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BEHAVIORAL DECISION THEORY AND IMPLICATIONS FOR THE  
SUPREME COURT'S CAMPAIGN FINANCE JURISPRUDENCE

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# BEHAVIORAL DECISION THEORY AND IMPLICATIONS FOR THE SUPREME COURT'S CAMPAIGN FINANCE JURISPRUDENCE

*Molly J. Walker Wilson\**

## ABSTRACT

*America stands at a moment in history when advances in the understanding of human decision-making are increasing the strategic efficacy of political strategy. As campaign spending for the presidential race reaches hundreds of millions of dollars, the potential for harnessing the power of psychological tactics becomes considerable. Meanwhile, the Supreme Court has characterized campaign money as “speech” and has required evidence of corruption or the appearance of corruption in order to uphold restrictions on campaign expenditures. Ultimately, the Court has rejected virtually all restrictions on campaign spending on the ground that expenditures, unlike contributions, do not contribute to corruption or the appearance of corruption. However, behavioral decision research and theory provide strong support for the notion that expenditures do corrupt the political process, because there is a nexus between campaign spending, strategic manipulation, and sub-optimal voting decisions. This Article applies behavioral research and theory to advance a new definition of “corruption,” arguing that there is a vital governmental interest in regulating campaign expenditures in order to limit manipulative campaign tactics and to reduce the existing inequities in access to channels of communication and persuasion.*

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## INTRODUCTION

Decision theorists have been writing for several decades about the potential for individuals to make sub-optimal choices as a result of particular features of human decision-making. Specifically, people do not behave like the “rational actor” depicted in law-and-economic theory because of the influence of biases and heuristics (cognitive shortcuts) on mental processes. Jon Hanson and Douglas Kysar have argued that certain actors are motivated by economic incentives to cultivate strategies designed to exploit these biases for gain.<sup>1</sup> Moreover, Hanson and Kysar claim that this form of strategic behavior is inevitable in the marketplace, because any entity that declined to exploit consumer biases would fail to be competitive and would suffer a devastating market share loss.<sup>2</sup> In the political marketplace, candidates and political parties, no less than corporate actors, have overwhelming incentives to manipulate voter decision-making by using knowledge about cognitive biases. But taking advantage of the full arsenal of tactics requires a great deal of money. Political consultants, polling, and targeting efforts are all expensive, and there is some evidence that holding other factors constant, the candidate who spends the most on strategic communication with the electorate is ultimately most likely to be successful at the polls.

The Supreme Court has consistently struck down legislative attempts to limit campaign spending on First Amendment grounds. The Court’s jurisprudence assumes that regulating expenditures is tantamount to regulating speech, and that there is no sufficiently compelling governmental interest justifying the interference with the right of free speech. This supposition discounts the role of money in developing strategies for packaging communication in ways that ultimately do not serve to inform the electorate, but rather to capitalize upon certain “irrationalities” of human decision-making. Interestingly, the Court *has* allowed limitations on *contributions* in the interest of preventing actual and apparent quid pro quo corruption. This Article argues for a new conceptualization of “corruption,” applying social science research and theory to reveal the potential for campaign communication to manipulate—rather than inform—the electorate.

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<sup>1</sup> Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999).

<sup>2</sup> Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1536 (1998); *see also* Hanson, *supra* note 1, at 635, 637 (explaining that those who have the motivation and the resources are able to “influence the context in which the decisions are made” and ultimately can “shape people’s behavior in desired directions”).

Empirical psychological research demonstrates that voters rely upon heuristics, or cognitive shortcuts, in determining vote choice.<sup>3</sup> Mental shortcuts are prevalent during the voting decision process because of the difficulty in obtaining perfect information and the low expected yield for any one vote cast.<sup>4</sup> These features of the voting context make voters particularly vulnerable to manipulation by political candidates and parties.<sup>5</sup> Meanwhile, political candidates have tremendous incentives to engage in vote-maximizing tactics.<sup>6</sup> The competition of the political marketplace, along with the potential expected gain from utilizing exploitative campaign tactics create the perfect storm, virtually assuring financial commitment to innovative techniques that capitalize on human irrationalities.<sup>7</sup>

In theory, a wide array of biases and heuristics could prove fertile ground for propaganda efforts. However, several are particularly

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<sup>3</sup> Social science research indicates that voters do not behave “rationally” when making voting decisions. See, e.g., Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 296 (2005); see also Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513 (2007). For the proposition that voters rely upon cues or heuristics and do not gain all relevant information, see ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* (1998); Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1424-25 (2005); Elizabeth Garrett, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and in Congress*, 27 OKLA. CITY U. L. REV. 665, 678 (2002); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141 (2003); James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion*, in ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY 153 (Arthur Lupia et al. eds., 2000); David Schleicher, *Irrational Voters, Rational Voting*, 7 ELECTION L.J. 149, 154 (2008).

<sup>4</sup> See Krishnakumar, *supra* note 3, at 537.

<sup>5</sup> See William T. Bianco, *Different Paths to the Same Result: Rational Choice, Political Psychology, and Impression Formation in Campaigns*, 42 AM. J. POL. SCI. 1061 (1998); see also Larry M. Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 AM. J. POL. SCI. 194 (1996); Thomas E. Nelson & Zoe M. Oxley, *Issue Framing Effects on Belief Importance and Opinion*, 61 J. POL. 1040, 1045 (1999); Thomas E. Nelson et al., *Toward a Psychology of Framing Effects*, 19 POL. BEHAV. 221, 226 (1997); Brian F. Schaffner, *Priming Gender: Campaigning on Women’s Issues in U.S. Senate Elections*, 49 AM. J. POL. SCI. 803, 803 (2005) (explaining that because they tend to be closer to the views of women on these issues, Democratic candidates who decide to target women are more likely to use their campaigns to prime women’s issues while Republicans will attempt to draw attention away from those topics toward other issues).

<sup>6</sup> Shanto Iyengar & Adam F. Simon, *New Perspectives and Evidence on Political Communications and Campaign Effects*, 51 ANN. REV. PSYCHOL. 149, 150 (2000).

<sup>7</sup> Many have been critical of political actors who engage in tactics blatantly designed to capitalize on the irrationalities of the public, but the real fault lies not with the individual or party actors, but with the structures that make manipulation so prevalent. See Reza DiBadj, *Reconceiving the Firm*, 26 CARDOZO L. REV. 1459, 1461 (2005) (“[T]he problem may not be with government per se, but with the structures that allow private parties to manipulate it.” (referencing AMITAI ETZIONI, *THE MORAL DIMENSION: TOWARD A NEW ECONOMICS* 217 (1988))).

relevant in the political campaign context. One bias that has been widely exploited by politicians is framing. Research on framing reveals that the manner in which a choice is presented can influence the decision-maker's preference.<sup>8</sup> The potential for exploitation through the use of frames is significant because framing can be a simple matter of strategic word choice and can lead individuals to make a choice that differs substantially from their initial preference.<sup>9</sup> Commentators have noted that the strategic use of frames can have important effects on the attitudes and behaviors of a target.<sup>10</sup>

Priming is another bias-based strategy which, like framing, can be used to influence attitudes and decisions.<sup>11</sup> Also known as "agenda-setting," political-campaign priming leads voters to consider particular issues to be particularly important by presenting these issues repeatedly in a variety of formats.<sup>12</sup> The availability heuristic is related to priming in that both can influence the relative ordering of voters' priorities. By portraying certain issues, events, or risks repeatedly and in vivid terms, candidates can assure that these issues, events, or risks will become cognitively "available" to voters and will be weighted heavily during the vote-decision process.<sup>13</sup> Finally, attitudes or impressions created

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<sup>8</sup> See generally Eldar Sharfir, *Prospect Theory and Political Analysis: A Psychological Perspective*, 13 POL. PSYCHOL. 311, 313-14 (1992) (providing a definition of framing). For early discussions of framing, see ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981).

<sup>9</sup> See Richard H. Thaler, *Mental Accounting Matters*, in CHOICES, VALUES, AND FRAMES 241, 244 (Daniel Kahneman & Amos Tversky eds., 2000); Tversky & Kahneman, *supra* note 8, at 457-58.

<sup>10</sup> James N. Druckman, *On the Limits of Framing Effects: Who Can Frame?*, 63 J. POL. 1041, 1059 (2001) (finding that "the results from both experiments suggest that a credible source can use a frame to alter the perceived importance of different considerations, and this, in turn, can change overall opinion," but qualifying this assertion with the caveat that the source must be credible); Donald R. Kinder & Don Herzog, *Democratic Discussion*, in RECONSIDERING THE DEMOCRATIC PUBLIC 347 (George E. Marcus & Russell L. Hanson eds., 1993).

<sup>11</sup> See LUPIA & MCCUBBINS, *supra* note 3, at 3 (distinguishing priming from framing).

<sup>12</sup> See Schaffner, *supra* note 5, at 805-07 (discussing the ways in which candidates increase the salience or weight assigned to various issues); see also DAVID C. BARKER, *RUSHED TO JUDGMENT: TALK RADIO, PERSUASION, AND AMERICAN POLITICAL BEHAVIOR* 10-11 (2002); SHANTO IYENGAR & DONALD KINDER, *NEWS THAT MATTERS* (1987); DARRELL WEST, *AIR WARS: TELEVISION ADVERTISING IN ELECTION CAMPAIGNS, 1952-2000* (3d ed. 2001); James N. Druckman et al., *Candidate Strategies to Prime Issues and Image*, 66 J. POL. 1180, 1181 (2004); James N. Druckman & Justin W. Holmes, *Does Presidential Rhetoric Matter? Priming and Presidential Approval*, 34 PRESIDENTIAL STUD. Q. 755-78 (2004); James N. Druckman, *Priming the Vote: Campaign Effects in a U.S. Senate Election*, 25 POL. PSYCHOL. 577, 590 (2004); Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599.

<sup>13</sup> See Molly J. Walker Wilson & Megan P. Fuchs, *Publicity, Pressure, and Environmental Legislation: The Untold Story of Availability Campaigns*, 30 CARDOZO L. REV. 2147, 2149 (2009) ("The availability heuristic is a widely-used mental shortcut that leads people to assign a higher likelihood to events that are readily 'available'—events that are particularly likely to come to mind due to their vividness, recency, or frequency.").

through the use of priming and framing may be strengthened by the confirmation bias.<sup>14</sup>

The notion that candidates and their surrogates exploit these and other biases in efforts to influence voting behavior is more than theoretical. History is replete with examples of candidates capitalizing on opportunities to harness the effects of cognitive irrationalities, and there is ample evidence of campaign dollars being used in furtherance of this goal. Although some scholars have argued that campaigning ultimately has “minimal effects” on election outcomes, this claim has been discredited by empirical studies of voting behavior.<sup>15</sup> Moreover, some evidence indicates that the relationship between campaign dollars spent and success in the polls is linear, or nearly so.<sup>16</sup> The use of campaign money to develop cognition-based strategies is of particular concern in light of empirical evidence that when citizens rely upon heuristics, they become less accurate in their voting decisions.<sup>17</sup>

Throughout its campaign finance jurisprudence, the Court has maintained that restrictions on campaign funding implicate freedom of speech concerns, and therefore require an overriding governmental interest. The Court has held that “corruption or the appearance of corruption” is a sufficiently compelling interest to merit impinging on freedom of speech.<sup>18</sup> However, as John Shockley has noted, the Court has resolutely rejected the claim of “many legal scholars and political analysts [who] forcefully argue that the Court’s definition of corruption should include the systemic view that financial power fosters unchecked or unaccountable influence in any electoral setting,”<sup>19</sup> and it has struck down virtually every spending limit proposed.<sup>20</sup> In so doing, the Court

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<sup>14</sup> Voters who experience the confirmation bias selectively ignore information that is inconsistent with a previously held favorable opinion of a candidate. See Michael Shermer, *The Political Brain*, 295 SCI. AM. 36 (2006), available at <http://www.scientificamerican.com/article.cfm?id=the-political-brain>; see also Peter R. Schorott, *Electoral Consequences of “Winning” Televised Campaign Debates*, 54 PUB. OPINION Q. 567, 568 (1990) (the process called “group polarization” occurs when like-minded people reinforce and strengthen one another’s views); Alexander Stille, *Adding Up the Costs of Cyberdemocracy*, N.Y. TIMES, June 2, 2001, at B9 (discussing practical consequences of polarization).

<sup>15</sup> See Stanton A. Glantz et al., *Election Outcomes: Whose Money Matters?*, 38 J. POL. 1033, 1038 (1976) (presenting empirical findings supporting the notion that capping expenditures would make “race[s] more competitive by preventing incumbents from swamping their challengers financially”).

<sup>16</sup> *Id.*

<sup>17</sup> An “accurate” vote is widely understood to be one that the voter would cast if he or she had all of the relevant information. See Bartels, *supra* note 5, at 217; Kuklinski & Quirk, *supra* note 3; Jeffrey J. Mondak, *Cognitive Heuristics, Heuristic Processing, and Efficiency in Political Decision Making*, in 4 RESEARCH IN MICROPOLITICS 84-104 (M. Delli Carpini et al. eds., 1994).

<sup>18</sup> *Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976); *McConnell v. FEC*, 540 U.S. 93, 161 (2003).

<sup>19</sup> John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377, 383-84 (1985). For the Court’s rationale, see *Buckley*, 424 U.S. at 48.

<sup>20</sup> The singular exception is *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

has equated money with speech, a notion that conflates spending to bring a message to the electorate with spending for other purposes—most notably to develop strategies that are designed to strategically manipulate voters' preferences. Research from social and cognitive psychology reveals ways in which certain campaign strategies can induce sub-optimal vote decisions.<sup>21</sup> Ironically, while more money can increase the amount of campaign communication, it can also lower the quality of the communication.

While the primary concern over unlimited spending is the potential for money to increase manipulative communication and corrupt voting decisions, there is a secondary effect relating more directly to inequality in access to funding. To the extent that social science demonstrates the potential for various strategic efforts to yield results, concerns arise over the potential for well-funded actors to gain a substantial edge in manipulating election outcomes.<sup>22</sup> As Chief Justice Earl Warren wrote, “[r]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies.”<sup>23</sup> Participatory democracy embodies notions of political equality, so that the legitimacy of a government rests upon the inclusion and *informed consent* of its members of society.<sup>24</sup> Ultimately, “[t]he broader purposes of our political system are ill-served . . . by allowing too many contests to turn on the differences in the amounts of money that candidates have to spend.”<sup>25</sup>

This Article proceeds in four Parts. Part I makes the case that campaign money buys more than communication—it also buys the ability to implement psychological strategies designed to capitalize on known features of human cognition. This Part delves into behavioral research and theory, detailing several cognitive theories that describe how carefully crafted campaign communication can lead individual voters to make sub-optimal choices. It also provides some historical

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*See infra* Part III.B.

<sup>21</sup> For support of this premise, see Francis N. Botchway, *Good Governance: The Old, the New, the Principle, and the Elements*, 13 FLA. J. INT’L L. 159 (2001); Keith D. Ewing, *Promoting Political Equality: Spending Limits in British Electoral Law*, 2 ELECTION L.J. 499 (2003); Lori Ringhand, *Defining Democracy: The Supreme Court’s Campaign Finance Dilemma*, 56 HASTINGS L.J. 77 (2004).

<sup>22</sup> See Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 896 (1998) (“[D]emocracy requires not only an equal opportunity for people’s votes to make a difference, but also an equal opportunity for people to persuade others to their views.”).

<sup>23</sup> *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (the seminal Supreme Court case on state legislative apportionment).

<sup>24</sup> See John Locke, *Two Treatises of Government*, at ii, viii, 4, 95, reprinted in READINGS ON POLITICAL PHILOSOPHY 530, 551 (F.W. Coker ed., 1938).

<sup>25</sup> J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 631 (1982).



examples of candidates employing psychological tactics. Part II draws a link between campaign dollars and voting outcomes, exploring theories from political science and behavioral decision theory that support this connection. Part III provides background on campaign finance reform, focusing on the Supreme Court's rejection of spending limits in *Buckley v. Valeo* and its progeny. Finally, Part IV argues for a governmental interest in limiting campaign spending. This Part argues for a broader definition of "corruption" than the Court's quid pro quo definition, and describes the potential threat to democracy posed by inequality created when one segment of the population possesses the resources and right to overwhelm the debate.

#### I. WHAT CAMPAIGN DOLLARS BUY: THE CASE FOR SPENDING LIMITS FROM SOCIAL SCIENCE RESEARCH AND THEORY

Models of information transmission imply that the ideological faction that expends sufficient resources on propaganda and manipulation, and that sends sufficiently loud signals can always prevail in defining the terms of debate . . . .<sup>26</sup>

One theme running throughout the Supreme Court's somewhat disjointed campaign jurisprudence is a First Amendment-based commitment to protecting the ability of individuals and groups to communicate political ideas and promote candidates of their choosing.<sup>27</sup> A critical assumption of this free speech focus is the notion that the primary function of campaign funds is to buy communication.<sup>28</sup> In *Buckley v. Valeo*, the Court made this assumption explicit when it stated that "it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."<sup>29</sup> Even proponents of spending limits who express concerns over equality and decry the ability of well-funded interests to "drown out" the opposition often assume a simple correlation between money and message volume.<sup>30</sup> Much of the discussion downplays or ignores

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<sup>26</sup> Dennis Chong, *Creating Common Frames of Reference on Political Issues*, in *POLITICAL PERSUASION AND ATTITUDE CHANGE* 222, 231 (Diana C. Mutz et al. eds., 1996).

<sup>27</sup> See *infra* Part III for a detailed discussion.

<sup>28</sup> See *id.*

<sup>29</sup> See *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976) (citations omitted). *Buckley*, its predecessors, and its progeny are discussed in substantially more detail in Part III, *infra*.

<sup>30</sup> See, e.g., Burt Neuborne, *Buckley's Analytical Flaws*, 6 J.L. & POL'Y 111, 120-21 (1997) ("When we are planning the process that will culminate in the selection of a great deliberative assembly of the people, why is it not possible to impose structural rules on ourselves to assure that one person does not drown everyone else out and that everyone gets a fair chance to have his

entirely the fact that campaign funds buy more than communication. In the political arena no less than in other “markets,” consultants, targeted research efforts, and high-priced strategists consume a substantial portion of the available funds.<sup>31</sup> Campaign messages are crafted with the utmost care, often after lengthy consultation with experts and “spin doctors.”<sup>32</sup> Information is often truncated, intentionally reduced to “sound bites” or otherwise packaged to have maximum impact in a manner that is best for the candidate’s prospect in the election, simultaneously rendering it about as informative and educational to the recipient as the average cat food commercial.

The indispensable role that political consultants have come to occupy in modern politics is indicative of the importance of tactical maneuvering in political campaigns.<sup>33</sup> The price tag for political strategy experts is considerable.<sup>34</sup> Yet candidates consistently demonstrate a willingness to commit campaign funds to retain these professionals.<sup>35</sup> Political consultants supply a critical knowledge of those cognitive mechanisms that have been successfully exploited by marketing strategists in other forums. It has been remarked:

Politics and campaigns are structured around how, where, and to whom a candidate or issue should be presented. In developing such strategies and tactics, campaign managers and political consultants do not turn to texts on American government or treatises on democratic theories. Instead, they consult experts in product development and advertising.<sup>36</sup>

The methods and purpose of political consultants are particularly important, given their central role in politics and the power they wield. Some commentators have gone so far as to argue that political

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or her say? The *Buckley* rules forbid us to try.”)

<sup>31</sup> See LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, *POLITICIANS DON’T PANDER* (2000) (describing the considerable resources invested by political operatives in efforts to craft messages that will persuade the public).

<sup>32</sup> *Id.*

<sup>33</sup> JAMES A. THURBER & CANDICE J. NELSON, *CAMPAIGN WARRIORS: THE ROLE OF POLITICAL CONSULTANTS IN ELECTIONS 2* (2000) (asserting that consultants are so central to the campaign process that they exercise key influence over it).

<sup>34</sup> See Edward L. Barrett, Jr., *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 684 (1997) (“Where does all this political money go? The biggest expense is the cost of purchasing advertising time on television (though increasingly, political consultants take a hefty share).”); see also Linda L. Fowler, *The Best Congress Money Can Buy?*, 6 ELECTION L.J. 417, 420 (2007) (reviewing JENNIFER A. STEEN, *SELF-FINANCED CANDIDATES IN CONGRESSIONAL ELECTIONS* (2006)) (discussing the “escalating costs of campaigns” and “dominance of political consultants in shaping election messages”).

<sup>35</sup> See LARRY SABATO, *THE RISE OF POLITICAL CONSULTANTS: NEW WAYS OF WINNING ELECTIONS* 49-53 (1981).

<sup>36</sup> Mary J. Culnan & Patricia M. Regan, *Privacy Issues and the Creation of Campaign Mailing Lists*, 11 INFO. SOC’Y 85, 86-87 (1995).

consultants have had important (and perhaps deleterious) influence within the campaign finance debate.<sup>37</sup>

Of course, political communication must be designed to be persuasive, but the content and quality of the messages vary in the degree to which they capitalize on human irrationalities and biases.<sup>38</sup> A crucial question for public advocates, commentators, and the Court is whether unfettered access to campaign funds intensifies the strategic distortion of information. Ultimately, this is an empirical question, and a tricky one to answer. Political candidates are unlikely to supply the type of information that would make detailed analysis feasible.<sup>39</sup> Even if it were possible to gain access to records of funds spent on strategy sessions and specific techniques employed, the challenge of directly linking dollars spent to specific impacts on voting behavior might well be insurmountable. In the absence of direct data, psychological research and theory provide insight regarding the potential for manipulative communication to distort vote choice.<sup>40</sup> Specifically, social and cognitive psychological research reveals the power of targeted communication strategies to directly and indirectly influence decision-making.<sup>41</sup> This varied and robust literature can shed light on how “strategy dollars” impact voting behavior.

A. *The Not-So-Rational Voter: Heuristics and Biases in Campaign Tactics*

Most of the current scholarship on voting behavior was born out of previous attempts to describe human judgment-formation more generally. Arguably, the most influential of the early theories was rational choice theory—the notion that in forming judgments, people are rational actors who consider all relevant information, apply reason, and weigh costs and benefits to arrive at a utility-maximizing decision.<sup>42</sup> Evidence from empirical studies of how human beings

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<sup>37</sup> See Robert F. Bauer, *A Report from the Field: Campaign Professionals on the First Election Cycle Under the Bipartisan Campaign Reform Act*, 5 ELECTION L.J. 105 (2006) (considering consultants for their role in, or impact on, elections); see also James A. Thurber et al., *Portrait of Campaign Consultants*, in CAMPAIGN WARRIORS: THE ROLE OF POLITICAL CONSULTANTS 33-34 (2000).

<sup>38</sup> See *infra* Part I.A.

<sup>39</sup> See, e.g., Marc Caputo, *Florida Lawmakers Want Names Behind Political Attack Ads*, MIAMI HERALD, Sept. 9, 2009, available at <http://www.miamiherald.com/news/southflorida/story/1213491.html>.

<sup>40</sup> See *infra* Part II.

<sup>41</sup> See Schaffner, *supra* note 5, at 805; see also IYENGAR & KINDER, *supra* note 12; WEST, *supra* note 12.

<sup>42</sup> An early attempt to apply a theoretical framework of human behavior to legal problems was born out of two ground-breaking articles: Ronald Coase, *The Problem of Social Cost*, 3 J.L.

formulate choice suggests that individuals are not “rational” in the strict sense of the word. Rather, individuals have limited memories, an inability to gather all relevant information and correctly weight factors, and the tendency to be influenced by biased or irrelevant information.<sup>43</sup> Behavioral decision theorists have focused much of their work on identifying systematic ways in which human decision-making deviates from rational choice theory.<sup>44</sup> The image of people as rational maximizers has not held up under close empirical scrutiny.<sup>45</sup> Instead of the elegant, parsimonious theory offered by classical law and economics, social science research has given rise to an untidy constellation of heuristics and biases that serve as the basis for much of human decision-making.<sup>46</sup>

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& ECON. 1 (1960), and Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961). The publication of these articles is widely viewed as marking the birth of law and economics, or the application of economic principles to legal problems. See, e.g., Amnon Lehari, *The Property Puzzle*, 96 GEO. L.J. 1987, 1990 (2008) (discussing the “foundational writings of Ronald Coase and . . . Guido Calabresi”); see also ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 2 (4th ed. 2004).

<sup>43</sup> Herbert Simon introduced the notion of “bounded rationality” in the 1950s to account for the fact that human beings have finite computational resources available for making choices. See HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY: BEHAVIORAL ECONOMICS AND BUSINESS ORGANIZATION* 2 (1982). Decision-making using incomplete or imperfect information is an important feature of human functioning in the real world. Scholarship supporting this notion is abundant. Sometimes called behavioral decision theory, sometimes behavioral law and economics, the interdisciplinary field that explores cognitive features of human decision-making combines law, psychology, and economic principles—as they relate to the “rational actor.” See, e.g., Jolls et al., *supra* note 2, at 1476 (“The task of behavioral law and economics, simply stated, is to explore the implications of actual not hypothesized human behavior for the law. How do ‘real people’ differ from homo economicus?” (internal parentheses omitted)).

<sup>44</sup> See Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 347-48 (1984); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 263-91 (1979) [hereinafter Kahneman & Tversky, *Prospect Theory*]; Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCHOL. 430, 430 (1972). For some early law review pieces discussing heuristical processing and responses in legal frameworks, see Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1436-42 (1983) (discussing the availability and representative heuristics); Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1428 (1979) (“[S]tudies show that in making individualized judgments people rely primarily on information about the case at hand, paying relatively little attention to background information about other cases.”).

<sup>45</sup> See BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); CHOICES, VALUES, AND FRAMES, *supra* note 9 (discussing empirical investigations of how human beings process information and make choices). For an early discussion of behavioral decision-making, see Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955).

<sup>46</sup> These heuristics and biases have been discussed under the rubric of “behavioral decision theory” or “behavioral law and economics,” and include anchoring and adjustment, optimism bias, representativeness heuristic, hindsight bias, conjunction fallacy, endowment effect and related status quo bias, risk aversion, and, of course, availability heuristic, to name a few.

Voters—who, after all, are simply human beings performing one of many decision tasks—routinely violate norms of rationality.<sup>47</sup> Each time a voter casts a ballot, he or she does so knowing that the individual vote will have little impact.<sup>48</sup> Accordingly, the very act of voting is irrational from a strict utility perspective. Furthermore, because a single voter has little power to influence an election outcome, the time that most voters devote to investigating the records and policy positions of political candidates is limited.<sup>49</sup> Armed with relatively scant information, voters tend to rely heavily upon heuristics.<sup>50</sup> Heuristics are cognitive shortcuts that serve to “keep the information processing demands of the task within bounds”—a useful function, particularly in low-information situations.<sup>51</sup> Voters’ use of heuristics is ultimately sensible—after all, like other types of decision-making, voting involves gathering, assimilating, and weighting a great deal of information derived from a potentially large number of sources.<sup>52</sup> However, the tendency of voters to rely on less than perfect information and to process that information in a relatively cursory way means that the decision-making process is particularly vulnerable to manipulation by political candidates and parties.<sup>53</sup>

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<sup>47</sup> See Kuklinski & Quirk, *supra* note 3, at 181-82 (“We have cautioned against overly optimistic accounts of a politically competent, rational public. Citizens not only are minimally informed, as nearly all scholars agree; but they are also prone to bias and error in using the limited information they receive.”).

<sup>48</sup> See Daniel J. Schwartz, *The Potential Effects of Nondeferential Review on Interest Group Incentives and Voter Turnout*, 77 N.Y.U. L. REV. 1845, 1851 (2002) (“Public choice theory assumes that each voter is economically rational, meaning that he will vote only if his expected benefits, discounted by the possibility that his vote will not affect the outcome, exceed his costs.” (citations omitted)); see also Roger L. Faith & Robert D. Tollison, *Expressive Versus Economic Voting*, in PREDICTING POLITICS 231, 231 (W. Mark Crain & Robert D. Tollison eds., 1990).

<sup>49</sup> Elizabeth Garrett and Daniel Smith argue that policymakers should take steps to improve the cues upon which voters typically rely in order to improve the “competence” of the electorate. See Garrett & Smith, *supra* note 3, at 296-97 (“Accordingly, policymakers can improve the competence of ordinary voters by structuring the information environment to provide citizens with cues or heuristics that will help them vote competently with limited data.”).

<sup>50</sup> *Id.* at 296; see also Bartels, *supra* note 5; Bianco, *supra* note 5, at 1064; Krishnakumar, *supra* note 3; Kuklinski & Quirk, *supra* note 3, at 181; Nelson & Oxley, *supra* note 5; Nelson et al., *supra* note 5; Schaffner, *supra* note 5.

<sup>51</sup> Robert P. Abelson & Ariel Levi, *Decision Making and Decision Theory*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 231-309 (Gardner Lindzey & Elliot Aronson eds., 1985).

<sup>52</sup> See also Bianco, *supra* note 5, at 1064; Krishnakumar, *supra* note 3, at 537; Kuklinski & Quirk, *supra* note 3.

<sup>53</sup> It is important to note that this is a *potential* rather than an inevitability. Voters vary in their susceptibility to manipulative tactics. Moreover, candidates vary in the degree to which they engage in the systematic exploitation of cognitive heuristics. Communication that straightforwardly presents a candidate’s policy position does not exploit these cognitive tendencies. Where communication crosses the line from informative to exploitative is not always clear. One of this Article’s objectives is to make the case that few, if any, national political candidates eschew strategic tactics of this type. Indeed, it is difficult to know whether, under our current system, a national candidate could be successful without the use of the techniques described in this Article. However, this Article argues that political strategies that systematically

Political scientists have suggested that voters are competent, even though the vote that they cast is based on limited information, if it is the same vote they would have cast if they had had complete information.<sup>54</sup> To the degree that a voter's reliance on limited information and cognitive heuristics results in a vote that is different from that which he or she would have cast with full information, the voter is not competent, and the vote is "incorrect."<sup>55</sup> The question is whether in light of what we know about how human beings make choices, voting decisions are vulnerable to cognition-based strategies. While the evidence is not incontrovertible, several bodies of research suggest that there is reason for concern. One commentator noted:

[R]esearch in the basic sciences of human cognition—neural science, cognitive psychology, and evolutionary psychology—has converged on several findings that are relevant for models of mass politics. Contrary to the political-heuristics and collective-opinion perspectives, these findings suggest that human cognition is not well adapted to the tasks of citizens.<sup>56</sup>

Voters already struggle to make utility-maximizing decisions in the complex political marketplace; the challenge increases when millions of dollars are spent to influence those decisions to favor particular candidates.

### B. *Some Examples of Heuristics and Biases Exploited During Political Campaigning*

The potential for sub-optimal vote decisions has been played down by some commentators who have argued that even when voters rely on imperfect informational cues or use shortcuts to arrive at a decision, they still may vote competently.<sup>57</sup> However, a substantial body of research from social and cognitive psychology and political science

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lead voters to make decisions that are different from those they would otherwise make should be minimized, and that gross disparities in the availability of funds with which to engage in these tactics should be eliminated, in order to create greater equality amongst political candidates for the good of the voting public and the goals of democracy.

<sup>54</sup> See Garrett & Smith, *supra* note 3, at 296; see also Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections*, in *CITIZEN, COMPETENCE AND DEMOCRATIC INSTITUTIONS* 147, 149 (Stephen L. Elkin & Karol Edward Soltan eds., 1999).

<sup>55</sup> Gerber & Lupia, *supra* note 54, at 149; see also Kuklinski & Quirk, *supra* note 3, at 156-57 (finding that the voting public is prone to make errors); Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 *AM. J. POL. SCI.* 951, 966 (2001) ("In fact, heavy reliance on political heuristics actually made decision making less accurate among those low in political sophistication.").

<sup>56</sup> Kuklinski & Quirk, *supra* note 3, at 154.

<sup>57</sup> See Garrett & Smith, *supra* note 3; see also Bartels, *supra* note 5; Bianco, *supra* note 5; Krishnakumar, *supra* note 3; Kuklinski & Quirk, *supra* note 3, at 157; Nelson & Oxley, *supra* note 5; Nelson et al., *supra* note 5.

casts serious doubt on this assertion.<sup>58</sup> Of those heuristics and biases most relevant to the vote-decision context, empirical investigations of priming and framing provide the most compelling evidence of political strategy based distortions in voting behavior.

### 1. Framing

Often something as simple as the way in which a choice is presented or framed can influence the decision-maker's preference in profound ways.<sup>59</sup> The effects of framing can be seen when two "logically equivalent (but not transparently equivalent) statements of a problem lead decision makers to choose different options."<sup>60</sup> Framing theory is rooted in prospect theory, a ground-breaking proposal for how certain features of a decision context can influence perceptions and decision outcomes.<sup>61</sup> Prospect theory has two main claims about how people make decisions with respect to a course of action when the outcome is uncertain. First, individuals assign more significance to a loss of a certain amount than they do to an equivalent gain.<sup>62</sup> Second, people overweigh low probabilities and underweigh moderate and high probabilities.<sup>63</sup> As a result, decision-makers are often inaccurate in determining how likely an outcome is and, as a result, misjudge risks. The premises of prospect theory have been borne out by empirical research and have been demonstrated in a wide variety of contexts.<sup>64</sup>

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<sup>58</sup> See Kuklinski & Quirk, *supra* note 3, at 156 ("Judging from . . . this research, various and sometimes severe distortions can occur in people's political judgments. They hold inaccurate and stereotyped factual beliefs, hold their beliefs overconfidently, resist correct information, prefer easy arguments, interpret elite statements according to racial or other biases, and rely heavily on scanty information about a candidate's policy positions.")

<sup>59</sup> See Sharfir, *supra* note 8 ("Framing refers to the tendency of normatively inconsequential changes in the formulation of a choice problem to affect the ways people represent the problem and, consequently, their preferences."); Tversky & Kahneman, *supra* note 8. For early discussions of framing, see GOFFMAN, *supra* note 8.

<sup>60</sup> Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LITERATURE 11, 36 (1998).

<sup>61</sup> See Kahneman & Tversky, *Prospect Theory*, *supra* note 44, at 279.

<sup>62</sup> See *id.*

<sup>63</sup> *Id.*

<sup>64</sup> See Darryl K. Brown, *Regulating Decision Effects of Legally Sufficient Jury Instructions*, 73 S. CAL. L. REV. 1105, 1112-13 (2000) (discussing the importance of wording on jury decision-making); Shane Frederick, *Measuring Intergenerational Time Preference: Are Future Lives Valued Less?*, 26 J. RISK & UNCERTAINTY 39, 48 (2003); Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions*, in CHOICES, VALUES, AND FRAMES, *supra* note 9, at 224, 225 (analyzing framing in the context of consumers' decisions about insurance); Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341, 1403 (1995) (finding that framing has substantial effects on non-pecuniary damage awards); Barbara J. McNeil et al., *On the Elicitation of Preferences for Alternative Therapies*, 306 NEW ENG. J. MED. 1259 (1982) (describing how framing influences medical decisions); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S260-62 (1986) (noting that consumers prefer to forgo a discount

The potential for exploitation of human decision-making through the use of frames is significant in the political marketplace, because framing is often simply a matter of strategic word choice—a simple restructuring of syntax can have important effects because “different frames can lead to different choices.”<sup>65</sup> There is some debate with respect to whether the target is passive or active in shifting focus according to the frame presented.<sup>66</sup> However, there is little controversy with respect to the power of framing techniques to influence opinion.<sup>67</sup> Indeed, the potential for strategic employment of this cognitive tendency has been cited as a hallmark characteristic of framing.<sup>68</sup>

Characteristics of the decision-maker or decision-making context that could theoretically decrease an individual’s vulnerability to manipulation rarely have that effect. For example, framing effects are so powerful that even professionals who arguably have the knowledge and expertise to avoid being misled are influenced by the way an outcome is framed.<sup>69</sup> Moreover, the potential for impact on decisions through linguistics or literal representations is almost limitless. As one commentator noted, “[f]raming is a potentially ubiquitous phenomenon: anywhere there is an informational asymmetry (and asymmetries are nearly universal in the consumer context), a framing effect is possible.”<sup>70</sup>

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than to pay a surcharge).

<sup>65</sup> See Tversky & Kahneman, *supra* note 8, at 454; see also Thaler, *supra* note 9.

<sup>66</sup> For support for the passive view, see SHANTO IYENGAR, IS ANYONE RESPONSIBLE?: HOW TELEVISION FRAMES POLITICAL ISSUES 130-36 (1991); JOHN ZALLER, THE NATURE AND ORIGINS OF MASS OPINION 83-84 (1992). For a discussion of research that supports the notion that individuals consciously and deliberately think about the relative importance of different considerations suggested by a frame, see Thomas E. Nelson et al., *Media Framing of a Civil Liberties Conflict and Its Effect on Tolerance*, 91 AM. POL. SCI. REV. 567 (1997). See also Thomas E. Nelson & Donald R. Kinder, *Issue Frames and Group-Centrism in American Public Opinion*, 58 J. POL. 1055 (1996); Nelson & Oxley, *supra* note 5; Nelson et al., *supra* note 5.

<sup>67</sup> See Hanson & Kysar, *supra* note 1, at 684-85 (“[F]raming effects are somewhat different from the other cognitive anomalies that have been identified by behavioral researchers. They are perhaps the most obviously exploitable of the biases, capable, for instance, of causing dramatic preference reversals based on an entirely nonsubstantive shift in terminology. And that is true inasmuch as they trigger or reflect the operation of other cognitive biases.”).

<sup>68</sup> Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 NOTRE DAME L. REV. 313, 317 (2006) (stating that one important aspect of framing is “the ability of someone who is propounding an option to present the option—i.e., to frame it—in such a way as to take advantage of framing effects and make the option seem more or less desirable”).

<sup>69</sup> For example, physicians—like their patients—prefer a treatment option when told that “90 live through the postoperative period and 34 are alive at the end of 5 years,” than when they are told, “10 die during the postoperative period and 66 die by the end of 5 years,” although the only difference between these outcomes is in the way they are stated. Donald A. Redelmeier et al., *Understanding Patients’ Decisions: Cognitive and Emotional Perspectives*, 270 J. AM. MED. ASS’N 72, 73 (1993).

<sup>70</sup> Richard L. Hasen, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391, 393 (1990).



## 2. How Candidates Use Framing

Framing is indeed ubiquitous in the political realm. The typical political candidate devotes considerable resources to framing the debate so as to gain an advantage.<sup>71</sup> In research on political campaign communications, framing has been described as the process by which a source characterizes a particular social or political issue and defines the considerations allegedly relevant to that issue.<sup>72</sup> Candidates frame by placing emphasis on a particular subset of potentially relevant considerations, causing listeners to focus on these considerations when forming an opinion about the issue.<sup>73</sup> In the popular media, framing has been recognized as a critical tool for politicians and parties alike, in the effort to control the agenda and the hearts and minds of Americans.<sup>74</sup>

Some scholars have expressed concern over the ease with which framing can serve the purposes of anyone who has sufficient resources. For example, Kinder and Herzog have explained that their “worry about the nefarious possibilities of framing is just that they can become freewheeling exercises in pure manipulation.”<sup>75</sup> One subset of framing called “valence framing” occurs when choice is influenced by language that describes options in diametrically opposed positive or negative terms.<sup>76</sup> Indeed, valence framing may be the most common type of framing seen during political campaigns. One example provided by

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<sup>71</sup> Dennis Chong, *How People Think, Reason, and Feel About Rights and Liberties*, 37 J. POL. SCI. 867, 870 (1993) (noting that the “essence of public opinion formation in general lies in the distillation or sorting out of frames of reference”).

<sup>72</sup> See Druckman, *supra* note 10, at 1042 (“Specifically, a framing effect is said to occur when, in the course of describing an issue or event, a speaker’s emphasis on a subset of potentially relevant considerations causes individuals to focus on these considerations when constructing their opinions.”); see also William A. Gamson & Andre Modigliani, *Media Discourse and Public Opinion on Nuclear Power: A Constructionist Approach*, 95 AM. J. SOC. 1, 3 (1989) (explaining that a frame is a “central organizing idea . . . for making sense of relevant events [and] suggesting what is at issue”).

<sup>73</sup> See Druckman, *supra* note 10, at 1042.

<sup>74</sup> For a depiction of how the use of framing tactics had been widely credited for winning the presidential election for the Republicans in 2004, see Matt Bai, *The Framing Wars*, N.Y. TIMES, July 17, 2005, § 6 (Magazine), at 38. Bai notes:

As the weeks passed, however, at Washington dinner parties and in public post-mortems, one explanation took hold not just among Washington insiders but among far-flung contributors, activists and bloggers too: the problem wasn’t the substance of the party’s agenda or its messenger as much as it was the Democrats’ inability to communicate coherently. They had allowed Republicans to control the language of the debate, and that had been their undoing.

*Id.*

<sup>75</sup> Kinder & Herzog, *supra* note 10, at 363.

<sup>76</sup> See Irwin P. Levin et al., *All Frames Are Not Created Equal: A Typology and Critical Analysis of Framing Effects*, 76 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 149, 150 (1998).

James Druckman relates to how individuals view a Ku Klux Klan rally. As noted by Druckman, the perceived acceptability of such a rally varies, depending upon whether it is framed as a free speech issue or a public safety issue.<sup>77</sup>

### 3. Priming

Priming, like framing, is a technique used to influence attitudes and decision outcomes.<sup>78</sup> The term “priming” has been used in a variety of related ways. At its most basic, priming is an experimental technique by which exposure to a target sensitizes the subject to a later presentation of the same or a similar target. Within a social psychological framework, researchers using the priming paradigm have found that individuals’ interpretation of information often depends on which knowledge structures are currently active.<sup>79</sup> Subsequent decisions are influenced by those concepts that are most accessible at the time that information is processed.<sup>80</sup> The accessibility of a particular concept—the likelihood that the concept will be retrieved and used—is enhanced by prior exposure to the concept.<sup>81</sup> Strategic priming may be thought of as a two-part process:

- (1) it sets the agenda by focusing public attention on certain topics, and
- (2) it provides the main basis for evaluation. Thus the messages communicated significantly influence which attitudes and information are likely to be retrieved or accessed from memory and incorporated into voters’ judgments about, and ultimate choices of, candidates.<sup>82</sup>

Examining the use and effects of priming reveals a great deal about how political candidates structure campaign strategy.<sup>83</sup>

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<sup>77</sup> See Druckman, *supra* note 10, at 1041.

<sup>78</sup> See LUPIA & MCCUBBINS, *supra* note 3 (distinguishing priming from framing).

<sup>79</sup> See Robert S. Wyer & Thomas K. Srull, *Category Accessibility: Some Theoretical and Empirical Issues Concerning the Processing of Social Stimulus Information*, in *SOCIAL COGNITION: THE ONTARIO SYMPOSIUM* 161 (E. Tory Higgins et al. eds., 1981).

<sup>80</sup> *Id.*

<sup>81</sup> Youjae Yi, *The Effects of Contextual Priming in Print Advertisements*, 17 *J. CONSUMER RES.* 215, 215 (1990); see also Tory E. Higgins & Gillian A. King, *Accessibility of Social Constructs: Information Processing Consequences of Individual and Contextual Variability*, in *PERSONALITY, COGNITION, AND SOCIAL INTERACTION* 69 (Nancy Cantor & John Kihlstrom eds., 1981).

<sup>82</sup> Lawrence R. Jacobs & Robert Y. Shapiro, *Issues, Candidate Image, and Priming: The Use of Private Polls in Kennedy’s 1960 Presidential Campaign*, 88 *AM. POL. SCI. REV.* 527, 528 (1994); see Bianco, *supra* note 5, at 1068 (describing a voter’s evaluation of a candidate who is willing to do whatever it takes to make a favorable impression).

<sup>83</sup> Research on priming offers one approach for conceptually linking the analyses of campaign behavior and vote choice. Incorporating candidate behavior in the study of voters would mean treating the influences on vote choices as endogenous to the campaign (i.e., the impact of deliberate strategies that candidates pursue in order to win over voters). See Jacobs &

#### 4. How Candidates Use Priming

Priming is one of the most commonly discussed psychological tactics employed by candidates and political parties in attempts to sway voter decision-making.<sup>84</sup> Also known as “agenda-setting,” political campaign priming leads voters to assign certain issues particular importance by focusing on those issues in news coverage and campaign ads.<sup>85</sup> One example of political agenda-setting occurred in Bill Clinton’s 1992 presidential campaign. Clinton successfully primed the issue of the economy, making it the issue upon which many voters evaluated the candidates. Ultimately, many believe that Clinton won the election in large part because the weak economy was problematic for the incumbent president.<sup>86</sup>

Priming is an important strategy because as a general matter, the electorate is not well-informed about all important political issues.<sup>87</sup> When a candidate engages in an attempt to prime particular issues, the goal is to place those issues front and center and to increase the importance or accessibility of those issues to the voting public.<sup>88</sup> Successful priming efforts can change the way voters think about a target by creating new cognitive avenues that, in turn, encourage positive evaluation. A candidate who has a favorable voting record on a particular issue might concentrate efforts on getting that issue into the media: television, print, and radio, as well as devoting considerable amounts of time to talking about that particular issue in campaign speeches, interviews, and debates.<sup>89</sup> Data on issue voting and campaign

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Shapiro, *supra* note 82; *see also* Bianco, *supra* note 5, at 1068.

<sup>84</sup> *See, e.g.*, BARKER, *supra* note 12; Druckman, *supra* note 12, at 584-90 (giving an example of priming in one election); *see also* Druckman & Holmes, *supra* note 12; Druckman et al., *supra* note 12, at 1181.

<sup>85</sup> *See* Schaffner, *supra* note 5, at 805 (“As they are set on the agenda, particular issues become primed in the minds of voters, meaning that voters give those issues more weight when making their vote decisions.”); *see also* IYENGAR & KINDER, *supra* note 12; WEST, *supra* note 12.

<sup>86</sup> For a time, Bush had the upper hand because of foreign policy developments such as the end of the Cold War and the Persian Gulf War. Clinton’s campaign strategist, James Carville, has been credited with focusing efforts on turning the attention of Americans to the economy, which had recently undergone a recession. Richard Alleyne, *Gordon Brown: It’s the Economy, Stupid!*, TELEGRAPH.CO.UK, May 23, 2008, <http://www.telegraph.co.uk/news/newsttopics/byelection/2015038/Gordon-Brown-Its-the-economy-stupid.html> (last visited Nov. 20, 2009).

<sup>87</sup> Voters, like people facing other types of decisions, will devote varying amounts of time and resources to learning about the positions of various political actors. *See* Garrett & Smith, *supra* note 3.

<sup>88</sup> Priming operates on the notion that “changes in the number of stories about an issue affect the ingredients of presidential performance evaluations.” Druckman, *supra* note 10, at 1043-44.

<sup>89</sup> *See* Druckman et al., *supra* note 12, at 1181 (“Candidates engage in priming by emphasizing certain issues—by giving those issues more space in their statements—with the goal of inducing voters to put more weight on those issues when choosing among candidates.”).

communication confirm that emphasizing a particular subset of issues influences the importance of those issues to the electorate as a whole.<sup>90</sup>

Often, one issue will be sufficiently important to a large segment of the electorate so as to make it an obvious target for priming for the candidate who stands to gain most from that issue's prominence.<sup>91</sup> Candidates and political parties determine which issues will reap the greatest benefit by conducting extensive polling.<sup>92</sup> Priming achieves optimal results when an issue: (1) reaches a certain threshold of importance to the voter, and (2) is likely to cast the candidate in a good light. More specifically, priming an issue will benefit a candidate when voters approve of the candidate's handling of the issue,<sup>93</sup> when the public supports the candidate's position on the issue,<sup>94</sup> or when the electorate deems the issue to be important.<sup>95</sup>

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<sup>90</sup> See John H. Aldrich & R. Michael Alvarez, *Issues and the Presidential Primary Voter*, 16 POL. BEHAV. 289 (1994); John H. Aldrich et al., *Foreign Affairs and Issue Voting: Do Presidential Candidates "Waltz Before a Blind Audience?"*, 83 AM. POL. SCI. REV. 123-41 (1989); Steven E. Finkel, *Reexamining the "Minimal Effects" Model in Recent Presidential Campaigns*, 55 J. POL. 1, 2 (1993) ("[E]mpirical studies showed possible increases in the electoral effects of campaign-related factors such as candidate personality judgments, media coverage, debates, and television advertising." (citations omitted)).

<sup>91</sup> For example, in the 2008 presidential election, much of the campaigning involved a candidate's position on the war in Iraq. Depending upon how the war was going (or how the public perceived the war was going), candidates would selectively prime this issue.

More generally, some candidates have engaged in targeted framing, known as political narrowcasting. According to Michael Kang, this strategy involves: (1) identifying every voter who might be persuaded to vote for one's party; (2) approaching each targeted voter with a tailored message designed specifically for her (all primed, framed, and ready to go); and (3) devoting effort to assuring that every voter who is likely to vote for one's party turns out on election day. Michael S. Kang, *From Broadcasting to Narrowcasting: The Emerging Challenge for Campaign Finance Law*, 73 GEO. WASH. L. REV. 1070, 1070 (2005).

Finally, a candidate may target a large swath of the voting public that is particularly likely to be swayed in the candidate's direction and turn up at the polls. For example, if young people are more likely to vote, then we may see issues being primed around financing education, whereas if older populations are more likely to vote we may see more issues being primed around healthcare, social security benefits, taxes, and so on. See Druckman et al., *supra* note 12, at 1182.

<sup>92</sup> See *id.* at 1181 ("A critical part of the priming strategy involves using public opinion polls to pinpoint advantageous issues for the campaign to emphasize."); see also JOHN G. GEER, *FROM TEA LEAVES TO OPINION POLLS: A THEORY OF DEMOCRATIC LEADERSHIP* (1996).

<sup>93</sup> Joanne M. Miller & Jon A. Krosnick, *News Media Impact on the Ingredients of Presidential Evaluations: Politically Knowledgeable Citizens Are Guided by a Trusted Source*, 44 AM. J. POL. SCI. 301, 301-02 (2000); see also John R. Petrocik, *Issue Ownership in Presidential Elections, with a 1980 Case Study*, 40 AM. J. POL. SCI. 825 (1996) (predicting that candidates will emphasize issues that will reflect favorably on them).

<sup>94</sup> WILLIAM H. RIKER, *THE STRATEGY OF RHETORIC: CAMPAIGNING FOR THE AMERICAN CONSTITUTION* (Randall L. Calvert et al. eds., 1996); Matthew Mendelsohn, *The Media and Interpersonal Communications*, 58 J. POL. 112, 113-14 (1996).

<sup>95</sup> MICHAEL W. TRAUGOTT & PAUL J. LAVRAKAS, *THE VOTER'S GUIDE TO ELECTION POLLS* (2d ed. 2000); Thomas H. Hammond & Brian D. Humes, "What This Campaign Is All About Is . . .": *A Rational Choice Alternative to the Downsian Spatial Model of Elections*, in INFORMATION, PARTICIPATION, AND CHOICE 141, 144 (Bernard Grofman ed., 1st paperback ed. 1995).

Personality traits are often targets of political priming. Candidates' personal characteristics are interpreted by voters to be indirect measures of performance and policy preferences. For example, while a candidate's record of being strong and decisive in dealing with rogue nations has direct implications for the candidate's future behavior as commander-in-chief, public perception of a candidate's "strength" as a leader is influenced by factors other than his or her record, and may be particularly susceptible to manipulation. Demeanor, dress, nonverbal behavior, and other aspects of a candidate's personal appearance have important implications for impression formation. Research has indicated the importance of personal impression for candidates,<sup>96</sup> and recent scholarship suggests that candidates engage in strategic priming to influence image perceptions.<sup>97</sup> Because negative perceptions of personality attributes are often more influential than favorable evaluations,<sup>98</sup> candidates generally devote more time and resources to reversing negative evaluations. So, if a candidate is viewed by the public as being less competent and less strong, but more warm and trusting, that candidate is likely to prime those issues that encourage favorable strength and competency evaluations, as opposed to those geared towards demonstrating trustworthiness or warmth.

Priming for image enhancement may be accomplished by promulgating particular representations of the candidate closely associated with images imbued with symbolic meaning. For example, "[a] candidate who seems unapproachable and "cold" may embark on a quest to be seen holding (and literally and metaphorically, kissing) as many babies as possible. Repetition of such imagery, particularly if the staging is subtle, can influence perceptions in powerful ways."<sup>99</sup> Candidates can also take a more direct approach by priming issues that elicit a certain evaluation of the candidate for reasons extraneous to the issue itself. Focusing on certain issues (such as gas prices or taxes for

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<sup>96</sup> SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* 56 (2d ed. 1994).

<sup>97</sup> Carolyn L. Funk, *Bringing the Candidate into Models of Candidate Evaluation*, 61 J. POL. 700, 700 (1999) ("[P]residential campaigns pay a good deal of attention to the development of candidate trait images."); Jacobs & Shapiro, *supra* note 82, at 527 ("[C]andidates use popular policy issues to influence or to 'prime' the electorate's standards for evaluating their personal attributes." (internal parentheses omitted)); Mendelsohn, *supra* note 94, at 113.

<sup>98</sup> Susan T. Fiske, *Attention and Weight in Person Perception*, 38 J. PERSONALITY & SOC. PSYCHOL. 889, 891-92 (1980); Richard R. Lau, *Two Explanations for Negativity Effects in Political Behavior*, 29 AM. J. POL. SCI. 119, 121 (1985).

<sup>99</sup> See POPKIN, *supra* note 96, at 88-89 (arguing that a sitting president can highlight and improve perceptions of his strength by campaigning from the White House Rose Garden); see also James N. Druckman, *The Power of Television Images*, 65 J. POL. 559, 569 (2003) ("My experiment, comparing television with audio, demonstrates that television images matter—they prime people to rely more on personality perceptions when evaluating candidates, which, in turn, can affect overall evaluations.").

working-class Americans) can make a candidate seem empathetic,<sup>100</sup> while priming issues of personal knowledge or experience can increase the public's perception that the candidate is competent.<sup>101</sup>

##### 5. The Link Between Priming and the Availability Heuristic

When events, connections, concepts, and risks are easily brought to mind, they are said to be "available." Research has demonstrated that recent or frequent events, and events or depictions that are vivid or emotionally loaded, are particularly likely to become cognitively available.<sup>102</sup> Empirical investigations of the availability heuristic suggest that judgments about the relative risk and importance of certain events and issues can be heavily influenced by how available representative examples are. For example, prior to the terrorist attack on the World Trade Center on September 11, 2001, Americans were relatively unconcerned about terrorism.<sup>103</sup> More than a year after the attack, public polls revealed that a significant percentage of respondents judged terrorism to be the single most important problem, and "fluctuations [in Americans' concern about terrorism] closely track[ed] the frequency of television news stories concerning terrorism."<sup>104</sup> Priming and activation of the availability heuristic both capitalize upon the fact that voters often use memory-based processing strategies when evaluating candidates and issues.<sup>105</sup> Candidates prime issues or images by repeating them, creating themes, and increasing the cognitive availability of the themes and any associated information.<sup>106</sup> Political

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<sup>100</sup> RICHARD F. FENNO, JR., *HOME STYLE* (1978).

<sup>101</sup> Patrick Sellers, *Strategy and Background in Congressional Campaigns*, 92 AM. POL. SCI. REV. 159-71 (1998).

<sup>102</sup> See Wilson & Fuchs, *supra* note 13, at 2149 ("The availability heuristic is a widely-used mental shortcut that leads people to assign a higher likelihood to events that are readily 'available'—events that are particularly likely to come to mind due to their vividness, recency, or frequency.").

<sup>103</sup> Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503, 532 (2007) ("[O]n September 10, 2001, terrorism was far from a high priority item for Americans—and . . . the year before the attacks, literally 0% of the public counted terrorism as the nation's leading problem!" (citing ROBERT E. GOODIN, *WHAT'S WRONG WITH TERRORISM?* 135 (2006))).

<sup>104</sup> *Id.*

<sup>105</sup> "In particular, the decay of certain effects suggests that voters often use memory-based processing strategies when evaluating candidates." Daron R. Shaw, *A Study of Presidential Campaign Event Effects from 1952 to 1992*, 61 J. POL. 387, 417 (1999) (looking at the effects of messages, party activities, mistakes, and outside occurrences on vote decisions).

<sup>106</sup> Politically and socially motivated actors have been accused of priming and engaging in availability campaigns. McCarthyism has been cited as one example of this: "The anticommunist educational campaign and widespread media coverage of world events (primed) an informational (availability) cascade . . . [and] such images have been vivid and easily retrieved." Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 179

psychologists have noted the effectiveness of such a strategy, finding that “information that is widely and repeatedly disseminated to the public stands a good chance of being absorbed (and retrieved later).”<sup>107</sup>

Public interest groups—particularly consumer watchdog and environmental groups—have successfully exploited the availability heuristic in a variety of situations.<sup>108</sup> Political candidates who have their own motivation to engage in impression formation may take a page out of the same book, developing political strategies modeled on those interest group successes.<sup>109</sup> While grassroots organizations may produce socially beneficial outcomes, such as when such groups generate public pressure resulting in the enactment of valuable legislation,<sup>110</sup> exploitation of the availability heuristic by political campaigns is unlikely to serve the public’s interest. More likely, voters are misled when political campaigns focus the public’s attention selectively on issues that reflect favorably on a candidate.<sup>111</sup> When voters selectively focus on certain issues, they may miss the big picture, or may ignore a serious weakness in a candidate.

## 6. The Confirmation Bias

An example of a bias that is particularly likely to influence those who vote strictly along party lines is the confirmation bias. The confirmation bias is the tendency to look for information that selectively confirms a previously held belief.<sup>112</sup> Research on the confirmation bias

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(2005). For more on informational and reputational cascades, see Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 708-09 (1999).

<sup>107</sup> Shaw, *supra* note 105, at 393; see ZALLER, *supra* note 66, at 83-84.

<sup>108</sup> For example, following the Exxon-Valdez oil spill, environmental groups, fishermen, and members of the tourist industry banded together in a concerted effort to flood the airwaves with accounts and images of dying wildlife and oil-soaked beaches. Another example is the campaign launched by the media following the publication of Rachel Carson’s *Silent Spring* in 1962, which detailed the harmful effects of DDT. For more examples of interest groups’ exploitation of the availability heuristic, see Wilson & Fuchs, *supra* note 13, at 2180-206. See also DEBORAH A. STONE, POLICY PARADOX AND POLITICAL REASON 106 (1988); Wells, *supra* note 106, at 169 n.327 (“[W]ith respect to public policy agenda-setting, . . . ‘groups, individuals, and government agencies deliberately and consciously design portrayals so as to promote their favored course of action.’” (quoting Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 WIS. L. REV. 71, 76)).

<sup>109</sup> Wilson & Fuchs, *supra* note 13, at 105.

<sup>110</sup> For more on how interest groups can serve an important role through strategic use of availability cascades, see Wilson & Fuchs, *supra* note 13. See also Krishnakumar, *supra* note 3, at 530 (explaining that “while the public views lobbyists as soulless mercenaries, skilled at arm-twisting and bribing legislators into appeasing their clients’ interests at the expense of the public good,” members of Congress regard lobbyists as an invaluable source of specialized knowledge).

<sup>111</sup> See *infra* Part IV.

<sup>112</sup> See generally Clifford R. Mynatt, Michael E. Doherty & Ryan D. Tweney, *Consequences of Confirmation and Disconfirmation in a Simulated Research Environment*, 30 Q.J. EXPERIMENTAL PSYCHOL. 395 (1978).

has demonstrated that individuals who are predisposed to a certain position or explanation are significantly less likely to generate or be receptive to disconfirming or challenging information.<sup>113</sup> To the degree that a candidate can activate party affiliation in voters, the candidate may be able to get voters of the same party to selectively ignore potentially damaging information or favorably evaluate ambiguous information.<sup>114</sup> Accordingly, a candidate who is concerned about a decline in support resulting from negative publicity or reputation downturn<sup>115</sup> may successfully shore up support from self-identified members of his or her political party by priming the party, thereby triggering the confirmation bias.<sup>116</sup>

## 7. The Dual-Process Model of Decision-Making

Although discussion of heuristical processing is prevalent in the decision-analysis literature, political communication is clearly not always a product of cognitive shortcuts. Whether a message is persuasive can also be a function of the quality of the argument. According to one theory of persuasion, the *central route* to persuasion involves “a person’s diligent consideration of information that s/he [sic] feels is central to the true merits of a particular attitudinal position.”<sup>117</sup> However, the peripheral route to persuasion may occur when a message is ambiguous, the recipient is overwhelmed, or the context is taxing in other aspects. Under these circumstances, there is an increased reliance upon cognitive shortcuts or heuristics to evaluate the value of the

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<sup>113</sup> Jennifer Garst et al., *Satisficing in Hypothesis Generation*, 115 AM. J. PSYCHOL. 475, 476 (2002) (showing that individuals came up with many fewer hypotheses when they had been presented with a single, rational hypothesis than when they had not been presented with a hypothesis, in spite of the presence of incentives to generate alternative explanations).

<sup>114</sup> Michael Shermer found that party affiliation predicted confirmation bias in the evaluation of information about statements made by George Bush and John Kerry. See Shermer, *supra* note 14, at 37.

<sup>115</sup> For example, a pro-war candidate may anticipate a drop in popularity when there is a significant, well-publicized setback in U.S. military efforts overseas. An example of this is the 2008 race during which John McCain was closely associated with the Iraq War. Having been a strong advocate for the “surge,” Senator McCain’s popularity was inextricably tied to the perceived success of the war effort. A major setback could have had serious repercussions for his candidacy.

<sup>116</sup> Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979); see also Michael A. McCann, *It’s Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459, 1511-12 (2006) (citing the confirmation bias in explaining why individuals in a variety of different circumstances do not look for disconfirming information).

<sup>117</sup> See Richard E. Petty et al., *Central and Peripheral Routes to Advertising Effectiveness: The Moderating Role of Involvement*, 10 J. CONSUMER RES. 135, 135 (1986).



communication.<sup>118</sup> In other words, “[a]ttitude changes that occur via the peripheral route do not occur because an individual has personally considered the pros and cons of the issue, but because the attitude issue or object is associated with positive or negative cues—or because the person makes a simple inference about the merits of the advocated position based on various simple cues in the persuasion context.”<sup>119</sup>

The elaboration-likelihood model predicts that individuals are more likely to pay careful attention to a message and to devote the cognitive effort necessary to think through the argument carefully when the issue is personally relevant.<sup>120</sup> This theory predicts that voters will evaluate candidates’ messages and political messages from other sources differently, depending upon the level of personal concern about the issue involved. It also suggests that in the midst of a complex political race, such as one for the presidency, where numerous issues are discussed and communication comes in many forms from many sources, there may be an increased tendency for voters to rely upon heuristics in evaluating candidates.<sup>121</sup>

## 8. The Role of Emotions in Persuasion

Political candidates and their proxies are famous (or infamous) for harnessing the power of emotional appeals.<sup>122</sup> Psychologists have accumulated overwhelming evidence that emotions play a significant role in how humans form judgments and make choices.<sup>123</sup> When making decisions, people are often guided by intuition or “gut instinct.”<sup>124</sup> Research has demonstrated that there are important differences between how different emotional states influence judgments.<sup>125</sup> Sadness and anger, for example, may impact choice-

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<sup>118</sup> See RICHARD E. PETTY & JOHN T. CACIOPPO, *COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE* (1986).

<sup>119</sup> Petty et al., *supra* note 117, at 135; see also Shelley Chaiken & D. Maheswaran, *Heuristic Processing Can Bias Systematic Processing: Effects of Source Credibility, Argument Ambiguity, and Task Importance on Attitude Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 460 (1994).

<sup>120</sup> Richard E. Petty et al., *Personal Involvement as a Determinant of Argument-Based Persuasion*, 41 J. PERSONALITY & SOC. PSYCHOL. 847, 852-53 (1981).

<sup>121</sup> *Id.*

<sup>122</sup> See TED BRADER, *CAMPAIGNING FOR HEARTS AND MINDS: HOW EMOTIONAL APPEALS IN POLITICAL ADS WORK* (2006).

<sup>123</sup> Examples of works on this topic include LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957), and Richard S. Lazarus, *Progress on a Cognitive-Motivational-Relational Theory of Emotion*, 46 AM. PSYCHOL. 819 (1991).

<sup>124</sup> Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 742 (2008).

<sup>125</sup> Dacher Keltner et al., *Culture, Emotion, and the Good Life in the Study of Affect and Judgment*, 13 PSYCHOL. INQUIRY 65, 66 (2002).

formation in very different ways.<sup>126</sup> So-called “hot-button” issues are famously fertile ground for emotional appeals, in part because the topics are already associated with various affective states—usually of negative valence.<sup>127</sup> Pairing messages with emotion-triggering issues can induce particular moods that increase the likelihood that the target of the message will accept a message.<sup>128</sup>

Negative emotions, like fear and anger, can have a particularly significant effect on behavior.<sup>129</sup> Moreover, because negative emotions play a central role in the risk-perception context, risk decisions are profoundly influenced by the affective component of decision-making.<sup>130</sup> The implications for marketing strategies—political marketing and marketing in other forms—are manifold.<sup>131</sup> The “negative” or “attack” ad may be the most obvious example of the connection between emotions and choice in politics.<sup>132</sup> The particular type of negative emotion elicited can matter a great deal and can result in different choices. As one commentator pointed out:

Fearful people perceive greater risk across new situations, leading them to be risk-averse. Angry people, by contrast, are characterized

<sup>126</sup> Herbert A. Simon, *Making Management Decisions: The Role of Intuition and Emotion*, 1 ACAD. MGMT. EXECUTIVE 57 (1987) (“What all of these decision-making situations have in common is stress, a powerful force that can divert behavior from the urgings of reason.”).

<sup>127</sup> Keltner et al., *supra* note 125 (“The core theme of anger, that which differentiates it from other negative states, is the unfairness of others’ actions. In contrast, sadness is defined by the sense that fate and circumstances are the cause of one’s current condition. Fear is defined by extreme uncertainty about potentially dangerous outcomes.”).

<sup>128</sup> Richard E. Petty et al., *Positive Mood and Persuasion: Different Roles for Affect Under High- and Low-Elaboration Conditions*, 64 J. PERSONALITY & SOC. PSYCHOL. 5 (1993); *see also* Herbert Bless et al., *Mood and Persuasion: A Cognitive Response Analysis*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 332, 332-46 (1990).

<sup>129</sup> Mary Frances Luce, *Choosing to Avoid: Coping with Negatively Emotion-Laden Consumer Decisions*, 24 J. CONSUMER RES. 409 (1998).

<sup>130</sup> As Dan Kahan notes:

Distinct emotional states—from fear to dread to anger to disgust—and distinct emotional phenomena—from affective orientations to symbolic associations and imagery—have been found to explain perceptions of the dangerousness of all manner of activities and things—from pesticides to mobile phones, from red meat consumption to cigarette smoking.

Kahan, *supra* note 124, at 744-45 (footnotes omitted). Much of the current work in this area is based upon that of Mary Douglas and Aaron Wildavsky, who were pioneers in the movement to use emotion and culture to explain responses to risk and decision-making more generally. *See, e.g.*, MARY DOUGLAS, RISK AND BLAME: ESSAYS IN CULTURAL THEORY (1992); MARY DOUGLAS & AARON B. WILDAVSKY, RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNOLOGICAL AND ENVIRONMENTAL DANGERS (1982); Aaron Wildavsky, *Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation*, 81 AM. POL. SCI. REV. 3 (1987).

<sup>131</sup> *See generally* Meryl Paula Gardner, *Mood States and Consumer Behavior: A Critical Review*, 12 J. CONSUMER RES. 281 (1985).

<sup>132</sup> Lynda Lee Kaid & Anne Johnston, *Negative Versus Positive Television Advertising in U.S. Presidential Campaigns, 1960-1988*, J. COMM., Summer 1991, at 53; *see also* STEVEN ANSOLABEHRE & SHANTO IYENGAR, GOING NEGATIVE: HOW POLITICAL ADVERTISEMENTS SHRINK AND POLARIZE THE ELECTORATE (1995).

by a sense of certainty and individual control that leads them to make risk-seeking choices. These findings suggest several strategic possibilities. Rhetoric that highlights the frightening consequences of a particular course of action can be used to block political change if it makes the electorate risk-averse. On the other hand, arguments that cause citizens to feel angry might inspire them to mobilize for—or against—a particular candidate. Because cognitive biases cause citizens to give emotionally compelling data disproportionate weight, candidates have a strong incentive to counter emotionally laden appeals with visceral images of their own. This tendency to engage in tit-for-tat might explain why emotional appeals endure even though their repeated use seemingly would have a declining marginal effect.<sup>133</sup>

As this quotation illustrates, psychological findings on the effect of emotion on persuasion and attitude change provide fertile ground for political strategy.<sup>134</sup> A well-funded candidate can pay for consultants conversant in the use of fear tactics, as well as focus-group feedback from which she can help gauge the reaction of the public to various negative-affect-triggering techniques.<sup>135</sup> Strategies exploiting positive emotions and negative emotions, in order to induce specific reactions, may prove strategically beneficial to the candidate, but it is unlikely to assist the voter, and in fact may obscure the issues and decrease the accuracy of the decision-maker.<sup>136</sup>

### C. *Refuting the Notion that Heuristics Improve Voter Decision-Making*

For some time, scholars who research voting behavior have expressed concern about the voting public's ability to understand issues and cast votes that represent their true intentions. For instance, when voting on a rent-control proposition in California, over three-quarters of the electorate either wrongly voted *for* rent control when they intended to oppose it or wrongly voted *against* rent control when they intended to support it.<sup>137</sup> As noted above, more than one commentator has

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<sup>133</sup> Jennifer Jerit, *Survival of the Fittest: Rhetoric During the Course of an Election Campaign*, 25 POL. PSYCHOL. 563 (2004).

<sup>134</sup> John G. Geer, *Campaigns, Party Competition, and Political Advertising*, in POLITICIANS AND PARTY POLITICS 186 (John G. Geer ed., 1998).

<sup>135</sup> Jennifer S. Lerner & Dacher Keltner, *Beyond Valence: Toward a Model of Emotion-Specific Influences on Judgment and Choice*, 14 COGNITION & EMOTION 473 (2000).

<sup>136</sup> See generally KATHLEEN HALL JAMIESON, *DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY* (1992).

<sup>137</sup> In 1980, many voters voting on California Proposition 10 voted in a way that was inconsistent with their professed views. Exit polling revealed that twenty-three percent of voters who wished to protect rent control had voted for the anti-rent-control proposition, while fifty-four percent of voters who opposed rent-control voted against the proposition. David Butler & Austin

suggested that people may be able to make reasonably good voting decisions without having a great deal of information upon which to base those decisions.<sup>138</sup> Indeed, some have suggested that the use of cognitive heuristics *improves* voter decision-making.<sup>139</sup> Reliance on cues may, in some cases, improve choice formation.<sup>140</sup> There is little question that heuristics can be helpful in a general sense.<sup>141</sup> As previously noted, heuristics assist decision-makers in sorting through vast quantities of information and in making sensible decisions based on a smaller data-set, particularly under time constraints and with limited resources.<sup>142</sup> However, the tendency of cognitive shortcuts to lead to less than optimal decisions has been well documented.<sup>143</sup>

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Ranney, *Theory, in REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY* 11, 18 (David Butler & Austin Ranney eds., 1994) (citing DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 141-44 (1984)); *see also* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1556 (1990).

<sup>138</sup> PAUL M. SNIDERMAN ET AL., *REASONING AND CHOICE: EXPLORATIONS IN POLITICAL PSYCHOLOGY* 1, 19 (1991) (“People can be knowledgeable in their reasoning about political choices without necessarily possessing a large body of knowledge about politics.”); *see also* Kang, *supra* note 3, at 1143 (“Despite their rational ignorance, voters can still make competent political choices. They often can use ‘heuristic cues’ as shortcuts to roughly the same conclusions that they would have reached had they been well-informed.”).

<sup>139</sup> Kang, *supra* note 3, at 1141 (“[S]trengthening heuristic cues in direct democracy offers the best means of rehabilitating voter competence pragmatically, at low cost, without trying to force voters to adjust the way they think about politics.”).

<sup>140</sup> In elections, the classic voting cue is of course the political party. *See* ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* 66-67 (1960). Others have identified a constellation of cues typically associated with voting decisions. Popkin, for example, has discussed candidate demographics, personal attributes, sound bites, and early returns as cues upon which voters rely. *See* POPKIN, *supra* note 96, at 76. Voters also look to public statements by elected officials or rely upon information provided by supporting interest groups.

As previously noted, psychologists have identified a cadre of heuristics that are discussed in detail in legal and psychological scholarship. *See, e.g.*, Jolls et al., *supra* note 2; *see also* Hanson & Kysar, *supra* note 1, at 637; Alon Harel & Uzi Segal, *Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Detering Crime*, 1 *AM. L. & ECON. REV.* 276 (1999); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 *U. CHI. L. REV.* 1203 (2003); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 *U. CHI. L. REV.* 571 (1998).

<sup>141</sup> Gerd Gigerenzer & Peter M. Todd, *Fast and Frugal Heuristics: The Adaptive Toolbox, in SIMPLE HEURISTICS THAT MAKE US SMART* 3, 27 (Gerd Gigerenzer et al. eds., 1999). Gigerenzer and Todd do more than argue that heuristical processing is helpful; they argue that fast and frugal decision-making is optimal, asserting that “[b]ounded rationality is neither limited optimality nor irrationality.” *Id.*; *see also* Wilson & Fuchs, *supra* note 13, at 2160 (“The availability heuristic is a perfect example of a fast and frugal heuristic used in judging risk under time constraints and with very little information.”).

<sup>142</sup> *See* Gigerenzer & Todd, *supra* note 141, at 28; *see also* REID HASTIE & ROBYN M. DAWES, *RATIONAL CHOICE IN AN UNCERTAIN WORLD: THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 1 (2001) (“We dominate this planet today because of our distinctive capacity for good decision making. . . . Human beings have an exceptional ability to choose appropriate means to achieve their ends.”).

<sup>143</sup> *See* Jolls et al., *supra* note 2; Thaler, *supra* note 9; *see also* Rachlinski, *supra* note 140, at 572-73 (“The hindsight bias thus suggests a problem with the law and economics of negligence. If, as many law and economics scholars posit, the common law evolves towards efficiency, then

One of the earliest studies that spoke directly to the role of cues and heuristics in voter decision-making was Bartels' 1996 investigation of the effects of voter ignorance.<sup>144</sup> Bartels examined whether cues and "informational shortcuts" improve voter accuracy and concluded that although voters do better than chance, they do "significantly less well than they would with complete information, despite the availability of cues and shortcuts."<sup>145</sup> In another study of voting behavior, Lau and Redlawsk investigated voters' use of five heuristics. They found that reliance on heuristics in presidential campaigns was ubiquitous, and more complex issues resulted in a greater reliance on cues.<sup>146</sup> Lau and Redlawsk's findings contradicted the notion that heuristics assisted uninformed voters in making accurate decisions. While they did find that heuristics were helpful in some cases, *it was only the sophisticated voters* who benefited from using cognitive shortcuts. Moreover, they found that heuristics made relatively unsophisticated members of the public *less* accurate.<sup>147</sup> The authors concluded:

We join in Bartels' skepticism that voters who are relatively unaware of politics can make decisions as if they had full information, simply by employing cognitive shortcuts. Ironically, heuristics are most valuable to those who might in fact need them least. Sophisticated voters, who understand the political environment, can use these shortcuts to their advantage. *But even they can be misled when the political environment is not structured according to their prior expectations.*<sup>148</sup>

Other scholars have been skeptical about the public's ability to use heuristics to make "accurate" decisions. Kuklinski and Quirk have reviewed the literature on the impact of heuristics on political opinion formation and have concluded that heuristics decrease voter competence.<sup>149</sup>

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why does it tolerate biased judgments that create inefficiency?" (citation omitted)); *supra* notes 61-64 and accompanying text (discussing prospect theory as an alternative to rational choice theory).

<sup>144</sup> See Bartels, *supra* note 5, at 218 (concluding based upon the data that the notion that the voters behaved as if they were fully informed should be "strongly rejected").

<sup>145</sup> *Id.* at 217.

<sup>146</sup> See Lau & Redlawsk, *supra* note 55, at 958-59.

<sup>147</sup> Again, an "accurate" vote is widely understood to be one that the voter would have cast if he or she had had all of the relevant information. See *supra* note 17 and accompanying text.

<sup>148</sup> Lau & Redlawsk, *supra* note 55, at 966-67 (emphasis added). The authors note that voters who use heuristics are particularly likely to make mistakes when the "outgroup" candidate is atypical. In other words, when a candidate is not a member of the voter's party of choice, that voter may erroneously ignore information that might favor that candidate. *Id.* at 964.

<sup>149</sup> See Paul M. Sniderman, *Taking Sides: A Fixed Choice Theory of Political Reasoning, in ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY* 67, 78 (Arthur Lupia et al. eds., 2000) (arguing that it "seems obvious that ordinary citizens, lacking information about politics, are vulnerable to errors in making political choices"). Mondak has demonstrated that respondents use the mention of Reagan's endorsement in poll questions as a cue to form policy preferences. When Reagan was popular, respondents were particularly likely to support

These findings are unsurprising when considering the relatively unsophisticated way in which voters engage in heuristical processing.<sup>150</sup> First, the average voter lacks the contextual information necessary to know how to accurately apply cues.<sup>151</sup> Second, the use of heuristics is quite often unconscious, meaning that the voter does not have the opportunity to evaluate its appropriateness (assuming that he or she was equipped to do so).<sup>152</sup> The third reason why voters are unable to systematically improve their voting behavior through the use of heuristics is that savvy politicians exploit the very mechanisms it has been argued may be helpful, as discussed above. On balance, the evidence indicates that voters become less accurate when they rely upon heuristics.

#### D. *Some Historical Examples of Voter Manipulation*

As previously noted, historical evidence illustrates that candidates prime issues favorable to them and engage in other tactics designed to shape voting behavior.<sup>153</sup> Examining the use of private polls by Presidents Kennedy and Nixon, for example, Jacobs and his colleagues found that the public statements of both presidents highlighted issues that were most likely to resonate with voters.<sup>154</sup> Kennedy was particularly strategic, according to a 1998 investigation of the former president's campaign tactics.<sup>155</sup>

[Not only were] the campaign's positions . . . developed to selectively prime voters in order to influence the electorate's standards for evaluating and judging competing office seekers, [but]

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policies he endorsed. This finding is telling because Reagan's policies did not vary with his popularity. Therefore, the driving force behind the preference formation was the popularity of the source, not the popularity or attractiveness of the policy. *See Mondak, supra* note 17.

<sup>150</sup> *See Kuklinski & Quirk, supra* note 3, at 156 (“[P]eople take their heuristics off-the-shelf, use them unknowingly and automatically, and rarely worry about their accuracy.”). For a general discussion of heuristical processing, see SIMON, *supra* note 43 (discussing findings supporting the theory of bounded rationality).

<sup>151</sup> MICHAEL X. DELLI CAPRINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 1, 51-53 (1996).

<sup>152</sup> *See* RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE 45 (1980); Mark C. Suchman, *On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 WIS. L. REV. 475, 480.

<sup>153</sup> *See* JACOBS & SHAPIRO, *supra* note 31, at 528 (examining the use of private polls by presidents Kennedy and Nixon, and citing, for example, that both presidents designed their speeches to selectively emphasize the issues that were both concerning to most Americans and which reflected favorably on their own agendas).

<sup>154</sup> *See id.*

<sup>155</sup> *Id.* at 527 (“Archival and interview evidence suggests that Kennedy deliberately used these popular issues to shape the electorate's standards for evaluating his personal attributes, rather than to win over utility-maximizing voters. We conclude that the study of priming offers one important approach to reintegrating research on candidate strategy and voter behavior.”).

the Kennedy campaign used salient, accessible issues in order to construct an appealing image of the candidate as competent and caring, an image that diverged quite noticeably (and favorably) from that of his opponent.<sup>156</sup>

A critical aspect of Kennedy's strategy was to emphasize a few salient issues so as to render these issues "available" to voters.<sup>157</sup> Kennedy's campaign team hoped to shape the electorate's standards for evaluating the candidates. Ultimately, Kennedy managed to construct a positive image of himself that was noticeably divergent from that of Nixon.<sup>158</sup> Although Nixon lost to Kennedy in the 1960 election, he was no stranger to the mind-control game. Nixon also relied on polling to craft message and shape opinion. His team created 233 private surveys, a number that exceeded the number of surveys assembled by his presidential contemporaries by a substantial margin.<sup>159</sup> Nixon has been credited with paving the way for the current tendency of candidates and sitting presidents to rigorously monitor public opinion.<sup>160</sup>

Often, politicians will attempt to capitalize upon events that are exogenous to their campaign. Clinton was able to capitalize upon just such an opportunity prior to the 1992 presidential election. During the Gulf War, George Bush enjoyed tremendous popularity among the American public. Following the war, when many Americans turned their attention to the lagging economy, Clinton exploited this change to great advantage, with the help of a team of artful rhetoricians and strategists.<sup>161</sup> Some commentators have voiced doubts that the Democrats could have triumphed in the 1992 election had they not capitalized upon the then-current changing tide.<sup>162</sup>

A more recent example of a political candidate capitalizing upon current concerns of the populace was Barack Obama's use of the Iraq

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<sup>156</sup> See *id.* at 529.

<sup>157</sup> See *id.* (noting that Kennedy chose "accessible" issues in order to influence voters' memories).

<sup>158</sup> *Id.*

<sup>159</sup> The number of Nixon surveys exceeded those of Kennedy by a factor of more than ten, and Johnson by a factor of nearly two. Lawrence R. Jacobs & Robert Y. Shapiro, *The Rise of Presidential Polling: The Nixon White House in Historical Perspective*, 59 PUB. OPINION Q. 163, 167 (1995).

<sup>160</sup> See *id.*

<sup>161</sup> James Carville is credited for keeping the voting public focused on the economic issues during this time. In order to keep the campaign on message, Carville hung a sign in Bill Clinton's Little Rock campaign headquarters that highlighted three points:

1. Change vs. more of the same;
2. It's the economy, stupid;
3. Don't forget health care.

Alleyne, *supra* note 86.

<sup>162</sup> Cf. Jon A. Krosnick & Laura A. Brannon, *The Impact of the Gulf War on the Ingredients of Presidential Evaluations: Multidimensional Effects of Political Involvement*, 87 AM. POL. SCI. REV. 963 (1993) (examining the role of priming in George Bush's dramatic increase in approval ratings during the Gulf War).

War. In the 2008 primary, Obama frequently engaged in priming the voting public, positioning the war front-and-center at every opportunity. Although his anti-war position was similar to that of his opponent Hillary Clinton, Obama created the impression of a substantial distinction by repeatedly harkening back to Clinton's initial vote authorizing George W. Bush to send troops to Iraq.<sup>163</sup> Although he was not in the United States Senate at the time of the congressional vote to authorize the use of force, Obama skillfully created the impression that his failure to vote for such authorization was a result of choice rather than of lack of opportunity,<sup>164</sup> suggesting that he had taken a dramatically different approach and diverging from his opponent's position at the time. By emphasizing that he had never voted to authorize the use of force, Obama attempted to shift focus away from a perceived deficit on his part with respect to foreign policy experience.<sup>165</sup>

Hillary Clinton engaged in her own attempts to shape voter cognitions. A particularly memorable example was Hillary Clinton's use of the "3:00 a.m." phone call political advertisement during the primary.<sup>166</sup> Clinton's primary strategy was to play up her experience—

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<sup>163</sup> The *Washington Post* cited Obama as delivering "some of his strongest statements against Hillary Clinton's stance on the war in Iraq" for having voted in 2002 to authorize the use of force:

"I have been open about my reasons for opposing the war, but one of my opponents in this race, Senator Clinton, has tried, I believe, to rewrite history," Obama said at a roundtable discussion on veterans [sic] issues with several military officers here. "She voted for a resolution called and I quote, 'a resolution to authorize the use of the United States Armed Forces again [sic] Iraq,' and now she is saying that she wasn't really voting for war. She cast her vote after failing to read the National Intelligence Estimate on Iraq . . . which raised enough doubts for the majority of Democratic senators who read it that they voted against the war. We need accountability in our leaders. You can't undo a vote for war just because a war stops being popular."

Alec MacGillis, *Obama Slams Clinton's War Vote*, WASHINGTONPOST.COM, Jan. 24, 2008, [http://voices.washingtonpost.com/44/2008/01/24/obama\\_slams\\_clintons\\_war\\_vote\\_1.html](http://voices.washingtonpost.com/44/2008/01/24/obama_slams_clintons_war_vote_1.html).

<sup>164</sup> It certainly is plausible that Barack Obama would have voted against authorizing the use of force; however, it is impossible to know for sure, a fact that is belied by his rhetoric at the time. Obama's success with this strategy is evidence of a phenomenon akin to a neglect of probability bias, in which the original probability of an occurrence is miscalculated, misremembered, or ignored. JONATHAN BARON, *THINKING AND DECIDING* 260-61 (3d ed. 2000).

<sup>165</sup> On the campaign trail, Clinton claimed that Obama was dangerously inexperienced in the area of foreign policy. For example, in a campaign speech at George Washington University:

[Clinton] assailed rival Sen. Barack Obama, D-Ill., as unwise, inexperienced, impulsive and indecisive—in short, a risk to the nation . . . . With a half-dozen retired generals standing behind her, Clinton said she was the only candidate who could restore a U.S. foreign policy that had the right combination of diplomacy and military might.

Jake Tapper & Eloise Harper, *Clinton Blasts Obama's Foreign Policy Readiness*, ABC NEWS, Feb. 25, 2008, <http://abcnews.go.com/Politics/Vote2008/story?id=4340399>.

It is important to note that the Iraq War was already an important issue during the 2007-2008 primary race. Obama's efforts to make the war a primary focus of the election were additive. However, Obama was effective in keeping the public's eye focused on the issue of the war through sustained efforts to maintain the topic as a central issue.

<sup>166</sup> See YouTube, Hillary and Her "Red Phone," <http://www.youtube.com/watch?v=kddX7LqgCvc> (last visited Jan. 26, 2010).



particularly with respect to foreign policy issues—and to emphasize Obama’s relative inexperience. Her slogan was “Ready to Lead on Day One.”<sup>167</sup> The “red phone” ad was one of the most dramatic examples of the exploitation of the availability heuristic during the 2007-2008 primary season. The opening scene features the outside of a house at nighttime. There is the sound of a phone ringing, and a voice-over says: “It’s 3:00 a.m. and your children are safe and asleep.” The camera shot changes to feature a young child sleeping. Several additional children are shown sleeping in their beds, while the voice-over continues: “But there’s a phone in the White House, and it’s ringing. Something’s happening in the world. Your vote will decide who answers that call; whether it’s someone who already knows the world’s leaders, knows the military—someone tested and ready to lead in a dangerous world.” The persistent sound of the phone ringing accompanied by the image of vulnerable young children sleeping in their beds and the suggestion that a world emergency is taking place created a vivid scene.<sup>168</sup> The advertisement seemed to have the very effect predicted by those who write about the availability heuristic. It was widely discussed, and although the message conveyed precisely what Clinton had been openly and repeatedly saying, it was nonetheless deemed objectionable by some. The interest, both positive and negative, that it generated was most likely a product of the advertisement’s power and the lasting impression it created.

If the concern about campaign expenditures is based on the notion that wealthy interests gain too much control over the election process, Barack Obama’s 2008 presidential race might suggest a different model. Obama’s campaign was the most well-funded in American history; he spent record amounts, and he achieved victory.<sup>169</sup> Rather than depending primarily upon corporations, wealthy individuals, and interest groups, Obama’s campaign was notable with respect to the level of support it garnered from small donors.<sup>170</sup> One news outlet

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<sup>167</sup> For a discussion of Clinton’s campaign theme and the Obama camp’s response to attacks on his perceived inexperience, see Posting of Susan Rice to the Huffington Post (Dec. 26, 2007, 16:56), [http://www.huffingtonpost.com/susan-rice/ready-to-lead-on-day-one\\_b\\_78339.html](http://www.huffingtonpost.com/susan-rice/ready-to-lead-on-day-one_b_78339.html).

<sup>168</sup> See *supra* note 166.

<sup>169</sup> The campaign revealed that it raised an impressive \$150 million in the single month of September. See *NPR News Morning Edition: Obama’s \$150 Million Changing Rules of the Game* (National Public Radio broadcast Oct. 20, 2008) (transcript available at <http://www.npr.org/templates/transcript/transcript.php?storyId=95882376>).

<sup>170</sup> See Michael Luo, *Obama’s September Success Recasts the Campaign Fund-Raising Landscape*, N.Y. TIMES, Oct. 20, 2008, at A21 (modified version available at [http://www.nytimes.com/2008/10/20/us/politics/20donate.html?\\_r=1](http://www.nytimes.com/2008/10/20/us/politics/20donate.html?_r=1)). In September, Obama’s Campaign Manager, David Plouffe, announced that the \$150 million raised in September represented an average donation of less than \$100, and that 632,000 new donors had made contributions in that month. *Id.* But see Press Release, The Campaign Finance Institute, Reality Check: Obama Received About the Same Percentage from Small Donors in 2008 as Bush in 2004 (Nov. 24, 2008), <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=216>.

commented that “Obama’s campaign has repeatedly demonstrated an ability to raise millions in small-dollar donations in a matter of hours over the Internet, almost at will.”<sup>171</sup> Obama credited his small donors for his campaign’s success via videotaped messages, telling them: “Instead of forcing us to rely on millions from Washington lobbyists and special interest PACs, you’ve fueled this campaign with donations of \$5, \$10, \$20, whatever you can afford.”<sup>172</sup> When the source of campaign funds is many small donors rather than a wealthy few, concerns associated with unlimited spending arguably decrease.<sup>173</sup> However, the likelihood that this type of fundraising will be accomplished by future candidates is far from certain, given the unique combination of factors at work during the 2008 election cycle.<sup>174</sup>

## II. HOW CAMPAIGN DOLLARS CHANGE VOTING OUTCOMES

In writing about campaign spending limits, many commentators have operated on the assumption that campaign money impacts vote outcomes. In fact, it has been said that “[t]he first deadly sin of unregulated political money is that of unequal influence.”<sup>175</sup> The

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<sup>171</sup> Brian C. Mooney, *In a Shift, Obama Rejects Public Funding*, BOSTON GLOBE, June 20, 2008, at A1, available at [http://www.boston.com/news/nation/articles/2008/06/20/in\\_a\\_shift\\_obama\\_rejects\\_public\\_funding/](http://www.boston.com/news/nation/articles/2008/06/20/in_a_shift_obama_rejects_public_funding/).

<sup>172</sup> See Adam Nagourney & Jeff Zeleny, *Obama Forgoes Public Funds in First for Major Candidate*, N.Y. TIMES ON THE WEB, June 20, 2008, <http://www.nytimes.com/2008/06/20/us/politics/20obamacnd.htm>.

<sup>173</sup> The topic of Obama’s campaign, and the implications for campaign financing and public funding, is the subject of a forthcoming companion essay.

<sup>174</sup> For example, America was embroiled in an unpopular war and was experiencing a serious financial recession. Public approval ratings for outgoing president George W. Bush and his administration were at all-time lows (ranging from 20-30% approving). There were a number of additional factors at work, an examination of which goes beyond the scope of the current discussion. For more on the Obama fundraising phenomenon, see Molly J. Walker Wilson, *The New Role of the Small Donor in Political Campaigns and the Demise of Public Funding*, 25 J.L. & POL. (forthcoming Feb. 2010).

<sup>175</sup> See, e.g., Frank Askin, *Political Money and Freedom of Speech: Kathleen Sullivan’s Seven Deadly Sins—An Antitoxin*, 31 U.C. DAVIS L. REV. 1065, 1069 (1998) (stating that the regime created by *Buckley* inappropriately enables large contributors to affect the democratic process); Paul Steinhauer & Mark Preston, *Obama Announces Big June Haul*, CNN.COM, July 17, 2008, <http://edition.cnn.com/2008/POLITICS/07/17/obama/index.html> (“Money, of course, is not the only factor in the campaign, but it does pay for advertisements on television, radio and the Internet and in print, as well as expensive get-out-the-vote efforts in crucial battleground states.”); see also Edwin C. Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 43-44 (1998) (expressing concern about inappropriate—wealth—influences on public opinion); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1163-65 (1994) [hereinafter Raskin & Bonifaz, *Democratically Financed Elections*] (criticizing *Buckley* for its deviation from the fundamental principle of democratic equality); Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273, 274-75, 277 (1993) [hereinafter Raskin & Bonifaz, *Wealth Primary*] (concerning what will happen “[w]hen the logic

intuitive notion that money ultimately *does* influence voting behavior has been demonstrated empirically.<sup>176</sup> Moreover, there is some evidence that the relationship between money spent and success in the polls is linear.<sup>177</sup> Empirical evidence from the past twenty years would tend to support what commentators have intuited since the early part of the past century: Campaign expenditures influence election outcomes in profound and substantial ways. To some, this influence is deeply troubling. As Edward McChesney Sait wrote in 1929:

It is an assumption which can be supported by impressive evidence, and which political experts, familiar with that evidence, will be disposed to admit: campaign expenditures, in many parts of this country, tend to be not only excessive but also corrupt. This corruption is particularly noxious because it affects the very foundations of the democratic process.<sup>178</sup>

#### A. *Contradicting the “Minimal Effects” View of Campaigning*

The link between money and vote outcomes has not received unilateral acceptance. One group questioning the existence of this relationship is that of political scientists belonging to the “minimal effects” school of thought.<sup>179</sup> Those who subscribe to a minimal effects view of political campaigning argue that political opinion is to a large degree stable, rendering campaign efforts largely ineffective and superfluous.<sup>180</sup> Proponents of this perspective maintain that campaigning has minimal effects on the outcome of a political race.<sup>181</sup> Ironically, research on cognitive processes has been cited in support of the notion that campaigns fail to influence vote decisions.<sup>182</sup> However,

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of the market—everything is for sale and the highest bidder wins—overrides the political principle of one person/one vote”); Wright, *supra* note 25, at 625-26 (“Political equality is the cornerstone of American democracy. Today’s electoral processes, tainted by huge inequalities in funds and special access for special interests, fall far short of that ideal and are moving further away every year.”).

<sup>176</sup> A relationship has been found between spending and election outcomes. Where an incumbent wins, for example, the more the challenger spends, the smaller the incumbent’s margin of victory. See Glantz et al., *supra* note 15, at 1037-38.

<sup>177</sup> *Id.*

<sup>178</sup> Edward McChesney Sait, *Campaign Expenditures*, 23 AM. POL. SCI. REV. 47 (1929).

<sup>179</sup> See Shaw, *supra* note 105, at 388 (“The conventional wisdom has it that campaigns produce ‘minimal effects’ in presidential elections.”); see also D. Sunshine Hillygus, *Campaign Effects and the Dynamics of Turnout Intention in Election 2000*, 67 J. POL. 50, 52 (2005).

<sup>180</sup> See, e.g., Finkel, *supra* note 90, at 1 (“Until recently, political scientists viewed presidential campaigns as having relatively minor effects on voters and electoral outcomes.”); Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1641 (1999) (“Endorsement decisions . . . often may have very little, if any, effect on the outcome of races.”).

<sup>181</sup> See generally WEST, *supra* note 12; Finkel, *supra* note 90.

<sup>182</sup> One writer has argued:

the claim that campaigns have minimal effects on voting behavior is increasingly being challenged.<sup>183</sup> As one commentator explained, “campaigns perform a critical ‘informing’ function, and they ‘help voters decide to vote for the candidate we would expect them to vote for based on their political predispositions.’”<sup>184</sup> Even scholars who downplay the importance of political strategy often admit that campaigns can create power effects.<sup>185</sup> Data suggests that when candidates invest resources in pre-election efforts, they often reap the rewards. One investigation found that “[o]f the thirty-one presidential elections held from 1860 through 1980, the winner outspent the loser [twenty-two] out of [thirty-one] times. If we focus just on open races, those with no incumbent running, the winner outspent the loser in [eleven] out of [twelve] races.”<sup>186</sup>

Scholars studying the impact of priming on voting behavior have specifically challenged the “minimal effects” theory.<sup>187</sup> According to priming experts, citizen evaluations of politicians have been shown to be affected in important ways following targeted priming (through media coverage or candidate discussion) of particular policy areas.<sup>188</sup> As one commentator puts it, “[t]hrough the agenda-setting effect,

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[A] source of . . . stability [of political views] lies in commonplace cognitive biases. For example, one form of cognitive bias identified in numerous studies is a kind of selective attention that causes people to attend most carefully to information with which they are already familiar or with which they already agree, and to ignore unfamiliar or challenging information. Another kind of cognitive bias causes voters to misinterpret information to which they do attend so as to make it seem more consistent with their existing beliefs than is actually the case. Both of these biases work against the possibility of persuasion during election campaigns.

James A. Gardner, *Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns*, 54 *BUFF. L. REV.* 1413, 1473-74 (2007).

<sup>183</sup> A number of empirical studies have demonstrated that voters are influenced by such campaign factors as television advertising and news coverage. See, e.g., ANSOLABEHRE & IYENGAR, *supra* note 132, at 17-18; THOMAS M. HOLBROOK, *DO CAMPAIGNS MATTER?* (1996); Shaw, *supra* note 105, at 388-89.

<sup>184</sup> Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 *GEO. WASH. L. REV.* 1036, 1050 n.61 (2005) (quoting HOLBROOK, *supra* note 183, at 17).

<sup>185</sup> See Finkel, *supra* note 90, at 17-19 (finding support for an “activation” model of campaign effects in which the campaigns served to activate existing political predispositions, and asserting the potential for substantially greater campaign effects).

<sup>186</sup> David C. Nice, Research Note, *Campaign Spending and Presidential Election Results*, 19 *POLITY* 464, 468 (1987). For a discussion of the effects of money and campaigning, see Glantz et al., *supra* note 15, at 1036. See also GARY JACOBSON, *MONEY IN CONGRESSIONAL ELECTIONS* (1980). See generally, STEPHEN WAYNE, *THE ROAD TO THE WHITE HOUSE* (1980); Burton Abrams & Russell Settle, *The Economic Theory of Regulation and Public Financing of Presidential Elections*, 86 *J. POL. ECON.* 245, 248 (1978); W.P. Welch, *The Effectiveness of Expenditures in State Legislative Races*, 4 *AM. POL. Q.* 333 (1976).

<sup>187</sup> See, e.g., Druckman et al., *supra* note 12 (arguing that priming is an important and effective strategy); see also Iyengar & Simon, *supra* note 6, at 150 (“Campaigns do matter and can be pivotal. In the current regime, the consequences of campaigns are far from minimal.”).

<sup>188</sup> See Druckman et al., *supra* note 12; see also IYENGAR & KINDER, *supra* note 12.

campaigns lead citizens to consider some issues more important than others by focusing more on those issues in news coverage and campaign ads.”<sup>189</sup> Other researchers have systematically uncovered a variety of methodological constraints that have resulted in misleading data.<sup>190</sup> As one investigator noted:

Previous research on campaigns has often been limited by the available data. Moreover, the way the data have been collected and analyzed has had a profound impact on the way that campaign effects are conceived. Much of this research relies on data that measures presidential campaigns as monolithic, time-invariant events that have the same average effect for all people during all points of the campaign. Clearly, the campaign is not so simplistic.<sup>191</sup>

Proponents of a more sophisticated approach have blamed simplified measures and an over-reliance on an outcome-driven analysis for yielding misleading data.<sup>192</sup> More recent attempts to gauge effects of campaign events in presidential and other races have increased in sophistication. A number of empirical investigations have yielded support for the notion that campaigning does influence voter decision-making.<sup>193</sup> Investigators have found that campaign strategy affects voters’ decision-making, and specifically with respect to priming and framing, empirical investigations have found support for the effectiveness of these tactics.<sup>194</sup> Specifically, research has demonstrated that agenda-setting (priming) has affected the importance voters assign to particular issues.<sup>195</sup> Framing and targeting particular audiences also seem to be successful campaign strategies that yield real

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<sup>189</sup> See Schaffner, *supra* note 5, at 805 (discussing how priming “women’s issues” leads more women to vote the democratic ticket); see also Finkel, *supra* note 90, at 17-19.

<sup>190</sup> See Iyengar & Simon, *supra* note 6, at 151 (highlighting certain methodological constraints, including limiting the investigation to “persuasion effects” and relying on survey data and self-report measures).

<sup>191</sup> D. Sunshine Hillygus & Simon Jackman, *Voter Decision Making in Election 2000: Campaign Effects, Partisan Activation, and the Clinton Legacy*, 47 AM. J. POL. SCI. 583, 584 (2003) (internal citation omitted); see also *id.* at 583 (finding that campaign effects surface when “richer” sources of data are mined).

<sup>192</sup> See HOLBROOK, *supra* note 183, at 153 (“Campaign effects are unlikely to be found by analyzing only ultimate vote decisions or election outcomes. A political campaign must be understood to be a process that generates a product, the election outcome, and like any other process, one cannot expect to understand the process by analyzing only the product.”).

<sup>193</sup> For example, Robert Hurd and Michael Singletary found an effect for endorsements among independent voters in the 1980 presidential election. The study used National Election Studies data and found a small, but statistically significant effect. Robert E. Hurd & Michael W. Singletary, *Newspaper Endorsement Influence on the 1980 Presidential Election Vote*, 61 JOURNALISM Q. 332, 335 (1984), cited in Hasen, *supra* note 180, at 1655 n.148.

<sup>194</sup> Specifically, research has revealed that campaigning can influence which issues voters rate as most important, how voters evaluate candidates, and whether citizens vote at all. See ANSOLABEHRE & IYENGAR, *supra* note 132, at 278; Lau & Redlawsk, *supra* note 55.

<sup>195</sup> Maxwell E. McCombs & Donald L. Shaw, *The Agenda Setting Function of Mass Media*, 36 PUB. OPINION Q. 176 (1972) (finding a correlation between which issues were presented to the voting public through the media and which issues the voters found important).

results in terms of influencing voting behavior. For instance, when campaigns focused more on women's issues, women became more likely to vote for the Democratic candidate, while voting behavior of men was unaffected.<sup>196</sup> Nelson and Kinder have demonstrated ways in which politicians can employ alternative frames for issues ranging from welfare to affirmative action to AIDS policy, and how manipulating these frames can influence the relative importance of certain predictors of opinion toward these issues.<sup>197</sup>

One apparent explanation for why campaigning matters is that Americans have become less likely to vote strictly along party lines.<sup>198</sup> When the only cue voters rely upon is political party membership, campaign efforts yield marginal effects. With the decline of partisanship and the burgeoning of the independent voter, campaign tactics have become increasingly influential.<sup>199</sup> The good news is that while undecided voters are especially likely to be influenced by some forms of exploitative campaign tactics, partisan neutrality may make these individuals *less* vulnerable to other types of manipulation.

Compelling evidence of the effect of campaigning comes from a study by Shaw that relied upon cross-sectional and pooled time-series models of candidate support as related to the candidates' television advertising and personal appearances during the 1988, 1992, and 1996 presidential campaigns.<sup>200</sup> Findings revealed a positive correlation between a candidate's campaign activities in a particular state and votes.<sup>201</sup> Specifically, data gathered weekly demonstrated a significant relationship between statewide support and campaigning. Shaw concluded that "[c]ampaign effects . . . appear to have been both direct and conditioned by the receptivity of the electorate."<sup>202</sup>

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<sup>196</sup> See generally Schaffner, *supra* note 5.

<sup>197</sup> See Nelson & Kinder, *supra* note 66, at 1057; see also Druckman, *supra* note 10, at 1044.

<sup>198</sup> See generally MARTIN P. WATTENBERG, *THE DECLINE OF AMERICAN POLITICAL PARTIES* (1986); MARTIN P. WATTENBERG, *THE RISE OF CANDIDATE-CENTERED POLITICS* (1991) (documenting the decline in partisanship in America); see also NORMAN NIE ET AL., *THE CHANGING AMERICAN VOTER* (1976). Moreover, party affiliation does not always indicate a candidate's position on an issue. See Heather K. Gerken, *Shortcuts to Reform*, 93 MINN. L. REV. 1582, 1594 (2009) ("[P]artisan cues do not provide a dependable heuristic for voters in the context of election reform.").

<sup>199</sup> See Shaw, *supra* note 105, at 389.

<sup>200</sup> Donald R. Shaw, *The Effect of TV Ads and Candidate Appearances on Statewide Presidential Votes, 1988-96*, 83 AM. POL. SCI. REV. 345 (1999).

<sup>201</sup> *Id.* at 356-57.

<sup>202</sup> *Id.* at 357.

B. *Evidence That Activation of Biases Is Not Passive*

Hanson and Kysar recently suggested that the decision-making process is more complex than the traditional model might suggest.<sup>203</sup> Behavioral decision theorists have typically conceived of heuristics and biases as operating automatically in a fixed manner. Rather than viewing the decision-making process as static, Hanson and Kysar proposed a dynamic model in which the decision-maker is influenced by external forces that trigger or exaggerate various biases. In a seminal article discussing exploitation of heuristics and biases in the marketplace, Hanson and Kysar proposed that “[c]onsumers are subject to a host of cognitive biases which, particularly when taken together, appear to render them vulnerable to manipulation.”<sup>204</sup> Hanson and Kysar further argued that “manipulation of consumers by manufacturers is not simply a possibility in light of the behavioral research but it is an inevitable result of the competitive market.”<sup>205</sup> In order to compete in the marketplace, manufacturers *must* take advantage of the profit maximizing opportunities that heuristics and biases present.<sup>206</sup> In a companion article, Hanson and Kysar presented empirical evidence of market manipulation.<sup>207</sup> They concluded that manufacturers routinely, and with significant skill, manipulate consumer perception to maximize their own benefit.<sup>208</sup>

Hanson and Kysar are not alone in claiming that commercial actors demonstrate a sophistication about cognitive phenomena that is sometimes underestimated and that the strategic exploitation of this information is inevitable.<sup>209</sup> For example, legal scholars have discussed

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<sup>203</sup> See Hanson & Kysar, *supra* note 1, at 636.

<sup>204</sup> *Id.* at 723.

<sup>205</sup> *Id.* at 726.

<sup>206</sup> *Id.*

<sup>207</sup> Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1466 (1999). In their article, Hanson and Kysar present the following claim:

Although the preceding evidence is far from systematic, we believe that it supports our basic claim that manufacturers manipulate consumer perceptions. The markets that we have described as evincing manufacturer manipulation—food products, pharmaceutical drugs, environmental pollutants, weapons, and automobiles—are all markets in which one would surmise intuitively that consumers are at least somewhat aware of the fact that health and safety issues are implicated by the product. When consumers are at least partially aware of health and safety risks, manufacturers have incentives to manipulate risk perceptions in the manner that benefits them most . . . .”

*Id.*

<sup>208</sup> See Hanson & Kysar, *supra* note 207, at 1572.

<sup>209</sup> For another article that looks at strategic behavior based upon knowledge of heuristics and biases in the products liability area, see Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1437 (2007) (“[F]irms

ways in which the credit card industry has learned to manipulate psychological and sociological forces for its benefit.<sup>210</sup> Commentators writing in the area of intellectual property have argued that “infringement and dilution are best understood as commercial behavior that manipulates the cognitive biases of consumers, and as such threatens to render their heuristic judgments persistently inaccurate.”<sup>211</sup> Even sports teams have been accused of manipulating the biases of the public for gain.<sup>212</sup> Hanson and Kysar suggest that competition in the marketplace provides sufficient incentives so as to induce market actors to exploit heuristics and biases, even if those actors do not fully understand the underlying theory of cognitive mechanisms.<sup>213</sup> However, much of the empirical evidence suggests that often the manipulation is deliberate and intentional.<sup>214</sup>

Although Hanson and Kysar’s project focused on products liability, they emphasize the universality of this marketplace phenomenon.<sup>215</sup> During campaigns, candidates act in the political marketplace just as others act in the marketplace for goods, identifying and exploiting heuristics and biases.<sup>216</sup> In thinking about the features of competitive markets it is clear that competing for votes—particularly in a national election—involves pressures that in many ways parallel

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have a natural competitive incentive to manipulate these biases through advertising and other marketing techniques that cause consumers to underestimate product risks.”). See also John E. Montgomery, *Cognitive Biases and Heuristics in Tort Litigation: A Proposal to Limit Their Effects Without Changing the World*, 85 NEB. L. REV. 15, 33 (2006) (“These groups are driven by competitive pressure to actively manipulate consumer risk perception in a way advantageous to product marketers; advertising is the vehicle to accomplish this result.”).

<sup>210</sup> David K. Stein, *Wrong Problem, Wrong Solution: How Congress Failed the American Consumer*, 23 EMORY BANKR. DEV. J. 619, 627 (2007) (“Credit card issuers have been able to manipulate and persuade consumers—using their knowledge of these forces—through advertising and other marketing techniques.”).

<sup>211</sup> Jeremy N. Sheff, *The (Boundedly) Rational Basis of Trademark Liability*, 15 TEX. INTELL. PROP. L.J. 331, 334 (2007).

<sup>212</sup> See generally McCann, *supra* note 116.

<sup>213</sup> See Hanson & Kysar, *supra* note 1, at 726.

<sup>214</sup> See Hanson & Kysar, *supra* note 207, at 1537.

<sup>215</sup> See Hanson & Kysar, *supra* note 1, at 637 (“The problem of market manipulation has implications for a broad range of legal issues.”). The article focuses on products liability for three reasons:

First, products liability scholarship is dominated by law and economics theory which is premised on a rational actor model of human behavior. Second, the issue of whether, and to what extent, consumers are able to acquire and comprehend product risk information has assumed a position of utmost importance to products liability theory. Finally, because consumer product purchases generally are the most frequent and familiar market transactions that any of us experience, an examination of the consumer product context provides a relevant, immediate, and accessible way to explore our more general thesis about market manipulation.

*Id.* at 637-38.

<sup>216</sup> It has been noted by many commentators that within government and the public sector, representations of particular courses of action are carefully crafted in such a fashion so as to promote a favored outcome. See *supra* note 108 and accompanying text.



competition for consumers in the products marketplace. “Moreover, public choice theory assumes that all players in the local decision-making process—elected officials, bureaucrats, business interests, lobbyists, neighborhood groups, and others—will act in the political marketplace as actors in the private, financial marketplace do: in their own self-interest.”<sup>217</sup> Given the tight competition and high stakes involved in national elections, it is logical that candidates employ strategic tactics aimed at manipulating voters’ decision-making processes. As Iyengar and Simon found, “manipulation . . . to promote political objectives is now not only standard practice *but in fact essential to survival*.”<sup>218</sup>

According to Hanson and Kysar, the party who is in the best position to control the flow of information and the presentation of options is the party who ultimately has the most power to shape future decisions.<sup>219</sup> The potential for any given candidate to gain too much control over information flow would appear to justify spending limits.<sup>220</sup> As Hanson and Kysar point out, “when a party to a transaction has the ability to assert this influence, the underlying transaction will not necessarily yield an increase in social welfare.”<sup>221</sup> Even in the context of a presidential election, when citizens are more active, more likely to vote, and better informed about the candidates, voters are still often confused regarding policy issues. Levels of voter comprehension of policy decisions are sufficiently low that scholars have debated whether voters are even competent to respond to policy rhetoric in any meaningful way.<sup>222</sup> This problem is compounded when “[a]ny efforts at self education are thwarted by manipulative campaigns designed to oversimplify the issues and appeal to the electorate’s worst instincts.”<sup>223</sup>

### III. THE STORY OF CAMPAIGN FINANCE REFORM

#### A. *The Goals of Campaign Finance Reform*

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<sup>217</sup> Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137, 146 (2008).

<sup>218</sup> See Iyengar & Simon, *supra* note 6, at 150 (emphasis added).

<sup>219</sup> See Hanson & Kysar, *supra* note 1, at 635.

<sup>220</sup> For articles that discuss various positions on campaign finance reform, see Lau & Redlawsk, *supra* note 55, and Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1057-58 (2005).

<sup>221</sup> See Hanson & Kysar, *supra* note 1, at 747.

<sup>222</sup> See Eule, *supra* note 137, at 1556.

<sup>223</sup> See *id.*

While most agree that there should be some regulation governing campaign dollars, there is disagreement with respect to questions of scope, degree, and means.<sup>224</sup> Broadly speaking, there are two potential pitfalls. On the one hand, the legislature could be too restrictive, creating laws that unconstitutionally restrict the ability of actors to support a candidate or promote an issue. On the other hand, the legislature could under-regulate and could fail to adequately protect the voters from inappropriate influences.<sup>225</sup>

The Supreme Court has consistently held that restrictions on campaign funding implicate the First Amendment and have thus required the showing of a compelling interest to outweigh protection of speech. The Court has held that “corruption or the appearance of corruption” is a sufficiently compelling interest to justify burdening speech and association freedoms.<sup>226</sup> Throughout its campaign finance jurisprudence, the Court has (with one notable exception) rejected the notion that equalizing the political field is an interest justifying regulation of campaign monies.<sup>227</sup>

The Court has likewise failed to recognize the potential for campaign spending to mislead voters or to distort voting decisions. The Court’s recognition of some interests and not others has resulted in limits on campaign contributions, but not in limits on candidate or independent expenditures. Although some recent scholarship has argued that the Court is moving toward an increasingly pro-regulatory position, there is no indication that the Court is inclined to reverse itself and adopt a level playing field approach. After the passage of thirty-three years, a number of notable Court decisions, and a second Congressional attempt to improve campaign finance law, the state and federal legislatures are still left with Court opinions that proscribe expenditure caps,<sup>228</sup> and the primary expenditure-contribution dichotomy first elucidated in *Buckley v. Valeo* remains alive and well.

There are two ways in which campaign funding can lead to “undue influence.” The first involves contributions. The rationale behind regulating contributions is the potential for a quid pro quo exchange of political favor for campaign monies. Even where there is no clear opportunity for quid pro quo exchange, there is the potential that a

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<sup>224</sup> The answer is not as simple as it may appear. It has been remarked: “[T]he Justices [cannot] agree on what purportedly is the central issue in campaign finance law.” See Ringhand, *supra* note 21, at 77.

<sup>225</sup> “Quid-pro-quo corruption is when elected politicians feel indebted to big donors and repay these donors with a variety of political favors.” *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>226</sup> The Court is not unanimous in its view that campaign funds constitute speech. Justice Stevens has famously asserted that “money is . . . not speech.” *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 398 (2000) (concurring). Justice Breyer also asserted that money is not speech, although he noted that money enables speech. *Id.* at 400 (concurring).

<sup>227</sup> See *Buckley*, 424 U.S. at 48-49.

<sup>228</sup> See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

candidate who has received substantial contributions from a particular source may be influenced by this generosity in the course of subsequent political dealings. The second way in which campaign financing can be said to have undue influence pertains to expenditures. When groups and individuals are able to spend theoretically unlimited amounts (“independent expenditures”) on communication directed at the voting public, there is the potential for these groups to gain excessive influence over the electorate. Empirical research on the effects of strategic campaign efforts has demonstrated the potential for exploitative tactics to be used to influence the decision-making processes of the electorate. Limiting spending on campaign communication would address the danger of mass distortion and manipulation of voting decisions.

### B. *A History of Campaign Finance Reform in the United States*

The campaign finance reform movement has a tortured history. The beginning of the saga was marked by extreme skepticism of Congress’s attempt to restrict campaign funding. The period following this is characterized as a move toward a more liberal approach and an increasing deference to the ability of legislators to define and address problems. More recently, the Court has swung back toward the earlier skepticism.

#### 1. The Federal Election Campaign Act and *Buckley v. Valeo*

*Buckley v. Valeo*<sup>229</sup> challenged the constitutionality of the Federal Election Campaign Act (FECA),<sup>230</sup> as amended in 1974. The FECA Amendments limited certain political contributions and expenditures, imposed disclosure requirements on political committees who receive contributions, and on individuals and groups who make contributions, developed public financing programs for Presidential elections, and created the Federal Election Commission as the administering agency of these requirements.<sup>231</sup>

The Act was challenged primarily on First Amendment grounds. The appellants argued that limiting the use of money for political purposes constituted an impermissible restriction of speech, because in their view “virtually all meaningful political communications in the

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<sup>229</sup> 424 U.S. 1 (1976).

<sup>230</sup> FECA was first signed into law in 1972. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in sections of 2, 18, and 47 U.S.C.).

<sup>231</sup> Pub. L. No. 93-443, 88 Stat. 1263 (1974).

modern setting involve the expenditure of money.”<sup>232</sup> The appellees argued that several important governmental interests were advanced by the regulations, including: (1) preventing corruption or the appearance of corruption; (2) “equaliz[ing] the relative ability of all citizens to affect the outcome of elections;” and (3) “tempering the dramatic increases in the costs of political campaigns so as to encourage the participation of political candidates lacking large sums of money.”<sup>233</sup>

The Court noted that the Act’s contribution and expenditure limitations “operate in an area of the most fundamental First Amendment activities” in that “[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”<sup>234</sup> The Supreme Court went on to say that the First Amendment “affords the broadest protection to such political expression in order ‘to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”<sup>235</sup> The Court concluded that a substantial interference with constitutionally protected rights of political speech and association may be permissible if the countervailing interest is sufficiently important and the government employs means closely drawn to avoid unnecessary abridgement of protected freedoms.<sup>236</sup> Ultimately, the *Buckley* Court sustained the Act’s individual contribution limits, disclosure provision, and public financing scheme, but found the expenditure limitations “constitutionally infirm.”<sup>237</sup>

In finding contribution limitations constitutional, the Court held that the primary purpose of the contribution limit—to avoid corruption and the appearance of corruption—was a constitutionally sufficient justification for the provision.<sup>238</sup> With respect to the abridged freedom, the court called a restriction on contributions a “marginal restriction” on the contributor’s speech because donating funds to a candidate only communicates support for the candidate without communicating any underlying rationale for the support.<sup>239</sup> With respect to *contributions*, FECA’s marginal restriction on First Amendment rights was outweighed by the governmental interests offered in support of the Act.<sup>240</sup>

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<sup>232</sup> See *Buckley*, 424 U.S. at 11.

<sup>233</sup> *Id.* at 25-26.

<sup>234</sup> *Id.* at 14.

<sup>235</sup> *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

<sup>236</sup> See *id.* at 25.

<sup>237</sup> *Id.* at 143.

<sup>238</sup> The Court stated that “the integrity of our system of representative democracy is undermined” when large contributions are given to secure “political quid pro quo from current and potential office holders,” as shown by the examples that surfaced after the 1972 election. *Id.* at 26-27.

<sup>239</sup> See *id.* at 20-21.

<sup>240</sup> The Court concluded that “the weighty interests served by restricting the size of financial

The Court viewed expenditures differently than contributions and accordingly struck down restrictions on expenditures.<sup>241</sup> According to the Court, the primary effect of these expenditure limitations was to limit speech.<sup>242</sup> In finding the expenditure limitations constitutionally infirm, the Court noted that a restriction on the amount of money a person or group can spend on political communication during a campaign “necessarily reduces the quantity of expression . . . because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”<sup>243</sup> The Court was also concerned with the breadth of the restrictions because of their application to all individuals and groups.<sup>244</sup>

In striking down expenditure limits, the Court downplayed any governmental interest in leveling the playing field with respect to influencing election outcomes.<sup>245</sup> With respect to the equalizing rationale, the Court famously said:

It is argued . . . that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation[s] on expenditures]. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and

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contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the \$1,000 contribution ceiling.” *Id.* at 29. The Court also concluded that the \$5,000 limitation on contributions by political committees enhanced the opportunity of association “of bona fide groups to participate in the election process, and the registration, contribution, and candidate conditions serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees.” *Id.* at 35-36. And finally, the \$25,000 limitation on total contributions during any calendar year was constitutional even though it did impose a restriction on “the number of candidates and committees with which an individual may associate himself by means of financial support,” since the restraint served “to prevent evasion of the \$1,000 contribution limitation” and was thus no more than a corollary to the individual limitation. *Id.* at 38.

<sup>241</sup> FECA as amended in 1974 limits expenditures by individuals or groups “relative to a clearly identified candidate” to “\$1,000 per candidate per election, and by a candidate from his personal or family funds to various specified annual amounts depending upon the federal office sought, and restricts overall general election and primary campaign expenditures by candidates to various specified amounts, again depending upon the federal office sought.” *Id.* at 1.

<sup>242</sup> The Court characterized limitations on expenditures as “restrict[ing] the quantity of speech by individuals, groups, and candidates.” *Id.* at 39.

<sup>243</sup> *Id.* at 19.

<sup>244</sup> *Id.* at 19-20. The Court asserted that placing restrictions on spending by candidates represented “substantial rather than merely theoretical restraints on the quantity and diversity of political speech” because the limitation appeared to “exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication.” *Id.*

<sup>245</sup> The Court explicitly rejected the goal of “equalizing the relative ability of individuals and groups to influence the outcome of elections.” *Id.* at 48-49.

social changes desired by the people. The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.<sup>246</sup>

Furthermore, according to the Court "there is no precedent which supports the position that "the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society."<sup>247</sup>

The Court failed to recognize any danger in one candidate spending substantial sums (and substantially more than her opponent), instead linking any danger stemming from expenditures with dangers associated with contributions.<sup>248</sup> But the Court was reassured with respect to this concern, noting that "the Act's contribution limitations and disclosure provisions" would address any potential dangers.<sup>249</sup> Particularly with respect to the overall campaign expenditures, the Court concluded that the financial resources available to a candidate would vary depending on "the size and intensity of the candidate's support."<sup>250</sup> Importantly, the Court decided that "there is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate."<sup>251</sup> According to the Court, the First Amendment precludes the government from dictating when and to what degree private spending on a candidate is excessive, leaving this determination in the hands of the citizens of the United States.<sup>252</sup>

After *Buckley*, the Court consistently adhered to two basic principles in its campaign finance cases. The first was that the only constitutionally acceptable rationale for campaign finance regulation was to combat the corruption or the appearance of corruption. Restricting political money to level the playing field between rich and poor candidates or to hold down the cost of running for office, on the other hand, were each repeatedly rejected as unworthy reasons to encroach upon the First Amendment. The second was that the only kind of acceptable corruption was the quid pro quo exchange of a specific campaign contribution for a cooperative vote on legislation. A more general view of corruption signaling that the political system was "for sale" was insufficient to justify campaign finance rules. While the

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<sup>246</sup> *See id.*

<sup>247</sup> *Id.* at 49.

<sup>248</sup> *Id.* at 47, 55.

<sup>249</sup> *Id.* at 55.

<sup>250</sup> *Id.* at 56.

<sup>251</sup> *Id.*

<sup>252</sup> Specifically, the Court indicated that it fell outside the government's "power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Id.* at 57. Instead, this is the responsibility of the citizenry as a whole. *Id.*

definition of “corruption” morphed slightly in later cases, the firm position against equalizing political voice was maintained in the Court’s subsequent decisions.<sup>253</sup>

## 2. Post-*Buckley*, Pre-BCRA Cases

Between the time that the court handed down its opinion in *Buckley* and the passage of the Bipartisan Campaign Reform Act (BCRA), there were a number of Supreme Court campaign finance cases. Three merit mentioning here. First, in *Boston v. Bellotti*,<sup>254</sup> the Court found unconstitutional a Massachusetts law limiting corporations’ participation in ballot measure campaigns. In determining that the law improperly abridged the First Amendment right to free speech, the Court claimed that “the fact that advocacy may persuade the electorate is hardly a reason to suppress it.”<sup>255</sup>

This permissive perspective on the proper role of corporate interests in elections was turned on its head in *Austin v. Michigan Chamber of Commerce*, decided twelve years after *Bellotti*.<sup>256</sup> Plaintiffs in *Austin* were challenging a Michigan law that prohibited non-media corporations from using general treasury funds for independent expenditures in state election campaigns. The Court used a novel type of corruption rationale to uphold the law, holding that “Michigan’s regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>257</sup> *Austin* is notable as the only case the Court has ever decided that seemed to accept the equalization rationale (in limited circumstances) and approved capping expenditures (albeit in a very circumscribed context).

In 2000, ten years after *Austin* was decided, the Court upheld Missouri’s campaign contribution limits for state elections in *Nixon v. Shrink Missouri Government PAC*.<sup>258</sup> In *Shrink Missouri*, the Court rejected the Eighth Circuit’s application of “strict scrutiny” based upon its interpretation of *Buckley*,<sup>259</sup> opting instead for a more flexible

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<sup>253</sup> See *supra* Part III.A.

<sup>254</sup> *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

<sup>255</sup> *Id.* at 790.

<sup>256</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

<sup>257</sup> *Id.* at 659-60.

<sup>258</sup> 528 U.S. 377 (2000).

<sup>259</sup> *Id.* at 384 (“Finding that *Buckley* had ‘articulated and applied a strict scrutiny standard of review,’ the Court of Appeals held that Missouri was bound to demonstrate ‘that it has a compelling interest and that the contribution limits at issue are narrowly drawn to serve that

approach.<sup>260</sup> Additionally, the Court refused to be tethered to a set basement for contribution limits, stating:

In *Buckley*, we specifically rejected the contention that \$1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate. As indicated above, we referred instead to the outer limits of contribution regulation by asking whether there was any showing that the limits were so low as to impede the ability of candidates to “amass[] the resources necessary for effective advocacy.”<sup>261</sup>

The *Shrink Missouri* Court’s rejection of “strict scrutiny” demonstrated greater willingness to make room for rationales other than corruption and appearance of corruption, while the Court’s refusal to put a floor on contribution limits suggested that the Court was less concerned about the silencing potential of campaign regulations than it had been when it decided *Buckley*.

The combination of the new version of corruption advanced by the Court in *Austin*, along with the more flexible approach taken in *Shrink Missouri*, would seem to leave room for a campaign regulation structure designed to protect the government’s interest in a fair and *equal* election process—namely, one that caps expenditures. Although the Court seemed poised to acknowledge the legitimacy of protecting the election process against the influence of those with substantial financial means, it stopped short of taking the steps it needs to prevent such influences, as we see in the major case to follow campaign finance reforms of 2002, *McConnell v. FEC*.

### 3. BCRA and *McConnell v. FEC*

The Bipartisan Campaign Reform Act of 2002 (BCRA),<sup>262</sup> otherwise known as the McCain-Feingold Act, was Congress’s attempt to amend the Federal Election Campaign Act of 1971 (FECA) and other portions of the United States Code “to purge national politics of what [is] conceived to be the pernicious influence of ‘big money’ campaign

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interest.” (quoting *Shrink Missouri Gov’t PAC v. Adams*, 161 F.3d 519, 521 (1998)).

<sup>260</sup> The Court held that “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.” *Id.* at 391. The majority in *Buckley* determined that the campaign finance context is “a case where constitutionally protected interests lie on both sides of the legal equation. For that reason there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words ‘strict scrutiny.’” *Id.* at 400 (Breyer, J., concurring).

<sup>261</sup> *Id.* at 397 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)). The Court went on to say: “We asked, in other words, whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.” *Id.*

<sup>262</sup> Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in sections of 2 U.S.C.).



contributions.”<sup>263</sup> Specifically, Congress sought to address “the increased importance of ‘soft money,’ the proliferation of ‘issue ads,’ and the disturbing findings of a Senate investigation into campaign practices related to the 1996 federal elections.”<sup>264</sup> Congress found that political parties were circumventing FECA in several ways, necessitating reform.<sup>265</sup> Title I of the BCRA “regulates the use of soft money<sup>266</sup> by political parties, officeholders, and candidates,”<sup>267</sup> while

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<sup>263</sup> *United States v. UAW*, 352 U.S. 567, 572 (1957). Relevant statutes enacted by the BCRA include: 2 U.S.C. §§ 441(i), 441(k), and 441(a) (repealed), and 2 U.S.C. § 438 (a). The BCRA formed the basis for *McConnell v. FEC*, 540 U.S. 93 (2003). FECA regulated donations “made by any person for the purpose of influencing any election for Federal office,” but left unregulated donations made “solely for the purpose of influencing state or local elections.” *Id.* at 122. As a result, prior to the enactment of the BCRA, corporations, unions, and even wealthy individuals “who had already made the maximum permissible contributions to federal candidates” could contribute “nonfederal money,” known as “soft money,” to political parties intended to influence state or local elections. *Id.* at 123. Such soft money contributions were often “designed to gain access to federal candidates” and were in many cases “solicited by the candidates themselves.” *Id.* at 125. “The solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA’s limitations on the source and amount of contributions in connection with federal elections.” *Id.* at 126.

<sup>264</sup> *McConnell*, 540 U.S. at 122.

<sup>265</sup> With regard to soft money, FECA’s existing disclosure requirements prior to the BCRA only pertained to “hard money,” or money contributed for the “purpose of influencing any election for Federal office.” *Id.* at 123 (referring to 2 U.S.C. § 431(8)(A)(i)) (emphasis omitted). This meant that “soft money” contributions for other election activities, such as state and local elections and mixed-purpose activities, went unregulated. Mixed-purpose activities referred to generic party advertising, such as “get-out-the-vote” drives and other informal activities that did not explicitly back a particular candidate and legislative advocacy advertisements that did not explicitly endorse the defeat or victory of a particular candidate. Essentially, as long as the ad did not use the magic words “Vote Against \_\_\_\_\_,” the ad or activity was beyond the reach of FECA regulation. These sorts of communications were referred to as “coordinated expenditures,” as opposed to “independent expenditures,” that did not refer to “communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” *Buckley*, 424 U.S. at 42-44. This is why Congress enacted Title I of the BCRA, which primarily restricts or regulates the use of soft money by political parties, officeholders, and candidates. Title I of the BCRA “takes national parties out of the soft-money business.” *McConnell*, 540 U.S. at 133.

<sup>266</sup> The term “soft money” may be thought of generally as political donations made in such a way as to avoid federal regulations or limits, and specifically, those donations going to a party organization rather than to a particular candidate or campaign.

<sup>267</sup> Title I was Congress’s attempt to “plug the soft-money loophole” of political contribution and expenditures. *McConnell*, 540 U.S. at 133. “The cornerstone of Title I is new FECA § 323(a), which prohibits national party committees and their agents from soliciting, receiving, directing, or spending any soft money.” *Id.* The remaining provisions of Title I reinforce the restrictions of section 323(a), with section 323(b)’s preventing “the wholesale shift of soft-money influence from national and state party committees by prohibiting state and local party committees from using such funds for activities that affect federal elections,” section 323(d)’s prohibiting “political parties from soliciting and donating funds to tax-exempt organizations that engage in electioneering activities,” section 323(e)’s restricting “federal candidates and officeholders from receiving, spending, or soliciting soft money in connection with federal elections and limit[ing] their ability to do so in connection with state and local elections,” and section 323(f)’s preventing the “circumvention of the restrictions on national, state, and local party committees by prohibiting state and local candidates from raising and spending soft money to fund advertisements and other public communications that promote or attack federal candidates.” *Id.* at 133-34.

Title II “primarily prohibits corporations and labor unions from using general treasury funds for communications that are intended to, or have the effect of, influencing the outcome of federal elections.”<sup>268</sup> It also doubled the contribution limit of hard money, from \$1,000 to \$2,000 per election cycle, with a built-in increase for inflation.<sup>269</sup>

In *McConnell v. Federal Election Commission*,<sup>270</sup> which challenged the constitutionality of the BCRA, the Court found governmental interest in preventing “both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.”<sup>271</sup> In upholding almost all of the BCRA, the Court applied the same rationale that guided the *Buckley* decision.<sup>272</sup> The Court maintained its focus on the link between campaign funding and speech, but found that the restrictions in section 323 of the BCRA had “only a marginal impact on the ability of contributors, candidates, officeholders, and parties to engage in effective political speech.”<sup>273</sup> The Court also held that section 323 shows “due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views.”<sup>274</sup>

Moreover, the Court deemed the BCRA critical to serving legitimate and vital governmental interests.<sup>275</sup> The objective of 323(b)

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Section 323(a) provides that “national committee[s] of a political party . . . may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.” *Id.* at 142 (alteration in original). The main goal is to effect a “return to the scheme that was approved in *Buckley*” and to stop donors who direct money to the political committees from contributing “large amounts of soft money for use in activities designed to influence federal elections.” *Id.* “The Government defends section 323(a)’s ban on national parties involvement with soft money as necessary to prevent the actual and apparent corruption of federal candidates and officeholders,” and the Court states that this prevention “constitutes a sufficiently important interest to justify political contribution limits.” *Id.* at 143. This interest was deemed “sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits.” *Id.* at 144.

<sup>268</sup> *Id.* at 132. In *McConnell*, the Court held that this was the governmental interest. *Id.*

<sup>269</sup> Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 307, 116 Stat. 81, 102 (codified at 2 U.S.C. §441a(a) (2006)).

<sup>270</sup> 540 U.S. 93 (2003).

<sup>271</sup> *Id.* at 136 (internal quotation marks omitted).

<sup>272</sup> The question for the Court thus became whether “large soft money contributions to national party committees have a corrupting influence or give rise to the appearance of corruption,” to which the Court answered yes. *Id.* at 145.

<sup>273</sup> *Id.* Specifically, the Court held that section 323 “does little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders.” *Id.* at 138.

<sup>274</sup> *Id.* at 139-40 (internal quotation marks omitted). The restriction of this section of the BCRA does not “chill such solicitations” but rather “tends to increase the dissemination of information by forcing parties, candidates, and officeholders to solicit from a wider array of potential donors.” *Id.* at 140.

<sup>275</sup> The Court based its conclusion that the BCRA served an important loop hole-closing function in large part on Congressional findings. *Id.* at 122-25. In 2000, for instance, a

is to prevent unregulated contributions to state and local party committees with the goal of financing federal election activities,<sup>276</sup> “foreclos[ing on a] wholesale evasion of section 323(a)’s anticorruption measures by sharply curbing state committees’ ability to use large soft-money contributions to influence federal elections.”<sup>277</sup> The Court found the prevention of corruption to be a sufficiently important governmental interest to outweigh the constitutional concerns,<sup>278</sup> and determined that the provision was not overbroad.<sup>279</sup>

Several provisions of the BCRA are particularly germane to the current discussion. Section 323(e) regulates the raising and soliciting of soft money by federal candidates and officeholders, prohibiting “soliciting, receiving, directing, transferring, or spending any soft money in connection with federal elections” and “limit[ing] the ability of federal candidates and officeholders to solicit, receive, direct, transfer, or spend soft money in connection with state and local elections,” in most instances.<sup>280</sup> Section 323(f) generally prohibits

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Congressional committee found that “the national parties diverted \$280 million—more than half of their soft money—to state parties.” *Id.* at 124. In 1990, the FEC clarified the phrase “on a reasonable basis” with regard to a party’s ability to allocate administrative expenses between accounts containing federal and non-federal funds by promulgating fixed allocation rates. *Id.* The clarification obligated the Republican and Democratic National Committees to pay for at least sixty percent of mixed-purpose activities with funding from federal accounts, which were subject to FECA. *Id.* The regulations, however, essentially allowed state candidates to expend “a substantially greater proportion of soft money than national parties to fund mixed-purpose activities affecting both federal and state elections.” *Id.* In response, the BCRA essentially prohibits the shifting of federal money to state party activity that affects federal elections, including the funding of mixed-purpose activities. *Id.* at 161-62; 2 U.S.C. § 441(i)(b) (2006).

<sup>276</sup> See *McConnell*, 540 U.S. at 161-62.

<sup>277</sup> *Id.* at 161. The governmental interest underlying new FECA section 323(b) is similar to the overriding interest of preventing actual corruption and the appearance of corruption. See *id.* at 167. Congress concluded:

[T]he corrupting influence of soft money does not insinuate itself into the political process solely through national party committees. Rather, state committees function as an alternative avenue for precisely the same corrupting forces. Indeed, both candidates and parties were asking donors who have reached the limit on their direct contributions to donate to state committees.

*Id.* at 164 (footnotes omitted).

<sup>278</sup> *Id.* at 165-66.

<sup>279</sup> In tackling the associational burden argument the Court found that the anti-circumvention goal outweighs any associational burden, and stated that “state and local parties can avoid these associational burdens altogether by . . . electing to pay for federal election activities entirely with hard money.” *Id.* at 171. Finally, the Court found the evidence regarding the impact of the BCRA on campaign revenues “speculative and not based on any analysis,” but held open the possibility for as-applied challenges in which the plaintiff would have to prove that the amount of funds available is “so radical in effect as to drive the sound of the recipient’s voice below the level of noise.” *Id.* at 173 (quoting *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 397 (2000)).

<sup>280</sup> See *id.* at 181. The Court said that “[b]y severing the most direct link between the soft money donor and the federal candidate, section 323(e)’s ban on donations of soft money is closely drawn to prevent the corruption or the appearance of corruption of federal candidates.” *Id.* at 182.

candidates for state or local office, or state or local officeholders, from spending soft money to fund “public communications,” defined as communication that “refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office.”<sup>281</sup> Free from this restriction are “communications made in connection with an election for state or local office which refer only to the state or local candidate or officeholder making the expenditure or to any other candidate for the same state or local office.”<sup>282</sup> Importantly, in upholding these provisions, the Court was not substantively altering the course it set in *Buckley*. By regulating only public communications, the BCRA targeted those soft-money *donations* (not expenditures) having the greatest potential to corrupt or give rise to the appearance of corruption of federal officeholders.<sup>283</sup>

Further evidence that the Court maintained its *Buckley* no-limits-on-expenditures position is that it struck down section 213 of the BCRA that required the candidate to choose between two spending options following the nomination of a candidate for a federal office.<sup>284</sup> This section effectively limited parties to independent expenditures or coordinated expenditures with respect to a given candidate, but only for those campaign ads that used a few magic words.<sup>285</sup> Under this provision, the parties would remain free to make independent expenditures for the vast majority of campaign ads that avoided the use of the magic words. However, the Court struck this provision down as unconstitutional, holding that while this may be a small category of

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<sup>281</sup> *Id.* at 184.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* In summary, the Court in *McConnell* held that section 323(a) does not violate the First Amendment, section 323(b) is closely drawn to match the important governmental interest, section 323(d) is a valid anti-circumvention measure, section 323(e) does not violate the First Amendment, and section 323(f) is a valid anti-circumvention provision. *Id.* at 93-101. The Court also upheld the disclosure requirements and use of the new term “electioneering communication” in section 201, but the Court did not foreclose the possibility of future challenges to particular applications of the disclosure requirement. Sections 202, 203, 204, and 214 were also held constitutional, while section 213 was found unconstitutional. Finally, sections 311 and 504 were found constitutional and section 318 was held to be in violation of the First Amendment. *Id.* at 102-10.

<sup>284</sup> *Id.* at 215.

<sup>285</sup> *Id.* at 215-16. An “independent expenditure” is an expenditure by a person “expressly advocating the election or defeat of a clearly identified candidate” and which is “not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” 2 U.S.C. § 431(17) (2006). The definition of a “coordinated expenditure” is less straightforward, in part because the very definition has been the subject of litigation. *See* Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001) (upholding restrictions on coordinated expenditures by parties). The BCRA expanded the definition of “coordinated expenditures.” Current FEC regulations defining “coordinated communications” contain a content prong, which requires that the communication be related to a federal election. 11 C.F.R. § 109.21(c) (2009).

burdened speech, “it plainly is entitled to First Amendment Protection.”<sup>286</sup> This aspect of *McConnell* is notable, not only because it is one of few provisions of the BCRA the Court found unconstitutional, but also because it indicates the Court’s continuing resistance to placing limitations on expenditures.

Some viewed *McConnell* as a surprising outcome, given the Court’s earlier attitude of general skepticism toward campaign funding restrictions.<sup>287</sup> However, it is important to understand that *McConnell* was not a sea change from the path the Court was on prior to that decision.<sup>288</sup> In spite of earlier cases suggesting that the Court may be turning over a new leaf, the *McConnell* opinion reaffirmed the fundamental tenets of its *Buckley* opinion.<sup>289</sup> First, *McConnell* reiterated the notion that any restriction on campaign funding implicates the First Amendment. As a result, attempts to restrict funding of campaigns and campaign activity must be narrowly tailored to serve an important governmental interest. The compelling interest remained avoiding corruption or the appearance of corruption, and while the Court was willing to permit loophole-closing provisions that went to the

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<sup>286</sup> See *McConnell*, 540 U.S. at 217. Under this provision, a “political party’s exercise of its constitutionally protected right to engage in core First Amendment Expression” results in a “loss of a valuable statutory benefit that has been available to parties for many years.” *Id.* To “survive constitutional scrutiny, a provision that has such consequences must be supported by a meaningful governmental interest.” *Id.* The governmental interest here is “requiring political parties to avoid the use of magic words,” and the Court said this is not enough to support the constitutional burden. *Id.* The Court further stated that “any claim that a restriction on independent express advocacy serves a strong Government interest is belied by the overwhelming evidence that the line between express advocacy and other types of election-influencing expression is, for Congress’s purposes, functionally meaningless.” *Id.*

The Government argues that this provision is “not an outright ban on independent expenditures, but rather offers parties a voluntary choice between a constitutional right and a statutory benefit,” but the Court rejected that argument saying that a “local party committee would be able to tie the hands of a state committee or other local committees in the same State” by being the first mover, thus taking the choice away. *Id.* at 218.

<sup>287</sup> See, e.g., Lillian BeVier, *Campaign Finance Regulation: Less, Please*, 34 ARIZ. ST. L.J. 1115, 1115-16 (2002); Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After Randall v. Sorrell*, 68 OHIO ST. L.J. 849, 850-52 (2007). Although some view *McConnell* as a substantial departure from *Buckley*, those who make this argument do so primarily based upon the tone of “deference” to Congress (or conversely lack of “skepticism” in Congressional attempts to regulate).

<sup>288</sup> See Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 32 (2004); see also Hasen, *supra* note 287, at 859.

<sup>289</sup> One commentator has remarked:

The Court in *McConnell*, as part of four recent Supreme Court cases making up “the New Deference Quartet,” seemed poised to embrace a political equality rationale for campaign financing. In particular, the Court seemed to tacitly endorse the “participatory self-government” objective for campaign finance reform proposed by Justice Breyer in a concurring opinion in one of the earlier New Deference cases. It nonetheless “continued to entertain the fiction that it [was] adhering to the anticorruption rationale of *Buckley v. Valeo* . . . .

Hasen, *supra* note 287, at 850-51 (citations omitted).

heart of soft-money *contributions*, the Court viewed this as a mere fix to the FEC, *not* a change to the rationale and scope of campaign limitations. Importantly, the Court continued to reject the notion that campaign regulation could have as a legitimate purpose to equalize political voice.<sup>290</sup>

#### 4. *Randall v. Sorrell* and *Davis v. FEC*

*Randall v. Sorrell*<sup>291</sup> was the first case since *Buckley* to seriously test the Court's treatment of general campaign expenditure limits. This case required the Supreme Court to consider the constitutionality of contribution and expenditure limits imposed by Vermont's "Act 64." The Vermont legislature's attempt to rein in campaign spending resulted from the conviction that unlimited campaign spending had distorted the electoral process and seriously compromised the fairness of elections.<sup>292</sup>

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<sup>290</sup> Gerard J. Clark & Steven B. Lichtman, *The Finger in the Dike: Campaign Finance Regulation After McConnell*, 39 SUFFOLK U. L. REV. 629, 642 (2006). The post-*Buckley* era was marked by a consistent adherence to two fundamental principles:

First, the only constitutionally acceptable rationale for campaign finance regulation was to combat the corruption or the appearance of corruption. Restricting political money to level the playing field between rich and poor candidates and to holding down the cost of running for office were repeatedly rejected as unworthy reasons to encroach upon the First Amendment. Second, prevention of only quid pro quo corruption—the exchange of a campaign contribution for a cooperative vote on legislation—justified burdening free speech. A more general view of corruption signaling that the political system was generally "for sale" was insufficient to justify campaign finance rules. The *McConnell* court abandoned neither of these principles.

*Id.*

<sup>291</sup> 548 U.S. 230 (2006).

<sup>292</sup> See Brief of Respondents, Cross-Petitioners Vermont Public Interest Research Group et al. at 7-9, *Randall v. Sorrell*, 548 U.S. 230 (2006) (Nos. 04-1528, 04-1530, 04-1697). Findings of the Vermont General Assembly that supported the imposition of limits on expenditures included the following:

- (1) Election campaigns for statewide and state legislative offices are becoming too expensive. As a result many Vermonters are financially unable to seek election to public office and candidates for statewide offices are spending inordinate amounts of time raising campaign funds. . . .
- (4) Robust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased.
- (5) Increasing campaign expenditures require candidates to seek and rely on a smaller number of larger contributors, often outside the state, rather than a large number of small contributors. . . .
- (9) Large contributions and large expenditures by persons or committees, other than the candidate and particularly from out-of-state political committees or corporations, reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens.
- (10) Citizen interest, participation and confidence in the electoral process is [sic] lessened by excessively long and expensive campaigns. . . .
- (12) Public financing of campaigns, coupled with generally applicable contribution and

The U.S. Court of Appeals for the Second Circuit upheld the constitutionality of spending limits,<sup>293</sup> and Justice Souter (whose dissent Justice Ginsburg joined) thought it appropriate to defer to the Vermont State Legislature in determining the appropriateness of spending limits.<sup>294</sup> However, a majority of the Roberts Court killed spending limits categorically.<sup>295</sup> One observer noted that “[f]or the foreseeable future, constitutional challenges to the spending limit holding of *Buckley* now appear foreclosed.<sup>296</sup>

The Court also rejected the contribution limitations set out in Act 64 as unconstitutionally restrictive.<sup>297</sup> Vermont’s low contribution limits, according to Breyer’s plurality opinion, were not sufficiently carefully tailored to pass muster. The opinion listed five factors that made the limitations problematic: (1) the contribution limits appeared to restrict funds available to challengers to run competitive elections; (2) political parties were subject to the same contribution limitations;<sup>298</sup> (3) the law appeared to count a volunteer’s expenses against the volunteer’s contribution limit, placing a particular burden on First Amendment freedoms; (4) the limits were not designed to adjust to account for inflation; and (5) nothing in the record foreclosed on the possibility that less restrictive limits would suffice.<sup>299</sup>

The *Randall* opinion was the first decided by the Roberts Court, and it is suggestive of the general future direction of campaign finance

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expenditure limitations, will level the financial playing field among candidates and provide resources to independent candidates, both of which will increase the debate of issues and ideas.

(13) In Vermont, campaign expenditures by persons who are not candidates have been increasing and public confidence is eroded when substantial amounts of soft money are expended, particularly during the final days of a campaign.

*Landell v. Sorrell*, 382 F.3d 91, 101-02 (2d Cir. 2004), *rev’d sub nom.* *Randall v. Sorrell*, 548 U.S. 230 (2006).

<sup>293</sup> See *Landell*, 382 F.3d at 97, 148-49.

<sup>294</sup> Justice Souter wrote:

[T]he *Buckley* Court did not categorically foreclose the possibility that some spending limit might comport with the First Amendment. Instead, *Buckley* held that the constitutionality of an expenditure limitation turns on whether the governmental interests advanced in its support satisfy the applicable exacting scrutiny . . . . Vermont’s argument therefore does not ask us to overrule *Buckley*; it asks us to apply *Buckley*’s framework to determine whether its evidence here on a need to slow the fundraising treadmill suffices to support the enacted limitations.

*Randall*, 548 U.S. at 281-83 (internal quotation marks omitted).

<sup>295</sup> *Id.* at 244-46 (plurality opinion); *id.* at 265 (Thomas, J., concurring in the judgment). Two more Justices, Kennedy and Alito, seemingly inclined the same way. *Id.* at 263 (Alito, J., concurring in part and concurring in the judgment); *id.* at 264 (Kennedy, J., concurring in the judgment).

<sup>296</sup> Hasen, *supra* note 287, at 861-62; see *Randall*, 548 U.S. at 246 (plurality opinion); *id.* at 264 (Kennedy, J., concurring in the judgment).

<sup>297</sup> *Randall*, 548 U.S. at 253-62; see *Buckley v. Valeo*, 424 U.S. 1, 96 (1976).

<sup>298</sup> This parallel limitation was deemed to infringe on the right of association. *Randall*, 548 U.S. at 256.

<sup>299</sup> See *id.* at 253-62.

jurisprudence. The holding accomplished two things. First, it dashed the hopes of all who saw merit in the potential leveling or equalizing effect of campaign finance law through the imposition of limits on campaign expenditures. Second, it raised the bar (again) with respect to campaign contribution limits, defining “narrowly tailored” in a particularly restrictive manner.

*Davis v. FEC*,<sup>300</sup> decided in 2008, reaffirmed the Court’s strong opposition to limits on expenditures and to advancing an equalizing rationale through campaign restrictions. In *Davis*, the Court evaluated the “Millionaire’s Amendment” provision of the BCRA, which loosened restrictions on the size of donations candidates may receive from individuals and the amount parties can spend on coordinated campaign expenditures when a candidate’s opponent spends above a certain amount of his own money. Importantly, the effect of the Millionaire’s Amendment was to equalize resources available to opposing candidates by making it easier for a given candidate to raise money when her opponent had access to substantial personal wealth.<sup>301</sup> The equalizing goal and effect of this amendment was rejected by the Court, because, according to the holding in *Davis*, the FEC’s interest in “level[ing] electoral opportunities for candidates of different personal wealth”<sup>302</sup> is ultimately outweighed by the “unprecedented penalty on any candidate who robustly exercises [his] First Amendment right.”<sup>303</sup> This reiteration of the Court’s concern over the unconstitutionality of hampering political speech was accompanied by another familiar theme from *Buckley*, namely the focus on “eliminating corruption or the perception of corruption,” which the Court determined the Millionaire’s Amendment failed to effect.<sup>304</sup>

### C. *Summarizing Thirty-Five Years of Legislation and Jurisprudence*

#### 1. Fundamental Tenets of the Court’s Jurisprudence

It is no easy task to look back over thirty-five years of lawmaking and Supreme Court decisions to distill a few simple lessons from the crazy quilt of statutory provisions and opinions. We are left with a patchwork of laws that regulate (and leave unregulated) campaign funding and spending. However, there are several threads that run

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<sup>300</sup> 128 S. Ct. 2759 (2008).

<sup>301</sup> See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 319, 116 Stat. 81, 109 (codified at 2 U.S.C. §441a-1 (2006)).

<sup>302</sup> See *Davis*, 128 S. Ct. at 2773.

<sup>303</sup> *Id.* at 2771.

<sup>304</sup> *Id.* at 2773.



throughout the Court's opinions. With respect to these basic principles, the current Court demonstrates no proclivity to change.

First, money is speech. The Court views funding of campaign activity as protected under the First Amendment. The protection of speech (in the form of support for candidates or as direct persuasions on the part of candidates, political parties, or third parties) and the protection of freedom of association (most often raised when political parties are subject to regulation) are guarded jealously, as is appropriate. However, equating money with speech is not uncontroversial. It has been argued that while money facilitates speech, money facilitates *many* things, and to equate campaign funds with pure speech is to conflate the means with the end.<sup>305</sup> Nevertheless, the Court starts with this premise, and the majority of the justices demonstrate no inclination to even re-open the issue for discussion.

Second, the *only* government interest sufficiently important to merit any impingement on the right of this type of "speech" is "corruption or the appearance of corruption." The Court has expanded its definition of corruption so as to extend it beyond pure quid pro quo political favor type exchange.<sup>306</sup> However, this expanded definition never grew sufficiently broad to permit the type of regulations that would prevent massive accumulation and spending of funds to bombard the electorate in every conceivable medium and with every type of tactic. In other words, "corruption" has never been interpreted by the Court to mean (or even to approach meaning) *distortion or exploitation of the electorate through the expenditure of vast sums of money*.<sup>307</sup>

A third and related point is that the Court has never overturned the portion of its *Buckley* holding that explicitly rejected the level-playing-field rationale for campaign regulation. Although the Court seemed to accept the notion that the expenditure of large sums of aggregated wealth by corporate interest parties was a type of "corruption" that merited placing limitations on First Amendment freedoms, the Court never explicitly approved of an equalizing rationale. As recently as 2008, the Court considered the leveling rationale in deciding the constitutionality of the Millionaire's provision of the BCRA, and squarely rejected it.<sup>308</sup>

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<sup>305</sup> See *supra* notes 18-21, 27-33 and accompanying text.

<sup>306</sup> Recall that in *Austin*, the Court approved of Michigan's attempt to quash a "different type of corruption." See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). In *Shrink Missouri*, the Court held that "corruption" was not limited to quid pro quo arrangements, but rather should encompass "the broader threat from politicians too compliant with the wishes of large contributors." See *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 389 (2000).

<sup>307</sup> Precisely *how* this manipulation occurs is the subject of later discussion in this Article. See *infra* Part IV.

<sup>308</sup> See *Davis*, 128 S. Ct. at 2773-74.

Finally, the Court has maintained its position that spending limits are unconstitutional. Seemingly tied to the equalization rationale,<sup>309</sup> the rejection of spending limits is a hallmark of Supreme Court campaign finance jurisprudence. The single exception to the rule came in the *Austin* case, where the spending limits were only applicable to general corporate treasury funds. With the exception of this limited instance, the Court has decided that not only is the equalization interest insufficient to allow Congress to restrict “speech,” but, in fact, there is nothing problematic in the unlimited spending of funds for campaigning purposes.<sup>310</sup> As long as a majority of the justices on the Court believe that there is nothing improper about a candidate, party, or independent entity, individually or in the aggregate, allocating vast sums to candidate-promotion efforts, no legislative body will be able to convince the Court to compromise the associated ostensible constitutional freedom.<sup>311</sup>

## 2. The Contribution-Expenditure Distinction

Even if a majority of the justices on the Court were to agree that equalizing candidate resources was an important governmental interest, observers might question the necessity of spending limits given the existence of contribution limits. Following the enactment of the BCRA, which closed the loophole on soft-money contributions, some observers have argued that contributions regulations have been expanded to the point that any potential for wealthy parties to skew election outcomes has vanished.<sup>312</sup> Strictly speaking, the prospect that well-funded entities

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<sup>309</sup> Contribution limitations may have the effect of leveling the political playing field to a certain extent, but only indirectly. Limits on independent expenditures would have a somewhat equalizing effect, but limiting the spending of the parties and the political candidates themselves would be the most direct way of assuring equality of resources. After the demise of Congress’s independent expenditures in *Buckley*, federal legislators have not attempted to limit candidate and party spending, and as we have seen, Vermont’s attempt to cap spending was overturned in *Randall*.

<sup>310</sup> See *Buckley v. Valeo*, 424 U.S. 1, 56-57 (1976).

<sup>311</sup> The Court is not the only reason why spending has not been curbed. Thomas E. Mann, a senior fellow at the Brookings Institute, has noted that:

McCain-Feingold was a very limited legislative initiative designed to restore the effectiveness and credibility of longstanding contribution limits and restrictions on the use of corporate and union treasury funds in federal elections. Its two major pillars—a ban on party soft money and the regulation of electioneering communications—were agnostic about the total amount of money raised and spent in federal elections even while the rhetoric of some of the bill’s supporters in Congress and outside reformers made clear they longed for a reduction in the money chase.

Thomas E. Mann, *A Collapse of the Campaign Finance Regime?*, 6 FORUM 1, 2 (2008).

<sup>312</sup> See, e.g., Yoav Dotan, *Campaign Finance Reform and the Social Inequality Paradox*, 37 U. MICH. J.L. REFORM 955 (2004) (arguing that the Court has been expanding permissible contribution regulation to the point where it almost achieves an equalizing function).

can influence voters via *contributions* has dramatically decreased. It would be a mistake, however, to suppose that contribution limits alone serve to equalize the relative voices of candidates. This makes too much of the distinction between contributions and expenditures.<sup>313</sup>

The fact that the Court has allowed restriction of contributions but not of expenditures has created an artificial line between the two.<sup>314</sup> Most of the dangers the Court sought to address by permitting contribution limits are present when expenditures are unregulated. As one observer noted, “[w]hen I contribute money to a candidate, I engage in an act of political association that is just as important as my decision to spend money on the candidate’s behalf independently. It is simply wrong to treat the two as fundamentally different acts.”<sup>315</sup>

Without *spending* limits, there is nothing to prevent individuals and groups from spending large amounts of money to promote a particular candidate.<sup>316</sup> Although the corruptive potential of the favor may be less obvious, the practical difference between funds spent by an independent individual and those spent by a candidate may be negligible.<sup>317</sup> Furthermore, leaving spending unregulated allows

<sup>313</sup> As Chief Justice Burger pointed out in *Buckley*:

The Court’s attempt to distinguish the communication inherent in political contributions from the speech aspects of political expenditures simply “will not wash.” We do little but engage in word games unless we recognize that people—candidates and contributors—spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utters the words.

*Buckley*, 424 U.S. at 244 (Burger, C. J., concurring and dissenting).

<sup>314</sup> See *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 386-88 (2000). The Court has maintained that an important distinction exists between contributions and expenditures based upon the *constitutionality of regulating these forms of financing*, not the effect of limiting them. For example, in *Shrink Missouri*, the Court asserted that “expenditure restrictions [are] direct restraints on speech.” *Id.* at 386. But in *Buckley*, the Court held that the “prevention of corruption and the appearance of corruption,” were “constitutionally sufficient justification[s]” for restricting contributions. *Id.* at 388 (citing *Buckley*, 424 U.S. at 25-26).

<sup>315</sup> See Neuborne, *supra* note 30, at 116.

<sup>316</sup> Justice White noted the disjunction in the majority’s reasoning in his dissent in *FEC v. National Conservative PAC*:

As in *Buckley*, I am convinced that it is pointless to limit the amount that can be contributed to a candidate or spent with his approval without also limiting the amounts that can be spent on his behalf. . . . It is nonsensical to allow the purposes of this limitation to be entirely defeated by allowing the sort of “independent” expenditures at issue here, and the First Amendment does not require us to do so.

*FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 511-12 (1985) (White, J., dissenting).

<sup>317</sup> Legislators have also argued that limiting contributions does not limit spending:

Admittedly, expenditures made directly by an individual to urge support of a candidate pose First Amendment issues more vividly than do financial contributions to a campaign fund. Nevertheless, to prohibit a \$60,000 direct contribution to be used for a TV spot commercial but then to permit the would-be contributor to purchase the time himself, and place a commercial endorsing the candidate, would exalt constitutional form over substance. Your Committee does not believe the First Amendment requires such a wooden construction.

S. REP. NO. 93-689, at 18-19 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587, 5604-05 (cited in

candidates to spend as much money as they can amass on media blitzes, personal appearances, and other various propaganda efforts. In theory, the amount of money that a candidate can spend in an effort to get him- or herself elected is *limitless*.

#### D. *Voices of Opposition from Within the Court*

Although the Court's holdings have been consistent in their rejection of the leveling rationale for campaign finance restrictions and have almost uniformly struck down spending caps, a notable group of individuals has been voicing opposition to striking down spending limits. The most prominent, and for obvious reasons important, members of this group are Supreme Court justices.

##### 1. Justice White

Justice White was the first Supreme Court Justice to voice opposition to the Court's holding on expenditure limitations in his partial dissent in *Buckley*. Unlike other justices, White did not view spending limits as a direct assault on "speech," but instead as similar to time, place, and manner regulations, which should be upheld "so long as the purposes they serve are legitimate and sufficiently substantial."<sup>318</sup> In *FEC v. National Conservative Political Action Committee*, White asserted that while expenditures "produce" speech, the expenditures are not, themselves, speech.<sup>319</sup> He went on to say:

The burden on actual speech imposed by limitations on the spending of money is minimal and indirect. All rights of direct political expression and advocacy are retained. Even under the campaign laws as originally enacted, everyone was free to spend as much as they chose to amplify their views on general political issues, just not specific candidates.<sup>320</sup>

White's opinion was that the members of the legislature were precisely those in the situation to know whether large-scale expenditures posed a threat to the integrity of the democratic process.<sup>321</sup> He opined:

[E]xpenditure limitations . . . maintain public confidence in the integrity of federal elections, equalize the resources available to the candidates, and hold the overall amount of money devoted to

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*Nat'l Conservative PAC*, 470 U.S. at 512.).

<sup>318</sup> See *Buckley*, 424 U.S. at 264 (White, J., concurring in part and dissenting in part).

<sup>319</sup> See *Nat'l Conservative PAC*, 470 U.S. at 507-08, 511.

<sup>320</sup> *Id.* at 508-09.

<sup>321</sup> See *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982).

political campaigning down to a reasonable level. I consider these purposes both legitimate and substantial, and more than sufficient to support the . . . incidental and minor burden on actual speech.<sup>322</sup>

## 2. Justice Stevens

Justice Stevens has been profoundly influenced by Justice White's approach to spending limits.<sup>323</sup> Stevens firmly holds the view that there are several legitimate reasons to place reasonable restrictions on campaign expenditures.<sup>324</sup> Among the interests Stevens cites is protection of the voters from misleading messages that might distort their subsequent decisions. Stevens points out that "flooding the airwaves with slogans and sound-bites may well do more to obscure the issues than to enlighten listeners."<sup>325</sup> According to Stevens, protecting the electorate from potentially limitless one-sided propaganda not only prevents confusion and limits the amount of misinformation, but it also serves a leveling function, "protect[ing] equal access to the political arena."<sup>326</sup> Ultimately, Justice Stevens is convinced that the deference due Congress, particularly in an area in which its members arguably have special experience, dictates respect for legislatively created regulation. This is particularly so, according to Stevens, because the proposed restriction "at best, has an indirect relationship to activity that affects the quantity—rather than the quality or the content—of repetitive speech in the marketplace of ideas."<sup>327</sup>

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<sup>322</sup> *Nat'l Conservative PAC*, 470 U.S. at 509 (White J., dissenting).

<sup>323</sup> "Although I did not participate in the Court's decision in *Buckley*, I have since been persuaded that Justice White—who maintained his steadfast opposition to *Buckley*'s view of expenditure limits—was correct." *Davis v. FEC*, 128 S. Ct. 2759, 2778 (2008) (Stevens, J., concurring and dissenting) (citing *Nat'l Conservative PAC*, 470 U.S. at 507-12 (White, J., dissenting)).

<sup>324</sup> Several goals of campaign spending limits are advanced by Stevens (and others). Among them are: improving the quality of speech by limiting its quantity, *Davis*, 128 S. Ct. at 2779 (Stevens, J., dissenting) ("[T]he imposition of reasonable limitations would likely have the salutary effect of improving the quality of the exposition of ideas."); unburdening elected officials so that they are free to perform their responsibilities, *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 649 (1996) (Stevens, J., dissenting); and increasing public confidence in the political system. *Randall v. Sorrell*, 548 U.S. 230, 283 (2006) (Souter, J., dissenting) ("[R]obust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased . . ." (internal quotation marks omitted)). These advantages of spending limits will not be discussed at length here, although the merits of these benefits should not be underestimated.

<sup>325</sup> *Davis*, 128 S. Ct. at 2778 (Stevens, J., concurring and dissenting).

<sup>326</sup> See *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 649-50 (Stevens, J., dissenting).

<sup>327</sup> *Randall*, 548 U.S. at 279-80 (Stevens, J., dissenting).

### 3. Justice Breyer

In *Shrink Missouri*, Justice Breyer, in a concurring opinion, introduced his participatory self-government principle. He took issue with the notion that an equality rationale is foreign to the First Amendment, noting:

The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many—in Congress, for example, where constitutionally protected debate, Art. I, § 6, is limited to provide every Member an equal opportunity to express his or her views. Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the political rights of the entire electorate.<sup>328</sup>

Breyer has captured two important points in this concurrence. The first is that many political and government processes are designed specifically to regulate communication for the express purpose of preserving a voice for all. Second, and relatedly, failing to regulate communication (in the name of free speech) has the perverse effect of suppressing speech—hence the need to structure procedures in this way. Although he advanced his general participatory self-government objective in the context of limits on contributions, the arguments he used to support such contribution limits directly support expenditure limits.<sup>329</sup> In Breyer's approach, we see the central notion of limiting funding for the purpose of promoting equality of voice:

[R]estrictions upon the amount any one individual can contribute to a particular candidate seek to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action. Moreover, by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process. In doing so, they seek to build public confidence in that process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.<sup>330</sup>

Breyer, like Stevens, noted Congress's experience with the subject matter, commenting that “the legislature understands the problem—the threat to electoral integrity, the need for democratization—better than

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<sup>328</sup> *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring).

<sup>329</sup> Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 252 (2002); see also STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 39-55 (2005).

<sup>330</sup> *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring) (citations omitted).

do we. We should defer to its political judgment that unlimited spending threatens the integrity of the electoral process.”<sup>331</sup> It is notable that Breyer uses the term “spending,” in light of the Court’s repeated denunciation of spending limits<sup>332</sup> and its explicit rejection of such limits in *Buckley*. Breyer’s use of this term, in conjunction with his participatory self-government goal, might seem to belie his opinion in *Randall*, where he authored the plurality opinion striking down Vermont’s spending limits.<sup>333</sup>

#### 4. Evidence from the “Majority” Itself

The Court demonstrated little concern over the potential influence of private monies in connection with elections, provided that no actual or apparent corruption was present. Yet the Court in *McConnell* upheld Title I under the reasoning that it “does little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders.”<sup>334</sup> The notion that regulating the ability of wealthy donors to influence elections is of no concern would seem to be at odds with the Court’s repeated insistence that regulating “speech” in this manner is unconstitutional. It also seems to clash with the Court’s insistence that it is not within Congress’s “power to determine that spending to promote one’s political views is wasteful, excessive, or unwise,”<sup>335</sup> and its acceptance of solicitation limitations, which “increase the dissemination of information by forcing parties, candidates, and officeholders to solicit from a wider array of potential donors.”<sup>336</sup> This language would seem to legitimize an equalizing rationale for regulation, controverting several of the Court’s holdings.

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<sup>331</sup> *Id.* at 403.

<sup>332</sup> As mentioned, *Austin*—which upheld some spending limits for corporations—was the notable exception. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

<sup>333</sup> See *Randall v. Sorrell*, 548 U.S. 230 (2006).

<sup>334</sup> *McConnell v. FEC*, 540 U.S. 93, 138 (2003).

<sup>335</sup> *Buckley v. Valeo*, 424 U.S. 1, 57 (1976); see also *supra* note 252 and accompanying text.

<sup>336</sup> *McConnell*, 540 U.S. at 140 (finding that solicitation limitations have “only a marginal impact on political speech”).

IV. DEFINING THE PROBLEM WITH THE COURT'S CAMPAIGN FINANCE  
JURISPRUDENCE

A. *A New Definition of "Corruption"*

When the United States Court of Appeals of the D.C. Circuit handed down its opinion in *Buckley*, the court struck down limits on personal-funds spending. The circuit court wrote: "Manifestly, the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or from his immediate family."<sup>337</sup> The Supreme Court agreed, quoting the lower court approvingly and insisting that the "primary governmental interest served by the Act, the prevention of actual and apparent corruption of the political process, does not support the limitation on the candidate's expenditure of his own personal funds."<sup>338</sup> From a pure quid pro quo standpoint, this must be correct. The use of personal funds reduces a candidate's dependence on outside contributions and lessens coercive pressures and resulting abuses campaign finance laws are designed to address. However, the question remains whether quid pro quo corruption is the only legitimate consideration for campaign regulation purposes.<sup>339</sup>

The Court's emphasis on quid pro quo corruption fails to account for the potential for other corruptive influences stemming from unlimited campaign spending.<sup>340</sup> Specifically, the relationship between money and potentially manipulative communication strategies arguably

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<sup>337</sup> *Buckley v. Valeo*, 519 F.2d 821, 855 (D.C. Cir. 1975).

<sup>338</sup> *Buckley*, 424 U.S. at 53.

<sup>339</sup> It has been remarked that "the Justices [cannot] agree on what purportedly is the central issue in campaign finance law: whether the challenged regulations were necessary to combat political corruption or the appearance of such corruption." Ringhand, *supra* note 21, at 77; see also Robert E. Mutch, *On the Origins of Campaign Finance Regulation*, 7 ELECTION L.J. 145, 145 (2008) (reviewing KURT HOHENSTEIN, *COINING CORRUPTION: THE MAKING OF THE AMERICAN FINANCE SYSTEM* (2007)) ("That the concept of corruption covers more than bribery is almost beyond dispute. What is hotly disputed, particularly when the subject is campaign finance, is how much more it covers.").

It is also worth noting that the "appearance of corruption" interest advanced by the Court permits a broader definition of corruptive influences and extends the concept to one that takes into account public perception of the funding activities. For more on public perception and "appearance of corruption," see Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004).

<sup>340</sup> See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990) (finding that corporate independent expenditures could have "corrosive and distorting effects" and could "unfairly influence elections").



supports a more expansive definition of “corruption.”<sup>341</sup> This notion is not entirely foreign, even to the majority. For example, the Court deviated from its usual narrow conception of corruptive influence in *Shrink Missouri*, where the Court identified a “broader threat from politicians too compliant with the wishes of large contributors.”<sup>342</sup> Admittedly, the *Shrink Missouri* opinion still relies upon a concept of corruption that is grounded in a money-for-political-favors based rationale.

As detailed earlier in this Article, the Court has permitted regulation of campaign monies only where it has seen a compelling governmental interest sufficient to outweigh any freedom-of-speech concerns.<sup>343</sup> It is from this basic rationale that the Court derives authority for the regulation of quid pro quo contributions. The question left unanswered is whether another type of corruption may pose similarly important concerns. Perhaps the definition of corruption ought to be expanded to include the potential for distortion in voting behavior as a result of heavy-handed psychological tactics.<sup>344</sup>

The task of supporting a truly democratic voting process while simultaneously guarding other principles fundamental to a free society is the challenge that has faced the Court throughout its campaign-finance jurisprudence history. One commentator has called this the judiciary’s “democracy-defining dilemma”;<sup>345</sup> the term “democracy” is frequently used and rarely defined,<sup>346</sup> but when a definition *is* advanced, it usually includes the notion of “fair” elections.<sup>347</sup> Many philosophers,

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<sup>341</sup> See Ronald Dworkin, *Free Speech and the Dimensions of Democracy*, in IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS 63, 70-72 (E. Joshua Rosenkranz ed., 1999) (asserting that impediments to full citizen participation are critically important in a democracy). For sources supporting a more expansive definition of “corruption,” see *infra* notes 350-364. For theoretical and empirical support for campaign spending limits, see *supra* Part II.

<sup>342</sup> *FEC v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 389 (2000).

<sup>343</sup> See *supra* Part III.

<sup>344</sup> A common understanding of what constitutes “democracy” has been difficult to form because of “the enormous difficulty in determining the definitional questions of ‘what’ is a democracy and ‘when’ is there a democracy.” Matthew Griffin, Note, *Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy Through Its Accreditation Process, and Should It?*, 32 N.Y.U. J. INT’L L. & POL. 725, 771 (2000) (arguing that it is inappropriate for the United Nations to have an accreditation process that relies upon passing a democracy test because, among other reasons, the notion that one can define democracy is misguided).

<sup>345</sup> Ringhand, *supra* note 21, at 77.

<sup>346</sup> For instance, “[m]ost of the work on governance appears satisfied with a description or provision of a shopping list of ingredients for good governance. Such elements include accountability, transparency, anti-corruption, rule of law, advancement for women, democracy and decentralization.” Botchway, *supra* note 21, at 161.

<sup>347</sup> See Bruce E. Cain, *Garrett’s Temptation*, 85 VA. L. REV. 1589, 1601-02 (1999) (“Three conditions characterize a fair party system: (1) The rules are impartial in their discriminatory effects—the system is, on average, equally discriminatory or advantageous to any particular party that gets a certain level of electoral support; (2) the system allows for the free contestation of

political scientists, and legal scholars have written in the area of democratic theory; an extensive discussion of this literature is beyond the scope of this Article. For present purposes, it will suffice to assume that liberal democracy depends upon a free and willing voting public, and a voting process that is unencumbered by systematic, wide-scale manipulation by any segment of the public, individual candidate, or political party.<sup>348</sup> Political advertising and other forms of propaganda are entrenched and vital aspects of the American political process, and political candidates inevitably tout their experience, promote their policies, and attack their opponents. However, while vigorous debate and self-promotion are vital elements of the American political process, temperance and egalitarianism are crucial as well.<sup>349</sup> In order for a government to operationalize democratic principles, it must place reasonable constraints upon a variety of institutions—and must accept restraints itself—that might otherwise undermine objectives of self-governance.

### B. *Corruptive Inequality of Funding*

Inequality in the tactical psychological-political competition is another danger of unlimited spending related to voter manipulation. The amount of money required to craft subtle and conspicuous political strategy, the funds required to hire pricey consultants, conduct research, and carry targeted messages to identified segment of the population puts the political race beyond the reach of all but a few politically inclined individuals. The cost of modern political campaigns has led some to

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offices at some level; and (3) the system satisfies the condition of popular sovereignty such that alternatives with more numerous support are generally preferred over others.”); see also Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONTEMP. PROBS. 279, 303 (2004) (“Just as the political, legal, and social capital values of democracy largely serve to support individual autonomy with respect to self-government through an informed elective process, so too these values inform autonomy with regard to dispute-resolution choices in a democracy, thus justifying a heavier emphasis on autonomy over other values.”).

<sup>348</sup> See Dworkin, *supra* note 341, at 70-72.

<sup>349</sup> See, e.g., Kenneth Lasson, *Torture, Truth-Serum, and Ticking Bombs: Toward a Pragmatic Perspective on Coercive Interrogation*, 39 LOY. U. CHI. L.J. 329 (2008) (“[W]ithout restraint, what is to prevent a once-fair-minded regime from evolving into one like those of Hitler, Stalin, or Pol Pot, which epitomize an ends-justifies-the-means view of government that leads to the murders of millions?” (emphasis added)); see also *Bradshaw v. Rodgers*, 20 Johns. 103, 106 (N.Y. Sup. Ct. 1822) (holding that the Fifth Amendment Takings Clause “relate[s] to the powers of the national government, and was intended as a restraint on that government”), *rev’d*, 20 Johns. 735 (N.Y. 1823); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2658 (2008) (arguing that it is in the interest of the public for courts and legislatures to constrain commercial expression just as it is in the best interest of the public to enjoy protection of the First Amendment and the resulting restraint on government).

worry that the goals of democracy are frustrated when the field of potential contenders is so circumscribed.<sup>350</sup>

Not only are voters left with a limited pool of political candidates, but the candidates who do run often have very different levels of political viability as a simple function of their relative resources. Of particular concern is the ability of citizens to promote, in any meaningful way, their chosen candidate. A single well-funded private or corporate actor can provide a greater advantage to a candidate than multiple (sometimes many multiple) individuals who lack substantial financial resources. One commentator expressed the view that

[a]llowing corporations to make campaign contributions may increase the *quantity* of political speech available to voters, but could decrease the ability of individuals to influence election outcomes. . . . [I]s democracy better served by . . . a system of unregulated political spending, or by one that attempts to equalize the influence of a variety of speakers?<sup>351</sup>

Spending limits would ameliorate this problem by leveling the playing field upon which campaigns are fought without either side having an unfair advantage based on financial resources alone.<sup>352</sup>

Germane to the discussion of spending limits and effects on election outcomes is Ronald Dworkin's notion of "partnership democracy."<sup>353</sup> This form of democracy is based on the idea that citizens should assume an active role in political decision-making.<sup>354</sup> The participatory element of partnership democracy, which involves shaping opinion, requires that the public be more than passive recipients of political communication. Instead, it conceives of a populace that is empowered to actively contribute to the political conversation. Dworkin asserts that "[p]eople cannot plausibly regard themselves as partners in an enterprise of self-government when they are effectively shut out from the political debate because they cannot afford a grotesquely high admission price."<sup>355</sup> The admission price remains high specifically because without reasonable limits on the amount well-endowed entities can spend, such expenditures literally dwarf the

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<sup>350</sup> Botchway has commented:

What is important is that people have a meaningful participation in the election of their representatives. In that case, they may be able to elect representatives who reflect their ideals and concerns. This requires the removal of tangible and latent obstacles to the emergence of candidates. Requirements based on wealth, ethnicity, education, sex, religion and publicity can frustrate the emergence of competent candidates and thereby limit the options available to the electorate.

Botchway, *supra* note 21, at 190.

<sup>351</sup> See Ringhand, *supra* note 21, at 78 (emphasis added).

<sup>352</sup> See Ewing, *supra* note 21.

<sup>353</sup> Dworkin, *supra* note 341, at 70-72; see also Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19-24.

<sup>354</sup> See *supra* note 353.

<sup>355</sup> See Dworkin, *supra* note 341, at 78-79.

contributions of the “average” citizen.<sup>356</sup> The prohibition on spending limits established in *Buckley* and upheld in subsequent Court decisions perpetuates this inequality of voice.<sup>357</sup>

The harm is not limited to those small donors whose dollars will never gain them admission to the political debate; it also extends to the public at large, which is repeatedly exposed to powerful messages on behalf of a candidate favored by those with financial wherewithal.<sup>358</sup> The danger is greatest in societies in which disparities in wealth create diversity of opportunity for such influence.<sup>359</sup> As Jamin Raskin and John Bonifaz have noted, “[i]n market societies where wealth is unevenly distributed yet crucial to the processes of election and governance, the inegalitarian logic of the economy undermines the egalitarian logic of one person, one vote democracy.”<sup>360</sup> Importantly, as Rawls argues:

The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate. For eventually these inequalities will enable those better situated to exercise a larger influence over the development of legislation.<sup>361</sup>

The way to assure that certain segments of the populace do not gain an inordinately loud voice in the political process is to exercise some measure of control over spending. Edwin Baker describes institutional “‘sluices’ through which public opinion flows” that are specifically structured in such a way as to promote various goals, including fairness and openness.<sup>362</sup> Baker argues in favor of regulating election-oriented communication in order to combat the “major dangers” facing the democratic election process.<sup>363</sup> Commentators who

<sup>356</sup> See Neuborne, *supra* note 30, at 120-21.

<sup>357</sup> *Id.*

<sup>358</sup> See Baker, *supra* note 175, at 43 (arguing for the importance of measures to assure that influences on public opinion are “appropriate”).

<sup>359</sup> See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006) (“To this day, the idea of self-sustaining political competition built into the structure of government is frequently portrayed as the unique genius of the U.S. Constitution, the very basis for the success of American democracy.”).

<sup>360</sup> Raskin & Bonifaz, *Democratically Financed Elections*, *supra* note 175, at 1162. Raskin and Bonifaz describe the problem thus:

More deeply, the tyranny of private money corrupts the democratic relationship of one person/one vote by making it exceedingly difficult for poor or middle-class persons to run for office, by leaving them without meaningful electoral choices, and by assuring that wealthy interests will set the parameters of political debate and the nature of the legislative agenda. Not surprisingly, the nonaffluent majority continues to lose ground in public policy and turn away in disgust from the political system.

Raskin & Bonifaz, *Wealth Primary*, *supra* note 175, at 277 (1993).

<sup>361</sup> JOHN RAWLS, A THEORY OF JUSTICE 225 (1971).

<sup>362</sup> See Baker, *supra* note 175, at 44.

<sup>363</sup> *Id.*

favor greater regulation have argued strenuously that more must be done to promote equality and fairness in the election process.<sup>364</sup>

#### CONCLUSION

A robust body of empirical evidence demonstrates that citizens are not “rational” when they vote, and further, that their reliance upon heuristical processing and their vulnerability to various biases influences their voting behavior. Importantly for campaign regulation purposes, these irrational patterns of processing information are exploited by political candidates. Research on voting behavior has illustrated the powerful effects of strategic campaign spending, and has demonstrated a link between money spent and voting outcomes. The implications of research and theory are troubling; simply put, voters often make incorrect choices (choices that are inconsistent with their own professed attitudes and goals) when they rely on cues supplied by sources that are politically motivated. The potential for campaign spending to influence vote choice is particularly troubling in light of the Court’s refusal to recognize any governmental interest justifying campaign spending limits. This Article has identified two important harms associated with unlimited campaign spending. Unregulated spending (1) facilitates the ability of well-funded actors to exploit cognitive biases and (2) creates gross inequities in the relative ability of actors to influence election outcomes.

Although the Supreme Court has rejected an equalizing rationale for limiting campaign spending, the leveling approach has been embraced by other societies who hold democratic elections. Great Britain, for example, has regulated campaign spending for more than a hundred years.<sup>365</sup> The purpose of the legislation, according to the British courts, is “to achieve a level financial playing field between competing candidates, so as to prevent perversion of the voters’ democratic choice between competing candidates within constituencies by significant disparities of local expenditure.”<sup>366</sup> The result of

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<sup>364</sup> Wright, *supra* note 25, at 625-26. Wright argues that:

Political equality is the cornerstone of American democracy. Today’s electoral processes, tainted by huge inequalities in funds and special access for special interests, fall far short of that ideal and are moving further away every year. But rather than give up faith and drift with the tide, we must reexamine and renew our commitment to realizing America’s fundamental political ideals.

*Id.*

<sup>365</sup> The initial British act regulating elections, the Representation of the People Act of 1884, has been amended many times—most notably in 1918, 1948, 1949, and 1983—and was most recently amended by the Political Parties, Elections and Referendums Act of 2000.

<sup>366</sup> *R v. Jones*, [1999] 2 Crim. App. 253, 255. U.K. law currently provides that “[t]he election expenses incurred by or on behalf of a candidate at an election must not in the aggregate exceed

excessive or dramatically asymmetrical spending by political candidates has been the subject of concern on the part of commentators in the United States as well.<sup>367</sup> It has been remarked that “[n]one of the rationales for strong protection of free expression—truth, autonomy and self-fulfillment, social stability, or self-government—justifies the continuing and unchecked abuses that excessive spending has brought to the electoral process.”<sup>368</sup>

Legislatures intuit what social science confirms. Congress and a number of state legislatures have enacted measures designed to limit campaign spending.<sup>369</sup> As recently as 2006, the Court struck down state legislation capping spending in *Randall v. Sorrell*.<sup>370</sup> The Vermont legislature’s concern that unlimited spending had distorted the election process and compromised the fairness of election outcomes is telling.<sup>371</sup> In a variety of contexts, legislators have described the corrosive, unequal, and distorting effects of money in politics. Some of the best evidence that spending undermines the democratic nature of elections in the United States comes from congressional insiders.<sup>372</sup>

The Court’s focus on protecting speech is misplaced in the campaign finance context, where the freedom to communicate ideas is best preserved by protecting some voices from being “drown[ed] out” and by limiting the ability of moneyed interests to determine election outcomes.<sup>373</sup> Until the Court recognizes the dangers inherent in

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[the permitted maximum].” Political Parties, Elections and Referendums Act, 2000, c. 41, § 132 (amending Representation of the People Act, 1983, c. 2, § 76).

<sup>367</sup> Ewing, *supra* note 21; *see also* Botchway, *supra* note 21; Ringhand, *supra* note 21, at 78.

<sup>368</sup> Wright, *supra* note 25, at 636.

<sup>369</sup> As previously discussed, FECA was the federal congressional legislation. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in sections of 2, 18, and 47 U.S.C.). According to the Hoover Institution:

With voters approving ballot initiatives in Massachusetts and Arizona in the 1998 elections, these two states will join the 22 that already have statutes on the books providing some sort of public financing for election campaigns. Some 12 states and New York City now have some form of expenditure limitations.

Hoover Institution, Campaign Finance: State and Local Overview, <http://www.campaignfinancesite.org/structure/states1.html> (last visited Nov. 20, 2009).

<sup>370</sup> *Randall v. Sorrell*, 548 U.S. 230 (2006).

<sup>371</sup> *Id.*

<sup>372</sup> Richard Hall, *Equalizing Expenditures in Congressional Campaigns: A Proposal*, 6 ELECTION L.J. 145, 147 (2007) (“[The claim that] money enhances access to influential legislators comes from a variety of sources, including reports of congressional insiders.”).

Moreover, elected officials have voiced concerns not only about the potential for inequality, but also about their inability to effectively represent their constituents because of the non-stop need to fundraise. *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1282 (1994) (“‘Disproportionate influence’ is hard to measure, and absent particularly nefarious patterns perhaps is defensible as an inevitable phenomenon in any real world of power. . . . [However,] [t]he quality no less than the equity of representation is a concern of constitutional dimension.”).

<sup>373</sup> Wright, *supra* note 25, at 631.

unchecked campaign spending, wealthy actors, candidates, and political parties will continue to distort election outcomes by engaging in widespread exploitation of the electorate.<sup>374</sup> In order to increase the legitimacy of the elective process, the Supreme Court should permit legislative bodies to structure campaign finance laws in ways that encourage citizen involvement, increase candidate accountability, and restrain manipulative psychological tactics.<sup>375</sup>

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<sup>374</sup> David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 237 (1991). Cole argues that:

[C]apitalism and democracy are an uneasy mix. Free market capitalism threatens the free marketplace of ideas by giving certain voices inordinate influence, not because of the power of their ideas, but because of the volume they can generate for their voices with dollars earned through commercial activities. Because even 'free speech' costs money, those who succeed in the economic marketplace are able to purchase far more speech opportunities than those who do not.

*Id.*

<sup>375</sup> Spencer Overton has suggested that "[r]eforms such as establishing matching funds and providing tax credits for smaller contributions, combined with emerging technology, would enable more Americans to make contributions and would enhance their voices in our democracy." Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 73 (2004).