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The Separation of Business and State

Timothy K. Kuhner†

ABSTRACT

National scandals involving corporate fraud, political corruption, lobbyists, and campaign finance have called attention to worrisome dynamics: the decreasing power of natural persons relative to legal persons in the political process; and the erosion of civic or democratic values in favor of corporate values. Both dynamics relate to the vexing problem of money in politics. American political thought and constitutional structure offer much-needed guidance in the form of analogies and separationist logic.

This Essay recasts the phenomenon of money in politics as a separation problem—that is, a problem of the private sphere of business overreaching into the public sphere of governance; in short, excessive entanglement. Once the problem is seen in this light, it is natural to search for insights in the two most significant separations in U.S. law: the separation of powers and the separation of church and state. An analysis of these earlier separations reveals that the forces at work today arise from the same perennial forces contemplated by the Founders: unrefined human nature, dominated by unenlightened self-interest and ideological passion, and factions which emerge as a collective manifestation of interest and passion. Relevant political philosophy from the first two separations helps define the contours of a third, that between business and state. Taken as analogies, the earlier separations help explain what is happening to politics and suggest a solution.

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I

THE PROBLEM AT HAND

There are some who see no problem with money in politics and question the existence of any such thing as the public interest.¹ I do not contend with them here. There are others and it is for them that I write. They form a large bipartisan group that focuses on American political ideals and retains a hopeful and dutiful orientation to democracy. This causes them to be wary of corruption and intolerant of its apologists. One rightly senses that corruption represents the exploitation of their creed and the prostitution of their beloved. Their concern goes beyond abject corruption—such as the bribery of public officials—to embrace thornier questions involving campaign finance, lobbyists, political action committees, and corporate political activity in any other form it might manifest. Although members of this bi-partisan group disagree about the causes and extent of the problem as well as the content of an ideal solution, they share the sense that money distorts democracy and that its influence must be addressed. For them and for all who consider appropriate some limitation on money in politics, I offer a new way of thinking. It is my sense that we lack a framework for conceptualizing limits on the ability of financial power to translate into political power, and that not just any will do. The framework must be general enough to account for the many dimensions of the issue and culturally resonant enough to motivate good faith consideration.

The issue of money in politics is truly vexing. Certain dimensions of the problem suggest that corporations have captured politics, while other dimensions suggest that wealthy individuals have done so. Money in politics can be viewed as an assault on political equality—wealthy actors subjugating common citizens—and yet it can also be viewed as a form of political expression—free speech. This is enough to cause a rational observer to throw up her hands. Moreover, the issue has a sort of magnetism that makes it a focal point for fallacies and stereotypes: the interests of corporations as either equal to the public good or as inimical to it; capitalism as either freedom or oppression. This is enough to cause a rational observer to walk away in disgust. Markets and democracy both arose as means of freedom and equality, and both

1. See generally James M. Buchanan, *Public Choice: The Origins and Development of a Research Program* (2003), Center for Study of Public Choice, George Mason University (describing the origins and core presuppositions of public choice theory) available at <http://www.gmu.edu/centers/publicchoice/pdf%20links/Booklet.pdf> (last visited January 10, 2008). Key questions raised by this program of research include whether it is possible to produce a rational social ordering through the aggregation of individual preferences and whether any voting system based on individuals' ranked preferences can satisfy basic requirements of fairness and stability. On these particular questions, see KENNETH J. ARROW, *SOCIAL CHOICE & INDIVIDUAL VALUES* 1-21, 46-60 (2d ed. 1970).

can be corrupted. They orient our society and inevitably interact. We must admit that the question of their interaction boils down to one of degree, but it is too important to be left to that, which alone degenerates into a most neglectful relativism. The issue deserves order at the hands of a principled framework. I propose separationism.

What we are witnessing can be conceptualized as an excessive entanglement between two systems and their respective spheres: the system of capitalism and the private economic sphere of business on the one hand, and the system of democracy or the public sphere of governance and state activities on the other. This lack of separation is characterized by increases in the importance of money in elections and related to the role of special interests in producing legislation, the replacement of sincere debate with a war of sound bites, and widespread ethical impropriety among elected leaders.² That these factors undermine democratic values and procedures, and produce poor public policies, has been demonstrated many times over.³ A vital organizing framework, in contrast, has not been provided. Thinking in terms of a separation between spheres provides several advantages.

The framework of separationism is faithful to American political traditions, particularly to the fears and responses of notable founders, and accurate enough to reveal aspects of the issue thus far opaque. If money in politics is conceived of as a separation problem, then it belongs within the same category of concerns that motivated the two other separations in our nation's legal tradition. Taken as analogies, the separation of powers and the separation of church and state help us to think deeply about money in politics and, perhaps, to envision the necessary solution. They suggest that the perennial forces of self-interest and passion have set themselves upon democracy once again. The separation of powers responded to the self-interested nature of humankind, as the Framers saw it. The Framers were not given to expecting something more balanced than raw power-seeking. And so a structural obstacle

2. Ethical impropriety, including the solicitation of bribes, misuses of earmarks, links to interested corporations, and ties to lobbyists convicted of corrupting public officials, has become rather commonplace. See Philip Shenon, *Federal Lawmakers From Coast to Coast are Under Investigation*, N.Y. TIMES, Jul. 27, 2007, at A16.

3. See, e.g., ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); CHARLES DERBER, *CORPORATION NATION: HOW CORPORATIONS ARE TAKING OVER OUR LIVES AND WHAT WE CAN DO ABOUT IT* (1998); ROBERT ENGLER, *THE POLITICS OF OIL: A STUDY OF PRIVATE POWER AND DEMOCRATIC DIRECTIONS* (1961); CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* (1977) (discussing the relationship between markets and democracy and expressing concern with economic power); STAN LUGER, *CORPORATE POWER, AMERICAN DEMOCRACY, AND THE AUTOMOBILE INDUSTRY 190-91* (2000) (arguing that corporate power should not be understood only to mean influencing political decisions, but also defining the "context and the problems that government responds to . . . distribut[ing] tremendous social costs to others"); TED NACE, *GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY* (2003); RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* (1996).

to usurpation had to be put in place: three separate branches of government with separate functions and members. The separation of church and state, on the other hand, arose partly from Jefferson's fear that the church would interfere with the state. In this way, ideological passion could come to reign over secular values and edict could trump reasoned debate. To protect the state and preserve religious freedoms, a constitutional amendment passed and two separate spheres of authority were demarcated.

In the case of a separation between business and state, the challenge of accounting for corporate nature in politics has been added to that of accounting for human nature. Even within the jaundiced view of human beings as rational utility maximizers,⁴ it is clear that utility for most individuals means more than economic profit. Not so with firms. Self-interested, profit-maximizing entities commonly seek to control the government because laws affect profits. This is interest. Passion, on the other hand, is more subtle. While interest manifests itself through an unrelenting and overt emphasis on profit-margins, passion has covertly undermined civic values. That is, the norms and values of economic competition and business culture have spread fast and deep, leading to an erosion of civic values in the public sphere. A profit-maximization ethos, antagonistic to social dialogue and good-faith deliberation, now pervades politics. It is the ideological counterpart to the so-called rational self-interest that dominates corporate legal structure. In sum, moneyed interests fit the description of factions given by Madison—"united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."⁵

These earlier separations are also useful teachers in the context of money in politics because they embody a piece of practical wisdom: namely, our own American political tradition of using laws to erect structural divides between institutions of government and the corrosive forces that set themselves upon politics. Thus, the earlier separations provide an accurate understanding and point to the necessary solution: that of a third separation, one capable of accounting for corporate nature. After exploring the first two separations, I discuss the separation of business and state.⁶ I describe the two ways in which

4. I refer here to the conventional view within neoclassical economics.

5. THE FEDERALIST No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

6. The notion of a separation of business and state has been mentioned in various places, but not developed in any detail. I have uncovered the following related references since the idea occurred to me in 2002: DERBER, *supra* note 3, at 196 (1998) ("[N]ew arrangements, new institutions, and greater deconcentration of corporate power and *separation of company and state* are needed.") (emphasis added); John Braithwaite, *On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers*, 47 U. TORONTO L.J. 305 (1997). Although Braithwaite focuses on separations of private power, he does note in passing a key point that I develop in this Article:

Through influence in a number of states, such private actors sometimes shape global regulatory regimes in ways that make the citizens of all states subservient to them.

Today, therefore, the separation of business and state has an importance that the

business has become excessively entangled with the state and make the case for a formal separation as a matter of law and public values.

In conclusion, I flag certain esoteric implications of separationism. Because base human tendencies underlie all three separation problems, personal and collective transformation emerge as imperatives. By protecting our democracy from corrosive influences, our nation's existing separations allow democratic governance to function in a more autonomous and unadulterated form. This begs the question of democracy's promise. Once freed from the reactive mode of countering threats, what positive functions might democratic governance serve? I suggest that separations provide the space for democracy to produce ethical growth and collective transformation. This is built into the very idea of self-governance in that citizens are forced into non-violent modes of dialogue, participation, introspection, and accommodation of differences. If separated from corrosive influences and exercised in good faith, democratic governance could improve human nature instead of perpetually falling victim to it.

Thus, the historical focus of this Essay proves, in the end, to be a vehicle for arriving at a hopeful place. But first, let us contemplate the territory we know in the present, a landscape characterized by widespread social problems and the decreasing ability of ordinary citizens to influence their government.

A. Democratic Dilemmas

One wonders why American democracy proves unable to uphold the public interest. It seems somehow inconsistent, even paradoxical. Why is it that the people suffer if this is a government of the people, by the people, and for the people?⁷ The reasons will of course depend on what set of policies we deem to be in the public interest and what sort of suffering we attribute to public policies as opposed to individual choices. But there are three basic inconsistencies or paradoxes that relate to democratic premises: why democracies produce unpopular policies; why the ability of citizens to participate in politics is unequal; and why political culture does not appear up to the task of self-governance. I discuss each of these briefly, as it seems a suitable path for raising the issue of entanglement between the spheres of business and state.

separation of church and state and separation of powers within the state once had. Even more neglected in the scholarly literature, however, is the separation of powers within business.

Briathwaite, *supra*, at 307-308. A few blogs and internet sources also suggest, without any elaboration, this notion. See, e.g., Jared Amerson, *Separation Between Corporation and State*, UTAH INDEPENDENT MEDIA CENTER, July 21, 2004, <http://utah.indymedia.org/news/2004/07/9113.php> (last visited January 10, 2008).

7. Abraham Lincoln, *The Gettysburg Address* (1863), reprinted in RICHARD D. HEFNER, *A DOCUMENTARY HISTORY OF THE UNITED STATES* 185 (5th ed. 1991).

1. *The Paradox of Popular Sovereignty*

A common set of complaints suffices to raise the question of where decision-making authority lies. Each complaint is not equally traceable to the problem of money in politics, but each does cause us to question how seemingly unpopular decisions can come about through representative governance. Public education is under-funded;⁸ the percentage of uninsured citizens is increasing with already 46 million living without health insurance;⁹ the minimum wage lingers behind the cost of living;¹⁰ environmental legislation lingers behind the evidence of global warming; and the government continues an unpopular foreign occupation projected to cost \$1-2 trillion to fight terrorism, remake the Middle East, and, ironically, spread democracy.¹¹

Several popular explanations for suboptimal public policies gloss over the accountability problems produced by monetary influence in politics. One fashionable explanation posits the irrationality of the voting public, theorizing

8. See Press Release, National Education Association, Congressional Swipes at Public Education Ignored in State of Union Address (Jan. 31, 2006), available at <http://www.nea.org/newsreleases/2006/nr060131a.html> (last visited January 10, 2008) (“No Child Left Behind has been under-funded by \$40 billion over the past five years, including \$1 billion in cuts by Congress in December.”). House Majority Leader Congressman Steny Hoyer posted the following statistics on his website: President Bush’s 2007 Fiscal Year budget proposal would (1) under-fund the “No Child Left Behind” initiative by \$15.4 billion; (2) call for “the largest cut to federal education funding in the 26-year history of the Education Department – a \$2.1 billion reduction”; and (3) under-fund special education by 23% (among other budget cuts in education). See Congressman Steny Hoyer, *Will President Bush’s Budget Pay for America’s Priorities?*, at 2-3, available at <http://majorityleader.house.gov/docUploads/SenateBushBudgetEducation.pdf> (last visited January 10, 2008).

9. See U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE 2005 (2006), available at <http://www.census.gov/hhes/www/hlthins/hlthin05/hlth05asc.html> (last visited January 10, 2008) (“In 2005, 46.6 million people were without health insurance coverage, up from 45.3 million people in 2004. . . . The percentage of people without health insurance coverage increased from 15.6 percent in 2004 to 15.9 percent in 2005.”); see also Todd Zwillich, *46 Million Lack Health Insurance*, WEBMD, Aug. 30, 2005, available at <http://www.cbsnews.com/stories/2005/08/30/health/webmd/main806291.shtml> (last visited January 10, 2008). Moreover, the majority of Americans desires guaranteed health care, and yet the President and Congress are consistently unwilling to provide it. See Robin Toner & Janet Elder, *Most Support U.S. Guarantee of Health Care*, N.Y. TIMES, Mar. 2, 2007, at A1.

10. See JARED BERNSTEIN & ISAAC SHAPIRO, CTR. ON BUDGET AND POLICY PRIORITIES, BUYING POWER OF MINIMUM WAGE AT 51-YEAR LOW I (June 20, 2006), <http://www.epi.org/issuebriefs/224/ib224.pdf> (last visited January 10, 2008) (“The minimum wage now equals only 31% of the average wage for private sector, nonsupervisory workers. This is the lowest share since at least the end of World War II. . . . After adjusting for inflation, the value of the minimum wage is at its lowest level since 1955.”); see also *Increasing the Minimum Wage: Initiative 688*, ECON. OPPORTUNITY INST. (1998), available at <http://www.eoionline.org/minimum.htm> (last visited January 10, 2008) (“[A] full-time worker earns 30% below the federal poverty threshold for a family of four . . . Since 1973, the percentage of workers earning wages that pay below the poverty level has increased from 23 percent to 30 percent—almost a third of the U.S. workforce.”).

11. Joseph E. Stiglitz, *The True Costs of the Iraq War*, PROJECT SYNDICATE (2006), available at <http://www.project-syndicate.org/commentary/stiglitz67> (last visited January 10, 2008).

that the general public does in fact exert significant control over politics, but that it makes bad choices due to a series of biases and cognitive errors.¹² A second variation of this same theory states that people are guided by emotion and passion and thus are prone to ignoring their material interests and those of the nation.¹³ Another type of explanation relates to voter cognition, but revolves principally around political strategy. It describes the success of conservative groups in trumping economic issues with moral issues, causing Americans to vote against their own economic self-interest.¹⁴

A third type of explanation capable of encompassing the former two begins by observing the powerful role played by moneyed interests, especially corporations, in the political process.¹⁵ It maintains that public policy does not serve the public interest because of the influence of money in politics. This influence is felt in the financing of campaigns, the need to employ the mass media and spin doctors—both of which are costly—to win elections, and the superior access to elected officials gained by lobbyists, all of which serve to disempower the general public. These three explanations are perfectly complimentary, except insofar as the first two posit that ordinary people have significant traction in the political process and that, to simplify, there is no problem with the system, only with people's decisions.

The third explanation, upon which I build, varies from the others by focusing on the ability of corporations and other moneyed actors to frustrate popular choice. It questions political representatives' accountability to the general public. Indeed, it signals a distortion or defect in our system of representative democracy. Legislative capture results from the increased traction and incentives afforded concentrated interests, as compared with the more diffuse interests of the general population.¹⁶ Although public policy often does not act in accordance with the interests of ordinary people, it does benefit some people. It would be preposterous to separate this concern over distributive outcomes from the fact that those who receive the largest piece of the pie happen to be among the same people and groups who enjoy far greater sway with elected officials than ordinary citizens. This raises another paradox.

12. See BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (2007).

13. See DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* (2007).

14. See THOMAS FRANK, *WHAT'S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA* (2004); GEORGE LAKOFF, *DON'T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE* (2004). For a related analysis written from a Republican Party perspective, see DAVID HOROWITZ, *THE ART OF POLITICAL WAR AND OTHER RADICAL PURSUITS* (2001).

15. See DERBER, *supra* note 3.

16. See *generally* MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971) (discussing how incentives for collective action apply most when private goods are generated for group members, as compared to public goods for the general public, and helping to explain why concentrated interests can defeat diffuse social interests).

2. *The Paradox of Political Equality*

The extent to which monetary power translates into political power serves as a useful way to measure political inequality. Since money influences elections and the political process more broadly, economic inequality provides a foundation for political inequality. If the law allows meaningful differences between the degree of influence an ordinary American and a wealthy American or corporation can exert, then the high degree of economic stratification in this country casts doubt on the integrity of American democracy. The relationship between economic and political inequality is mutually reinforcing: greater political traction for the wealthy leads to public policies favorable to the wealthy, which leads to greater economic inequality, which in turn leads to greater political inequality, and so on. Tighter regulations on money in politics could stop this cycle, but those regulations are harder and harder to pass as wealthy interests become more entrenched in the political process.

Economic inequality has reached such heights that commentators have declared a new gilded age.¹⁷ Although real wages have stagnated in the last two decades for a significant majority of Americans, the income of the top .1% of the population has increased by 600%.¹⁸ In the 1990s, for example, the real median wages of CEOs increased over 60%, and in 2004 a new record was reached: “The ratio of CEO compensation to that of the average US worker [became] the highest in recorded history.”¹⁹ Indeed, in 1998 the top 1% of the population had greater assets than the bottom 90% combined.²⁰ Meanwhile, the average worker’s pay increases have been offset by inflation and the rising cost of health care.²¹

17. See Louis Uchitelle, *The Richest of the Rich, Proud of a New Gilded Age*, N.Y. TIMES, July 15, 2007, at A1 (“Only twice before over the last century has 5 percent of the national income gone to families in the upper one-one-hundredth of a percent of the income distribution.”).

18. GLOBAL VALUES 101: A SHORT COURSE 55 (Kate Holbrook et. al. eds., 2006).

19. Madeleine Baran, *CEO Pay Reaches All-Time High as Workers’ Wages Stagnate*, THE NEW STANDARD, July 31, 2004, available at <http://ncwstandardnews.net/content/index.cfm/items/757> (last visited January 10, 2008).

20. Edward N. Wolff, *Recent Trends in Wealth Ownership, 1983-1998*, Table 2 (Jerome Levy Econ. Inst. & N.Y. Univ., Working Paper No. 300, 2000). See also Bradford Plumer, *Purchasing Power*, THE NEW REPUBLIC, Jan. 30, 2007, available at <http://www.tnr.com/doc.mhtml?i=w070129&s=plumer013007> (last visited January 10, 2008) (“By the late ‘90s, the richest 1 percent of American households held one-third of all wealth in the U.S. economy, and took in 14 percent of the national income – a greater share than at just about any point since the Great Depression.”).

21. See Baran, *supra* note 19 (“[T]he average worker will receive a 3.3 to 3.5 percent pay increase this year . . . Pay increases for most workers are at the slowest rate since at least the mid-1970s. Inflation and mounting health care costs are expected to off-set these already small raises.”). Incidentally, early U.S. policies in Iraq will likely produce similar effects. For example, one of Paul Bremer’s first actions as the interim administrator of Iraq was to change Iraq’s corporate laws so that all domestic industries and resources could be entirely foreign-owned; 100% of profits earned could be taken out of Iraq; and foreign companies would receive either a 15% flat tax or no tax at all, if operating pursuant to a reconstruction contract. See Dana Milbank & Walter Pincus, *U.S. Administrator Imposes Flat Tax System on Iraq*, WASH. POST, Nov. 2,

If democracy concerns those “processes by which ordinary citizens exert a relatively high degree of control over [political] leaders,”²² it follows that certain conditions must be in place to restrain citizens who are exceptional, for example, in terms of monetary power or brute strength, from dominating ordinary citizens. And yet the Supreme Court has ruled that corporate monetary contributions constitute free speech protected by the First Amendment of the Constitution. For example, in striking down a state statute criminalizing some corporate expenditures designed to influence the vote on referendum proposals, the Supreme Court noted that corporate use of financial power is a “type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”²³ This statement is notable in light of vast disparity of wealth between legal persons and natural persons, and in light of the amount of money required to mount a successful campaign at the federal level.²⁴

Of the top 100 richest entities in the world, as measured by the Gross Domestic Product or sales, 52 are corporations and 48 are countries.²⁵ Under current Supreme Court case law, corporations are considered legal persons and have constitutional rights.²⁶ Relying on their status as legal persons, which allows them equal protection and free speech under the Constitution, corporations contributed nearly \$2 billion to political causes in 1996.²⁷ The Bush and Gore campaigns combined spent \$325 million on the 2000 election.²⁸ In 2004, the average House winner raised over \$1 million and the average Senate winner more than \$6 million.²⁹ Approximately \$2 billion were spent on

2003, at A9; *see also* L. PAUL BREMER, COALITION PROVISIONAL AUTHORITY ORDERS No. 39 “Foreign Investment” (Dec. 20, 2003), No. 37 “Tax Strategy for 2003” (Sept. 19, 2003), No. 38 “Reconstruction Levy” (Apr. 4, 2004), and No. 49 “Tax Strategy for 2004” (Feb. 2, 2004), available at <http://www.cpa-iraq.org/regulations/index.html#Orders> (last visited January 10, 2008).

22. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 2 (1956) (seeking to uncontroversially describe the thing that concerns democratic theory).

23. *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

24. Legal persons are of course controlled by natural persons, but CEOs and board members are hardly representative of “ordinary people”; moreover, their organizational structure roots out conscience and makes moral behavior rather out of place. *See generally* JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 60-110 (2004) (describing the profit-maximizing, externality producing, liability avoiding, and democracy co-opting nature of the large corporation).

25. INST. FOR POL’Y STUD., CORPORATE VS COUNTRY ECONOMIC CLOUT: THE TOP 100 (2003), http://www.ips-dc.org/global_econ/top_100.pdf (last visited January 10, 2008).

26. *See Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886); JAMES D. COX ET AL., CORPORATIONS 2-6 (2d ed. 2002) (describing corporate personhood and the constitutional rights of corporations).

27. DERBER, *supra* note 3, at 33.

28. *See* CHARLES LEWIS, THE BUYING OF THE PRESIDENT, 2004: WHO’S REALLY BANKROLLING BUSH AND HIS DEMOCRATIC CHALLENGERS 4 (2004).

29. *See* THE CAMPAIGN FIN. INST., HOUSE AND SENATE WINNER’S RECEIPTS, 2001-2004, http://www.cfinst.org/pr/pdf/Congr/ElectionResults_Table1.pdf (noting the mean quantity raised as \$1,024,918 for the House and \$6,580,722 for the Senate) (last visited January 10, 2008).

TV ads this past political campaign season and in the last sixty days before the election, 90% of these ads were negative.³⁰ Fifty percent of the thirty-six senators who left office between 1998 and 2005 have become lobbyists,³¹ and the number of lobbyists has more than doubled since the year 2000.³²

This picture bodes poorly for political equality. The power of concentrated interests coupled with permissive laws and the monetary demand of political campaigns makes governmental capture something of an inevitability.³³ Private interests—wealthy, well organized, and afforded traction by the political system—easily overwhelm the general public in terms of access and influence. We need not look further than Congress itself for confirmation. After interviewing sixteen Congress members, more than half of whom were Republican, Larry Makinson reported that “[v]irtually everyone accepted the long-held Washington premise that money buys access to members.”³⁴ Ronald Dworkin argues that “[l]arge campaign contributors purchase what is euphemistically called ‘access’ to officials; in fact they often purchase not merely access but control.”³⁵ As such, wealth is a form of political capital, and, given the broad disparities in wealth within the United States, the amount of attention and concern that U.S. citizens will receive from their elected representatives will vary accordingly. We need not even speak of the prospect of equality in ability to access and influence elected representatives.

One reason for this inequality lies in the harsh realities of political campaign finance. As noted above, it takes millions of dollars to win a congressional or presidential election, and therefore securing large campaign donations, as large as permissible under law, becomes paramount. This is significant on several fronts. First, it means that, as a general rule, the average citizen cannot run for Congress or the Presidency. As Representative Tim Roemer observed, “the amount of time it takes to raise the money. . . [and] some people’s inherent access to the political system [because] they come from money . . . certainly precludes poor and low income people from ever running.”³⁶

30. Susan Page, *Nasty Ads Close Out a Mud-caked Campaign*, USA TODAY, Nov. 3, 2006, at A11.

31. Jeffrey H. Birnbaum, *Hill a Steppingstone to K Street for Some*, WASH. POST, July 27, 2005, at A19 [hereinafter Birnbaum, *Hill a Steppingstone*] (“Two thirds of the Republican senators who went into private life since 1998—12 of 18—have become lobbyists, compared with one-third of Democratic senators—6 of 18—who have done the same. In the House, nearly half of the Republicans eligible to become lobbyists have registered to do so over that period—46 of 94. House Democrats became lobbyists at a lower rate—32 percent, or 22 of 68 retirees.”).

32. Jeffrey H. Birnbaum, *The Road to Riches Is Called K Street*, WASH. POST, June 22, 2005 at A1 [hereinafter Birnbaum, *The Road to Riches*].

33. *C.f.* OLSON, *THE LOGIC OF COLLECTIVE ACTION*, *supra* note 16.

34. LARRY MAKINSON, *SPEAKING FREELY: WASHINGTON INSIDERS TALK ABOUT MONEY IN POLITICS* 59 (2003).

35. RONALD DWORIN, *IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE* 129 (2006).

36. MAKINSON, *supra* note 34, at 74. The problems of such inequality are of the

Second, the realities of political finance signify that moneyed interests will be overrepresented in determining the outcome of political campaigns and legislative priorities. Representative Robert Borski has noted that “you can’t raise \$1,000 from people who make \$45,000 or \$50,000 a year.”³⁷ Indeed, most of those with the wherewithal to contribute the necessary funds enjoy household incomes of over \$100,000.³⁸ Essentially, wealthier people are the ones who are positioned to contribute substantially to political campaigns, constituting a basic plutocracy.

Gore Vidal has confirmed Representative Borski’s point and expanded it to include corporations, which form part of the plutocracy:

Of the billions now spent each election cycle, most is donated in checks exceeding \$1,000. But less than one-tenth of 1 percent of the general population make individual contributions at this rate. And among group contributors, better than 90 percent comes from corporations, which duly record their political investment as a tax-deductible “cost of doing business.”³⁹

Moneyed interests make campaign contributions with expectations of returns on their investments, a supposition evidenced by corporations giving heavily to both political parties.⁴⁰ It follows that those who do not fund campaigns will receive only limited attention. Political inequality and corporate political activity warrant reflection on the nature of our political community.

Corporate legal personhood brings new meaning to the notion of a government of the people, by the people, and for the people.⁴¹ In light of these legal persons’ immense resources and superior attributes—such as perpetual life, simultaneous existence in multiple places, and limited liability in addition to civil rights⁴²—the nature of the political community and its outputs change substantially. The eras of slavery, segregation, and the exclusion of women from the vote illustrate the most obvious forms of a democratic deficit. Today there is a more subtle, but nonetheless important, distance between the theory and the practice of democracy. Formally speaking, we are all included in elections, but absent public financing of elections, wealthy interests receive

foundational sort. See M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 25 (2d ed. 1998) (“[T]he major concern of ancient theorists of constitutionalism was to attain a balance between the various classes of society and so to emphasize that the different interests in the community, reflected in the organs of the government, should each have a part to play in the exercise of the deliberative, magisterial, and judicial functions alike.”).

37. MAKINSON, *supra* note 34, at 37.

38. Plumer, *supra* note 20 (“[I]n the 2000 election, 95 percent of those donors making substantial campaign contributions came from households earning over \$100,000.”).

39. Gore Vidal, Foreword in DAVID DONNELLY ET AL., *MONEY AND POLITICS: FINANCING OUR ELECTIONS DEMOCRATICALLY*, at ix-x (1999).

40. LEWIS, *supra* note 28, at 119-28. The large contributions of labor unions to the Democratic Party should be recognized as one major difference between the two. *See id.*

41. *See* COX, *supra* note 26.

42. *See id.* at 3-6.

greater attention. Furthermore, as Ralph Nader and Noam Chomsky have powerfully pointed out,⁴³ our two-party system affords only a small range of choices, and the news media often function to manufacture consent on any given issue. Both political parties receive heavy corporate funding, the media are largely owned by corporations, and the general public, lacking the resources to compete with entire industries, does not set the agenda.⁴⁴

3. *The Paradox of Democratic Culture*

Beyond the paradoxes associated with control of government, there lies yet another which concerns the spirit of politics. If democracy rests on the premise of popular engagement and reasoned dialogue between opposing camps, how is it that we have arrived at a place of widespread cynicism, utter partisanship, and ideological determinism? Even four members of the Supreme Court have observed a “cynical electorate.”⁴⁵ This is in line with a total voter turnout rate of 41.3% in 2006 and 60.93% in 2004, averaging out to half of the eligible voting population.⁴⁶ Tied to cynicism and modest turnout, many have observed the poor quality of political debate in the United States. Ronald Dworkin laments the “lack of any decent argument in American political life,”⁴⁷ and writes that “each side has no respect for the other. We are no longer partners in self-government; our politics are rather a form of war.”⁴⁸ Al Gore noted the same phenomenon: “American democracy is now in danger—not from any one set of ideas, but from unprecedented changes in the environment within which ideas either live and spread, or wither and die. I do not mean the physical environment; I mean what is called the public sphere, or the marketplace of ideas.”⁴⁹

The paradoxes discussed above—those of sovereignty, equality, and culture—draw our attention to the matter of democratic integrity and the challenge of generating a suitable framework of analysis.

43. See EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* (1988); RALPH NADER, *THE GOOD FIGHT: DECLARE YOUR INDEPENDENCE AND CLOSE THE DEMOCRACY GAP* 23-33 (2004).

44. See DAVID CROTEAU & WILLIAM HOYNES, *THE BUSINESS OF MEDIA: CORPORATE MEDIA AND THE PUBLIC INTEREST* (2d ed. 2006) (discussing deregulation, ownership concentration, mergers and acquisitions, advertising revenue, and media models among other issues).

45. *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007) (Souter, J., joined by Stevens, J., Ginsburg, J., and Breyer, J., dissenting) (noting that “the demand for campaign money in huge amounts from large contributors . . . has produced a cynical electorate”).

46. See U.S. Election Project, *Voter Turnout Statistics*, http://elections.gmu.edu/voter_turnout.htm (last visited January 10, 2008).

47. DWORKIN, *supra* note 35, at 4. Dworkin further observes that “our national politics fails the standards of even a decent junior high school debate.” *Id.* at 127.

48. *Id.* at 1.

49. AL GORE, *THE ASSAULT ON REASON* 2-3 (2007).

B. A Path to Resolution.

In considering how to address the issue of monetary influence in politics, we can be guided by the sense that problems cannot be solved at the same level of consciousness at which they were created.⁵⁰ Corporations infringe on politics because they see no separation between the private sphere and public sphere. Profit-maximizing entities see politics as a competition of interests, a game to be played as fiercely as possible. Therefore, corporations will fight, undermine, or even violate barriers to monetary influence over politics. These entities come from the world of business and are guided, even in their relationship to government,⁵¹ by the norms and values of the business world.

For those who operate on this level, the temptation to control government becomes irresistible. Rates of taxation, corporate bailouts, health care policy, and foreign policy devoted to liberalizing other countries, all profoundly affect corporate profits.⁵² Philip Morris, for example, spent more on the 1996 elections than any other special interest organization, a fact explained by its director of communications in the following terms: "Philip Morris supports those who share our thoughts. We have a responsibility to our employees and shareholders to be in the political process and we are happy to do so."⁵³ Indeed, Milton Friedman, Nobel Prize-winning economist and the great champion of economic liberalism, has described profit-maximization as the "one and only one social responsibility of business."⁵⁴ Since the purpose of the corporation is to create wealth for shareholders, and government policies affect profit, it follows that corporations will seek to influence the government to the greatest extent possible.

Consequently, the private sphere of the economy—businesses, corporations, and money—has become excessively entangled with the public sphere of governance and democracy. We are therefore confronted with a separation problem. We ought to consider whether a stronger wall of separation should be erected between our two engines of freedom: capitalism and democracy, business and state.⁵⁵ If we answer in the affirmative, then we must

50. Philip D. Gould & Patricia H. Murrell, *Therapeutic Jurisprudence and Cognitive Complexity: An Overview*, 29 *FORDHAM URB. L.J.* 2117, 2131 (2002).

51. Corporate influence over the medical profession, for example, provides a case study outside of the realm of governance. See, e.g., Op-Ed., *Is Your Doctor Tied to Drug Makers?*, *N.Y. TIMES*, July 2, 2007, at A20.

52. See DWORKIN, *supra* note 35, at 91 (discussing the distributive impact of the Bush administration's tax policies).

53. See DERBER, *supra* note 3, at 165.

54. See Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, *N.Y. TIMES*, Sept. 13, 1970 (Magazine).

55. Even the economically liberal perspective of Milton Friedman acknowledges the need for separation: "The kind of economic organization that provides economic freedom directly, namely, competitive capitalism, also promotes political freedom because it separates economic power from political power and in this way enables the one to offset the other." MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 9 (1962). The particular circumstances to which Friedman

inquire into the dimensions of the separation problem and the appropriate character of a solution. Guidance on both of these matters can be found in the political thought and legal doctrines surrounding the two separations already established under U.S. law.

II

HISTORICAL ANALOGIES

A. Historical Perspectives on Corporations

Before looking for guidance in historical analogies, let us take stock of what certain key historical figures have said about corporations directly. Early in the history of our nation, Thomas Jefferson noted the conflict between economic power and representative democracy, and expressed a most controversial aspiration: "I hope we shall take warning from the example and crush in its birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country."⁵⁶ Fifteen years later, in 1831, a young French lawyer named Alexis de Tocqueville arrived in the United States. Lost amidst his classic study of American democracy, lies a prescient warning. Referencing the "manufacturing aristocracy," Tocqueville said this: "[T]he friends of democracy should keep their eyes anxiously fixed in this direction; for if ever a permanent inequality of conditions and aristocracy again penetrates into the world, it may be predicted that this is the gate by which they will enter."⁵⁷ Forty years later, the Civil War nearing its end, Abraham Lincoln confessed a staggering fear that corroborated Tocqueville's prediction:

As a result of the war, corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed. I feel at this moment more anxious for the safety of my country than ever before, even in the midst of war.⁵⁸

Those of us concerned with the problem of corporations in politics can rest assured, we are in good company.

Grave admonitions by famed statesmen continued in more recent eras.

responds in this quote had everything to do with government interference in economic activity, yet the underlying concern below the superficial question of whether the government is interfering in the economy or vice-versa is simply whether the two institutions are maintained relatively separate.

56. Letter from Thomas Jefferson to Tom Logan (Nov. 12, 1816), *reprinted in* 10 THE WRITINGS OF THOMAS JEFFERSON 69 (Paul L. Ford ed., G.P. Putnam's Sons 1892-1899).

57. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 161 (Knopf Everyman's Library Series No. 179, 1994).

58. Letter from Abraham Lincoln to William F. Elkins (Nov. 21, 1864), *in* 2 EMANUEL HERTZ, ABRAHAM LINCOLN: A NEW PORTRAIT 954 (1931).

Forty years after Lincoln's remarks, at the start of the new century, President Theodore Roosevelt pleaded before Congress: "[a]ll contributions by corporations to any political committee or for any political purpose should be forbidden by law."⁵⁹ Discussing the type of political corruption associated with corporate financial influence over national elections, Roosevelt said there was "no enemy of free government more dangerous and none so insidious."⁶⁰ President Eisenhower's famous 1961 farewell address struck a similar tone: "In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought . . . The potential for the disastrous rise of misplaced power exists and will persist."⁶¹ Although his remarks centered on the "military-industrial complex" and did not touch on corporate political influence more broadly, the dangers of the former are but one troubling result of the latter. Eisenhower urged the nation to respond to unwarranted corporate influence over politics. "It is the task of statesmanship," he said, "to mold, to balance, and to integrate these and other forces, new and old, within the principles of our democratic system—ever aiming toward the supreme goals of our free society."⁶²

That these men had occasion to make such remarks from early in the life of the nation and up through recent times testifies to the absence of explicit constitutional provisions for controlling corporations.⁶³ Although concerned by the possibility of corporate power and interested in a role for corporations in the development of the nation, Madison failed to persuade other delegates to the Constitutional Convention to grant the federal government control over corporate charters.⁶⁴ Still, Jefferson, Madison, and Hamilton had been busy anticipating the forces that could sink the republic, and they largely succeeded in countering them through constitutional structure. The first force was human nature, specifically self-interested power-seeking, which Madison advocated restraining by creating three separate branches of government, each with its

59. Fed. Election Comm'n v. Wisconsin Right to Life, Inc., 127 S.Ct. 2652, 2690 (2007) (Souter, J., dissenting) (quoting President Theodore Roosevelt). Justice Souter's opinion usefully summarizes the history of campaign finance reform and notes how Roosevelt's remarks led to the Tillman Act of 1907.

60. *Id.* at 2689 (Souter, J., dissenting) (quoting President Theodore Roosevelt).

61. Avalon Project at Yale Law School, *Military-Industrial Complex Speech, Dwight D. Eisenhower, 1961*, <http://www.yale.edu/lawweb/avalon/presiden/speeches/eisenhower001.htm> (last visited January 10, 2008).

62. *Id.*

63. At the Constitutional Convention, however, Madison proposed repeatedly that the federal government be placed in charge of corporations. This proposal was defeated largely through reference to the situation of the oppressive East India Company, which acted as a proxy for foreign governments. The strength of the federal government could be unduly increased and made more dangerous through control of corporations. And so the power to grant corporate charters came to reside in the several states. See Nace, *supra* note 3, at 47-48 (discussing Madison's proposal as well as a more limited proposal by Benjamin Franklin, both of which were rejected at the Constitutional Convention).

64. *Id.*

own areas of competence. The second force was the church, an ideologically-driven and potentially oppressive force, which Jefferson felt should be distanced from the state by a “wall of separation.”⁶⁵

Although the Framers failed to account for corporations, their efforts to separate corrosive forces from the state provide a pathway for those of us to whom responsibility for the third separation falls. In addition to providing a pathway for action, earlier separations provide a pathway for understanding, drawing our attention to the forces of interest and passion. This is the guidance they left us.

B. *The Separation of Powers.*

“Separation is a necessary, if not sufficient, condition of liberty: its absence promotes tyranny.”⁶⁶

I. *History and Theory*

The American Revolution vindicated the values of popular sovereignty and political equality.⁶⁷ Significant consequences flowed from the premises that government derives its power from the consent of the governed, and that all people are created equal and have unalienable rights to life, liberty, and the pursuit of happiness.⁶⁸ If power was to be vested in the people, for example, then the demons of human nature had to be accounted for in governmental structure. Otherwise, the government would be compromised by the failings of the populace. James Madison, Alexander Hamilton, and John Jay argued in *The Federalist Papers* that human nature and the problem of factions demanded a separation of powers to prevent any person or group from dominating government.⁶⁹

The flaws of human nature that necessitated a separation of powers were largely the same ones that required the establishment of a federal government. In describing the reasons why the states—if they remained separate or in a mere partial confederacy—would likely wage war against each other, Hamilton noted that to imagine any other outcome “would be to forget that men are

65. Although the phrase, “separation of church and state” is attributed to Jefferson (*see* his 1802 letter to the Danbury Baptists Association), it was Roger Williams who first referred to a “wall of separation” in this context. *See* ROGER WILLIAMS, MR. COTTON’S LETTER LATELY PRINTED, EXAMINED AND ANSWERED (1644), *reprinted in* 1 ROGER WILLIAMS, THE COMPLETE WRITINGS OF ROGER WILLIAMS 108 (Russell & Russell 1963).

66. GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD* 9 (1997).

67. *See* USHistory.org, *The Declaration of Independence*, July 4, 1776, available at <http://www.ushistory.org/declaration/document/index.htm> (last visited July 8, 2007).

68. *See id.* (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”).

69. *See* THE FEDERALIST PAPERS.

ambitious, vindictive, and rapacious.”⁷⁰ He continued on to describe the particular forms taken by such rapaciousness: “[T]he love of power or the desire of pre-eminence and dominion – the jealousy of power or the desire of equality and safety.”⁷¹ The private passions of “leading individuals in the communities” could also interfere.⁷² Hamilton considered that “[m]en of this class . . . have in too many instances abused the confidence they possessed; and assuming the pretext of some public motive, have not scrupled to sacrifice the national tranquility to personal advantage or personal gratification.”⁷³ If united under a single government, the theory went, individual states run by self-interested rulers would not destroy each other.

It did not follow, however, that the mere fact of a federal government would adequately control these facets of human nature. Although a union would prevent wars between the states, it would not prevent the emergence of factions, which Madison defined as “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of the citizens, or to the permanent and aggregate interests of the community.”⁷⁴ Thus, the federal government proposed a crucial structural device for preventing the concentration of power within any given group, a “foundation for that separate and distinct exercise of the different powers of government.”⁷⁵

The first three articles of the Constitution describe the different functions of the three branches of government, thus providing for a separation of powers. Beyond specifying the powers of the federal government, the first three articles of the Constitution specify which branch may exercise which powers. Powers committed to one branch cannot be exercised by another branch; accordingly, three distinct spheres emerge. The separation of powers is not just about branches of government. It also entails a “separation of persons”⁷⁶ where “no individual being allowed to be at the same time a member of more than one branch.”⁷⁷ Indeed, what sense would it make if, although the branches themselves remained separate, one group of people was permitted to control them all? In this way, the separation of powers could become a dead letter. In the end, the Framers agreed upon three separate articles, three separate branches, and a resulting system of checks, balances, and structural controls to secure liberty from the grasp of human nature. Arguing for a separation of powers, Madison said:

Ambition must be made to counteract ambition. The interest of the

70. THE FEDERALIST No. 6 (Alexander Hamilton), *supra* note 5, at 54.

71. *Id.*

72. *Id.*

73. *Id.*

74. THE FEDERALIST No. 10 (James Madison), *supra* note 5, at 78.

75. THE FEDERALIST No. 51 (James Madison), *supra* note 5, at 321.

76. VILE, *supra* note 36, at 18.

77. *Id.* at 14.

man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary.⁷⁸

Taking this view seriously might lead one to question whether self-government, indeed whether democracy itself, is a sound proposition. But Madison also saw the positive potential in human nature; beyond a “degree of depravity,” he noted “there are other qualities in human nature which justify a certain portion of esteem and confidence.”⁷⁹ He went on to suggest that the “political jealousy of some among us” is not representative of the human character.⁸⁰ And thankfully so, for if it were, “the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.”⁸¹

Thus, the very possibility of good governance in a democracy emanates from human potential. And although Madison was wise to pit ambition against ambition, we might go further and ask whether ambition need be the end point of human progress. Indeed, ambition in the service of greed describes our present dilemma. Might it not be possible, though, to rise above this and either cease to be ambitious or to put ambition in the service of something greater than greed? Our political tradition suggests a depth of aspiration consistent with such a project, but the first order of business has been to restrain vices, not to generate virtues.

The Framers understood the vices of human nature, especially narrow self-interest, to warrant a separation in law to preserve democracy. It turns out, however, that the forces of self-interest and passion are not so easily restrained. And so we come to a familiar bromide: the realization of democratic potential requires democratic vigilance. In this case, the vigilance is owed towards the new forms in which self-interest and passion might manifest in order to achieve their ends. Madison was familiar with human nature and with factions composed of individuals—whether a majority or a minority, individuals nonetheless. Today, we are faced with corporate nature and factions composed of multinational corporations.

2. *Lessons for the Separation of Business and State*

Madison identified human nature as a key rationale for the separation of powers and unequal property distribution as a key cause of factions.⁸² Today,

78. THE FEDERALIST NO. 51 (James Madison), *supra* note 5, at 322.

79. THE FEDERALIST NO. 55 (James Madison), *supra* note 5, at 346.

80. *Id.*

81. *Id.* Iraq may provide a modern example where this inference would apply.

82. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison), *supra* note 5, at 79 (“[T]he most

corporate nature generates a greater challenge, even aside from the rising inequality associated with corporate flourishing.⁸³ Corporations are driven by profit-maximization, a common impulse that, when pursued single mindedly, proves adverse to the rights of the citizens, or to the permanent and aggregate interests of the community. Milton Friedman stated that increasing its profits is “the one and only social responsibility of business.”⁸⁴ This exclusive focus on profit-maximization is also reflected in corporate law where the CEO is obligated to maximize financial returns for shareholders.⁸⁵ The single-minded goal of profit-maximization leads corporations to attempt to influence the state, for it is law that determines rates of taxation, minimum labor standards, environmental ordinances, liberalization of foreign economies necessary for the expansion of markets, the existence of civil remedies for defective products, environmental harm, workplace abuse, and many other matters upon which profits depend. And like all exercises of power for self-interested purposes, the motivation behind corporate driven reform will not be honestly and openly displayed for all to see. Corporations, with the help of experts in psychology, advertising and marketing, focus groups, and visual media productions, have done their best to frustrate public awareness, even to suppress independent, critical thought.⁸⁶

As might now be clear from the philosophy behind the separation of powers, corporate nature should be understood as a new manifestation of human nature, albeit in a more sophisticated form. Unlike natural persons, corporations have limited legal liability, perpetual existence, the power of

common and most durable source of faction, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society.”)

83. See notes 17-20, *supra* (discussing rising inequality).

84. Friedman, *supra* note 54. This belief has been defied, or at least reformed slightly, by some corporations. The voluntary reforms of the corporate social responsibility movement constitute a positive development. They are, however, dependent on the profitability of good behavior. See generally WILLIAM C. FREDERICK, *CORPORATION BE GOOD! THE STORY OF CORPORATE SOCIAL RESPONSIBILITY* (2006); and DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (2006) (documenting and praising various aspects of the voluntary movement for corporate reform, but noting the limits on its potential imposed by shareholders, corporate legal structure, and market conditions).

85. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes.”); MARJORIE KELLY, *THE DIVINE RIGHT OF CAPITAL: DETHRONING THE CORPORATE ARISTOCRACY* 19-28 (2001) (discussing business models and the obligations owed to shareholders in corporate law); Donald E. Schwartz, *Defining the Corporate Objective: Section 2.01 of the ALI’s Principles*, 52 GEO. WASH. L. REV. 511, 512-513 (1984) (discussing the primary importance of economic objectives in the corporate legal form).

86. See EDWARD L. BERNAYS, *PROPAGANDA* 71-128 (1928); STUART EWEN, *PR!: A SOCIAL HISTORY OF SPIN* 215-414 (1996); JOHN STAUBER & SHELDON RAMPTON, *TOXIC SLUDGE IS GOOD FOR YOU! LIES, DAMN LIES AND THE PUBLIC RELATIONS INDUSTRY* 13-24 (1995).

virtual location, and the power to shape-shift, or reorganize themselves.⁸⁷ It is partly because of these attributes that the need for outside restraint on corporate nature is greater than the same need with regard to human nature. And yet the need is also greater for a less obvious reason.

Our nation's political structure is built on the assumption that members of the political community care about more than one thing. Rousseau expressed this as the twin capacities of self love and pity,⁸⁸ not to mention eventual surrender to the general will pursuant to the social contract.⁸⁹ Rousseau wrote that "there is another principle. . . which, having been given to man in order to mitigate, in certain circumstances, the ferocity of his egocentrism or the desire for self-preservation before this egocentrism of his came into being, tempers the ardor he has for his own well-being by an innate repugnance to seeing fellow man suffer. . . I am referring to pity."⁹⁰ Madison's theory that factions could be set against each other and that an expansive democracy could temper local prejudices was functionally similar. It posited the moderation of pure self interest by necessity. To get anything done in a large, representative system, competing groups would have to form alliances and generate consensus positions.⁹¹

Unlike human nature, corporate nature is not tempered by pity or inter-factional accommodation. Joel Bakan elaborates:

[T]he corporation can neither recognize nor act upon moral reasons to refrain from harming others. Nothing in its legal makeup limits what it can do to others in pursuit of its selfish ends, and it is compelled to cause harm when the benefits of doing so outweigh the costs. Only pragmatic concern for its own interests and the laws of the land constrain the corporation's predatory instincts, and often that is not enough to stop it from destroying lives, damaging communities, and endangering the planet as a whole.⁹²

Although we must applaud the corporate social responsibility movement,⁹³ which seeks to reform corporate nature from the inside, we cannot wager the integrity of democracy on voluntary corporate reform. This would be akin to Madison passing out Bibles to all citizens, imploring them to

87. See NACE, *supra* note 3 (discussing the powers granted to corporations by law).

88. See Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, in JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT; DISCOURSE ON THE ORIGIN OF INEQUALITY; DISCOURSE ON POLITICAL ECONOMY 105, 116 (Donald A. Cress trans. & ed., Hackett Publishing 1983) (1754).

89. See JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 69 (Maurice Cranston trans., Penguin Classics 1968) (1762).

90. Rousseau, *Discourse on the Origin of Inequality*, *supra* note 88, at 133.

91. See James Madison, *Speech in the Federal Convention on Factions* (June 6, 1787), in JAMES MADISON, WRITINGS 92, 92-93 (Jack N. Rakove ed., 1999). See generally The Federalist No. 10 (James Madison) (contending with the threat posed by factions).

92. BAKAN, *supra* note 24, at 60.

93. See FREDERICK, *supra* note 84.

behave morally, instead of separating the powers of government.

C. *The Separation of Church and State*

I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State.⁹⁴

—Thomas Jefferson

1. *History and Theory*

The separation of church and state was intended to safeguard the state from religion, and religion and religious freedom from the state.⁹⁵ The first of these two purposes provides a useful analogy for the problem of plutocracy.⁹⁶ Jefferson believed that "the church should be walled off from the state in order to safeguard secular interests (public and private) 'against ecclesiastical depredations and incursions.'"⁹⁷ Separation was necessary, in part, to prevent religion from corrupting and undermining government.

This much is reflected in the Supreme Court's 1947 decision in *Everson v. Board of Education*.⁹⁸ In addition to quoting Jefferson's "wall of separation" metaphor as the intention behind the First Amendment, the Court noted the impermissibility of religious groups driving government affairs: "Neither a state nor the Federal Government can, openly or secretly, participate in the

94. Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), in 5 *THE FOUNDERS' CONSTITUTION* 96 (Philip B. Kurland & Ralph Lerner eds., 1987).

95. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1158-59 (2d ed. 1988) (describing the various "schools of thought" behind the First Amendment). Drawing on the purpose of safeguarding religion from the state, one could attempt an essay on how the religious clauses reveal the evils of state interference in the economy. This would focus on "the evangelical view (associated primarily with Roger Williams) that 'worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained.'" *Id.* at 1158.

96. Kevin Phillips has usefully described plutocracy as "the fusion of money and government," PBS, *Transcript: Bill Moyers Interviews Kevin Phillips*, Apr. 9, 2004, available at http://www.pbs.org/now/transcript/transcript_phillips.html, and defined the term as government by or in the interest of the rich, KEVIN P. PHILLIPS, *AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY*, at xi (2006).

97. TRIBE, *supra* note 95, at 1158-59. Supporting this view of Jefferson's reasons for separationism, Tribe notes Jefferson's interest in barring clergy from public office and his "conviction that only the complete separation of religion from politics would eliminate the formal influence of religious institutions and provide for a free choice among political views." *Id.* at 1159. *But see* DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 60 (2002) (arguing that Jefferson's metaphor "was not offered as a general pronouncement on the prudential relationship between religion and all civil government; rather, it was, more specifically, a statement delineating the legitimate constitutional jurisdictions of the federal and state governments on matters pertaining to religion").

98. 330 U.S. 1 (1947).

affairs of any religious organizations or groups and vice versa.”⁹⁹ The words “vice versa” direct our attention to something often taken for granted. It is clear to all but the most radical of the religious right that the state is not supposed to be coordinated with or subordinated to the Church, merely the “secular arm of [a] Deity maintaining outward order and decorum among men.”¹⁰⁰ Indeed, the Constitution provides no mechanism for religious authority to assert control over the government. In fact, the Constitution prevents it.

This task of ascertaining the state’s nature turns out to be a lot cleaner in theory than in practice, especially now with the political ascendancy of a radical religious minority. Consider the following contemporary facts about the United States noted by Kevin Phillips in his book, *American Theocracy*:

[A]n elected leader who believes himself in some way to speak for God, a ruling political party that represents religious true believers and seeks to mobilize the churches, the conviction of many voters in that Republican party that government should be guided by religion, and on top of it all, White House implementation of domestic and international political agendas that seem to be driven by religious motivations and biblical worldviews.¹⁰¹

The separation of church and state in a formal sense does not prevent religious doctrine and religious individuals from inspiring state policy and conditioning political debate. However, it does prevent religious organizations and groups from exercising formal or *de facto* control over the state. It is the difference between inspiration and control that one must note when contemplating the political influence of religious or economic actors.

In sum, separationism is a messy enterprise, a question of degree. Chief Justice Burger has confessed that “total separation is not possible in an absolute sense,” that “[s]ome relationship between government and religious organizations is inevitable” and that “the line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”¹⁰² Given the importance of religion and economy in American society, it could hardly be otherwise. But the fact of a formal separation provides constitutional criteria for principled arguments and establishes a baseline of secularism in governance. Formal separation limits the amount of control religious authorities can exercise. The absence of a formal separation with regard to monetary influence is damning in this precise regard.

99. *Id.* at 16.

100. JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 5 (1927).

101. PHILLIPS, *supra* note 96, at viii-ix.

102. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

2. *Lessons for the Separation of Business and State*

Much like the case of religious authority infiltrating the state, allowing a fusion between money and politics threatens core principles relating to the nature of the state and individual rights. First, when religious or monetary power is allowed to translate into political power, sovereignty is redefined. When sovereignty comes from a superior being or wealthy interests, the notion of popular sovereignty becomes pure myth. Second, when policies and candidacies become significantly influenced by money or religion, the frequency and value of reasoned debate on the merits of candidates or policy alternatives decrease. Third, when power stems from corporations or religious groups instead of ordinary people, political equality declines. Inequality in access and the distributive effects of policy outcomes reveals that all citizens are far from equal in their political rights. As explained by Justice O'Connor, "the essential command of the Establishment Clause [is] . . . that government must not make a person's religious beliefs relevant to his or her standing in the political community."¹⁰³ Similarly, the absence of a separation of business and state makes a person's wealth and corporate affiliation relevant to his standing in the political community.

The first dilemma concerns whether our representative democracy will become a theocracy or a plutocracy. The second and third dilemmas pertain to free exercise of religious or political freedoms. Theocracy endangers the free exercise of religion and the rights of religious minorities, while plutocracy threatens the free exercise of politics and the rights of the middle and lower socio-economic classes. Thus, each separation problem relates both to the nature of the state and the rights of citizens.

Beginning with the nature of the state, both theocracy and plutocracy arise from the entanglement of powerful social institutions with the sphere of governance. The excessive entanglement problems of both church and business arise from the fact that institutions, participants, and values belonging to the civic, public sphere of the state are unduly influenced by another sphere. Our political tradition relies on this notion of separate spheres of influence: church and state as two institutions that properly occupy separate spheres, business and state as two institutions that properly occupy separate spheres, each for the benefit of the other. As the Supreme Court beautifully illustrates, this is the core logic of separationism in American political theory:

The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to

103. *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

create a complete and permanent separation of the spheres of religious activity and civil authority.¹⁰⁴

Religious authority encroaching on civil authority leads to theocracy and oppression of minority religions. Corporate political activity, when insufficiently regulated, inserts economic authority over civil authority and leads to plutocracy and oppression of lower socio-economic classes.

Excessive entanglement renders the state merely the secular arm of the church or the market maintaining outward order and decorum among men, subordinating it to a greater power. This would be acceptable if either the market or the church were capable of governing human affairs to the satisfaction of our political values and traditions. But the market is not a suitable institution of governance. It is in fact the government that keeps the market free, sustainable, and relatively just by policing anticompetitive behavior, illegalizing corrupt practices, instituting consumer protections, regulating pollution, overseeing product safety, maintaining minimum standards for wages and working conditions, to name just a few examples.

Still, traditional state functions, such as social security, even policing, jailing, and the training and provision of soldiers, increasingly appear destined for the private sector. Using these examples or others that another political system might consider within the domain of the state, such as the media or health care, the conclusion remains the same: the state is increasingly irrelevant. In this way, each area of human life, from health to security, becomes an industry, a new front on which corporations can turn a profit. The proper realm of state functions, evaluating the performance of the private sector in any given front, and the proper rules on issues such as competition, taxation, and labor standards are all, of course, political choices. But exercising any of these choices is recast as interference with the market, a sort of heresy. This belief in markets has become a passion analogous to religious fervor, causing human beings to insist on some authority higher than political choice, an authority higher than government.

Moving away from the nature of the state and to the question of individual rights, the dilemma can be stated as this: do we desire that the free exercise of religion be an entitlement of all Americans? Do we desire that the free exercise of politics be an entitlement as well? The object of a separation of business and state in this regard is to secure the free exercise of politics, which obtains when popular sovereignty and political equality are respected. This form of free exercise is secure when monetary influence does not translate into political influence.¹⁰⁵ American political thought is rooted in the belief that the state

104. *Everson v. Bd. of Educ.*, 330 U.S. 1, 31-32 (1947).

105. Others would say that the regulation of monetary influence frustrates the free exercise of politics. This raises an interesting conflict of rights. The analysis begins with whether one believes money to be a legitimate form of political expression. My concern with this type of political expression is that it is in practice only available to relatively wealthy interests and

should not be subordinated to any church, and that individuals are entitled to choose and freely exercise their own religion. The strength of this belief should not be any stronger than the belief that the state should not be subordinated to or formally coordinated with corporations, and that the people should have the right to meaningful and relatively equal political participation.

Religious and economic values cannot help but influence politics and it would be inconsistent with democracy for individuals to be disallowed from seeking to vindicate their religious or economic interests through the political process. The question addressed in this Essay is not how to prevent corporations and the wealthy from vindicating their interests through politics, but rather how to conceive of and limit the influence of monetary power over politics. In other words, market actors should be able to express their political views, but their superior resources should not be allowed to drastically affect political outcomes. This leads to plutocracy and threatens free exercise. Again, whether we speak of the boundaries between religion and state or business and state, the question is one of degree.

Therefore, we might be inspired by the three-pronged test of *Lemon v. Kurtzman* designed by the Supreme Court to “draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’”¹⁰⁶ Admittedly, applying this test to ascertain impermissible interference with the state flips the matter on its head. The Supreme Court was concerned about state encroachment on the religious sphere—whether the state had made a law “respecting an establishment of religion.”¹⁰⁷ The Court was not addressing a foreign sphere’s encroachment on the state. But the parallels are nevertheless striking: the separation of business and state seeks to limit sponsorship, financial support, and active involvement of moneyed interests in state activity. The Court synthesized three tests from prior cases: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”¹⁰⁸ Some relationship between the state and

economic inequality in the United States is extremely high. This means that this right quickly runs up against the rights of others to a fair and equal system of political participation. It may boil down to a question of degree, but in principle it is difficult to accept that the use of monetary power to control a deliberative, participatory system of representative democracy constitutes a legitimate exercise of political freedom.

106. 403 U.S. 602, 612 (1971).

107. *Id.*

108. *Id.* Although these formulations hardly appear to lend themselves to judicial interpretation, several Justices have said the same about the Lemon test itself. *See, e.g.,* Edwards v. Aguillard, 482 U.S. 578, 636-637 (1987) (Scalia, J., dissenting) (“[D]iscerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. . . . To look for the *sole purpose* of even a single legislator is probably to look for something that does not exist.”) (emphasis in original). Moreover, the purpose here is not to formulate a judicial test, but

religion is inevitable, but excessive entanglement is forbidden. For our purposes, excessive entanglement must refer not to the economic or distributive function of a piece of legislation, a judicial precedent, or executive action, but rather the role of economic influence in generating law and policy. For example, concerns over sponsorship, financial support, and active involvement would counsel us to scrutinize the gifts and travel purchased for politicians by lobbyists, the use of earmarks, and campaign contributions.¹⁰⁹

The Court's Establishment Clause jurisprudence also draws our attention to the problem of secrecy common to separation problems. The Court has indicated that the Establishment Clause prohibits religious groups and organizations from participating in state affairs: "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."¹¹⁰ Let us take note of the word "secretly" above. Corporate donations, lobbyist contacts, and the true interests motivating public policies, from attempts to privatize social security to the invasion of Iraq, are rarely made visible to the average voter. This signals the need for transparency and disclosure regarding political contributions and contacts with lobbyists. But on a grander scale, the various facets of the separation of church and state remind us of the need for a formal separation in which such tests can be solidly grounded.

III

THE SEPARATION OF BUSINESS AND STATE

Section 1. Democratic integrity being vital to the principles and operation of our system of government, and the political rights of natural persons, the Separation of Business and State is hereby established. Popular sovereignty and political equality shall not be denied or abridged by allowing monetary power to translate into political power. To this end, presidential and congressional elections shall be publicly financed.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

Section 3. This amendment shall not be so construed as to limit the power of the United States to regulate economic actors or economic affairs within its jurisdiction.

—Proposed Amendment XXVIII to the Constitution of the United States (2007)¹¹¹

rather to locate lines of inquiry relevant to the third separation, to advance our thinking.

109. I mean to be cautious in suggesting that doctrinal tools meant to guide courts can play the role of political philosophy in guiding citizens in their efforts to determine the proper relationship between the spheres of business and state. This is why I suggest that we might be inspired by them, but not that we ought to literally apply them.

110. *Everson*, 330 U.S. at 16.

111. I propose this Amendment as a thought experiment.

Existing law on campaign finance and corruption provides an important degree of separation between business and state.¹¹² Without them, our country would be abjectly corrupt. But the existing laws do not have constitutional status, nor do they offer a formal separation between business and state. Indeed, the task of regulating the role of money in politics is extraordinarily difficult and possibly doomed because the only formal, sacrosanct norm in play has been interpreted in favor of business interests. Just this past June, for example, in *Federal Election Commission v. Wisconsin Right to Life, Inc.*,¹¹³ the Supreme Court further eviscerated the Bipartisan Campaign Reform Act of 2002 (BCRA), commonly known as the McCain-Feingold Act.¹¹⁴ Corporations were entitled to First Amendment free speech protection in their quest to control political outcomes, but no rule of similar weight could be found to protect the governmental interest in regulating corporate political influence.¹¹⁵ Even acknowledging that constitutional norms can be interpreted to questionable effect to suit the dominant interests of the day,¹¹⁶ the fact of a constitutional norm provides a hook for principled argument and, most importantly, a great deal of weight in favor of the protected interest.¹¹⁷

112. See, e.g., 18 U.S.C. § 666 (2000) (bribery and embezzlement); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 181 (to be codified in scattered sections of 2 U.S.C.) (campaign contributions); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (upholding the BCRA's prohibition on express advocacy, or its functional equivalent, by a corporation in the period immediately preceding an election). The BCRA is distinguished from the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), and the like in that it pertains to the political process and federally-funded agencies, whereas the activities of the Securities and Exchange Commission pertain to corporate activity within the economic sphere. Although somewhat cosmetic and weak, not to mention lacking in independent oversight, the Democrats' pending ethics reform bill also merits attention. See Jeff Zeleny & Carl Hulse, *U.S. Congress Votes to Tighten Rules on Lobbyist Ties*, N.Y. TIMES, Aug. 3, 2007, at A1.

113. 127 S.Ct. 2652 (2007) (striking down on First Amendment grounds the BCRA's prohibition on issue advocacy advertisements by corporations and unions).

114. 116 Stat. 181.

115. The operative functions of the opinion in these regards are: holding that the BCRA section restricting corporate advertisements is in fact a restriction on political speech and therefore subject to strict scrutiny, see *Wisconsin Right to Life*, 127 S.Ct. at 2663-64, and deciding that no compelling interest is furthered by regulating the ads in question, see *id.* at 2671-74. Two established governmental interests were held inapplicable: "preventing corruption and the appearance of corruption" and "addressing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *Id.* at 2672.

116. Consider, for example, the interpretation of the Fourteenth Amendment's equal protection clause, passed in order to protect the rights of freed slaves, to prevent states from regulating corporations as they please. Years after holding that corporations possessed legal personhood, the Supreme Court denied full personhood to human beings who were "1/8th Negro" or more. See THOM HARTMANN, *UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS* 95-127 (2002) (discussing the Supreme Court's interpretation of the Fourteenth Amendment).

117. Why democratic integrity was not enshrined within the Bill of Rights is a question beyond the scope of this Essay. But it is a question worth pondering. For example, before the passage of the First Amendment, Great Britain's troubles with the East India Company were on display. It was in fact a battle for Britain to restrain the political activities of the Company and to

A focus on earlier separations helps us arrive at a deeper understanding of the challenges we now face in relation to money in politics, one that can shape the public debate and lead to stronger laws. By recognizing that our current challenge is mostly unique in superficial detail, we may clear the haze. As Madison stated, factions are united by interest or passion, two problems of human nature. Interest is exemplified by greed and power-seeking, qualities that motivate the separation of powers. We should understand passion to mean something closer to “the condition of being acted upon,” rather than “extreme, compelling emotion.”¹¹⁸ This ability of organized groups to act upon member’s sensibilities and thus replace the secular, civic ethic with a religious agenda is one reason behind the separation of church and state. The problem of money in politics presents challenges of both interest and passion—interest because corporations are designed to maximize profit for shareholders, a goal that causes them to set their sights on controlling the government, and passion because politics has been affected by the norms and values of capitalism, such that profit-seeking has supplanted the civic functions of reasoned debate and citizen empowerment.¹¹⁹

The contours of the separation of business and state should therefore account for both interest and passion. I argue that interest causes excessive physical entanglement—tangible meddling in politics through campaign contributions, lobbyists, and corporate ownership of the media. This entanglement affects the integrity of political institutions and their accountability to ordinary people. Passion, on the other hand, causes excessive ideological entanglement—politics adopting a profit-maximization ethos, being run like a business, and the supplanting of the civic ethic with a business ethic. Interest concerns the rules of the game, while passion concerns the spirit in which the game is played. The first is a matter of law; the second is a matter of ethos and public values. The relationship between the two is mutually reinforcing, such that progress on one front ought to produce progress on the other.

A. Physical Entanglement

Physical entanglement consists of all the tangible ways in which undue influence is exerted upon the state. Specifically, physical entanglement includes all the ways corporations might invest in a politician or, more broadly, the ways in which monetary power can translate into political power. Such entanglement

assert sovereignty over territories controlled by the company. See The India Act of 1784, 24 Geo. 3, c. 25, § 2 (Eng.) and The Charter Act of 1813, 53 Geo. 3, c. 155 (Eng.). Against this backdrop, it might be considered evident that corporations could significantly disrupt the democratic norms upon which our democracy was premised.

118. WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1310 (2d ed. 1975).

119. PHILLIPS, *supra* note 96, at 335 (discussing “free-market core theology” and “tax cut theology”).

includes campaign contributions and events at which lobbyists influence politicians' priorities.¹²⁰ In a system where Congressional candidates must raise \$1 to \$7 million and presidential candidates must raise hundreds of millions of dollars, candidates must plan and formulate public policy from the perspective of their core donors, rather than the general public. Needless to say, they run on a platform calculated to obtain popular support, but they must satisfy their financial backers to the point of obtaining the funds required to run for office and later secure re-election.¹²¹ In terms of elections, ordinary people cannot gauge what they are voting for; and, their range of choice in candidates is severely limited, as only those candidates amenable to the agenda of moneyed interests will stand a chance. In terms of public policy formation, the prospects for independent leadership, careful consideration of options on their merits for the common good, and accountability to the general public are cast into doubt.

Under the current realities of campaign finance, the need to raise large sums of money compromises the integrity of political choices. To borrow a metaphor from Thomas Paine, "as a man, who is attached to a prostitute, is unfitted to choose or judge of a wife,"¹²² so is a man beholden to corporate interests unfitted to choose sound *public* policy. Such a man will undoubtedly enact private policy into public policy. Analogous to the case of the King of England at the time of the American Revolution, the will of corporations and other moneyed interests is the law, but instead of proceeding directly from their mouths, it is handed to the people under the formidable shape of an act of Congress, a judicial decision, or presidential action.¹²³ If we desire that policy decisions be debated openly on the merits and decided with due regard for the public interest, then we implicitly disagree with the view that the amount of money offered to influence a given policy choice is a clear social signal that should guide the decision.

Similar to the dynamic motivating a separation of persons, which notes that a separation of powers means little if the same people hold posts within various branches, the separation of powers will also mean very little if members of the executive and the legislature are bankrolled by the same moneyed interests. Full public financing of elections should therefore be seen as the preferred means of ending excessive physical entanglement.¹²⁴

120. See *supra* notes 27-32 and accompanying text.

121. This sort of politics is common in democracies world-wide. See U.S. AGENCY FOR INT'L DEV., MONEY IN POLITICS HANDBOOK: A GUIDE TO INCREASING TRANSPARENCY IN EMERGING DEMOCRACIES 27-32 (2003), available at <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/usaidmoneypolitics.pdf> (last visited January 10, 2008).

122. See THOMAS PAINE, COMMON SENSE 12 (2002).

123. This paraphrases *id.* at 8.

124. The political obstacles for meaningful reform are presently being tested by Senators Charles E. and Arlen Specter. They are seeking sponsors for a constitutional amendment that would overturn Supreme Court caselaw, beginning with *Buckley v. Valeo*, 424 U.S. 1 (1976), holding that money is a form of protected speech. See David D. Kirkpatrick, *Senators Push for*

B. Ideological Entanglement

“The ethics of business are not those of society, but rather those of the poker game.”¹²⁵

—A.Z. Carr

“POLITICS, *n.* A strife of interests masquerading as a contest of principles.”

—Ambrose Bierce, *The Devil’s Dictionary*¹²⁶

While physical entanglement suggests the need for stricter regulations, the dimension of ideological entanglement raises questions regarding political ethos, specifically the values that guide modes of debate and persuasion. Ideological entanglement refers to politicians’ and political institutions’ adoption of an ethos associated with profit-maximization and market actors.¹²⁷ Profit in politics need not be measured in dollars, for political capital is much broader than economic capital. Public perception, for example, is a valuable commodity to any politician, perhaps more valuable than money itself. It is therefore not surprising that politics is becoming a perception management game, instead of a process for enabling rational debate on the issues. As Ronald Dworkin has noted,¹²⁸ politics now seems directed at winning at any cost, instead of enabling rational debate on the merits of policies. This relates to rhetoric itself, a vehicle for persuasion and manipulation distinct from markets. The use of rhetoric to manipulate public perception, however, is a strategy that elevates profit over principles. This ordering lies at the core of single-minded profit maximization and returns us to the question of whether an ethos innate to one sphere ought to be accepted in a different sphere.

This confusion between the spheres of business and state erodes the public’s ability to be informed on and participate in issues of public importance. For example, rather than inform the public on why the U.S. invaded Iraq, whether those reasons bore any fruit in practice, and the current grounds for a continued military presence in Iraq, our political leadership labels detractors as terrorist supporters, coins many sound bite phrases—such as

Fund-Raising Amendment, N.Y. TIMES, Oct. 8, 2007, at <http://thecaucus.blogs.nytimes.com/2007/10/08/senators-push-for-fund-raising-amendment/> (last visited January 10, 2008). Excellent proposals for limiting physical entanglement are on the table. Advocacy groups have also put forward meaningful proposals. Consider, for example, the election reform recommendations made by Common Cause. See Common Cause Homepage, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=186966> (last visited July 8, 2007).

125. Albert Z. Carr, *Is Business Bluffing Ethical?*, 46 HARV. BUS. REV. 143 (1968).

126. *The Devil’s Dictionary*, <http://www.thedevilsdictionary.com/?P> (last visited January 10, 2008).

127. I refer to this meaning of the term, ideology: “the doctrines, opinions, or way of thinking of an individual, class, etc.” WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 902 (2d ed. 1975).

128. See *supra* notes 47-48 and accompanying text.

“defeatocrats” and “cut and run” democrats¹²⁹—and quite strategically and self-consciously fashions an entire set of new post-hoc rationales for the war. Thus, an invasion originally about Weapons of Mass Destruction (WMDs) becomes a quest to spread freedom and democracy, bring rights to Muslim women, provide stability in the Middle East, and is reconfigured as a necessary step in winning the war on terror.¹³⁰ It matters little that Al-Qaeda did not exist in Iraq prior to the U.S. invasion. It also matters little that the invasion has become a cause célèbre for terrorists everywhere. As reported by the New York Times, “Bush did such a good job selling the weapons-hunting nostrum that 40 percent of Americans recently said the weapons were there.”¹³¹ In fact, at the moment of the 2004 presidential election, 50 percent of Americans believed that Iraqis formed part of the group of hijackers behind the 9/11 attacks.¹³²

President Bush used the media to sell the war just as corporations use the media to sell products and make a profit. Both will use advertisements, slogans, and celebrity spokespeople to convince consumers that they should buy the product. The goal of politics has become much like this. Politics seeks to convince us, not to enable us. Political discourse is designed to win re-election and to gain power for political shareholders. As Paul Hawken puts it, “We have elevated the ideology and mores of corporate life into a belief system before which we pay homage, and we have allowed it to take over the political system.”¹³³ Rather than honestly address any given event, the machinery of politics is harnessed to control political fallout by managing public perceptions. This modus operandi need not favor business interests over the people’s interests, but in practice it does so. Business interests enjoy superior financial resources and ownership of the media.¹³⁴ This leads to a superior ability to

129. See *Bush Goes on Offensive Against ‘Cut and Run’ Democrats*, FOXNEWS.COM, Sept. 29, 2006, <http://www.foxnews.com/story/0,2933,216417,00.html> (last visited January 10, 2008) (referring to a statement made by President Bush: “The party of FDR, the party of Harry Truman has become the party of cut and run.”); Patrick Yoest & George Cahlink, *Lawmakers Split on Response to Airline Terror Threat*, CQ TODAY, Aug. 10, 2006, available at http://public.cq.com/public/20060810_cqtoday_yoest.html (last visited January 10, 2008) (discussing a statement made by then-House Majority Whip John. A. Boehner when he referred to democrats as “defeatocrats”).

130. See President George W. Bush, Press Conference at the White House (July 12, 2007), available at <http://www.whitehouse.gov/news/releases/2007/07/20070712-5.html> (last visited January 10, 2008) (discussing the changed policy of instilling democracy in Iraq, helping Iraqi leaders secure their positions, and making sure terrorists know they cannot hide out in Iraq).

131. *Bulletin: No W.M.D. Found*, N.Y. TIMES, Jan. 13, 2005, at A34.

132. DWORKIN, *supra* note 35, at 128. Certainly some of these mistaken beliefs could be due to cognitive error among voters; however, certainly a great deal of these beliefs must be attributed to the Bush administration’s consistent efforts to link the war in Iraq to 9/11 and WMDs.

133. PAUL HAWKEN, *THE ECOLOGY OF COMMERCE: A DECLARATION OF SUSTAINABILITY* 123 (1993).

134. See BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* (2004); ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* (1999).

harness the power of public relations, marketing, and psychological tactics, both in the sale of their own positions and in the discrediting of others.

We all recognize that the goal of business is to maximize economic capital. We should not, however, permit the goal of politics to be the maximization of political capital—power and simply winning.¹³⁵ In practice, winning means ensuring one's election or re-election, simply minimizing public fallout from mistakes, discrediting an adversary, whether or not they deserve to be discredited on the merits, and obscuring or challenging inconvenient facts simply because they are inconvenient. Thus, concern with the accuracy of data suggesting the presence of WMDs in Iraq makes one "anti-Bush" or "anti-American." Concern with House members taking illegal funds from lobbyists makes one "Anti-Tom DeLay." Indeed, the response from Delay's office to the PAC scandal was to attack the credibility of the New York Times, instead of addressing the issue: "There are certain liberal newspapers, including the New York Times and the Washington Post, that are out to get Tom DeLay."¹³⁶

This leads to inefficiencies and distortions in both the market for ideas and the ability of the public to take actions that are responsive to their own preferences. Also implicit in this dilemma is the suspicion that politicians decide upon a course of action in advance and then figure out how to minimize public outrage and maximize public acceptance. In few instances do politicians treat the public with respect and entertain an honest debate in which they are open to persuasion.¹³⁷

The profit-maximization ethic in politics, a facet of ideological entanglement, frustrates the free exercise of politics. For example, Jefferson's prescription for obtaining knowledge now seems an impossible burden: "A patient pursuit of facts, and cautious combination and comparison of them, is the drudgery to which man is subjected by his Maker, if he wishes to obtain sure knowledge."¹³⁸ Similarly, Thomas Paine's conviction that nature and reason might triumph over show, prejudice, and interest becomes increasingly

135. Consider that automakers maintain that global warming is a problem. See Danny Hakim, *Challenge to Emissions Rule is Set to Start*, N.Y. TIMES, Apr. 10, 2007, at A19. Compare this to the Bush administration's constant assertions that we are winning in Iraq; that there was a connection between Saddam and WMDs and Al Qaeda; and that we are "spreading freedom."

136. Carl Hulse & Philip Shenon, *DeLay Denounces Report on Payments to His Family*, N.Y. TIMES, Apr. 7, 2005, at A21 (Mr. Delay is quoted as calling the article about his wife and daughter's receipt of more than 500,000 by his political action and campaign committees, "just another seedy attempt by the liberal media to embarrass me").

137. See DWORKIN, *supra* note 35, at 128 ("Truth as a gold standard has become obsolete: politicians never seek accuracy in describing their own records or their opponents' positions. They seek the maximal distortion that leaves some tiny fig leaf of truth intact somewhere in the fine print.").

138. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 71 (Frank Shuffelton ed., 1998)

outdated. Thus wrote Paine: “And however our eyes may be dazzled with show, or our ears deceived by sound; however prejudice may warp our wills or interest darken our understanding, the simple voice of nature and reason will say it is right.”¹³⁹ Never before did the forces of prejudice and interest have such sophisticated modes of influence at their disposal. Similarly, Freud’s description of leaders capable of securing peace now seems even more utopian than before: “independent thinkers, unamenable to intimidation and fervent in the quest of truth . . . [who have] subordinated [their] instinctive life to the dictates of reason.”¹⁴⁰ Can common sense prevail amidst ideological entanglement, the very antithesis of enlightenment ideals?

Here, separationism means distancing business values from civic values, creating a place where common sense can be found and good leaders cultivated. This would be a minimum condition for the free exercise of politics. But on present course, ideological entanglement is demolishing the public sphere, the place where concerned parties voice their concerns and learn from each other, and ultimately arrive at outcomes that can be justified on the strength, not wealth, of the competing positions expressed.¹⁴¹ This destruction bears familiar fruit: malaise, cynicism, and popular disenchantment—all predictable qualities of a society that no longer believes in itself.¹⁴²

IV

THE PROMISE OF DEMOCRACY

The separation of business and state stands as the unfinished legacy of the Constitution. We separated the powers of government because we recognized our flaws as human beings, and we separated church from state because we wanted to safeguard the integrity of each. Fundamentally, both of these separations embody the same insight: democracy itself requires autonomy from the perennial forces that would corrupt it. Because these forces take root in the human heart, separationism is a form of political discipline, a way of binding

139. PAINE, *supra* note 122, at 6.

140. Sigmund Freud, *Why War?—A Letter to Albert Einstein*, in *THE FUTURE OF PEACE IN THE TWENTY-FIRST CENTURY* 6 (Nicholas N. Kittrie et al. eds. 2003).

141. Although one might be tempted to describe the ways in which free market ideology has become a quasi-religion of most politicians, and to link this belief system to a decrease in the breadth of political choice, I believe it would be a mistake. A widespread belief in certain economic doctrines does not threaten democracy per se. Misleading and disregarding the public, on the other hand, preventing it from passing judgment on this widespread belief and the policies generated thereby (or any other belief or policy) does threaten democracy.

142. See JEDEDIAH PURDY, *FOR COMMON THINGS: IRONY, TRUST, AND COMMITMENT IN AMERICA TODAY* 10-12(1999) (noting the “contemporary attitude of wry detachment that avoids taking anything or anyone all that seriously [which] easily devolves into a meretricious sarcasm;” and identifying “sanctimonious political pronouncements” as one of the cultural elements that “render cliché nearly anything that anyone would feel it important to say.”). “In place of the romantic idea that each of us harbors a true self struggling for expression,” Purdy’s ironist “offers the suspicion that we are just quantum selves—all spin, all the way down.” *Id.* at 10. Spin is nothing less than the language of ideological entanglement.

ourselves to the mast of good governance. This is our American political tradition.

The viability of continuing this tradition depends on our hopes for democracy. I have discussed the goals of ensuring accountability, allowing for meaningful and relatively equal participation, and have insisted on an open and sincere debate. A deeper and less familiar goal also deserves mention. Separations are, in practice, questions of degree, and they are from time to time eroded;¹⁴³ even so, the fact of a constitutional separation significantly conditions the debate. It lends legitimacy to those who seek integrity in government and space for democracy. And insofar as legal frameworks influence the socialization of citizens, separationism improves our values, even our character.¹⁴⁴

The deeper goal to which I refer relates to socialization. Underlying each separation we have seen certain human shortcomings attributed to human nature. The need to constrain them constitutes the grand theme that unites the various parts of this Essay. The need for the separation of powers comes from certain aspects of human nature, tyrannical and lusting for power. This is the problem of unenlightened self-interest. The need for the separation of church and state derives from other aspects of human nature; humans can be divisive, exclusive, egotistical, and prone to marginalizing and subjugating others who are different. This is the problem of passion and ideology. Excessive entanglement between business and state is a new manifestation of the same problem, coupled with the sophisticated vehicle of the corporation. But beyond mere constraint, we ought to entertain a seldom-heard possibility inherent in separationism: enabling democratic politics to serve a transformative function, namely improving human nature.¹⁴⁵

143. With regard to the separation of powers, for example, see generally ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973) (describing presidential offenses against the separation of powers); ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* (2005) (describing a resurgence in congressional power after Watergate and a new rise in presidential usurpation of powers, most notably in the post-9/11 era). On the topic of the erosion of the separation of church and state, see GERARD V. BRADEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987) (offering an excellent sense of how separationism is a messy enterprise and tracing this particular separation from the foundational period to the recent past), and Susan Gellman, *The First Amendment in a Time that Tries Men's Souls*, 65 *LAW & CONTEMP. PROBS.* 87, 97-100 (2002).

144. E.B. Taylor's classic 1871 definition posits that law is part of culture: culture, "that complex whole which includes knowledge, belief, art, morals, law, customs, and many other capabilities and habits acquired by . . . [members] of society." Marshall Soules, *Notes Toward a Definition of Culture*, 2002, www.mala.be.ca/~soules/media112/culture.htm (last visited January 10, 2008).

145. In making my concluding comments on the matter of transformation, I do not attempt to account for the many important arguments already made in this regard. See, e.g., JOHN ADAMS, *A DISSERTATION ON THE CANON AND FEUDAL LAW* (1765) at <http://www.teachingamericanhistory.org/library/index.asp?document=43> (last visited January 10, 2008) (noting the detriment to liberty and human potential arising from ecclesiastical authority and civil tyranny—"Thus was human nature chained fast for ages in a cruel, shameful, and deplorable

We must ask, if not a church meddling in politics, if not a tyrannical dictator trying to amass all the powers of governance, if not governmental capture by wealthy actors, then what will be the next manifestation of our failed human natures? Personal and collective transformation are of the essence lest democratic politics remain in the same, age-old cycle of bad-faith, pretext, and exploitation. Surely if greed, the lust for power, and the need for superiority persist within the human heart, then no system, no safeguard, no ethic will truly suffice. I do not mean to set out a utopian project that would free future generations from the responsibility of democratic vigilance that attends self-governance. I merely mean to point out that in addition to vigilance and separations, which are preclusive ethical projects aiming to suppress negative aspects of our nature, we ought to consider the positive ethical project associated with self-governance. Ultimately, government must serve a set of interests and to posit the desirability of popular sovereignty and political equality is to profess great faith in the people, in the collectivity, in ourselves.

The need for transformation is a concession to the corruptibility of any system, even, or especially, one premised on popular sovereignty and political equality. The phenomenon of “illiberal democracy,” Fareed Zakaria’s term for democracies that become repressive, illustrates this. Zakaria notes that “[d]emocratically elected regimes, often ones that have been reelected or reaffirmed through referenda, are routinely ignoring constitutional limits on their power and depriving their citizens of basic rights and freedoms.”¹⁴⁶ Business is not the only force that can co-opt government. It is easy to identify because it is a force that is outside of and distinct from most people. But the very idea behind business and capitalism derives from the need to harness the self-interest that manifests within us. That is, capitalism is thought to be a humane alternative to a system in which self-interest is not usefully channeled and may resort to more violent forms than economic competition.¹⁴⁷ If politics no longer serves the cause of economic interests, might it revert back to serving the more vindictive forces of nationalism or ethnic oppression?¹⁴⁸ The tradition

servitude”); Ralph Waldo Emerson, *THE AMERICAN SCHOLAR: SELF-RELIANCE, COMPENSATION* 77 (1911) (discussing the need to focus on personal transformation, beyond social transformation—“All men plume themselves on the improvement of society, and no man improves”); STANLEY CAVELL, *CONDITIONS HANDSOME AND UNHANDSOME: THE CONSTITUTION OF EMERSONIAN PERFECTIONISM* (1991) (discussing moral perfectionism in the context of democracy). I have chosen to account for a few authors in the text, but mainly to make my own argument lightly and briefly. The conclusion, like the rest of this Essay, is intended to generate questions and provoke thought. It is not intended to reach any definitive conclusions or provide a full scholarly review of related sources.

146. Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 *FOREIGN AFF.* 22 (1997).

147. Milton Friedman has praised capitalism in this regard: “an arrangement under which greed will do the least harm; capitalism is that kind of system.” EDWARD CHANCELLOR, *DEVIL TAKE THE HINDMOST: A HISTORY OF FINANCIAL SPECULATION* 241 (1999).

148. Zakaria cites many examples of this scenario where the people elect violent leaders, as in the case of Hamas, or decide to oppress minorities openly. See Zakaria, *supra* note 146, at 22.

of separationism is therefore just the first answer to corruption. Transformation is the second and more enduring one.

John Dewey has provided a foundation upon which the transformative argument can be linked to democracy. He suggested that politics could be a process of personal and community growth. Noting the benefits of negotiation and participation in shared communities of interest, he expressed faith in the capacity of the public to participate meaningfully in politics and to be improved thereby.¹⁴⁹

The devotion of democracy to education is a familiar fact. The superficial explanation is that a government resting upon popular suffrage cannot be successful unless those who elect and who obey their governors are educated. . . . But there is a deeper explanation. A democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience. The extension in space of the number of individuals who participate in an interest so that each has to refer his own action to that of others, and to consider the action of others to give point and direction to his own, is equivalent to the breaking down of those barriers of class, race, and national territory which kept men from perceiving the full import of their activity. These . . . points of contact . . . secure a liberation of powers which remain suppressed as long as the incitations to action are partial, as they must be in a group which in its exclusiveness shuts out many interests.¹⁵⁰

Dewey's democratic humanism is part of the ethic with which to replace the business ethic in governance.

Because this ethic is presently far from established, we must once again take legal and institutional steps to account for human nature and corporate nature. While these forces remain, separation is necessary. But this does not mean that we should rest once separation has been accomplished. We should then use this opportunity to ask what is at the heart of our human weakness, this taken-for-granted reality that human nature is negative. The two earlier separations account for the forces of self-interest, ideological passions, and factions but do not set out to improve them. The separation of business and state would carry on this necessary condition of accounting for self-interest and passion by keeping them a distance away from the state. But in the end, we are left in a reactive mode, constantly dealing with the symptoms of a problem instead of dealing with its causes. And, worse, it involves confusing an opportunity for a problem.

Robert Bush and Joseph Folger's book, *The Promise of Mediation*, sheds further light on the opportunity at hand. They maintain that mediation—a

149. Compare DEWEY, *supra* note 100, with WALTER LIPPMANN, *THE PHANTOM PUBLIC* (1925). See also STEVEN C. ROCKEFELLER, *JOHN DEWEY: RELIGIOUS FAITH AND DEMOCRATIC HUMANISM* (1991).

150. JOHN DEWEY, *9 THE MIDDLE WORKS: 1899-1924*, at 93 (Jo Ann Boydston ed., 1980).

procedure in which a disinterested third party facilitates the resolution of a problem between two or more interested parties—can do more than relieve backlog in the courts.¹⁵¹ Instead they contend that mediation can generate the empowerment of individuals to resolve conflict and increase their capacity to empathize with others. Bush and Folger elaborate a transformational model of mediation, where the job of the mediator is to empower the parties to take as much control of the matter as possible and to encourage them to put themselves in the shoes of the other parties involved. This model is an alternative to the dominant directive model where the mediator attempts to steer the parties towards the resolution she thinks best, ignoring the potential for growth.¹⁵²

In the transformative orientation to conflict, two aspects of moral growth are possible: first, the invigoration of self “through realizing and strengthening one’s inherent human capacity for dealing with difficulties of all kinds by engaging in conscious and deliberate reflection, choice, and action,”¹⁵³ second, the ability to reach “beyond the self to relate to others” through “realizing and strengthening one’s inherent human capacity for experiencing and expressing concern and consideration for others, especially others whose situation is ‘different’ from one’s own.”¹⁵⁴ These aspects of growth are empowerment and recognition.

Empowerment is the result of a state of affairs in which people frame issues in their own terms, generating possible solutions and controlling outcomes. The overlap with popular sovereignty and political equality should be clear. Bush and Folger contend that mediation empowers individuals to take control of their lives, and restores to the participants what is rightfully theirs: the right to make decisions and to have some meaningful chance of those decisions having traction. The practice of meaningful participation in the issues that affect a person is thus said to inspire a “greater sense of self-respect, self-reliance, and self-confidence.”¹⁵⁵ The opportunities for recognition provided by participatory processes such as mediation and democracy come in the form of situations where it is advantageous to see the other parties’ points of view and come to understand their interests and experiences. This, along with empowerment, is related to the overall goal of transformation—“the transformation of individuals from fearful, defensive, and self-centered beings into confident, empathetic, and considerate beings, and . . . the transformation of society from a shaky truce between enemies into a strong network of

151. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION*, at xv (1994) (noting the “opportunities that conflict affords for moral development” and asserting that mediation can “capture those opportunities by helping people respond with compassionate strength”).

152. The fact that the corporate-controlled media and special interests currently accomplish the same directive task in our democracy should not be lost on readers.

153. BUSH & FOLGER, *supra* note 151, at 81.

154. *Id.*

155. *Id.* at 20.

allies.”¹⁵⁶

Democracy is essentially a large-scale mediation where the interests of millions of parties are mediated through representative institutions. Dewey, Bush, and Folger point to the view that democracy is not just a mechanism for producing good ends, but also a system of beneficial means. Through the means of accommodating divergent viewpoints, understanding the situations of others, and being called to form one's own opinions and to participate in political dialogue, participants in democracy will find themselves presented with opportunities for personal transformation. Collective transformation will follow.¹⁵⁷

American democracy, with its tradition of separationism, is not laudable simply for its ability to restrain our vices, pitting ambition against ambition.¹⁵⁸ It deserves attention because of its habit of providing ways for us to overcome our vices. Democracy places responsibilities upon individuals that, if exercised in good faith, generate empathy and empowerment.

The transformative opportunities that self-governance supplies are of course categorically undermined by excessive physical and ideological entanglement between business and state. Corporate control of politics disempowers citizens and business logic manifested in political discourse ridicules the very concept of honesty, never mind recognition or empathy. The modality of business is competition and the aim is victory. These are the necessary consequences of corporate nature, as I have described it. This is the level of narrow self-interest and ideological passion. We must transcend this base level and aspire to something greater.

To the extent corporate influence is lessened, other forms of influence must rush in to fill this void. It is in this regard that democratic governance, freed from corporate entanglements, beckons ethical growth. Since the laws and policies made in a democracy emanate from the people, the outer world rapidly becomes a reflection of our collective inner world. Seen in this light, personal transformation becomes patriotic. If our level of consciousness is defined by anger, fear, passion, or greed, it follows that we will elect leaders who will carry forth our ill-advised priorities. If we have transcended this level, but our elected leaders have not, it follows that they will defy our will and

156. *Id.* at 20-21.

157. Dewey, Bush, and Folger may be describing the surface layer of something deeper. What seems to lie beneath the transformations they describe is a change in consciousness—transcendence of the impulse to subjugate (recall Hamilton's words, “ambitious, vindictive, and rapacious”), a quieting of the mind, overcoming the ethical confusion that leads to a willingness to manipulate others and, ultimately, the possibility of making something of the opportunities inherent in democratic governance.

158. In addition to Madison's justification for the separation of powers along these lines, we might also add Milton Friedman's belief that society's goal was simply to “set up an arrangement under which greed will do the least harm: capitalism is that kind of system.” CHANCELLOR, *supra* note 147, at 335.

pursue their own ill-advised priorities. And if the system itself is set up such that only special interests have any traction, our level of consciousness—indeed our very being—becomes irrelevant. This means that we must direct our efforts at improving our own selves, our nation's public values, and our laws and institutions. Each of these tasks is very much at home in our political history.

We are called to continue the American tradition of separationism. Separationism provides a framework within which the issue of money in politics can be conceptualized and addressed. This framework reminds us of that we are part of a longstanding political project aimed at freedom and governmental legitimacy. This is our lineage and, perhaps, our legacy.

