Campaign Finance, Iron Triangles & the Decline of American Political Discourse

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I. Introduction

Democracy is supposed to be a participatory sport, one in which all citizens have a role to play. Unfortunately, since the mid-1960’s, public confidence in politics and government has fallen sharply. This is reflected in numerous public opinion surveys and in declining levels of participation in the political process. Most Americans fail to either vote or register to vote, and fewer volunteer on political campaigns, keep informed on political issues, or pay much attention to politics at all. American democracy has become largely a spectator sport. Increasing numbers of citizens watch passively as moneied interests exert greater and greater influence on elections and policy...
outcomes. Americans watch TV at record levels, and nearly twice as many watch "American Idol" than the most popular TV news program. Historians may someday conclude that this was an idle generation, unable or unwilling to assume many of the responsibilities of citizenship. Unfortunately, these are dangerous times for American democracy to so lose its way.

II. Moneyed Interests in American Politics

It is easy to blame politicians for the decline in public confidence, but the problem is larger than any particular individual or political party. To be elected and to keep one's office, politicians must enter into a web of symbiotic relationships with powerful private interests. As a Senate staffer in the 1980's, I saw firsthand how important it was for incumbent members of Congress to court powerful financial contributors and then to curry favor with their lobbyists.

Political scientists have long referred to the capture of government by private interests as an "Iron Triangle." Each side of the triangle reinforces the mutual dependence and privileged positions of the other sides. Private interest groups provide the crucial financial contributions that help politicians get elected. In return, they gain access to elected officials and the ability to dominate the legislative process that protects their business interests.

Meanwhile, legislators routinely evade public scrutiny by delegating many hard decisions and details of policymaking to administrative agencies which are then subject to lobbying and capture by the same private interest groups. The "revolving door" is a great incentive for legislators and bureaucrats to play ball in return for the prospect of much higher paying salaries and positions in the private sector. According to a study by the Center for Public Integrity, "Over a three-year period ending in 2005, nearly 1,600 former lawmakers across the country were registered to lobby state legislatures for special interests." A study by Public Citizen found that 43 percent of

4. For the week of April 3-9, 2006, more than 23 million Americans viewed the television show American Idol, while about 14 million viewed 60 Minutes, the most popular TV news program, according to the Nielsen TV ratings. David Bauder, TV ratings: 'Idol' Boosts 'House,' ASSOCIATED PRESS, Apr. 12, 2006, available at http://www.ocregister.com/ocregister/entertainment/atoz/article_1996599.php (last visited Jan. 8, 2007).
5. The author served as a legislative assistant to former U.S. Senator Paul E. Tsongas.
members of Congress who left office between 1998 and 2004 became lobbyists.\textsuperscript{8}

One of the more notorious examples of revolving door influence involved Billy Tauzin, a Republican representative from Louisiana who wrote Medicare legislation in 2004 that forbids the federal government from negotiating prescription drug prices. He soon retired and became president of the Pharmaceutical Research and Manufacturing Association (Pharma), the industry’s trade group, for a reported $2 million per year.\textsuperscript{9} Unfortunately, this is rather routine. Elected representatives regularly leave office to become registered lobbyists, executives or board members for the same corporations that had previously lobbied them and contributed to their campaigns while in office.\textsuperscript{10}

The close link between political donations and policy outcomes, while usually hidden, is widely assumed by a cynical public and often suggested in the journalistic press.\textsuperscript{11} Those with money to shower on politicians, whether in the form of campaign contributions or corporate board memberships, receive access and favorable legislation and regulatory treatment. Such symbiotic relationships, routine as they are, cross the line into illegality when the payoffs are made explicit. Last year, Congress was marked by bribery scandals involving both Republican and Democratic lawmakers.\textsuperscript{12} Jack Abramoff, the Republican lobbyist at the center of one of those scandals, claimed that his own activities were consistent with the prevailing culture among lobbyists.\textsuperscript{13} Such cries were clearly intended to excuse Abramoff’s own conduct and we should be reluctant to conclude that political bribery is widely practiced in such explicit form. But we should also be on guard against a more insidious corruption in our politics.

The U.S. political system was founded on the idea that membership and participation in private interest groups facilitates political representation for all citizens. James Madison argued in The Federalist Papers that interest groups (or “factions,” as he referred to them) posed a particular danger that could threaten “both the public good and the rights of other citizens” in a democracy.\textsuperscript{14} There were two methods of curing the mischief


\textsuperscript{10} Id.

\textsuperscript{11} Greg Palast, The Best Democracy Money Can Buy (Plume 2004).


\textsuperscript{14} The Federalist No. 10 (James Madison). Madison was most concerned with controlling the excesses of any majority factions in a popular democracy. Id.
of faction, according to Madison: removing its causes, or controlling its effects. But there was no way to remove its causes since factions were the outgrowth of political freedom and “the natural diversity in the faculties of men.” Destroying such liberty, Madison warned, would be “worse than the disease.”

The only solution, according to Madison, was to control the effects of faction, and that could be accomplished by enlarging the geographic scope of the republic and encouraging the proliferation of minority factions to oppose and counter the influence of any potentially dangerous faction.

From the beginning, this was a selective theory of representation. Not only were blacks, women and poor white men excluded from representation and deprived of the vote, but the system of checks, balances, and separation of powers ensured that minority factions could always slow the legislative agenda of populist forces. This was made clear by Madison’s view that the constitutional blueprint would help stymie “a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project.”

The Madisonian solution of encouraging factions to counter factions became the touchstone for modern liberal political theory. After World War Two, concerns about the rise of corporate power were assuaged in part by the idea of “countervailing power.” John Kenneth Galbraith coined that phrase to describe the promotion of Big Labor to counter the power of Big Business. As long as labor was free to organize, nurtured by an activist government that would guarantee procedural fairness, the outcome of the political clash and collective bargaining between business and labor was presumed to equate with the public interest.

This discourse of countervailing power dominates liberal pluralist theory and animates much of the campaign finance reform discussion. For instance, pluralists argue that the public interest is simply the outcome of interest group politics, the bargain of the moment, the sum of the parts of their clashing private agendas. Any other definition of the public interest would require a normative theory of politics that substitutes subjective values for the outcomes of the political marketplace. The pluralists offer an appealing proceduralist vision that limits

15. Id. (“Liberty is to faction what air is to fire, an aliment without which it instantly expires.”).
16. Id. (“Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in union with each other.”).
17. Id. (the views of dangerous factions would then be “refined[d] and enlarge[d] . . . by passing them through the medium of a chosen body of citizens . . . ”).
19. The Federalist No. 10 (James Madison).
the role of government to safeguarding
the freedom of citizens to voluntarily asso-
ciate, form interest groups, and spend
freely on political campaigns.
According to this discourse, govern-
ment restrictions on political contribu-
tions and expenditures would infringe on
people's freedoms and First Amendment
rights without advancing any compelling
or actual public interest. For example,
Lillian BeVier argues that the two prin-
cipal purposes of campaign finance reform
are to prevent political corruption and to
equalize the relative ability of individuals
to influence election outcomes. But
each of these reform justifications, claims
BeVier, seeks to alter political outcomes and
is therefore related to the communicative
effects of the regulated activity. Since reform is not seen as normatively
neutral, a strict scrutiny standard is jus-
tified to protect political speech. While
such a First Amendment jurisprudence
protects the liberty which gives life to fa-
tion, it also serves to entrench existing
distributions of wealth and power that
keeps much of the public excluded from
the political process.
This, then, is a conservative dis-
course that confines reform within nar-
row limits. It is also a judicial discourse,
written by and for judges, that is uncon-
cerned with the realities of power imbal-
ances in contemporary society and is
ignorant of the larger context of pluralist
theory that seeks to ensure political fair-
ness, widespread participation, and rep-
resentation for all.
For instance, Galbraith's theory of
countervailing power is premised on the
idea that the public would be adequately
represented either by large corporations
or large unions. Unfortunately, that is
an assumption that seems increasingly
anachronistic.
The hope that big labor might re-
present a more general public interest,
and thereby counter the power of the
large corporation, fails on two grounds.
First, the union movement represents a
smaller and smaller portion of the work-
ing public, and related to that fact, it
wields less and less power to counter the
corporate juggernaut, even for the special
interest of union members.
In an era of large scale organization,
private interest groups often impede col-
lective action and make it more difficult
to even articulate a coherent public inter-
est. In many industries, labor is weak,
unable to counter the power and influ-
ence of big corporations. In the few indus-
tries where unions do wield some
power, labor leaders often push a narrow
agenda in the interests of their members
that ignores any larger public interest.
Pluralist apologists of today's cam-
paign finance status quo conveniently ig-
ore the failure of the federal
government to protect and promote union
organizing. Instead, successive govern-
ments, starting with the Reagan admin-
istration, have actively undermined the

23. Id. at 1060-62.
power of organized labor. For instance, the National Labor Relations Board, established during the New Deal to adjudicate labor disputes, was stacked with a majority of Reagan appointees. The pluralist vision of procedural due process was replaced with a distinct bias in favor of management. When combined with increased foreign competition and mass layoffs, the result has been sharp declines in union organizing in the U.S. Today, only 7.8 percent of private sector workers are unionized, less than a third of the rate of the early 1970’s.

This suppression of organized labor resembles the first method for curing the mischiefs of faction – removing the causes of faction – that was soundly rejected by Madison as worse than the disease. Here, the foundation of a particular faction has been undermined by destroying the freedom of working people to organize into unions. With the labor faction increasingly neutralized, the institutions and policies of government have fallen under the influence of big business and management interests.

Nor does the modern corporation stand as a proxy for the public interest. While a large portion of the public holds stock in corporate America, either directly or through pensions or mutual funds, there is little reason to believe their interests, as citizens or even as shareholders, are represented adequately by corporate managers. Corporate governance still resembles a system of rigged Soviet elections, even after the Enron-inspired reforms. CEO compensation continues to skyrocket to levels that previous generations would have considered obscene. For most Americans, it is easy to conclude that the modern publicly-held corporation is run less in the interests of shareholders and much more in the interests of a private managerial elite.

Studies of federal election and campaign finance records by the non-partisan Center for Responsive Politics show how business contributions have dwarfed those of labor. In the 2006 Congressional election campaign, business interests contributed some $848 million to Republican and Democratic candidates and parties, while labor interests contributed only $49 million. The study concluded that business interests dominate, “with

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24. According to Sumner Rosen, the Reagan administration dismantled much of “the structure of economic and social policy which provided the stage on which labor was able to organize coalitions, lobby, negotiate, and wield power.” Summer Rosen, Labor – A Movement at Risk, in ALAN GARTNER, WHAT REAGAN IS DOING TO US 211 (HarperCollins 1982).


an overall advantage over organized labor of about 15-to-1.28

The advantage enjoyed by business interests reflects two important realities. First, business elites have sufficient wealth to give large amounts of money in political contributions. But those not at the top of the ladder have little disposable income to spend on political contributions or interest group politics. For instance, stock and mutual fund ownership remains relatively concentrated in a few hands. Only 50 percent of U.S. households own more than $1,000 in financial assets,29 and a large majority of Americans are either net debtors or only marginally net creditors.30 Most Americans simply lack the resources to contribute any significant amount to political campaigns.

In *Buckley v. Valeo*, the Supreme Court upheld restrictions on political contributions while striking down limits on political expenditures.31 A contribution limit, said the Court, “entails only a marginal restriction” on free speech while expenditure limits “represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.”32 As a practical matter, however, the top-heavy distributions of wealth and income are the most substantial constraints on campaign political contributions and political spending, and therefore the most significant restraint on the quantity and diversity of political speech. But since these are matters beyond the institutional competence of the judicial branch, the judicial discourse continues to view the financial constraints of most citizens as merely theoretical, no matter how substantial in reality.

The second reality is that corporate elites have been rewarded for their 15-to-1 advantage in political contributions by a policy environment favorable to their interests.33 The past three decades, as the decline of organized labor became a rout, has been marked by policies of deregulation, privatization, and tax cuts for those at the top of the nation’s income distribution. The result has been a “virtuous” cycle for the country’s elites: their


32. Id. at 19.

large political contributions lead to policies that enhance their wealth and incomes; and their greater wealth and incomes enable them to make ever larger political contributions.34

While 59 percent of business donations go to Republicans (and make up 96 percent of the money the Republicans collect), the 41 percent that goes to Democrats is six times as much as Democrats receive from labor.35 And while many large industries favor the Republicans and certain public sector unions favor the Democrats,36 the amount of money raised by the two parties and their candidates was remarkably even, with the Democrats raising $617 million and Republicans $632 million for House and Senate races in 2006.37

Only a week after the Democrats took back control of the House and Senate, a wide range of traditionally Republican business interests—pharmaceutical companies, the oil and gas industry, and defense contracting firms—were reportedly throwing money at Democratic officeholders and lining up former Democratic members of Congress to lobby for them.38 Moreover, even prior to the Democratic takeover of Congress, most big business interests had already and quite routinely hedged their bets by contributing heavily to key Democrats, particularly the ranking minority members who suddenly became the chairs of important committees.39

In *Who Rules America?: Power, Politics, & Social Change*, G. William Domhoff analyzes the structure and distribution of power in the U.S., including interlocking corporations. He concludes that the owners and top-level managers in large U.S. corporations, banks and agribusinesses are the dominant figures in Washington politics, while real estate, construction, and land development companies dominate most local governments.40

Moreover, Domhoff recognizes the critical importance of campaign finance in helping elite business interests control the candidate-selection process. While reforms in campaign finance laws have attempted to restrict the size of donations

35. Domhoff, *supra* note 9 at 150.
by large contributors at the national level, the effects of those reforms have been quite perverse. For instance, while reforms in 2002 closed one loophole (the so-called “soft money” loophole for individual and corporate donations for “party-building”), the cap on individual donations was doubled from $1,000 to $2,000, with a maximum of $895,000 to party and individual candidates over a two-year period.41

Although direct contributions from corporate treasuries to politicians are outlawed, corporate CEOs now typically deliver the maximum in individual donations from dozens of their top executives. For instance, in 2004, just 548 Republicans fund-raisers collected bundles of $100,000 or more from friends and colleagues, an estimated 40 percent of the $262 million raised by President Bush for the primaries after he opted out of the public financing system. It was much the same for Democrats: 564 fund-raisers collected bundles of $50,000 or more, an estimated 21 percent of the $248 million that was raised by John Kerry for the primaries.42

Both Republicans and Democrats protect a corporate governance structure that redistributes wealth from shareholders (including pensions and mutual funds) to top corporate officers. Those same corporations are also rewarded with billions of dollars in subsidies, tax breaks, and relaxed regulatory treatment. For instance, the costs of environmental pollutions are often passed on—“externalized”—to consumers and taxpayers. In return for all these favors, the top echelons of corporate officers contribute heavily to both parties, kicking back a rather small percentage of their huge compensation packages to protect their protectors.

Other reforms have also reinforced the influence of wealthy donors. Corporate leaders, trade associations, and trade unions contribute through Political Action Committees (PACs). Advocacy groups, referred to as 527s after the relevant section of the tax code, now receive unrestricted donations to support candidates, but since they are also prevented from communicating with their candidates, they have become major players in producing negative political advertisements on television and radio that throw mud at opponents and lower the standards of public discourse.43 Perhaps most notable among 527s, according to Domhoff, were the wealthy Texas friends of the Bush family who paid for the media ads against John Kerry's record in Vietnam by the Swift Boat Veterans, which were “thought to be the most effective ads launched in the air war.”44

This flood of money that continues to pour into election campaigns should raise concerns about the integrity of our gov-

41. Id. at 148-49.
42. Id. at 149.
44. Domhoff, supra note 9 at 150.
erning institutions and public policies. Instead of liberal pluralism, we have what Theodore Lowi denounced as interest group liberalism: captured governments and iron triangles that serve narrow private interests while excluding the unorganized and general public from the processes of policymaking.45

While captured government stems in large part from the campaign finance system, the limiting of campaign contributions may not be the best or most appropriate response.46 Some would argue that such proposals resemble the means disfavored by Madison that would stamp out the causes of faction by suppressing liberty. Perhaps there are more direct ways to limit the effects of faction. As discussed below, one way to limit the effects of faction is to limit what interest groups with money can actually buy in politics. For instance, opening the TV airwaves and providing free airtime to political candidates would make it easier for candidates to communicate with voters without first selling themselves to powerful interest groups and wealthy financial contributors.

III. The Freest Speech that Money Can Buy

As the Supreme Court recognized in Buckley v. Valeo, political contributions and expenditures have expressive consequences not unrelated to the purposes of the First Amendment.47 Money is rightly equated with political speech because of the many forms of communication that money can buy, whether it is communicating through pamphlets or with paid advertisements in newspapers, television or radio. Television has come to dominate political discourse in today’s mass media environment. As former Senator Bill Bradley has said about campaigning for public office, “You simply transfer money from contributors to television stations.”48

According to Paul Taylor and Norman Ornstein, during the 2000 election cycle, “television stations took in an estimated $1 billion of the estimated $4 billion in overall campaign spending by


47. Buckley v. Valeo, 424 U.S. 1, 14 (1976) (concluding that political contributions and expenditure limitations "operate in an area of the most fundamental First Amendment activities").

candidates, parties and issue groups at all levels of politics—federal, state and local.” 49 This trend has been intensifying. Over the past two decades, spending on political ads has more than quadrupled in real, inflation-adjusted terms. 50 Unfortunately, the 527 loophole has guaranteed that much of this spending is negative in content, not informing voters of the positive positions or platforms of candidates, but attacking the character or distorting the positions of opponents.

Taylor and Ornstein claim that this arms race of political spending has led to price gouging by TV broadcast companies which have sharply raised the unit cost of TV air time during election seasons. They cite a study by the Center for the Study of Elections and Democracy at Brigham Young University that found the average cost of a 30-second political spot tripled during the height of the campaign cycle during the 2000 election. 51 According to the party and interest group officials who are paying such high costs of TV ads, the rates “are becoming extortionist.” 52

Such “extortion” is arguably at the heart of today’s corrupt political culture. Candidates pay a high price to communicate with voters. They must accept campaign contributions from powerful factions, and in return, they grant access and favors to those private interests. Such symbiotic relationships exclude the general public and undermine any conception of a public interest that transcends the sum of the parts.

Moreover, TV ads have become increasingly important in recent years precisely because TV executives are less focused on news and more concerned with entertainment and short-term profits. This shift has occurred not just in general terms, but also within TV news programming itself. 53 In 1976, Paddy Chayefsky’s Academy Award winning movie “Network” offered a dark preview of the future of TV news. Thirty years later, life has truly imitated art. The format is largely the same for network evening news and cable headline news programs: hard news, particularly political news and foreign affairs, has been condensed to several minutes squeezed in between entertainment, sports, weather, ocasional natural disasters and other sensational stories.

This transformation from news to “infotainment” becomes apparent when we consider the length of time of the average “sound bite” (i.e., the piece of footage that is aired during the news and taken from a longer interview or speech). In 1968, the average sound bite was 43 seconds;

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49. Id.
50. Id.
51. Id. (reporting that prices tripled in 17 media markets where there were competitive congressional and senatorial races).
52. Id.
by 2000, the sound bite had been reduced to only 7.3 seconds.\(^{54}\)

The shrinking sound bite should be seen for what it is: the narrowing of an important public space, the privatization of political discourse, and the censorship of political speech by corporate TV executives and production editors, all hidden behind the façade of objective journalism.\(^{55}\) Candidates learn to speak in seven-second sound bites to get on the news, “a medium that reduces political debate to messages worthy of bumper stickers or fortune cookies.”\(^{56}\)

Likewise, the format of televised presidential debates routinely provides for journalistic interrogation rather than direct debate between candidates. This tends to magnify the importance of journalists and to diminish that of the candidates who rely on quotable facts and slogans geared to the short sound bite. As the historian and social critic Christopher Lasch concluded in 1992, “[o]nly ideas are missing” from such debates, which is understandable enough “in view of TV’s aversion to consecutive thought.”\(^{57}\) According to Lasch, “more than programs and policies, [this] country needs a new vision of the good life, one that rejects the equation of success with the ‘life styles of the rich and famous.’”\(^{58}\)

Ideas take time to formulate, articulate, and be heard in a deliberative democracy. At the time of this writing, thanks to the vapid commercialism of TV, Americans seem far more interested in whether celebrity Britney Spears is wearing undergarments than about events in Iraq or Afghanistan.\(^{49}\) More than a decade after Lasch’s commentary, the problem has only gotten worse, as TV has ironically become the biggest impediment to the marketplace of ideas.

In 1968, insurgent presidential candidates like Robert Kennedy or Eugene McCarthy stood some chance of having their messages heard. In forty seconds, a news producer could piece together enough of their remarks to provide viewers with some content and some context. Twenty years later, the sound bite had been whittled down to such an extent that no candidate could reasonably rely on TV news as the medium for his or her message. Moreover, with their messages so heavily filtered, candidates have a huge incentive to raise big money from special interests to pay for expensive thirty-second adver-

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57. Christopher Lasch, How Television Deflates Politics, N.Y. Times, Feb. 24, 1992, at A19 (arguing that candidates “should insist on debating each other instead of responding to questions put to them by commentators and pundits”).
58. Id.
Tisements on TV, the most effective of which are often negative ads. What passes as free speech has become the most dumbed-down speech that money can buy.

IV. The Sound of Silence

The shrinking sound bite reflects the commercialization of broadcast news and coincides with the rise of TV as the main source of news for most Americans, trends which in combination have sharply narrowed our political discourse. As critic George Trow noted, “[t]he work of television is to establish false contexts and to chronicle the unraveling of existing contexts; finally, to establish the context of no context and to chronicle it.”

Instead of an informed discussion in which the news builds on that of previous days, we have reduced our political discourse to the seven-second sound bite, just enough time for staged media events that grossly distort and limit the free exchange of ideas.

Legal analysis is not particularly perceptive in judging whether big money, along with the commercialization of broadcast news, is corrupting our politics and public officials. This is because legal scholars, many of whom are former law clerks, typically look at these questions in the narrowest of terms, such as the kind of cause and effect evidence that would be admissible in a court.

For instance, Bradley Smith concludes that money does not buy elections by pointing to the 1994 congressional elections in which many Republican challengers defeated better-funded Democratic incumbents. Of course, Smith ignores the significant overlaps between their donor sources and the many similarities in the policy positions of the opposing candidates, such as the entire so-called Washington-Wall Street Consensus. How significant is a “contested” election if both candidates are receiving huge contributions from the same corporate interests?

That brings us to Smith’s next point, that campaign contributions affect very few votes and that “large campaign contributions are usually offset by equally well-financed interests that contribute to a different group of candidates.” This, of course, is nothing more than the liberal pluralist credo, its assumption of counter-


62. LINSBERRY, ET AL., supra note 60 at 374.


64. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 53-54 (W. W. Norton & Co. 2002).

65. SMITH, supra note 63 at 1069.
vailing powers and the Madisonian conception of faction combating faction. But as previously discussed, the empirical evidence clearly shows a bias in favor of large corporate and financial interests in campaign contributions. Numerous reform proposals, however flawed, at least recognize that our present campaign finance system allows privileged factions to buy political influence.\textsuperscript{66}

Bradley Smith's final defense of the campaign finance system is that the "available evidence simply does not show a meaningful, casual relationship between campaign contributions and legislative voting patterns."\textsuperscript{67} Short of strapping lie detectors on our elected officials to determine their motivations on the many subtle and intricate decisions inherent in the legislative process and agenda setting, we would be hard pressed to find any such "available evidence." Any inquiry of the relationship between campaign contributions and actual legislative votes would miss the more subtle impacts of money on legislative agendas. How many proposals are never raised in the heat of campaigns, never introduced as legislation, and if introduced, simply buried in a subcommittee without hearings or further consideration?

At some time in our social or working lives, most people have probably felt subtle pressures to stifle the expression of their views. It is fair to speculate how our political leaders have limited the expression of their own views and the development of their legislative programs and agendas.

As troubling as it is to the judicial temperament, our inquiry must proceed with less clarity than the evidence that would be admissible in a criminal trial for bribery and vote-buying. The comments that follow are raised in such a spirit of uncertainty and conjecture. But since we may never know for sure how money corrupts our politics, let us at least consider how money may have already narrowed our public discourse.

A. The Discourse of Reform in an Age of Globalization

For all its advantages in promoting economic growth, economic liberalism also undermines public sector capabilities at all levels - local, state, and national. This is precisely because of the mobility of people and capital, core features of a liberal economic environment. For instance, as state and local governments attempt to regulate and tax corporate activity, businesses are able to relocate to jurisdictions with lower taxes and less regulation. As economic liberalism has gone global, this so-called "race to the bottom" has also gone global.\textsuperscript{68}

The dynamic nature of this problem is difficult to describe in a seven-second sound bite. Free markets allow entrepreneurial and profitable activity,
which in turn results in negative externalities that require government regulation and public services, including investment in infrastructure and education. But as the state seeks to regulate and tax at a local level, those with wealth—those profiting in the liberal economic environment—are able to avoid regulation and taxes. The public sector becomes underfunded, the quality of public services declines, and special interests then lobby for privatization as the solution. While there is an arguable public interest in extending the jurisdictional reach of the state for purposes of taxation and regulation, that perspective is not regularly articulated in our political discourse, perhaps because there are no special moneymed interests pushing such an agenda.

In the 1960 Presidential campaign, John Kennedy called for the federal government to subsidize local school teacher salaries. Without federal subsidies, he warned, the burden would fall on the local property tax and result in vastly unequal levels of spending and quality of education throughout the country. Kennedy’s argument was not easily reduced to a short sound bite. While the “race to the bottom” may seem like a bumper-sticker phrase, it would still require at least several sentences to explain its meaning and relevance to issues like property taxes and public education. Likewise, with Kennedy’s appeal to public morality arguments, discourse requires time and space to be heard:

We need the best educated citizens in the world. Schools in your own state may be good and the teachers may be well-compensated, and they may be in my own state of Massachusetts. But we are our brother’s keeper. This is not fifty separate states. This is a national problem to make sure that whatever talent and ability any young man or woman may have, that they have a chance to develop it in good schools with competent and well-compensated teachers.69

Kennedy’s message, made before TV became a complete tower of babble, had an impact on the public discourse. His opponent, Richard Nixon conceded the need for federal subsidies for local public schools.70 It is difficult to imagine today’s major party candidates engaging in such a high level of debate about public education.

Kennedy’s warning was prophetic. Today, after decades of federal income tax cuts for the wealthiest Americans, the burden of supporting our public schools has fallen primarily on the state and local property tax. Not surprisingly, the quality of our public schools varies dramatically, depending on the local property tax base. In addition, state and

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70. Id. at 512 (quoting Vice President Nixon as supporting Federal assistance to States and localities for school construction).
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local property taxes have risen to such high levels that many retirees can no longer afford to live out their lives in the same communities where they have raised their families. Nearly a half century after John Kennedy ran for President, his proposed solution of federal subsidies arguably remains the most progressive and rational solution for our ailing public schools. Yet, his proposal is no longer part of the public discourse, which is instead driven by the privatization agenda of private interest groups.71

Perhaps more than any other modern President, Kennedy understood the inherent tensions in the American political system. He said, “The real dilemma we face is whether a free society in which each of us follows our own self-interest can compete over a long period of time with a totalitarian system.” Soviet totalitarianism may be a thing of the past,72 but the tensions within a free society between private interests and the public interest is perhaps even more acute today.

Kennedy argued that because of the influence of special interest lobbies, Congress was often not well equipped to make basic policy or to speak for the national interest. The President, he said, was the ultimate “defender of the public good and the public interest against all the narrow private interests which operate in our society.”73 No doubt it was easier for Kennedy, with his personal fortune as campaign war chest, to play the role of the Platonic philosopher king and resist the siren song of private interest groups and their campaign contributions.74

When compared to Kennedy in 1960, today’s political candidates are far more dependent on campaign contributions and beholden to special interest groups, and far more constrained by the filtering of TV news. The largest single campaign contributor on education issues is the National Education Association.75 Although the NEA represents more than three million school teachers, its legislative

71. There has been much recent commentary about Milton Friedman’s proposals to privatize schools by granting parents vouchers to purchase education for their children at the schools of their choice. While such proposals were largely ignored when Friedman first raised them fifty years ago, private interests now lobby for such vouchers and school choice. Liberty & Learning: Milton Friedman’s Voucher Idea at Fifty (Robert C. Elbow & Jerome T. Ealy, eds., 2006).


74. Kennedy’s view of the role of the enlightened statesman resisting private interests was apparent in his Pulitzer Prize winning book, Profiles in Courage (1956). Likewise, according to Madison, a republic was superior to a democracy because of its ability to “enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.” The Federalist No. 10 (James Madison).

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agenda does not include federal aid for local school teacher salaries, probably because such subsidies would be linked to stricter federal standards for school teacher qualifications and performance—which the NEA opposes.76

The past fifty years has witnessed a decline in the quality of our political discourse on the problems of public education. The seven-second sound bite is barely long enough for the sloganeering of “Leave No Child Behind,” yet another empty promise that leaves behind entire neighborhoods and school districts across the country.

Perhaps Kennedy’s proposal for federal subsidies for local teacher salaries was decades ahead of its time. But if Kennedy’s argument seems naively idealistic or anachronistic today, perhaps that’s a measure of the silence of our age, of how unusual it has become for us to hear the public interest articulated with such reason and passion, and of how cynically accustomed we’ve become to politicians looking out only for their private interests.

It is certainly troubling that in today’s political environment there is so little room for a sophisticated discussion about public education in America. It is much the same for the wide range of public policy issues related to the mobility of capital in a liberalized economy. For instance, we see a race to the bottom in corporate law. Corporate executives have the resources to lobby Congress to maintain a lax system of corporate governance in which Delaware arguably leads the race to the bottom. While the public interest may be served by uniform federal standards, there are no significant private interests lobbying for such a solution, and any such proposals are marginalized and excluded from TV news by corporate media conglomerates.

Likewise, free trade agreements have special interest constituencies, namely those corporations that profit from liberalized trade. But the workers and local communities that suffer dislocations—the externalities of free trade—lack the resources to effectively lobby for adequate adjustment assistance. Likewise, there are no significant private interests to lobby for taxing the profits of the winners in global trade, such as a modest one percent tax on the massive volume of global financial transactions (the so-called Tobin Tax proposal) that could raise billions.

There has been a similar silence about the relationship between liberalized trade and the financing of health care for American workers. For instance, U.S. automakers are contractually obligated, as a result of collective bargaining, to provide their employees with expen-

sive private health insurance. Automakers in Europe and Asia need not absorb such costs since their workers are routinely insured under universal national health insurance plans.77 This serious competitive disadvantage has helped to push U.S. automakers to the brink of bankruptcy and finally to lobbying the federal government rather frantically for relief from high health costs.78

Once again, the problem comes down to the powerful private interests that support this expensive and uncompetitive regime, including the private health insurance industry, pharmaceutical companies, and the American Medical Association. The UAW, the union representing American autoworkers, is theoretically supposed to provide the countervailing power to these interests. But the UAW, far too weak to take on this range of powerful interests and demand universal entitlements for all citizens, has focused instead on private health benefits for its own members.

In each of these public policy areas – public school finance, corporate governance, trade adjustment assistance, and national health insurance – the discourse has been constrained. The arguments that any of these reform proposals would serve the public interest are inherently complex and would require far more than seven-second sound bites to properly articulate and be heard.

B. Public Discourse Without Historical Context

In 1968, the average “sound bite” on the evening news was about 43 seconds. By 1988, it was less than 8 seconds, just long enough for presidential candidate George H.W. Bush to promise, “Read my lips, no new taxes.”79 Sixteen years later, his son, President George W. Bush simplified the debate on Iraq to a choice between “stay the course” or “cut and run.”

The shrinking TV sound bite often reinforces false dichotomies, excludes a wide range of alternatives, and ignores historical context. For instance, the appeal to “stay the course” in Iraq was juxtaposed against one simple alternative – the “cut and run” alternative – which was attributed to any dissenting American. The choice between two abject failures, staying a losing course versus admitting defeat, only served to stifle any discussion of any other alternatives.

If there is finally some discussion about the range of possible alternatives for Iraq, significantly, this conversation did not occur during the 2004 presidential campaign or the 2006 congressional elections. Instead, only after the 2006 elections were over did many political leaders begin to speak more freely about

77. For an early recognition of the dynamic, see Timothy A. Canova, *Tight Money Puts the Squeeze on a Decent Living*, Newsday, Dec. 8, 1982, at 70 (arguing that the U.S. should subsidize its labor force with universal health and education entitlements so U.S. industry could compete against such worker subsidies provided in Japan and Europe).
our dilemma in Iraq. Hopefully the public discourse on Iraq will have time to develop before the start of the 2008 presidential campaign shortens the political attention span again and recasts every issue as periphery to the horse race between prospective presidential candidates.

Among the alternatives presently being discussed are proposals to (1) increase U.S. troop strength to better train the Iraqi military, (2) take sides in Iraq’s internal sectarian strife against certain Shiite militias, or (3) partition Iraq into three autonomous states and/or redeploy U.S. forces to the Kurdish zone of Iraq.80

Democratic theory suggests the necessity of political debate on these kinds of pressing issues. The free expression of ideas is, after all, a necessary prerequisite to the clash of ideas and the attainment of truth in the marketplace of ideas. The narrowing of our public discourse, stemming in large part from the commercialization of the TV airwaves, is a case of market failure, a blockage in the marketplace of ideas.

The non-debate on a national military draft is a case in point. A week after the September 11th terrorist attacks, nearly 80 percent of the American people supported such a military draft.81 However, the idea was quickly rejected and still is by many Washington insiders, including the so-called military experts captured by the special interests that congregate around the Pentagon. Defense contractors and their agents in Congress and the Pentagon were wedded to the Rumsfeld doctrine of high technology warfare, high tech profits, and sweetheart deals for reconstruction contracts.82 There was no private constituency to lobby for the Powell doctrine of overwhelming force in Afghanistan or Iraq.

Historical context was completely missing from discussions about the wars in Afghanistan and Iraq. Without a national military draft, a much more active fiscal policy, and a reorientation of American consumption patterns, the U.S. arguably lacks the capability to effectively wage war or conduct a successful occupation in either Iraq or Afghanistan.83

During the entire 2004 presidential campaign, there was an incredible uniformity of silence on the issue of Iraq. No candidate with national aspirations seriously articulated a compelling alternative vision for the U.S. war in Iraq, such as partition as an exit strategy or linking a withdrawal of U.S. forces to the adoption of a military draft to be better prepared for the fallout from withdrawal. Not one

candidate dared to make the argument for a fuller mobilization, the kind of mobilization that had ensured victory in World War Two and the successful occupations of Germany and Japan, contributed to the Marshall Plan and postwar reconstruction efforts, and facilitated the post-war boom through the G.I. Bill of Rights.

After September 11th, American public opinion instinctively recognized the need for shared sacrifice, as reflected in the high levels of support for a national military draft, energy conservation, and alternative energy programs to end the country's addiction to Mideast oil imports. But since such mobilizations would require widespread private sacrifice, the most powerful private factions aligned quickly against such strategies. It did not pay – or perhaps it is more accurate to say that no organized interest group would pay – to make the case for mobilization and shared sacrifice.

Perhaps there were and still are compelling reasons to reject a fuller mobilization of resources, a national military draft, and other forms of shared sacrifice. There seems, however, no good reason these issues were not fully discussed in public political debates. Unfortunately, any potential candidate's credibility with private moneys' interests continues to depend on rejecting any such strategies as a non-starter.

V. Freedom for the Airwaves

The liberal agenda for campaign finance reform would restrict political contributions and expenditures, all in an effort to level the playing field between candidates, diminish the influence of private interests, and introduce greater fairness in the political marketplace. But limiting the ability of citizens to raise and spend money is a rather inefficient and probably ineffective means for revigorating political discourse.

As Madison recognized, the causes of faction can not be stifled without suppressing liberty, the same liberty that is indispensable to the democratic freedoms of association and expression. Rather, reform must focus on limiting the effects and mischiefs of faction by containing what moneys' interests are presently able to purchase in a democracy, namely a near-monopoly on televised political discourse. The most efficient way to accomplish such objectives may be to mandate free television airtime for qualified political candidates, perhaps through the allocation of vouchers to those candidates who are listed on election ballots.

Mandating free airtime may sound rather interventionist. Critics of free airtime will no doubt argue that we should not have the government telling private businesses what to air on TV. Free airtime, they may assert, would be contrary

84. Tony Judt argues that only the U.S. Army had "the resources and organizational capacity to administer the demographic equivalent of a medium-sized country" that presented itself in Europe in the aftermath of World War Two in the form of a massive refugee and displaced persons crisis numbering in the many millions. Tony Judt, Postwar: A History of Europe since 1945 26 (2005).
to free market enterprise, would violate the state’s political neutrality, and would therefore not serve any valid public purpose.

But such arguments and conclusions are based on very flawed assumptions, starting with the assumption that private broadcast companies have some property interest in allocating airtime as they see fit. If broadcast companies had a property interest in the airwaves, then any requirement to provide candidates with free airtime could be considered a taking of private property, thereby requiring a valid public purpose and just compensation.

Fortunately, the facts contradict such assumptions. First, the public owns the electromagnetic broadcast spectrum—the TV and radio airwaves—as certainly as any other natural resource. This principle has been well accepted by the Supreme Court since Congress first started to regulate the airwaves nearly eighty years ago. The airwaves belong to the public, and radio and television broadcasters receive space on the spectrum in return for obligations to act as “public trustees” in the public interest.87

The high point for requiring that TV companies fulfill their public responsibilities was in 1961 when Newton Minow, the Chair of the Federal Communications Commission (FCC) during the Kennedy administration, spoke to TV executives before the National Association of Broadcasters (NAB):

I invite you to sit down in front of your television set when your station goes on the air and stay there without a book, magazine, newspaper, profit and loss sheet or rating book to distract you—and keep your eyes glued to that set until the station signs off. I can assure you that you will observe a vast wasteland. You will see a procession of game shows, violence, audience participation shows, formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, western badmen, western good men, private eyes, gangsters, more violence, and cartoons. And endlessly, commercials—many screaming, enjolting, and offending.88

In what came to be known as the “Vast Wasteland” speech, Minow signaled the federal government’s determination that broadcasters justify their licenses and that the public airwaves serve public education purposes, rather than solely commercial interests.89

In more recent years, the broadcast and entertainment industries have successfully opposed any real obligations to the public, and of course sex and crass commercialism have been added to the increasing levels of violence depicted on TV. These industries are among the biggest financial contributors to political campaigns, giving more than $17 million in the 2006 Congressional elections and $33 million in the 2004 Presidential elections.90 According to the non-partisan Center for Responsive Politics, these in-

87. Taylor & Ornstein, supra note 48 at 1.
89. Id.
The cozy relationship between the media conglomerates and the FCC has been enabled, of course, by the third leg of the iron triangle, our elected officials from both major political parties in Congress and in the White House. As Taylor and Ornstein point out, the pattern continued during the Clinton administration when in 1996, Congress gave away more of the broadcast spectrum to TV license holders. While the plunder was rightly denounced by leading Republican Senators and commentators as a “giant corporate welfare program,” “one of the greatest scams in American history,” and “a rip-off on a scale vaster than dreamed of by yesteryear’s robber barons,” Congress and the President went ahead with the give-away.92

In fact, in exchange for their licenses to broadcast over the public airwaves, the media companies have never paid a single penny. By one estimate in 2001 by a Wall Street analyst, if the licenses were sold at auction – a good free-market practice – it would have brought in $367 billion to the federal treasury.94

Thomas Jefferson understood that democracy ultimately rests on an informed public opinion, and it is therefore the very first object of government to maintain a free and diverse press. He wrote: “Were it left to me to decide whether we should have a government without newspapers, or newspapers with-

92. KELLNER, supra note 53, at 64.
94. Id.
out government, I should not hesitate a moment to prefer the latter. While the central importance of an informed public to the practice of democracy has not changed since the times of Jefferson, the dominant means of communication has evolved from newsprint to television. Unfortunately, due in large part to the many failures of TV to inform the public, our political system today is beginning to resemble what Jefferson feared most: government without news. 96

Government has increasingly become subject to iron triangles and captured by private interests and factions, while the news of how government impacts our lives is increasingly marginalized and lost among the babble of celebrity news chatter. The TV media culture of slashing newsroom budgets, “Network” infotainment, and seven-second sound bites, along with the FCC’s deregulation of the airwaves, may now constitute the greatest internal obstacles to an informed public discourse and to democracy itself. Free speech is little more than a cliché if the public lacks the freedom to hear and political candidates lack the practical ability to be heard.

Robert McChesney reminds us that early in American history, the federal government “established extensive subsidies to spawn a diverse media system” and the “two most significant were printing subsidies to most leading newspapers of the day and postal subsidies.” 97 According to McChesney, freedom of speech did not mean a prohibition against government support for the press:

Over 90 percent of the post office’s business was sending out newspapers; it was basically the press’s delivery system. Newspapers were charged just a fraction of the actual mailing cost, to subsidize them. . . . The connection between media policy making, media subsidies, and a diverse marketplace of ideas in which citizens could engage and govern their own lives was a standard view. 98

Today, we have massive media subsidies in the form of the free giveaways of the airwaves to media conglomerates. However, unlike the media subsidies in early American history, today’s subsidies are not contributing to a diverse marketplace of ideas, but rather have helped to


96. For instance, U.S. television news of the occupation in Iraq has failed to cover numerous accidental shootings and killings of Iraqi civilians by U.S. military forces. See William Langewieshe, Welcome to the Green Zone: The American Bubble in Baghdad, ATLANTIC MONTHLY, Nov. 2004, at 70 (reporting of “many stories, glossed over in official reports, of innocent Iraqis [sometimes entire families] who were shredded in their cars because they happened to drive too close to a patrol that had been bombarded or fired upon”).


98. Id. According to McChesney, “James Madison favored charging no [postal] fee whatsoever; he regarded any charge as a form of censorship that would eliminate dissenting views, which would be unable to survive if they had to pay the full price.” Id.
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undermine diversity in our public discourse.

Walter Cronkite, the long-time anchorman for CBS-TV news from 1962 to 1981, has concluded that money is undermining our politics, denying access to government for ordinary Americans, and entrenching “an oligarchy of the already powerful.” Invoking Jefferson, Cronkite argues that a nation cannot be both ignorant and free. This leads to Cronkite’s indictment of the TV news: “By limiting debate and candidate communications with the electorate, our nation invites the ignorance that can cripple our democracy.”

Cronkite, along with Common Cause and the Alliance for Better Campaigns, lobbied unsuccessfully to have an amendment added to the McCain-Feingold Act that would have required TV broadcast companies to provide free airtime to candidates. The proposal sought to have TV broadcasters yield a small percentage of their windfall profits from political advertisements — less than one percent — to fund free airtime for candidates. Unfortunately, the U.S. is among only seven democracies around the world that do not offer free airtime. As Cronkite concludes, “The failure to give free airtime for our political campaigns endangers our democracy.”

There must also be renewed efforts to require broadcast companies to meet genuine public interest obligations. The only significant criticism of the media industry seems to come from cultural conservatives upset with the sex and violence depicted on television, in movies, and in music. Liberals have largely capitulated to the media conglomerates, and justified the sell-out with bogus First Amendment arguments.

In light of the massive giveaway of the airwaves, it seems only fair to require that TV broadcasters provide free airtime to political candidates and be subject to more stringent regulation. Broadcasters will no doubt argue that many Americans get their news from cable and satellite TV stations, mediums that do not technically use the electromagnetic spectrum. Of course, the federal government could easily require free airtime on cable and satellite TV stations, as well, in exchange for all of the past federal subsidies to those industries. Federal, state and local tax-

101. Id.
102. Id.
103. Id.
104. Id. All the European democracies “provide their candidates with extensive free airtime.” The other purported democracies without free airtime for political candidates include Ecuador, Honduras, Malaysia, Taiwan, Tanzania, and Trinidad and Tobago. Id.
105. Id. Cronkite has also narrated a short video, THE CASE FOR FREE AIR TIME, which was produced by the Alliance for Better Campaigns and funded with grants from the Pew Charitable Trusts, The Open Society Institute, and the Joyce Foundation. The video is available for viewing at http://www.freeairtime.org (last visited Jan. 3, 2007).
payers have, after all, subsidized the development of cable TV through deregulation and the granting of easements, and the development of the satellite TV industry since the early days of the space program and the National Aeronautics and Space Administration (NASA).

Clearly, the federal government has the regulatory authority, and the taxpayer has the moral authority, to require these industries to fulfill their public responsibilities by providing free airtime to political candidates. The need to reinvigorate our public discourse and debate is so great and pressing, however, that it would arguably be worth it for the federal government to pay yet additional subsidies to the TV broadcast networks and cable and satellite TV companies to provide airtime that would then be allocated for free to political candidates.

It may seem unfair, even ironic, for the federal government to pay yet more subsidies to broadcasters to provide free airtime on public airwaves. The TV industry – networks, cable, and satellite – have the revenue to provide such airtime. Nevertheless, it would be well worth the public expense if there is no other way politically to open the airwaves and television mediums to truly free speech and diverse viewpoints.

According to Albert O. Hirschman, a basic function of any political system is the articulation of self-interest, and without such a “voice” the only rational alternative for citizens is acquiescence or indifference.\(^\text{106}\) Is it any mystery why Americans have lost so much faith in our institutions of government? Most Americans are not among the wealthy elite that can afford $100,000 or even $1000 per plate fund-raisers, they are not effectively represented by organized interest groups, and they lack access to elected and appointed officials. Sadly, for many Americans it has been entirely rational to lose faith in the political system.

As long as the FCC remains an agency captured by corporate media interests, there is little prospect for change. Ultimately the responsibility rests with Congress to break this iron triangle by requiring the FCC to re-impose regulations on broadcast TV, and to extend such regulations to cable and satellite, including limits on commercial time, greater scrutiny of licensing renewals, limits to corporate media mergers, and restoration of equal-time rules, the Fairness Doctrine and child educational requirements.\(^\text{107}\) Without such regulations and reforms, the campaign finance system will continue to contribute to a public discourse devoid of meaning, and campaign finance reforms will fail to achieve any real objectives.

Television, which began with such enormous promise to enlighten and educate the public, has become the most pervasive medium for distracting the public.

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and impoverishing our political discourse. For democracy and freedom to flourish, our public airwaves must be reclaimed as mediums for free and unfiltered political speech.