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## Hamilton at Wits End: The Lost Discipline of the Spending Clause vs. the False Discipline of Campaign Finance Reform

Bradley A. Smith\*

### I. INTRODUCTION

In 1796, Congressman James Madison proposed that the federal government undertake a survey for a national post road from Maine to Georgia, which he suggested would be, “the commencement of an extensive work.”<sup>1</sup> Madison’s proposal drew the attention of his long-time friend and confidant, Thomas Jefferson, then in temporary retirement at Monticello. In private correspondence, Jefferson inquired of Madison, “[h]ave you considered all the consequences of your proposition respecting post roads? I view it as a source of boundless patronage to the executive, jobbing to members of Congress and their friends, and a bottomless abyss of public money.”<sup>2</sup>

Although Madison’s proposal appeared to fall under a power specifically granted to Congress by the Constitution, “[t]o establish [p]ost [o]ffices and post [r]oads,”<sup>3</sup> Jefferson nonetheless opposed the measure as being beyond Congress’s enumerated powers. “Does the power to *establish* post roads,” asked Jefferson, “mean that you shall *make* the roads, or only *select* from those already made those on which there shall be a post? If the term be equivocal, (and I really do not think it so) which is the safest construction?”<sup>4</sup> Jefferson argued that the more liberal construction would open the door to wholesale spending by Congress, in ways that harbored ill for representative government. “[I]t will be a

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<sup>1</sup> Joseph H. Harrison, Jr., *Sic Et Non: Thomas Jefferson and Internal Improvement*, 7 J. EARLY REPUB. 335, 339 (1987).

<sup>2</sup> Letter from Jefferson to Madison (Mar. 6, 1796), in 2 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 923 (James Morton Smith ed., 1995).

<sup>3</sup> U.S. CONST. art. I, § 8, cl. 7.

<sup>4</sup> Letter from Jefferson to Madison (Mar. 6, 1796), in 2 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 924 (James Morton Smith ed., 1995).

scene of eternal scramble among the members who can get the most money wasted in their state, and they will always get most who are meanest.”<sup>5</sup> Jefferson also expressed concern whether the national government could ever be truly sensitive to local concerns and opinions, rhetorically asking, “[w]hat will it be when a member of N[ew] H[ampshire] is to mark out a road for Georgia?”<sup>6</sup>

In contrast, Jefferson’s former cabinet colleague, Treasury Secretary Alexander Hamilton, had no constitutional qualms about federal spending for road construction.<sup>7</sup> Indeed, Hamilton favored an expansive federal role generally, and interpreted the Constitution in that manner.<sup>8</sup>

Today, Jefferson’s concerns seem nothing short of quaint. The federal government spends over \$1.8 trillion per annum, with federal highway spending alone anticipated to exceed \$26.9 billion in fiscal year 2001.<sup>9</sup> The idea that one should interpret Congress’s enumerated powers, or its authority to spend money to carry them out narrowly, scarcely remains an element of public discourse. Quite the contrary, a substantial percentage of Congress’s extraordinary expenditures are made in support of no enumerated power whatsoever, but merely under a vague constitutional grant of power that we now call the “Spending Clause.” Through this spending, the federal government extends its reach into virtually all aspects of human endeavor and local politics. To cite just a few examples, the government attempts to influence the individual consumption of alcohol;<sup>10</sup> how doctors practice medicine;<sup>11</sup> how counselors advise patients;<sup>12</sup> and numerous other areas that would seem remote even under the expansive view that the courts have adopted of the Commerce Clause.<sup>13</sup>

Today, this core power to spend goes more or less unchallenged. Most scholarship accepts the expansive, “Hamiltonian” view of the power. Current legal controversies over the spending

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<sup>5</sup> *Id.* at 923.

<sup>6</sup> *Id.* at 924.

<sup>7</sup> Letter from Alexander Hamilton to Jonathan Dayton (Oct.-Nov., 1799), in 23 THE PAPERS OF ALEXANDER HAMILTON 599, 601-02 (Harold C. Syrett et al. eds., 1976). Further, though it appears he might have had doubts that the Constitution would allow Congress to actually operate roads, he probably would have favored a constitutional amendment to give the federal government that power. *Id.* at 603 (suggesting a constitutional amendment should be had so that Congress could “open,” as opposed to merely spend money for, canals).

<sup>8</sup> See David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 5-24 (1994) [hereinafter Engdahl, *The Spending Power*].

<sup>9</sup> EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, FINAL SEQUESTRATION REPORT TO THE PRESIDENT AND CONGRESS, FISCAL YEAR 2001, at 9 (2001).

<sup>10</sup> See *South Dakota v. Dole*, 483 U.S. 203 (1987).

<sup>11</sup> See *Harris v. McRae*, 448 U.S. 297 (1980); *Bowen v. American Hosp. Ass’n*, 476 U.S. 610 (1986).

<sup>12</sup> See *New York v. Schweiker*, 557 F. Supp. 354 (1983).

<sup>13</sup> See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

power tend to be concerned with whether, or to what extent, the federal government may condition the receipt of funds on the agreement of individual recipients and other program beneficiaries to engage (or to refrain from engaging) in particular behaviors; and on whether, or to what extent, the policies behind such conditional federal spending may be used to preempt state laws which would otherwise frustrate the federal policies at issue.<sup>14</sup> Given the Supreme Court's steadfast adoption of an expansive, "Hamiltonian" interpretation of the spending power,<sup>15</sup> this discussion of what is called the doctrine of "unconstitutional conditions" has a certain practical bent that may be missing from work which would go further toward a full-scale reconsideration of the Spending Clause. Furthermore, a robust doctrine of unconstitutional conditions may go a long way towards restricting federal spending and the reach of even the Hamiltonian view of the spending power, a concern at the heart of this modest essay. However, beyond examination of the unconstitutional conditions doctrine, the core Hamiltonian view of the spending power is generally unchallenged.

In this symposium, surrounded by scholars of the first rank, many of whom have devoted substantial efforts to understanding and interpreting Congress's spending power, my contribution must necessarily be modest. I will refrain from the difficult task of attempting to dissect the efforts of the Supreme Court to explain or limit the spending power. I will not attempt to argue whether or not the prevailing, so-called "Hamiltonian" view of the spending power is "right" or "wrong," either as a matter of textual interpretation or of founding intent. Rather, I will merely suggest that this prevailing interpretation, with or without the limitations of the unconstitutional conditions doctrine, places pressures on the American system of representation that are not easily overcome. In particular, an expansive interpretation of the Spending Clause fosters political rent-seeking, that is, the seeking of special favors from government, through the democratic process. These pressures come to the fore in my area of expertise, campaign finance law, for campaign finance regulation is largely an effort to control political rent-seeking. However, most proposals for campaign finance regulation run directly counter to the First Amendment,

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<sup>14</sup> See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1919 (1995) [hereinafter Baker, *Conditional Federal Spending*]; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1111 (1987); D. Bruce LaPierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982).

<sup>15</sup> See *United States v. Butler*, 297 U.S. 1 (1936); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937); *Dole*, 483 U.S. 203; *Rust v. Sullivan*, 500 U.S. 173 (1991).

and to a smoothly functioning system of representation. I have, unfortunately, no solution to offer—at least not one which would be politically palatable in these times, or which might not create other, competing pressures on democratic self-government in the United States. However, perhaps merely identifying the problem can be a step forward in our thinking, not only about campaign finance, but also about the purpose of democratic self-government more generally.

Part II of this paper reviews the general contours of the Spending Clause as it has come to be understood, contrasting the Hamiltonian and Madisonian views and suggesting that the triumph of Hamiltonianism is a part of a massive redefinition of the relationship between the federal government, the states, and the people. Part III discusses how the Hamiltonian interpretation creates problems for representative democracy, and discusses campaign finance regulation as a desperate but doomed effort to resolve these dilemmas. I conclude by suggesting that the prevailing interpretation of the Spending Clause has helped to bring us to a political crossroads from which, given current attitudes, there is no obvious way out: it is, I suggest, Hamiltonianism at wits' end.

## II. EVOLUTION OF A CLAUSE

### A. The Source of the Spending Power

Some level of authority for Congress to authorize expenditures of money appears to have been considered self-evident to the drafters of the Constitution. Without such power, the Constitution's provisions authorizing Congress to "borrow money,"<sup>16</sup> or to "lay and collect [t]axes,"<sup>17</sup> or to "support Armies"<sup>18</sup> and "maintain a Navy,"<sup>19</sup> for example, would make no real sense. Yet, except for Congress's authorization to draw compensation "paid out of the Treasury of the United States,"<sup>20</sup> the Constitution grants Congress no specific power to spend money for anything. The power appears to be assumed within the framework of the Constitution as an obvious extension of Congress's authority to carry out various enumerated actions—the "necessary and proper" Clause of Article I, Section 8.<sup>21</sup> If congressional spending is limited to that which is "necessary and proper" to effect Congress's enumerated

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<sup>16</sup> U.S. CONST. art. I, § 8, cl. 2.

<sup>17</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>18</sup> U.S. CONST. art. I, § 8, cl. 12.

<sup>19</sup> U.S. CONST. art. I, § 8, cl. 13.

<sup>20</sup> U.S. CONST. art. I, § 6, cl. 1.

<sup>21</sup> U.S. CONST. art. I, § 8, cl. 18 (The Congress shall have the Power, "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .").

powers, then Congress's power to spend must be quite limited, even under a relatively expansive definition of "necessary and proper." As for spending beyond that pertaining to enumerated powers, there is some question about the source of any such power, and correspondingly, how broad this power, if it exists at all, might be. The most common interpretation is that the locus of the spending power, beyond that necessary and proper to effectuating enumerated powers, is implied in Article I, Section 8, Clause 1, which authorizes Congress to "pay the Debts and provide for the common Defence and general Welfare of the United States."<sup>22</sup> Professor David Engdahl, however, argues that the power is more appropriately found in Article IV, Section 3, Clause 2, which grants Congress the power to "dispose of . . . Property belonging to the United States."<sup>23</sup> Yet another possibility might be an implied power under Article I, Section 9, Clause 7, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>24</sup>

Two of these possible sources of the spending power place no apparent constraints on that power, at least not without reference to other portions of the document. Indeed, the Appropriations Clause of Article I, Section 9, only grants the power at all through the pregnant inference that money may be drawn from the Treasury if appropriated by law, and offers no guidance as to any potential restraints on the power. It appears that no reported case has relied upon this clause, nor has any major commentary treated it as the source of the spending power. Similarly, the courts have not adopted Engdahl's reliance on Article IV, nor does Engdahl's theory place inherent restraints on the subjects for which Congress may appropriate funds. Indeed, Engdahl argues that Article IV's clear lack of any restraint on the purposes for which funds may be disposed is both the correct Hamiltonian interpretation of the spending power and, correspondingly, a virtue

<sup>22</sup> See, e.g., *United States v. Butler*, 297 U.S. 1, 64 (1936).

<sup>23</sup> Engdahl, *The Spending Power*, *supra* note 8, at 50-51; David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215 (1995) [hereinafter Engdahl, *The Basis of the Spending Power*].

<sup>24</sup> So far as I know, others have not sought to find the spending power in this clause; I presume that this is because either my research or logic is faulty, but I leave open the possibility of an original thought. The clause is generally viewed as a check on the authority of the executive to spend. See Jeffrey T. Renz, *What Spending Clause? (or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 140 (1999). By implication, this view suggests that, technically, the power to spend is not a congressional power at all, but is actually an executive power provided for under the President's duty to see that "the Laws be faithfully executed." See *id.* (quoting U.S. CONST. II, § 3, cl. 1.). Our concern remains with the scope of the projects for which Congress may appropriate money, however.

to rooting the power in Article IV.<sup>25</sup> However, Article I, Section 8, Clause 1, is the provision on which the federal courts have hung their collective hat,<sup>26</sup> and where scholars have generally assumed that the authority is found.<sup>27</sup>

Finding the spending authority in Article I, Section 8 is important, because Article I, Section 8 contains language which is susceptible to interpretation as either a limit on the spending power or a potential extension of that power. The central language in debates over the scope of the spending power hinges on what is meant by Congress's authority, in Article I, Section 8, to "provide for the . . . general Welfare." The question, in particular, is whether this language expands or contracts congressional power beyond the powers enumerated elsewhere in the Constitution. Two major schools of thought have existed since the Founding, as indicated by the names given to their respective positions: the "Madisonian" view, for followers of James Madison, and the "Hamiltonian" view, named for the first Secretary of the Treasury.<sup>28</sup> I will not attempt a full and thorough explication of either view or the various nuances that might exist within each camp,<sup>29</sup> but a brief summary of each view is important for our purposes.

<sup>25</sup> Engdahl, *The Spending Power*, *supra* note 8, at 52. Engdahl does not see this formulation as leading to unchecked federal power—quite the contrary, he believes that separating the spending power from Article I, Section 8, with its "general Welfare" clause, does away with the mistaken idea that Congress may engage in non-fiscal measures, where it otherwise lacks enumerated powers under the Constitution, on the theory that it has broad non-fiscal power to "provide for the . . . general Welfare." *Id.*

<sup>26</sup> See, e.g., *Butler*, 297 U.S. at 64; *Helvering v. Davis*, 301 U.S. 619, 640 (1937); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

<sup>27</sup> See, e.g., Baker, *Conditional Federal Spending*, *supra* note 14, at 1919; Rosenthal, *supra* note 14 at 1111. Finding any free-standing spending power in the general welfare "clause" is more problematic than most courts and scholars seem to think. A most cursory reading reveals that the "General Welfare Clause" is not really a clause at all, but merely a phrase within a clause. Hence it would seem clearly to be a limitation rather than a grant of power. See THOMAS JEFFERSON, OPINION ON THE CONSTITUTIONALITY OF THE BILL FOR ESTABLISHING A NATIONAL BANK (Feb., 15 1791), *reprinted in* DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 191 (1994).

<sup>28</sup> The two men collaborated, of course, on writing *The Federalist Papers* in an effort to explain and bolster support for the Constitution during the ratification phase in the states.

<sup>29</sup> Such discussions can be found in e.g., Renz, *supra* note 24, at 103-142; Engdahl, *The Spending Power*, *supra* note 8, at 5-26; Rosenthal, *supra* note 14, at 1112; *Butler*, 297 U.S. at 63-78; *id.* at 79-88 (Stone, J., dissenting). Some have suggested that there are really three interpretations of the clause: the Madisonian interpretation, and "strong" and "weak" Hamiltonian interpretations. The "strong" Hamiltonian interpretation finds in the "general Welfare" clause the power for Congress to regulate generally, even beyond the enumerated powers that follow in the subsequent clauses of Paragraph 8. The "weak" Hamiltonian position finds no such general, regulatory power, but does hold that Congress has broad authority to spend for the general welfare. See Renz, *supra* note 24, at 103, 124. Given that this "strong" interpretation has not been found persuasive by the courts or most commentators, and that we are primarily concerned here with congressional spending, rather than direct regulation, I will not devote space to this "strong" Hamiltonian position.

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## B. The Conflicting Views, Briefly Described

The Madisonian view of Article I, Section 8 holds that Congress's power to spend for the "general Welfare" is limited to effectuating Congress's enumerated powers. In this view, the inclusion of the General Welfare Clause serves to limit Congress's power, rather than to expand it. Indeed, Madison himself often evinced nothing short of scorn for interpretations of the General Welfare language that would expand Congress's powers beyond those enumerated elsewhere in the Constitution. For example, in *Federalist No. 41*, he wrote:

It has been urged and echoed that the power 'to . . . provide for the common defense and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections [to the Constitution], than their stooping to such a misconstruction . . . . [W]hat color can the objection have, when a specification of the objects alluded to by these general terms immediately follows and is not even separated by a longer pause than a semicolon? . . . For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity . . . .<sup>30</sup>

Madison reiterated this view throughout his lifetime. For example, he wrote in 1800 that any interpretation of the General Welfare Clause as a grant of powers beyond those otherwise enumerated would lead to the creation of a government, "without the limitations formed by a particular enumeration of powers."<sup>31</sup> He continued:

The true and fair construction of this expression ["general Welfare"], both in the original and existing federal compacts, appears . . . too obvious to be mistaken. In both the Congress is authorized to provide money for the common defence and general welfare. In both, is subjoined to this authority an enumeration of the cases to which their powers shall extend . . . . Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question

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<sup>30</sup> THE FEDERALIST NO. 41, at 262-63 (James Madison) (Clinton Rossiter ed., 1961).

<sup>31</sup> JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS (1800), reprinted in JONATHAN ELLIOTT, 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 552 (1891).



arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it. If it be not, no such application can be made. This [is the] fair and obvious interpretation . . . .<sup>32</sup>

Madison's approach, of course, would have strictly confined congressional spending, even in light of the constitutional authorization for Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>33</sup>

The contrasting Hamiltonian view of Article I, Section 8, concludes that the General Welfare Clause provides a broad grant of power for Congress to spend, effectively, for any purpose. Hamilton viewed the General Welfare Clause as a separate grant of authority, if not to regulate, at least to spend. Wrote Hamilton: "The terms 'general Welfare' were doubtless intended to signify more than was expressed or imported in those which preceded; otherwise, numerous exigencies incident to the affairs of a nation would have been left without a provision."<sup>34</sup> Hamilton went on to argue the phrase "general Welfare" was "susceptible neither of specification nor of definition. It is, therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper."<sup>35</sup>

In sum, under the Hamiltonian interpretation, the General Welfare Clause is the only limit on an otherwise plenary spending power.<sup>36</sup> However, because the legislature is the sole determinant of what constitutes the general welfare, the clause provides no real limit whatsoever, nor even guidance to those who would wield the spending power. This appears to be exactly what Hamilton had in mind.<sup>37</sup> Like Madison, Hamilton held steadfastly to his view of the spending power throughout his lifetime.<sup>38</sup>

32 *Id.* See also, e.g., James Madison, Speech in Congress (Feb. 2, 1791), reprinted in 6 THE WRITINGS OF JAMES MADISON 19, 28 (Gaillard Hunt ed., 1906); see also Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), in 9 THE WRITINGS OF JAMES MADISON 411, 418-19 (Gaillard Hunt ed., 1910).

33 U.S. CONST. art. I, § 8, cl. 18.

34 ALEXANDER HAMILTON, REPORT ON MANUFACTURES TO THE HOUSE OF REPRESENTATIVES (Dec. 5, 1791), reprinted in 3 THE WORKS OF ALEXANDER HAMILTON 294, 371 (Henry Cabot Lodge ed., 1885).

35 *Id.* at 372.

36 See, e.g., Rosenthal, *supra* note 14, at 1125.

37 Engdahl, *The Spending Power*, *supra* note 8, at 12 ("The first step toward understanding Hamilton's view of the spending power, therefore, is to recognize that the Constitution's principle of enumerated powers does not countenance—but in fact repels—. . . [the] mistaken conclusion that some matters, some activities or events, are shut off from the federal government's attention . . . .").

38 See, e.g., *id.* at 5-24.

Of course, the debate over the extent of the spending power was not restricted to the two founding giants. Rather, it simmered throughout the nineteenth century and into the early twentieth. Its importance was limited in part by the relatively small size of the federal government, and the reluctance of the federal government to engage in deficit spending outside of wartime. Shifting political demands and fortunes also influenced both the tone of the debate and which view held the upper hand at any particular time.<sup>39</sup> The influential jurist Joseph Story was an early and eloquent advocate of the Hamiltonian view,<sup>40</sup> and later advocates included Justice Holmes, at least indirectly,<sup>41</sup> the eminent counsel and later Chief Justice Charles Evans Hughes,<sup>42</sup> as the Hamiltonian interpretation gradually asserted its dominance. However, the Madisonian view retained influential defenders well into the twentieth century.<sup>43</sup>

### C. The Hamiltonian Victory

From a judicial standpoint, the core issue was finally settled in a series of cases involving “New Deal” programs. The first of these, *United States v. Butler*,<sup>44</sup> involved a challenge to the Agricultural Adjustment Act of 1933, which provided for federal subsidies to farmers who agreed to reduce their planted acreage.<sup>45</sup> The Supreme Court unanimously endorsed the Hamiltonian reading of the Spending Clause.<sup>46</sup> Whether the justices applied it correctly is another matter, as the Court reached the rather Madisonian conclusion that the spending was not in furtherance of the “general Welfare,” and so was proscribed by the Constitution.<sup>47</sup> In any event, the next year the Court upheld key portions of the Social Security Act in the paired cases of *Steward Machine Co. v. Davis*<sup>48</sup> and *Helvering v. Davis*,<sup>49</sup> emphatically reaffirming its adherence to the Hamiltonian view. Since then, the Court has not wavered

<sup>39</sup> *Id.* at 26-35; Renz, *supra* note 24, at 97-99.

<sup>40</sup> 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 907-20 at 662-72 (Melville M. Bigelow ed., 5<sup>th</sup> ed., William S. Hein & Co. 1994) (1833).

<sup>41</sup> See *Hammer v. Dagenhart*, 247 U.S. 251, 281 (1918) (Holmes, J., dissenting) (“It seems to me entirely constitutional for Congress to enforce its understanding [of good policy about anything] by all the means at its command.”).

<sup>42</sup> See *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 192-95 (1921) (Hughes position is set forth in his argument for appellees before the Court).

<sup>43</sup> See, e.g., CHARLES WARREN, THE MAKING OF THE CONSTITUTION 474-79 (Fred B. Rothman & Co. ed. 1993) (1928).

<sup>44</sup> 297 U.S. 1 (1936).

<sup>45</sup> *Id.* at 54-55.

<sup>46</sup> *Id.* at 66.

<sup>47</sup> *Id.* at 77-78. This conclusion drew a dissent from three of the justices. The dissenters agreed, however, that the Hamiltonian interpretation of the spending clause was the correct one. *Id.* at 80-81 (Stone, J., dissenting).

<sup>48</sup> 301 U.S. 548 (1937).

<sup>49</sup> 301 U.S. 619 (1937).

on the issue—although it has been criticized in specific cases for misapplying the clause.<sup>50</sup> Indeed, judicial fealty to the Hamiltonian interpretation is so complete that one commentator recently claimed that, “No one today candidly denies that Hamilton’s view of the spending power was correct.”<sup>51</sup>

With this victory for the general Hamiltonian interpretation of the power, the main issue for both courts and commentators became the extent to which Congress could condition the receipt of federal funds on the recipient’s willingness to conform to certain behavior dictated by Congress.<sup>52</sup> Even those adhering to a most restrictive view of the spending power must agree that Congress may, when spending to effect an enumerated power, impose corresponding regulations which are necessary to assure that the money is spent to address its goal. Failure to impose such conditions would arguably leave the spending vulnerable to constitutional challenge under a Madisonian view of the power, as it would effectively allow the federal government to spend in ways that do not support its enumerated powers.<sup>53</sup> It would seem equally uncontroverted that Congress, as a condition of granting funds pursuant to one enumerated power, may impose conditions that could have been enacted or imposed pursuant to another enumerated power.<sup>54</sup> More difficult questions arise when Congress attempts to condition funds on the recipients’ agreement to engage, or not to engage, in behavior otherwise beyond the enumerated federal powers,<sup>55</sup> or to condition the grant of funds on the recipients’ agreement to forego a constitutional right.<sup>56</sup> An effort to address the latter situation has been made, in part, through the slow, difficult development of the complex doctrine of unconstitutional conditions.<sup>57</sup> However, while this doctrine has restricted

<sup>50</sup> See, e.g., Engdahl, *The Spending Power*, *supra* note 8, at 36-37 (criticizing the *Butler* court for a self-contradictory opinion); See Sullivan, *supra* note 14, at 1500-06.

<sup>51</sup> Engdahl, *The Spending Power*, *supra* note 8, at 5. But see John Eastman, *Restoring the “General” to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001).

<sup>52</sup> This issue had been bubbling even before the decision in *Butler* and the Social Security Act cases. Under the Maternity Act of 1921, the federal government sought to provide funds to states that adopted certain plans for promoting maternal and infant welfare, an area of activity traditionally reserved to the states and certainly beyond any enumerated power of Congress. In *Massachusetts v. Mellon*, 262 U.S. 447 (1923), the Supreme Court dodged a substantive challenge to this conditional spending by dismissing the case for lack of standing.

<sup>53</sup> This point is succinctly made in Justice Stone’s *Butler* dissent: “Expenditures would fail of their purpose and thus lose their constitutional sanction if the terms of payment were not such that by their influence on the action of the recipients the permitted end would be attained.” *United States v. Butler*, 297 U.S. 1, 83 (Stone, J., dissenting).

<sup>54</sup> Rosenthal, *supra* note 14, at 1126.

<sup>55</sup> *Id.* at 1127.

<sup>56</sup> Sullivan, *supra* note 14, at 1415.

<sup>57</sup> *Id.* at 1416 (“Just when the doctrine appears secure, new decisions arise to explode it.”).

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government regulatory power in limited circumstances,<sup>58</sup> it has been a minimal check on government power, especially where federal regulation through conditions on spending is concerned.<sup>59</sup>

A second result of the triumph of Hamiltonianism, more important for purposes of this paper, has been the constitutional legitimization of a vast amount of federal spending, often conditioned on the acceptance of regulation otherwise beyond Congress's enumerated powers. This spending has changed the fundamental relationship between the government and the people, and in turn, the fundamental nature of American politics and representation.

As is usually the case when legal doctrines shift, the timing of the *Butler*, *Helvering*, and *Steward Machine* cases, solidifying the hold of the Hamiltonian view of the Spending Clause, is not pure chance. The Sixteenth Amendment to the Constitution, ratified in 1913, authorized the federal government to directly tax income, creating a vast new source of revenue for the government. That same year, passage of the Seventeenth Amendment provided for the direct election of Senators, who had formerly been chosen by state legislatures. The effect of the Seventeenth Amendment was to strip from the states one of their primary weapons to fight federal encroachment on state power. United States Senators, suddenly able to appeal directly to popular passions when seeking reelection, rather than to state officials jealously guarding their own power, were no longer a bulwark of states' rights against the federal leviathan. Finally, a changing intellectual climate in the United States created a growing demand for federal involvement in areas traditionally reserved to the states. In such a climate, it is clear, in hindsight at least, that something had to give.

The Spending Clause decisions of the late 1930's were merely part of an enormous change in the relationship between the federal government, the states, and the people at large. The Spending Clause cases were decided more or less simultaneously with a line of cases greatly expanding Congress's regulatory power under the Commerce Clause<sup>60</sup> and eroding constitutional protections under the Due Process Clauses of the Fifth and Fourteenth Amendments.<sup>61</sup> In 1938, the Supreme Court decided *United States v. Carolene Products Company*,<sup>62</sup> upholding against due process challenges a piece of egregiously transparent special interest legislation that sought to benefit the dairy industry by driving pro-

<sup>58</sup> See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>59</sup> See *South Dakota v. Dole*, 483 U.S. 203 (1987); see also Baker, *Conditional Federal Spending*, *supra* note 14, at 1929-32.

<sup>60</sup> U.S. CONST. art. I, § 8, cl. 3. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>61</sup> U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

<sup>62</sup> 304 U.S. 144 (1938).

ducers of a competing, legal, non-dairy product out of the market on the phoniest of pretexts.<sup>63</sup> The *Carolene Products* decision “freed the forces of interest group politics from the stumbling block of the federal courts,”<sup>64</sup> and suggested that there would be no due process limits to Congress’s ability to regulate in the economic sphere.<sup>65</sup>

Before the decisions in *Butler*, *Helvering*, *Steward Machine Co.*, *Wickard v. Filburn*, and *Carolene Products*, one could conceive of the federal government’s powers as modest islands, surrounded by a vast sea of rights belonging to the states or to the people.<sup>66</sup> After these decisions, the balance of power changed: indeed, the doctrines of unconstitutional conditions in the realm of the Spending Clause, and of “strict scrutiny” over legislation affecting the rights of “discrete and insular minorities,” in the realm of due process,<sup>67</sup> can largely be seen as efforts to shore up small islands of personal liberties now awash in a sea of federal power. In sum, by vastly expanding the regulatory power of the federal government, the judicial revolution of the 1930’s opened up unprecedented opportunities for rent-seeking by business, labor, and other interests, especially in the economic sphere.<sup>68</sup> The triumph of the Hamiltonian interpretation of the Spending Clause was a part of this revolution.

### III. THE CAMPAIGN FINANCE CONNECTION

#### A. The Evil to be Addressed

The threat to civil liberties caused by the demise of the Commerce Clause, the Spending Clause, and substantive due process as significant limits on government power may have been held at bay by the doctrines of unconstitutional conditions and strict scrutiny for civil liberties.<sup>69</sup> However, proponents of activist government have had an even more difficult time creating legal standards that harness the special interest rent-seeking unleashed by these convergent trends.

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<sup>63</sup> See Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397.

<sup>64</sup> *Id.* at 399.

<sup>65</sup> *Id.*

<sup>66</sup> Cf. U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); U.S. CONST. amend. X (“The powers not delegated to the United States . . . are reserved to the States respectively, or to the people.”).

<sup>67</sup> The actual language of *Carolene Products* calls not for “strict” scrutiny but for “more exacting” scrutiny. See *Carolene Products*, 304 U.S. at 152 n.4. The Court first adopted the phrase “strict scrutiny” in *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>68</sup> This paper deals with the problem on a federal level. It should be clear, however, that the rent-seeking problems discussed here also exist at the state level, where checks on government power have been equally eroded.

<sup>69</sup> I am by no means certain that this is true.

Rent-seeking by special interests was not, of course, unknown before the New Deal. Indeed, the effort to protect society from rent-seeking was at the heart of many elements of the Constitution. In promoting the American Revolution, the founders had eradicated, in America at least, the notion that government was merely an extension of the private authority of the monarchy. Rather, public and private interests were recognized as separate realms.<sup>70</sup> However, if government policy was not merely to be an extension of the interests of the governed, the founders needed something to replace the monarchy as a source of law and policy above politics and free from the power and pressure of markets. At the time of the Revolution, the nation's founders looked to civic virtue and self-sacrifice to promote the public good, and believed that these attributes were promoted by the very existence of republican government.<sup>71</sup> However, by the time the Constitutional Convention convened in Philadelphia, the men sitting down to write that constitution had become jaded. By then, it seemed plain that civic virtue alone was insufficient to assure the public good against the power of special interests. The writing of a new constitution became, to a substantial extent, an effort to recognize these interests and to put them to use for the public good.<sup>72</sup>

Hamilton understood the difficulty of separating public policy from factional private interest. He was very concerned with finding disinterested men of virtue to give order to public affairs. Though himself a "self-made" man without the leisure of so many of the founders, Hamilton saw a need for legislators to be free from the pressure of markets. He was fearful that legislatures would be dominated by merchants, looking after their parochial interests, and the landed class looking after theirs.<sup>73</sup> Hamilton's only real solution to this problem, put forth in *Federalist No. 35*, was to rely on members of the "learned professions," particularly lawyers, whom Hamilton thought formed "no distinct interest," and would be the "impartial arbiter" between the "different branches of industry."<sup>74</sup> In addition, Hamilton expressed remarkable confidence in the voters to choose such wise and disinterested men for the legislature.<sup>75</sup> Hamilton, simply put, was better at seeing the potential benefits of the new government, than at finding ways to guard against its potential dangers.

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<sup>70</sup> See generally GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 187-89 (1992); DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 69-72 (1994).

<sup>71</sup> See WOOD, *supra* note 70, at 190, 252-53.

<sup>72</sup> *Id.* at 253.

<sup>73</sup> *THE FEDERALIST* No. 35, at 214-16 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>74</sup> *Id.* at 215-16. Not surprisingly, Hamilton was a member of the learned professions.

<sup>75</sup> *Id.* at 216-17.

That was not the case with Madison. Whereas Hamilton saw the benefits the nation could reap from the new Constitution, and envisioned the United States as a dynamic, thriving nation of great wealth and power,<sup>76</sup> Madison focused his attention on the potential problems the new Constitution might create.

Madison's best work in the *Federalist Papers* is, to a significant extent, an acknowledgment of the inevitable existence of private interests and an effort to show how a government might be structured so that it would be likely to protect the public good from domination by private interests. *Federalist No. 10*, of course, most frankly acknowledges the tendency toward "faction," as Madison called it. Madison argued that the causes of faction could not be controlled, at least not without "destroying the liberty which is essential to its existence,"<sup>77</sup> but that the worst effects of faction could be ameliorated in two ways. The first is through representative government, rather than direct democracy.<sup>78</sup> The second is through the size of the legislative body—neither too large nor too small.<sup>79</sup> The separation of powers between the states and the federal government is essential for this second feature:

By enlarging too much the number of electors [relative to the number of representatives], you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, and local and particular to the State legislatures.<sup>80</sup>

In *Federalist No. 56*, Madison responded to the concern that the U.S. House would be too small for members to have adequate knowledge of local affairs by arguing first, that the role of the federal government would be modest and deal with issues for which little particularized local knowledge would be necessary;<sup>81</sup> and second, that at one member for approximately each 30,000 citizens, the ratio of citizens to members would be sufficiently low.<sup>82</sup>

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76 GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* 72-78 (1997).

77 THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

78 *Id.* at 82-83.

79 *Id.* at 83. See also THE FEDERALIST NO. 55 at 343-44 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 56 at 346-50 (James Madison) (Clinton Rossiter ed., 1961).

80 THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).

81 THE FEDERALIST NO. 56, at 346-48 (James Madison) (Clinton Rossiter ed., 1961).

82 *Id.* at 348-350. From the U.S. Census 2000 statistics, I estimate that our 435 congressmen each now represent approximately 655,702 constituents, which is twenty-one times the number of constituents in Madison's day. *U.S. Census Bureau, Resident Population of the 50 States, the District of Columbia, and Puerto Rico: Census 2000, Table 2* (visited March 3, 2001) <<http://www.census.gov/population/www/cen2000/respop.html>>.

In *Federalist No. 51*, Madison argued that the principles of federalism would put private interests to work as a bulwark against overreaching government: “[T]he society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger . . . .”<sup>83</sup> Elsewhere, Madison argued that the separation of powers within the federal government would help to prevent any particular interest from capturing the government.<sup>84</sup> Finally, as we have already seen,<sup>85</sup> the principle of enumerated powers would prevent the federal government from overpowering the states—so much so, in fact, that Madison—and Hamilton too—argued that the states would hold the upper hand against the national government.<sup>86</sup> It was hoped that, through such a carefully structured division of power, the federal government could remain free of special interest dominance, and would, indeed, play the role of the “disinterested and dispassionate umpire in disputes between different passions and interests in the State.”<sup>87</sup>

It is an oversimplification, but perhaps a helpful one, to describe Madison’s theory as follows. First, factions are an inevitable result of freedom, and efforts to extinguish them are worse than the problems they cause; thus, a major goal of the Constitution was to structure the government in such a way as to control the worst ills of faction, and to give elected officials incentives and a framework to act for the common good. This task could be aided by the large geographic jurisdiction of the proposed federal government, which would cause it to “take in a greater variety of parties and interests[,]”<sup>88</sup> and promote higher quality representation at the federal level. Finally, by strictly limiting the powers of that federal government, so that it would concern itself only with matters of “great and aggregate interests,”<sup>89</sup> factions would be limited to the minor squabbles of local matters and state government, where intimate knowledge of particular local conditions was most necessary in any case. Where the Spending Clause was concerned, that meant that Congress would be largely restricted to appropriating money for the purposes of carrying out powers otherwise enumerated in the Constitution. Or such was the Madisonian case, in a nutshell.

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83 THE FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

84 THE FEDERALIST NOS. 47, 48 (James Madison) (Clinton Rossiter ed., 1961).

85 See *supra* notes 31-32 and accompanying text.

86 THE FEDERALIST NO. 45 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 31 at 196-97 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

87 Letter from Madison to Edmund Randolph (Apr. 8, 1787), in WOOD, *supra* note 70, at 253.

88 THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).

89 *Id.*



For the better part of a century, the Madisonian approach largely held sway. For example, although Justice Story argued early on that Congress had never limited appropriations to the specific powers enumerated in the Constitution, spending for non-enumerated purposes appears to have been the exception rather than the rule.<sup>90</sup> During all this time, the government remained small, the opportunities for rent-seeking limited, and campaign finance regulation non-existent.

By the end of the nineteenth century, this period of strictly limited government was reaching its end. Beginning with the creation of the Interstate Commerce Commission in 1881, Congress and the states increasingly took steps to regulate railroad rates, business practices, and working conditions.<sup>91</sup> By 1913, demand for federal action on a variety of fronts led to the adoption of the Sixteenth Amendment and the income tax, providing the federal government with an enormous source of new revenue, as was soon made apparent during the First World War.<sup>92</sup> As government spending and regulation expanded, interested money began to flow into the political system, and calls for campaign finance regulation became common for the first time.<sup>93</sup> Rapid growth in campaign spending, and major campaign finance reform initiatives have ever since followed close behind periods of increased government activism. The first federal acts regulating campaign finance were passed during the "Progressive" era between the turn of the century and World War I. The Federal Corrupt Practices Act was passed during the otherwise quiet 1920's in response to the Teapot Dome scandal, but it was the explosion in government spending during the New Deal of the 1930's that led to campaign finance measures being passed in 1939, 1940, 1943, and 1947.<sup>94</sup> A third wave of campaign finance regulation passed in the 1970's,<sup>95</sup> following the initiation of President Johnson's "Great Society" programs. It was at that time that the creation of Common Cause, Public Citizen, and other groups created a permanent presence to lobby for campaign finance regulation. Meanwhile, the level of govern-

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<sup>90</sup> See Engdahl, *The Spending Power*, *supra* note 8, at 26-33, for a description of many such exceptions.

<sup>91</sup> See, e.g., STUART CHASE, *GOVERNMENT IN BUSINESS* 25 (1936).

<sup>92</sup> Income tax rates rose from an initial seven percent on incomes over \$500,000 in 1913 to top rates of over 75% during World War I. PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE* 638-39 (1997).

<sup>93</sup> See generally BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM* 21-38 (2001) (for a discussion of the progression of regulation of political finance) [hereinafter SMITH, *UNFREE SPEECH*]; GEORGE THAYER, *WHO SHAKES THE MONEY TREE* 30-62 (1973) (for a discussion of the sources of campaign cash).

<sup>94</sup> Bradley A. Smith, *Campaign Finance Reform: The General Landscape: The Sirens' Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL'Y 1, 22-23 (1997) [hereinafter Smith, *Sirens' Song*].

<sup>95</sup> *Id.* at 23-26.

ment spending rose inexorably, under both Republican and Democratic presidents and Congresses, to its present level of nearly \$2.8 trillion per year,<sup>96</sup> while campaign spending accelerated at rates far greater than inflation, easily exceeding two billion dollars in federal races in the elections of 2000.<sup>97</sup>

The correlation between the growth of government spending and the demand for campaign finance regulation is no coincidence. Higher government spending increases opportunities for private rent-seeking from the government. These opportunities trigger more spending on campaigns as interested parties seek to take advantage of these available rents. The result is a cause and effect relationship by which the growth rate of government spending accounts for eighty percent or more of the growth rate in campaign spending.<sup>98</sup>

Advocates of campaign finance regulation generally argue that large campaign contributions hinder legislative efforts to reach the common good in three ways.<sup>99</sup> The most often heard argument is that it leads to *quid pro quo* corruption in a form not far removed from bribery.<sup>100</sup> the overt exchanges of legislative votes for campaign contributions. This seems to be what the Supreme Court had in mind when it upheld limits on contributions to candidates in *Buckley v. Valeo*.<sup>101</sup> Here the frustration of the public good is obvious—legislators vote to please the particular interests of contributors rather than voting for the good of all. Legislators may continue to debate issues, but the debates will be aimed less at

<sup>96</sup> BUREAU OF ECONOMIC ANALYSIS, *Government Current Receipts and Expenditures* (visited Feb. 19, 2001) <<http://www.bea.doc.gov/bea/dn/nipaweb/TableViewFixed.asp?SelectedTable=37&FirstYear=1999&LastYear=2000&Freq=Qtr>>.

<sup>97</sup> See *Center for Responsible Politics* (visited Feb. 20, 2001) <<http://www.opensecrets.org>> (showing total expenditures of approximately \$1.1 billion by Federal Republican and Democratic Party committees, (visited Feb. 20, 2001) <<http://www.opensecrets.org/parties/total.asp?Cmte=rpC>>, (visited Feb. 20, 2001) <<http://www.opensecrets.org/parties/total.asp?Cmte=dpC>>; \$344 million in spending by presidential campaigns, (visited March 3, 2001) <<http://www.opensecrets.org/2000elect/index/AllCands.htm>>; \$555 million by House candidates, and \$437 million by Senate candidates, (visited March 3, 2001) <<http://www.opensecrets.org/2000elect/storysofar/index.asp?display=totals>>. These amounts do not include spending on internal communications to members of unions and other advocacy and member groups, amounts spent on issue advertising by such groups during the period of the campaign, or amounts spent by presidential candidates defeated in the primaries). Reports may be accessed through (visited March 3, 2001) <<http://www.fec.gov>>.

<sup>98</sup> John R. Lott, Jr., *A Simple Explanation for Why Campaign Expenditures are Increasing: The Government is Getting Bigger*, 43 J.L. & ECON. 359, 383 (2000) (attributing 87% of the rise in federal campaign expenditures to increased government spending) [hereinafter Lott, Jr., *Simple Explanation*]; see also FILIP PALDA, *HOW MUCH IS YOUR VOTE WORTH?* 96 (1994) (noting near one-to-one correlation in growth percentages between that of campaign spending and that of government expenditures).

<sup>99</sup> The discussion that follows owes much to Daniel Ortiz's analysis, although I ultimately do not break down the interests in quite the way he does. See Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 897-901 (1998).

<sup>100</sup> See Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784 (1985).

<sup>101</sup> 424 U.S. 1, 26-27 (1976).

determining any common good than at justifying positions pre-determined by contributions.<sup>102</sup>

A second way in which campaign contributions might frustrate legislation for the common good is by distracting legislators from the pursuit of that good. That is to say, legislators may be required to spend so much time raising money that they shirk their more important legislative duties,<sup>103</sup> in particular that of reasoned debate. The Madisonian view of politics, like that of Edmund Burke, holds that the careful thought and deliberation of elected representatives is an essential part of "refining" public views in a way that helps to determine the public good.<sup>104</sup> If legislators feel compelled to ignore this duty in order to engage in fund raising, the public good may suffer.<sup>105</sup>

Third, limitations on campaign giving and spending may be necessary to enhance debate not just among the legislators, but also among the public. This is the "drowning out" theory. It holds, first, that inequalities among speakers will mean that certain views are not heard, simply because they are "drowned out" by better financed views.<sup>106</sup> Second, it holds that what the voters will hear may not be what they ought to hear. That is, reformers suggest that the mass marketing of political ideas through costly but brief and simplified television ads may hinder, rather than help informed decision making by the public;<sup>107</sup> better, they seem to think, that voters should be forced to wade through long leaflets and attend candidate forum nights. Though not a Madisonian argument *per se*, this argument has echoes of Madison's concern that "[t]he influence of factious leaders" might lead voters to support measures that were against their best, long-term interest.<sup>108</sup>

<sup>102</sup> See, e.g., Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1392 (1994).

<sup>103</sup> See, e.g., Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994).

<sup>104</sup> THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961); Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), in REPRESENTATION 157, 174-76 (Hanna Fenichel Pitken ed., 1969).

<sup>105</sup> This line of thought might be viewed as a modern twist on another belief common to the men who shaped the Constitution, including both Madison and Hamilton: that good legislators would be men of "leisure and easy circumstances," liberally educated, with time to consider and debate the affairs of government—in other words, an American aristocracy. See WOOD, *supra* note 70, at 253-55; Saul Cornell, *Aristocracy Assailed: The Ideology of Backcountry Anti-Federalism*, 76 J. AM. HIST. 1148, 1162 (1989).

<sup>106</sup> See, e.g., Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408-10 (1986) [hereinafter Fiss, *Free Speech*]; J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1018-20 (1976). I have sharply criticized both the theoretical and empirical validity of this view in Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 69-72 (1997) [hereinafter Smith, *Money Talks*].

<sup>107</sup> Wright, *supra* note 106, at 1012.

<sup>108</sup> THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

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Based on these concerns,<sup>109</sup> the campaign finance regulators seek to put into place structural safeguards that will assure wise political decision-making. The goal, as it was with Madison and the founders, is to structure government in such a way that legislators will reach decisions in the public good, rather than in the interest of one faction or another.<sup>110</sup>

Each of the regulators' theories can be criticized on its own terms. For example, there is precious little in the way of systematic evidence to suggest that campaign contributions are the source of significant *quid pro quo* corruption,<sup>111</sup> and strong theoretical reasons to doubt that such *quid pro quo* corruption is the serious problem portrayed by reformers.<sup>112</sup> Similarly, there is no particular reason to think that, freed from fund-raising responsibilities, officeholders would not simply enjoy more leisure time. Finally, a growing body of literature shows that voter knowledge, including voters' ability to identify candidates, their party affiliation, their stands on issues, and their general place on the ideological spectrum, benefits substantially from mass political

109 A fourth concern is that of political equality. See, e.g., Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789 (1998); Sunstein, *supra* note 102; Ortiz, *supra* note 99, at 899-901. As the size of government grows, and opportunity for rent-seeking increases, inequality in the ability to capture rents becomes a greater perceived problem. Cf. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369 (1994) [hereinafter Strauss, *Corruption*]. I have not devoted space to this argument in this text because it does not address the type of "good government" arguments—the search for a world above interest group politics—at issue here. I have discussed equality concerns at length in other writings, including Bradley A. Smith, *Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591, 612-16 [hereinafter Smith, *Some Problems*] and especially Smith, *Money Talks* *supra* note 105, at 63-97.

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110 Ortiz, *supra* note 99, at 897-901. Of course, another possible goal may be merely to silence political opposition so as to enhance one's own rent-seeking opportunities or the opportunity to enact one's own policy preferences. I assume, however, that most proponents of regulation argue in good faith.

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111 See Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1067-71 (1996) [hereinafter Smith, *Faulty Assumptions*]. Typical of the research showing that campaign contributions have little effect on legislative behavior, and that most donors give to candidates who agree with their positions prior to taking office, is John R. Lott, Jr. & Stephen G. Bronars, *Time Series Evidence on Shirking in the U.S. House of Representatives*, 76 PUB. CHOICE 125 (1993).

112 Smith, *Faulty Assumptions*, *supra* note 111 at 1067-71; See also SMITH, UNFREE SPEECH, *supra* note 93, at 126-31; Smith, *Some Problems*, *supra* note 108, at 616-24. Readers interested in a far more sophisticated debate than can be laid out here may want to review the following articles from the 1995 University of Chicago Legal Forum: Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111; David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141; Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain*, 1995 U. CHI. LEGAL F. 163 [hereinafter Lowenstein, *Campaign Contributions and Corruption*]; see also Professor Lowenstein's earlier article, Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989) [hereinafter Lowenstein, *The Root of All Evil*], for an excellent work at developing a much more sophisticated model of "corruption" than the simplistic *quid pro quo* model that the Supreme Court seemed to have in mind in *Buckley v. Valeo*, 424 U.S. 1 (1976), and that is portrayed in much popular and some academic literature.

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advertising.<sup>113</sup> These disputes are, for the most part, fights over empirical matters for which conclusive data is simply not available. Assuming there is some validity to the complaints raised by the reform community, the real question is whether the regulatory community is moving down the right path.

#### B. Heirs to Madison?

In certain respects, the proponents of campaign finance regulation in the late twentieth century can claim to be the rightful heirs to the Madisonian tradition. Like Madison, they seek to promote a government dedicated to the public good in a world dominated by private interests. Like Madison and the other framers of the Constitution, they do not believe that the natural interplay of private interests in the political system will inexorably lead to the public good.<sup>114</sup>

In their distaste for “special interests,” and their tendency to equate virtually all private campaigning and lobbying as “corrupt,”<sup>115</sup> modern reformers also harken back to a pre-constitutional notion of disinterested, enlightened leadership. Under this model of representation, with which the younger Madison was much taken, legislators themselves had no particular interests to advance or cause to defend, other than the “common good.”<sup>116</sup> Yet by the time the Constitution was written, Madison and other leaders were already much jaded by experience, and this concept of representation was under attack. Anti-federalist writers argued that the gentry, hiding behind the veil of disinterestedness, were in fact as interested as was anyone else. They too benefited or lost personally through various government policies. This vested interest was not necessarily a bad thing, indeed the anti-federalists saw it as a good thing, so long as it was recognized that the gentry were an interested cabal like any other group in society.<sup>117</sup>

Much of the same debate goes on today with the campaign reform lobby. For example, in the elections of 1998, the reform group Campaign for America, which seeks to ban all “soft money” ads, nevertheless ran their own “soft money” ads in Kentucky.<sup>118</sup>

<sup>113</sup> See, e.g., John J. Coleman & Paul F. Manna, *Congressional Campaign Spending and the Quality of Democracy*, 62 J. POL. 757 (2000).

<sup>114</sup> See WOOD, *supra* note 70, at 253.

<sup>115</sup> See SMITH, UNFREE SPEECH, *supra* note 93, at 10-11.

<sup>116</sup> See Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, in BEYOND CONFEDERATION ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 69 (Richard Beeman et al. eds., 1987).

<sup>117</sup> See generally *id.*; see also WOOD, *supra* note 70, at 255-60; Letter from the Federal Farmer (Jan. 20, 1788), in THE ANTI-FEDERALIST 79 (Herbert J. Storing ed., 1985); Letter from Brutus “To the Citizens of the State of New York” (Nov. 15, 1787), in THE ANTI-FEDERALIST 122, 125-26 (Herbert J. Storing ed., 1985).

<sup>118</sup> Edward Zuckerman, *Reformer Spent \$466,029 to Fix Kentucky Senate Race*, POL. FIN. & LOBBY REP., Nov. 11, 1998, at 1, 4.

Samuel Issacharoff and Pamela Karlan, though sympathetic to reform goals, have noted that most scholarly arguments for regulation would have the predictable effect of giving greater political power to scholars and intellectuals, while reducing the power of business owners and others.<sup>119</sup> The press, which has ardently supported campaign finance regulation, also faces conflicts of interest, as its political power is enhanced by limits on private contributions and spending for political communication.<sup>120</sup>

Even if Madison might still search for disinterested leadership, there remains the question of how to assure it through the structure of government. One might quarrel over whether the Constitution, and in particular the First Amendment, in fact protects campaign giving and spending.<sup>121</sup> But in at least two important ways, efforts to regulate campaign finance are directly at odds with the Madisonian approach to the Constitution. First, whereas Madison sought to create a government structure that would protect individual freedoms as an integral part of any public good, modern campaign finance “reformers” seek to limit individual freedoms in order to produce a government structure that will yield a common good.<sup>122</sup> Campaign finance regulation does not seek to change the structure of government at all, or even the way in which citizens cast votes. Rather, it seeks to change the way in which people discuss issues of government and politics. It seeks to do this through rather straightforward restrictions on the right to speak and participate in politics. Campaign finance regulation turns out not to be a structural approach to government at all, but a policy approach in which the government directly invokes its police power in order to regulate the human conduct at issue. The modern campaign finance reform movement seeks to achieve its goals by, “destroying the liberty which is essential to [faction’s] existence.”<sup>123</sup> In this respect, it has far more in common with the Alien and Sedition Acts than with any Madisonian approach to government.<sup>124</sup>

119 Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1731 (1999).

120 See Arthur N. Eisenberg, *Buckley, Rupert Murdoch, and the Pursuit of Equality in the Conduct of Elections*, 1996 ANN. SURV. AM. L. 451, 459-60 (1996).

121 See, e.g., *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring); *id.* at 410-30 (Thomas, J., dissenting).

122 See, e.g., E. Joshua Rosenkranz, *Faulty Assumptions in “Faulty Assumptions”: A Response to Professor Smith’s Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867, 895-96 (1998); Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055 (1999); Fiss, *Free Speech*, *supra* note 106; Wright, *supra* note 106.

123 THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

124 The notorious Alien and Sedition Acts of 1798 constituted, among other things, an attempt to make criminal any “false, scandalous and malicious writing” against the government. For a full account of these acts, their passage, and ultimate failure, see JAMES MOR-

Second, the modern approach to reform also differs from the constitution making of 1787 in that it seeks to narrow the range of voices, rather than to increase them. Madison argued that the way to alleviate the effects of faction was to “take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it . . . to act in unison”<sup>125</sup> Campaign finance reformers, on the other hand, seek to silence voices. Their argument, that by silencing some they will enhance the voices of others,<sup>126</sup> is almost certainly wrong,<sup>127</sup> and frequently appears to be motivated by bias against the substantive arguments of those they would silence.<sup>128</sup> By silencing one source of potential influence, they seek to boost the power of other interests, which they have determined are underrepresented. In fact, by narrowing the number of players and driving out one of the most fluid sources of political power, they actually entrench a small elite of incumbents, staff, lobbyists, journalists, consultants, celebrities, and lawyers.<sup>129</sup>

### C. Heirs to Hamilton?

When Jefferson criticized Madison’s proposal to begin a survey for possible post roads, it was not the knee-jerk reaction of a hopelessly out of touch theorist who was not aware of the highly plausible constitutional sanction for the undertaking. Rather, what Jefferson intuitively realized was that once the structural limits on the federal spending power were ignored, or interpreted to give the federal government broad powers in the domestic sphere, the lid would come off: “[I]t will be a scene of eternal scramble among the members who can get the most money”<sup>130</sup>

TON SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956).

<sup>125</sup> THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).

<sup>126</sup> See, e.g., Fiss, *Free Speech*, *supra* note 106, at 1414-15; Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1227-28 (1994); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 84-85, 236-39 (1993).

<sup>127</sup> See, e.g., Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, in *THE BILL OF RIGHTS IN THE MODERN STATE* 225-53 (Geoffrey R. Stone et al. eds., 1992); John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 122-23 (1996).

<sup>128</sup> See, e.g., Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?*, 83 MICH. L. REV. 939, 945 (1985); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1061 (1985) [hereinafter BeVier, *Money*]. I discuss the substantive biases of many prominent reform scholars at some length in SMITH, *UNFREE SPEECH*, *supra* note 93, at 120-21, 146-47, 162 & accompanying notes.

<sup>129</sup> See SMITH, *UNFREE SPEECH*, *supra* note 93, at 201-13.

<sup>130</sup> See Letter from Jefferson to Madison (March 6, 1796), in 2 *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826*, at 923 (James Morton Smith ed., 1995).

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Thus, even where spending appeared to be in support of a specifically enumerated federal power, Jefferson felt that the spending power should be construed narrowly. In the case of the post roads, Madison hastened to reassure his friend that his proposal was “limited to the choice of roads where that is presented, and to the opening them, in other cases, so far only as may be necessary for the transportation of the mail.”<sup>131</sup> Local governments, he added, would maintain and improve any roads opened by the federal government.<sup>132</sup>

For the most part, those leading the effort to regulate campaign finance have rejected Jefferson’s fundamental insight into the nature of federal spending. There are, and have been, to be sure, supporters of limited government, by which I mean a much smaller government role than currently exists in the United States, who have favored restrictions on campaign giving and spending. Barry Goldwater may be the most notable among them.<sup>133</sup> But for the most part, campaign finance regulation in the United States has drawn its support from those who generally favor active government, an expansive interpretation of the Spending and Commerce Clauses, and in particular, high levels of federal spending.<sup>134</sup>

It appears, however, that Jefferson and Madison were correct. Under both Republicans and Democrats, government spending goes up. Agencies are captured by the interests they are intended to regulate. Citizens, in increasing numbers, perceive their government to be run for the benefit of special interests.<sup>135</sup>

The quest to limit campaign speech is a case of Hamiltonianism at wits end. Having broken down the Constitution’s structural restraints on federal spending, and seen the federal treasury fueled with direct taxes on income, these modern Hamiltonians find themselves in search of something with which to replace the discipline of a strictly construed Spending Clause.

<sup>131</sup> Letter from Madison to Jefferson (Apr. 4, 1796), in 2 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 929 (James Morton Smith ed., 1995).

<sup>132</sup> *Id.*

<sup>133</sup> See Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1128-29 (1994).

<sup>134</sup> Lott, Jr., *Simple Explanation*, *supra* note 98, at 385.

<sup>135</sup> See, e.g., Rasmussen Research Poll, *Americans Say Government Does Not Reflect Will of the People*, (visited March 3, 2001) <<http://www.portraitofamerica.com/html/poll-58.html>> (finding that by 46% to 40% respondents felt that “government [does not] accurately reflect the will of the [American] people”); Gallup Poll, *Gallup Poll Surveys—Gallup Poll News Service—October 6-9, 2000* (visited March 3, 2001) <<http://www.gallup.com/poll/surveys/2000/topline001006/q25t28.asp>> (finding 63% agreed with statement, “no matter what new laws are passed, special interests will always find a way to maintain their power in Washington.”).



So far, however, the effort to replace constitutional discipline on the government with statutory speech prohibitions on the citizenry has failed in a manner that should be increasingly apparent to even the casual observer. Few believe that presidential elections, which are funded by the government, are better than senatorial elections, which are not. Few would argue that politics in New York, which bans corporate contributions, are more guided by concern for the public interest than politics in Virginia, where such contributions are legal. Since the passage of the 1974 Amendments to the Federal Election Campaign Act,<sup>136</sup> campaign finance has been more heavily regulated in the United States than ever before. Yet, there is little sense that the effort has been successful at curbing special interest influence. Of course, these issues are far more complex and multi-faceted than these few rhetorical comments might suggest. I resort to this rhetorical technique precisely because a thorough discussion is far beyond the scope of this paper, and even a thorough citation to the literature would take several pages.<sup>137</sup> However, I do want to suggest that, though the issue is complicated, on the mere face of things there is little reason to think that campaign finance regulation has been, or will be, successful on its own terms. Nor can this failure be blamed entirely, or even primarily, on the courts, which have admittedly struck down much campaign finance regulation as unconstitutional.<sup>138</sup>

Though the courts have cut wide swaths through campaign finance regulation, it is not fair to blame the courts for the failure of the enterprise. The cases, though perhaps controversial, are well-grounded in precedent.<sup>139</sup> Furthermore, a growing number of reform-minded advocates and scholars are themselves showing an

<sup>136</sup> 2 U.S.C. §§ 431, 455 (2000); 26 U.S.C. §§ 9001-9042 (2000).

<sup>137</sup> See Smith, *Faulty Assumptions*, *supra* note 111, at 1071-91, where I have discussed the failure of campaign finance laws at some length. See BeVier, *Money*, *supra* note 128; Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 213 (1989); and Daniel D. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, for a few of the best articles arguing that efforts have failed. More sympathetic treatment of reform failures can be found in Cain, *supra* note 112; Strauss, *Corruption*, *supra* note 109; Sunstein, *supra* note 102; Levinson, *supra* note 128. There is virtually no literature arguing that campaign finance regulation has been successful, although there is a great deal arguing that it could be, if done right. See Lowenstein, *The Root of All Evil*, *supra* note 112; Kenneth R. Mayer, *Public Financing and Electoral Competition in Minnesota and Wisconsin* (1998); MICHAEL J. MALBIN & THOMAS L. GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* (1998), for a few of the better pieces.

<sup>138</sup> See *Buckley v. Valeo*, 424 U.S. 1 (1976); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996). These are the most notable cases in this regard at the Supreme Court level.

<sup>139</sup> See, e.g., Ralph K. Winter, *The History and Theory of Buckley v. Valeo*, 6 J.L. & POL'Y 93 (1997); L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243; Polsby, *supra* note 137.

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understanding, not always present in their predecessors, that the problem may be impossible to solve short of the most radical constitutional surgery, if then. For some, the result is skepticism, coupled with a patient if sometimes pessimistic search for answers within present constitutional norms.<sup>140</sup> For others, the call is for far more radical surgery,<sup>141</sup> including, in some cases, government regulation of the press and strict limits on the amount and/or type of political speech by individuals.<sup>142</sup>

What is perhaps ironic is that even if these most radical solutions were adopted, the core dilemmas of campaign finance, caused by the problem of rent-seeking, would remain.<sup>143</sup> The desire to seek rents would still lead to efforts to influence candidates and campaigns. Indeed, many of those efforts would be moved underground, or take other forms less visible to the public. For example, payments might be made under the table, or through straw donors. Certain individuals would still exercise “undue” influence through media access or ownership, or through communications to groups with large memberships. Other groups would retain influence through their size and ability to lobby.<sup>144</sup> It is extremely difficult to see how such rent-seeking techniques could be regulated.<sup>145</sup>

In fact, one of the great ironies of the debate over campaign finance reform is that reform is posited as a necessity to prevent special interest rent-seeking, yet the reform effort itself has become a major source of rent-seeking.<sup>146</sup> Efforts to pass reform have been stymied as groups attempt to shape such bills in ways that will strengthen their legislative and electoral influence relative to

<sup>140</sup> See, e.g., Issacharoff & Karlan, *supra* note 119; Ortiz, *supra* note 99; Lowenstein, *Campaign Contributions and Corruption*, *supra* note 112.

<sup>141</sup> See, e.g., Jamin Raskin & Jon Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273 (1993) (calling for mandatory debates, free air time and personal subsidies for candidates, public funding of campaigns, increased reporting requirements, low spending limits, and contribution limits of \$20 or less); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 791-92 (1987) (arguing that the state should subsidize viewpoints which are not adequately represented in public discourse).

<sup>142</sup> See, e.g., Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996); Foley, *supra* note 126. See also Stuart Taylor, Jr., *The President’s Least-Favorite Nominee*, February 26, 2000 NAT’L J. available in 2000 WL 6436855 (quoting U.S. Senator John McCain on his desire to ban all “negative” ads; and former Senator and presidential candidate Bill Bradley on his proposal to place a 100% tax on all issue-oriented political speech).

<sup>143</sup> See Smith, *Sirens’ Song*, *supra* note 94, at 26-41; see also Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994); Fried, *supra* note 127.

<sup>144</sup> See Charles E. M. Kolb & Christopher Dreibelbis, *Campaign Finance Reform: A Business Perspective*, 50 CATH. U. L. REV. 87 (2000).

<sup>145</sup> See Smith, *Sirens’ Song*, *supra* note 94, at 35-41; Lott, Jr., *Simple Explanation*, *supra* note 98, at 362.

<sup>146</sup> See, e.g., Lowenstein, *The Root of All Evil*, *supra* note 112 at 309-10.

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that of their competitors.<sup>147</sup> Meanwhile, advocates of reform in the current Congress have been touting it to Republicans on the very much self-interested grounds that it will benefit Republicans and incumbents at the polls,<sup>148</sup> which would seem to be the exact opposite of any pitch to the “public good.”

#### IV. CONCLUSION

The triumph of the Hamiltonian view of the Spending Clause has created extensive opportunities for private rent-seeking from government appropriations. Although it is not at all clear that campaign donations play anything more than a trivial part in this rent-seeking,<sup>149</sup> the push to regulate campaign contributions and spending is an effort to bring rent-seeking under control. As a structural impediment to rent-seeking, it bears some resemblance to the type of Madisonian designs placed in the Constitution, aimed at creating a legislature that would place the common good ahead of private interests. However, unlike true Madisonian devices, it attempts to perform its magic by restraining private liberty, rather than by creating a structure for government that minimizes the tendencies of citizens to seek rents and government to grant them. The enterprise fails because it attacks a symptom, rather than the cause, of the problem.

Many of the most ardent advocates of campaign finance regulation support the expansive view of the Spending Clause that creates so much incentive for rent-seeking. This is not as odd as it may seem. Their desire for active government creates a corresponding need for something to serve as a check on rent-seeking. Their preference for active government makes them more willing to accept the loss of political freedom inherent in their campaign finance regulation proposals. The problem is that little short of the most draconian regulatory measures are likely to succeed, and even those are probably destined to fail. In other words, high levels of government spending and rent-seeking go together. Campaign regulation has been shown to shift the form of the rent-seeking, but not to reduce its presence. The events culminating in the *Butler*, *Helvering*, *Steward Machine Co.*, and *Carolene Products*

<sup>147</sup> SMITH, UNFREE SPEECH, *supra* note 93, at 93-94; *see also* Kolb & Dreibelbis, *supra* note 144, at 108 (arguing, in support of regulation, that big business will not be harmed due to its superior lobbying ability).

<sup>148</sup> *See, e.g.*, Peter H. Stone, *Soft Money and the Senate*, BALTIMORE SUN, Jan. 7, 2001 at 1M (quoting Trevor Potter and Joshua Rosenkranz).

<sup>149</sup> *See, e.g.*, GREGORY WAWRO, LEGISLATIVE ENTREPRENEURSHIP IN THE U.S. HOUSE OF REPRESENTATIVES (2000); Jeffrey Milyo, David Primo, and Timothy Groseclose, *Corporate PAC Campaign Contributions in Perspective*, 2 BUS. & POL. 75 (2000); Stephen G. Bronars & John R. Lott, Jr., *Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?*, 40 J.L. & ECON. 317 (1997).

cases effectively removed most constitutional restraints on government power and unleashed the forces of rent-seeking in a war of all against all.

The campaign finance regulators, in a futile effort to prevent this rent-seeking, would now have us sacrifice our political liberty as well. Reform efforts have sought to impose a truce in that war by banning or limiting one form of weaponry—campaign money. However, such a truce can only be truly obtained when interests agree to quit trying to pillage one another through the power of government—or at least when government is placed under such restraints that it cannot fulfill the rent-seekers' aims.

Fortunately, it appears that the American people are willing to tolerate some level of rent-seeking, at least if the alternative is the type of campaign regulation commonly proposed by regulators. Polls consistently show that campaign finance reform remains a very low priority with voters,<sup>150</sup> in part because voters may be more realistic than the reformers. Polls also show that voters have little confidence in more regulation leading to a reduction in corruption.<sup>151</sup>

But if Hamilton is at wits' end, so is Madison. For there seems to be little popular support in the United States for reinvigorating checks on the spending power, such as a strict construction of the general welfare phrase or the enumerated powers of Article I. A recent Rasmussen Research survey asked poll respondents:

3. The Constitution gave limited powers to the federal government. Sometimes, Congress passes laws that are not authorized by the Constitution. For example, there is no authority in the Constitution for the federal government to pay for 100,000 additional teachers in local school systems.

In a case like this, is it better for Congress to follow the Constitution or is it better for Congress to pay for 100,000 additional teachers?<sup>152</sup>

Despite the loaded question, which presumed the Madisonian position and presented it as fact to respondents, 51 percent preferred that Congress hire the teachers, with just 36 percent urging Con-

<sup>150</sup> For a summary of earlier data, see Bradley A. Smith, *A Most Uncommon Cause: Some Thoughts on Campaign Reform and a Response to Professor Paul*, 30 CONN. L. REV. 831, 833-36 (1998).

<sup>151</sup> Rasmussen Research Poll, *Portrait of America: Americans say Campaign Spending Limits will NOT Clean Up Politics* (visited March 3, 2001) <<http://www.portraitofamerica.com/html/poll-266.html>> (80% thought more laws would not reduce special interest influence); see also Rasmussen Research Poll, *Rush Limbaugh is a Reg Flag for Many Americans; They'd Rather Have Rather* (visited March 3, 2001) <<http://www.portraitofamerica.com/html/poll-696.html>> (found by a nearly 27% to 14% margin voters would support a candidate who opposed new campaign finance laws in favor of enforcing existing laws, with the large plurality considering it one of many issues).

<sup>152</sup> Rasmussen Research Poll, *51% Would Vote for Constitution Today* (visited March 3, 2001) <<http://www.portraitofamerica.com/html/poll-1066.html>>.

gress to follow the Constitution.<sup>153</sup> This is all the more remarkable given that the issue (hiring a relatively small number of teachers through federal taxation rather than local taxes), though clearly important to voters, hardly seems a matter of immediate and great national concern. A similarly loaded question, after also having described the activity as not authorized by the Constitution, asked, “is it better for Congress to follow the Constitution or is it better for Congress to provide funding for the artistic community?” This time, 38 percent chose the spending and 54 percent urged Congress to follow the Constitution.<sup>154</sup>

I believe it is all but inconceivable that the body politic would tolerate a return to a strict Madisonian reading of the spending power today. This leaves supporters of a strict Madisonian reading with a dilemma as challenging as that faced by their Hamiltonian counterparts. There is little evidence that the American public has the desire to put the spending power back in the bottle. There apparently are other societal goals besides reducing rent-seeking and protecting individual liberty and property rights. Defenders of the latter goals, despite substantial effort, have failed to persuade the majority of voters that freedom and property rights can accomplish these goals. Alternatively, they have failed to persuade their fellow citizens to reorder their priorities. If these modern Madisonians cannot win the underlying battle over the size and scope of the federal government, it is unlikely that the battle over campaign finance regulation will end.

There may be, of course, a way out through compromise. For example, Professor John Nagle has urged legislative recusal as an alternative to the regulatory approach of most campaign finance reforms.<sup>155</sup> This would leave citizens free to engage in political activity without constraint, placing the burden on legislators to step aside in cases of apparent conflict of interest. Professors Ian Ayres and Jeremy Bulow have argued for mandated donor anonymity as a way to avoid corruption and rent-seeking, while simultaneously addressing many of the First Amendment arguments raised against campaign finance regulation.<sup>156</sup> These efforts may be the cutting-edge of a serious effort to move debate away from traditional, highly regulatory campaign finance reform proposals. At least in the foreseeable future, however, it is hard to imagine such proposals gaining any political traction. Further, as is often the case with efforts at compromise, both sides of the reform debate

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69 (2000).

<sup>156</sup> Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837 (1998).

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are likely to find their opponent's proposals woefully inadequate in any case.

The problem of campaign finance is largely a problem of government spending and power, and the perception that rent-seeking results from it. A substantial majority of Americans seem willing to live with an expansive Spending Clause, and a correspondingly expansive central government, in order to accomplish various other goals that, they apparently believe, government can accomplish. Whether or not they will tolerate a full-scale assault on their liberties, in the name of eliminating the corresponding rent-seeking, remains to be seen.