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Campaign Finance Regulation and the Marketplace of Emotions

Barry P. McDonald*

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"[I]t is the reason, alone, of the public, that ought to control and regulate the government. The [public's] passions ought to be controlled and regulated by the government."

— Publius (Federalist No. 49)¹

* Associate Professor of Law, Pepperdine University School of Law. I gratefully acknowledge the *Pepperdine Law Review* for hosting a symposium in April, 2008, entitled *Free Speech and Press in the Modern Age: Can 20th Century Theory Bear the Weight of 21st Century Demands?*, at which a condensed version of this Essay was presented. I also wish to thank Rick Hasen and Robert Pushaw for providing helpful comments on an outline of my presentation remarks, which formed the core of this Essay.

1. THE FEDERALIST NO. 49 (James Madison) (discussing the role of the public in resolving disputes between the various branches of the federal government). With respect to the subject of this Essay, it might be more appropriately said that those who target the passions of the public to influence political elections might wisely be subject to reasonable regulation that might not be necessary were the public's reason being appealed to instead. In her symposium essay, Lillian BeVier misconceives this theme in asserting that I am "implicitly claiming that political speech that is animated by emotion instead of reason ought to be susceptible to regulation." Lillian R. BeVier, *Can Freedom of Speech Bear the Twenty-first Century's Weight?*, 36 PEPP. L. REV. 415, 417 n.11 (2009). Rather, I am arguing that to the extent political candidates and related groups utilize sophisticated marketing techniques in their advertising and other communications that are designed primarily to manipulate voters' emotions rather than appeal to their reason, the government's interests in placing reasonable regulations on such communications become commensurately stronger—a principle that modern First Amendment theory and doctrine in this area ought to reflect as I propose in this Essay.

I. INTRODUCTION

This Symposium encourages its participants to ask whether free speech theories developed and applied by the United States Supreme Court in the twentieth century to fashion doctrine in different areas of First Amendment law remain valid in light of twenty-first century conditions and demands. The task of this Essay will be to focus on the theoretical model the Court applies in assessing the constitutionality of campaign finance regulation, particularly in light of new scientific research regarding the nature of electoral communications² and the manner in which they are mentally received and processed by potential voters. It will conclude that the Court's model contains extremely questionable premises and assumptions that it has relied on to justify applying a stringent level of First Amendment protection to these communications. This stringent protection, in turn, has resulted in the Court striking down most attempts by the United States Congress and state legislatures to impose campaign-related spending limits on political candidates, parties, and interest groups, as well as limits on campaign-related financial contributions that the Court views as unreasonably low. This Essay will propose a theoretical model that appears to more accurately describe the nature and impact of electoral communications, and the level of free speech protection for those communications which that model might justify.

II. THE FIRST AMENDMENT AND CAMPAIGN FINANCE REGULATION: OLD THEORY AND DOCTRINE

In its seminal decision in *Buckley v. Valeo*,³ the Court laid down the well-known modern paradigm for assessing the constitutionality of campaign finance regulations: limitations on campaign-related expenditures are subjected to some form of strict scrutiny and normally struck down, while limitations on campaign contributions are evaluated under a more intermediate standard of review and are typically upheld unless the Court views them as being unreasonably low.⁴ The *Buckley* Court explained that

2. For purposes of this Essay, I will use the term "electoral communications" to refer to campaign-related communications directed to potential voters by political candidates and their campaigns, political parties, and political interest groups that are enabled by campaign-related contributions and expenditures of money. Not surprisingly, in modern political campaigns the bulk of such communications consist of political advertising directed to selected audiences, and the fund-raising activities necessary to sustain such "purchased communications." See *infra* notes 66–70 and accompanying text.

3. 424 U.S. 1 (1976).

4. See, e.g., *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2770–73 (2008). As Sam Issacharoff and Pam Karlan have creatively described, such a scheme of unlimited spending "outflows" supported by limited contribution "inflows" creates unstable campaign "hydraulics" pursuant to which money of dubious legality pours into the system through any cracks and fissures it

both campaign-related expenditures and contributions are entitled to strong First Amendment protection, even though the state's interest in regulating the latter might often be paramount because of the danger of a quid pro quo exchange of money for official action (an interest the Court determined did not justify the regulation of campaign spending).⁵

This strong First Amendment protection for both campaign expenditures and contributions, the Court reasoned, was warranted because the "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of [our] system of government."⁶ Moreover, 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.'"⁷ The Court then observed, citing to a case dealing with allegedly lurid and indecent magazine stories,⁸ that while First Amendment protections were not "confined to 'the exposition of ideas,'" a major purpose of that amendment was to protect "the free discussion of governmental affairs . . . [and] debate on public issues,"¹⁰ and to help citizens "make informed choices among candidates for office."¹¹ It viewed these goals as being essential because "the identities of those who are elected will inevitably shape the course that we follow as a nation."¹² In rejecting the argument that a cap on campaign expenditures and contributions was simply a regulation of the manner of expression and thus warranted less scrutiny, the Court reasoned 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 by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."¹³ Throughout the rest of its decision, the Court reiterated similar rationales for giving strong First Amendment protection to campaign-related spending and contributions, and especially to the former.¹⁴

can create or find. See generally Samuel Isacharoff and Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

5. See *Buckley*, 424 U.S. at 14–59.

6. *Id.* at 14.

7. *Id.*

8. See *id.* (citing *Winters v. New York*, 333 U.S. 507 (1948)).

9. *Id.*

10. *Id.*

11. *Id.* at 14–15.

12. *Id.* at 15.

13. *Id.* at 19.

14. See, e.g., *id.* at 49 n.55 (asserting that "[d]emocracy depends on a well-informed electorate,

The Court thus justified its approach to assessing the constitutionality of campaign finance regulations on a “more the better” theory: the notion that the more electoral communications candidates, their campaigns, political parties, and interest groups engage in through spending allowed by political donations, the more political ideas will be exchanged, discussed, and debated, the more informed the electorate will become, and, presumably, the better the candidates will be that get elected. In other words, the Court’s theory was based on the premise that unlimited quantities of electoral communications result in increased public deliberation on ideas, that in turn produce better informed citizens, that in turn result in better decisions about candidates for office. The Court has generally adhered to this theory as a justification for continuing to utilize the *Buckley* doctrinal framework to assess the constitutionality of campaign finance regulations today.¹⁵

This theory of what we might call “stimulated democratic deliberation” (SDD) appears to be a hybrid of two prominent theories that members of the Court and commentators have espoused to justify constitutional protection for freedom of expression generally: the marketplace of ideas theory and the democratic deliberation theory. The marketplace theory derives from Justice Holmes’s famous dissent in *Abrams v. United States*,¹⁶ where he wrote:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.¹⁷

Under this theory, a free flow and exchange of ideas results in the best outcome because it is the process most likely to result in “truth,” which in turn is the most secure basis for taking action and presumably implementing government policy. Moreover, the marketplace of ideas is the best vehicle for producing truth because those “thoughts” that are powerful enough to be accepted by society will be the most likely to reflect it. While Justice Holmes did not explain why he believed the latter proposition to be so, he did provide a hint when he went on to write that “[o]nly the emergency that

not a citizenry legislatively limited in its ability to discuss and debate candidates and issues”); *id.* at 57 (explaining that “[t]he First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is . . . the people . . . who must retain control over the quantity and range of debate on public issues in a political campaign”).

15. *See, e.g.,* *Randall v. Sorrell*, 548 U.S. 230, 240–46 (2006) (plurality opinion).

16. 250 U.S. 616 (1919).

17. *Id.* at 630 (Holmes, J., dissenting).

makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, ‘Congress shall make no law . . . abridging the freedom of speech.’”¹⁸ In this passage, Holmes suggests that giving society sufficient time to deliberate on ideas both true and false, good and bad, will eventually yield “good counsels” on which society will act, and that will be the most likely to embody truth.

The democratic deliberation theory of free speech is rooted in Justice Brandeis’s famous concurrence in *Whitney v. California*.¹⁹ There, Justice Brandeis, who had been the only Justice to join Justice Holmes’s dissent in *Abrams*,²⁰ appeared to be elaborating on Holmes’s marketplace theory, yet also seemed to be most concerned with justifying protection for *political* speech and truth as opposed to truth generally. As Brandeis stated:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . [and] that public discussion is a political duty. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law²¹

Building on Brandeis’s concurrence, the twentieth century philosopher Alexander Meiklejohn crafted the democratic deliberation theory of free speech which holds that the Free Speech and Press Clauses of the First Amendment are designed primarily to facilitate democratic self-governance.²² Thus, political speech receives primary constitutional protection, together with those processes of communication that are designed to ensure that all viewpoints relevant to self-governance are heard and that reasoned deliberation on such issues occurs.²³ This theory differs from the marketplace theory primarily in the subject of constitutional protection—i.e., political speech versus speech generally—and in a greater tolerance for regulating societal flows of ideas and information in order to

18. *Id.* at 630–31.

19. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

20. *See Abrams*, 250 U.S. at 631 (Holmes, J., dissenting).

21. *Whitney*, 274 U.S. at 375–76 (Brandeis, J., concurring).

22. *See generally* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

23. *See, e.g., id.* at 22–27.

ensure that the ideal conditions for a comprehensive and reasoned public discussion of issues obtain.²⁴

The Court's SDD theory borrows certain elements of marketplace and democratic deliberation theory, while at the same time ignoring elements of both. As to marketplace theory, the SDD theory shares the premise that flows of speech should be unregulated, and that the "free market" will ultimately operate to separate the good ideas from the bad. In exalting the importance of political over other forms of speech that might contribute to the discovery of truth, however, SDD theory departs from marketplace theory. With regards to democratic theory, it is this same exaltation of political over other forms of speech that SDD theory borrows from it. SDD theory ignores democratic theory, however, in its general reluctance to permit regulation of electoral speech in order to enhance its deliberative quality—such as by permitting limits on personal spending by candidates in order to address "speech quantity imbalances" that might be caused by differences in their personal wealth.²⁵

There is one major premise shared by both marketplace and democratic theory, however, that SDD theory does appear to incorporate. Both marketplace and democratic theory appear to assume that rational thought, or the "power of reason" as Justice Brandeis put it,²⁶ will ultimately govern democratic decision-making so long as the requisite conditions of free speech obtain. Justice Holmes spoke of the "ultimate good" being achieved by a "free trade in ideas," the "power of the thought" to get itself accepted in the market, and the "correction of evil counsels."²⁷ Besides lauding the power of reason, Justice Brandeis talked about "deliberative forces" prevailing over the arbitrary, "public discussion" being a political duty, men being freed from the "bondage of irrational fears," the founding generation having "confidence in the power of free and fearless reasoning applied through the processes of popular government," and the necessity of averting the evil of falsehoods and fallacies "by the processes of education."²⁸ Meiklejohn similarly shared a strong faith in the notion that the American people would make reasoned and intelligent decisions of self government if

24. *See id.*

25. *See, e.g.,* Davis v. Fed. Election Comm'n, 128 S. Ct. 2759, 2773–74 (2008); Buckley v. Valeo, 424 U.S. 1, 54 (1978) ("The ancillary interest in equalizing the relative financial resources of candidates competing for elective office . . . is clearly not sufficient to justify . . . infringement of fundamental First Amendment rights.").

26. *See supra* note 21 and accompanying text.

27. *See supra* notes 17–18 and accompanying text.

28. *See supra* note 21 and accompanying text; *see also* Whitney v. California, 274 U.S. 357, 376–77 (1927) (Brandeis, J., concurring).

only they were given the freedom to deliberate and the proper conditions within which to do so.²⁹

The Court's SDD theory appears to embody a similar assumption that a free flow of communications from political candidates, campaigns, parties, and interest groups will result in "better" decisions by voters, in the sense of producing more reasoned, deliberate, and informed choices of political representatives who presumably hold views on important issues that are congruent with theirs. As noted earlier, implicit in SDD theory are at least three basic assumptions: first, that the greater the quantity of electoral communications, the more ideas relevant to self-governance will be exchanged, discussed, and debated; second, that such an enhanced public discussion of ideas will result in more informed voters; and third, that a more informed voter will make better decisions about those who "inevitably shape the course that we follow as a nation."³⁰ In other words, SDD theory assumes that electoral communications consist mainly of ideas relevant to self-governance, presumably regarding important issues of the day, and that voters will receive and mentally process those ideas in a rational way—to wit, in a way that makes them more knowledgeable about those issues, and willing to exercise their candidate choices in a manner consistent with their views about those best able to grapple with them.³¹ In short, SDD theory assumes that people largely behave as rational actors in the manner in which they exercise their voting franchise.

Such an assumption, and the fact Justice Holmes, Justice Brandeis, and Professor Meiklejohn shared it, is hardly surprising considering that rational actor models of human behavior, including those applied to voter decision-making, were popular during much of the twentieth century and remain so today.³² However, a plethora of recent research in neuroscience, political psychology, and political science is casting substantial doubt on the accuracy of such models of voter behavior.³³ This research is finding that voters' emotions and feelings about candidates and political parties play a much

29. See, e.g., MEIKLEJOHN, *supra* note 22, at 25.

30. See *supra* notes 12–15 and accompanying text.

31. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 52–53 (1976) (asserting 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").

32. See, e.g., DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* 26–30 (Public Affairs 2007).

33. See *infra* Part III.

larger role than reasoned deliberation in making their decisions.³⁴ Moreover, political candidates, groups, and their consultants have intuited this fact for some time and generally design their electoral communications to take advantage of it.³⁵ These developments cast doubt on the validity of the Court's SDD theory, and raise the question of whether its attendant doctrines in the area of campaign finance regulation should be revised on the basis of a more accurate model of the nature of electoral communications and their impact on American voters. It is to this question that this Essay will turn after examining the recent research and the insights it provides into the nature of electoral communications today.

III. THE NEW SCIENCE AND MODERN ELECTORAL COMMUNICATIONS

Within the past couple of decades, the neuroscientist team of Hanna and Antonio Damasio began studying cases of human brain injuries that left formerly intelligent and thoughtful individuals with little ability to make sound judgments even though they retained basic thinking and speaking skills.³⁶ This research led Antonio Damasio to publish his seminal work, *Descartes' Error: Emotion, Reason and the Human Brain*,³⁷ in 1994. In that work, Damasio set forth what is known today as the somatic marker hypothesis.³⁸ At a very general level, this hypothesis posits that, contrary to conventional wisdom which held that human cognition was a brain process that operated largely independent from that organ's processing of feelings and emotions, cognition in fact utilizes neural networks dedicated to both reasoning and the experiencing of emotions.³⁹ In other words, Damasio found that thinking and deliberation are not processes that are separate from our emotions, but rather draw on our emotional faculties to a significant extent.

According to Damasio, human memories are largely stored and organized in the brain's emotional circuits through a process by which networks of related thoughts, perceptions, images, and ideas are marked or "tagged" with certain positive or negative emotions.⁴⁰ When the brain engages in cognitive activities such as deliberating on a decision, it retrieves from memory and utilizes such bundles of thoughts and related perceptions

34. See *infra* Part III.

35. See *infra* Part III.

36. ANTONIO DAMASIO, *DESCARTES' ERROR: EMOTION, REASON AND THE HUMAN BRAIN* (G.P. Putnam's Sons 1994).

37. *Id.*

38. *Id.* at 165–201.

39. See *id.*; see also ANTONIO DAMASIO, *DESCARTES' ERROR: EMOTION, REASON AND THE HUMAN BRAIN* at x–xiii (Penguin Group 2005); WESTEN, *supra* note 32, at 60–63.

40. See DAMASIO, *supra* note 36, at 165–201; see also WESTEN, *supra* note 32, at 3.

to assist in that process.⁴¹ And when they are so retrieved and utilized, their emotional tags or markers both guide and bias our cognitive processing of them, as the thoughts brought into conscious deliberation give rise as well to their associated feelings. Sometimes these emotions operate on our thoughts to produce better judgments and decisions, sometimes more irrational ones, sometimes they operate at a level of conscious awareness, and sometimes at an unconscious one.⁴² In short, Damasio's work suggests that emotion is inextricably bound up in the process of reasoning.

As in other areas of human cognition, Damasio's work has sparked a plethora of new research, particularly by political scientists, psychologists, and neuroscientists, in understanding the role played by emotions in voter information processing and decision-making. In certain studies, various teams of neurologists and psychologists designed experiments using magnetic resonance imaging (MRI) techniques to watch how our brains process political information and images. In the most interesting experiment conducted right before the 2004 elections, Emory University psychology professor Drew Westen and a team of researchers observed the brains of committed Republicans and Democrats as they viewed a series of slides doctored to present incumbent candidate George W. Bush, his opponent John Kerry, and certain politically-neutral figures, taking inconsistent positions with different groups to essentially pander for votes.⁴³ In the process of deciding that the positions taken by the candidate of the opposing party and the neutral figures were indeed inconsistent, the subjects utilized both cognitive and emotional circuitry of their brains. However, in deciding

41. See DAMASIO, *supra* note 36, at 165–201.

42. See *id.*

43. See WESTEN, *supra* note 32, at x–xiv; see also Drew Westen et al., *Neural Bases of Motivated Reasoning: An fMRI Study of Emotional Constraints on Partisan Political Judgment in the 2004 U.S. Presidential Election*, 18 J. COGNITIVE NEUROSCIENCE 1947–58 (2006). Westen's work, and particularly the implications he draws from it as set forth in his book *The Political Brain*, see *supra* note 32, has not been free from criticism. See, e.g., David Brooks, *Stop Making Sense*, N.Y. TIMES, Aug. 26, 2007, available at <http://www.nytimes.com/2007/08/26/books/review/Brooks-t.html>. Much of the criticism seems directed at the fact that Westen comes at his subject from an unapologetically “democratic” or “liberal” viewpoint, urging the Democratic Party to learn from his book in order to defeat Republican candidates in elections and to change policies sponsored by the Republican Party (and particularly by the administration of George W. Bush). See, e.g., WESTEN, *supra* note 32, at 17–23. While this author takes no position on Westen's political views and believes a more objective and scholarly presentation of his work might have been more fitting, certainly the fact that he hopes Democrats will actually use it to achieve political successes seems to do little to impugn the validity of his findings regarding the mechanisms of political psychology. If anything, it demonstrates his confidence in those findings.

that the positions of their own parties' candidates were *not* inconsistent, the subjects relied principally on the emotional circuits of their brains.⁴⁴

A fact that really surprised the researchers was that after the emotional circuits of subjects had assisted them to reach false conclusions about their own candidates, additional circuits associated with feelings of reward lit up to reinforce their biased reasoning—the same circuits that activate when a drug addict receives a fix.⁴⁵ According to Westen, this discovery adds new meaning to the term “political junkie.”⁴⁶ A similar MRI experiment conducted by a team of neuroscientists at the University of California at Los Angeles led one of the researchers to conclude that “the passions swirling through elections are not driven by a deep commitment to issues. We are not fighting over the future of our country; we are fighting for our team [A]ll that really matters is who wears the team uniform.”⁴⁷

It might be said that these researchers are part of a school of thought that has developed regarding the role of emotions in decision-making called “motivated reasoning.”⁴⁸ At bottom, and consistent with Damasio’s work, this theory holds that, given the way human reasoning utilizes information stored in memory associated with different emotional markers, when we deliberate about issues connected with strong emotional preferences we are unconsciously motivated to retrieve and process information that allows us to reach conclusions consonant with our emotional biases—as the political partisans did in the foregoing MRI experiments.⁴⁹ Especially in the voting context, where decisions regarding “issues” depend on complex and specialized information and are assessed in the context of a low expected marginal utility of one’s vote, voters’ decisions are based principally on their emotional predispositions towards a party (i.e., partisan loyalty) and feelings generated by a candidate and her campaign about how much a candidate cares about their interests and values.⁵⁰ Factual data and other information incongruent with such feelings are “rationally” processed to strongly bias conclusions in favor of such emotional commitments.

A related school of thought regarding the role of emotions in voter decision making, based mainly on empirical research conducted by political scientists, is called “Affective Intelligence” (AI).⁵¹ Although this theory

44. See WESTEN, *supra* note 32, at xiii–xiv.

45. *Id.*

46. *Id.* at xiv.

47. Joshua Freedman, Op-Ed., *This is Your Brain on Politics*, N.Y. TIMES, Jan. 18, 2005, at A21; see also Jonas Kaplan et. al., *Us Versus Them: Political Attitudes and Party Affiliation Influence Neural Responses to Faces of Presidential Candidates*, NEUROPSYCHOLOGIA 45, 55–64 (2007).

48. See, e.g., Westen et al., *supra* note 43, at 1947–48.

49. See also DAVID REDLAWSK, *Emotions and the Processes of Voter Decision Making*, in POLITICAL COMMUNICATION REPORT (2006); WESTEN, *supra* note 32, at 99–100.

50. See, e.g., WESTEN, *supra* note 32, at xiv, 90, 99, 115, 120–122.

51. See generally, e.g., MICHAEL MACKUEN ET. AL., *The Third Way: The Theory of Affective*

also holds that emotions have a strong role to play in such decisions, AI proponents are more sanguine about their effects, believing that emotional influences can result in rational voter decision-making.⁵² According to AI, voters normally rely on their emotional predispositions such as partisanship or ideology to cast votes—which can be a reasonable voting strategy assuming it has resulted in satisfactory outcomes in the past—unless the voter is presented with new and unfamiliar information that creates anxiety which may, in turn, force a more deliberate and reasoned assessment of information and choices.⁵³ Thus, one could say, AI attempts to split the baby between rational-actor and motivated-reasoning models of voter behavior.

Since AI posits different outcomes tied to different emotional effects information may have on voters, various experiments have been designed to test the impact that emotional appeals have on voters. Probably the most comprehensive study to date, published in 2006 by University of Michigan political scientist Ted Brader,⁵⁴ has found that emotional appeals in political advertising can significantly influence voter behavior: appeals to positive emotions such as enthusiasm or hope motivate voter turnout and participation in elections, yet do so by strengthening partisan commitments that increase the polarization of the electorate;⁵⁵ appeals to voter fear or anxiety cause less reliance on prior preferences and increased assessments of issues and candidates;⁵⁶ however, other studies have shown that voters must be subjected to sustained flows of cognitively incongruent information before they will move away from emotionally-favored positions.⁵⁷ Reason, then, ultimately may triumph but usually over the longer haul. Studies have also shown that appeals to anger can depress overall information seeking by voters,⁵⁸ and negative ads in general can discourage voters—and especially non-partisan, independent voters—from participating in elections at all.⁵⁹

Intelligence and American Democracy, in THE AFFECT EFFECT: DYNAMICS OF EMOTION IN POLITICAL THINKING AND BEHAVIOR 124–51 (W. Russell Neuman et al. eds., 2007).

52. See *id.* at 124–29; REDLAWSK, *supra* note 49, at 1–2.

53. See MACKUEN., *supra* note 51, at 124–29; REDLAWSK, *supra* note 49, at 1–2.

54. See TED BRADER, *CAMPAIGNING FOR HEARTS AND MINDS: HOW EMOTIONAL APPEALS IN POLITICAL ADS WORK* (University of Chicago Press 2006).

55. See *id.* at 14–15, 143–44, 181–83.

56. See *id.*

57. See, e.g., REDLAWSK, *supra* note 49, at 2.

58. See, e.g., Nicholas A. Valentino et al., *Is a Worried Citizen a Good Citizen? Emotions, Political Information Seeking, and Learning via the Internet*, 29 POLITICAL PSYCHOLOGY No. 2, 264–67 (2008).

59. See generally, e.g., STEPHEN ANSOLABEHERE & SHANTO IYENGAR, *GOING NEGATIVE: HOW*

Finally, in contrast to conventional wisdom holding that if emotional appeals work at all, their effectiveness is limited to less educated and less sophisticated voters, evidence from both lines of research finds that emotional appeals have the *greatest* impact on *more politically engaged and aware citizens*.⁶⁰ This is because they are the voters that tend to have the strongest partisan affiliations. The political disengagement or alienation of voters, on the other hand, reduces the effect of political advertisements in general.

In sum, although the new research in this area is not monolithic in its findings or conclusions, one principle that most of it seems to agree on is that, although reason and emotion are inherently intertwined in voters' decision-making processes, emotions appear to play a very influential and even dominant role. As Westen writes:

[The marketplace of ideas] view of mind and brain couldn't be further from the truth. In politics, when reason and emotion collide, emotion invariably wins. Although the marketplace of ideas is a great place to shop for policies, the marketplace that matters most in American politics is the *marketplace of emotions*.⁶¹

This research seems to confirm what many have long intuited to be the case, including political consultants who have developed a cottage industry assisting political players to develop strategies designed to capitalize on voters' emotions—mainly through political advertising campaigns on television and in other media that typically make both cognitive and emotional appeals but tend to be dominated by the latter.⁶² The Hillary Clinton “Red Phone” ad⁶³ and the Tom Tancredo “Bomb in a Backpack” ad⁶⁴ are good examples of this from the 2008 presidential race (and specifically from the primary contests of that race). Both ads attempted to make substantive statements, respectively, about the relative experience of the candidates or the wisdom of our immigration policies, yet

POLITICAL ADVERTISEMENTS SHRINK AND POLARIZE THE ELECTORATE (1997).

60. See, e.g., BRADER, *supra* note 54, at 14–15, 143–44, 181–83.

61. WESTEN, *supra* note 32, at 35–36.

62. See, e.g., BRADER, *supra* note 54, at 147–176, 153 (explaining that while most political ads reviewed in a comprehensive study contained appeals to both emotion and reason, “the reputation of political advertising as primarily emotional is well founded: in nearly 72 percent of ads, the appeal to emotions dominated the appeal to logic. For the most part, the patterns are similar across different types of races, as appeals to emotion dominate everywhere” (citation omitted)).

63. See, e.g., Orlando Patterson, Op-Ed, *The Red Phone in Black and White*, N.Y. TIMES, Mar. 11, 2008, available at <http://www.nytimes.com/2008/03/11/opinion/11patterson.html>.

64. See T.W. Farnam, *Tancredo Ad Links Immigration to Terrorism*, WALL ST. J. WASHINGTON WIRE, Nov. 13, 2007, available at <http://blogs.wsj.com/washwire/2007/11/13/tancredo-ad-links-immigration-to-terrorism/>.

overwhelmingly used emotional cues designed to appeal to voters' emotions—here, the emotions of fear and anxiety. As many commentators have observed, these means of political persuasion are little different than the means utilized by Madison Avenue advertising firms to market consumer products.⁶⁵ It is not surprising, then, that political candidates and groups draw heavily on Madison Avenue expertise when they hire their political consultants or design a political advertisement.⁶⁶

The effectiveness of these marketing techniques explains why political advertising, and especially television advertising, has become “the principal tool of politicians in major elections.”⁶⁷ Indeed, paying for such “media buys” and raising the funds necessary for them, are the main reasons why spending by political campaigns has spiraled upwards at unprecedented rates in recent decades.⁶⁸ Such expenditures constitute the bulk of spending by modern political campaigns.⁶⁹ Political parties and other interest groups also spend a substantial amount of their funds on such advertising.⁷⁰ It seems fair to say, then, that when the Court steadfastly insists on treating campaign expenditures as the equivalent of political speech, it is in reality giving the strongest First Amendment protection to communications that, in many ways, bear more resemblance to commercial advertising than the “interchange of political ideas” romanticized in its decisions.

65. See, e.g., Alexandra Alter, *Reading the Mind Of the Body Politic*, WALL ST. J., Dec. 14, 2007, available at http://online.wsj.com/article/SB119759511839128473.html?mod=special_page_campaign2008_leftbox (discussing the trend towards the use of sophisticated commercial marketing techniques in political advertising, including “neuromarketing” based upon the science discussed in this Essay and “microtargeting” techniques, as well as quoting an ad consultant asserting that “[p]olitical marketing is a fairly pure analog to commercial marketing. . . . I’m looking at a package of shampoo the same way I’m looking at my next leader”).

66. See *id.*; see also BRADER, *supra* note 54, at 20 (explaining how “some candidates have taken a ‘Madison Avenue’ approach by enlisting the help of companies experienced at product advertising. During the 1980s and 1990s, however, increased reliance on ads fueled the rise of political consulting as a profession, complete with a trade association and industry publications. Campaign ads have since become more sharp-edged and more slickly packaged” (citations omitted)).

67. BRADER, *supra* note 54, at 20.

68. *Id.* at 20 (discussing televised political ads and asserting that “[w]hat began with a modest splash in the 1950s has grown to an electronic flood in recent decades. Television advertising is the primary cause of the upward spiral in campaign spending, as most candidates for major offices devote a greater proportion of their budget to airing ads than to any other type of expenditure. The second largest campaign expense often is fundraising to collect the money needed (largely) for ads”).

69. See *id.*

70. See *id.* (asserting that “[i]nterest groups also devote substantial resources to airing ads to influence candidate elections, ballot propositions, and even policy debates outside of elections”).

IV. A MORE COHERENT FREE SPEECH MODEL AND DOCTRINE FOR ASSESSING THE CONSTITUTIONALITY OF CAMPAIGN FINANCE REGULATIONS

To recap what was said earlier about the theoretical model the Court applies in campaign finance cases, it bases the strong constitutional protection provided to electoral communications on an under-theorized hybrid of Justice Holmes's marketplace of ideas model (under which a free exchange of ideas is seen as facilitating the discovery of truth) and the democratic deliberation model championed by Justice Brandeis and Professor Meiklejohn (pursuant to which speech is protected commensurate with its capacity to promote intelligent democratic decisions).⁷¹ While not excluding protection for emotional forms of expression, the Court's SDD theory emphasizes the importance of rational thought, discussion, and deliberation for achieving these goals.⁷² However, if the political psychology research discussed above is accurate and continues to be substantiated by continuing investigation, SDD theory seems inadequate both because it does not accurately reflect the nature of the communications it purports to model, and because it reflects an incomplete account of how voters process those communications and make their electoral decisions.

As to the nature of electoral communications, as just discussed, the bulk of campaign and related political spending is spent on political advertisements that consist mainly of communications purposefully crafted to appeal primarily to voters' emotions and only secondarily to their deliberative faculties.⁷³ Thus, the Court's enduring characterization of communications fostered by campaign contributions and spending as involving the dissemination of political ideas or debates on important issues of the day, appears, at best, naïve and, at worst, disingenuous. Certainly some communications fostered by political donations consist of useful information, ideas, and debate, but on the whole they are increasingly geared towards eliciting facile emotional responses in potential voters.

Moreover, the new political psychology research tells us that even if voters had the time, expertise, and motivation to obtain and evaluate the information and ideas pertinent to important issues, they are still likely to evaluate them through the lens of their gut feelings. Even when voters do engage in reasoned assessments about such issues, their emotions are likely to heavily influence their thinking process.

Accordingly, if the Court's SDD model does not accurately and completely depict the nature of electoral communications and how they influence voter decision-making, is there a sounder theoretical and doctrinal

71. See *supra* notes 3–32 and accompanying text.

72. See *supra* notes 25–31 and accompanying text.

73. See *supra* notes 62–70 and accompanying text.

framework for assessing the constitutionality of campaign finance regulations? A more accurate and complete model of electoral communications would first include the fact that the bulk of them constitute sophisticated attempts to elicit desired emotional responses from voters in order to color their receipt of whatever “subsidiary” substantive information or message an ad might possess. Moreover, a more accurate model would reflect the principal findings of the research discussed above. First, it would recognize the fact that as to the bulk of the electorate committed to a particular political party or ideology,⁷⁴ emotionally-laden predispositions will normally determine their decisions about candidates even in the face of information and rational argument that might dictate a different decision.⁷⁵ And, second, with respect to independent voters that may be more open to rational appeals, the model would recognize that their voting choices will still be strongly influenced by the way their emotions color and affect the reception and processing of those appeals.⁷⁶

This revised model of communications and decision-making in the electoral context raises the question of whether highly speech-protective doctrinal rules predicated on the traditional but incomplete rational actor model are desirable to foster such a marketplace of emotionally-laden communications and decision-making. The answer would seem to depend on whether the speech interests at stake, and the competing societal interests in regulation, remain the same under the old and new models.

As to the relevant speech interests, as discussed earlier, the Court’s SDD model rests principally on the premise that an uninhibited flow of political information and ideas will generally result in reasoned debate and discussion that will facilitate good electoral decisions.⁷⁷ The question then becomes whether an uninhibited flow of electoral speech that is quite frequently targeted at appealing to a voter’s emotions can similarly be said to facilitate good electoral decisions. There is reason to be much more skeptical about this latter proposition.

As noted earlier, certainly emotion and reason are not inherently opposed to each other; cognitive science has shown that emotional guidance is an essential ingredient of sound reasoning processes.⁷⁸ Moreover, as also noted, most political appeals involve both emotional and substantive appeals

74. See WESTEN, *supra* note 32, at x-xiv (estimating that 60–80 percent of the electorate constitute committed partisans); see also *id.* at 27, 115.

75. See *supra* notes 54–59 and accompanying text.

76. See *supra* notes 54–59 and accompanying text.

77. See *supra* notes 26–31 and accompanying text.

78. See *supra* notes 40–42 and accompanying text.

even though the former typically predominates.⁷⁹ But decisions that are driven primarily by our feelings are generally thought to be less trustworthy and sound than those resting primarily on reasoned deliberation—at least when it comes to decisions that rely on an accurate assessment of objective factors or conditions, rather than those that are more subjective in character such as those involving moral or ethical choices.⁸⁰ The main reason for this, of course, is that emotions and feelings are not necessarily rational. Whereas reason is a process by which we use that primarily human faculty of conscious intelligence to make sense of the world in an orderly, systematic way—principally utilizing the outer “gray matter” of our brain which evolved last as part of it becoming a human brain—emotions are essentially physiological responses to sensory stimuli and perceptions, powered by lower brain neural systems that evolved early on in animals to guide them through a potentially dangerous physical environment.⁸¹ Thus, although reason usually draws upon emotion to assist it in assessing different decision options, emotion is capable of operating independently of reason—and frequently does to motivate irrational choices or actions.⁸² Additionally, given emotion’s evolutionary purpose of providing survival instincts, not surprisingly they often push people towards looking principally to their self-interest as opposed to looking to the common good of the community.⁸³

Probably most important in the context of electoral communications, recall that our memories normally organize and store networks of related thoughts, perceptions, and images with associated emotional markers or tags. When we think or deliberate on something important to us, we normally call up such

79. See *supra* notes 61–66 and accompanying text.

80. See, e.g., Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 5 (2007) (in a study of judicial decision-making, asserting that “judges are predominantly intuitive decision makers, and intuitive judgments are often flawed. To be sure, intuition can lead to accurate decisions, as Malcolm Gladwell documents in his bestseller, *Blink*, while deliberation can lead to error, as any court observer knows. But intuition is generally more likely than deliberation to lead judges astray”) (footnotes omitted); Richard Alleyne, *Careful Deliberation ‘Better Than Snap Decisions:’ A Trend Towards Trusting to Gut Instinct Rather than Careful Deliberation Could be “Outright Dangerous” and Lead to Making Worse Choices*, *New Research Claims*, LONDON TELEGRAPH, Aug. 11, 2008, available at <http://www.telegraph.co.uk/news/2538526/Careful-deliberation-better-than-snap-decisions-research-suggests.html> (discussing a new study refuting recent claims about the superiority of gut instinct over deliberation as a basis for decision-making); accord Deirdre Van Dyk, *Gut Decisions May Not be Smart*, TIME, Aug. 22, 2008, available at <http://www.time.com/time/health/article/0,8599,1835431,00.html>.

81. See, e.g., WESTEN, *supra* note 32, at 45–68.

82. See *id.*

83. See *id.* at 26 (observing “the framers of American democracy made clear, like both Plato and the social contract philosophers, that only through reason can people set aside their self-interested and parochial desires to make decisions in the common interest. Passions can lead to rapid, poorly thought-out, self-interested acts, or to the psychology of the mob, inflamed by the emotion of the moment and capable of turning on anyone in its path” (citation omitted)).

networks that are related to the subject of our deliberation in order to assist us in that process.⁸⁴ A particular subject, then, can unconsciously activate networks of related subject associations and their concomitant feeling states. One could say that we use “reasoning by analogy” to a very significant extent. The problem is that political consultants and advertisers are aware of this fact, and frequently try to capitalize on this by using images or music in ads that are designed to activate chains of related thoughts and feelings that can subtly and unconsciously bias a viewer against a certain candidate.⁸⁵ The Willie Horton ad aired by supporters of the first President Bush against the democratic candidate Michael Dukakis in the 1988 presidential race was a good example of this.⁸⁶ It purported to make a substantive statement that Dukakis was soft on crime, but did so by using bleak images of menacing-looking prisoners, and especially an African-American prisoner with very dark skin and a prominent, overarching brow line (all underscored by threatening music), to activate a voter’s related mental associations about crime and racial attitudes—including any fears, anxieties, or prejudices associated therewith.⁸⁷

Now it is clear that appeals to reason may also be manipulated in the service of self-interested ends. Consider, for instance, George W. Bush’s protests against Al Gore for his alleged use of “fuzzy math” during their presidential debates.⁸⁸ But unlike questionable emotional appeals, dubious factual claims are at least subject to verification and rebuttal by reference to objective or empirical criteria.⁸⁹ Thus it seems apparent that emotional appeals are subject to greater abuse than rational ones, and frequently are used to distort ordinary reasoning processes. These observations lead to the conclusion that while emotional appeals can and often do have value, the speech interests at stake in fostering their uninhibited flow in the electoral context seem appreciably less than fostering an unlimited flow of political information and ideas under the Court’s rational deliberation account of electoral communications.

On the other side of the First Amendment scale, it appears that at least some important interests in government regulation, and particularly those regarding campaign-related expenditure limitations, may be greater under an

84. See, e.g., *id.* at 83–112.

85. See *supra* notes 61–66 and accompanying text.

86. See WESTEN, *supra* note 32, at 63–68 (discussing Horton ad).

87. See *id.*

88. See *id.* at 31–34.

89. This is illustrated by the proliferation of media programs and websites during the recent election purporting to verify factual claims made by different candidates and their campaigns. See, e.g., *Anderson Cooper 360: Keeping Them Honest Segments* (CNN television broadcast), available at <http://ac360.blogs.cnn.com/category/keeping-them-honest> (last visited Jan. 26, 2009).

emotional primacy account of electoral communications than the Court found them to be under its deliberative model. Equalizing candidate spending would appear to be a more compelling interest when the means of persuasion focus on emotional rather than rational appeals.⁹⁰ The largest spenders are not necessarily fostering the “deliberative good” with emotionally-driven appeals, and arguments about “buying elections”⁹¹ seem to have more force in such a context. Also, in such an environment there may be more concern whether good ideas (i.e., those with high “rational worth”) put forth by those with less spending power may nevertheless receive adequate dissemination and consideration by virtue of their inherent sense.

Moreover, capping overall campaign-related spending may be more justifiable under an emotional primacy model.⁹² The purported benefits from uninhibited spending under such an account seem less compelling when considered against concerns about public cynicism regarding the influence of money in politics, and the amount of time and resources expended by campaigns in raising funds. Further, concerns about limiting or chilling issue advocacy by “independent” political interest groups, in order to address competing concerns about such groups exercising undue influence on political races in periods immediately preceding elections,⁹³ may not be as great under the emotional primacy model. If political advertisements run by “527 corporations” or similar interest groups, like the National Organization for Women or the National Rifle Association, are adding more to the “battle for emotions” than they are the “battle for the mind,” there may well be more reason to limit their influence on races in the run up to an election (and concomitantly less concern about limiting their “issue advocacy” during such periods).

Finally, under an emotional primacy account of electoral communications, there may even be more persuasive reasons for regulating the nature or size of political *contributions* in order to address concerns about corruption stemming from candidate reciprocity.⁹⁴ Constraints that

90. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 48–58 (1976) (rejecting argument that a “governmental interest in equalizing the relative ability of individual and groups to influence the outcome of elections” justifies expenditure limits); see also *Davis v. Fed. Election Comm’n*, 128 S. Ct. 2758, 2773–74 (2008).

91. See, e.g., Jeremy Paul, *Campaign Reform for the 21st Century: Putting Mouth Where the Money Is*, 30 CONN. L. REV. 779, 781 & n.7 (1998).

92. See *Buckley*, 424 U.S. at 54–58 (rejecting asserted justifications for overall campaign spending limitations and striking them down); accord *Randall v. Sorrell*, 548 U.S. 230, 240–46 (2006) (plurality opinion).

93. See *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (striking down application to political interest group of issue advocacy ban during period before election).

94. See *Randall*, 548 U.S. at 248–53 (striking down limits on campaign contributions that the Court viewed as being unreasonably low).

might be imposed on such reciprocity by reasoned and principled positions staked out during a campaign would potentially be weaker under this account than it would under the deliberative model.

In sum, if empirical support for the electoral “marketplace of emotions”⁹⁵ continues to be substantiated by scientific investigation, it may be that a rigorously speech-protective standard that unduly ties the government’s hands in addressing the stronger regulatory interests posited above might be undesirable. The question then becomes: What would be a preferable doctrinal alternative? A simple and obvious answer seems to jump out from the Court’s campaign finance decisions themselves: to employ the more flexible “intermediate” standard of review for assessing the constitutionality of expenditure limitations that the Court now uses to evaluate the constitutionality of contribution limitations.⁹⁶ Not only would that standard give the Court more latitude to recognize the stronger regulatory interests that the emotional primacy model suggests, but it would also reflect the more heterogeneous nature of the speech interests bound up in electoral communications to a more accurate extent than the Court’s current doctrine.

V. CONCLUSION

There is no doubt that protection for political speech remains at the core of First Amendment concerns, and this Essay is in no way suggesting that the government be able to restrict electoral communications on the basis of whether they appear to carry more of an emotional or rational message. In the end, this Essay is making a fairly modest proposal that others have suggested but for different reasons: that it may be desirable for the Court to employ a more flexible approach to assessing campaign-related spending limits—similar to that already used in assessing contribution limits—that allows federal and state legislatures to continue their experimentations with, and search for, an optimal election scheme. Such an approach seems especially desirable given the new light that neuroscience and political psychology is shedding on the manner in which electoral communications influence voter decision-making.

95. WESTEN, *supra* note 32, at 35–36.

96. *See, e.g.,* Davis v. Fed. Election Comm’n, 128 S. Ct. 2758, 2770–71 (2008) (asserting that contributions limits “cannot stand unless they are ‘closely drawn’ to serve a ‘sufficiently important interest’ When contribution limits are challenged as too restrictive, we have extended a measure of deference to the judgment of the legislative body that enacted the law” (citations omitted)); *see also supra* notes 3–5 and accompanying text.

