concerning rates, rate changes, refunds, and claims procedures imposed an unreasonable burden on its operations.²⁴¹ Several aspects of the California regulation directly conflicted with FedEx's national policies.²⁴² For example, FedEx required customers to pay their bills within fifteen days,²⁴³ whereas California law prohibited extending credit to customers for more than one week. California regulations also had the effect of making FedEx's money-back guarantee an illegal rebate.²⁴⁴

Although the California district court rejected FedEx's preemption argument, the Ninth Circuit proved receptive. In 1991, FedEx successfully persuaded the court of appeals that the Airline Deregulation Act preempted state trucking regulation, even with respect to packages shipped solely in intrastate commerce.²⁴⁵ The court concluded that the trucking operations of FedEx were integrally related to its operation as an air carrier and that the Airline Deregulation Act preempted state regulation of rates and terms of service by an air carrier.²⁴⁶ In particular, although California defended its regulations on the basis that the regulations focused on highway safety, the court found that the state regulations were

236. *Fed. Express Corp. v. Tennessee Pub. Serv. Comm'n*, 925 F.2d 962 (6th Cir. 1991).

237. *Fed. Express Corp. v. California Pub. Util. Comm'n*, 716 F. Supp. 1299, 1301 (N.D. Cal. 1989).

238. *Id.*

239. *Fed. Express Corp. v. California Pub. Util. Com'n*, 936 F.2d 1075, 1076 (9th Cir. 1991).

240. *Id.*

241. *See Fed. Express Corp.*, 716 F. Supp. at 1305-06 (describing the burden imposed by California regulations).

242. *See Consumer Cost Hearings*, *supra* note 230, at 107 (statement of Doyle Cloud) (outlining areas in which California law conflicted with FedEx national policies and interfered with the company's operations).

243. *Id.*

244. *Economic Regulation Hearings*, *supra* note 232, at 229 (testimony of Frederick W. Smith).

245. *Fed. Express Corp. v. California Pub. Util. Comm'n*, 936 F.2d 1075, 1078 (9th Cir. 1991).

246. *Id.*

primarily economic in nature: "The PUC's regulation of rates, of discounts and promotional pricing, of claims, of overcharges, of bills of lading and freight bills, and its imposition of fees enters the zone that Congress has forbidden the states to enter."²⁴⁷ As a result of the Ninth Circuit decision,²⁴⁸ California deregulated "integrated intermodal carriers" such as FedEx.²⁴⁹

Armed with the California decision, FedEx went to Texas, which regulated intrastate trucking very restrictively.²⁵⁰ There, FedEx negotiated with the executive branch in an effort to avoid the protracted litigation that it underwent in California.²⁵¹ As a carrot to enlist the support of Governor Ann Richards, FedEx offered to open a major hub in Fort Worth.²⁵² FedEx explicitly linked the hub to receiving a ruling from Texas Attorney General Dan Morales that FedEx was exempt from Texas trucking regulations.²⁵³ FedEx also obtained the help of Texas Congressman David Cain in seeking the Attorney General's opinion.²⁵⁴ Smith had an established relationship with Cain due to Cain's position as chairman of the House Transportation Committee. FedEx's approach was successful, and in a letter opinion issued on December 14, 1993, the Attorney General ruled that FedEx engaged in integrated air-ground delivery services and that these services were exempt from the trucking regulations of the Texas Railroad Commission.²⁵⁵ Three days after the decision, FedEx announced that it would open a new air hub in Fort Worth.²⁵⁶

247. *Id.*

248. See *United Parcel Serv. Inc. v. California Pub. Util. Comm'n*, 77 F.3d 1178 (9th Cir. 1996) (describing California's deregulation of "integrated intermodal carriers," through the adoption of Cal. Pub. Util. Code § 4120, as prompted by the court's decision in *Fed. Express Corp. v. California Pub. Util. Comm'n*, 936 F.2d 1075, 1078 (9th Cir. 1991)).

249. See Cal. Pub. Util. Code § 4120 (repealed 1996) (defining "integrated intermodal carriers" as those carriers which provide "air-ground transportation service for the packages or articles in both interstate and intrastate commerce").

250. See, e.g., Bill Mintz, *Trucking in Texas Wheels into New Era; Regulations Cut as State Gives Reins to Federal Government*, HOUS. CHRON., Dec. 31, 1994 (describing Texas trucking regulation as "heavy-handed").

251. Mary Hull, *For Morales, FedEx Opinion was Great PR*, TEX. LAW., Jan. 10, 1994, at 16.

252. See Richard A. Oppel Jr. & Laura Castaneda, *FW Lands Federal Express Hub that Could Employ up to 2,500 Intense Lobbying by Richards, Granger Helps Secure Deal*, DALLAS MORN. NEWS, Dec. 17, 1993, at 1A (describing Richards' strong interest in securing the hub).

253. *Id.* (quoting CEO Smith as stating that, if FedEx had not received a favorable opinion from Morales, it would have located the new hub in Louisiana or Kansas).

254. See Hull, *supra* note 251 (reporting that FedEx "sought Morales' opinion through state Rep. David Cain").

255. See *Weekly Case Summaries; Texas Attorney General's Opinions; Statutory Interpretation*, TEX. LAW., Jan. 10, 1994, at 34 (summarizing Attorney General Letter Opinion No. 93-112, 12/14/93).

256. Oppel & Castaneda, *supra* note 252.

FedEx obtained similar decisions in other states,²⁵⁷ but the process of addressing the state regulations on a piecemeal basis was burdensome. Consequently, FedEx, simultaneously, sought congressional action. Its early efforts, despite extensive lobbying, were unsuccessful.²⁵⁸ FedEx also attempted to broaden support for deregulation. Smith obtained the support of other air express companies in 1987 and sought the aid of shippers by appealing to the 1,300 member National Industrial Transportation League.²⁵⁹

One possible reason for FedEx's lack of success was the opposition of UPS, which indicated to Congress that it was able to operate successfully under the existing state regulations.²⁶⁰ UPS argued that the states had an important interest in regulating intrastate trucking activity,²⁶¹ but it was also clear that UPS's possession of the necessary certifications for intrastate trucking provided it with a competitive advantage over FedEx, which in the absence of deregulation, had to go through the burdensome regulatory processes to obtain similar certifications.²⁶²

The situation for UPS changed, however, once FedEx obtained the favorable Ninth Circuit ruling. Because UPS had to continue conforming to state economic regulations within the Ninth Circuit but FedEx did not, it was now UPS that faced a disadvantage.²⁶³ Unlike FedEx, UPS conducted the majority of its operations by ground, and therefore was not classified as an integrated air carrier. Although UPS

257. See, e.g., *Legislation to Increase the Efficiency Hearings*, *supra* note 219 (statement of Frank Kruesi) (describing the Kentucky legislature's adoption of legislation "in May 1994 exempting from its regulation the carriage of packages weighing less than 150 pounds, by motor carriers affiliated with either direct or indirect air carriers").

258. See *Economic Regulation Hearings*, *supra* note 232, at 227 (testimony of Frederick W. Smith) (stating that FedEx had been advocating deregulation for two years); *Id.* at 307 (testimony of Robert E. Smith, Senior VP, UPS) (describing proposed amendment to FAA that would have preempted state regulation of ground operations by an air cargo carrier, that Senator Sasser unsuccessfully attempted to offer in 1987); Gregory Johnson, *Managing Traffic*, J. COM., June 9, 1988, at 2B (describing Reagan Administration bill, The Trucking Productivity Improvement Act of 1987, H.R. 2591, which would have totally preempted state economic regulation of the trucking, that died in committee).

259. Gregory S. Johnson, *Federal Express Wages Battle for Deregulation*, J. COM., Nov. 25, 1987, at 2B.

260. *Economic Regulation Hearings*, *supra* note 232, at 307 (testimony of Robert E. Smith).

261. *Id.* at 306.

262. *Id.* at 303-05. Robert Smith explained: "I don't know whether it will be very difficult for Federal Express today to be able to go to the various States and to get the rights that we already have there." *Id.* at 305.

263. See *Legislation to Increase the Efficiency Hearings*, *supra* note 219 (testimony of James A. Rogers, VP Government Affairs, UPS) (conceding that "at its most basic, I am here because of the [Ninth Circuit] decision").

followed FedEx's lead by challenging California's regulations in state and federal court, it was unsuccessful.²⁶⁴

As a result, UPS faced pressure, not just to favor deregulation, but to join forces with FedEx. At the same time, several members of Congress suggested that UPS and FedEx get together to resolve their differences over the deregulation legislation.²⁶⁵ As a result, after several years of disagreement, UPS shifted its position on intrastate trucking. Suddenly, UPS began to describe intrastate trucking regulations as burdensome.²⁶⁶ Working together, UPS and FedEx developed a jointly acceptable proposal for deregulation, H.R. 3221.²⁶⁷

Opposition to H.R. 3221 included the Teamsters and the American Trucking Association. The American Trucking Association took a somewhat limited role due to conflicts within its membership regarding the desirability of deregulation.²⁶⁸ Nonetheless, its official policy was to "oppose[] further deregulation of interstate commerce."²⁶⁹ Many small and local truckers feared deregulation because it would eliminate states' ability to protect local business from more efficient national competition. The National Association of Regulatory Utility Commissions also expressed this concern, arguing that codification of the Ninth Circuit decision would "confer private benefits on the intrastate trucking operations of a very few express delivery companies" while thousands of smaller trucking companies would still have to meet state regulations.²⁷⁰ The Teamsters argued that

264. See *United Parcel Serv., Inc. v. CPUC*, 839 F. Supp. 702, 703 (N.D. Cal. 1993) (describing UPS's unsuccessful challenges in state court); *id.* at 706-708 (denying federal court claim based on preclusive effect of state proceeding).

265. *Regulatory Issues (Intrastate Deregulation; Negotiated Rates; and Overweight Containers): Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 102nd Cong. 746 (1992) (testimony of James A. Rogers, VP of Public Affairs, UPS) [hereinafter *Regulatory Issues Hearings*].

266. *Legislation to Increase the Efficiency Hearings*, *supra* note 219 (testimony of James A. Rogers).

267. *Regulatory Issues Hearings*, *supra* note 265, at 746 (testimony of James A. Rogers); see Robert P. James, *High Court Move Seen as Giving FedEx Major Boost in Intrastate Trucking*, *TRAFFIC WORLD*, June 15, 1992, at 9 (describing H.R. 3221 as "a UPS/Fedex-backed bill"). H.R. 3221, sponsored by Rep. Bob Clement, D-Tenn. would have preempted state regulation for express carriers like Federal Express and United Parcel Service. Along with H.R. 3221, several competing proposals were introduced. See John D. Schulz, *Bush Administration Weighs in on Latest Push for Truck Deregulation*, *TRAFFIC WORLD*, Apr. 6, 1992, at 21 (noting that at least six bills concerning trucking deregulation were pending in Congress). Rep. J. Dennis Hastert, R-Ill., introduced legislation supported by the administration to lift state economic regulation of all trucking services. At the same time, Rep. Peter A. DeFazio, D-Ore., offered legislation to overturn the Ninth Circuit decision and preserve state authority to regulate intrastate transport.

268. Schulz, *supra* note 267, at 21.

269. *Id.* (quoting ATA President Thomas J. Donohue).

270. Williams, *supra* note 220, at 326-27.

deregulation would eliminate union jobs.²⁷¹ Finally, the states themselves opposed deregulation as an unwarranted congressional intrusion into a matter of local concern.²⁷²

Although the congressional climate appeared to support some form of deregulation, it was unclear whether deregulation should be narrowly tailored to the express carriers or addressed to all state economic trucking regulations. In addition, the political controversy was too much of an obstacle for passage in an election year.²⁷³ H.R. 3221 died at the end of the 102nd Congress.²⁷⁴

UPS then obtained the support of Senator Wendell Ford of Kentucky, who headed the Senate Aviation Subcommittee.²⁷⁵ In 1994, Ford added a provision to the Aviation Authorization Bill, a FAA funding statute, that explicitly preempted state regulation.²⁷⁶ Originally, the bill was limited to express carriers, but, when trucking operators objected, Ford expanded the bill. Eventually, the bill was extended to exempt virtually all trucking operations from state economic regulation.²⁷⁷ On August 23, 1994, after approximately fifteen years, trucking deregulation was finally achieved, through a provision inserted into the Federal Aviation Administration Act of 1994, an airport funding law, and passed by Congress by voice vote without dissent or public hearings.²⁷⁸ The legislation broadly preempted state regulation of intrastate trucking through two separate provisions: 49 U.S.C. 41713(b), which barred states from regulating prices, routes, or service of air carriers "when such carrier is transporting property by aircraft or by motor vehicle"; and 49 U.S.C.

271. See James W. Brosnan, *Shift is on to Lift Trucking Rules*, COM. APPEAL, July 21, 1994, at 4B (describing the "staunchest opposition" to deregulation as coming from the Teamsters).

272. See, e.g., *Legislation to Increase the Efficiency Hearings*, *supra* note 219 (testimony of Keith Bissell, Tennessee Public Service Comm'n on behalf of the National Ass'n of Regulatory Utility Comm'rs).

273. Schulz, *supra* note 267, at 21.

274. See *Legislation to Increase the Efficiency Hearings*, *supra* note 219 (testimony of James A. Rogers, VP Government Affairs, UPS) (explaining that, although HR 3221 had 190 co-sponsors, it had died at the end of the prior Congress); *Senate Panel Pushes Higher FAA Funding, Some Denver Funding*, 297 AV. DAILY 463 (1989) (recounting the adoption of an amendment sponsored by John Sasser "to require DOT to study the effect on consumers of state regulation of the rates, routes and services of the express package industry" and describing amendment as favoring FedEx "which seeks federal regulation of intrastate trucking").

275. UPS maintained a large hub in Louisville, Kentucky. Brosnan, *supra* note 271.

276. *Id.*

277. James W. Brosnan & Richard Locker, *PSC Halts Reviews After Passage of Trucking Bill*, COM. APPEAL, Aug. 17, 1994 at 4B.

278. Charles T. Jones, *U.S. Judge to Decide Truck Case*, DAILY OKLAHOMAN, Dec. 28, 1994, at 15. The bill took effect on Jan. 1, 1995. *Kelley v. United States*, 69 F.3d 1503, 1505 (10th Cir. 1995).

11501(h), which barred states from imposing such regulations on any motor carrier other than an air carrier.²⁷⁹

As the foregoing discussion reveals, several factors contributed to FedEx's eventual success. By simultaneously pursuing litigation and legislation, FedEx was able to obtain a favorable judicial ruling that enabled it to exert pressure both on Congress to act and on UPS to support deregulation.²⁸⁰ FedEx's coalition-building was also a factor. FedEx started with the air carriers, then enlisted the support of the shippers, and eventually persuaded UPS to add its support.²⁸¹ Finally, even the American Trucking Association dropped its opposition.²⁸² FedEx built these coalitions by supporting the broadest possible deregulation rather than attempting to maintain the narrow competitive advantage that it obtained by virtue of the Ninth Circuit ruling.²⁸³

It is important to note that trucking deregulation, even at the very end, occurred as a byproduct of a concerted legislative effort to provide relief from state trucking regulation for air carriers. Ultimately, FedEx's efforts were central, and its influence is reflected in the legislative history. In addition to extensive testimony by FedEx officials, FedEx repeatedly supplied detailed information supporting its claims that state trucking regulation was inefficient.²⁸⁴ Thus, FedEx armed members of Congress with the necessary information to justify deregulation as serving the interests of consumers and shippers.²⁸⁵ FedEx also traded on its professional reputation to generate legislative support. In a key hearing, Smith used the

279. Notably, even at this point, the states and the Teamsters did not concede defeat. Five states and the Teamsters challenged the constitutionality of the legislation in federal court. The Tenth Circuit upheld the legislation in *Kelley v. United States*, 69 F.3d 1503 (10th Cir. 1995), and the Supreme Court denied certiorari. 517 U.S. 1166 (1996).

280. See de Figueiredo & de Figueiredo, *supra* note 194 (using game theory to model litigation and lobbying as independent activities in multi-stage interest group strategy).

281. Significantly, when UPS joined the deregulatory effort, it brought some union representatives on board, significantly weakening the effectiveness of the continued Teamsters opposition. Hill Interview V, Apr. 15, 2002, *supra* note 28.

282. Mitchell E. MacDonald, *Federal Government Cans Intrastate Motor Carrier Regulation*, 33 TRAFFIC MGMT. 17, (1994).

283. See, e.g., Rip Watson, *Carrier Interests Spar as Hearings Approach*, J. COM., July 12, 1994, at 3B (quoting FedEx VP Doyle Cloud as stating "We support the broadest possible removal of state regulation").

284. See, e.g., *Regulatory Issues Hearings*, *supra* note 265, at 1136 (statement of Frederick W. Smith) (detailing the cost savings expected to be achieved through deregulation as demonstrated by five different studies). FedEx itself commissioned one such study. *Id.*

285. See Hirschman, *supra* note 49, at 1C (quoting David Traynham, a staff member on the House Aviation Subcommittee, as explaining that the ability of FedEx and UPS to convey information to Congress about the effect of trucking deregulation was a key issue in the success of the legislation).

example of FedEx's actions in arranging a special flight to deliver drilling equipment to help save Baby Jessica to explain to members of the committee the importance of express freight.²⁸⁶

FedEx also made use of its extensive political relationships. Tennessee Congressman Bob Clement sponsored H.R. 3321—the bill that seemingly generated the greatest momentum for deregulation. In the Senate, Tennessee Senator Jim Sasser, whose re-election campaign was run by Smith,²⁸⁷ co-sponsored the legislation that eventually passed.²⁸⁸ Moreover, by the early 1990s, FedEx had built a reputation for itself in Congress. Members of the House Committee were well acquainted with Smith; during the hearings, several made reference to his earlier appearances in connection with such issues as air cargo deregulation.²⁸⁹

Was money a factor in FedEx's success? FedEx's political donations were substantial and well publicized by the mid 1990s.²⁹⁰ Moreover, FedEx donated money to many of the key players in trucking deregulation,²⁹¹ including Rep. Bob Clement²⁹² and House subcommittee chairman Norman Mineta,²⁹³ who reportedly played an instrumental role in securing passage of the legislation at the conference committee stage.²⁹⁴ Nonetheless, FedEx's contributions do not appear to have been out of line for the industry.²⁹⁵ As one commentator noted, in analyzing the role of FedEx's political expenditures in connection with trucking deregulation, "despite the

286. *Regulatory Issues Hearings*, *supra* note 265, at 738 (testimony of Frederick W. Smith). See also *supra* note 97 and accompanying text (describing Baby Jessica incident).

287. See *supra* note 59 and accompanying text.

288. Dave Hirschman, *FedEx, UPS Push for End to Intrastate Regulations*, COM. APPEAL, May 8, 1994, at 1C.

289. See, e.g., *Regulatory Issues Hearings*, *supra* note 265, at 739 (statement of Rep. Hammerschmidt, Member Subcomm. on Surface Transportation).

290. Hirschman, *supra* note 49 (observing that FedEx and UPS together donated more money to politicians in the 1991-92 election cycle than all the passenger airlines combined but explaining that "political spending at FedEx has remained relatively constant in the last four years").

291. Half the members of the House Subcommittee on Surface Transportation received political donations from FedEx. Roland Klose, *Fed Ex Visits PAC Friends in Congress*, COM. APPEAL, Apr. 1, 1992, at B3.

292. *Id.*

293. Mineta sponsored H.R. 3321. *Id.*

294. See MacDonald, *supra* note 282 (describing the importance of Mineta's efforts in obtaining the Senate's agreement to broad deregulatory legislation).

295. See Klose, *supra* note 291 (observing that "the air express company appears to have only managed to keep pace with other transportation interests seeking to influence federal policy"). In analyzing competing interest groups with respect to trucking deregulation, Klose noted that although FedEx was the tenth largest contributor to members of the House Public Works Committee in 1987-1988, the Airline Pilots Association and the Teamsters together contributed more than seven times as much. Competitor UPS was the third largest contributor.

size of Federal Express's contributions to the key transportation policymakers in the House, its giving has been substantially less than other special interests, including two large labor groups and air express competitor United Parcel Service."²⁹⁶ In particular, the Teamsters—the interest group that remained most strongly opposed to trucking deregulation—contributed more than \$5 million to political candidates in 1993 and the first nine months of 1994.²⁹⁷ Accordingly, the story of trucking deregulation does not appear to be strongly consistent with the vote buying hypothesis. More generally, trucking deregulation suggests that the traditional story of interest group competition in politics offers an incomplete explanation as to why one interest group is successful in prevailing over a competing group.²⁹⁸

C. Unionization and the FAA Rider

FedEx entered the cargo transportation industry as an air carrier rather than a ground carrier. As a result, it was covered by airline regulations, including the Railway Labor Act ("RLA").²⁹⁹ FedEx took advantage of its status as an air carrier for purposes of labor regulations. Early on in its history, FedEx successfully established that because it was subject to the RLA, it was exempt from the National Labor Relations Act³⁰⁰—which covers employees at most other shipping companies, including UPS.³⁰¹

The significance of FedEx's air carrier status is threefold. First, FedEx labor disputes are subject to the jurisdiction of the National Mediation Board ("NMB") rather than the National Labor Relations Board ("NLRB"). Second, the rules governing strikes and work stoppages under the RLA are much less favorable to labor.³⁰²

296. *Id.*

297. Hirschman, *supra* note 49.

298. Indeed, it is worthy of note that, in the midst of the battle to deregulate trucking, Teamsters' lobbyists were reportedly successful in persuading House and Senate Democratic congressional campaign committees to stop using the services of Federal Express. Roland Klose, *Lawmaker Supports Exemption for FedEx*, COM. APPEAL, July 31, 1991, at B4.

299. 45 U.S.C. §§ 151 *et seq.* (2005).

300. 29 U.S.C. §§ 151 *et seq.* (2005).

301. *See, e.g.,* Adams v. Fed. Express Corp., 547 F.2d 319, 320 (6th Cir. 1976) (holding that Federal Express is subject to the RLA); *id.* at 324 (appending In re Representation of Employees of Fed. Express Corp., National Mediation Board Case No. R-4564, Jan. 13, 1976 (finding that FedEx and its mechanics constitute an air carrier and employees within the meaning of the RLA)); Fed. Express Corp., 6 N.M.B. No. 1032 (1978) (holding that FedEx truck drivers were subject to NMB jurisdiction under FLA).

302. As one commentator explained:

Third, and most important, under the RLA, unions must organize a company's employees nationally rather than locally;³⁰³ this requirement makes it substantially more difficult to unionize. As a result, despite continued union attempts to organize FedEx employees,³⁰⁴ only the pilots succeeded in unionizing.³⁰⁵ The ability to avoid union constraints in dealing with its workers was a cost-saving measure for FedEx and "a key element of Federal Express' market strategy."³⁰⁶

FedEx secured its coverage under the RLA through a series of judicial and administrative agency decisions.³⁰⁷ Again, a key component of FedEx's success was demonstrating that its nonairline employees were engaged in work that was an integral part of its air carrier operations.³⁰⁸ Importantly, FedEx faced repeated opposition from the Teamsters and other unions, which challenged FedEx's status under the RLA. Indeed, the Teamsters sought to use trucking deregulation as a tool to eliminate FedEx's favored status under the

Under the RLA, unions may strike only over "major" issues, and must follow an arduous course of mediation before they legally can do so. They may not strike at all over minor issues, which must be arbitrated. Under the NLRA, a company can be struck at one terminal, but not others. Strictly local disputes can escalate into work stoppages, and there is no legal distinction between major and minor disputes. Thus, they're all major.

Larry Kaufman, *Inside Talk - Larry Kaufman UPS Wants to See a Level Playing Field on the Labor Front*, J. COM., June 30, 1993, at 2B.

303. See, e.g., *Chicago Truck Drivers v. National Mediation Bd.*, 670 F.2d 665, 665-66 (7th Cir. 1981) (explaining that, pursuant to the RLA, the union must seek certification as to entire craft or class of FedEx employees); Chris Isidore, *FedEx Pilots Accept Collective Bargaining*, J.COM., Feb. 8, 1999, at 14A (explaining that, because FedEx is covered by the RLA, "organizing must be done on a company-wide basis within each job classification, rather than location by location as at other companies").

304. See, e.g., *Adams v. Fed. Express Corp.*, 547 F.2d 319 (6th Cir. 1976) (describing unsuccessful efforts by Teamsters to organize FedEx mechanics in the mid 1970s); *Chicago Truck Drivers v. National Mediation Board*, 670 F.2d 665, 666 (7th Cir. 1981) (describing unsuccessful attempts by Chicago Truck Drivers Union to represent local FedEx truck drivers).

305. FedEx pilots did not succeed in unionizing until 1993, after several unsuccessful votes. See Dane Hamilton, *Teamsters to Start a Drive for FedEx Ground Workers*, J. COM., Mar. 8, 1993, at 1A (reporting successful unionization vote by pilots in January 1993); Mark B. Solomon, *Federal Dodge Labor's Bullet, but More may be in Chamber, Pilot's Union may seek Rerun Election*, J. COM., Aug. 26, 1991, at 3B (describing unsuccessful unionization efforts).

306. David P. Baron, *Theories of Strategic Nonmarket Participation: Majority-Rule and Executive Institutions*, 10 J. ECON. & MGMT. STRAT. 47, 50 (2001).

307. See, *supra* note 301 (citing cases); see also *Chicago Truck Drivers*, 670 F.2d at 665 (holding that FedEx truck drivers were not subject to the NLRA); *Fed. Express Corp.*, 23 N.M.B. 32 (1995) (holding that all FedEx employees, not just pilots, etc., are subject to RLA and therefore not subject to NLRB jurisdiction).

308. See, e.g., *Chicago Truck Drivers*, 670 F.2d at 666 (concluding that FedEx trucking operations were "an integral part of the Employer's air carrier operations").

RLA.³⁰⁹ Litigation offered FedEx a mechanism by which to secure its status that was partially shielded from labor's substantial political strength.

In the early 1990s, the differential treatment for FedEx and UPS was challenged. The United Auto Workers sought to organize FedEx ground employees under the NLRA, arguing that changes in FedEx's intermodal transportation increased the importance of its trucking services, an area that traditionally was not covered by the RLA.³¹⁰ At the same time, UPS attempted to free itself from NLRB regulation, arguing that it too should be governed by the RLA and the NMB.³¹¹ The NLRB heard oral arguments in both cases together and concluded that different regulatory treatment continued to be warranted. With respect to FedEx, the NLRB concluded that it had "never asserted jurisdiction over Federal Express" and that FedEx "has been a carrier under the RLA since at least the mid 1970s."³¹² In contrast, the NLRB observed that it had exercised jurisdiction over UPS for at least forty-seven years, that UPS continued to transport over 90% of its shipments by ground, and that UPS's ground transportation was not sufficiently related to its air operations to remove it from NLRA coverage.³¹³ The D.C. Circuit affirmed NLRB's decision, explaining that a key distinction between UPS and FedEx was the complete dependence of FedEx's trucking operations on its air-freight services.³¹⁴

UPS vowed to take the issue to Congress in order to obtain equal treatment.³¹⁵ Before it could do so, however, in 1995, as part of the enactment of the Interstate Commerce Commission Termination Act, Congress removed the "express company" classification from the

309. Klose, *supra* note 291, at B4.

310. See *Fed. Express Corp.*, 317 N.L.R.B. 1155 (July 21, 1995) (describing procedural history of litigation); dissenting opinion of William B. Gould IV, 317 N.L.R.B. 1155, 1158 (describing claimed change in the nature of FedEx's operations).

311. *United Parcel Serv. Inc. v. Nat'l Labor Relations Bd.*, 92 F.3d 1221, 1222 (D.C. Cir. 1996).

312. *Fed. Express Corp.*, 317 N.L.R.B. at 1156.

313. See *United Parcel Serv. Inc.*, 92 F.3d at 1222 (summarizing the NLRB's findings); *United Parcel Serv. Inc.*, 218 N.L.R.B. 778, 1995 NLRB LEXIS 878, *21-26 (Aug. 25, 1995) (rejecting UPS's argument that it is an "express company" under the RLA and therefore not an employer under section 2(2) of the NLRA).

314. *United Parcel Serv. Inc.*, 92 F.3d at 1228 (DC Cir. 1996) (finding it "abundantly clear that FedEx's trucking services, unlike UPS, Inc., do principally serve FedEx's air-delivery services").

315. Chris Isidore, *UPS, FedEx may be Subject to Different Labor Laws*, J. COM., Sept. 11, 1995, at 2B.

RLA.³¹⁶ FedEx had relied on this language to argue that all of its operations, not just its airline operations, were subject to the RLA. By most accounts, the removal of the language appears to have been a technical error;³¹⁷ there is no legislative history offering any affirmative reason for eliminating the classification.³¹⁸ Nonetheless, the change created a potential ambiguity in FedEx's status. Importantly, the change gave the unions new ammunition in their attempt to subject FedEx to the NLRA.³¹⁹

FedEx sought corrective legislation. Powerful opposition from unions and UPS as well as charges of special interest legislation made direct efforts to overturn the change unlikely to succeed. Democrats sympathetic to labor vowed to fight the provision and warned of a possible White House veto.³²⁰ Nonetheless, FedEx's political allies persevered in their efforts to reinstate RLA coverage for express companies. Indeed, legislators tried to attach riders to some six separate bills without getting the provision adopted.³²¹ In each case,

316. William Roberts, *FedEx Gets its Way in Aviation Legislation*, J. COM., Sept. 27, 1996, at 1A.

317. See, e.g., Richard E. Cohen, *The Democrats Express Themselves*, 28 CONG. CHRON. 2185 (Oct. 12, 1996) (stating that "Members and aides who worked on the 1995 legislation said that they never intended to change the status of Federal Express."). But see Letter, *FedEx Acts like Robber Barons*, J. COM., Oct. 7, 1996, at 8A ("In fact, the nonpartisan Congressional Research Service has stated, 'The deletion of 'express company' from Section 1 of the Railway Labor Act does not appear to have been inadvertent or mistaken.'"). See also David R. Sands, *Federal Express, Unions Fight over two Little Words in Bill*, WASH. TIMES, July 29, 1996, at A8 (summarizing dispute over whether change was inadvertent).

318. See, e.g., 142 CONG. REC. H11, 457-58 (daily ed. Sept. 27, 1996) (statement of Rep. Molinari) (explaining removal of "Express Company" term as based on assumption that the term was obsolete and failure to realize significance of term for NMB purposes); 142 CONG. REC. S11, 941 (daily ed. Sept. 30, 1996) (statement of Senator McCain) (stating that it was clear to all conferees that the elimination of the express company language reflected "a mistake in the legislation that needed to be repaired").

319. See William Roberts, *Loss of Two Words Stirs Fears at FedEx*, J. COM., June 10, 1996, at 1A (summarizing union argument and significance of the change for pending NLRB ruling). Significantly, however, other language in the Termination Act provided that abolishing the ICC did not "expand nor contract coverage of the employees and employers by the Railway Labor Act." James W. Brosnan, *Dropped Term in Law Raises Union Ire at FedEx*, COM. APPEAL, June 12, 1996, at 4B.

320. William Roberts, *Organized Labor set to Fight GOP on FedEx Rider*, J. COM., May 20, 1996, at 1B.

321. See, e.g., Mike Dorning & Mary Jacoby, *Simon Knows how to Play the Game in Senate*, CHI. TRIB., Sept. 29, 1996, at C2 (quoting Rep. Bill Lipinski of Chicago, the ranking Democrat on the House Aviation Subcommittee as stating that FedEx had unsuccessfully tried to attach the provision to six bills in the past nine months). For example, Senator Hollings offered the provision at an Appropriations Committee mark-up of a transportation spending bill; the amendment was subsequently rejected by the committee. Sands, *supra* note 317, at A8. Congressman Shuster attached an amendment as a last minute addition to the 1996 Railroad Unemployment Insurance Amendments Act, that would have restored the definition of "express company" to the RLA. Roberts, *supra* note 320, at 1B. When it became clear that the

supporters of the amendment characterized it as a technical correction, while opponents challenged the measure as special interest legislation.³²²

Eventually, Senator Hollings reintroduced the provision as a rider to the FAA authorization bill in conference committee.³²³ The FAA authorization bill, which enjoyed extensive support apart from the FedEx provision, was to reauthorize the FAA and to approve various airport security measures.³²⁴ Despite the fact that neither the Senate nor the House versions of the bill contained the provision, the conference committee approved it—House Republicans joining with a unanimous group of five Senate conferees, Democrat and Republican—by an 8-2 vote.³²⁵ The media quoted Rep. Bud Shuster, R-Pa., chairman of the House Transportation and Infrastructure Committee, as saying, "I have been instructed by my leadership to accept this."³²⁶

The conference bill then went back to the House, where it was passed, substantially along party lines. Significantly, when the House Parliamentarian ruled that the FedEx rider constituted a substantive amendment that was arguably beyond the scope of the Conference Committee's authority, the House waived any such objections to the bill.³²⁷

When the measure went to the Senate floor for final passage, Senator Kennedy led an effort to block the legislation through a filibuster.³²⁸ Although the filibuster threatened to prevent Congress from adjourning,³²⁹ after four days of debate, FedEx was able to obtain enough votes to invoke cloture by an ample 66 to 31 margin.³³⁰ House Democrats raised yet another objection, arguing that the Conference

amendment faced too much opposition from House Democrats, it was withdrawn from the bill. William Roberts & Chris Isidore, *House GOP Pull Labor Law Amendment Sought by Federal Express Corp.*, J. COM., May 22, 1996, at 1B.

322. It is not clear that either characterization is wholly incorrect.

323. Roberts, *supra* note 320, at 1A.

324. Editorial, *Irony in the Political Skies*, OMAHA WORLD HERALD, Oct. 7, 1996, at 6 [hereinafter *Irony in the Political Skies*].

325. Roberts, *supra* note 320.

326. *Id.*

327. Thirty Republicans voted in opposition to the measure; fifteen Democrats voted in favor. 142 CONG. REC. S12, 179 (daily ed. Oct. 2, 1996) (statement of Senator Kennedy).

328. *FAA Reauthorization, Facts on File*, WORLD NEWS DIGEST, Oct. 10, 1996, at 740 [hereinafter *FAA Reauthorization*]. Kennedy termed the provision an "anti-union" measure and unsuccessfully attempted to block its adoption through several other procedural measures *Irony in the Political Skies*, *supra* note 324, at 6.

329. See Cohen, *supra* note 317 (summarizing the political battle over adoption of the provision).

330. Lee E. Helfrich, *Playing Games in the Senate: We all Lose when the Republican Majority Fiddles with Parliamentary Rules to Thwart Democracy*, LEGAL TIMES, Oct. 25, 1999, at 68.

Report exceeded the scope of the committee's authority. When the Chair upheld this position, the Senate voted to overturn the Chair's ruling.³³¹ The bill then passed by the overwhelming margin of 92 to 2, definitively establishing the status of FedEx workers as aviation employees.³³²

FedEx pulled out all the stops in its effort to obtain the legislative change. The company's effort to generate political support included substantial political expenditures.

1995-96 Soft Money Contributions	973,000 ³³³
1995-96 PAC Expenditures	943,000 ³³⁴
Lobbying Expenditures - 1/1/96-6/30/96	1,149,150 ³³⁵

FedEx hired nine Washington lobbying firms in the first six months of 1996, and its PAC made donations totaling over \$800,000 to more than 224 candidates for the House and Senate in the 1993-94 election cycle,³³⁶ in addition to the company's soft money donations and other attempts to obtain congressional allies.³³⁷ Yet this strategy entailed a certain amount of risk. Unlike most of its other political initiatives, the FAA rider was impossible to defend as anything other than special interest legislation. Further, FedEx's substantial political contributions allowed opponents of the legislation to argue that support for the rider was motivated by the contributions, rather than the merits.³³⁸

There are reasons, however, to question the causal relationship between these expenditures and FedEx's success. First, it is important to note the process that was employed to restore the

331. 142 CONG. REC. S12, 225 (daily ed. Oct. 3, 1996) (cloture vote).

332. *FAA Authorization*, *supra* note 328, at 740. Southern Democrats joined with Senate Republicans to defeat the filibuster. See David Rogers, *Unions and FedEx Spar on Capitol Hill Meanwhile Senators Vote To End State Review Of Mutual-Fund Sector*, WALL ST. J., Oct. 2, 1996, at A3 (describing FedEx's support from Southern Democrats).

333. Nancy Watzman et al., *Two New Ways to Look at Global Connections to U.S. Politics*, in OPENSECRETS.ORG MONEY IN POLITICS ALERT (May 19, 1997), available at <http://www.opensecrets.org/alerts/v3/ALRTV3N16.asp>.

334. THE ALMANAC OF FEDERAL PACS 2000-2001, at 92 (Edward Zuckerman ed., 2000).

335. Lewis, *supra* note 18, at 37.

336. See *id.* (explaining that a corporation typically hires a lobbying firm because of its relationship with specific lawmakers).

337. *Id.* (describing various FedEx efforts to gain influence with lawmakers).

338. See, e.g., 142 CONG. REC. H11, 458 (daily ed. Sept. 27, 1996) (statement of Rep. Nadler) (describing FedEx as "a large source of campaign contributions for lots of people").

"express company" designation. FedEx's allies did not seek to make the change through stand-alone legislation, which would have entailed a traditional vote on the measure. Instead, from the beginning, they chose to attach the change as a rider to another bill that was uncontroversial and likely to pass. The eventual attachment of the rider to the FAA reauthorization bill occurred during the Conference Committee. Accordingly, one key issue was obtaining a legislative committee that was willing to approve the rider. The Conference Committee was comprised of legislators who had previously established relationships with FedEx, including: Tennessee Congressman John Duncan, the head of the Aviation Subcommittee; Congressman Bud Shuster; Senator Wendall Ford; and Senator Fritz Hollings.³³⁹ Both Shuster and Ford had worked closely with FedEx on trucking deregulation.

Significantly, at least in the first instance, the procedure employed required substantial efforts by a few key legislators to introduce the FedEx rider and to accept the resulting political fallout.³⁴⁰ It seems unlikely that a corporation could obtain this type of support for a \$5,000 political contribution.³⁴¹ Rather, FedEx's relationships with the dominant legislators appear to have been far more important.³⁴² In particular, FedEx had the support of Senator Hollings, the ranking Democrat on the Senate Commerce, Science and Transportation Committee, and chief sponsor and proponent of the amendment.³⁴³ Senator Hollings's support was not purchased through campaign contributions; Hollings received no substantial political contributions from FedEx or Smith prior to 1996.³⁴⁴ Rather, FedEx

339. See Rogers, *supra* note 332, at A3 (describing Hollings' and Ford's support for FedEx).

340. See Hill Interview III, Apr. 12, 2002, *supra* note 28 (observing "how much trouble a lot of senators were willing to go through" to support FedEx's position).

341. The maximum permissible contribution by a PAC to an individual congressional candidate is \$5,000. 2 U.S.C. § 441a(2)(A) (2005).

342. Significantly, these relationships were not exclusively tailored to the FAA rider. Instead, FedEx had, over a period of time, cultivated relationships with legislators that served on the congressional committees with jurisdiction over FedEx's operations. See, e.g., Frank N. Wilner, *Up Close and Ugly*, TRAFFIC WORLD, Oct. 16, 2000, at 12 (describing FedEx's attempts to build a relationship with Bud Shuster while "FedEx was lobbying Congress on bilateral aviation relations with Japan."). See also Rogers, *supra* note 332, at A3 (describing FedEx's relationships with several key Senate Democrats who supported the legislation, including Senator Bennett Johnston, who was described as Fred Smith's tennis partner).

343. Cohen, *supra* note 317. For a discussion of the importance of bill sponsorship in raising the saliency of a policy issue see Wendy Schiller, *Senators as Political Entrepreneurs: Using Bill Sponsorship to Shape Legislative Agendas*, 39 AM. J. POL. SCI. 186 (1995).

344. *FedEx Become Big Hollings Contributor*, THE BULLETIN'S FRONTRUNNER, July 8, 1998 (reporting that, prior to battle over the 1996 rider, Hollings had received no substantial contributions from FedEx). Subsequently, however, FedEx and its executives became the top donors to Hollings's 1998 reelection campaign. *Id.*

earned the loyalty of Senator Hollings a decade earlier by donating its aircraft to fly hay to his state during the 1986 droughts.³⁴⁵ Senator Hollings openly acknowledged that his introduction of the FAA rider was based on his gratitude to FedEx for the haylifts as well as the company's track record as a good corporate citizen.³⁴⁶

Similarly, FedEx had cultivated the loyalty and support of Bud Shuster, author of the Conference Committee Report, prior to the FAA rider.³⁴⁷ FedEx employed the services of Shuster's former chief of staff, lobbyist Ann Eppard, in connection with the rider.³⁴⁸ FedEx also regularly provided Shuster with a private aircraft for his exclusive use.³⁴⁹ In addition to his effort on FedEx's behalf in the House and on the Conference Committee, Shuster wrote a letter to the Senate, justifying the FedEx rider as necessary to correct a technical error.³⁵⁰

As indicated above, FedEx's reputation was a key factor in its success. For example, when Senator Kennedy attempted to degrade FedEx in an effort to block the rider, other legislators were able to respond by pointing to FedEx's recognition as one of the "100 Best Companies to Work for in America."³⁵¹ Senator Hollings explicitly referenced the fact that former senators from both parties, Senators Baker and Mitchell, were currently FedEx Board members.³⁵² Senator Tanner criticized attacks on the company by pointing to FedEx's contributions to the Civil Patrol and to Operation Desert Storm.³⁵³

Moreover, focusing on the closeness of the vote to end the Senate filibuster³⁵⁴ overlooks the significance of the strategy employed by FedEx's allies. After the House approved the FAA Reauthorization bill, with the FedEx rider attached, it adjourned. At this point, the

345. Cohen, *supra* note 317, at 2185.

346. Lewis, *supra* note 18, at 37; *see also* Dave Williams, *Hollings Wins Provision to Help Federal Express*, STATE NEWS SERVICE, Oct. 3, 1996.

347. Federal Aviation Authorization Act of 1996, Pub. L. No. 104-264, 110 Stat. 3213 (1996).

348. William Roberts, *Republican Strategy for FedEx Falls Flat, Organized Labor, Democrats Unite to Oppose Special Provision*, J. COM., May 29, 1996, at A1; Wilner, *supra* note 342, at 12.

349. *See* Wilner, *supra* note 342, at 12 (stating that FedEx provided aircraft for Shuster on six separate occasions in 1995, and quoting a FedEx official as stating "[w]e generally tried to do any trip that Mr. Shuster wanted to do").

350. 142 CONG. REC. S12, 175-76 (daily ed. Oct. 2, 1976) (letter from Bud Shuster and Susan Molinari to Trent Lott dated July 12, 1996).

351. *See* 142 CONG. REC. S12, 173 (daily ed. Oct. 2, 1996) (statement of Senator Hollings) (citing ROBERT LEVERING & MILTON MOSKOWITZ, *THE 100 BEST COMPANIES TO WORK FOR IN AMERICA* 121-26 (1993)).

352. 142 CONG. REC. S12, 185 (daily ed. Oct. 2, 1996) (statement of Senator Hollings).

353. 142 CONG. REC. H11, 460 (daily ed. Sept. 27, 1996) (statement of Rep. Tanner). Congressman Tanner also observed that Fred Smith was a Vietnam veteran who "crawled through the rice paddies." *Id.*

354. *See* Baron, *supra* note 306, at 50 (highlighting FedEx's need to obtain 60 votes to invoke closure as "the focus of its nonmarket strategy").

fate of the FedEx rider was largely predetermined. The Senate was faced with the choice between voting down the bill, which would have had the effect of allowing the FAA's funding to expire and greatly jeopardizing air travel, or approving the bill in its existing form. If the Senate had attempted to approve a modified version of the bill without the FAA rider, the bill would have had to go back to the House for approval, requiring the House either to return to Washington or to approve the bill by unanimous consent – neither of which were realistic options. As a result, the filibuster debate and vote were more a matter of political posturing than a meaningful indication of the legislators' substantive positions on the rider.

Indeed, understanding the political context of the cloture vote is important. Although the votes supporting FedEx may not have been purchased through political donations, the Teamsters' donations, in contrast, may have purchased favorable, though ineffective, votes. Notably, the FedEx rider was most strongly opposed by the pro-labor Democrats. Unlike FedEx, which at the time donated substantial amounts of money to both political parties,³⁵⁵ the Teamsters' more substantial donations were targeted at Democrat allies—precisely those allies who voted against cloture.³⁵⁶ According to the Federal Election Commission, the Teamsters' PAC, known as the Democratic Republican Independent Voter Education Fund, was the top contributor to congressional campaigns in the 1995-96 election cycle.³⁵⁷ Perhaps more significantly, the Teamsters were not reticent about the expectations that they attached to their political contributions. After they failed to prevail on the FedEx rider,

355. Robert D. Novak, *Smith Splits the Ranks*, COM. APPEAL, Oct. 18, 1996, at A6.

356. See Ruth Marcus, *Labor Spent \$119 Million For '96 Politics, Study Says; Almost All Contributions Went to Democrats*, WASH. POST, Sept. 10, 1997, at A19 (reporting that "[t]he top union PAC giver [in the 1996 election cycle] was the International Brotherhood of Teamsters, which made \$ 2.6 million in PAC contributions, all but \$ 106,000 to Democrats"). Labor contributions had also become an increasingly important component of the Democrats' political funding. See William Schneider, *Big Labor's Crushing Embrace*, NAT. J., Nov. 29, 1997 (reporting that by 1996, labor PACs accounted for almost half of the PAC contributions to Democratic congressional candidates).

357. David Barnes, *Will White House Intervene in Teamsters UPS Strike?*, J. COM., Aug. 11, 1997, at 12. See also James W. Brosnan & Anna Davis, *Lott Gripes Despite Party's Slice of Business PAC Pie, GOP gets Two-Thirds of Funds from Memphis Firms*, COM. APPEAL, Dec. 27, 1996, 1A.

The FedEx PAC dwarfs all others in Tennessee and it was the fourth-largest corporate PAC in the U.S. in terms of receipts as of June 30, with \$ 1.2 million. But chief rival United Parcel Service is No. 2 with \$ 1.9 million, and both shrink in size compared with the Teamsters PAC's \$ 6.2 million in receipts.

Teamster President Ron Carey cut off Teamster funding to the Democratic Senatorial Campaign Committee.³⁵⁸

Moreover, if the cloture vote was not critical—that is, if the Democrats voting against cloture knew their votes would be of little use—and if the Democrats realized their symbolic votes against cloture would signal their support to organized labor, how should those votes be analyzed? The cloture vote, like the vote on trucking deregulation considered in Subsection II.B.1 above, demonstrates that votes cast may differ dramatically in their significance. Even if empirical studies could demonstrate a causal relationship between campaign contributions and votes, that relationship would not necessarily prove that the contributions had a meaningful impact on legislative policy. Rather, the analysis highlights the fact that empirical studies need to incorporate an analysis of significance when counting votes.

D. Noise Regulation

Airplanes are noisy, and the aviation industry has continually dealt with efforts to regulate the noise produced by take-offs and landings. As aircraft grew in size and an increasing percentage of aircraft were commercial jets, the problems of aircraft noise intensified.³⁵⁹ Local communities responded by imposing noise regulations. Even as FedEx was beginning its operations in the mid-1970s, the battle between airlines and local communities was heating up. Anti-noise groups successfully challenged aircraft noise through litigation.³⁶⁰ Individual communities and airports began to restrict aircraft noise through zoning, noise limits, and curfews.³⁶¹

358. Novak, *supra* note 355, at A6.

359. The aircraft noise externality has been described as a classic market failure justifying government regulation. Steven A. Morrison, et al., *Fundamental Flaws of Social Regulation: The Case of Airplane Noise*, 42 J. L. & ECON., 723, 723 (1999). The decision of airlines to move from point to point flying to the hub and spoke system also increased the problem of aircraft noise by overburdening primary hub airports. See Luis G. Zambrano, *Balancing the Rights of Landowners with the Needs of Airports: The Continuing Battle over Noise*, 66 J. AIR L. & COM. 445, 450 (2000) (explaining that noise problems are exacerbated as flights are added and runway capacity is increased).

360. See, e.g., *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256, 268 (1946) (upholding inverse condemnation claims); See also Mary Jo Soenksen, Note, *Airports: Full of Sound and Fury and Conflicting Legal Views*, 12 TRANSP. L. J. 325, 335 (1982) (claiming that noise-related litigation claims for inverse condemnation and nuisance between 1971 and 1976, cost airport owners more than \$ 28 million).

361. An additional method of controlling aircraft noise was with noise-related fees. See, e.g., John Davies, *Washington State Legislators Propose Fees on Noisy Jets*, J. COM., Feb. 2, 1990, at 5B (describing state proposal to impose extra landing charges for noisy aircraft).

Noise regulation was a particular problem for the air carrier industry. Unlike passenger airlines, most air carriers flew at night, when noise regulations were most restrictive.³⁶² A 1972 survey found that only 25% of passengers arrived or departed between the hours of 10:00 p.m. and 7:00 a.m., but 90% of all cargo and mail moved in and out of airports during those hours.³⁶³ In addition, many carriers, especially new entrants, were flying older and noisier aircraft that they were able to purchase more cheaply than newer models.³⁶⁴

In 1968, Congress amended the Federal Aviation Act to grant the FAA specific power to address aircraft noise and to include noise considerations in the exercise of its regulatory authority.³⁶⁵ The FAA responded to this directive by issuing Federal Aviation Rule ("FAR") 36, which established procedures for measuring and limiting aircraft noise.³⁶⁶ Anti-noise groups, however, generally viewed the FAA's actions as unsatisfactory.³⁶⁷

Congress subsequently adopted the Noise Control Act of 1972.³⁶⁸ The most significant aspect of the Act was its impact on state and local regulation of aircraft noise. In *City of Burbank v. Lockheed*

362. See, e.g., *Government Policies on Aircraft Noise: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 99th Cong. 578-79 (1986) (testimony of Robert P. Silverberg, Counsel, Airborne Express) [hereinafter *Government Policies on Aircraft Noise Hearings*] (describing how the majority of Airborne Express's flights take place during the late evening and early morning hours).

363. Eugene Kozicharow, *Federal Action Needed to Block Curfews*, AVIATION WK., Mar. 8, 1976 (reporting results of a 1972 survey by Airport Operators Council International at U.S. airports).

364. See *Government Policies on Aircraft Noise Hearings*, *supra* note 362, at 590 (testimony of Kevin Flynn, Assistant General Counsel, People Express) (explaining that noise regulations imposed a disproportionate impact on new entrants who flew the relatively less expensive stage 2 aircraft).

365. Pub. L. No. 90-411, 82 Stat. 395 (codified as amended at 49 U.S.C. 1431 (2005)).

366. Among the key elements of FAR 36 was a procedure for classifying aircraft according to noise levels and a prohibition on the certification of new aircraft that did not meet specified noise standards. Adoption of Noise Type Certification Standards and Procedures, 34 Fed. Reg. 18,355 (1969) (codified at various sections of 14 C.F.R. §§ 21, 36). Aircraft were divided into three categories or "stages" depending on the aircraft's size and number of engines. See Kristin L. Falzone, Comment, *Airport Noise Pollution: Is There a Solution in Sight?*, 26 B.C. ENVTL. AFF. L. REV. 769, 783 n.129 (1999) (explaining criteria for different stages). FAR 36 was subsequently extended to most aircraft with maximum weights over 75,000 pounds manufactured after Dec. 1, 1973. Noise Standards for Newly Produced Airplanes of Older Type Design, 38 Fed. Reg. 29,569 (1973) (codified at 14 C.F.R. §§ 21.183(e), 36.1(a)(d)(1-3)).

367. See, e.g., John J. Jenkins Jr., *The Airport Noise and Capacity Act of 1990: Has Congress Finally Solved the Aircraft Noise Problem?* 59 J. AIR L. & COM. 1023, 1032 (1994) (describing new regulations as "a disappointment to anti-noise groups").

368. Pub. L. No. 92-574, 92 Stat. 1239 (codified as amended at 49 U.S.C. § 1431). Among other things, the 1972 legislation involved the Environmental Protection Agency in the regulation of aircraft noise. See Jenkins, *supra* note 367, at 1033 (describing role of the EPA under the 1972 statute).

Air Terminal, Inc.,³⁶⁹ the Supreme Court concluded that the Noise Control Act preempted local regulation of aircraft noise.³⁷⁰ In addition, the Court found that the nationwide imposition of curfews and other restrictions would undermine the congressional objectives underlying the Federal Aviation Act, including efficient and uniform use of navigable airspace.³⁷¹ In a footnote, however, the Court created a limited right for local airport operators to regulate aircraft noise.³⁷² This right became known as the proprietor's exemption.³⁷³

The post-*Burbank* state of regulation was problematic for both sides. In response to continued pressure from anti-noise groups, the FAA enacted FAR Part 91 in 1976, which applied stricter standards of noise regulation.³⁷⁴ The new FAA rules implemented a phase-out of the stage one aircraft, the noisiest type, over an eight-year period.³⁷⁵ This move was broadly viewed as insufficient, however, and both the FAA and Congress faced mounting pressure in the early 1980s to implement a phase-out of stage two aircraft.³⁷⁶

The implementation of stricter noise standards raised several concerns. First, the cost of a stage two phase-out was substantial. Although the stage one aircraft were of sufficient vintage that they were largely being phased out anyway,³⁷⁷ a majority of U.S. commercial aircraft were stage two aircraft; replacing them quickly would have been extremely expensive.³⁷⁸ Cargo carriers in particular warned Congress that forcing them to convert quickly to quieter

369. 411 U.S. 624 (1973).

370. See *id.* at 633 (holding that the 1972 Act "reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting state and local control").

371. *Id.* at 639-40.

372. *Id.* at 635 n.14.

373. See, e.g., James F. Gesualdi, Note, *Gonna Fly Now: All the Noise About the Airport Access Problem*, 16 HOFSTRA L. REV. 213 (1987) (summarizing cases applying the *Burbank* proprietor's exception and upholding curfews).

374. 14 C.F.R. §§ 91.801-.877 (1997). See Falzone, *supra* note 366, at 786 (describing noise standards imposed by FAR Part 91).

375. *Id.*

376. See Lyn Loyd Creswell, *Airport Policy in the United States: The Need for Accountability, Planning, and Leadership*, 19 TRANSP. L. J. 1, 56 (1990) (describing demand for stage two phase-out).

377. See Mary Beth Franklin, *FAA to Crack Down on Aircraft Noise*, UPI, Dec. 26, 1984 (observing that stage one aircraft, first manufactured in the 1950s, were largely phased out by the FAA deadline and indicating that only 85 stage one aircraft were being operated by domestic airlines).

378. See Creswell, *supra* note 376, at 56 (explaining that, in 1988, stage two aircraft made up 58% of U.S. commercial aircraft, and that cost of immediately replacing them with stage three aircraft would have been \$50 billion). These costs would be reduced substantially by a slower phase-out. *Id.*

aircraft would pose “devastating consequences” for the industry.³⁷⁹ Second, the FAA had retained the power to exempt airlines from the requirements of Part 91.³⁸⁰ Airlines were concerned about making substantial capital expenditures to comply with the new standards and then being disadvantaged if the FAA selectively exempted their competitors from the stage two phase-out.³⁸¹ Third, and perhaps most important, cargo carriers were concerned that, despite the FAA’s increasingly strict noise regulations, local airports and municipalities would continue to impose curfews and other operating restrictions. They argued that these restrictions particularly burdened cargo carriers³⁸² and that they should explicitly be preempted by a uniform national noise policy.³⁸³

In 1986, Smith explained to Congress that “there is no other issue that has any more crucial significance for us and our very able competitors than this issue of noise.”³⁸⁴ Smith testified that the only workable solution was federal noise standards coupled with federal preemption of local restrictions such as airport curfews.³⁸⁵ In particular, Smith argued that it was unreasonable to require airlines to phase out stage two aircraft if they could not be assured of airport access, including nighttime access, for compliant stage three planes.³⁸⁶

Congress responded. In November 1990, Congress passed the Aircraft Noise and Capacity Act of 1990 (“ANCA”).³⁸⁷ In adopting the legislation, Congress stressed the importance of formulating a national noise policy. ANCA’s key components included the establishment of a national noise policy and a schedule for the phasing

379. Leo Abruzzese, *Cargo Carriers State Access and Noise Case*, J. COM., May 10, 1989, at 5B.

380. See Franklin, *supra* note 377 (quoting FAA statement describing a “large volume of last minute petitions for exemptions from the standards”).

381. See *Air Cargo and Passenger Deregulation: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 96th Cong. 250 (1979) (testimony of Frederick Smith) (explaining that FedEx did not want to make the investment of buying aircraft that complied with the standards of FAR 36 only to find that the FAA was going to exempt its competitors, such as Evergreen or Emery, from compliance).

382. See Abruzzese, *supra* note 379, at 5B (describing concerns of cargo carriers regarding restrictions on nighttime takeoffs and landings).

383. See Comments of Federal Express Corporation before the Dept. of Transport., FAA, Wash., DC, Dec. 10, 1985 at 3 reprinted in *Government Policies on Aircraft Noise Hearings*, *supra* note 362, at 534 (describing serious concern over “the failure, to date, of the federal government to preempt local regulations relating to aircraft and airport noise”).

384. *Government Policies on Aircraft Noise Hearings*, *supra* note 362, at 508 (testimony of Frederick W. Smith).

385. *Id.* at 510.

386. *Id.* at 512.

387. 49 U.S.C. §§ 47521-47533 (2005).

out of all stage two aircraft by the year 2000.³⁸⁸ ANCA explicitly prohibited the adoption of local restrictions on the operation of aircraft that met stage three standards of compliance, unless such local restrictions were first approved by the FAA.³⁸⁹ Even with respect to noisier stage two aircraft, ANCA required airport operators to go through a formal notice-and-comment procedure in order to impose restrictions.³⁹⁰

Although proponents of ANCA argued that it would substantially reduce aircraft noise,³⁹¹ ANCA was widely viewed as a victory for air carriers.³⁹² Critics observed that airline industry sponsors were able to “sneak” the legislation through Congress in the final days of the 1990 session.³⁹³ As one commentator explained, “No public hearings were held, and although committee staffers consulted industry lobbyists during the bill’s markup, representatives of airport operators were not consulted.”³⁹⁴

It is important to recognize, however, that ANCA did not have the same effect on all carriers. First, by requiring airlines to achieve stage three compliance, ANCA favored larger and more established airlines over small and upstart carriers.³⁹⁵ Thus, ANCA enhanced FedEx’s competitive position relative to newer and less financially

388. See Jenkins, *supra* note 367, at 1036-1053 (describing details of ANCA provisions).

389. *Id.* at 1038. ANCA also largely eliminated the role of the EPA in airport noise abatement. See Sidney A. Shapiro, *Lessons From A Public Policy Failure: EPA and Noise Abatement*, 19 *ECOLOGICAL L.Q.* 1, 58-60 (1992) (describing ANCA’s effect in shifting greater control to the FAA).

390. Jenkins, *supra* note 367, at 1041; see also Zambrano, *supra* note 359, at 460.

391. See Jenkins, *supra* note 367, at 1037 (describing claims that ANCA would reduce aircraft noise).

392. See, e.g., Mitchell E. Macdonald, *Tax Compromise Contains Good News, Bad News for Transport Agency*, 29 *TRAFFIC MGMT.* 13 (Dec. 1990) (describing air carriers as “elated” in response to the new legislation); Falzone, *supra* note 366, at 788 (describing Congress as passing ANCA “in response to the air industry’s lobbying efforts.”).

393. Shapiro, *supra* note 389, at 59, n.350. See also Jenkins, *supra* note 367, at 1036-37 (describing how ANCA was passed “in the waning hours of the 1990 Congressional session”).

394. Shapiro, *supra* note 389, at 59, n.350. This characterization is not entirely accurate. As indicated above, Congress had previously held hearings to consider legislation to establish a national aircraft noise policy. See *supra* notes 362-368 and accompanying text. In addition, prior to ANCA’s adoption, the House Subcommittee on Aviation held four days of hearings on Federal Aviation Noise. *Federal Aviation Noise Policy: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 101st Cong. (1990) [hereinafter *Federal Aviation Noise Policy Hearings*].

395. See, e.g., *Federal Aviation Noise Policy Hearings*, at 394 (testimony of Brian Cole, General Counsel, Burlington Air Express) (describing the burden imposed by a requirement of conversion to stage three aircraft and proposing a “de minimis” exemption for “all-cargo operations with two or three flights a day at a particular airport”).

stable entrants.³⁹⁶ FedEx's dominant position in the industry enabled it to bear these costs more easily than its many smaller competitors. Indeed, ANCA was enacted precisely when a significant number of smaller carriers were making efforts to expand their aircraft operations in order to compete in the market with FedEx. Noise regulation raised the cost of doing so.³⁹⁷ Second, federal preemption of local noise restrictions provided a disproportionate benefit to cargo carriers, which were most affected by the imposition of airport curfews.

An additional component of ANCA's implementation was of particular value to FedEx. In developing regulations for noise abatement under ANCA, the FAA adopted a performance-based measure of compliance rather than a design-based measure of compliance.³⁹⁸ Under the performance approach, airlines were able to meet stage three standards either by purchasing the newer and quieter stage three engines or by installing hush kits which enabled stage two engines to meet the stage three noise requirements. Although it was not clear that retrofitting stage two aircraft with hush kits was comparable to purchasing stage three engines in terms of reducing aircraft noise,³⁹⁹ a position subsequently taken by the European Union,⁴⁰⁰ the hush kits substantially reduced the financial burden associated with meeting ANCA's requirements.⁴⁰¹ FedEx, which flew a large number of stage two Boeing 727 aircraft,⁴⁰² chose to address the regulatory issue by retrofitting its planes with hush kits.⁴⁰³ Thus the performance-based standard enabled FedEx to

396. See *id.*, at 359-90 (statement of Rep. Duncan, Member, House Subcomm. on Aviation) (noting risk that only big companies would be able to comply with proposed rules and small companies would be driven out of business).

397. Hill Interview V, Apr. 15, 2002, *supra* note 28 (observing that ANCA was a good strategic decision for large companies such as FedEx and UPS that could pay the costs associated with regulatory compliance, because it would have the effect of "keep[ing] out the little guys").

398. See 14 C.F.R. §§ 36.1(f)(5)-(6) (1991) (defining "Stage 3 noise level" and "Stage 3 airplane"). See also Benedicte A. Claes, *Aircraft Noise Regulation in the European Union: The Hushkit Problem*, 65 J. AIR L. & COM. 329, 347-58 (2000) (describing and defending the alternative design-based measure of compliance adopted by the European Union).

399. See Claes, *supra* note 398, at 347-58.

400. See John Zarocostas, *Noise about Hushkits; U.S. Carriers Complain About Efforts to Ban many Older Planes*, J. COM., Jan. 15, 2001, at 27 (describing prohibition on use of hush kits in the EU). Under pressure from the U.S. airline industry, the EU eventually agreed "to modify legislation that would have banned many older US aircraft with 'hushkit' engine noise mufflers from Europe's airports". *US Pleased with EU Hushkit Ban Changes but Suspicious of New Rules*, AGENCE FRANCE PRESSE, Mar. 27, 2002.

401. See Jenkins, *supra* note 367, at 1052 (describing hush kits).

402. See Ira Breskin, *Freighter "Hushkits" Feasible, Engine Manufacturer Says*, J. COM., Nov. 24, 1989, at 5B (describing FedEx as "one of the largest operators" of later generation 727s).

403. Zarocostas, *supra* note 400, at 27.

continue its preferred approach to noise compliance. In contrast, UPS phased-out its use of stage two engines by purchasing new engines for all its planes.⁴⁰⁴ Accordingly, a design-based standard would have benefited UPS relative to FedEx.

FedEx also benefited from the FAA's acceptance of the hush kit approach because FedEx manufactured and sold hush kits for Boeing 727 aircraft through its subsidiary, Federal Express Aviation Services, Inc.⁴⁰⁵ FedEx, jointly with Pratt and Whitney, developed a 727 hush kit and received approval for several types of hush kits even before the adoption of ANCA.⁴⁰⁶ The FAA's certification of hush kits as an acceptable way for carriers to meet stage three requirements, coupled with the adoption of ANCA, dramatically increased the market for hush kits.⁴⁰⁷ As a result, FedEx was able to sell the kits, which bore million dollar price tags, to other carriers.⁴⁰⁸

In sum, ANCA offered FedEx relief from curfews and other local noise restrictions at the cost of compliance with federal noise regulations. The federal noise regulations were specifically structured in a way that favored FedEx relative to its competitors and created a commercial market for FedEx's hush kits. Moreover, although ANCA appeared on its face to be a statute of general application, it was widely understood as being tailored to favor FedEx's interests. As one "enraged housewife" described it, ANCA was "a bad bill, made specifically for Federal Express, which operates an older fleet mostly at night."⁴⁰⁹

404. *Id.*

405. See Debra Sykes, *Carriers Turn down the Volume of Aircraft Noise*, 114 GLOBAL TRADE & TRANSP. 30 (July 1994) (describing FedEx as a "leader" in marketing and assembling the hush kit for 727s).

406. See Breskin, *supra* note 402, at 513 (describing joint venture with Pratt and Whitney); Stanley W. Kandebo, *Noise Compliance Rules Boost Airline Interest in Hushkits*, 135 AVIATION WK. & SPACE TECH. 56 (Aug. 5, 1991) (reporting that FedEx received FAA approval for its first hush kit in May 1989, its second in Feb. 1990 and its third in Nov. 1990). FedEx subsequently received FAA approval for its heavyweight hush kits in 1993. See Dave Hirschman, *Aircraft: Fed Ex Gets Approval for Heavy "Hush Kits"*, COM. APPEAL, Sept. 13, 1993, at B4 (reporting the FAA's approval of FedEx's heavyweight hush kits for 727s).

407. See, e.g., Jenkins, *supra* note 367, at 1052 (explaining that hush kits offered carriers a cheaper alternative to buying new planes or engines to meet stage 3 requirements); Kandebo, *supra* note 406, at 56 (describing airlines' increased interest in hush kits as a result of ANCA).

408. See, e.g., Kandebo, *supra* note 406, at 56 (describing hush kit prices as ranging from \$1.6 - \$1.85 million each, installed); Hirschman, *supra* note 406, at B4 (reporting that FedEx had received firm orders for over 100 hush kits at prices from \$ 1.65 million to \$2.45 million installed).

409. Don Carter, *New Airport Noise Law Did Little to Clear Air*, SEATTLE POST-INTELLIGENCER, Mar. 22, 1991, at B5 (quoting Carla Janes, a Washington resident).

E. Other Lawmaking Initiatives

Although a complete analysis of the major lawmaking initiatives in which FedEx has been involved is beyond the scope of this Article, the issues described in Sections A through D above are typical of FedEx's efforts in several ways. First, these were lawmaking issues in which FedEx sought legal changes that were of substantial financial significance to its operations. For FedEx, political activity was not a diversion of operating funds but rather an integrated part of its business strategy. Second, with the exception of the FAA "express company" rider, the issues were of general application, extending beyond FedEx and its operations. Third, as the case study demonstrates, FedEx's political involvement was far more extensive and complex than the making of campaign contributions to targeted legislators. Fourth, FedEx ultimately was successful in obtaining the desired regulatory changes although, in many cases, the effort extended over a prolonged period of time.⁴¹⁰ Finally, although the resulting legal changes applied broadly, in each case they provided particularized benefits to FedEx.

This pattern extends to other issues as well. An important example is FedEx's effort to compete with the United States Postal Service ("USPS"). At its inception, FedEx faced the problem of the Private Express Statutes, which prohibit private firms from delivering mail⁴¹¹ and thus precluded FedEx from expanding its operations to deliver letters.⁴¹² FedEx was constrained in its ability to challenge the Post Office's monopoly, not only because the USPS was a powerful political adversary,⁴¹³ but also because FedEx relied heavily on

410. Importantly, the balance of political forces is dynamic and, as they say, past performance is no guarantee of future success. Although FedEx continues to use similar political tools, a recent instance in which FedEx has, to date, failed to prevail is its dispute with the Department of Transportation over its claim for compensation in connection with the Sept. 11th attacks. See, e.g., Angela Greiling Keane, *DOT Wins FedEx Court Bout*, Traffic World, July 12, 2004, at 31 (describing FedEx's unsuccessful attempt to challenge DOT compensation procedures in federal court); Angela Greiling Keane, *Van Tine Advances; FedEx Continues to Oppose Nominee for No. 2 Spot at DOT; Full Senate to Vote*, TRAFFIC WORLD, Nov. 24, 2003, at 13 (describing unsuccessful efforts by FedEx to block the nomination of Kirk Van Tine as deputy secretary of transportation).

411. 39 U.S.C. §§ 601-06 (2005); 18 U.S.C. §§ 1693-99 (2005). More seriously punishable than merely carrying mail is the creation of a private express network capable of competing with the USPS. 18 U.S.C. § 1696.

412. Importantly, the Second Circuit upheld the constitutionality of the Private Express Statutes in 1978. *U.S. Postal Serv. v. Brennan*, 574 F.2d 712, 716 (2d Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

413. As one commentator reports:

The Postal Service, perhaps more than any other agency, is composed of politically powerful interest groups hostile to change. The agency's 800,000 workers and 25,000

revenue that it received for transporting mail delivered by the USPS.⁴¹⁴ Openly criticizing the government monopoly would jeopardize this revenue.⁴¹⁵

FedEx resolved the issue by securing a limited exception to the Private Express Statutes for courier services—the transport of items on a time-sensitive basis for which cost considerations were less important.⁴¹⁶ Smith argued to Congress that these courier services did not compete with the USPS's delivery of the mail and thus did not threaten its monopoly.⁴¹⁷ Ultimately in 1979, faced with the threat of congressional action, the USPS created an exemption from the Private Express Statutes for “extremely urgent letters.”⁴¹⁸ The exemption was specifically tailored to the needs of FedEx, enabling the company to carry letters for overnight delivery. In response to this regulatory change, FedEx significantly transformed its operations, shifting its focus from parcels to urgent business letters—a change that allowed FedEx to grow dramatically.⁴¹⁹

As with air cargo deregulation, this initiative occurred at an early stage of FedEx's operations. FedEx was not, in the late 1970s, the type of large public company envisioned by the Supreme Court in its campaign finance decisions that could influence the political process through massive corporate donations. Rather, the story leading to the urgent letter exemption is similar to that of the Federal Express Act—a fledgling company identified a regulatory issue that

postal managers exert enormous influence on Capitol Hill. Legislators are very hesitant to upset the postal unions, whose members live in every congressional district in the country.

See Thomas M. Lenard, *The United States Postal Service*, HERITAGE FOUNDATION REPS (1989).

414. See Dave Hirschman, *UPS Slams FedEx, Postal Plans*, ATLANTA J. & CONST., Sept. 8, 2000, at 1F (explaining that revenue from the USPS kept FedEx going during the mid 1970s).

415. See *Postal Oversight: Hearings Before the Senate Comm. on Post Office and Civil Service*, 93rd Cong. 291 (1973) (testimony of William Gelfand, VP, Flying Tiger Line, Inc.) (explaining that “the U.S. Postal Service reserves its own right to give mail to whom it desires without any established policies”).

416. *The Private Express Statutes: Hearings Before the Subcomm. on Postal Service of the House Comm on Post Office and Civil Service*, 93rd Cong. 34-35 (1973) (statement of Frederick W. Smith); see also *id.* at 43 (testimony of Frederick W. Smith) (proposing either time sensitive or rate sensitive test for exception to statutory monopoly).

417. See *id.* at 25-36 (statement of Frederick W. Smith) (explaining why the provision of special services did not compete with the USPS).

418. 39 C.F.R. § 320.6 (2005). The Postal Service defined such letters as those that met either a time of delivery test or a price test. 39 C.F.R. § 320.6(b)(1) (2005).

419. In June 1981, FedEx introduced the FedEx Overnight letter and within two months the new service was generating \$100,000 in revenues per night. See *Airline Observer*, AVIATION WK. & SPACE TECH., Aug. 17, 1981, at 35 (explaining how declining package size was responsible for increasing FedEx revenues). By 1982, following its expansion into the overnight letter industry, FedEx's net profits had reached \$78m and reflected an amazing 16% of revenues. *Federal Express; First Past the Parcel Post*, THE ECONOMIST, Sept. 18, 1982, at 78.

was of key importance to its business strategy and educated government policymakers about the issue through testimony, coalition building, and developing relationships with political officials.

FedEx's competition with the USPS did not end with the urgent letter exemption to the Private Express Statutes. Indeed, as FedEx's size and political influence grew, FedEx's challenges became bolder. In 1995, FedEx asked Congress to eliminate the USPS monopoly.⁴²⁰ In 1997, FedEx sued the USPS for violating the Lanham Act⁴²¹ through advertisements that falsely claimed that the USPS's Priority Mail offered comparable service to that of FedEx.⁴²² Although legislative relief remained elusive, FedEx's political power eventually led to a market-based resolution.⁴²³ In 2001, FedEx and the USPS publicly announced the creation of a \$6 billion, seven-year joint venture. The deal gave FedEx the right to haul USPS Express Mail, Priority Mail, and some first-class mail as well as the right to place FedEx drop boxes outside, and in some cases inside, government post offices.⁴²⁴

FedEx's experience with respect to international air shipping rights has been similar. Traditionally, gaining the right to fly international routes has been a complex political issue. Routes are the subject of bilateral agreements between countries that, in most cases,

420. See *Oversight Hearings on the United States Postal Service: Hearings Before the Subcomm. on Postal Service of the House Comm. on Government Reform and Oversight*, 104th Cong. (1995) (testimony of James Campbell, Jr., Counsel, Federal Express) (testifying that the USPS should "give up the monopoly and other special rights").

421. Section 43 of the Lanham Act, 15 U.S.C. § 1125(a) (2005), prohibits "any person" from making false or misleading representations of fact that would cause confusion as to the source, sponsorship, approval, association or origin of goods or services in the marketplace.

422. Although the USPS argued that, as a federal agency, it was immune from suit, the courts sided with FedEx. *Fed. Express Corp. v. U.S. Postal Service*, 959 F. Supp. 832, 840 (W.D. Tenn. 1997), *aff'd.*, *Fed. Express Corp. v. U. S. Postal Serv.*, 151 F.3d 536, 546 (6th Cir. 1998). The USPS then settled the suit by agreeing to drop the advertising campaign. See Ira Teinowitz & Sean Callahan, *Post Office Axes Ads Rapping its Rivals*, ADVERTISING AGE, Dec. 7, 1998, at 1 (attributing USPS decision to drop the controversial ads to the negotiations to end the FedEx lawsuit); Bill McAllister, *FedEx Delivers Blow to Ad Campaign by Postal Service*, WASH. POST., Dec. 9, 1998, at C11 (stating agency officials had confirmed the Advertising Age report).

423. That FedEx's political power was a significant factor in the deal is strongly suggested by the fact that FedEx was awarded the contract on a sole source basis rather than through a competitive bidding process. *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1075 (Fed. Cir. 2001).

424. Eileen Kennedy, *Federal Express Forms Alliance with U.S. Postal Service*, THE TELEGRAPH (Nashua, N.H.), Jan. 11, 2001. Notably, FedEx replaced Emery, which previously had a contract to deliver a portion of the Priority and Express mail. *Id.* Emery challenged the procedure by which FedEx was awarded the contract, and lost. *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d at 1089.

sharply restrict the number of permitted flights and carriers.⁴²⁵ Routes to Asia have been particularly restricted.⁴²⁶ At the same time, routes to Asia constitute an increasingly important component of the air cargo business, making increased service to Asia particularly desirable for FedEx.⁴²⁷

FedEx did not rely exclusively on political activity to obtain access to Asian routes. Indeed, its primary source of access was commercial: FedEx purchased the right to fly to China from Evergreen in 1995 and obtained the right to fly to Japan by acquiring Flying Tiger in 1988.⁴²⁸ Nonetheless, FedEx deployed its political capital aggressively to secure and improve its position.⁴²⁹ Importantly, with respect to international air routes, these efforts frequently provided FedEx with specific advantages relative to its competitors.⁴³⁰

For example, in the mid 1990s, FedEx sought increased air rights to Japan, in part to facilitate FedEx's use of its new hub in the Philippines.⁴³¹ Japan resisted, leading FedEx to complain to the Department of Transportation and to Congress.⁴³² When Japan resisted, FedEx used its influence in the Senate to have a resolution introduced threatening sanctions against Japanese airlines.⁴³³ Japan

425. See, e.g., Gabriel S. Meyer, Note, *U.S. - China Aviation Relations: Flight Path Toward Open Skies?*, 35 CORNELL INT'L L. J. 427, 428-30 (2002) (describing bilateral agreements and resulting restrictions).

426. See *id.* at 429 (describing restrictions imposed by existing treaty between U.S. and China); see generally Derek Lick, Note, *More Turbulence Ahead: A Bumpy Ride During U.S.-Japanese Aviation Talks Exemplifies the Need for A Pragmatic Course in Future Aviation Negotiations*, 31 VAND. J. TRANSNAT'L L. 1207 (1998) (describing hostilities between U.S. and Japan over proposals to expand air rights).

427. See, e.g., Lick, *supra* note 426, at 1222-24 (describing the importance of the Japanese cargo market).

428. Rick Brooks, *UPS Seems to Chip Away at FedEx's Big Lead in China-Company Works Hard to Get Its Own Direct Flights Into Growing Market*, WALL ST. J., May 16, 2000, at B4; see also Douglas A. Blackmon & Diane Brady, *Orient Express: Just How Hard Should A U.S. Company Woo A Big Foreign Market?*, WALL ST. J., Apr. 6, 1998, at A1 (describing FedEx's acquisition of the routes).

429. Asra Q. Nomani & Douglas A. Blackmon, *Reoriented: How Maneuvering By Airlines Shaped U.S.-Japan Accord*, WALL ST. J., Feb. 2, 1998, at A1 (detailing FedEx's political activity leading to a favored position under the new aviation treaty with Japan).

430. For example, FedEx's operations in China are significantly more developed than those of rival UPS. See Brooks, *supra* note 428, at 134 (reporting that "UPS is having trouble chipping away at FedEx's big lead in China"). See also Lick, *supra* note 426, at 1209 (stating that "most of the revenues" generated by air cargo operating in the Japanese market have gone to one carrier, FedEx).

431. Nomani & Blackmon, *supra* note 429, at A1.

432. See, e.g., *International Aviation: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 104th Cong. (1995) (testimony of Frederick Smith) (detailing FedEx's complaints about Japan's refusal to approve FedEx's route applications).

433. Nomani & Blackmon, *supra* note 429, at A1.

responded by approving additional FedEx flights.⁴³⁴ In August 1996, Smith obtained a private forty-five minute meeting with President Clinton regarding FedEx's need for increased routes to Japan.⁴³⁵ The Administration made protection of FedEx's rights a key component of subsequent negotiations⁴³⁶ and, ultimately, in 1998, the United States and Japan reached agreement on a new treaty.⁴³⁷ As the Wall Street Journal reported, the "biggest winner" under the treaty was FedEx.⁴³⁸

III. IMPLICATIONS OF THE CASE STUDY

A. Political Activity and Corporate Operations

The FedEx case study demonstrates that the characterization of corporate political activity as a diversion of operating funds is, at best, naive. U.S. corporations operate within a complex legal infrastructure, and the regulatory environment is an integral part of market decisions for corporations as well as a key factor in their growth and strategic planning. FedEx, and indeed the entire air cargo industry, could not have gotten off the ground without air cargo deregulation. FedEx's ability to develop and serve its customer base was critically enhanced by the urgent letter exemption, which enabled it to deliver letters as well as freight. Noise standards, labor rules, and trucking regulation directly affected FedEx's operating costs, influencing the manner in which FedEx developed its business plan, affecting its pricing structure, and defining its key industry competitors.

Campaign finance scholars and the Supreme Court have isolated corporate political activity without considering the relationship of politics to the firm's business strategy. Corporate scholars may emphasize marketplace competition at the cost of overlooking nonmarket strategies. Yet, as the FedEx story shows, firm competition takes place both in the marketplace and in the political arena; the dynamics of one environment affect the other.⁴³⁹

434. *Id.*

435. *Id.*

436. *Id.*

437. See Lick, *supra* note 426, at 1254-59 (analyzing the new agreement).

438. Nomani & Blackmon, *supra* note 429, at A1.

439. Although this Article has focused upon the effect of political activity on business operations, a firm's business operations also affect its political environment and may arguably be viewed as part of its political strategy. See, e.g., Sara F. Ellison & Catherine Wolfram, *Pharmaceutical Prices and Political Activity* 1 (Working Paper 2001) (explaining how pharmaceutical firms voluntarily reduced prices in the face of public pressure in a successful

Importantly, the connection between politics and business is not unique to FedEx. In attempting to implement its market strategy, MCI, for example, faced similar regulatory barriers to entry. MCI could not engage in marketplace competition with AT&T over the provision of long distance telephone service unless regulatory change eliminated AT&T's monopoly.⁴⁴⁰ MCI invested in political capital and, despite AT&T's substantial political clout, successfully obtained regulatory change—deregulation of the long distance industry.⁴⁴¹ Following this success, MCI continued to be a dominant political player and successfully used its political capital on a range of other issues.⁴⁴² Indeed, MCI's view of the importance of Washington politics seems to rival that of FedEx, as reflected in its purchase of the naming rights to the MCI Center.⁴⁴³

Another example is Enron. Deregulation of the energy industry was a key component of Enron's business plan.⁴⁴⁴ Enron developed its political capital—making large political contributions and building relationships with state and federal government officials⁴⁴⁵—in order to obtain regulatory changes that would enable it to build its energy trading market.⁴⁴⁶ Having established this political capital, Enron continued to use it. Thus, Senator Phil Gramm was instrumental in insuring that the Commodity Futures Modernization

effort to avoid price regulation and arguing that the most politically vulnerable firms were most responsive to the threat of regulation).

440. See Hart, *supra* note 17, at 58-59 (explaining that "MCI's success would have been impossible without deregulation of the telecommunications industry").

441. *Id.* at 59.

442. See Mike Mills, *Telecom's Lavish Spending on Lobbying*, WASH. POST, Dec. 6, 1998, at H01 (describing MCI's extensive political activity and suggesting that this activity was related to MCI's receipt of regulatory approval for its merger with WorldCom).

443. See Rudolph A. Pyatt Jr., *Bricks and Mortar Built Year's Top Local Business Stories*, WASH. POST, Jan. 1, 1998, at C03 (describing MCI's multi-million dollar purchase of the naming rights to the MCI Center in Washington).

444. See, e.g., William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1278 (2002) (explaining that Enron's "primary business, energy trading, only came into existence in the wake of deregulation of electricity and natural gas production and supply").

445. Like FedEx, Enron's political strategy consisted of a combination of large political expenditures and the cultivation of relationships with public officials and policymakers. See Timothy P. Duane, *Regulation's Rationale: Learning from the California Energy Crisis*, 19 YALE J. ON REG. 471, 474 n.10 (2002) (describing relationships including Enron's selection of Wendy Gramm, wife of Senator Phil Gramm, to serve on its board of directors and Enron's payment of \$50,000 to President Bush's senior economic advisor, Lawrence B. Lindsey to have Lindsey serve on Enron's advisory board).

446. See Bratton, *supra* note 444, at 1278-79 (describing Enron's extensive political activity aimed at eliminating protected energy monopolies, and its success in this efforts); Kurt Eichenwald, *Enron's Collapse: Audacious Climb to Success Ended in a Dizzying Plunge*, N.Y. TIMES, Jan. 13, 2002, at 1 (explaining how deregulation enabled Enron to create and dominate the nation's energy trading markets).

Act⁴⁴⁷ included the "Enron Point," which excluded energy trading companies from federal financial oversight.⁴⁴⁸

Of course, firms play politics in different ways. Even the easily measured empirical benchmarks of political activity reveal different strategies. The following table provides an illustration:

	FedEx	UPS	American Airlines	United Airlines
PAC Expenditures 1995-96 ⁴⁴⁹	943,000	1,788,147	320,817	181,550
Soft Money Contributions 1997-98 ⁴⁵⁰	927,750	300,181	497,804	290,927
Lobbying Expenditures 1997 ⁴⁵¹	3,300,000	880,000	5,560,000	1,200,000

Despite the importance of legislative policies to large public companies, 40% of Fortune 500 companies do not even have a political action committee.⁴⁵² Nine of the Fortune 100 firms, including IBM, have neither established a PAC nor contributed soft money.⁴⁵³ IBM does, however, make extensive lobbying expenditures and has a highly respected Washington government affairs office.⁴⁵⁴

Firms also modify the form of their political participation. British Petroleum ("BP"), for example, contributed almost \$1.7 million to U.S. candidates and political parties from 1999 to 2002.⁴⁵⁵ In 2002, however, Chief Executive Officer Sir John Brown announced that BP would cease making political contributions worldwide.⁴⁵⁶ BP did not forswear all political activism; it merely shifted its tactic from

447. Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000).

448. Bratton, *supra* note 444, at 1279-80.

449. THE ALMANAC OF FEDERAL PACS 2000-2001 (Edward Zukerman ed., 2000).

450. Center for Responsive Politics, *Soft Money*, www.opensecrets.org (last visited Nov. 10, 2005).

451. Center for Responsive Politics, *Lobbyist Spending: Air Transport*, www.opensecrets.org (last visited Oct. 31, 2005).

452. Ansolabehere, et al., *supra* note 18, at 108. The explanation for the failure of more firms to establish PACs cannot solely be freeriding. Roughly one-third of industries have no firms at all with PACs. *Id.*

453. Hart, *supra* note 17, at 40-41.

454. David M. Hart, *Why Do Some Firms Give? Why Do Some Give a Lot?: High-Tech PACs, 1977-1996*, 63 J. POL. 1230, 1242 (2001).

455. Justin Gerdes, *Big Oil Still Lubes U.S. Energy Policy*, ENVIRON. NEWS NETWORK, Apr. 5, 2002.

456. *Id.* (reporting Sir Browne's announcement).

campaign contributions to lobbying.⁴⁵⁷ Indeed, at the same time that BP ceased its political donations, the company hired Anji Hunter, one of Tony Blair's closest aides, as director of communications.⁴⁵⁸

Empirical studies that focus on a single type of activity, therefore, may overlook or distort the extent of a corporation's political involvement.⁴⁵⁹ Similarly, empirical studies virtually never consider more subtle forms of political influence, including lobbying and testimony by in-house employees, participation in the "revolving door" of hiring former government officials and staffers, development and exploitation of relationships between corporate and political leaders, and corporate philanthropy. One of the advantages of the case study methodology is that it identifies factors that may be omitted from broader based empirical studies.⁴⁶⁰ These factors are important not just in designing campaign finance regulation but also in understanding the process by which interest group competition is resolved.⁴⁶¹ Many of FedEx's actions are far less transparent forms of political influence than PAC expenditures.⁴⁶² At the same time, there are reasons to believe that they are more effective in influencing policy—in part because they transmit information that enables a political official to understand and to rationalize his support for the

457. Some current research supports BP's decision, finding that lobbying expenditures are more effective at influencing government policy than political contributions. See Micky Tripathi, et. al., *Are PAC Contributions and Lobbying Linked? New Evidence from the 1995 Lobby Disclosure Act*, 4 BUS. & POL. 131 (2002) (identifying correlation between PAC contributions and lobbying and emphasizing importance of lobbying); J.R. Wright, *Contributions, Lobbying and Committee Voting in the U.S. House of Representatives*, 84 AM. POLI. SCI. REV. 417 (1990) (finding that the number of lobbying contacts was a better predictor of legislators' votes than campaign contributions).

458. Rosemary Bennett & Astrid Wendlandt, *Business Finds New Ways for Its Presents to Be Felt*, FIN. TIMES, Apr. 3, 2003, at 4.

459. See, e.g., Moe, *supra* note 29, at 1095 (observing that empirical studies "focus only on very small parts of the whole" and therefore "omit factors whose causal effects may overwhelm or distort the 'special' relationships on which they singularly focus").

460. See also Witold Henisz & Bennet Zelner, *The Strategic Organization of Political Risks and Opportunities*, 1 STRATEGIC ORG. 451, 451 (2003) (identifying the importance of bringing the insights of strategic organization to political activity and urging scholars to focus greater attention on the process by which corporations identify and exploit political opportunities).

461. See, e.g., *id.*, at 456 (finding that interest group concentration and power do not guarantee success in obtaining policy objectives and finding heterogeneity in interest group effectiveness depending on their capabilities to manage political risks and opportunities). Among the factors that Henisz and Zelner identify as important are firms' skills in understanding their policymaking environment, "cultivating relationships, building and maintaining coalitions, framing debates in a manner that resonates with powerful external or internal constituencies, and enhancing the perceived legitimacy of their behavior." *Id.*

462. See also Fisch, *supra* note 15, at 1101-02 (observing that politically vulnerable companies make generous charitable contributions and publicize those contributions and arguing that such contributions may be motivated by an effort to generate goodwill from policymakers).

corporation's policy objectives⁴⁶³ and in part because they look less like vote-buying.⁴⁶⁴

Is playing politics a good business strategy? It is hard to know. In addition to the challenges of quantifying a firm's investment in political capital, it is difficult to separate the effect of the firm's political activity from other components of its business strategy. The bankruptcies of MCI/WorldCom and Enron make it clear that even extraordinary political effectiveness cannot save a firm from the effects of bad business decisions or fraud. Moreover, inter-firm comparisons of profitability or shareholder value are likely to be misleading as industry competitors may have very different company histories, ownership structures, and so forth. For example, FedEx experienced the dramatic growth of a successful start-up company from the late 1970s, when UPS was already well established, at least with respect to ground shipping.⁴⁶⁵ Nonetheless, a back of the envelope comparison between FedEx and UPS from 1999 to 2004, a period during which the two were industry leaders and each others' primary competitors, reveals that a comparable investment in the common stock of each company would have produced a cumulative return of 107.65% for FedEx⁴⁶⁶ and 15.37% for UPS.⁴⁶⁷

The importance of the legal environment in business operations and the role of politics in shaping that environment make it clear that corporations cannot and will not abstain from political activity. Indeed, these factors explain why regulation of corporate political activity has been and will continue to be characterized by corporations responding to regulatory limits by developing alternative ways to participate in the political process. Moreover, the range of activities by which corporations can and do influence policymaking, despite

463. See Henisz & Zelner, *supra* note 460, at 454-55 (explaining that interest groups are influential because they provide information to politicians, particularly information that legitimizes their desired policy).

464. See, e.g., Hart, *supra* note 454, at 1242-43 (explaining IBM's decision not to form a PAC as based on concerns about the firm's involvement in campaign finance scandals in the 1970s).

465. For example, an investment of \$1000 in FedEx stock on April 12, 1978 was worth \$91,638.67 as of Oct. 27, 2004, reflecting a cumulative return of 9,068.37%. *FedEx Investment Calculator*, <http://fdx.client.shareholder.com/calculator.cfm>. A Darden School study, however, which compares the financial performance of the two companies over the period from 1982 until 1995, finds that UPS offered substantially better returns to investors and that UPS has consistently managed its capital more efficiently than FedEx. Robert F. Bruner & Derick Bulkley, *The Battle for Value: Federal Express Corporation vs. United Parcel Service of America, Inc.*, UVA-F-1115, Darden School Case Study (July 1997).

466. *FedEx Investment Calculator*, <http://fdx.client.shareholder.com/calculator.cfm>. (calculating return for an investment of \$1,000 from Nov. 10, 1999 to Oct. 27, 2004).

467. *UPS Investment Calculator*, <http://www.shareholder.com/ups/calculator.cfm> (last visited Oct. 31, 2005) (calculating return for an investment of \$1000 from Nov. 10, 1999 to Oct. 27, 2004).

increasing statutory efforts to restrict such influence, should give pause to regulators. This analysis suggests a need to rethink the existing regulatory structure, a subject to which this Article turns in the next Section.⁴⁶⁸

B. The FedEx Story and Campaign Finance Regulation

Does the FedEx story suggest that attempts to regulate corporate political participation are misguided? In a sense, yes. Existing regulatory policy is largely, if not entirely, driven by the perception that corporate political activity is illegitimate and should be limited. The preceding discussion argues instead that such activity is an important component of corporate business strategy and that political efforts are related to and supplement marketplace competition. In addition, the more expansive and textured conception of political activity described in this Article explains how corporations have developed alternatives to evade existing attempts at regulation and why they will continue to do so. Because corporate political activity is inevitable, campaign finance regulation should focus less on the issue of *whether* corporations should participate in politics and instead consider the question of *how* corporations should participate.

This Article does not argue that existing restrictions on corporate political activity should be eliminated, nor does it propose a specific regulatory structure. Such conclusions are beyond the scope of this Article and would require both a more extended analysis of the existing regulatory framework and, more importantly, a broader inquiry into the nature and extent of political activity across a range of companies, industries, and time periods. It would be presumptuous to premise a reform agenda on the experience of a single corporation. Nonetheless, the FedEx case study identifies several approaches that should guide an agenda for regulatory reform.

First, as the FedEx experience reveals, a substantial amount of political activity occurs off the radar screen. There is no systematic mechanism by which corporate involvement with respect to specific policy issues is recorded, reported, or disclosed. The visibility of corporate political activity, on an issue specific basis, is happenstance and sporadic, depending largely on individual press reports.⁴⁶⁹

468. The analysis also suggests limits in the extent to which broad-based empirical research accurately captures the nature and effectiveness of political activity, an issue that I explore in more detail elsewhere. Fisch, *supra* note 15.

469. Although media research has been remarkably effective in uncovering the role of corporations in the political process, as indicated by the references in this Article, the nature and extent of press coverage is subject to potential biases. See, e.g., Riccardo Puglisi, *Being the New*

Concededly, recent regulations have increased disclosure requirements. Existing campaign finance laws require the disclosure of PAC expenditures and soft money donations,⁴⁷⁰ and recent federal legislation also requires public disclosure of lobbying expenditures.⁴⁷¹ In practice, however, these disclosures are incomplete. Individual firms may mask their activity by acting through a trade association, and that association's members, objectives, and financial structure may be only partially transparent. Although firms must disclose funds paid to outside lobbyists, they need not quantify the in-house dollars expended on lobbying, nor are the disclosure requirements sufficiently detailed as to subject matter. Firms also need not disclose their efforts to generate grassroots lobbying support, a process former Senator Lloyd Bentsen has termed "astroturf lobbying."⁴⁷² Perhaps most importantly, there is no single source in which the range of political activity is collected and organized, either by policy initiative or by corporation.

At least two mechanisms could provide more informative disclosure. One approach would involve Congress providing, as part of a bill's legislative history, information on persons and groups that participated in the legislative process. Congress might, for example, disclose the identities of those who drafted, testified, and commented on proposed legislation, as well as a summary of their testimony or position, in the Conference Report or as part of the final statute. This type of disclosure, although foreign to the campaign finance literature, is not unprecedented. Administrative agencies routinely publish the formal comments of participants in the rulemaking process and include a summary of participant positions as part of the rulemaking process. For example, the Securities and Exchange Commission publishes comment letters on its website⁴⁷³ and, in its adopting releases, briefly describes the responses that it received to its requests

York Times: The Political Behaviour of a Newspaper (Massachusetts Inst. of Tech. Dep't of Political Science Working Paper Sept. 24, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=573801 (reporting results of empirical research finding New York Times' coverage during presidential campaigns is influenced by the party affiliation of the incumbent president).

470. Importantly, disclosed information is posted on the Federal Election Commission's web site, www.fec.gov, enabling direct public access.

471. The Center for Responsive Politics posts reported lobbying expenditures, but its data is several years old. See Center for Responsive Politics, www.opensecrets.org (last visited Oct. 31, 2005) (providing lobbying expenditures for 1997 through 2000).

472. See Lyon & Maxwell, *supra* note 84, at 563 (describing astroturf lobbying).

473. See Securities and Exchange Commission, How to Submit Comments, <http://www.sec.gov/rules/submitcomments.htm> (last visited Oct. 31, 2005) (explaining how to submit comments and stating that all comments will be made available to the public and posted on the SEC website).

for comments.⁴⁷⁴ This disclosure greatly increases the transparency of interest group involvement in the rulemaking process.

It may also be desirable to incorporate political activity into the disclosure requirements applicable to publicly-traded companies under the federal securities laws. In addition to enabling shareholders to monitor the activities of a corporation's officers and directors, and thereby to police against possible waste or self-dealing, such disclosure would integrate information on political activity with a firm's reporting on the business operations to which the firm's political participation relates. Although reporting political activity would require corporations to make some judgments about the cost and purpose of particular expenditures, the requirement would be consistent with the growing recognition of the importance of including intangibles in financial reporting.⁴⁷⁵ Moreover, management could provide an overview of activities and substantive issues in a narrative form as part of the Management's Discussion and Analysis disclosure.⁴⁷⁶

The FedEx story also highlights the information component of corporate political activity. Many regulatory issues are highly complex, and political officials are poorly positioned to evaluate the costs and benefits of policy choices under consideration.⁴⁷⁷ In contrast, corporations are typically knowledgeable about the costs and benefits of proposed regulatory changes; indeed, they are likely to be the lowest cost providers of information about the effects of regulatory choices upon business operations. The result has long been recognized as an information asymmetry that constrains efficient policymaking.⁴⁷⁸

474. See, e.g., SEC Final Rule, Short Sales, Sec. & Exch. Act Rel. No. 34-50,103, Jul. 28, 2004, available at <http://www.sec.gov/rules/final/34-50103.htm> (describing comments of industry participants in response to proposed short sale price test).

475. See, e.g., Robert E. Litan, *The GAAP Gap: Corporate Disclosure in the Internet Age*, 32 U. WEST. L.A. L. REV. 193, 195-96 (2001) (identifying the need for financial disclosure to incorporate increased information about intangible assets); Olufunmilayo B. Arewa, *Breaking Through the Intangibles Haze: Business Paradigms and Changing Business Discourse* (Working Paper 2004) (on file with author) (describing the importance of growth in intangibles to financial reporting and business strategy).

476. See Item 303 of Regulation S-K, Management's Discussion and Analysis of Financial Conditions and Results of Operations ("MD&A"), 17 C.F.R. § 229.303 (requiring management to supplement financial disclosure with information about trends, commitments, and other transactions that may materially affect issuer's financial condition).

477. See, e.g., Bruce Bimber, *Information as a Factor in Congressional Politics*, 16 LEGIS. STUD. Q. 585, 597 (1991) (describing legislators as "often uncertain about the relationship between political outcomes in the legislature and their actual consequences for constituents").

478. See, e.g., Otto Keck, *The Information Dilemma: Private Information as a Cause of Transaction Failure in Markets, Regulation, Hierarchy, and Politics*, 31 J. CONFLICT. RES. 139, 155-56 (1987) (citing Max Weber's earlier work, MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT,

Corporate political activity has the potential to overcome the information asymmetry if corporations, through their participation in policymaking, can obtain beneficial regulatory changes. Indeed, one of the reasons that lobbying may be one of the more effective forms of political participation is its role in conveying information to policymakers.⁴⁷⁹ Moreover, corporate political activity is privately funded—the corporation that benefits from efficiently structured legal rules pays the cost of informing the policymaker about how best to structure those rules. Accordingly, campaign finance rules that encourage information production may be socially valuable. At the same time, campaign finance regulation may be able to limit wasteful expenditures.⁴⁸⁰

This analysis offers a justification for existing limitations on naked corporate money expenditures such as direct contributions or soft money donations that have little information content. Such limitations may have the effect of channeling expenditures toward high information content activities such as lobbying, testimony, and other direct contacts. Regulation might further increase the information content of political activity by providing a formal structure for the provision of information, such as a written position statement in the form of a comment letter (akin to the administrative comment process) or as part of the required lobbying disclosure. Some of this information is already provided through written statements when corporate officials give formal testimony; the availability of this information could be enhanced by including a list of such statements in the legislative history.

Finally, the FedEx story should cause us to think more carefully about the nature of special interest legislation. Policy reforms that provide particularized benefits to corporations that have actively participated in the regulatory process are typically characterized as special interest legislation with the derogatory connotation of rentseeking. As the case study shows, however, effective political influence depends on intangibles such as relationships and political expertise, rather than mere monetary expenditures. Accordingly, firms face barriers to entering the political arena, and those firms that have invested in political capital can

Tuebingen: Mohr (Siebeck) 574 (1980), and stating that recent scholarship concurs with Weber in regarding "asymmetric information as one of the main problems in regulation").

479. See, e.g., Scott Ainsworth, *Regulating Lobbyists and Interest Group Influence*, 55 J. POL. 41, 44-45, 52 (1993) (describing lobbyist role in the provision of information and emphasizing quality as well as quantity of lobbyist contacts as a factor in lobbying effectiveness).

480. In particular, David Hart distinguishes political efforts that seek industry-wide benefits from so-called "arms races." Hart, *supra* note 454, at 1231.

exploit economies of scale to participate more efficiently. Thus, the structure of the political process causes levels of corporate political activity to vary dramatically among firms, even within a given industry. As the following tables demonstrate, FedEx's political expenditures, in addition to its less visible activities, have consistently outdistanced those of its industry competitors.

PAC Contributions⁴⁸¹

	1977-78	1985-86	1989-90	1995-96	1999-2000
Emery/CNF Transport	0	108,000	99,050	87,000	91,250
Evergreen	0	0	12,450 ⁴⁸²	0	0
Federal Express	8,985	225,500	756,950	943,000	1,175,180

Soft Money Contributions⁴⁸³

	1997-98	1999-2000	2001-2002
Emery/CNF Transport	0	0	500
Evergreen	24,000	140,000	86,000
Federal Express	927,750	1,327,600	582,469

Lobbying Expenditures⁴⁸⁴

	1997	1998	1999	2000
Emery/CNF Transport	0	0	0	0
Evergreen	20,000	0	0	\$40,000
Federal Express	3,300,000	3,320,000	3,320,000	3,320,000

FedEx's regulatory initiatives—including air cargo deregulation, trucking deregulation, aircraft noise regulation, and the urgent letter exemption to the Private Express Statutes—benefited its peers, and the statistics suggest that other firms may have been

481. THE ALMANAC OF FEDERAL PACS 1992-1993, at 129 (Edward Zukerman ed., 1992) (for 1977-1990); THE ALMANAC OF FEDERAL PACS 2000-2001, at 59, 91 (Edward Zukerman ed., 2000) (for 1991-1998); Center for Responsive Politics, Data of PAC Contributions to Federal Candidates: Air Transport, www.opensecrets.org (last visited Oct. 31, 2005).

482. Center for Responsive Politics, Top Contributors to Federal Candidates and Parties (Airlines), Election Cycle 1990, <http://www.opensecrets.org/industries/contrib.asp?Ind=T1100&Cycle=1990> (last visited Nov. 10, 2005).

483. Center for Responsive Politics, Soft Money Donor Search, www.opensecrets.org (last visited Nov. 10, 2005).

484. Center for Responsive Politics, Data of Lobbyist Spending: Air Transport, www.opensecrets.org (last visited Oct. 31, 2005).

freeriding on FedEx's political activities. Although the specialization and the resulting segmentation within an industry between politically active firms and freeriders may prevent wasteful duplication of effort, this suggests a puzzle as to why FedEx would be willing to incur a disproportionate share of the costs of representing its industry in the political process.

The case study offers some insight into this question. It reveals that, although FedEx has generally sought broad-based reforms that benefit the entire express carrier industry, each piece of legislation provided particularized benefits to FedEx. For example, only FedEx and Flying Tiger benefited from the provision of the 1977 Air Cargo Deregulation Act that granted existing carriers a one-year competition free head start for entry into new markets.⁴⁸⁵ As one commentator explained, this window of opportunity gave FedEx a sufficient head start to enable it to dominate the new industry.⁴⁸⁶ Trucking deregulation began with the ICC increasing the scope of the exemption for services incidental to air cargo transportation and included FedEx obtaining a favorable Ninth Circuit decision that exempted it from intrastate trucking restrictions. The final version of the statute deregulating intrastate trucking contained a separate provision applicable to air carriers,⁴⁸⁷ providing a measure of insulation in the event that the broader provisions of the statute were successfully challenged as unconstitutional.⁴⁸⁸ In seeking relief from the Postal Service monopoly, FedEx obtained an exemption—the express letter exemption—specifically crafted to enable it to introduce the FedEx Overnight Letter.⁴⁸⁹ FedEx was the first air cargo company to introduce overnight letter delivery service and was able to use this service to distinguish itself at a time when the air cargo industry was becoming increasingly competitive.⁴⁹⁰

485. See Dempsey, *supra* note 134, at 148 (describing this component of the Act as "a rather clever provision; allowing established air cargo companies a one year moratorium (from November 1977 to November 1978) during which they were free to enter any domestic markets of their choice; new entrants would be free to enter only after that period").

486. *Id.*

487. 49 U.S.C. § 41713(b) (2005).

488. Indeed, the legislation was challenged as unconstitutional, although the Tenth Circuit rejected the challenge. *Kelley v. United States*, 69 F.3d 1503, 1511 (10th Cir. 1995), *cert. denied*, 517 U.S. 1166 (1996).

489. The exemption was of limited benefit to other cargo carriers that did not rely on air transport to the same extent and that were less interested in expanding from cargo to letters, such as UPS.

490. See Susan Castledine, *Competition Grows in Air Freight Package Service*, AVIATION. WK. & SPACE TECH., Nov. 30, 1981, at 36 (describing competition in the air cargo industry and range of services offered by different companies).

Similarly, FedEx was successful in the broad effort to establish national regulation of aircraft noise, but the structure of ANCA was particularly beneficial to FedEx. First, national regulation virtually eliminated local restrictions on flights such as curfews, which were burdensome for the air cargo industry and particularly for FedEx due to the nature of its business model. Second, the price for national regulation was a national policy that required the airline industry to reduce aircraft noise through the use of quieter planes and engines. These reductions were expensive. As one of the largest air cargo carriers subject to the regulation, FedEx could more easily bear the costs of the regulation than its smaller competitors; indeed, the regulation effectively increased the barriers to new entry into the air cargo industry. Third, FedEx successfully persuaded regulators to adopt a performance-based approach to regulation. Performance standards both allowed FedEx to continue to use its older airplanes and offered FedEx the opportunity to profit by selling hush kits to other carriers.

One might characterize these particularized benefits for FedEx as special interest legislation. Alternatively, they may be understood as a subsidy for FedEx's political activity. By providing FedEx with specific benefits, the statutes allowed FedEx to overcome the freerider problem presented by allocating firm specific political capital to broad-based regulatory initiatives. Although this analysis clearly does not extend to all legislation that provides particularized benefits to a limited number of firms, it suggests that statutory benefits must be evaluated within the cost structure of political activity and the relationship between that activity and marketplace competition.

CONCLUSION

Academics are a long way from understanding the political process and the role of corporations within that process. The mixed, complex, and often opaque motives of political actors create substantial obstacles to studying the effects of corporate political activity. At the same time, it is difficult to get a handle on the scope of corporate political activity and to identify the range of corporate activities that are designed to influence the political process. Nonetheless, increasing levels of political participation by corporations, which in turn lead to ever-increasing campaign finance regulations, demand a better understanding of corporate political activity.

This Article offers a modest starting point for developing a broader framework of analysis. The Article uses a case study

methodology to look inside the black box and to explore the nature of corporate participation in the political process. The case study provides the first detailed analysis of the manner in which a corporation develops and deploys its political capital across a range of policy initiatives. The analysis provides valuable insights as to the breadth of activities that influence legislative policymaking, the interrelationship of those activities, and their potential effectiveness, both in achieving the corporation's desired policy objectives and in enhancing its market position. In particular, the FedEx story provides powerful evidence that political participation is an important component of corporate business strategy.

There are several key implications of the FedEx story. First, the case study predicts that existing regulatory efforts to limit corporate political participation are unlikely to succeed, both because they use an artificially narrow conception of political participation and because of the relationship between a corporation's market and nonmarket activities. Second, it suggests that such efforts may be misguided in that advocates of such restrictions overstate the social costs of corporate political participation and overlook the ways in which such participation may enhance the legislative process. Finally, the study reveals several factors that policymakers should consider in their efforts to regulate corporate political activity, including transparency, provision of information, and firm specialization with respect to political capital.

Regulation has become an important factor for U.S. businesses. As a result, corporate political activity must be integrated within a corporation's overall business strategy, and corporations need to develop and manage their political capital in the same way that they manage other business assets. The FedEx story demonstrates the importance of politics to business and explains the growing investment by corporations in political capital. It further explains how the business world has responded, and will continue to respond, to regulatory restrictions by developing alternative mechanisms for exerting political influence. By understanding how and why corporations participate in politics, policymakers can better address concerns about the effect of corporate political influence.

Symbiotic Federalism and the Structure of Corporate Law

Marcel Kahan

Edward Rock

58 Vand. L. Rev. 1573 (2005)

We examine the relationship between federal and state lawmaking in the area of corporate law. The possibility that federal legislation may preempt state corporate law constitutes a threat to Delaware, which derives significant profits from being the domicile of choice for public corporations. But this threat is significant only in times when systemic change is seen as generating a significant populist payoff. Delaware has adapted to this threat by pursuing a "classical" common law model of lawmaking: corporate law is largely judge-made; judicial opinions are filled with quasi-deterministic reasoning; statutory law is comparatively narrow and rarely the subject of partisan disputes; the judiciary as well is relatively non-partisan and has a claim to technical expertise; and the law is enforced through litigation brought by private parties. By creating and enhancing an apolitical gloss over Delaware's corporate law, these various traits help shield Delaware against the threat of federal preemption. But this classical model of lawmaking carries with it intrinsic limitations: legal change is slow, standard-based and incremental. Because of these constraints, federal law may be needed to complement Delaware's. In that respect, the relation between federal law and Delaware law is symbiotic, rather than competitive: Delaware is happy to have federal law pick up the slack and thereby reduce the likelihood that ineffective regulation produces a populist backlash.
