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James Madison, *Citizens United*, and the Constitutional Problem of Corruption

# JAMES MADISON, *CITIZENS UNITED*, AND THE CONSTITUTIONAL PROBLEM OF CORRUPTION

ANTHONY J. GAUGHAN\*

*One of the most controversial decisions in the modern history of the Supreme Court is Citizens United v. Federal Election Commission. In a 5–4 ruling, the Supreme Court struck down the ban on corporate independent expenditures. The majority defined corruption in narrow terms and held that quid pro quo corruption was the only constitutionally permissible basis for campaign finance regulation.*

*The decision set off a storm of outrage. President Obama even took the remarkable step of condemning the ruling during his State of the Union Address. Recent polls show that the public still overwhelmingly opposes the majority’s ruling in Citizens United.*

*On the tenth anniversary of Citizens United, this Article puts the constitutional problem of corruption in historical context by examining the political career of James Madison. The Citizens United case turned on the First Amendment’s freedom of speech clause. Madison wrote the First Amendment while he served in Congress. He also played a key role in drafting*

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*the Constitution and in authoring the Federalist Papers, which explained and defended the Constitution during the ratification debates.*

*Nearly two centuries after his death, Madison looms as large as ever in American constitutional law. The Supreme Court still consults his writings and career for guidance in interpreting the Constitution. Madison's appeal even transcends traditional divides, as justices across the ideological spectrum routinely cite him.*

*The story of Madison's political career thus brings a unique and important perspective to the Citizens United ruling. The underlying issues of free speech—as well as the threat of corruption posed by powerful financial interests—were well-known to Madison. One of the most important constitutional theorists in history, he was also a career politician, serving as a four-term member of Congress and later as a two-term President of the United States. In addition, he helped Thomas Jefferson found the Democratic-Republican Party (known today as the Democratic Party), which meant that Madison spent his life not only as a public intellectual but also as a practical politician engaged in party building. Madison's political experiences thus provide a revealing glimpse into how the First Amendment's author approached the issue of money in politics when it came to his own election campaigns.*

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#### INTRODUCTION

In January 2010, the United States Supreme Court decided the case of *Citizens United v. Federal Election Commission*.<sup>1</sup> A 5–4 majority held in *Citizens United* that the government may not suppress political speech on the basis of the speaker's corporate identity.<sup>2</sup> In striking down the

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1. 558 U.S. 310 (2010).

2. *Id.* at 365 (discussing § 441b (current version at 52 U.S.C. § 30118 (2012))) (“We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No

federal ban on the use of general corporate treasury funds for independent political expenditures,<sup>3</sup> the majority identified the congressional goal of banning quid pro quo corruption as the only constitutionally permissible basis for campaign finance restrictions.<sup>4</sup> The Court further concluded that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption” because they do not involve coordination with candidates.<sup>5</sup> Two months later in *SpeechNOW.org v. Federal Election Commission*,<sup>6</sup> the D.C. Circuit Court of Appeals held that in the wake of the Supreme Court’s decision in *Citizens United*, the Federal Election Commission (FEC) could not enforce contribution limits on independent expenditure groups.<sup>7</sup> The era of the Super PAC was born.<sup>8</sup>

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sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).

3. *Id.* at 357 (“Limits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government’s interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for-profit corporations. The Government does not claim that these expenditures have corrupted the political process in those States.”).

4. *Id.* at 359 (citations omitted) (“When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption . . . The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt . . .”); see also *SpeechNOW.org v. FEC*, 599 F.3d 686, 692 (D.C. Cir. 2010) (“The Supreme Court has recognized only one interest sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech: preventing corruption or the appearance of corruption.”). The Supreme Court reinforced this conclusion four years later. See *McCutcheon v. FEC*, 572 U.S. 185, 207 (2014) (plurality opinion) (“[W]hile preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—‘*quid pro quo*’ corruption.”).

5. *Citizens United*, 558 U.S. at 357.

6. 599 F.3d 686 (D.C. Cir. 2010).

7. *Id.* at 692–93 (“[T]he government has *no* anti-corruption interest in limiting independent expenditures.”).

8. Richard L. Hasen, *The Decade of Citizens United*, SLATE (Dec. 19, 2019, 5:50 AM), <https://slate.com/news-and-politics/2019/12/citizens-united-devastating-impact-american-politics.html> [<https://perma.cc/U8WK-XZSH>] (“After *Citizens United*, courts and the Federal Election Commission issued decisions that led to the creation of super PACs, political committees that spend money independent of candidates to promote or oppose candidates for office.”). On Super PACs, see Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644 (2012).

The *Citizens United* ruling generated immediate controversy.<sup>9</sup> Critics focused on the Supreme Court's narrow definition of corruption, which limited campaign finance regulation to corrupt bargains between candidates and contributors (i.e., quid pro quo corruption).<sup>10</sup> Under *Citizens United*, Congress may limit the amount of direct contributions to candidates, but it may not restrict independent campaign expenditures that wealthy individuals or outside groups make without coordinating with candidates.<sup>11</sup> Critics argued that the ruling effectively put many forms of corruption outside the scope of regulation, which in turn increased the influence of money in politics.<sup>12</sup> A decade later, the controversy over *Citizens United* still roils American politics.<sup>13</sup>

On the tenth anniversary of the *Citizens United* decision, this Article puts the constitutional problem of corruption in historical context by examining the political career of James Madison. The *Citizens United* case turned on the First Amendment's freedom of speech clause.<sup>14</sup> Madison wrote the First Amendment while he served in Congress as a Representative from Virginia.<sup>15</sup> He also played a key role in drafting the Constitution and in authoring the *Federalist Papers*, which explained and defended the Constitution during the ratification debates.<sup>16</sup>

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9. See *infra* Part II.

10. *Citizens United*, 558 U.S. at 359.

11. See Hasen, *supra* note 8. Super PACs “can take unlimited donations from individuals, corporations, and labor unions. The legal rationale flowed directly from *Citizens United*: If independent spending cannot corrupt, then contributions to fund independent spending cannot corrupt either.” *Id.*

12. See *id.* (“The whole [concept] of *Buckley* and *Citizens United* is that independent spending cannot corrupt because there can be no coordination with candidates and therefore no opportunity for a quid pro quo. But in fact, thanks to porous FEC rules, candidates and supportive super PACs can legally do just about anything together, short of sitting down to plot a campaign advertising strategy.”).

13. For example, many Democratic presidential candidates in 2020 called for a constitutional amendment overturning *Citizens United*. See, e.g., Alexander Burns, *Seven 2020 Democrats Pledge to Focus First Bill on Fighting Corruption*, N.Y. TIMES (July 29, 2019), <https://www.nytimes.com/2019/07/29/us/politics/end-citizens-united-pledge.html>.

14. *Citizens United*, 558 U.S. at 365.

15. IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787–1800, at 255–65 (1950) (discussing Madison's leading role in Congress and authorship of the Bill of Rights); see also N.Y. Times Co. v. United States, 403 U.S. 713, 718–19 n.5 (1971) (Black, J., concurring).

16. NOAH FELDMAN, THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT xi (2017) (“Madison devised the Constitution. . . . Then Madison set out to convince the nation to ratify the constitution he had brought forth.”).

Nearly two centuries after his death, Madison looms as large as ever in American constitutional law. The Supreme Court still consults his writings and career for guidance in interpreting the Constitution.<sup>17</sup> Madison's appeal even transcends traditional divides, as justices across the ideological spectrum routinely cite him.<sup>18</sup> In the 2016 case of *Evenwel v. Abbott*,<sup>19</sup> for instance, Justice Ginsburg cited Madison in the majority opinion,<sup>20</sup> and both Justice Thomas<sup>21</sup> and Justice Alito<sup>22</sup> cited Madison in their concurring opinions.<sup>23</sup> The Court has also scrutinized specific incidents during Madison's political career for evidence of how Americans interpreted the Constitution in the early national period.<sup>24</sup> For example, in the 2019 partisan redistricting case

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17. See, e.g., *Bond v. United States*, 572 U.S. 844, 866 (2014) (quoting THE FEDERALIST No. 51 (James Madison)) (“As James Madison explained, the constitutional process in our ‘compound republic’ keeps power ‘divided between two distinct governments.’”); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1966)) (“But before we do so, we must find that the question is presented in a ‘case’ or ‘controversy’ that is, in James Madison’s words, ‘of a Judiciary Nature.’”).

18. See, e.g., *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

19. 136 S. Ct. 1120 (2016).

20. *Id.* at 1127 (quoting THE FEDERALIST No. 54 (James Madison)) (“‘It is a fundamental principle of the proposed constitution,’ James Madison explained in the Federalist Papers, ‘that as the aggregate number of representatives allotted to the several states, is to be . . . founded on the aggregate number of inhabitants; so, the right of choosing this allotted number in each state, is to be exercised by such part of the inhabitants, as the state itself may designate.’”).

21. *Id.* at 1138 (Thomas, J., concurring) (quoting THE FEDERALIST No. 10 (James Madison)) (“Of particular concern for the Framers was the majority of people violating the property rights of the minority. Madison observed that ‘the most common and durable source of factions, has been the various and unequal distribution of property.’”).

22. *Id.* at 1146 (Alito, J., concurring) (“That interpretation is confirmed by James Madison’s summary of the same statement by Hamilton . . .”).

23. *Evenwel* is far from unusual. See, e.g., Justice Ginsburg’s majority opinion in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2672 (2015) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 241 (Max Farrand ed., 1966)) (“As Madison urged, without the Elections Clause, ‘[w]henver the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.’”), and Chief Justice Roberts’s dissenting opinion, *id.* at 2681 (Roberts, C.J., dissenting) (quoting THE FEDERALIST No. 39 (James Madison)) (“As James Madison explained, the Senate would ‘derive its powers from the States,’ while the House would ‘derive its powers from the people of America.’”).

24. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

of *Rucho v. Common Cause*,<sup>25</sup> the majority put great weight on the fact that Patrick Henry attempted to gerrymander Madison out of a seat in the House of Representatives.<sup>26</sup>

The story of Madison's political career thus brings a unique and important perspective to the *Citizens United* ruling. The underlying issues of free speech—as well as the threat of corruption posed by powerful financial interests—were well-known to Madison.<sup>27</sup> One of the most important constitutional theorists in history, he was also a career politician, serving as a four-term member of Congress and later as a two-term President of the United States.<sup>28</sup> In addition, he helped Thomas Jefferson found the Democratic-Republican Party (known hereafter as the “Republican” Party),<sup>29</sup> which meant Madison spent his life not only as a public intellectual but also as a practical politician engaged in party building.<sup>30</sup> Madison's political experiences thus provide a revealing glimpse into how the First Amendment's author approached the issue of money in politics when it came to his own election campaigns.

This Article reaches three principal conclusions. First, Madison began his career wary of the influence of money in politics, but he soon came to see campaign expenditures as essential to political communication.<sup>31</sup> Second, Madison promoted his political agenda by building a network of partisan newspapers that served as propaganda

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25. 139 S. Ct. 2484 (2019).

26. *Id.* at 2494. (“During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe.”).

27. FELDMAN, *supra* note 16, at xii (“Madison denounced Hamilton's plans as a blatantly unconstitutional attempt to shift power from the people to the capitalists.”); *id.* at 599 (“Madison showed no inclination whatever to punish antiwar beliefs or sentiments” because of his commitment to the First “amendment's guarantee of free speech.”).

28. ROBERT ALLEN RUTLAND, *THE PRESIDENCY OF JAMES MADISON 1–2* (1990).

29. NOBLE E. CUNNINGHAM, JR., *THE JEFFERSONIAN REPUBLICANS: THE FORMATION OF PARTY ORGANIZATION, 1789–1801*, at 88 (1957); JULES WITCOVER, *PARTY OF THE PEOPLE: A HISTORY OF THE DEMOCRATS* 26 (2003) (Jefferson's Republican Party “came to be known, in turn, as the Democratic-Republican and finally, later, the Democratic Party. By some accounts, the original name ‘Republican’ was chosen out of sentiment for the French Republicans and their own revolution”); *see also* David Brown, *Jeffersonian Ideology and the Second Party System*, 62 *THE HISTORIAN* 17, 17–30 (1999).

30. FELDMAN, *supra* note 16, at xii (“With Jefferson, he formed the Republican Party to counter the Federalist Party.”).

31. *See infra* Part II.

vehicles; by creating a party organization that dramatically increased the cost of elections; and by welcoming the participation of wealthy campaign donors.<sup>32</sup> Indeed, the expensive nature of American campaigns dates back to the electioneering tactics first developed by James Madison, Thomas Jefferson, and the party they founded. Third, Madison took an unusually broad view of the First Amendment right of freedom of expression.<sup>33</sup> He believed that free speech rights should take precedence even when the government had compelling reasons to regulate or silence particular forms of speech.<sup>34</sup> Moreover, the idea advanced by *Citizens United's* critics that a special First Amendment protection exists for neutral, nonpartisan media organizations would have seemed alien to Madison since no such organizations existed at the time. In fact, he rejected the very idea of an independent press, pointedly noting that the newspapers of his day were heavily influenced by partisan as well as business considerations.<sup>35</sup> Accordingly, during Madison's presidency, freedom of expression applied universally and equally to all Americans, regardless of whether the speech emanated from the media or the general public.<sup>36</sup>

There is of course no way of knowing with certainty how the author of the First Amendment would have viewed the *Citizens United* ruling. But the story of Madison's political career reveals that he took a pragmatic approach toward money in politics and a strict approach toward free speech. Madison's experiences as a candidate, party leader, and officeholder thus demonstrate that the majority's reasoning in *Citizens United* has a much stronger constitutional foundation than the ruling's critics would suggest. Money may not be speech, but Madison understood from personal experience that money is essential to effective political communication. The right to free speech does not mean much if the speaker lacks the means to disseminate the speech. The story of Madison's career illustrates that point. In the process, it shows that money has played a crucial role in facilitating political communication as far back as the eighteenth century.

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32. See *infra* Part III.

33. See *infra* Part IV.

34. FELDMAN, *supra* note 16, at xiii, 599.

35. *Id.* at 423.

36. See *id.* at 599 ("Madison showed no inclination whatever to punish antiwar beliefs or sentiments.").

## I. THE CONSTITUTIONAL PROBLEM OF CORRUPTION

The *Citizens United* case arose from a challenge to federal restrictions on political activity by corporations and unions.<sup>37</sup> Prior to *Citizens United*, federal law barred the use of corporate and union general treasury funds for making “direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate.”<sup>38</sup> In addition, the Bipartisan Campaign Reform Act of 2002<sup>39</sup> (BCRA) extended the ban to include a prohibition on the use of corporate and union general treasury funds to pay for “any broadcast, cable, or satellite communication” that referred to a federal candidate within thirty days of a primary or sixty days of a general election.<sup>40</sup>

A nonprofit corporation called Citizens United challenged the law by suing the Federal Election Commission in the U.S. District Court for the District of Columbia.<sup>41</sup> The dispute arose from a ninety-minute documentary—*Hillary: The Movie*—that Citizens United produced to undermine Hillary Clinton’s campaign for the 2008 Democratic presidential nomination.<sup>42</sup> Citizens United sought to air the documentary through video-on-demand services in the 30 days before the 2008 New Hampshire primary.<sup>43</sup> However, the Federal Election Commission viewed the movie as an illegal corporate-funded independent expenditure.<sup>44</sup> Although most of Citizens United’s funds came from individual donors, a small amount of its financial support came from for-profit corporations.<sup>45</sup> Citizens United’s acceptance of donations from for-profit corporations thus disqualified it from engaging in electioneering communications.<sup>46</sup>

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37. *Citizens United v. FEC*, 558 U.S. 310, 318–19 (2010).

38. *Id.* at 320.

39. 2 U.S.C. § 441b (current version at 52 U.S.C. § 30118 (2012)).

40. *Citizens United*, 558 U.S. at 321.

41. *Id.* at 321–22.

42. *Id.* at 319 (“In January 2008, Citizens United released a film entitled *Hillary: The Movie* . . . It is a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party’s 2008 Presidential primary elections.”). The film “depicts interviews with political commentators and other persons, most of them quite critical of Senator Clinton.” *Id.* at 320, 325 (“[T]here is little doubt that the thesis of the film is that she is unfit for the Presidency.”).

43. *Id.* at 321.

44. *Id.*

45. *Id.* at 319 (“Citizens United has an annual budget of about \$12 million. Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.”).

46. *Id.* at 327 (“Citizens United does not qualify for the *MCFL* exemption, however, since some funds used to make the movie were donations from for-profit corporations.”).

In a sharply divided 5–4 ruling, the Supreme Court sided with *Citizens United*.<sup>47</sup> The majority held that the federal ban on the use of general treasury funds for independent expenditures made “political speech a crime.”<sup>48</sup> In invalidating the ban, the Court emphasized that while the public might embrace or reject the contentions in *Hillary: The Movie*, the Constitution did not permit the government to criminalize the film’s broadcast.<sup>49</sup> Writing for the majority, Justice Kennedy noted that “[t]he civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.”<sup>50</sup>

The most controversial aspect of the Court’s opinion was its holding that corporations possess First Amendment rights like any other speaker.<sup>51</sup> Justice Kennedy asserted that “[b]oth history and logic” indicated that the Constitution does not permit the Government to “impose restrictions on certain disfavored speakers.”<sup>52</sup> An unconstitutional effort to police speech struck the majority as the government’s true motivation in banning corporate election activity. “Speech restrictions based on the identity of the speaker,” Kennedy warned, “are all too often simply a means to control content.”<sup>53</sup> The regulation’s practical implications particularly alarmed the majority. Justice Kennedy noted that BCRA’s electioneering regulations outlawed Sierra Club advertisements, National Rifle Association books, and American Civil Liberties Union websites if they referred to a federal candidate before an election.<sup>54</sup> Such regulations, he warned, “are classic examples of censorship.”<sup>55</sup>

The *Citizens United* court rejected the government’s assertion that the enormous financial power of corporations justified restrictions on

47. *Id.* at 372 (“The judgment of the District Court is reversed with respect to the constitutionality of 2 U.S.C. § 441b’s restrictions on corporate independent expenditures.”).

48. *Id.*

49. *Id.* (“Some members of the public might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation’s course; still others simply might suspend judgment on these points but decide to think more about issues and candidates. Those choices and assessments, however, are not for the Government to make.”).

50. *Id.* (quoting *McCannell v. FEC*, 540 U.S. 93, 341 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

51. *Id.* at 342 (“Under the rationale of these precedents, political speech does not lose First Amendment protection ‘simply because its source is a corporation.’” (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978))).

52. *Id.* at 341.

53. *Id.* at 340.

54. *Id.* at 337.

55. *Id.*

corporate speech. *Citizens United* thus broke with a twenty-year-old precedent. In a 1990 case called *Austin v. Michigan State Chamber of Commerce*,<sup>56</sup> the Court had upheld a state ban on independent corporate expenditures using general treasury funds.<sup>57</sup> The *Austin* court warned of “the corrosive and distorting effects of immense aggregations” of corporate wealth and held that “[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures.”<sup>58</sup>

But the *Citizens United* majority scornfully rejected *Austin*’s reasoning. The antidistortion rationale, the majority asserted, could “produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations.”<sup>59</sup> Although federal law exempted media corporations from the corporate electioneering ban, Justice Kennedy warned that “the largest media corporations have ‘immense aggregations of wealth,’” and “[t]hus, under the Government’s reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities.”<sup>60</sup> The majority also did not believe that the exemption for media corporations made sense in the first place.<sup>61</sup> The institutional press, Justice Kennedy insisted, does not have “any constitutional privilege beyond that of other speakers.”<sup>62</sup> Technological changes, such as the rise of the internet, made the distinction between the institutional press and other speakers untenable.<sup>63</sup> Equally fatal in the majority’s view was the fact that the government’s position would allow business corporations that owned media entities to exercise free speech rights that other corporations did not have.<sup>64</sup>

As the majority saw it, “[t]he purpose and effect of this law is to prevent corporations, including small and nonprofit corporations,

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56. 494 U.S. 652 (1990).

57. *Id.* at 668 (“Michigan identified as a serious danger the significant possibility that corporate political expenditures will undermine the integrity of the political process, and it has implemented a narrowly tailored solution to that problem.”).

58. *Id.* at 660.

59. *Citizens United*, 558 U.S. at 351.

60. *Id.* at 351–52 (quoting *Austin*, 494 U.S. at 660).

61. *Id.* at 352 (“The media exemption discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.”).

62. *Id.* (quoting *Austin*, 494 U.S. at 691 (Scalia, J., dissenting)).

63. *Id.* (“With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.”).

64. *Id.* at 352–53.

from presenting both facts and opinions to the public.”<sup>65</sup> The majority concluded, therefore, that the law’s regulation of corporate speech could not “be squared with the First Amendment.”<sup>66</sup>

The Court’s defense of corporate political speech set off a storm of criticism. In a concurring opinion that dissented “emphatically”<sup>67</sup> on the corporate speech issue, Justice Stevens insisted that in the past the Court had frequently “held that speech can be regulated differentially on account of the speaker’s identity.”<sup>68</sup> Rejecting “the blanket rule that the majority espouses,” Stevens asserted that the Court’s precedents “recognize that the Government’s interests may be more or less compelling with respect to different classes of speakers, and that the constitutional rights of certain categories of speakers, in certain contexts, ‘are not automatically coextensive with the rights’ that are normally accorded to members of our society.”<sup>69</sup> The dissent saw no merit in the majority’s concern that a future Congress might attempt to ban speech by media corporations.<sup>70</sup> In a footnote, Stevens observed that the “press might be able to claim special First Amendment status.”<sup>71</sup> In any case, the real threat in his view came from unrestricted corporate political speech.<sup>72</sup> In ominous terms, he warned that the majority’s “ruling threaten[ed] to undermine the integrity of elected institutions across the Nation.”<sup>73</sup>

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65. *Id.* at 355.

66. *Id.* at 353.

67. *Id.* at 396 (Stevens, J., concurring in part and dissenting in part).

68. *Id.* at 420–22 (Stevens, J., concurring in part and dissenting in part) (“Yet in a variety of contexts, we have held that speech can be regulated differentially on account of the speaker’s identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems.”).

69. *Id.*

70. *Id.* at 431 n.57.

71. *Id.*

72. *Id.* at 479 (“In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. . . . At bottom, the Court’s opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding. . . . While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.”).

73. *Id.* at 396.

The majority's decision also generated extraordinary criticism from the other branches of government and the public at large. President Barack Obama condemned the decision during his 2010 State of the Union Address<sup>74</sup> and later called for a constitutional amendment to overturn *Citizens United*.<sup>75</sup> The ruling remains highly controversial. In the 2020 campaign, the Democratic presidential candidates almost universally condemned the *Citizens United* decision. For example, in supporting the call for a constitutional amendment to reverse *Citizens United*, Vermont Senator Bernie Sanders declared that he would make "clear that money is not speech and corporations are not people."<sup>76</sup> The public overwhelmingly agrees with Sanders's sentiments. Public opinion surveys indicate *Citizens United* is one of the most unpopular rulings in modern history. For example, a 2018 poll found that 75% of Americans support amending the Constitution to reverse *Citizens United*.<sup>77</sup> The polling data reflected the widely held view that *Citizens United* represented a "hostile corporate takeover of our democratic process."<sup>78</sup>

Ironically, despite the fury over the corporate speech issue, the *Citizens United* ruling has only had a modest impact on corporate political spending. Ten years after the decision, relatively few corporations engage in electioneering communications, and the amounts barely move the needle.<sup>79</sup> In fact, major corporations

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74. Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), <https://www.nytimes.com/2010/01/29/us/politics/29scotus.html>.

75. Andrew Prokop, *President Obama: I'd Love a Constitutional Amendment to Reverse Citizens United*, VOX (Feb. 9, 2015, 11:00 AM), <https://www.vox.com/2015/2/9/7992489/obama-citizens-united-constitutional-amendment> [<https://perma.cc/4DHD-VYV7>].

76. Holly Otterbein, *Sanders Unveils Plan to Stop Corporate Donations to Dem Convention*, POLITICO (Oct. 7, 2019), <https://www.politico.com/news/2019/10/07/bernie-sanders-corporate-donations-dnc-036157> [<https://perma.cc/7ZX8-68DF>].

77. Ashley Balcerzak, *Study: Most Americans Want to Kill 'Citizens United' with Constitutional Amendment*, PRI (May 10, 2018), <https://www.pri.org/stories/2018-05-10/study-most-americans-want-kill-citizens-united-constitutional-amendment> [<https://perma.cc/6NE4-NZVA>].

78. Scott Castleton, *It's Time for Liberals to Get over Citizens United*, VOX (May 7, 2018, 9:10 AM) (quoting Congresswoman Rosa DeLauro), <https://www.vox.com/the-big-idea/2018/5/7/17325486/citizens-united-money-politics-dark-money-vouchers-primaries> [<https://perma.cc/TAC8-849C>].

79. See Hasen, *supra* note 8 ("Looking at the amount of direct corporate spending in elections over the past decade, one might think that *Citizens United* was a bust. Few for-profit corporations spend money in their own names boosting or dissing candidates.").

accounted for less than 5% of independent spending in 2018, which itself only accounted for about 20% of total election spending.<sup>80</sup> Although it is possible that some corporations may be using nondisclosing 501(c) “dark money” groups to finance independent expenditures, the fact remains that candidates and parties still account for the lion’s share of campaign expenditures.

Instead, what made *Citizens United* so important was the fact that it did *not* break new ground on a crucial issue: the constitutionally permissible grounds for campaign finance regulation. Like the majority in the landmark 1976 case, *Buckley v. Valeo*,<sup>81</sup> the majority in *Citizens United* declined to recognize any governmental interest other than quid pro quo corruption—i.e., corrupt bargains between contributors and candidates—as a valid basis for regulation.<sup>82</sup> In cases in the 1990s and 2000s, such as *Austin*, the Court had defined corruption in broad terms and acknowledged other potential constitutional justifications for regulation besides the anticorruption interest. For example, in the 2003 case of *McConnell v. FEC*,<sup>83</sup> the Court recognized the Congressional goal of limiting donor access and influence as a constitutionally permissible basis for campaign finance regulation.<sup>84</sup> But in *Citizens United*, Justice Kennedy rejected the regulatory rationales accepted by the *Austin* and *McConnell* courts and returned to *Buckley*’s single-minded focus on quid pro quo corruption.<sup>85</sup> In overturning *Austin* and rejecting the antidistortion rationale,<sup>86</sup> Justice Kennedy cited *Buckley* for the principle that the government has no constitutionally permissible interest “in equalizing the relative ability of

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80. Karl Evers-Hillstrom, *In Hyperpartisan Political Environment, Major Corporations Stay Away from Controversial Super PACs*, CTR. FOR RESPONSIVE POL. (Apr. 12, 2019), <https://www.opensecrets.org/news/2019/04/major-corporations-stay-away-from-controversial-pacs20> [<https://perma.cc/BF4J-XQ7Y>].

81. 424 U.S. 1 (1976).

82. See *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (rejecting the other bases proffered by the government).

83. 540 U.S. 93 (2003).

84. *Id.* at 154 (2003) (“It was not unwarranted for Congress to conclude that the selling of access gives rise to the appearance of corruption. In sum, there is substantial evidence to support Congress’ determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption.”).

85. *Citizens United*, 558 U.S. at 359 (“When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption.”).

86. *Id.* at 365 (“*Austin* is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures.”).

individuals and groups to influence the outcome of elections.”<sup>87</sup> As Justice Kennedy emphasized, “[t]he First Amendment’s protections do not depend on the speaker’s ‘financial ability to engage in public discussion.’”<sup>88</sup> Nor, in the majority’s view, did slowing “the skyrocketing cost of political campaigns” represent a constitutionally permissible basis for regulation.<sup>89</sup> The Court emphasized that contributors’ special access and influence with officeholders was not sufficient to justify restrictions on independent expenditures. According to Justice Kennedy, “[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.”<sup>90</sup>

*Citizens United* thus left viable only one regulatory interest: the anticorruption interest.<sup>91</sup> Moreover, by defining that interest narrowly and applying it exclusively to quid pro quo corruption, the Court left Congress and the FEC with very little regulatory room to maneuver.<sup>92</sup> As Justice Kennedy put it, “[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”<sup>93</sup>

The Court thus concluded that the anticorruption interest was not sufficient to sustain the government’s ban on corporate independent expenditures because such expenditures did not involve coordination with candidates.<sup>94</sup> As Justice Kennedy explained, “[I]imits on independent expenditures . . . have a chilling effect extending well beyond the Government’s interest in preventing quid pro quo corruption.”<sup>95</sup>

The full ramifications of the Court’s decision became apparent two months later. Applying the logic of *Citizens United*, the D.C. Circuit barred the Federal Election Commission from imposing contribution limits on all outside groups—not just corporations—engaged in

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87. *Id.* at 350 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976)).

88. *Id.* (quoting *Buckley*, 424 U.S. at 49).

89. *Id.* (quoting *Buckley*, 424 U.S. at 26).

90. *Id.* at 359.

91. *Id.* at 357.

92. *Id.* (“The anticorruption interest is not sufficient to displace the speech here in question.”).

93. *Id.* at 357 (*Buckley*, 424 U.S. at 47).

94. *Id.* (“[I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”).

95. *Id.*

independent expenditures.<sup>96</sup> In *SpeechNOW.org*, the D.C. Circuit observed that “[t]he Supreme Court has recognized only one interest sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech: preventing corruption or the appearance of corruption.”<sup>97</sup> It further noted that in *Citizens United* the Supreme Court held that independent expenditures do not “lead to, or create the appearance of, quid pro quo corruption.”<sup>98</sup> The D.C. Circuit thus concluded it had no option but to rule against the FEC because the plaintiff, SpeechNOW, an independent expenditure group, did not coordinate its activities with candidates.<sup>99</sup> Writing for the circuit court, Judge Sentelle explained that “[g]iven this analysis from *Citizens United*, we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as SpeechN[OW].”<sup>100</sup>

In the years since *Citizens United*, Super PACs and other outside groups have spent at least \$4.5 billion in state and federal elections.<sup>101</sup> Nearly \$1 billion of that figure has been spent by 501(c) organizations that do not disclose their donors.<sup>102</sup> Moreover, ten families alone accounted for over \$1 billion in expenditures.<sup>103</sup> Not

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96. *SpeechNOW.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010) (“In light of the [Supreme] Court’s holding as a matter of law that independent expenditures do not corrupt or create the appearance of quid pro quo corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption.”).

97. *Id.* at 692.

98. *Id.* at 694 (quoting *Citizens United*, 558 U.S. at 360).

99. *Id.* at 689 (SpeechNOW “intends to operate exclusively through ‘independent expenditures’”). The court elaborated:

Given this precedent, the only interest we may evaluate to determine whether the government can justify contribution limits as applied to SpeechN[OW] is the government’s anticorruption interest. Because of the Supreme Court’s recent decision in *Citizens United v. FEC*, the analysis is straightforward. There, the Court held that the government has no anti-corruption interest in limiting independent expenditures.

*Id.* at 692–93.

100. *Id.* at 695.

101. Karl Evers-Hillstrom, *More Money, Less Transparency: A Decade Under Citizens United*, CTR. FOR RESPONSIVE POL. (Jan. 14, 2020), [https://www.opensecrets.org/news/reports/a-decade-under-citizens-united?utm\\_source=CRP+Mail+List&utm\\_campaign](https://www.opensecrets.org/news/reports/a-decade-under-citizens-united?utm_source=CRP+Mail+List&utm_campaign) [<https://perma.cc/6ERK-JLQ6>].

102. *Id.*

103. *Id.* (“The [ten] most generous donors and their spouses injected \$1.2 billion into federal elections over the last decade.” (emphasis omitted)).

surprisingly, *Citizens United* has generated an enormous amount of scholarship, most of which is critical of the ruling, particularly of the majority's narrow definition of corruption.<sup>104</sup> The general public also rejects the Supreme Court's definition of corruption. A 2018 Pew Research Center poll found that 77% of Americans support imposing caps on the amount individuals and groups can spend on campaigns.<sup>105</sup>

But is the post-*Citizens United* era as different from past eras as one might think? A study of James Madison's career suggests that the campaign finance world he operated in—and helped create—bore more similarities to our modern age than one might assume.

## II. JAMES MADISON'S FIRST RACE

James Madison was born in 1751 to a wealthy family in Orange County, Virginia.<sup>106</sup> At the time of Madison's birth, Virginia was a colony in the British Empire. Although Parliament exercised ultimate decision-making authority, the colonists nevertheless governed themselves relatively independently.<sup>107</sup> Americans thus conducted elections throughout the colonial period.

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104. For a small sampling of the academic literature on *Citizens United*, see generally RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* (2016); Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643 (2011); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012); Ciara Torres-Spelliscy, *Deregulating Corruption*, 13 HARV. L. & POL'Y REV. 471 (2019).

105. Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, PEW RES. CTR. (May 8, 2018), <https://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence> [https://perma.cc/8RKV-9A9M].

106. IRVING BRANT, *THE FOURTH PRESIDENT: A LIFE OF JAMES MADISON* 3 (1970); RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 6–7 (1971) (“He was of the substantial gentry, of the three or four hundred families that throughout his lifetime dominated Virginia politics and made such a large contribution to the public life of the new United States.”).

107. SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 7 (2005) (“The major claims on democracy's behalf before the Revolution rested on the rising power, in many colonies, of the lower houses of the colonial legislatures . . . .”); W.L. MORTON, *The Local Executive in the British Empire 1763–1828*, 78 ENG. HIST. REV. 436, 436 (July 1963) (“The colonies of Great Britain were self-governing from their foundation. As they grew in population and wealth their powers of self-government grew correspondingly, except as they were checked by royal instruction and parliamentary legislation. In time therefore colonial self-

Surprisingly perhaps, money played a prominent role in colonial elections. Private wealth influenced eighteenth century elections in two ways. First, elected officials largely came from the upper ranks of society, and in some colonies wealth was even a formal prerequisite for office-holding.<sup>108</sup> In South Carolina, for example, eligibility to serve in the colonial legislature required ownership of at least 500 acres or ten slaves.<sup>109</sup> Throughout the colonies, wealthy men of property saw office-holding as both a privilege and an obligation of their social class.<sup>110</sup> As the historian Richard Beeman observed, the practice of limiting colonial office-holding to the rich was intended “to preserve the standing of the legislature as an exclusive body of men visibly recognizable for their wealth and social prestige.”<sup>111</sup> The assumption that officeholders should come from privileged backgrounds persisted after the Revolution.<sup>112</sup> The framers of the Constitution—including James Madison—hoped that the new Congress would be populated by the upper classes.<sup>113</sup> They envisioned a leadership class made up of “gentlemen” educated at Harvard or Princeton and possessing “sufficient wealth and independence that they did not have to earn a living in too blatant or mercenary a fashion.”<sup>114</sup>

But money also influenced eighteenth century politics in a more subtle way: the candidates’ practice of “treating” the electorate. Since the earliest days of colonial politics, American voters expected candidates for elective office to provide free alcohol at the polling

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government was bound to come into conflict with imperial control, as it did after the cession of Canada in 1763 in the clash of colonial and metropolitan legislative authority aroused by the Stamp Act.”).

108. WILENTZ, *supra* note 107, at 7 (“[T]he legislators were generally out of touch with their own constituents between elections, and ran their affairs much like the oligarchies that commanded the early eighteenth century House of Commons under Robert Walpole.”); *see also* RICHARD R. BEEMAN, *THE VARIETIES OF POLITICAL EXPERIENCE IN EIGHTEENTH-CENTURY AMERICA* 139 (2006).

109. BEEMAN, *supra* note 108, at 139.

110. WILENTZ, *supra* note 107, at 8; *see* GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 294 (1991) (noting that in the 1780s Americans finally began to abandon “the age-old tradition that public office was the responsibility of a leisured patriciate”).

111. BEEMAN, *supra* note 108, at 139.

112. WILENTZ, *supra* note 107, at 8 (“Dependent men were politically unreliable because they could be easily manipulated by their patrons.”).

113. Gordon S. Wood, *Launching the Extended Republic: The Federalist Era*, in *LAUNCHING THE EXTENDED REPUBLIC: THE FEDERALIST ERA* 1, 15 (Ronald Hoffman & Peter J. Albert eds., 1996).

114. *Id.*

places on Election Day.<sup>115</sup> The practice continued for decades after the Revolution.<sup>116</sup> By “treating” voters to vast quantities of beer, rum and whiskey, candidates demonstrated both their affluence and public-spiritedness.<sup>117</sup> As the historian W.J. Rorabaugh explained, “[t]he most important facet of treating was never the dispensing of strong drink, which was expected as a matter of course, but the manner and style of dispensing it. The candidate had to demonstrate his generosity and hospitality without a hint of stinginess or parsimony.”<sup>118</sup>

The practice of providing the voters with free alcohol was such an entrenched feature of early American political life that candidates who declined to participate faced almost certain defeat.<sup>119</sup> The early political career of George Washington was a case in point. In 1755, Washington mounted his first campaign for the Virginia House of Burgesses, the colonial legislature.<sup>120</sup> But, in a sharp departure from custom and practice, he refused to incur the expense of treating the voters to free alcohol.<sup>121</sup> The decision reflected his extremely stingy approach to money.<sup>122</sup> Although the scion of a distinguished family, Washington grew up with little inheritance of his own.<sup>123</sup> A deep sense of financial insecurity haunted him, which was only allayed when he married Martha Custis, the richest widow in Virginia.<sup>124</sup> But that marriage remained four years in the future in 1755. As a young

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115. FELDMAN, *supra* note 16, at 29–30 (tracing the roots of the American tradition from English politics); see W.J. RORABAUGH, *THE ALCOHOLIC REPUBLIC: AN AMERICAN TRADITION* 152 (1979) (“Another occasion when Americans drank was at elections, when candidates were expected to treat the public, voters and nonvoters alike. Treating at elections had been a colonial custom borrowed from England.”).

116. RORABAUGH, *supra* note 115, at 152 (“Such electoral practices did not change significantly after the Revolution.”).

117. FELDMAN, *supra* note 16, at 29–30; RORABAUGH, *supra* note 115, at 152, 154.

118. RORABAUGH, *supra* note 115, at 152.

119. *Id.*

120. RON CHERNOW, *WASHINGTON: A LIFE* 67 (2010) (“At the election in Winchester on December 10, 1755, Washington was crushed by his two opponents . . .”); RORABAUGH, *supra* note 115, at 152.

121. RORABAUGH, *supra* note 115, at 152.

122. CHERNOW, *supra* note 120, at 107 (“Washington was congenitally prickly about money . . .”); cf. RORABAUGH, *supra* note 115, at 152.

123. CHERNOW, *supra* note 120, at 18 (“The following year, when George was fifteen, his family underwent a period of extreme financial stringency that ended his education.”).

124. *Id.* at 79 (“By marrying Martha Dandridge Custis, Washington swiftly achieved the social advancement for which he had struggled in the military. . . . Marriage to Martha brought under his control a small kingdom of real estate . . . . She had a bountiful collection of properties . . .”).

and novice candidate with few personal assets of his own, he showed no interest in buying alcohol for voters.<sup>125</sup>

The decision backfired on him. Washington went down to a surprising defeat in his first election,<sup>126</sup> and he spent the next two years fighting in the French and Indian War.<sup>127</sup> He would never make the same mistake again during his long political career. During the 1758 elections for the House of Burgesses, he bought and distributed on Election Day 144 gallons of alcohol (some historians even place the amount at 160 gallons), including everything from rum to wine, an amount so generous he hoped it would persuade voters to forget his blunder three years before.<sup>128</sup> As Washington explained in a letter to James Wood, his de facto campaign manager, “my only fear is that you spent with too sparing a hand.”<sup>129</sup>

Washington need not have worried. The huge campaign expenditure worked wonders, just as he had hoped it would. He received over 300 votes, a tally sufficient to win the legislative seat.<sup>130</sup> As W.J. Rorabaugh pointed out, “[f]or his 144 gallons of refreshment he received 307 votes, a return on his investment of better than 2 votes per gallon.”<sup>131</sup>

Although the boozy spectacle of eighteenth century elections falls far short of romanticized versions of the country’s democratic origins, the candidates’ practice of “treating” the voters continued into the nineteenth century.<sup>132</sup> Candidates who broke with the tradition did so at their peril, as James Madison would learn the hard way.

In April 1777, less than a year after the Declaration of Independence, the Commonwealth of Virginia held its first republican elections.<sup>133</sup> Madison looked like a shoo-in to win a seat in the new Virginia House of Delegates. A twenty-six-year-old Princeton graduate from a prominent local family, he already had experience in

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125. RORABAUGH, *supra* note 115, at 152.

126. *Id.*

127. CHERNOW, *supra* note 120, at 69, 91 (stating that Washington entered the war in 1756 and resigned after taking Fort Duquesne in 1758).

128. *Id.* at 88; RORABAUGH, *supra* note 115, at 152.

129. RORABAUGH, *supra* note 115, at 152.

130. *Id.*

131. *Id.*

132. *Id.*

133. FELDMAN, *supra* note 16, at 29 (“The elections for the Virginia assembly in April 1777 were the first republican elections in which Virginia’s citizens had ever participated.”).

public office.<sup>134</sup> In 1776, he had served as a delegate to the state constitutional convention, where he made a mark as a thoughtful and devoted public servant.<sup>135</sup> When Virginia held its first republican elections in 1777, Madison put his hat in the ring for a seat in the House of Delegates.<sup>136</sup>

But there was just one problem: Madison refused to buy booze for the electorate, just like Washington twenty-two years before.<sup>137</sup> The practice of wooing voters with alcohol struck young Madison as incompatible with republican principles.<sup>138</sup> In his view, the “corrupting influence of spirituous liquors” undermined the integrity of American elections.<sup>139</sup> As Madison saw it, voters should cast their ballots on the basis of the candidates’ personal qualities, not on the amount of their campaign expenditures.

Despite the honorable nature of Madison’s decision, which was fully consistent with the theoretical underpinnings of republican ideology, his opposition to treating sunk his candidacy. Madison lost the election to Charles Porter, a local tavern owner whose occupation well-positioned him to meet voters’ Election Day expectations.<sup>140</sup> Thus, like Washington before him, Madison learned that voters expected candidates to spend money in seeking their votes.

But also like Washington, Madison was a quick study. As Noah Feldman has pointed out, “[n]ever again would Madison fail to liquor up the voters when he ran for office.”<sup>141</sup> Madison’s experience demonstrated the surprisingly expensive nature of politics during America’s founding era. By requiring candidates to incur significant financial costs to prove their commitment to the ordinary voter, the practice of treating the voters weeded out those who lacked the funds or inclination to make the customary expenditures.<sup>142</sup>

Not surprisingly, therefore, in the eighteenth century the majority of officeholders came from the upper classes and thus could afford to

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134. *See id.* at 6, 24, 28.

135. *Id.* at 24.

136. *Id.* at 28–29.

137. *Id.* at 29.

138. *Id.*

139. *Id.*

140. *Id.* at 30.

141. *Id.*; RORABAUGH, *supra* note 115, at 152.

142. *See* RORABAUGH, *supra* note 115, at 152–53 (noting it was “widely conceded” in eighteenth and nineteenth century American politics that “liquor elected incompetents and the lack of it defeated able men”).

buy alcohol in bulk for the electorate. The idea of government by independently wealthy officeholders was attractive because it meant they were beholden to no one and, in theory at least, served solely on behalf of the public interest.<sup>143</sup> Accordingly, at the time of the Revolution, conventional wisdom held that politicians should not only pay for their own campaign expenses, but should also serve in office without pay.<sup>144</sup> Washington himself exemplified the republican ideal of a self-sacrificing public servant.<sup>145</sup> As commander-in-chief of the Continental Army, he refused to accept a salary.<sup>146</sup> Washington's contemporary Benjamin Franklin believed the republican ideal so important that at the Constitutional Convention in 1787 he proposed that executive branch officials should receive "no salary, stipend, Fee or reward whatsoever for their services."<sup>147</sup>

The democratization of American politics, however, rendered the old republican ideal of self-financing aristocratic officeholders obsolete even before the Constitution was adopted. As John Adams noted, if officeholders received no salary, "all offices would be monopolized by the rich, the poor and middling ranks would be excluded and an aristocratic despotism would immediately follow."<sup>148</sup> The delegates rejected Franklin's proposal and the Constitution expressly authorized Congress to set compensation levels for federal officeholders.<sup>149</sup>

As the historian Gordon Wood has explained, the defeat of such proposals signaled that Americans had begun the process of abandoning "the age-old tradition that public office was the responsibility of a leisured patriciate."<sup>150</sup> Indeed, upwardly mobile men from the "middling" classes increasingly won election to the

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143. Wood, *supra* note 110, at 287 (describing how the rise of middle class officeholders during the early national period "undermined the two-thousand-year-old classical tradition of aristocratic public service").

144. *Id.* at 287 ("In an ideal republican world, government officeholders ought to serve without salary. Receiving profits from a public office smacked of interestedness and tainted the officeholder's virtue.").

145. See Garry Wills, *CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT* 3, 9, 185–86 (1984).

146. Wood, *supra* note 110, at 289.

147. *Id.* at 291.

148. *Id.* at 289.

149. *Id.* at 291–92.

150. *Id.* at 294.

state legislatures beginning in the 1780s.<sup>151</sup> As Wood pointed out, “all levels of government were steadily being democratized and occupied by people with interests to promote.”<sup>152</sup>

James Madison recognized that the democratization of American politics meant that new types of leaders would be elected. He did not entirely welcome the change. He privately expressed the fear that provincial local politicians would be elected to the First Congress.<sup>153</sup> To curb the populist instincts of the general public, he considered supporting a freehold suffrage requirement.<sup>154</sup> But upon reflection he realized that the Constitution would not be approved if it was viewed solely as an instrument of political elites. Accordingly, in his public remarks, Madison embraced the democratic spirit of the age. In No. 39 of the *Federalist Papers*, he wrote that it was essential that the new government “be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it.”<sup>155</sup>

As the new republic democratized, it also polarized. The ratification debates in the late 1780s and the partisan battles of the 1790s gave rise to an epic political communications war. Communicating political messages over a large republic like the United States required money. As the country grew, and as ordinary people’s opinions and votes mattered like never before, campaign costs grew accordingly. Madison found himself forced to choose a pragmatic course. When he first ran for office in 1777, he feared that the use of money in elections—such as paying for the voters’ alcohol—corrupted republican values. But practical realities led him to increasingly rely on wealthy allies to help pay for his political communication costs.

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151. Wood, *supra* note 113, at 15–16, 18 (“[P]roperty qualifications for participation in public life either as voters or officeholders lost their relevance and rapidly fell away.”).

152. *Id.* at 15.

153. *Id.*

154. HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 89 n.14 (Murray Dry ed., 1981) (“While James Madison initially favored some form of freehold suffrage requirement as a way of checking the excesses of popular government, he later concluded that such a restriction on the franchise was dubious both in practice and in principle.”).

155. THE FEDERALIST No. 39 (James Madison).

### III. THE COST OF POLITICAL COMMUNICATION

Like many Americans, James Madison feared that corrupt officeholders would undermine democracy.<sup>156</sup> The success of the republic, he believed, depended on elected officials choosing to place the public interest ahead of their own private and factional interests.<sup>157</sup> During the Constitutional convention, he defined government corruption not only as bribery but also as government policies that promoted private ends at the expense of the public good.<sup>158</sup> In Federalist No. 57, he stressed that the Constitution's framers sought to promote the election of virtuous leaders who would "pursue, the common good of the society."<sup>159</sup> The Constitution, he added, was designed to establish "the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust."<sup>160</sup>

Along with his fear of self-interested factions, Madison worried about the power of concentrated wealth.<sup>161</sup> He opined, for example, that the "power of all corporations ought to be limited" such that they could not engage in "the indefinite accumulation of property."<sup>162</sup> But he also proposed giving Congress the power to charter corporations during the Constitutional Convention in 1787.<sup>163</sup> Although his fellow delegates declined the idea, Madison's proposal reflected his pragmatism. If corporations must exist, why not put them under the authority of Congress?

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156. RALPH KETCHAM, *PRESIDENTS ABOVE PARTY: THE FIRST AMERICAN PRESIDENCY, 1789–1829*, at 31 (1984) (explaining fear that "domination of politics by private, special interests would guarantee the triumph of the opposite of civic virtue—corruption").

157. *Id.* at 114 ("Madison took seriously the concept of the public interest, thought devotion to it was the critical mark of the good official, and saw a compelling need for active, honest executives."); *see also id.* at 118 ("To [Madison] a faction was a group whose interests were 'adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.' Madison thus hoped that factions would so check one another that a truly 'aggregate' view, an uncorrupted policy, a public interest could be asserted.").

158. *Id.* at 116 ("A good executive would have to be not only 'separate' from the other branches but also protected as much as possible from corruption, which meant to Madison not only dishonesty and intrigue but also, more fundamentally, pursuit of private (partial) over public (common) interest.").

159. THE FEDERALIST No. 57 (Madison).

160. KETCHAM, *supra* note 156, at 117.

161. ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 4 (2018).

162. *Id.* at 4.

163. *Id.* at 3.

Madison's pragmatism would become increasingly apparent during his meteoric rise as both a constitutional theorist and an ambitious politician. Although concentrated wealth alarmed republican thinkers like Madison, he needed the support of wealthy private individuals to circulate his ideas. In the end, therefore, the practical necessities of using money to fund his political campaigns proved more compelling to Madison than republican theories of political purity.

The *Federalist Papers* provided an early example of how money proved essential to Madison's political ambitions. In the months after the Constitutional Convention, Madison joined with Alexander Hamilton and John Jay in writing eighty-five essays in support of the Constitution's ratification.<sup>164</sup> Historians, legal scholars, and judges understandably and quite rightfully focus on the substance of the essays. The *Federalist Papers* have become a source that even the Supreme Court itself frequently consults to understand the intent of the Constitution's framers.<sup>165</sup>

But the *Federalist Papers* are important for another reason. They illustrate that the effort to sway public opinion in favor of the Constitution cost a significant amount of money.

The first series of Federalist essays appeared in New York City newspapers in the fall of 1787 and early 1788.<sup>166</sup> But Hamilton and Madison knew that the Constitution's ratification depended on more than persuading readers in New York. It required the approval of ratifying conventions in nine of the original thirteen states.<sup>167</sup> Accordingly, Hamilton contracted with the publishers John and

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164. Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 802 (2007). Hamilton wrote fifty-one essays, Madison wrote twenty-nine essays, and Jay wrote five essays. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 102 (1993).

165. See, e.g., *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016); *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 523 (2014); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 362 (1995); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806 (1995); *Powell v. McCormack*, 395 U.S. 486, 539–40 (1969); see also RON CHERNOW, *ALEXANDER HAMILTON* 260 (2004) (“By the year 2000, [the *Federalist Papers*] had been quoted no fewer than 291 times in Supreme Court opinions, with the frequency of citations rising with the years.”).

166. CHERNOW, *supra* note 165, at 246–47, 249; JOHN C. MILLER, *ALEXANDER HAMILTON AND THE GROWTH OF THE NEW NATION* 188 (1959); Maggs, *supra* note 164, at 812.

167. U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

Archibald McLean to reprint the essays in a two-volume book.<sup>168</sup> The McLeans ultimately published 500 copies of the two-volume set.<sup>169</sup> The publishers sent copies far beyond New York City, and Hamilton specifically directed that fifty copies be sent to Richmond before the vote of the Virginia ratifying convention.<sup>170</sup> He and Madison also mailed copies to allies in Pennsylvania.<sup>171</sup>

But the project resulted in enormous printing costs, far more than Hamilton or the publisher expected. The original contract between Hamilton and McLean called for the printing of twenty essays at the cost of 30 pounds.<sup>172</sup> But Hamilton and Madison ended up writing over four times as many essays as anticipated, which meant that the printing costs eventually reached 220 pounds.<sup>173</sup> Dismayed by the experience but still supportive of the Federalist cause, McLean ultimately charged Hamilton a fee of 144 pounds in all, with the publisher absorbing the remaining costs himself.<sup>174</sup> It is unknown whether Madison paid Hamilton back for any portion of the publication costs, but it is possible that he did. He certainly could afford it. A member of one of the Virginia gentry's most prominent families, Madison had a wealthy father and stood to inherit a large estate.<sup>175</sup> Interestingly, according to Virginia state records, the day after publication of Madison's last contribution to the *Federalist Papers*, he was overdrawn on his state salary and expense account by 100 pounds.<sup>176</sup> It is entirely possible that some of those expenses included his share of the *Federalist Papers*' publication costs.

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168. CHERNOW, *supra* note 165, at 248; Maggs, *supra* note 164, at 812–13.

169. Maggs, *supra* note 164, at 815.

170. *Id.*

171. *Id.* at 816.

172. CHERNOW, *supra* note 165, at 248; MILLER, *supra* note 166, at 192.

173. CHERNOW, *supra* note 165, at 248 (“The project’s magnitude mushroomed tremendously from its origins. . . . Instead of one projected volume of two hundred pages . . . *The Federalist* ended up running to two volumes of about six hundred pages. To worsen matters, the luckless printer was stuck with several hundred unsold copies and grumbled that he didn’t clear five pounds on the whole deal.”); MILLER, *supra* note 166, at 192.

174. See Letter from Archibald McLean to Robert Troup (Oct. 11, 1788), in *THE INTIMATE LIFE OF ALEXANDER HAMILTON* 82 (Allan McLane Hamilton ed., 1910) (“The money expended for Printing, Paper, Journeyman’s Wages and Binding was upwards of two hundred and twenty Pounds; of which sum I have charged Col. Hamilton with 144 pounds.”).

175. FELDMAN, *supra* note 16, at 394; KETCHAM, *supra* note 106, at 6–7.

176. BRANT, *supra* note 15, at 185 (“Madison’s service in the Continental Congress came to a close when he set out for home on March 4, 1788, the day after his final

In any case, the total expenses incurred in the publication of the *Federalist Papers* far exceeded the ability of a person of ordinary means to pay. Although 220 pounds may not seem like a large amount, it was a considerable sum for the 1780s. By way of comparison, the annual rent for Madison's Philadelphia home was 200 pounds.<sup>177</sup> In modern terms, the *Federalist Papers* certainly cost many thousands of dollars to publish. The precise conversion to modern dollars depends on the currency Hamilton and McLean used. The reference to "pounds" may mean British pounds, which remained in circulation for years after the Revolutionary War. If that was the case, 220 British pounds in 1787 translates to about \$36,604 in 2020.<sup>178</sup> To be sure, that figure must be used with caution. The eighteenth century American currency system was "a highly confusing" combination of English currency, foreign coins (especially Spanish and Portuguese), and American money.<sup>179</sup> The states, including Pennsylvania, sometimes referred to their local currency as "pounds."<sup>180</sup> In any case, in his writings in the 1780s, Hamilton referred to his possession of "pounds sterling," a common term for the British pound.<sup>181</sup> For example, in a letter to his brother in June 1785, Hamilton promised to send fifty "pounds sterling" to relieve his brother's financial distress.<sup>182</sup>

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*Federalist* article was published. He was then, an audit showed, overdrawn £100 for salary and expenses, which he refunded to the state.").

177. Roland M. Baumann, *John Swanwick: Spokesman for "Merchant-Republicanism" in Philadelphia, 1790-1798*, 97 PA. MAG. HIST. & BIOGRAPHY 131, 168 n.172 (1973) ("Swanwick secured for the Madisons a three-story brick house in Philadelphia for a yearly rent of £200.").

178. For the conversion of historical British pounds to modern U.S. dollars, see Eric W. Nye, *Pounds Sterling to Dollars: Historical Conversion of Currency*, UNIV. OF WYO., <https://www.uwyo.edu/numimage/currency.htm> [<https://perma.cc/G6HD-CYAR>].

179. EDWIN J. PERKINS, AMERICAN PUBLIC FINANCE AND FINANCIAL SERVICES, 1700-1815, at 25-26 (1994).

180. Farley Grubb, *Creating the U.S. Dollar Currency Union, 1748-1811: A Quest for Monetary Stability or a Usurpation of State Sovereignty for Personal Gain?*, 93 AM. ECON. REV. 1778, 1783, 1787 (2003); Ronald W. Michener and Robert E. Wright, *State "Currencies" and the Transition to the U.S. Dollar: Clarifying Some Confusions*, 95 AM. ECON. REV. 682, 685 (2005) ("We contend that the 'Pennsylvania pounds' mentioned in these records do not refer specifically to Pennsylvania bills of credit. . . . Media of exchange were usually *not* denominated in pounds and included such diverse means of payment as country produce; foreign coins such as Spanish dollars, pistareens, or guineas; paper money; book account transfers; or a combination thereof.").

181. Joseph Albert Ernst, MONEY AND POLITICS IN AMERICA, 1755-1775, at xviii (1973) ("Pounds sterling would be the value of anything stated in terms of English sterling.").

182. *Alexander Hamilton to James Hamilton, 22 June 1785*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Hamilton/01-03-02-0444>

But whatever the precise amount that the 220 pounds converts to in modern terms, not many people—then or now—could afford the expense of publishing the *Federalist Papers*. Hamilton’s bank account (and perhaps Madison’s too)<sup>183</sup>—combined with the publisher’s willingness to bear a significant share of the costs—made it possible for the *Federalist Papers* to reach readers during the critical months of the ratification debate. Would the public have been better served if privileged individuals like Hamilton and Madison had refrained from using their personal financial resources to broadcast their political message? It seems hard to see how the answer could be yes, especially in light of the widespread veneration of the *Federalist Papers* today. The fact that the authors possessed far more wealth than the general population—and thus had a larger platform on which to speak—did not make the sentiments they expressed any less valuable. As the Supreme Court emphasized in *Citizens United*, “[t]he rule that political speech cannot be limited based on a speaker’s wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”<sup>184</sup>

The *Federalist Papers* provided a microcosm of the role of money in the broader battle for public opinion during the ratification debate. The battle pitted the proratification Federalists against the Constitution’s opponents, known collectively as the Anti-Federalists.<sup>185</sup> The Federalists, of course, ultimately prevailed. One reason why was because they possessed a crucial communications advantage: they and

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[<https://perma.cc/ZE65-N6SC>] (“The situation you describe yourself to be in gives me much pain, and nothing will make me happier than, as far as may be in my power, to contribute to your relief. I will cheerfully pay your draft upon me for fifty pounds sterling, whenever it shall appear. I wish it was in my power to desire you to enlarge the sum; but though my future prospects are of the most flattering kind my present engagements would render it inconvenient to me to advance you a larger sum.”).

183. Hamilton was also willing to go into debt on behalf of public service. See CHERNOW, *supra* note 165, at 483 (“The plain truth was that Hamilton was indebted and needed money badly. . . . If Hamilton had a vice, it was clearly a craving for power, not money, and he left public office much poorer than he entered it.”).

184. *Citizens United v. FEC*, 558 U.S. 310, 350 (2010).

185. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 134 (1996) (“One irony of ratification was that both sides had to appeal to a public opinion in which they placed little confidence”); CLINTON ROSSITER, *1787: THE GRAND CONVENTION* 278–79 (1987) (explaining that the Federalists supported ratification and the Anti-Federalists opposed it); STORING, *supra* note 154, at 5 (“The Anti-Federalists were primarily *against* the Constitution”).

their allies owned most of the newspapers in the late 1780s.<sup>186</sup> Far from an “impartial medium,” newspapers played a critical role by actively promoting the ratification cause.<sup>187</sup> In fact, only twelve out of the nation’s 100 newspapers supported the Anti-Federalists.<sup>188</sup> Business considerations played a significant role in the lopsided coverage. Newspaper editors feared offending the powerful merchant class, which supported the Federalists.<sup>189</sup> As James Madison himself would later note, newspaper publishers depended on the advertising revenues that they generated from merchants.<sup>190</sup> Making their pages available to the Anti-Federalists posed a financial risk that few newspaper owners or editors could afford.<sup>191</sup> The financial influence of the merchant class thus gave the Federalists a significant advantage in the communications war with the Anti-Federalists.

The Federalist advantage in the dissemination of information was not the primary reason the Constitution was ultimately adopted.<sup>192</sup> The most important asset the Federalists possessed was the fact that George Washington and Ben Franklin supported the Constitution.<sup>193</sup>

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186. RAKOVE, *supra* note 185, at 135 (describing how “a predominantly Federalist press” promoted ratification).

187. *Id.* at 146.

188. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 486 (1969).

189. *Id.* at 486–87. On the widespread support for ratification among merchants and others engaged in interstate and international commerce, see the groundbreaking quantitative analysis of ROBERT A. MCGUIRE, *TO FORM A MORE PERFECT UNION: A NEW ECONOMIC INTERPRETATION OF THE UNITED STATES CONSTITUTION* 142 (2002). “Delegates with merchant interests . . . were more likely to have voted to ratify the Constitution than were others.” *Id.*

190. FELDMAN, *supra* note 16, at 423.

191. WOOD, *supra* note 188, at 486–87 (explaining how “editors ‘afraid to offend the great men, or Merchants who could work their ruin,’ closed their columns to the opposition”).

192. JOHN K. ALEXANDER, *THE SELLING OF THE CONSTITUTIONAL CONVENTION: A HISTORY OF NEWS COVERAGE* 202 (1990) (“[N]ews media coverage of the convention essentially belonged to those who came to be called Federalists. . . . There is no effective way to assess the degree to which people were moved or possibly even controlled by the news media. Nevertheless . . . much of the coverage of the convention had been artfully calculated to prepare the minds of the people to receive any form of government the delegates offered.”); RAKOVE, *supra* note 185, at 146 (“But even taking these disadvantages into account, it seems doubtful that the course of public debate hinged on an imbalance in the dissemination of information and opinion.”).

193. RAKOVE, *supra* note 185, at 135 (“Appeals to the collective stature of the Convention and the prestige of Washington and Franklin thus formed an important element of Federalist strategy.”); *see also id.* at 136 (“All doubts should vanish simply because the two greatest Americans of their age had joined in framing the Constitution.”).

As America's "only two national heroes" in the 1780s, Washington and Franklin commanded extraordinary influence with the public.<sup>194</sup> Indeed, Alexander Hamilton later asserted that the decisive factor in the Constitution's ratification was the "very great weight of influence of the persons who framed it, particularly in the universal popularity of General Washington."<sup>195</sup> Likewise, Madison observed, "[h]ad the Constitution been framed & recommended by an obscure individual, instead of the body possessing public respect & confidence, there can not be a doubt, that altho' it would have stood in the identical words, it would have commanded little attention from those who now admire its wisdom."<sup>196</sup>

In the end, no amount of Anti-Federalist arguments could overcome the fact that the most respected leaders in America sided with the Federalists.

But it took a concerted campaign of editorials, pamphlets, and handbills to inform the public that Washington and Franklin supported ratification.<sup>197</sup> The Federalists' access to a broad network of sympathetic newspapers, publishers, and pamphleteers made sure that the public was repeatedly reminded of the crucial fact that Washington and Franklin backed the Constitution.<sup>198</sup>

The key point is simply that money influenced the outcome of the ratification debate. It was expensive to communicate a political message, even in 1787. From the very beginning of American politics, therefore, Madison, Hamilton, and the Constitution's other framers understood that money was essential to disseminating political speech. Indeed, without it, the Constitution might never have been ratified in the first place. It is also noteworthy that the contending parties did not have a level financial playing field. The Federalists' financial resources gave them a clear advantage in the communications battle. Under the logic of *Austin*, therefore, the Federalists had "an unfair advantage in the

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194. ROSSITER, *supra* note 185, at 278.

195. RAKOVE, *supra* note 185, at 135.

196. *Id.* at 139.

197. ROSSITER, *supra* note 185, at 278 (observing that "this elite—or series of elites—did as effective a job of arguing and manipulating as could have been done in those days of slow-paced communications and primitive organization" and noting "the Federalist argument that what was good enough for Washington and Franklin should be good enough for every American.").

198. RAKOVE, *supra* note 185, at 135–36; ROSSITER, *supra* note 185, at 279 ("In the end, the Federalist won this war because they numbered among their leaders an overpowering majority of the word-makers—preachers, teachers, pamphleteers, editors, and lawyers—of republican America.").

political marketplace” because they used their superior “resources amassed in the economic marketplace.”<sup>199</sup> But under the approach laid out by the Court in *Citizens United*, the Federalist communications advantage would not be subject to government regulation because the government does not have a constitutionally permissible interest “in equalizing the relative ability of individuals and groups to influence the outcome of elections.”<sup>200</sup> The *Citizens United* ruling is thus far more consistent with the practices of those who supported the Constitution’s ratification than *Austin*’s antidistortion rationale.

Most important of all, Madison and Hamilton put the lessons they learned in the ratification battle to practical use in the momentous political struggles of the 1790s. After the Constitution’s ratification in 1788, a new ideological schism developed.<sup>201</sup> A rapidly intensifying partisan divide pitted President Washington, Vice President Adams, and Treasury Secretary Hamilton on one side against Secretary of State Jefferson and Congressman Madison on the other.<sup>202</sup> The dispute concerned the economic policies of the new nation. As head of the Treasury Department, Hamilton had centralized federal power through the establishment of a national bank, the federal assumption of state government debts, the industrialization of the American economy, and the promotion of a strong federal union.<sup>203</sup> In the process, the Hamiltonian program concentrated power in urban areas, especially in the North, a consolidation that threatened to reduce the influence of rural areas, especially in the South.<sup>204</sup>

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199. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 659 (1990).

200. See *Citizens United v. FEC*, 558 U.S. 310, 350 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (per curiam)).

201. WILENTZ, *supra* note 107, at 43, 45.

202. CHERNOW, *supra* note 165, at 392, 395 (“On issue after issue, ranging from redemption of war debt to creating a national bank, Washington had sided with Hamilton against Jefferson and Madison.”); DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 136 (1980); FORREST McDONALD, *THE PRESIDENCY OF THOMAS JEFFERSON* 17–18 (1987).

203. LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 128, 129 (1978) (“Hamilton’s ideal was a great republic, and his model for greatness was Britain. He realized that Britain’s strength rested on commerce, manufacturing, a sound currency, and the world’s best system of public finance. He meant to make America a match.”); MCCOY, *supra* note 202, at 134.

204. *Id.* at 153–54; see also WILENTZ, *supra* note 107, at 46 (“The early congressional clashes over Hamilton’s policies had a strong sectional character, pitting the North against the South.”).

Hamilton's policies horrified Madison and Jefferson, Virginians born and bred in the state's agricultural heartland.<sup>205</sup> Although Madison sided with Hamilton during the ratification debate, he feared that Hamilton's financial policies would corrupt the new nation's republican virtues.<sup>206</sup> Madison thus joined with Jefferson to preserve America's agrarian nature and resist the concentration of financial power in northeastern cities.<sup>207</sup>

But Jefferson and Madison had no hope of stopping Hamilton unless they could win elections. President Washington sided with Hamilton, which meant that Jefferson and Madison had minimal influence within the Administration.<sup>208</sup> In order to block Hamilton, therefore, they would have to build a political base outside the Washington Administration. To that end, they abandoned their long-standing misgivings about political parties and started a partisan faction of their own, which they called the "Republicans" to distinguish it from Hamilton's Federalist faction.<sup>209</sup> Even before George Washington's first term as president had ended, a full-blown war for public opinion erupted between the Federalists and Republicans. Both sides poured money—including, remarkably, money from government sources—to any newspaper editor willing to promote the Federalist or Republican party lines.<sup>210</sup>

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205. BANNING, *supra* note 203, at 154; CHERNOW, *supra* note 165, at 391; MCCOY, *supra* note 202, at 153–55; WILENTZ, *supra* note 107, at 42, 44–49.

206. BANNING, *supra* note 203, at 154 ("Only after the completion of Hamilton's economic program did Jefferson and Madison turn explicitly and systematically to the charges of conspiracy and corruption that others had occasionally suggested in Congress and the press.").

207. *Id.* at 154, 300.

208. CHERNOW, *supra* note 165, at 395.

209. KETCHAM, *supra* note 156, at 119 ("He even joined Jefferson in founding an antiministerial, republican party, which each conceived as 'a party to end all parties,' that is, an instrument, a temporary *means* to overcome the power of party (inherently malignant) so skillfully mustered by Hamilton.").

210. Herbert E. Alexander, *Financing Presidential Campaigns*, in 4 HISTORY OF AMERICAN PRESIDENTIAL CAMPAIGNS: 1789–1968, at 3870 (Arthur M. Schlesinger, Jr. ed., 1971) ("The system of a newspaper supporting, and being supported by, one political faction or the other—and often supplemented with government printing subsidies—quickly developed. Editors' fortunes rose and fell with the political success of their patrons. Newspapers vilified candidates mercilessly, and various factions spun off their own papers."); CULVER H. SMITH, THE PRESS, POLITICS, AND PATRONAGE: THE AMERICAN GOVERNMENT'S USE OF NEWSPAPERS, 1789–1875, at 13 (1977) ("Certain papers, published in the capital, came to be regarded as the personal organs of Hamilton and Jefferson, giving authoritative expression to the questions at issue between them.").

The first editor to join the fray was John Fenno, owner of the *Gazette of the United States*.<sup>211</sup> Hamilton persuaded Fenno to establish the newspaper in 1789.<sup>212</sup> The *Gazette* immediately became the preeminent vehicle for Federalist propaganda. Fenno's newspaper attacked President Washington's critics, advocated on behalf of the Administration's controversial financial program, and described Hamilton in "adoring" terms.<sup>213</sup> In defending the Washington Administration, the *Gazette* published anonymous articles, including some written by Hamilton himself.<sup>214</sup> But Fenno's support did not come for free. To keep the *Gazette* afloat, the Federalists directed private and public money to the newspaper and its owner. The Federalist-controlled Senate awarded Fenno government printing contracts and Secretary Hamilton granted him the Treasury Department's printing contracts.<sup>215</sup> Fenno made no secret of his special business relationship with the government. He added to the *Gazette's* masthead the words "By Authority," brazenly signaling his semi-official status in the Washington Administration.<sup>216</sup> But Fenno always seemed to need more money. At one point, he even issued an appeal to "the wealthy part of the community"—a core Federalist constituency—for financial assistance.<sup>217</sup> Keenly aware of the newspaper's political potency, Hamilton raised money on the paper's behalf and personally loaned \$2000 to Fenno to keep the *Gazette* in business.<sup>218</sup> As the historian Culver Smith has observed, "the paper was too valuable to Hamilton and the Federalists to let it die."<sup>219</sup>

The effectiveness of the Federalist propaganda campaign convinced Jefferson and Madison that they had to fight fire with fire.<sup>220</sup> Like Hamilton, they understood that money was essential to communicating their political message effectively. Accordingly, Jefferson hired the

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211. WILLIAM J. SMALL, *POLITICAL POWER AND THE PRESS* 48 (1972); SMITH, *supra* note 210, at 13.

212. CHERNOW, *supra* note 165, at 395.

213. *Id.*; SMALL, *supra* note 211, at 48; SMITH, *supra* note 210, at 14.

214. SMALL, *supra* note 211, at 51 (Hamilton "privately wrote for . . . the *Gazette of the United States*"); SMITH, *supra* note 210, at 14.

215. SMALL, *supra* note 211, at 49.

216. SMITH, *supra* note 210, at 13. In fact, Fenno appeared in a directory of government officers in 1791. CHERNOW, *supra* note 165, at 395.

217. SMITH, *supra* note 210, at 14.

218. *See* CHERNOW, *supra* note 165, at 395; SMITH, *supra* note 210, at 14.

219. SMITH, *supra* note 210, at 14.

220. WILENTZ, *supra* note 107, at 49.

talented editor Philip Freneau as a Republican propagandist.<sup>221</sup> To secure Freneau's services, Jefferson gave him a job as a government translator, a position that paid \$250 a year and involved no actual responsibilities.<sup>222</sup> To sweeten the offer, Madison promised Freneau that he would receive all of the State Department's printing contracts, as long as Freneau advocated for the Republican cause.<sup>223</sup>

Madison and Jefferson's financial inducements worked. Freneau founded the *National Gazette*, which immediately became the principal communication vehicle for advancing Jefferson and Madison's political agenda.<sup>224</sup> The newspaper made no pretense of objectivity.<sup>225</sup> It sometimes made wild allegations, including once claiming that Hamilton's financial plan had diverted \$50 million in public funds to wealthy special interests.<sup>226</sup> Many of the attacks came from the pens of Madison and Jefferson themselves, who both wrote unsigned articles for the *National Gazette*.<sup>227</sup>

The *National Gazette's* attacks infuriated Hamilton and Washington. In an anonymous public letter, Hamilton revealed that Jefferson had used government funds to finance Freneau's partisan attacks on the Federalists.<sup>228</sup> Sarcastically, Hamilton called Jefferson's use of government money for partisan purposes "an experiment somewhat new in the history of political manoeuvres in this country."<sup>229</sup> But it was a questionable line of attack because Hamilton had used government funds to pay John Fenno, the Federalist publicist. Accordingly, Freneau replied to Hamilton's letter by pointing out that the Federalists had rewarded "the immaculate Mr. John Fenno" with a government contract worth \$2000 a year.<sup>230</sup> One can only wonder what the electorate thought of the revelation that the Federalists and Republicans had used government funds to finance their partisan propaganda campaigns.

221. SMALL, *supra* note 211, at 48.

222. *Id.* at 48–49. As Jefferson explained, "[t]he clerkship for foreign languages in my office is vacant; the salary, indeed, is very low, being two hundred and fifty dollars a year; but it also gives so little to do as not to interfere with any other office one may choose." *Id.*

223. See SMITH, *supra* note 210, at 15.

224. SMALL, *supra* note 211, at 49; WILENTZ, *supra* note 107, at 49–50.

225. CHERNOW, *supra* note 165, at 396 ("Like other newspapers of the 1790s, Freneau's *National Gazette* did not feign neutrality.").

226. See SMITH, *supra* note 210, at 16.

227. See SMALL, *supra* note 211, at 50. See generally ELKINS & MCKITRICK, *supra* note 164, at 266–70 (noting Madison began writing for the paper only three weeks after it was established).

228. SMITH, *supra* note 210, at 16.

229. *Id.*

230. *Id.* at 17.

The partisan press war appalled President Washington. He described the *National Gazette's* editorials as “outrages of common decency.”<sup>231</sup> But the President’s efforts to silence the newspaper failed. When Washington ordered Jefferson to fire Freneau from his government position, Jefferson refused, asserting that Freneau’s “paper has saved our constitution which was galloping fast into monarchy.”<sup>232</sup> By the end of his presidency, newspapers had become such vicious vehicles of partisan attacks that Washington stopped reading them altogether, confining himself to reading advertisements because he believed they were “the only truths we can rely on in a newspaper.”<sup>233</sup>

Madison possessed an equally skeptical view of the supposed neutrality and objectivity of the press. His perspective anticipated key aspects of Justice Kennedy’s majority opinion. In *Citizens United*, the Supreme Court warned that a ban on corporate speech “would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations.”<sup>234</sup> Although the dissent claimed that a special constitutional protection might be extended to protect media corporations,<sup>235</sup> Justice Kennedy found no reasonable grounds to distinguish media corporations from ordinary business corporations.<sup>236</sup> As Kennedy explained:

So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.<sup>237</sup>

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231. SMALL, *supra* note 211, at 49.

232. JON MEACHAM, THOMAS JEFFERSON: THE ART OF POWER 273 (2012); SMALL, *supra* note 211, at 49.

233. SMALL, *supra* note 211, at 54–55.

234. *Citizens United v. FEC*, 558 U.S. 310, 351 (2010).

235. *Id.* at 431 n.57 (Stevens, J., dissenting) (“[T]he drafters of the First Amendment did draw distinctions—explicit distinctions—between types of ‘speakers,’ or speech outlets or forms . . . . The text and history highlighted by our colleagues suggests why one type of corporation, those that are part of the press, might be able to claim special First Amendment status, and therefore why some kinds of ‘identity’-based distinctions might be permissible after all. Once one accepts that much, the intellectual edifice of the majority opinion crumbles.”).

236. *Id.* at 352–53.

237. *Id.*

Likewise, James Madison ridiculed the idea that news organizations occupied a more elevated and objective perspective than other business ventures. Indeed, Madison believed that business considerations inevitably shaped newspapers' coverage of public affairs just as they did any other revenue-generating enterprise. He observed that although newspapers ostensibly stood as the "guardian of public rights" and the "organ of necessary truths," the reality as he saw it was that newspapers took pains not to offend advertisers.<sup>238</sup> Newspapers, he complained, found themselves in "prostration to advertising customers."<sup>239</sup> Since merchants and other commercial interests represented a disproportionately large share of their advertisers, newspapers in Madison's time period took a pro-British and protrade position.<sup>240</sup> Accordingly, Madison concluded that the press was "tainted with partiality."<sup>241</sup> The notion of an independent, neutral press corps free of business considerations thus struck Madison as absurd, just as it did Justice Kennedy in *Citizens United*.

In addition to using government funds to establish partisan newspapers, Madison and Jefferson turned to wealthy individuals to bankroll their new party. One of their most important financial backers was the wealthy Philadelphia merchant John Swanwick, who used his personal fortune to finance Republican campaigns in Pennsylvania in the 1790s.<sup>242</sup> In 1794 Swanwick's campaign war chest enabled him to win a congressional seat of his own in Philadelphia, which previously had been a Federalist stronghold.<sup>243</sup> Swanwick's use of his personal fortune to win elections did not trouble James Madison. Quite the reverse. Madison celebrated Swanwick's victory,

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238. See FELDMAN, *supra* note 16, at 423. For the full editorial, see James Madison, *Foreign Influence*, PHILADELPHIA AURORA GEN. ADVERTISER, Jan. 23, 1799, available at *Founders Online*, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Madison/01-17-02-0140> [<https://perma.cc/2UL2-YN82>].

239. FELDMAN, *supra* note 16, at 423

240. *Id.*

241. *Id.*

242. See Roland M. Baumann, *John Swanwick: Spokesman for "Merchant-Republicanism" in Philadelphia, 1790–1798*, 97 PA. MAG. HIST. & BIOGRAPHY 131, 163 (1973) ("He was, moreover, a valuable ally since his cashbox over the years was used to subsidize the infant Republican Party organization.").

243. *Id.* at 164, 181 (describing the three-term Federalist incumbent Thomas Fitzsimmons and noting that Swanwick was "Philadelphia's first Republican congressman"). Swanwick was not "afraid to employ his own fortune to insure his political success." *Id.* at 163, 165 ("[F]ew other men in the party could afford a costly congressional campaign and service in an underpaid political office.").

describing it as “of material consequence” because it occurred in the country’s commercial and political capital.<sup>244</sup> In Congress, Swanwick would continue to put his fortune at the disposal of Republican causes, organizing public rallies and printing petitions and handbills that advocated Republican policies.<sup>245</sup> Throughout, he maintained a close personal relationship with Madison, even securing a rental home in Philadelphia for Madison and his wife, Dolley.<sup>246</sup>

When Washington announced he would not run for a third term in 1796, the rivalry between the Federalists and the Republicans gave rise to the first contested presidential election in American history. The 1796 election pitted Jefferson against Vice President Adams in a campaign that both sides viewed as a battle for the republic’s survival.<sup>247</sup> Adams and the incumbent Federalist Party ultimately won the election, but the Republicans employed innovative campaign tactics that ushered in a new—and much more expensive—era of American politics. The most important innovations came from Madison’s close political ally, John Beckley, who developed a mass distribution system for Republican political literature.<sup>248</sup> Madison and Jefferson placed great value on Beckley’s skills.<sup>249</sup> As the historian Noble Cunningham has observed, Beckley was “a mysterious sort of person” who “worked behind the scenes” where he “displayed much skill in the realm of practical politics” and “knew how to win elections.”<sup>250</sup> In Pennsylvania alone Beckley distributed 30,000 tickets, which helped voters write Republican candidates and electors on their ballots.<sup>251</sup> He also printed and circulated copies of Republican campaign speeches.<sup>252</sup> The cost of Beckley’s electioneering tactics is unknown, but printing came at a high cost, as Hamilton and Madison had discovered a decade before with the *Federalist Papers*.

One key lesson that Jefferson and Madison took from the 1796 election was the importance of marshalling campaign funds. In a letter

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244. *Id.* at 164.

245. *Id.* at 167.

246. *See id.* at 168 n.172 (“Swanwick secured for the Madisons a three-story brick house in Philadelphia for a yearly rent of £200.”).

247. Page Smith, *Election of 1796*, in 1 HISTORY OF AMERICAN PRESIDENTIAL CAMPAIGNS: 1789–1968, *supra* note 210, at 62–63.

248. *See* CUNNINGHAM, *supra* note 29, at 105–06.

249. *Id.* at 45 (Beckley was recognized by Republicans as possessing “the confidence of our two illustrious patriots Mr. Jefferson and Mr. Madison”).

250. *Id.* at 102.

251. *Id.* at 105–06.

252. *Id.* at 102, 104, 106.

to Madison in February 1799, Jefferson urged that no expense be spared by Republicans in the 1800 election, which pitted Jefferson against Adams in a rematch of the 1796 race.<sup>253</sup> Republicans, Jefferson wrote, must engage in “systematic energies and sacrifices. The engine is the press. Every man must lay his purse and his pen under contribution.”<sup>254</sup>

Jefferson practiced what he preached, contributing his own “purse” to the Republican press effort.<sup>255</sup> For example, he paid James Callender, a newspaper writer, to launch vicious attacks on President Adams in the *Richmond Examiner*.<sup>256</sup> After the election, Jefferson privately acknowledged his covert financial role in the campaign: “I as well as most other republicans who were in the way of doing it, contributed what I could to the support of the republican papers and printers, paid sums of money for the Bee, the Albany Register, etc.”<sup>257</sup> In addition to funding newspapers, Jefferson paid for the circulation of Republican campaign pamphlets.<sup>258</sup>

Interestingly, Madison does not seem to have joined Jefferson in investing his own funds in the Republican effort. The historian Robert Allen Rutland has estimated that during Madison’s long career in elective office his “total campaign expenses could not have exceeded one hundred dollars.”<sup>259</sup> Madison was content to let others finance his campaigns for him, and there was no shortage of volunteers among wealthy Republican supporters. As Jefferson had urged, Republicans spared no expense in establishing partisan newspapers across the country in 1799 and 1800.<sup>260</sup> Federalists and Republicans alike viewed party-controlled newspapers “as a most important instrument for influencing the electorate.”<sup>261</sup> In addition to establishing partisan newspapers, both parties distributed vast numbers of pamphlets and handbills to sway public opinion.<sup>262</sup>

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253. Noble E. Cunningham, Jr., *Election of 1800*, in 1 HISTORY OF AMERICAN PRESIDENTIAL CAMPAIGNS: 1789–1968, *supra* note 210, at 114.

254. *Id.* at 114.

255. *Id.*

256. *Id.*

257. *Id.*

258. Alexander, *supra* note 210, at 3870.

259. RUTLAND, *supra* note 28, at 1–2.

260. See CUNNINGHAM, *supra* note 29, at 172–73.

261. *Id.* at 167.

262. *Id.* at 214, 223–24; RICHARD P. MCCORMICK, THE PRESIDENTIAL GAME: THE ORIGINS OF AMERICAN PRESIDENTIAL POLITICS 67 (1982). The 1800 election was “more

The Republicans proved far more adept at campaigning than their Federalists opponents.<sup>263</sup> Not coincidentally, the Republicans prevailed in the election, a victory that led to the first transfer of power from one party to another in American history.<sup>264</sup> The Federalist defeat in 1800 resulted at least in part from the party's failure to adapt to a changing political landscape. The Republican tactic of inundating the voting public with campaign literature astounded the Federalists.<sup>265</sup> Many Federalists believed campaigning was beneath the dignity of elected officials as it led to "loud and so indecently rude" public displays on election day.<sup>266</sup> They found particularly appalling the Republican innovation of sending candidates and orators on the campaign trail to communicate directly with the electorate.<sup>267</sup> According to the Federalists, Republicans made campaign speeches that were "foolish and inflammatory" and "fraught with all the falsehood imaginable—solely with a view to affect our election."<sup>268</sup> They also decried the Republicans' distribution of printed tickets, which Federalists saw as a form of cheating because it assisted voters in writing Republican candidates and electors on their ballots.<sup>269</sup>

Republican tactics may have made elections more noisy, competitive, and boisterous, but they also had the crucial advantage that they worked.<sup>270</sup> John Beckley once again employed his electioneering genius to bombard voters with campaign literature.<sup>271</sup> In one of his many groundbreaking techniques, he wrote a campaign biography of Thomas Jefferson and then arranged for 5000 copies of it to be printed and distributed in multiple states.<sup>272</sup> In many other ways, Republicans used money to get their message out to voters. Some Republican leaders paid for pamphlets attacking John Adams.<sup>273</sup> Others used more indirect but equally effective methods.

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than a personal duel, more than a competition involving parties of notables, it was a contest between recently organized political parties." MCCORMICK, *supra*, at 70.

263. See CUNNINGHAM, *supra* note 29, at 258–59.

264. Cunningham, *supra* note 253, at 134.

265. See CUNNINGHAM, *supra* note 29, at 206.

266. *Id.* at 252.

267. *Id.* at 207.

268. *Id.* at 209.

269. See *id.* at 206–07.

270. *Id.* at 252, 258–59.

271. *Id.* at 197.

272. *Id.* at 197–98.

273. *Id.* at 198.

For example, at a time when the incumbent Federalists controlled the printing contracts of the presidential and congressional branches, Republican legislatures gave lucrative state printing contracts to newspapers that would support Republican candidates.<sup>274</sup> The Republican campaign tactics represented a systematic effort to communicate with the national electorate. As Noble Cunningham has explained:

In their attention to party organization and machinery, the Republicans remained constantly aware of the necessity of maintaining popular support. Party spokesmen therefore exploited every available agency of mass communication: official papers such as petitions against governmental measures, public circular letters from congressmen to their constituents, newspapers, pamphlets, handbills, private letters which circulated among leading figures, and personal contacts and word-of-mouth communications.<sup>275</sup>

The volume of campaign literature sometimes overwhelmed voters.<sup>276</sup> As a South Carolina observer complained, “[w]e are so beset and run down by Federal republicans and their pamphlets that I begin to think for the first time that there is rottenness in the system they attempt to support, or why all this violent electioneering?”<sup>277</sup>

But it worked. After the election, the Federalist leader Fisher Ames admitted that the Republicans’ “unceasing use” of partisan newspapers helped make Jefferson’s victory possible.<sup>278</sup> The Federalists’ comparatively restrained approach to campaigning had no chance of succeeding against aggressive Republican campaign tactics. It would never again be viewed as “improper” for candidates and parties to “campaign for election.”<sup>279</sup> Jefferson’s victory in 1800 thus represented a turning point in campaign tactics. In 1790, candidates had relied on their own personal assets and conducted minimalist campaigns of modest scale.<sup>280</sup> But, by the end of the decade, the nature of American election campaigns had radically changed.<sup>281</sup> The “detestable practice of electioneering” was here to stay.<sup>282</sup>

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274. *Id.* at 173.

275. *Id.* at 259.

276. Alexander, *supra* note 210, at 3870.

277. *Id.*

278. CUNNINGHAM, *supra* note 29, at 167.

279. *Id.* at 252 (“A candidate’s efforts to win an election could now be viewed not merely as personal ambition but as a contribution to the party cause.”).

280. *Id.* at 249 (“A candidate for political office generally had to rely upon his own resources and those of his friends to promote his election.”).

281. *See id.* at 251 (“By the end of the decade of the nineties, the growth of political parties had wrought fundamental alterations in the political life of the country.”).

The crucial question, of course, is where did the Republican money come from? There was no Federal Election Commission and no public reporting of campaign expenditures in 1800.<sup>283</sup> Thus, we will never know who paid for Beckley's 5000 campaign biographies of Jefferson, nor how many wealthy individuals the Republicans relied on to finance their political communications. What we do know is that Jefferson, Madison, and the other figures of the day went out of their way to avoid disclosing how they financed their election campaigns. For example, Jefferson urged that Madison take pains to keep his role in the political writing campaign "sacredly secret."<sup>284</sup> Likewise, Jefferson hid his own role in the Republicans' expensive communications strategy.<sup>285</sup> "Do not let my name be connected with the business" of distributing pro-Republican political pamphlets, he instructed James Monroe in February 1799.<sup>286</sup> Other politicians in the early national period maintained a similar level of secrecy. For example, on behalf of Aaron Burr's gubernatorial campaign, New York Congressman Peter Van Gaasbeck paid for a rally in Kingston, New York.<sup>287</sup> But Gaasbeck instructed his allies not to disclose the source of the funds. "When you go to Kingston," Gaasbeck wrote one of the rally's organizers, "assure our Friends that every expense they are at will be cordially refunded from him who is not to be seen in that act; now my worthy fellow put the wheel in Motion."<sup>288</sup>

It seems virtually certain that wealthy and politically connected individuals bore the vast majority of campaign costs in the early national period. Few ordinary Americans had disposable income to spend on contributing to an election campaign. Indeed, as Noble Cunningham noted, the rise of the Republican Party organization did not come from the "grass roots."<sup>289</sup> Instead, wealthy candidates like Thomas Jefferson and James Madison, powerful party leaders like John Beckley, and business figures with a financial interest in the outcome of elections drove the creation of the innovative—and expensive—Republican

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282. *Id.* at 207.

283. Alexander, *supra* note 210, at 3869 ("Little is known of campaign finance in the early days of the Republic. With no requirement that records be filed, only fragmentary bits of information have surfaced.").

284. Cunningham, *supra* note 253, at 114.

285. *Id.*

286. *Id.*

287. CUNNINGHAM, *supra* note 29, at 259–60.

288. *Id.*

289. *Id.* at 259.

tactics of 1800, such as buying control of newspapers, distributing campaign literature, and holding election rallies.<sup>290</sup>

The bottom line, therefore, is that James Madison's political career illustrated the distinction between republican theories of political purity on the one hand, and the inescapable reality on the other that communicating with voters costs money. Madison began his political career in 1777 with a surprising defeat because he renounced the role of money in politics. He spent the rest of his career relying on well-to-do allies to fund his political activities, an effort that would culminate in two presidential terms of his own. None of his success would have been possible without financial backers who funded his and his party's political communications. Although young Madison had a fairly puritanical view of the role of money in politics, there is no evidence that he felt guilty about his campaign tactics later in life. He certainly left no indication that he thought relying on wealthy donors to fund his party's political activities rendered his party corrupt.

#### IV. MADISON'S BROAD INTERPRETATION OF THE RIGHT OF FREE SPEECH

In the spring of 1789, Congressman Madison proposed amending the Constitution by adding a bill of rights.<sup>291</sup> His views on the subject had changed over time. At the Virginia ratification convention the year before, Madison had argued that "no bill of rights was necessary because 'all powers not given are reserved.'" <sup>292</sup> Even after he began work on the Bill of Rights, the right of free speech did not command much of Madison's thinking.<sup>293</sup> In the late 1780s and early 1790s, the issue of religious freedom loomed much larger in his mind than the issue of free speech.<sup>294</sup>

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290. *Id.* ("In the 1790's one rarely finds effective party organization springing from the so-called 'grass roots.' Instead, the organization of the Republican party and the introduction of smoothly functioning party machinery were due largely to the leadership of a few dedicated and influential political leaders, such as Jefferson, Madison, members of Congress, John Beckley, and others. The newspapers report numerous popular party gatherings, but this more abundant source of information has often obscured the fact that the archives hold not a few confidential letters revealing the careful preparation that commonly preceded such meetings.")

291. BRANT, *supra* note 15, at 268.

292. FELDMAN, *supra* note 16, at 230, 232.

293. *Id.* at 429 ("In drafting the Constitution, Madison had paid no attention at all to the phenomenon of free speech.")

294. BRANT, *supra* note 15, at 268 ("Religious freedom was Madison's first concern, both in drafting his amendments and in the deliberations which now ensued.")

At the time that Madison wrote the First Amendment, it was not even clear what “freedom of speech” and “freedom of the press” really meant. As the scholar Eugene Volokh has explained, the phrase “freedom of the press” referred to the technology of printing and publishing, and not to any special constitutional protection for newspapers, editors, or journalists.<sup>295</sup> Moreover, many Americans in the 1790s believed that the right of free expression only protected against prior restraint, not post-publication punishment of speech.<sup>296</sup> As the revolutionary pamphleteer Thomas Paine observed, “the term *liberty of the press* . . . refers to the fact of printing *free from prior restraint* . . . .”<sup>297</sup> The Federalist Party, in particular, took a restrictive view of the right of free expression.<sup>298</sup> Federalists controlled the White House and Congress throughout the 1790s, and they proved quite willing to punish their political opponents for speech critical of the incumbent party.<sup>299</sup>

The political battles of the 1790s brought the issue of freedom of expression to the forefront of Madison’s thinking. In 1791—the same year the First Amendment was adopted—Madison and Jefferson began their propaganda war against the Federalists by enlisting the services of Philip Freneau and his *National Gazette*.<sup>300</sup> Madison saw the Republican press as essential for combating Hamilton’s ideas and for advancing the Jeffersonian political agenda.<sup>301</sup> The struggle against

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295. Eugene Volokh, *Freedom for the Press as an Industry or for the Press as a Technology? From the Framing to Today*, 160 U. PENN. L. REV. 459, 538 (2012) (“[P]eople during the Framing era likely understood the text as fitting the press-as-technology model as securing the right of every person to use communications technology, and not just securing a right belonging exclusively to members of the publishing industry. The text was likely not understood as treating the press-as-industry differently from other people who wanted to rent or borrow the press-as-technology on an occasional basis.”).

296. FELDMAN, *supra* note 16, at 429; LEONARD W. LEVY, SEASONED JUDGMENTS: THE AMERICAN CONSTITUTION, RIGHTS, AND HISTORY 61 (1995) (“[T]he free press clause, like the due process clause, had only an established common law meaning: freedom to speak, write, and publish as one pleased, subject to subsequent punishment for being too offensive.”).

297. LEVY, *supra* note 296, at 42.

298. See FELDMAN, *supra* note 16, at 429 (discussing the Federalists’ belief that the First Amendment only prohibited pre-publication speech, not punishing seditious libel post-publication); JOHN FERLING, JOHN ADAMS: A LIFE 364–65 (1992); DAVID MCCULLOUGH, JOHN ADAMS 505–06 (2001).

299. See FERLING, *supra* note 298, at 364 (discussing the attacks on the Federalist party and how the Federalist party responded); MCCULLOUGH, *supra* note 298, at 505–06.

300. CHERNOW, *supra* note 165, at 396.

301. See *id.* at 396, 400 (“Freneau’s *National Gazette* provided a handy platform for Madison.”); SMALL, *supra* note 211, at 48–49; SMITH, *supra* note 210, at 14–15.

Hamilton thus taught Madison the importance of a robust, highly partisan opposition press. Writing in December 1791 in the *National Gazette*, Madison emphasized the importance of a “general intercourse of sentiments.”<sup>302</sup> To that end, he advocated a “free press, and particularly a circulation of newspapers through the entire body of the people.”<sup>303</sup>

Crucially, of course, Madison did not mean a free press in the modern sense of a neutral, detached corps of professional editors and writers committed to journalistic objectivity. No newspaper met that definition in the 1790s.<sup>304</sup> As the historian Ron Chernow has observed, newspapers in the 1790s “were unabashedly partisan organs that supplied much of the adhesive power binding the incipient parties together.”<sup>305</sup> Newspapers did little in the way of reporting facts and instead focused on offering partisan opinions on the issues of the day.<sup>306</sup> During the early national period, therefore, newspapers “more closely resembled journals of opinion than daily newspapers.”<sup>307</sup> Indeed, Madison used the *National Gazette* to launch “anonymous blasts against Hamilton,” including falsely insinuating that Hamilton was personally corrupt and was conspiring against the United States with its British enemies.<sup>308</sup> To Madison, the phrase “freedom of the press” meant the freedom to print vicious—and, depending on one’s point of view, false—partisan attacks on the party in power. The printing press thus offered Madison and Jefferson a crucial vehicle for communicating with the electorate.

Madison’s broad conception of the right of free expression clashed with the Federalist efforts to silence their critics. The Federalist campaign of political repression prompted Madison to take a broad view of the First Amendment, one that was highly protective of the

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302. GERALD LEONARD & SAUL CORNELL, *THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS’ CONSTITUTION, 1780s–1830s*, at 53 (2019).

303. *Id.*

304. RICHARD P. MCCORMICK, *supra* note 262, at 65 (explaining that most newspapers had partisan interests); Jeffrey L. Pasley, *1800 as a Revolution in Political Culture: Newspapers, Celebrations, Voting, and Democratization in the Early Republic*, in *THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC* 138 (James Horn et al. eds., 2002) (“Where colonial printers had usually at least paid lip service to the ideal of giving all viewpoints equal access, the new journals tended to be or quickly became committed, admitted partisans.”).

305. CHERNOW, *supra* note 165, at 396.

306. *Id.*

307. *Id.*

308. *Id.* at 400; FELDMAN, *supra* note 16, at 355–56.

right to free speech. The first flash point between the Madisonian and Federalist views of political speech arose when dozens of anti-Federalist clubs known as Democratic-Republican Societies took root across the country in the early 1790s.<sup>309</sup> Inspired by Freneau's *National Gazette* as well as by revolutionary groups in France, the Democratic-Republican Societies both galvanized and organized the Washington Administration's critics.<sup>310</sup> As the historian Matthew Schoenbachler has explained, the societies served "as the first media of organized popular political dissent in the new republic."<sup>311</sup> In pamphlets and handbills, the societies opposed Hamilton's financial program, criticized President Washington's concentration of executive power, and condemned the social elitism of the Federalists in general.<sup>312</sup> The societies even accused the Federalists of subverting American liberty, going so far as to accuse Washington and Hamilton of seeking to install in America "the corrupt policy of trans-Atlantic monarchy and aristocracy."<sup>313</sup>

Ironically, the leaders of the Democratic-Republican Societies tended to be fairly wealthy themselves, at least by the standards of the 1790s.<sup>314</sup> The officers of the clubs typically consisted of merchants, lawyers, slaveowners, professionals, and skilled artisans, a group that exercised considerable economic power in their own right.<sup>315</sup> The relative

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309. WILENTZ, *supra* note 107, at 40–41; Matthew Schoenbachler, *Republicanism in the Age of Democratic Revolution: The Democratic-Republican Societies of the 1790s*, 18 J. EARLY REPUBLIC 237, 237–38 (1998).

310. THE DEMOCRATIC-REPUBLICAN SOCIETIES, 1790–1800: A DOCUMENTARY SOURCEBOOK OF CONSTITUTIONS, DECLARATIONS, ADDRESSES, RESOLUTIONS, AND TOASTS 3–4 (Philip S. Foner ed., 1976) (“[G]roups of ‘banditti-like’ people were reading Philip Freneau’s *National Gazette* and discussing its advice to organize into societies and voice their opposition to Federalist policies. . . . Jacobin societies of France were their immediate forerunners.”); see WILENTZ, *supra* note 107, at 53; Schoenbachler, *supra* note 309, at 239.

311. Schoenbachler, *supra* note 309, at 239.

312. WILENTZ, *supra* note 107, at 54–55; Schoenbachler, *supra* note 309, at 245–46, 252.

313. Schoenbachler, *supra* note 309, at 245; see WILENTZ, *supra* note 107, at 54–55.

314. Albrecht Koschnik, *The Democratic Societies of Philadelphia and the Limits of the American Public Sphere, Circa 1793–1795*, 58 WM. & MARY Q. 615, 620 (2001) (“Initiation fees, quarterly dues, and the ticket prices for celebrations put membership out of reach of the urban poor. Aspiring or prosperous merchants, professionals, and artisans represented about two-thirds of the membership (245 out of 306 men can be identified).”).

315. *Id.* at 620; see also THE DEMOCRATIC-REPUBLICAN SOCIETIES, *supra* note 310, at 9 (“We can conclude that the Democratic-Republican societies represented a coalition of merchants, political leaders, landowners, slaveowners, professionals, small tradesmen, mechanics, seamen, and laborers and that within this coalition,

prosperity of the societies' leaders enabled them to pay for printing and circulating handbills and political tracts. But the leaders generally came from the ranks of the upwardly mobile, and thus often found themselves socially excluded from the Federalists' old money circles.<sup>316</sup>

The ferocity of the societies' public accusations alarmed the Federalists.<sup>317</sup> The Federalists viewed the societies as an example of "democratic excess" and believed that opposition to the Administration's policies should be confined to the ballot box and not expressed in public criticism.<sup>318</sup> Accordingly, many Federalists challenged the "very idea of organized popular criticism" of the Washington Administration.<sup>319</sup> The Federalists simply did not believe that the societies' public critique of the government represented a legitimate form of political discourse.<sup>320</sup>

The controversy over the societies anticipated a growing Federalist hostility to opposition speech. The Federalists particularly objected to the fact that the societies' alliance with Republican newspaper editors enabled the societies to reach a wide audience, which the Federalists claimed made the societies disproportionately and unfairly influential with the public.<sup>321</sup> Whereas the societies viewed their activities as "an emphatic affirmation of the popular right to unrestricted speech and association," the Federalists viewed them as having too prominent of a place on the public stage.<sup>322</sup> The Federalist critique of the Democratic-Republican Societies bore more than a passing resemblance to the Supreme Court's reasoning in *Austin* two centuries later.<sup>323</sup> In upholding

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mechanics supplied the bulk of the membership while the political leaders and professionals supplied the bulk of the leadership.").

316. Koschnik, *supra* note 314, at 620.

317. See Schoenbachler, *supra* note 309, at 245.

318. *Id.* at 254 ("In the face of the societies' assault upon elitist politics and social privilege, the Federalists insisted that democracy was a process, not an end of government; popular participation began and ended on election day.").

319. *Id.* at 253, 254 ("Indeed, the mere existence of such popular organizations flew headlong into Federalist notions of a strong central government at a healthy remove from the people at large.").

320. See *id.* at 256 ("In the face of Federalist denials of the legitimacy of political opposition arising outside of government circles, the societies portrayed themselves as defenders of the revolutionary heritage.").

321. See Koschnik, *supra* note 314, at 630 ("But the Federalists considered the societies' extensive recourse to newspapers a blatant attempt to misrepresent public opinion and worried about the influence the societies' shrewd use of print might give them.").

322. *Id.* at 623, 630.

323. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990).

Michigan's ban on corporate independent expenditures, the Supreme Court asserted that the government could impose regulations designed to ensure that "expenditures reflect actual public support for the political ideas espoused by corporations."<sup>324</sup> Likewise, the Federalists insisted that editorials in the Republican newspapers did not reflect actual public support for the positions the Republicans espoused, and thus should be suppressed.<sup>325</sup>

When John Adams became president in 1797, his Administration took a confrontational approach to the Republican newspapers. His wife, Abigail Adams, supported a crackdown on the "wicked and base" criticism emanating from the "vile incendiaries" of the Republican press.<sup>326</sup> Federalist animosity toward Republican newspapers became increasingly aggressive. In one case, a Federalist mob attacked the building that housed the Philadelphia *Aurora*, a Republican newspaper edited by Benjamin Franklin's grandson, Benjamin Franklin Bache.<sup>327</sup> Abigail Adams had no sympathy for Bache, complaining that in "any other country, Bache and all his papers would have been seized long ago."<sup>328</sup> When the twenty-nine-year-old Bache died shortly thereafter of yellow fever, President Adams condemned the young man posthumously as a "malicious libeller."<sup>329</sup> The President took satisfaction from the fact that "the yellow fever arrested him in his detestable career."<sup>330</sup>

When the United States entered into an undeclared naval war against France in 1798, the Federalists used the crisis as a pretext to silence their Republican opponents once and for all.<sup>331</sup> In July 1798, Congress passed the Sedition Act,<sup>332</sup> which criminalized "any false, scandalous, and malicious" statement about federal officeholders or any statement intended to "excite against them . . . the hatred of the good people of the United States."<sup>333</sup> The Sedition Act represented a

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324. *Id.* at 660.

325. *See* Koschnik, *supra* note 314, at 630 ("Describing their opponents as unrepresentative was a common Federalist tactic.").

326. CHERNOW, *supra* note 165, at 571; McCULLOUGH, note 298, at 506.

327. CHERNOW, *supra* note 165, at 570.

328. *Id.* at 571.

329. *Id.* at 570-71.

330. *Id.* at 571.

331. *See* FELDMAN, *supra* note 16, at 414; McCULLOUGH, note 298, at 505-06 ("[T]he real and obvious intent was to stifle the Republican press.").

332. 1 Stat. 596 (1798).

333. *Id.* § 2.

direct attack on press freedom and the right to criticize the government. One member of the Federalist majority in Congress freely admitted that the new law was intended to ensure that American newspapers would only publish “pure sentiments and good principles,” i.e., Federalist principles.<sup>334</sup> The bottom line was the Federalists did not believe in the value of a free, full, and open public discourse. As the President’s personal secretary explained, “the liberty of the press . . . is a powerful engine for the subversion of all government—a mighty lever, sufficient . . . to overthrow the social order of the world.”<sup>335</sup> To underscore the stakes as the Federalists saw them, President Adams signed the Sedition bill into law on July 14, 1798, the ninth anniversary of the storming of the Bastille, the uprising that triggered the French Revolution.<sup>336</sup>

The Federalists soon made good on their threats.<sup>337</sup> They pursued criminal cases for seditious libel against editors of five of the six most important Republican newspapers.<sup>338</sup> The power of criminal prosecutions became a campaign weapon for Federalists to wield in the presidential election.<sup>339</sup> Under the Sedition Act, Federalist prosecutors brought criminal charges against Republican editors in Connecticut, Pennsylvania, and New York, all states that the parties viewed as crucial to the outcome of the 1800 election.<sup>340</sup> With good reason, Madison and Jefferson feared that under the pretense of suppressing seditious libel the Federalists would destroy the Republican Party.<sup>341</sup> Alarmed by the rising threat of repression, Jefferson warned Madison that “[i]f these papers fall, . . . Republicanism will be entirely browbeaten.”<sup>342</sup> Indeed, as the historians Stanley Elkins and Eric McKittrick observed, “the freedom of the Republican press to pass judgment on officeholders—openly, aggressively, even abusively—was essential to the party’s survival.”<sup>343</sup>

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334. FERLING, *supra* note 298, at 365.

335. *Id.* at 366.

336. *Id.* at 365.

337. CHERNOW, *supra* note 165, at 574–75; FELDMAN, *supra* note 16, at 431–32.

338. CHERNOW, *supra* note 165, at 575.

339. See MERRILL D. PETERSON, *ADAMS AND JEFFERSON: A REVOLUTIONARY DIALOGUE* 81 (1976) (“Most of the prosecutions were targeted for political effect.”).

340. FELDMAN, *supra* note 16, at 431–32.

341. *Id.* at 415.

342. *Id.*

343. ELKINS & MCKITTRICK, *supra* note 164, at 701.

Even members of Congress were not safe from the Federalist onslaught. In one of the most dramatic episodes of the Administration's crackdown on dissent, Federalist prosecutors brought criminal charges under the Sedition Act against Republican Congressman Matthew Lyon of Vermont.<sup>344</sup> The Federalists charged Lyon with committing sedition when the newspaper he owned accused President Adams of having an "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice."<sup>345</sup> Lyon was convicted, fined \$1000, and sentenced to four months in prison.<sup>346</sup> But the Federalists' intimidation tactics did not cow Lyon's Republican supporters. He campaigned for re-election from his jail cell and won by the largest margin of his career.<sup>347</sup>

The ballot box proved critical to ending the Sedition Act. The Republicans' victories in the 1800 election brought the seditious libel prosecutions to an end. The Sedition Act expired on March 3, 1801, the day before Jefferson's inauguration.<sup>348</sup> President Jefferson ordered the release of those serving their sentences and pardoned a number of the editors convicted under the Act.<sup>349</sup> Ironically, despite the Federalists' efforts to silence them, Republican newspapers played a decisive role in the election's outcome.<sup>350</sup> As the historian Jeffrey Pasley observed, "In the aftermath of the 1800 election, Federalists and Republicans alike blamed or credited the nationwide network of Republican newspapers for Jefferson's triumph."<sup>351</sup>

After Jefferson's election, Republicans redoubled their efforts to build a partisan newspaper empire,<sup>352</sup> creating in the process a political communications network that operated much like modern PACs. Party officials donated money to fund Republican newspapers and reported their progress to President Jefferson.<sup>353</sup> Prior to the

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344. FELDMAN, *supra* note 16, at 421.

345. *Id.*

346. ELKINS & MCKITRICK, *supra* note 164, at 710; FELDMAN, *supra* note 16, at 421.

347. ELKINS & MCKITRICK, *supra* note 164, at 711.

348. SMITH, *supra* note 210, at 21.

349. MEACHAM, *supra* note 232, at 357; SMITH, *supra* note 210, at 21.

350. Pasley, *supra* note 304, at 136.

351. *Id.*

352. See NOBLE E. CUNNINGHAM, JR., *THE JEFFERSONIAN REPUBLICANS IN POWER: PARTY OPERATIONS, 1801-1809*, at 236-38 (1963) ("Fully conscious of the power of public opinion and the influence of the press in molding popular sentiment, Republican party strategists were constantly alert to the problems and the uses of the press . . . . When Republicans came to power in 1801, party leaders appeared to regard the need for more Republican presses as one of the greatest demands of the party.").

353. *Id.* at 239, 243.

1808 election, for example, Attorney General Levi Lincoln assured Jefferson that individual Republican leaders in Massachusetts had donated \$50 to \$100 each to establish and maintain a Republican paper in Worcester.<sup>354</sup> Likewise, Republican supporters in Kentucky boasted to Senator John Breckinridge that “[a] small number of persons have united, and at a great expense, procured a new press and types, and hired, upon a liberal salary, an Editor and a Printer.”<sup>355</sup> In what amounted to de facto campaign fundraising appeals, Republicans leaders urged supporters to provide financial support to their partisan newspapers.<sup>356</sup> In 1808, a Republican circular in New York called on party members “to extend their patronage by liberal subscriptions and payments for papers. Let every Republican make it a matter of principle and honor to pay his printer when due, and it would greatly aid him in his resources.”<sup>357</sup>

One tactic Republicans developed under Jefferson was to distribute their newspapers to voters for free.<sup>358</sup> But the practice was ruinously expensive for the newspapers.<sup>359</sup> Accordingly, Republican leaders implored their supporters to contribute money for the distribution of free newspapers.<sup>360</sup> For example, during James Madison’s successful 1808 campaign for president, a Massachusetts Republican newspaper editorial urged fellow Republicans to “unite in forming A PATRIOTIC FUND, to defray the charges of printing and distributing *gratis*, handbills, pamphlets, and other papers.”<sup>361</sup> The newspaper editor noted that “[a] dollar a man from every one who could afford it, would be amply sufficient.”<sup>362</sup> In addition, President Jefferson directed government printing contracts to Republican newspapers across the country.<sup>363</sup> Jefferson also once again personally contributed to Republican newspapers, paying over \$70 for fourteen subscriptions

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354. *Id.* at 243.

355. *Id.* at 244.

356. *Id.* at 245.

357. *Id.*

358. *Id.* at 245–46.

359. *Id.* at 247.

360. *Id.* at 246.

361. *Id.*

362. *Id.*

363. *See id.* at 248–49 (“The policy of rewarding Republican printers with federal patronage . . . was followed by the administration. . . . Once inaugurated, the policy of supporting Republican presses with printing patronage appears to have been consistently applied throughout the Jeffersonian administration.”).

during the 1804 campaign.<sup>364</sup> By the end of his presidency, he subscribed to thirty-three newspapers.<sup>365</sup> He also subsidized Republican printers by paying generously for their political pamphlets.<sup>366</sup> In one case, the President paid a New York Republican printer over \$98 to print campaign pamphlets and partisan newspapers.<sup>367</sup> In another case, he gave a Philadelphia Republican printer over \$120 during the 1804 election.<sup>368</sup> Yet, Jefferson always maintained a low opinion of the information purveyed by newspapers. Writing privately in 1807, he observed, “[n]othing can now be believed which is seen in a newspaper. . . . [T]he man who never looks into a newspaper is better informed than he who reads them . . . .”<sup>369</sup>

James Madison benefited from the partisan newspaper network and the sophisticated political organization that the Republicans had built in the early 1800s.<sup>370</sup> Although a brilliant man, he was not a good campaigner and did not enjoy the campaign trail.<sup>371</sup> A small, shy, and inconspicuous person, he struggled to connect with strangers and never became a particularly effective public speaker.<sup>372</sup> Madison was instead a party builder, working behind the scenes to organize Republicans into a powerful partisan organization.<sup>373</sup> In the end, the Republican political communications network consisting of newspapers, pamphlets, handbills, and party rallies more than compensated for Madison’s personal shortcomings as a dull and uncharismatic candidate. As Noble Cunningham observed, by 1808 Republicans had in place a system of “[e]ffective organization and

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364. *Id.* at 253.

365. *Id.* at 253–54.

366. *Id.* at 255.

367. *Id.*

368. *Id.* at 270–71.

369. *Id.* at 264.

370. *Id.* at 305.

371. See FELDMAN, *supra* note 16, at 310 (“In fact, Madison hated running for office. . .”).

372. See *id.* at 445 (“Madison had conducted politics mostly in writing. . . . [P]olitics was conducted face-to-face, often through social contact. That was not Madison’s natural inclination.”); see, e.g., LYNNE CHENEY, JAMES MADISON: A LIFE RECONSIDERED 3 (2014) (“[N]o one thought of him as an orator for the ages . . .”); KETCHAM, *supra* note 106, at 107–08 (“[H]e was thought awkward at formal events. . . . He overcame his habitual shyness and reserve only when among people he trusted. . . . He therefore seldom made a good first impression. . . .”); WILENTZ, *supra* note 107, at 42 (describing Madison as short, “nervous, and achingly shy”).

373. See CUNNINGHAM, *supra* note 29, at 258 (“[I]t was Madison who assumed the Republican leadership.”).

aggressive campaigning through newspapers, party literature, and personal contacts [that] directly aimed at winning and maintaining the support of the voter.”<sup>374</sup> Thanks in no small part to the Republicans’ complex—and expensive—campaign organization, Madison won the presidency in 1808 and won reelection in 1812.<sup>375</sup>

Madison thus keenly understood the importance of freedom of expression. The Adams Administration’s efforts to repress its opponents profoundly shaped Madison’s view of the First Amendment. By the late 1790s, he believed that the First Amendment’s right of freedom of expression categorically denied Congress the authority to punish seditious libel.<sup>376</sup> The Federalist claim that the First Amendment only protected against prior restraint struck Madison as absurd.<sup>377</sup> As he explained, “It would seem a mockery that no law should be passed, preventing publications from being made, but that laws might be passed for punishing them in case they should be made.”<sup>378</sup> Madison also warned that censorship undermined the principle of democratic elections because it suppressed “information and communication among the people, which is indispensable to the just exercise of their electoral rights.”<sup>379</sup> The Federalist censorship campaign convinced Madison that a broader, more protective view of free speech was necessary.<sup>380</sup> As the scholar Noah Feldman has explained, “it became clear [to Madison] that free speech would be necessary to keep public opinion informed,” as public opinion represented “the ultimate guarantor of liberty.”<sup>381</sup>

Throughout his presidency, Madison remained true to his principles and never acted to suppress the Federalist press, even when doing so would have benefited him politically.<sup>382</sup> In June 1812,

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374. CUNNINGHAM, *supra* note 352, at 298.

375. See Irving Brant, *Election of 1808*, in 1 HISTORY OF AMERICAN PRESIDENTIAL CAMPAIGNS: 1789–1968, *supra* note 210, at 185–221; see also Norman K. Risjord, *Election of 1812*, in 1 HISTORY OF AMERICAN PRESIDENTIAL CAMPAIGNS: 1789–1968 *supra* note 210, at 249–72.

376. FELDMAN, *supra* note 16, at 428.

377. *Id.* at 429.

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. See DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 12 (1989) (finding that even in the face of rampant obstruction of his government’s policies and outright treason, Madison never abridged freedom of speech or press).

Congress declared war on Britain, a conflict that resulted from the Royal Navy's harassment of American shipping.<sup>383</sup> The War of 1812 soon escalated into a major conflict that lasted until February 1815.<sup>384</sup> The war resulted in the deaths of several thousand people and cost the government over \$158 million.<sup>385</sup> Throughout the conflict, Madison's opponents subjected him to ferocious attacks and actively worked to undermine his prosecution of the war.<sup>386</sup> Federalist governors in New England even refused to provide military assistance to the war effort.<sup>387</sup> In August 1814, the British Army captured Washington D.C., forcing President Madison to flee the White House in a humiliating retreat.<sup>388</sup> Opposition to the war became so intense that in December 1814 Federalist leaders from the New England states convened a regional conference in Hartford, Connecticut.<sup>389</sup> Some observers feared the Hartford convention would ultimately lead to the secession of the New England states from the Union.<sup>390</sup>

President Madison viewed the Federalist obstruction of his war policies as treasonous. In a letter to Jefferson, Madison wrote that "the seditious opposition in Massachusetts and Connecticut, with the intrigues elsewhere insidiously co-operating with it, have so clogged the wheels of the war that I fear the campaign will not accomplish the object of it."<sup>391</sup> A visitor to the White House found the President "miserably shattered and woe-begone" with "[h]is mind . . . full of the New England sedition."<sup>392</sup> In a private letter, Madison accused the antiwar Federalists of providing "inducement" to the British to persevere in the war.<sup>393</sup> A Republican newspaper editor even warned the President that the antiwar Federalists threatened to provoke "all the horrors of civil war, anarchy, and probably terminate in despotism."<sup>394</sup>

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383. See DONALD R. HICKEY, *THE WAR OF 1812: A FORGOTTEN CONFLICT* 26 (1989) ("War appealed to Republicans because it offered the prospect of winning diplomatic concessions from the British, of forcing them to give up the Orders in Council and impressment and perhaps modify their other maritime practices as well.").

384. *Id.* at 301.

385. *Id.* at 302-03.

386. See MCCOY, *supra* note 382, at 12 (observing that "few Presidents have been subjected to so much personal invective and abuse" as Madison during the War of 1812).

387. KETCHAM, *supra* note 106, at 537.

388. *Id.* at 578-79; HICKEY, *supra* note 383, at 198-99.

389. FELDMAN, *supra* note 16, at 598.

390. *Id.* at 598-99.

391. KETCHAM, *supra* note 106, at 537.

392. *Id.* at 592.

393. *Id.* at 593.

394. FELDMAN, *supra* note 16, at 598.

But Madison’s commitment to free expression never wavered. Despite “countless cases of outright treason” in New England, Madison refused to silence his enemies.<sup>395</sup> As the historian Harry Coles observed of Madison, “Though the provocation was extreme, he never suggested measures abridging freedom of speech or press.”<sup>396</sup> President Madison did not even take steps to prevent the Hartford convention from discussing disunion or advocating peace with Britain.<sup>397</sup> As Noah Feldman has emphasized, “It is essentially impossible to imagine any subsequent wartime president—all of whom, without exception, engaged in at least some attempts to suppress opposition—allowing the Hartford convention to go forward.”<sup>398</sup>

There is no regulatory interest more compelling for the government than national security. In Federalist No. 23, Alexander Hamilton identified the defense of the nation as the federal government’s foremost duty.<sup>399</sup> The Supreme Court takes the same view. As the justices observed in a 1980 case, “[i]t is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”<sup>400</sup>

But President Madison believed that the Constitutional right to free speech took precedence, even over the government’s compelling interest in national security. Accordingly, during the darkest days of the war when the capital itself fell into the hands of a foreign invader, Madison took no action to suppress the Federalists’ “treasonous” statements. In *Citizens United*, Justice Kennedy wrote for the majority that “[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply

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395. See MCCOY, *supra* note 382, at 12, 14 (observing that Madison “never hinted at measures abridging freedom of speech or press, even in the face of rampant obstruction of his government’s policies and countless cases of outright treason in the ‘eastern states’ of New England. . . . Less than two years after the end of ‘Mr. Madison’s War,’ one of his admirers proudly noted that not only a powerful foreign enemy, but violent domestic opposition as well, had been ‘withstood without one trial for treason, or even one prosecution for libel.’”).

396. HARRY L. COLES, *THE WAR OF 1812*, at 257 (1965).

397. See FELDMAN, *supra* note 16, at 599 (finding that Madison instead approached the Convention with an attitude of “calm and philosophical tranquility”).

398. *Id.*

399. THE FEDERALIST No. 23 (Alexander Hamilton) (“The principal purposes to be answered by union are these: The common defense of the members; the preservation of the public peace as well against internal convulsions as external attacks . . .”).

400. *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)).

engaging in political speech.”<sup>401</sup> During the War of 1812, Madison’s tolerant approach to disloyal Federalists reflected precisely Kennedy’s view. The Sedition Act convinced Madison that the broadest possible protections should be extended to citizens engaged in political speech.<sup>402</sup> Even a foreign invasion did not shake his commitment to free speech.

#### CONCLUSION

As a young man, James Madison might have agreed with the critics of the *Citizens United* decision. His refusal to buy alcohol for voters in 1777 reflected his Republican principles, which viewed the role of money in politics through a lens of distrust. But as a politician, he became a pragmatist and a realist.<sup>403</sup> As Noah Feldman has put it, Madison learned that he had “to use the tools of politics to achieve” his ideals and principles.<sup>404</sup> Above all, Madison recognized that to realize his policy goals, he had to persuade the public to support his partisan and political agenda.<sup>405</sup>

The threat posed by corruption was not lost on James Madison. He feared the concentration of wealth that Hamilton’s financial programs would produce. But Madison did not attempt to ban or otherwise restrict the financial resources that Hamilton used to fund the Federalist Party’s political communications. Instead, Madison and Jefferson sought to defeat the Hamiltonian program at the ballot box. To that end, Madison joined with Jefferson in forming the Republican Party, which depended on the use of money to rally supporters and win over the electorate. Jefferson urged Republican leaders to make financial contributions to the partisan cause, and he and Madison welcomed the support of wealthy individuals like John Swanwick. The party Madison and Jefferson cofounded developed innovative electioneering tactics that dramatically increased the cost of campaigns. The phenomenon of soaring campaign costs thus began with James Madison himself. Yet, during his long career in

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401. *Citizens United v. FEC*, 558 U.S. 310, 349 (2010).

402. See FELDMAN, *supra* note 16, at 599 (writing that Madison “would not violate the principles of liberty to save liberty itself”).

403. *Id.* at 285, 370 (remarking that Madison emerged “as an increasingly adept, realistic politician” and noting that as a politician Madison “had become increasingly pragmatic and increasingly partisan”).

404. *Id.* at 314.

405. *Id.* at 285 (“[H]e was learning how to shape and respond to public opinion. The skill would be increasingly necessary in the difficult years that lay ahead.”).

office, Madison gave no indication that he thought that campaign contributions or expenditures constituted a form of corruption that could be banned or restricted under the Constitution.

Above all, Madison viewed the Constitutional right to free expression in sweeping terms. During the War of 1812, he feared that Federalist antiwar rhetoric threatened the survival of the United States. Nevertheless, despite the compelling national security interest in silencing disloyal Federalists, President Madison took a strongly pro-speech position, even though it came at his own political detriment. Equally important, Madison did not believe that a principled distinction could be drawn between business speakers on the one hand, and media speakers on the other. His political experience taught him that ideological biases and business interests influenced every newspaper. Accordingly, his support for a broad and sweeping freedom of expression extended to all speakers, including politicians, business leaders, journalists, voters, and ordinary citizens alike.

In his majority opinion in *Citizens United*, Justice Kennedy observed that “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”<sup>406</sup> James Madison devoted his entire career to that principle. The fractious world of practical politics taught him that more political speech was better than less.

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406. *Citizens United*, 558 U.S. at 339.