

IT'S EVEN WORSE THAN IT LOOKS

HOW THE AMERICAN
CONSTITUTIONAL SYSTEM
COLLIDED WITH THE NEW
POLITICS OF EXTREMISM

THOMAS E. MANN AND NORMAN J. ORNSTEIN

BASIC BOOKS

A MEMBER OF THE PERSEUS BOOKS GROUP
NEW YORK

*To our terrific families who keep both of us grounded—
Sheilah, Stephanie, and Ted, Suzanne and Leonardo;
and Judy, Matthew, Danny, and Harvey*

*And in memory of our dear friend and
prescient scholar, Austin Ranney*

Copyright © 2012 by Thomas E. Mann and Norman J. Ornstein

Published by Basic Books,
A Member of the Perseus Books Group

All rights reserved. Printed in the United States of America. No part of this book may be reproduced in any manner whatsoever without written permission except in the case of brief quotations embodied in critical articles and reviews. For information, address Basic Books, 387 Park Avenue South, New York, NY 10016-8810.

Books published by Basic Books are available at special discounts for bulk purchases in the United States by corporations, institutions, and other organizations. For more information, please contact the Special Markets Department at the Perseus Books Group, 2300 Chestnut Street, Suite 200, Philadelphia, PA 19103, or call (800) 810-4145, ext. 5000, or e-mail special.markets@perseusbooks.com.

Design and production by Eclipse Publishing Services

A CIP catalog record for this book is available from the Library of Congress.

Hardcover ISBN: 978-0-465-03133-7

E-book ISBN: 978-0-465-03136-8

10 9 8 7 6 5

members as recently as the 1980s, a small fringe group. In the 112th Congress, the RSC had 166 members, or nearly seven-tenths of the caucus.

Relative ideological shifts between the two parties account for much, but not all of the asymmetric polarization. Part of their divergence stems from factors beyond ideology. As we discussed at the beginning of this chapter, the most important of these are side effects of the long and ultimately successful guerilla war that Newt Gingrich fashioned and led to end the hegemonic Democratic control of the House and national policy making. Other important factors are the rise of the new media and the culture of which it became an essential part, as well as the changing role of money and politics.

New Media and New Culture

As population shifts occurred and helped to trigger partisan and ideological movements, communications in the U.S. and the world were revolutionized, with dramatic implications for political discourse.³⁶ The media world in which we grew up in the 1950s was dominated by three television networks, which captured more than 70 percent of Americans as a regular viewing audience. A healthy majority relied on their news divisions, and especially the nightly news shows, as their primary source of information. Without remote controls, most Americans were passive consumers of that news. Second in line were newspapers. Most metropolitan areas had at least two and often more. While the editorial pages of the newspapers often had distinct party leanings, the news pages usually bent over backward to report news objectively, avoiding rumor or hearsay and relying on facts (with the exception of celebrity gossip columns in the tabloids).

Contrast that with the current situation. With the remarkable telecommunications revolution, there has been a veritable explosion of media. Adam Thierer of the Progress and Freedom Foundation pointed out in 2010 that there were almost 600 cable television channels, over 2,200 broadcast television stations, more than 13,000 over-the-air radio stations, over 20,000 magazines, and over 276,000 books published annually. As of December 2010, there were 255 million websites, and over 110 million domain names ending in .com, .net, and .org, and there were over 266 million Internet users in North America alone.³⁷

Thierer also observed in early 2010:

There are an estimated 26 million blogs on the Internet. YouTube reports that 20 hours of video are uploaded to the site every minute, and 1 billion videos are served up daily by YouTube, or 12.2 billion videos viewed per month. For video hosting site Hulu, as of Nov. 2009, 924 million videos were viewed per month in the U.S. Developers have created over 140,000 Apps for the Apple iPhone and iPod and iPad and made them available in the Apple App Store. Customers in 77 countries can choose apps in 20 categories, and users have downloaded over three billion apps since its [the iPhone's] inception in July 2008.³⁸

The plethora of channels, websites, and other information options has fragmented audiences and radically changed media business models. The fragmentation also applies to attention spans. In 1950, the average weekly usage of a TV set was just over thirty hours, and the time per channel was twelve hours. By 2005, weekly TV set usage was up to nearly sixty hours, but time per channel was down to three hours. In the old days, the network news shows viewed themselves (and viewers deemed them

so) as a public trust, were not required to be separate cost centers for their networks, and provided, along with newspapers and newsreels, a common set of facts and core of information that were widely shared.

Now, network news divisions have cut back dramatically on their news personnel and range of coverage as their share of viewers has declined to a tiny fraction of past numbers, and they rank far down as people's primary sources of information. The nightly news shows do provide a kind of headline service for viewers, but with more soft news about entertainment, lifestyle, and sports and with fewer in-depth pieces or extended interviews with sources. Local broadcast stations have found significant success with local news, but not of the political variety. Coverage of local elections or local politicians has declined dramatically.³⁹

Cable news networks now compete with broadcast networks for news viewership. While their number of viewers remain less than the broadcast news channels, their business models enable them to be potentially more profitable. In 2010, Fox News returned a net profit of \$700 million, more than the profits of the three network news divisions combined,⁴⁰ and one-fifth of Newscorp's total profits, despite the fact that Fox nightly news shows get around two million viewers, compared to the twenty million combined for the three network nightly newscasts. At the same time, broadcast news divisions are struggling and go through regular layoffs and cutbacks in domestic and international bureaus and of news personnel.

The Fox business model is based on securing and maintaining a loyal audience of conservatives eager to hear the same message presented in different ways by different hosts over and over again. MSNBC has adopted the Fox model on the left, in a milder form (especially in the daytime). CNN has tried multiple business

models, but has settled on having regular showdowns pitting either a bedrock liberal against a bedrock conservative or a reliable spinner for Democrats against a Republican counterpart. For viewers, there is reinforcement that the only dialogue in the country is between polarized left and right, and that the alternative is cynical public relations with no convictions at all. The new business models and audiences are challenging the old notion that Americans can share a common set of facts and then debate options.

Pew Research Center studies have found that the audiences for Fox, CNN, and MSNBC are sharply different when it comes to partisan identity and ideology.⁴¹ Another survey also noted differences between Fox viewers and the general public on attitudes and facts: "When compared against the general population, Fox News viewers are significantly less likely to believe that [President] Obama was born in the US, and that one of the most important problems facing the US is leadership. . . . Fox viewers are significantly less optimistic about the country's direction."⁴² There is little doubt that Fox News is at least partly responsible for the asymmetric polarization that is now such a prominent feature of U.S. politics.

Newspapers, of course, are struggling even more than television networks. For years, polls showing declining readership among young generations forebode declining circulation. Because of waning ad revenues, especially from the bread-and-butter classified ads now supplanted by Craigslist and other online services like it, many newspapers have folded or merged with others for survival, creating more one-newspaper towns. Even more than networks, newspapers have reduced reporting corps and folded bureaus. One result has been the sharply reduced oversight of political figures and policy makers, and thus fewer checks and balances on their behavior.

America has gone back to the future with the new and prominent role of partisan media, just as in much of the nineteenth century but with far more reach, resonance, and scope than at any earlier period. The Fox News model—combative, partisan, sharp-edged—is the most successful business model by far in television news.

With the increased competition for eyeballs and readers, all media have become more focused on sensationalism and extremism, on infotainment over information, and, in the process, the culture has coarsened. No lie is too extreme to be published, aired, and repeated, with little or no repercussion for its perpetrator. The audiences that hear them repeatedly believe the lies, Obama's birthplace a prime example. A late-September 2011 Winthrop University survey of South Carolina Republicans found that 36 percent of those polled believed that the president was probably or definitely born outside the United States, a drop of only 5 percent from 41 percent in April, before the official release of his long-form birth certificate.⁴³ Barraged with media reports, including blogs and viral e-mails, and already convinced through years of messaging, these voters are inured to factual information. A world in which substantial numbers of Americans believe that the duly elected president of the United States is not legitimate is a world in which political compromise becomes substantially more difficult.

In a fragmented television and radio world of intense competition for eyeballs and eardrums sensationalism trumps sensible centrism. The lawmakers who get attention and airtime are the extreme and outrageous ones. For lawmakers, then, the new role models are people like Joe Wilson, Michele Bachmann, and Alan Grayson, the first two still in Congress. Outrageous comments result in celebrity status, huge fund-raising advantages, and

more media exposure. Mild behavior or political centrism gets no such reward.

In addition to lawmakers, the bombastic and blustering figures in the political culture—the Ann Coulters, Michael Moores, and Erick Ericksons—are rewarded with huge book sales and cable jobs. Coulter's book titles range from *Godless* to *Slander to Guilty to Demonic to Treason*, all about liberals in America. The language is not conducive to debate and deliberation, but is now guaranteed to bring spots on the best-seller lists and huge lecture fees. Periodically, Coulter will say something so offensive and outrageous, or so wrong, that cable networks pledge to stop putting her on the air. That moratorium lasts, on average, for a few months, until the ratings drive in the new age overcomes the shame of showcasing a grenade-throwing extremist.

Beyond the bombast driven by the new media models, there are other sources of inflammatory rhetoric and misinformation, from tweets to blogs to viral e-mails. A good and persistent example of the latter is an e-mail that keeps circulating and being forwarded in bulk despite major efforts to debunk it. It reads in part:

No one has been able to explain to me why young men and women serve in the U.S. Military for 20 years, risking their lives protecting freedom, and only get 50% of their pay. While politicians hold their political positions in the safe confines of the capital, protected by these same men and women, and receive full pay retirement after serving one term.

Monday on Fox news they learned that the staffers of Congress family members are exempt from having to pay back student loans. . . .

For too long we have been too complacent about the workings of Congress. Many citizens had no idea that members of Congress could retire with the same pay after only one term, that they specifically exempted themselves from many of the laws they have passed (such as being exempt from any fear of prosecution for sexual harassment) while ordinary citizens must live under those laws. The latest is to exempt themselves from the Healthcare Reform . . . in all of its forms.⁴⁴

In reality, all the “facts” in the e-mail are wrong. Here’s a Congressional Research Service report on pensions:

Congressional pensions, like those of other federal employees, are financed through a combination of employee and employer contributions. . . . Members of Congress are eligible for a pension at age 62 if they have completed at least five years of service. Members are eligible for a pension at age 50 if they have completed 20 years of service, or at any age after completing 25 years of service. The amount of the pension depends on years of service and the average of the highest three years of salary. By law, the starting amount of a Member’s retirement annuity may not exceed 80% of his or her final salary.

As of October 1, 2006, 413 retired Members of Congress were receiving federal pensions based fully or in part on their congressional service. Of this number, 290 had retired under [the Civil Service Retirement System] and were receiving an average annual pension of \$60,972. A total of 123 Members had retired with service under both CSRS and [the Federal Employees Retirement System] or with service under FERS only. Their average annual pension was \$35,952 in 2006.⁴⁵

On the Fox News assertion about student loans, this from factcheck.org (responding to dozens of inquiries):

Are members of Congress exempt from repaying student loans?

Are members’ families exempt from having to pay back student loans?

Are children of members of Congress exempted from repaying their student loans?

Do congressional staffers have to pay back their student loans?

The answers are: no, no, no and yes—although some full-time congressional staffers participate in a student loan repayment program that helps pay back a portion of student loans. No more than \$60,000 in the House and \$40,000 in the Senate can be forgiven and only if the employee stays on the job for several years.⁴⁶

The assertion that members of Congress are exempt from the provisions of the Affordable Care Act is also false. Members of Congress are subject under the health-care reform law to the same mandate as others to purchase insurance, and their plans must have the same minimum standards of benefits that other insurance plans will have to meet. Members of Congress currently have no gold-plated free plan, but the same insurance options that most other federal employees have, and they do not get it free. They have a generous subsidy for their premiums, but no more generous (and, compared to many businesses or professions, less generous) than standard employer-provided subsidies throughout the country.⁴⁷

This e-mail is a new political version of an urban legend, but with serious consequences. Former Senator Robert Bennett

(R-Utah) has reported that a Tea Party activist who challenged Bennett's renomination to the Senate (he was blocked from even running for reelection as a Republican in 2010) said he was motivated to run by that e-mail. The exaggerated views of politicians reinforced here enhance the anti-politician populism that fueled the Tea Party movement. In the new age and the new culture, the negative and false charges are made rapidly and are hard to counter or erase. They also make rational discourse in campaigns and in Congress more difficult and vastly more expensive.

Viral e-mails and word-of-mouth campaigns are expanding sharply, mostly aimed at false facts about political adversaries. As the *Washington Post's* Paul Farhi notes in an article titled, "The e-mail rumor mill is run by conservatives," they are overwhelmingly coming from the right and are aimed at President Obama and other liberals—and they are powerful:

Grass-roots whisper campaigns such as these predate the invention of the "send" button, of course. No one needed a Facebook page or an e-mail account to spread the word about Thomas Jefferson's secret love child or Grover Cleveland's out-of-wedlock offspring (both won elections despite the stories, which in Jefferson's case were very likely true).

But it has become a truism that in their modern, Internet-driven form, these persistent narratives spread far faster and run deeper than ever. And they share an unexpected trait: Most of the time, Democrats (or liberals) are the ones under attack. Yes, George W. Bush had some whoppers told about him—such as his alleged scoffing that the French "don't have a word for 'entrepreneur'"—but when it comes to generating and sustaining specious and shocking stories, there's no contest. The majority of the junk comes from the right, aimed at the left.

We're not talking here about verifiably inaccurate statements from the mouths of politicians and party leaders. There's plenty of that from all sides. And almost all of those statements are out in the open, where they get called out relatively quickly by the opposition or the mainstream media.

Instead, it's the sub rosa campaigns of vilification, the can-you-believe-this beauts that land periodically in your inbox from a trusted friend or relative amid the noise of every political season.

This sort of buzz occurs out of earshot of the news media. It gains rapid and broad circulation by being passed from hand to hand, from friend to relative to co-worker. Its power and credibility come from its source. . . .

Of the 79 chain e-mails about national politics deemed false by PolitiFact since 2007, only four were aimed at Republicans. Almost all of the rest concern Obama or other Democrats. The claims range from daffy (the White House renaming Christmas trees as "holiday trees") to serious (the health-care law granting all illegal immigrants free care).⁴⁸

The impact of all this is to reinforce tribal divisions, while enhancing a climate where facts are no longer driving debate and deliberation, nor are they shared by the larger public.

Money in Politics

Author Robert Kaiser struck a chord when he titled his recent book *So Damn Much Money*.⁴⁹ American elections are awash in money, politicians devote an inordinate amount of their time dialing for dollars, and campaign fund-raising is now considered a normal part of the lobbying process.

Kaiser's book was mostly about lobbying. In a city where much of the business is about divvying up over \$3 trillion in federal spending and carving out tax breaks from over \$2 trillion in revenues, the money spent on influencing those decisions has mushroomed, and the money that lobbyists and their associates make has become almost mind-boggling. The corruption that Kaiser describes—direct and indirect, from literal or near bribes and the trading of favors to the insidious corruption of the revolving door, where lawmakers and other public officials leave office and become highly paid lobbyists asking for favors from their former colleagues and using their expertise to influence the passage and implementation of laws and regulations—has moved from a chronic problem to an acute one. It was dampened a bit after the uproar of the Jack Abramoff–Tom DeLay era that ended with Abramoff's conviction and DeLay's departure from Congress in 2006, or perhaps more accurately, in 2010 with the conviction of Kevin Ring, one of Abramoff's associates, over a series of bribes and lavish perks provided to lawmakers and staff in return for legislative benefits. But the money in Washington and the problems of the revolving door have barely abated and, with the new era of campaign finance since the Supreme Court's *Citizens United* decision, have in many ways become shockingly worse.

In 2011, Jack Abramoff himself came out of exile as a repentant sinner and talked openly about the corrupt system in Washington, vividly describing the depth of rot. On November 6, 2011, Abramoff appeared on *60 Minutes* and described how he had corrupted congressional staffers:

When we would become friendly with an office and they were important to us, and the chief of staff was a competent person, I would say or my staff would say to him or her at some point, "You know, when you're done working on the

Hill, we'd very much like you to consider coming to work for us." Now the moment I said that to them or any of our staff said that to 'em, that was it. *We owned them. And what does that mean? Every request from our office, every request of our clients, everything that we want, they're gonna do. And not only that, they're gonna think of things we can't think of to do.*⁵⁰

While Abramoff was caught and served prison time, the fundamentals of the system he described have not changed. If other lobbyists do not operate with his flamboyance, the system awash in money still operates as it did in 2006. One vivid example is "Newt, Inc.," the name observers of Newt Gingrich coined after he left Congress. The industrious Gingrich created a web of for-profit and not-for-profit groups that garnered nearly \$150 million in fees from a wide array of businesses and trade associations. Newt's influence-for-hire operation included the now well-publicized \$1.6 million to \$1.8 million from Freddie Mac to legitimize its efforts with House Republicans, and over \$30 million from health-care-related organizations. Gingrich said he did no lobbying, but of course, it's hard to figure out what his clients were buying other than access to policy makers.

To be sure, money has long played a problematic role in American democracy. Reconciling the tension between economic inequality and political equality, while preserving the constitutional guarantee of free speech, is no easy task. A healthy democracy with open and competitive elections requires ample resources for candidates to be heard and voters to garner the information they need to make considered decisions. This country has regulated campaign finance for over a century, though often with weak and porous statutes and grossly inadequate means of

enforcement.⁵¹ A major increase in recent decades in the demand for and supply of money in politics directly exacerbates dysfunctional politics by threatening the independence and integrity of policy makers and by reinforcing partisan polarization.

The first flows from the inadequate measures to limit the source and size of contributions to candidates and parties. Prohibitions on corporate contributions in federal elections were enacted early in the twentieth century; these were extended to direct spending as well as contributions from corporations and unions in the 1940s. Violations of these laws by the Committee to Reelect the President in the 1972 election led to the passage of a more ambitious regulatory regime that added contribution limits, public funding of presidential campaigns, and more effective public disclosure.

By the 1990s, parties found ways of raising so-called soft money—unlimited contributions from corporations, unions, and individuals ostensibly used for purposes other than influencing federal elections. The availability of these unrestricted sources of campaign funds created increased opportunities for inappropriate pressure and conflicts of interest if not outright extortion or bribery between public officials and private interests.

Stories of politicians using elaborate inducements to raise huge sums of soft money from big donors (including sleepovers in the Lincoln Bedroom and—literally—menus of intimate access to key committee chairs in Congress or top party leaders based on levels of soft money contributions) led to a drive for major reform. It was intensified by the growing impact of “independent” outside and party ads, financed by soft money from individuals, corporations, and unions, using a loophole in the regulations that allowed unlimited funds for so-called “issue ads.” The ads did not say explicitly “elect” or “defeat” a candidate, but

in every other respect were aimed at voters in a district or state to influence the election outcomes.

The Bipartisan Campaign Reform Act (known widely as the McCain-Feingold Act), passed in 2002, was designed to prohibit party soft money and to bring electioneering communications (those campaign ads parading as issue ads) under the contribution and disclosure restrictions of the law. The Supreme Court upheld it in 2003, in *McConnell v. Federal Election Commission*.

That law worked as intended, until it was overwhelmed by a series of Supreme Court decisions, which, in combination with a lax Federal Election Commission and increasingly brazen entrepreneurs pushing the boundaries of the law beyond recognition, have created the political equivalent of a new Wild West. *Citizens United v. Federal Election Commission*, decided by a 5–4 majority in 2010, was the centerpiece of the Court’s recent deregulatory juggernaut to overturn decades of law and precedent. In a breathtaking breach of judicial norms dealing with cases and controversies and legal precedents, the Court ruled that corporations and unions were free to make unlimited independent expenditures in elections for public office. Step back for a moment and look at the trajectory of this case.⁵² The plaintiff, Citizens United (a conservative group), narrowly challenged a provision of the 2002 Bipartisan Campaign Reform Act to enable in this situation unlimited corporate advertising funding for a “documentary” film called *Hillary: The Movie*. The film was unabashedly designed to derail Hillary Rodham Clinton’s campaign for president. Citizens United wanted only an “as applied” exception for their documentary, which they believed did not meet the standard of “electioneering communications” in the law. They explicitly did not raise the larger question of overturning the ban on corporate spending in federal campaigns.

The Justices heard the case on that basis, but Chief Justice John Roberts, with support from his allies on the Court, decided unilaterally to raise the broader issue of whether a prohibition on corporations' independent expenditures was constitutional, and he demanded a rehearing. That 5–4 ruling overturned decades of established doctrine, throwing the world of campaign finance into turmoil and demonstrating a troubling new approach to governance by the Supreme Court. The willingness to do something dramatic and highly controversial on a 5–4 vote, underscoring the pattern set in 2000 by the 5–4 highly charged decision that decided the outcome of the presidential election, *Bush v. Gore*, was accompanied by what we believe was a reckless approach to jurisprudence.

The sweep and scope of the decision was especially disturbing, given what Chief Justice nominee Roberts had vowed at his confirmation hearings in front of the Senate Judiciary Committee in September 2005. In his opening statement, he said:

Judges and justices are servants of the law, not the other way around. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedents, shaped by other judges equally striving to live up to the judicial oath. . . . I will remember that it is my job to call balls and strikes and not to pitch or bat.

I do think that it is a jolt to the legal system when you overrule a precedent. . . . It is not enough that you may think the prior decision was wrongly decided. . . . The role of the judge is limited; the judge is to decide the cases before them; they're not to legislate; they're not to execute the laws.

Now add the comments Roberts made a year later at the Georgetown University Law Center commencement: "The broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible ground." He added: "If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more."⁵³

Judges and Congresses in the past had carefully considered the cases overturned and the laws struck down in *Citizens United*, including in the *McCormell* decision barely six years earlier. Only one thing had changed—the political and ideological complexion of the Supreme Court brought on in particular by the retirement of Sandra Day O'Connor. Had O'Connor not retired, *Citizens United* either would not have been broadened or would have been decided 5–4 the other way.

Justice Anthony Kennedy, who drew on reasoning that struck pragmatic observers of money and politics as bizarre, authored the *Citizens United* decision. He equated money with speech and equated corporations, which have the one goal of making money, with individual citizens, who have many goals and motives in their lives, including making a better society, protecting their children and grandchildren and future generations, and so on. And, as legal scholar Richard Hasen recently noted, Kennedy added gratuitously in the decision his flat statement: "We now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."⁵⁴ That statement, belied by the everyday experience of politicians and lobbyists throughout Washington, has opened the floodgates to even more money in politics, and more corruption.

It has also resulted in a substantial infection of judicial elections—something Kennedy, in an earlier opinion (*Caperton v. A.T. Massey Coal*) had decried, saying (ironically, given his

reasoning in *Citizens United*) that independent expenditures *could* corrupt judges and courts. A new report by the Brennan Center at New York University looking at judicial elections in 2009–2010 noted: “Nearly 40% of all funds spent on state high court races came from just 10 groups, including national special interest groups and political parties; nearly 1/3 of all funds spent on state high court elections came from non-candidate groups (\$11.5 million out of \$38 million in 2009-10); and, though outside groups paid for only 40% of total ads, they were responsible for 3 in 4 attack ads.”⁵⁵

Sure enough, in the wake of *Citizens United*, political operatives stepped in with creative ways to push the envelope and use huge sums of money both to influence campaigns and to shape legislative outcomes, and to brazenly evade the disclosure requirements for donors that were upheld by the Supreme Court. In one particularly egregious example, former Bush adviser Karl Rove and former Republican National Committee chair Ed Gillespie created two political organizations called American Crossroads. The first, under Section 527 of the Internal Revenue Code, was required to disclose its donors. But the ever-creative Rove also launched a *second* group, American Crossroads GPS, this one a 501(c)4 under the tax code designed for nonprofit social welfare advocacy organizations. The important thing about these groups is that they don’t have to disclose donors. The second group raised \$5.1 million in June 2010 alone, with a goal of reaching \$50 million for that election, and according to media accounts, succeeded in its fund-raising because it tapped into sources that did not want to be identified. The “concept paper” describing for potential donors the reasons to support American Crossroads GPS said the group will conduct “in-depth research on congressional expense account abuses,” to blame Democrats

for “failed border controls” and to frame the BP oil spill as “Obama’s Katrina.”⁵⁶

It is impossible to imagine that American Crossroads GPS has any purpose other than electing Republican candidates while keeping the fat-cat donor names hidden from public view. As *Politico* reporter Ken Vogel noted, Rove created the spinoff group so donors wouldn’t have to be publicly associated with him.⁵⁷

Rove is not the only political operative seizing on this loophole in IRS regulations to do aggressive partisan campaigning. In February 2010, former Senator Norm Coleman formed a 501(c)4 “action tank” called the American Action Network, which spent a large sum of money in 2010 on attack ads hitting Governor Charlie Crist, who ran as an Independent in the Florida Senate race, and Senator Patty Murray (D-Wash.) in her campaign. Its sister 501(c)3, called American Action Forum, is its “think tank.” Not surprisingly, unions and other liberal and Democratic groups have followed suit, creating a money arms race to attract anonymous large donors.

Given that both parties are exploiting the nonprofit loophole, it would be easy to blame them both equally, and media reinforce that tendency. In a January 27, 2012, CNN piece, anchor Erin Burnett called it “Democratic and Republican bipartisan loophole action.” Her guest, *Politico* reporter David Levinthal added, “Well, of course, the Democrats want to blame the Republicans and the Republicans want to blame the Democrats, but you’re right. This is not exclusive to any one party and is this going to change? Well, Congress tried to change it back in 2010. They tried to pass a piece of legislation called the DISCLOSE Act. Well it went nowhere.”

In fact, the blame for evasion of disclosure laws is heavily tilted to the Republican side. The leaders in the effort to evade

disclosure laws have been Republicans, and the Democrats' united effort to create a robust disclosure regime after *Citizens United* was thwarted on a filibuster in the Senate in 2010 when all fifty-nine Democrats voted for the DISCLOSE Act, but could not get a single Senate Republican, including reformers like John McCain and Olympia Snowe, to provide the necessary sixtieth vote to overcome the filibuster.

Along with the misuse of nonprofit status to evade disclosure, the *Citizens United* decision, combined with the D.C. Circuit Court of Appeals decision in *SpeechNow v. Federal Election Commission*, resulted in a new vehicle to erase any campaign contribution limits.⁵⁸ The *SpeechNow* decision said that so-called independent-expenditure committees, which can attack or defend candidates directly, could receive contributions in unlimited amounts, that is, via soft money. This meant the creation of what have been called "super PACs" (now made famous by TV host Stephen Colbert, who created his own), which have exploded on the scene since 2010. Super PACs are in theory not allowed to coordinate with candidates and are required to disclose contributors. But it is a measure of how farcical the law's remaining constraints are that 2012 presidential candidates' closest advisers are forming super PACs on their behalf as an obvious way to evade campaign contribution limits. Even sitting members of Congress are trying to blow the remaining limits on soft money out of the water by creating their own super PACs.⁵⁹

A group of candidate Mitt Romney's former aides, friends, and business associates formed a super PAC called "Restore Our Future," ostensibly independent of Romney's campaign. But the founders included his former campaign general counsel, former political director, and former media team leader. Beyond the super PAC itself, the Romney effort shows that the temptation

for chicanery is great. In mid-2011, a mystery donor had a Massachusetts tax lawyer form a sham corporation with the sole purpose of donating \$1 million to Restore Our Future; as soon as the contribution was made, the corporation disbanded.⁶⁰ Only after a major public uproar did the donor identify himself: Edward Conard, the former managing director of the Romney-founded Bain Capital. Despite the obvious attempt to evade disclosure requirements, the Romney super PAC took the money and declared the controversy over once Conard's name became public.⁶¹

Romney, of course, was not alone among presidential candidates in making sure that super PACs arose so the candidates could avoid presidential campaign contribution limits. Candidate Rick Perry's close friend and former staffer from his governor's office, Mike Toomey, created a Perry super PAC, "Make Us Great Again." Toomey earlier had settled civil litigation for his efforts to get the Texas Association of Business to funnel \$1.7 million in secret corporate contributions to Texas legislative candidates. He had also secretly financed an effort to get the Green Party on the ballot in Texas in 2010 to siphon votes from Perry's Democratic opponent in the gubernatorial campaign. Andrew Wheat, the research director of Texans for Public Justice, commented, "Rick Perry and Mike Toomey have been attached at the hip for 25 years. Any suggestion that these Siamese twins operate independently of one another is a legal fiction."⁶²

Congressional leaders have not been far behind in the super PAC race. John Murray, a top adviser to House Majority Leader Eric Cantor, left Cantor's staff in October 2011 to form a super PAC, a 501(c)4, and a nonprofit educational entity known as a 501(c)3, all to help elect "pro-market candidates" (and not coincidentally use the unlimited super PAC and unlimited and

anonymous 501(c)4 contributions to help advance Cantor). Congressional Democratic leaders have not formed their own super PACs, but House Minority Leader Nancy Pelosi has raised money for a super PAC called House Majority PAC, while Senate Majority Leader Harry Reid has raised money for Majority PAC, a counterpart advancing Democratic candidates for the Senate.

The out-of-control money system is showing itself in big and corrupting ways in Congress.⁶³ We have had conversations with several incumbents in the Senate up for election in 2012. They say the same thing: they can handle any of the several prospective opponents they might face, but all of them fear a stealth campaign landing behind their lines and spending \$20 million on “independent” efforts designed to portray the incumbent as a miscreant and scoundrel who should be behind bars, not serving in the Senate. And, of course, the contributors to the campaign would be undisclosed.

Most politicians understand that constituents who like or approve of them don't really know much about them; voters don't spend a lot of time focusing on politics and politicians. So a vicious and unrelenting negative ad campaign can work. What do candidates do then? Beyond the money they raise directly for their campaigns against their opponents, they are working overtime to raise their own protective war chests, meaning they spend every spare moment not deliberating or debating policy, but on “call time,” begging for money. Time spent this way means less time to spend with colleagues, and since the money raised in many cases will go directly into campaigns of vilification against other lawmakers, it is not exactly conducive to working together.

Many lobbyists in Washington will add another twist to the new post-*Citizens United* world. We have heard the same story

over and over: a lobbyist meets with a lawmaker to advocate for a client, and before he gets back to the office, the lawmaker calls asking for money. The connections between policy actions or inactions and fund-raising are no longer indirect or subtle.

Then there is a third element. As one Senator said to us, “We have all had experiences like the following: A lobbyist or interest representative will be in my office. He or she will say, ‘You know, Americans for a Better America really, really want this amendment passed. And they have more money than God. I don't know what they will do with their money if they don't get what they want. But they are capable of spending a fortune to make anybody who disappoints them regret it.’” No money has to be spent to get the desired outcome.

Writer Jane Mayer's October 10, 2011, article in *The New Yorker* recounted the chilling story of wealthy North Carolina businessman Art Pope who spent tens of millions of dollars to buy (with apparent success) a state legislature to his liking. Reinforcing the point about destructive polarization, Mayer shows that Pope's money paid for vicious ads that attacked the integrity of incumbent moderate Democrats and moderate Republicans—to eliminate the center, discourage others of a moderate mind-set from running, and create yet more polarization, this time at the state level. And one major result of his efforts was partisan gerrymandering in North Carolina in 2011 that has targeted three of the few remaining centrist “Blue Dog” Democrats in the House for extinction.⁶⁴

This is just the beginning. Each week seems to bring yet another new initiative by candidates, parties, or private interests to set up parallel political organizations and escape all restrictions on money in politics. The independence, integrity, and legitimacy of government are the victims.

These developments in campaign finance work in multiple ways to reinforce the partisan polarization at the root of dysfunctional politics. Parties are at the center, not the periphery, of fundraising. They expect members of Congress to raise money for the team through their personal campaign committees and leadership PACs, so that resources can be redistributed from safe to competitive seats. Party leaders are prolific fund-raisers, as are aspiring leaders. They expect committee and subcommittee chairs to use their positions to raise campaign funds for the party. Becoming a committee chair can depend more on one's fund-raising prowess than one's legislative or policy skills or knowledge. Many of the super PACs and other independent groups are effectively extensions of the parties, part of the multilayered coalitions that constitute today's political parties.⁶⁵ These fund-raising and spending arrangements provide special opportunities for generous donors and spenders, many (like the infamous Koch brothers who have created a web of well-financed conservative groups with innocuous names to promote their ideological and business interests) with extreme ideological views and direct stakes in public policy decisions to shape the positions and agendas of the parties.

Many parts of this story are familiar to readers who have been watching Washington and American politics. Many stories, as we have said, are variations on age-old themes or amplifications of earlier trends. We constantly have to ask ourselves whether all this is truly any different from the past, or even different from what we remember through rosy gauze from previous decades. But our conclusion is firm: the combination of old trends, new technologies, new players, and a coarsened political culture has passed a critical point, leading to something far more troubling than we have ever seen.⁶⁶

Beyond the Debt Ceiling Fiasco

If the debt ceiling mess were the only example of a political system gone wild, it would be easy to say either that it was an anomaly or that the inherent messiness of a disputatious political process—one built around, as the late constitutional scholar Edward Corwin put it, “an invitation to struggle” among and across the branches—makes such showdowns inevitable.¹ But the current situation is different. If the politics of partisan confrontation, parliamentary-style maneuvering, and hostage taking has been building since the late 1970s, it has become far more the norm than the exception since Barack Obama's election. In 2009–2010, when the Democrats controlled the House and Senate as well as the White House, it was all about drawing sharp partisan lines in the dust, with no Republican votes available for any major legislative initiative, save the three Senate Republicans who voted early on for the economic stimulus in return for major