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## Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate, The

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# **The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate**

*Jeremy N. Sheff\**

*The industrialization of the channels and scale of communication has led some well-meaning reformers to try to regulate the ability of powerful private actors to leverage economic inequality into political inequality, particularly in the area of campaign finance. Such reform efforts are ostensibly intended to further the deliberative democratic ideal of rational, informed public decisionmaking by preventing well-funded private interests from improperly influencing democratic debate and, by extension, political outcomes. This Article examines empirical findings in political science, psychology, and marketing and argues that, in the context of contemporary American society, the normative principles of deliberative democracy and formal equality operate at cross-purposes. Equalizing measures in campaign finance regulation are extremely likely to increase the divergence between actual political decisionmaking and a deliberative, informed, rational ideal by increasing the incentives for speakers to mislead and manipulate voters or by entrenching preexisting majorities. This Article argues that, rather than focusing on equality of financing, reformers would do better to think about how to ameliorate the source of non-optimal political decisionmaking: the (economically rational) political ignorance, non-rational decisionmaking, and civic disengagement of the average citizen.*

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\* Assistant Professor of Law, St. John's University School of Law. I am grateful for helpful comments from Professors Richard Hasen, Daniel Ortiz, Ilya Somin, and Brian Tamanaha. This Article also benefited from comments at the New York City Junior Faculty Colloquium at Fordham Law School. All errors are the author's alone.

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## I. INTRODUCTION

*[I]t is said that Cato contrived to drop a Libyan fig in the Senate, as he shook out the folds of his toga, and then, as the senators admired its size and beauty, said that the country where it grew was only three days' sail from Rome. And in one thing he was even more savage, namely, in adding to his vote on any question whatsoever these words: "In my opinion, Carthage must be destroyed." In this way Cato is said to have brought to pass the third and last war against Carthage . . . .<sup>1</sup>*

Justice Holmes famously asserted that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."<sup>2</sup> This empirical claim about the relationship between the truth of a proposition and its popular acceptance is the quintessential crystallization of a widely espoused instrumentalist account of the right to free expression. Ultimately, the free exchange of ideas is considered a means to the end of rational and optimal decisionmaking in a deliberative democracy.<sup>3</sup> While such instrumentalist

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1. 2 PLUTARCH, LIVES 383 (Bernadotte Perrin trans., Loeb Classical Library ed., 1914); see also Charles E. Little, *The Authenticity and Form of Cato's Saying "Carthago Delenda Est,"* 29 CLASSICAL J. 429 (1934).

2. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

3. See, e.g., ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948) ("Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information . . . which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*").

arguments have been levied against government interference in the “market-place of ideas” for centuries,<sup>4</sup> the industrialization of the channels and scale of communications in the twentieth and twenty-first centuries has led many to doubt the ability of laissez-faire First Amendment policy to secure its promised benefits. Reasoning backward from the ends of instrumentalist First Amendment theory, reformers argue that the ability of certain powerful private actors to manipulate the scope and content of debate requires some qualification of Holmes’s conclusion. Specifically, reformers contend that truth can only emerge from competition on a level playing field and that, left unchecked, the disproportionate wealth of certain speakers will allow them to exert a greater influence on public debate (and, by extension, public policy) than less endowed citizens and groups, in violation of the fundamental democratic principle of political equality.<sup>5</sup> Implicit in this argument is a claim that laissez-faire First Amendment doctrine is causing our democratic processes to generate policy outcomes that are inferior to those that could be achieved through more muscular regulation of public debate.<sup>6</sup>

Modern First Amendment instrumentalists have proposed various departures from existing doctrine as a means to the end of optimal, rational, egalitarian self-government. Among the most hotly contested of these arise in the area of campaign finance law. Well-meaning reformers lament rigid constitu-

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4. See, e.g., JOHN MILTON, *AREOPAGITICA* (1644) (“And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter[?] . . . This I know, that errors in a good government and in a bad are equally almost incident; for what Magistrate may not be mis-inform’d, and much the sooner, if liberty of Printing be reduc’t into the power of a few[?]”).

5. See, e.g., Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 HARV. L. REV. 1641, 1656 (1967) (“The soap box is no longer an adequate forum for public discussion. Only the new media of communication can lay sentiments before the public, and it is they rather than government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance. As a constitutional theory for the communication of ideas, laissez faire is manifestly irrelevant.”); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411 (1986) (“What is said determines what is not said . . . [A]utonomy adds nothing and if need be, might have to be sacrificed, to make certain that public debate is sufficiently rich to permit true collective self-determination.”); Morton J. Horwitz, *The Supreme Court, 1992 Term – Foreword, The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 113 (1993) (“[T]he central practical goal of modern First Amendment history [is] the use of free speech doctrine to ‘level the playing field’ in order to provide economically or socially weak political dissidents with a chance to engage in political debate.”).

6. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1717 (1999) (“One common starting point for electoral reform is a claim that the current system somehow adulterates the outcomes that a purer system would produce.”).

tional barriers to creative measures that would, in theory, increase the diversity of viewpoints represented in political debate while privileging no viewpoint over any other, resulting in a better-informed citizenry and, therefore, better decisionmaking, better government, and better policy. Chief among these barriers is the widely disparaged yet remarkably stable contribution/expenditure distinction of *Buckley v. Valeo*<sup>7</sup> and its progeny. By attempting to place all candidates, citizens, or interests on an equal footing in terms of the amount they can spend on political campaigning, reformers hope to design a marketplace of ideas from which truth can reliably emerge victorious.

This Article argues that the categorical assertion of Justice Holmes's dissent in *Abrams* is indeed descriptively inaccurate, but that the relationship between popular acceptance of an idea and its truth is too complex and fraught to be reliably controlled by blunt field-leveling measures in campaign finance regulation. As a result, reform proposals tend to focus on the wrong targets, potentially exacerbating the conditions they purport to alleviate. Reformers who believe that unsound policy is being generated as a result of an improperly skewed marketplace of ideas would do better to explore the dynamics of political decisionmaking and persuasion in an effort to determine why policy outputs fall short of the perceived ideal. The political science, psychology, and marketing literatures provide helpful guidance in this regard, suggesting that finance regimes play less of a role in campaign outcomes than do background levels of knowledge and commitment. Investigation of these literatures suggests that the level playing field envisioned by instrumentalist reformers, in which all speakers or points of view have equal fiscal resources for the propagation of their arguments, is anathema to those reformers' ultimate goals. Put simply, equality of resources is not a useful means to the end of enlightened policy in our democracy.

Part II of this Article sets up the elements of the problem to be examined: whether campaign finance reforms, and particularly measures to equalize campaign expenditures, are normatively desirable from an instrumentalist point of view. Part III explores the relevant political science, psychology, and marketing literatures in an effort to explain the dynamics of knowledge, persuasion, and action in public debate, both in general and in the specific context of electoral campaigns. Part IV applies the social science findings of Part III to the questions outlined in Part II. Part IV goes on to argue that equality-minded reforms are unlikely to influence the outputs of the political process in a way that would satisfy reformers' goals and are in fact more likely to aggravate the conditions of which reformers currently complain. Part V concludes the Article with some discussion of potential alternative means to the social ends of instrumentalist free speech policy.

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7. 424 U.S. 1 (1976).

## II. WHY LEVEL THE PLAYING FIELD? THE ARGUMENT FOR REFORM

The project of this Article is to address only one of the many instrumentalist rationales underlying campaign finance reform agendas: the political equality rationale.<sup>8</sup> Since the Supreme Court (in)famously announced in *Buckley v. Valeo* its view that “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,”<sup>9</sup> equality-based arguments in favor of campaign finance reform have been at a disadvantage relative to arguments addressing the Court-approved, anti-corruption justification for reform.<sup>10</sup> Nevertheless, equality remains a central concern of reformers, who often either assail the *Buckley* rule as misguided or repackage equality

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8. Other rationales include the anti-corruption rationale endorsed by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976); the “participatory self-government” rationale expressed in the recent campaign finance opinions of Justice Breyer, 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. PENNUMBRA 31, 57 (2004), available at <http://www.pennumbra.com/issues/pdfs/153-1/Hasen.pdf>; the rationale that limiting fundraising frees up candidate time for worthier democratic pursuits, see generally Vincent Blasi, *Spending Limits and the Squandering of Candidates’ Time*, 6 J. L. & POL’Y 123 (1997); and the anti-extortion rationale that has gained attention in the wake of the sweeping deregulation of corporate political expenditures occasioned by the Supreme Court’s recent decision in *Citizens United v. Federal Election Commission*, No. 08-205, slip op. (U.S. Jan. 21, 2010), see *North Carolina Right to Life v. Leake*, 525 F.3d 274, 335-36 (4th Cir. 2008) (describing a campaign by private interests to influence legislators’ behavior by threatening them with a barrage of negative advertising if they did not adopt the group’s preferred position), cited in Election Law Blog, <http://electionlawblog.org/> (Feb. 4, 2010, 08:18 PDT), available at <http://electionlawblog.org/archives/015213.html>; see also Yglesias (Think Progress), <http://yglesias.thinkprogress.org/> (Jan. 22, 2010, 12:15 EDT), available at <http://yglesias.thinkprogress.org/archives/2010/01/money-for-nothing-and-votes-for-free.php> (“[A] group doesn’t actually need to spend vast sums of money to have a decisive influence on politics. It just needs to be able to credibly threaten to spend said sums.”).

9. 424 U.S. at 48-49.

10. *Id.* at 26-27 (finding that campaign finance regulation is constitutionally justified by the government’s interest in preventing corruption of the democratic process or the appearance thereof). *But see* *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986) (“Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation’s political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.”).

concerns as corruption concerns.<sup>11</sup> Examples of equality-inspired proposals range from radical “equal-dollars-per-voter” voucher regimes (usually entailing explicit abrogation of *Buckley*)<sup>12</sup> to more moderate (and legislatively successful) voluntary incentive-based systems of equal public financing.<sup>13</sup> What these proposals have in common is their goal of preventing economic inequality – a natural and accepted byproduct of a capitalist economy such as ours – from being leveraged into political inequality – a normatively unacceptable condition in a purportedly democratic society like ours.<sup>14</sup>

It is not always clear from reformers’ arguments how campaign financing translates economic power into political power; indeed, the mechanism often appears to be largely assumed.<sup>15</sup> This assumption has crept into the

11. In one such repackaged argument, Professor David Strauss has argued that corruption concerns are a byproduct of inequality concerns in an environment of interest-group politics. See generally David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369 (1994).

12. See generally Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 42-43 (1996); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994).

13. See, e.g., Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1400 (1994); see also Citizens Clean Elections Act, 16 ARIZ. REV. STAT. ANN. §§ 16-940 to -961 (2006) (establishing a voluntary system of campaign expenditure limits in exchange for public funding in elections for state office); Maine Clean Election Act, ME. REV. STAT. ANN. tit. 21-A, §§ 1121-1128 (2006) (same). These two states, the first to adopt robust public-financing regimes for state elections, have achieved some success in expanding the circle of candidates for state office and increasing election competitiveness but have not yet seen significant declines in overall campaign expenditures or increases in voter participation. See generally GEN. ACCTG. OFFICE, CAMPAIGN FINANCE REFORM: EARLY EXPERIENCES OF TWO STATES THAT OFFER FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES, GAO-03-453 (2003); Kenneth R. Mayer, Timothy Werner & Amanda Williams, *Do Public Funding Programs Enhance Electoral Competition?*, in THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 245 (Michael McDonald & John Samples eds., 2006), available at <http://works.bepress.com/mayer/115>.

14. See generally Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893 (1998) (outlining and critiquing the equality-based objection to unregulated private financing of political campaigns).

15. *Id.* at 901 (“The notion that people can transform economic into political power has such great common-sense appeal that few reformers even bother to explain how it occurs. That speakers with more money can make more appeals to voters than can those with less money seems obviously to violate equality, particularly the equality of opportunity to persuade others . . .”). This assumption has been called into question recently. See, e.g., BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 48-51 (2001) (critiquing the argument that “money buys elections” as an example of the fallacy that correlation is equivalent to causation).

analysis of the Supreme Court<sup>16</sup> and remains a background principle of debates about campaign finance reform. Professor Daniel Ortiz argues that the assumption that relative levels of campaign spending influence political outcomes “requires, descriptively, that a significant number of citizens . . . be civic slackers: voters who make political decisions in a somewhat careless way.”<sup>17</sup> He further argues that campaign reform measures seeking to cure deficiencies in policy that result from the political participation of such “civic slackers” imply “a strong normative commitment to a particular conception of how people should vote . . . [, that is, through] the independent exercise of deliberate political judgment.”<sup>18</sup>

Professor Ortiz characterizes reformist arguments that rely on these two premises as potentially inegalitarian or elitist but encourages reformers to make them explicit.<sup>19</sup> This Article will take the argument one step further. It will analyze, descriptively, the dynamics underlying voter decisionmaking, as understood by the social scientists who study them. Based on this analysis, it will then argue that, given the two necessary premises of reformist arguments (the descriptive belief in an uninformed, unmotivated electorate and the normative belief in the superiority of deliberative political decisionmaking), equality-based campaign finance measures are actually detrimental to reformers’ ostensible goals.

Considering the importance to reformist arguments of the assumption that private campaign financing allows economic power to be translated into political power, the factual basis for the assumption has received surprisingly little scrutiny in the legal academic literature. As noted above, Professor Ortiz has exposed the basic model of the electorate necessary to uphold the assumption<sup>20</sup> and has elsewhere noted that this “civic slacker” model is supported by empirical research.<sup>21</sup> In a recent symposium, some of the contributors also discussed the empirical underpinnings of campaign finance regula-

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16. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659-60 (1990) (decrying “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”); Hasen, *supra* note 8, at 58 (arguing that the only basis for *Austin* and similar opinions of the Court is the conclusion that allowing unlimited election-related speech by moneyed interests such as corporations or unions “would give [their] views disproportionate weight in society, and the legislature is seeking to democratize the influence that money can bring to bear upon the electoral process”).

17. Ortiz, *supra* note 14, at 913.

18. *Id.*

19. *Id.* at 913-14.

20. See *supra* note 17 and accompanying text.

21. Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1, 26-29 (1995) (noting that American voters tend to be “civic slob,” in contrast with “the deliberate, informed civic smarty of classical democratic theory”).



tion in ballot measure campaigns.<sup>22</sup> Apart from these early steps, however, the legal academy has given little attention to the two central questions begged by equality-based reformist arguments: (1) do political campaigns actually influence the outcomes of democratic processes, and, (2) if so, what is the mechanism by which they do so?

These questions are of more than mere academic interest. If campaign spending does not influence campaigns in the ways reformers assume, reform measures are at best superfluous and at worst counterproductive from an instrumentalist point of view. Similarly, an understanding of the mechanism (if any) by which money translates into political outcomes would help to identify appropriate targets for regulation and avoid regulation of inappropriate ones. Thus, reformers would be well served to learn more about the relationships between campaign financing, campaign activities, and political outcomes. Some difficulty arises insofar as this learning is generally not to be found in the legal authorities that are the mainstay of traditional legal analysis, particularly in areas as enmeshed in constitutional law as the campaign finance debate. Nevertheless, the political science, psychology, and marketing literatures have all examined the relationship between information campaigns and social outcomes, and their findings bear directly on the questions that much of the debate in the legal academy has simply assumed away. Given the comparative advantage scholars in these social science disciplines enjoy in addressing these types of empirical questions, legal academics would be well served to draw on their work when considering policy changes in campaign finance.<sup>23</sup> This Article is an effort to do precisely that.

### III. CAMPAIGNS, CASH, AND THE POWER OF REPETITION

#### A. Does Campaign Spending Matter?

The first question equality-minded reformers must address is whether campaign spending makes any difference in the outcome of political processes. The political science literature teems with analyses of the dynamics of voter decisionmaking and the influence of political campaigns on those dynamics. One robust and persistent finding validates the “civic slacker”

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22. See generally Thomas Stratmann, *The Effectiveness of Money in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 1041 (2005); John M. de Figueiredo, *How Much Does Money Matter in a Direct Democracy*, 78 S. CAL. L. REV. 1065 (2005).

23. Cf. Richard A. Epstein, *Let “The Fundamental Things Apply”*: *Necessary and Contingent Truths in Legal Scholarship*, 115 HARV. L. REV. 1288, 1291 (2002) (“The division of labor matters, and lawyers *qua* lawyers have no comparative advantage in doing empirical work. As such, their preferred strategy should be to rely on the empirical work done by trained social scientists, or in the alternative, to spend time and effort acquiring the expertise needed to do social science work at their level . . . . Lawyers should be able to understand, interpret, and critique the work of social scientists, not replicate it.”).

view of the electorate. It is generally recognized in social science circles that American voters tend not to be especially well informed:

The democratic citizen is expected to be interested and . . . to be well informed about political affairs. He is supposed to know what the issues are, what their history is, what the relevant facts are, what alternatives are proposed, what the party stands for, what the likely consequences are. By such standards the voter falls short . . . . [W]hen it comes to politics and political information, most Americans are severely malnourished. We are inattentive to most things political; we care little, know less, and participate in politics only when absolutely necessary (and often not even then). Our political views are peripatetic, hastily assembled, unconstrained by ideology, and unencumbered by data. Americans, in short, fail to meet the dictates of even the most charitable versions of democratic theory.<sup>24</sup>

The low-information condition of political decisionmaking in American democracy has attracted serious scholarly attention to questions such as the distribution of political knowledge and sophistication,<sup>25</sup> the proper measurement of such knowledge and sophistication,<sup>26</sup> and especially whether low

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24. Paul Freedman, Michael Franz & Kenneth Goldstein, *Campaign Advertising and Democratic Citizenship*, 48 AM. J. POL. SCI. 723, 724 (2004) (quoting BERNARD R. BERELSON, PAUL F. LAZARSFELD & WILLIAM N. MCPHEE, *VOTING: A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN* 308 (1954)) (internal citations and quotation marks omitted). The legal academy's awareness of voter ignorance and its implications has lagged behind the political science literature and has only begun to catch up in the past decade. See, e.g., Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004) (arguing that judicial review is not necessarily countermajoritarian because legislation cannot be understood to be an expression of popular will in a democracy where the electorate is generally uninformed); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1145-46, 1153-54 (2003) (evaluating the implications of a low-information electorate for direct democracy); Ortiz, *supra* note 21, at 26-29 (noting that American voters tend to be "civic slob," in contrast with "the deliberate, informed civic smarty of classical democratic theory").

25. See, e.g., Robert C. Luskin, *Measuring Political Sophistication*, 31 AM. J. POL. SCI. 856, 885-89 (1987) (summarizing and interpreting numerous studies of the distribution of political sophistication).

26. See generally Michael X. Delli Carpini & Scott Keeter, *Measuring Political Knowledge: Putting First Things First*, 37 AM. J. POL. SCI. 1179 (1993) (an influential defense of survey-based measures of political knowledge); see also Luskin, *supra* note 25, at 864-85 (describing various measures of political sophistication and their conceptual underpinnings); Jeffery J. Mondak, *Reconsidering the Measurement of*

voter knowledge or sophistication leads to deviation from policies or election results that would obtain under conditions of greater voter knowledge. The growing consensus is that, although heuristic cues can assist low-information voters in bringing their political decisionmaking closer to that of fully informed voters,<sup>27</sup> persistent deviations remain.<sup>28</sup>

A related question of particular relevance to this Article is whether, given the low-information environment of American electoral politics, spending on campaign communications can affect voter knowledge, electoral or policy preferences, or voting behavior. Again, political scientists have examined this question in depth, and more recent scholarship is moving away from a long-standing dismissive view of campaigns' capacity to alter election outcomes and toward the position that there are moderate campaign effects on voter knowledge, preferences, and even behavior.<sup>29</sup> Campaign messages do

*Political Knowledge*, 8 POL. ANALYSIS 57, 58-64 (1999) (critiquing popular survey-based methods of measuring political knowledge as incomplete and potentially misleading).

27. See generally, e.g., SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* (1991) (arguing that voters use heuristic cues to approximate fully informed decisionmaking and that any remaining individual deviations from the informed ideal likely cancel each other out in the aggregate); see also Kang, *supra* note 24, at 1149-50 (arguing that heuristic cues allow voters to bring their voting behavior into line with their preferences).

28. See Patrick Fournier, *The Impact of Campaigns on Discrepancies, Errors, and Biases in Voting Behavior*, in CAPTURING CAMPAIGN EFFECTS 45, 45-48 (Henry E. Brady & Richard Johnston eds., 2006) (summarizing research demonstrating that low-information voters' decisionmaking deviates from decisionmaking of better informed voters, on both an individual and an aggregate basis); see generally, e.g., Larry M. Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 AM. J. POL. SCI. 194 (1996) (describing, testing, and critiquing as descriptively inaccurate models of voter behavior – such as that advanced in POPKIN, *supra* note 27 – that hypothesize that low-information voters use heuristic cues to approximate fully informed decisionmaking and that remaining deviations from fully informed decisions cancel each other out); Martin Gilens, *Political Ignorance and Collective Policy Preferences*, 95 AM. POL. SCI. REV. 379 (2001) (finding that not only the level of general political knowledge but also the level of policy-specific knowledge has a significant effect on policy preferences, particularly but not exclusively among those with high levels of general political knowledge); Robert C. Luskin & James S. Fishkin, *Deliberative Polling, Public Opinion, and Democracy: The Case of the National Issues Convention*, at 10-15 (Jan. 2005) (unpublished manuscript), available at <http://cdd.stanford.edu/research/papers/2005/issues-convention.pdf> (describing attitude change on political issues as a result of increased information gained through a deliberative polling exercise); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 419-31 (1998) (critiquing various arguments that shortcuts in voter decisionmaking can compensate for low levels of political knowledge).

29. See, e.g., THOMAS H. HOLBROOK, *DO CAMPAIGNS MATTER?* 1-19 (1996) (summarizing scholarship arguing for and against the proposition that political campaigns affect voter decisions); Daron R. Shaw, *The Effect of TV Ads and Candidate*

appear to increase voter information, particularly among voters with the least background political knowledge – the “civic slackers” benefit most in informational terms.<sup>30</sup> Campaign ads also appear to affect voter attitudes toward candidates. In particular, political advertising appears to have the ability to implant emotional or affective attitudes toward its sponsors and subjects, though the positive or negative tenor of the ads can determine the polarity of these attitudes.<sup>31</sup> Significantly, repeated exposure to a candidate’s campaign advertisements appears to moderately but consistently strengthen positive

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*Appearances on Statewide Presidential Votes, 1988-96*, 93 AM. POL. SCI. REV. 345, 345-47 (1999) (same); Shanto Iyengar & Adam F. Simon, *New Perspectives and Evidence on Political Communication and Campaign Effects*, 51 ANN. REV. PSYCHOL. 149 (2000) (arguing that the conventional wisdom that campaigns have negligible effects is based on methodological and conceptual errors and reviewing new research pointing to a diversity of campaign effects).

30. See generally, e.g., Freedman, Franz & Goldstein, *supra* note 24 (arguing that campaign television ads increase voter information, particularly among less informed voters); cf. Thomas M. Holbrook, *Presidential Campaigns and the Knowledge Gap*, 19 POL. COMM. 437 (2002) (finding that some campaign communications – specifically presidential debates – can reduce the information gap between high-information and low-information voters). A slightly different view can be found in STEPHEN ANSOLABEHRE & SHANTO IYENGAR, GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE 51-61 (1995), where the authors report experimental results showing that a single political advertisement exposure reduces the information gap between individuals more likely to be politically informed and those less likely to be informed, but that with a second exposure this gap widens to its original spread (the experiment does not test more than two exposures). The authors theorize that this result could be extrapolated to support the proposition that “the more candidates advertise, the more their message reaches only better-informed portions of the electorate,” however, their results show absolute information gains for less informed voters with repeated advertising, even though relative gains after two exposures return to pre-advertising levels. *Id.* at 54-55.

31. See generally, e.g., Charles Atkin & Gary Heald, *Effects of Political Advertising*, 40 PUB. OPINION Q. 216 (1976) (demonstrating experimentally that positively and negatively charged ads can have corresponding effects on voters’ affective responses to the subjects and, in the case of negative advertising, the sponsors of the ads); Chingching Chang, *The Impacts of Emotion Elicited by Print Political Advertising on Candidate Evaluation*, 3 MEDIA PSYCHOL. 91 (2001) (arguing that positive and negative print ads evoke emotions that in turn affect candidate evaluation in line with the positive or negative valence of the emotion); see also Richard R. Lau, Lee Sigelman, Caroline Heldman & Paul Babbitt, *The Effects of Negative Political Advertisements: A Meta-Analytic Assessment*, 93 AM. POL. SCI. REV. 851, 857 (1999) (finding based on meta-analysis of studies examining negative political ads that such ads decrease positive affect for the target of the ad but decrease it even more for the ad sponsor). But see Robert G. Meadow & Lee Sigelman, *Some Effects and Noneffects of Campaign Commercials: An Experimental Study*, 4 POL. BEHAV. 163 (1982) (finding that presentation of television ads did not appreciably affect voter assessment of candidate qualities along certain dimensions or their vote choice).

attitudes toward the candidate, though the tone of the advertisement may influence its effects.<sup>32</sup>

Despite these reported effects of political advertising, it is far less clear whether or how these effects translate into different voting behaviors or political outcomes.<sup>33</sup> At the aggregate level, there is a fair amount of early research, particularly the work of Professor Gary Jacobson beginning in the 1970s and 1980s, suggesting that campaign spending by incumbents does not tend to increase their share of the vote, while campaign spending by challengers does.<sup>34</sup> However, this finding has been increasingly criticized recently on several grounds. One criticism notes that, insofar as candidates can be expected to behave strategically, increases in vote share are not necessarily an appropriate measure of the effects of campaign spending on results in first-past-the-post, winner-take-all elections, where margin of victory is far less important than victory itself.<sup>35</sup> Another notes that empirical research underlying the finding omits key variables (such as the contested nature of a race, the relative cost of media across districts, and background partisan identifications within a district), likely skewing the results; significantly, studies that attempt to control for these missing variables find a more reliable correlation between spending and vote share.<sup>36</sup> In short, through refinement of methodologies,

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32. Atkin & Heald, *supra* note 31, at 225-26 & n.23 (finding that repeated advertising increases recipients' positive affective response to the sponsor, except where the tone of the advertisement is negative); *cf.* ANSOLABEHRE & IYENGAR, *supra* note 30, at 91-94 (reporting experimental results showing that negative ads can benefit their sponsor, particularly in general as opposed to primary elections, but that this effect is heavily mediated by pre-existing party affiliation, with increased conservatism correlating to increased receptiveness to negative ads).

33. See generally James N. Druckman, *Does Political Information Matter?*, 22 POL. COMM. 515 (2005) (exploring the relevance of political information and communications where the effects of such information on voter behavior are unclear); *cf.* ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 238-59 (1957) (arguing that voter ignorance is rational in light of the insignificance of any single vote to the outcome of an election and the costs of obtaining political information). *But see* MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* 218-67 (1996) (arguing that voters' level of political knowledge does influence their political behavior in measurable ways, with repercussions for democratic society, such that increasing voter knowledge is normatively desirable).

34. See generally, *e.g.*, Gary C. Jacobson, *Money and Votes Reconsidered: Congressional Elections, 1972-1982*, 47 PUB. CHOICE 7 (1985).

35. See Alan S. Gerber, *Does Campaign Spending Work? Field Experiments Provide Evidence and Suggest New Theory*, 47 AM. BEHAV. SCIENTIST 541, 560-69 (2004).

36. See Thomas Stratmann, *Some Talk: Money in Politics. A (Partial) Review of the Literature*, 124 PUB. CHOICE 135, 136-41 (2005); *see also* Stratmann, *supra* note 22, at 1060-61; Daniel R. Ortiz, *The Empirics of Campaign Finance*, 78 S. CAL. L. REV. 939, 940-43 (2005); Alan Gerber, *Estimating the Effect of Campaign Spending on Senate Election Outcomes Using Instrumental Variables*, 92 AM. POL. SCI. REV.

empirical research in political science is moving from demonstrations of modest and ambiguous correlations of campaign spending to aggregate election outcomes toward more rigorous demonstrations of aggregate spending effects. However, it should be noted that the size of these effects, while statistically significant, is relatively small: one recent study concludes that \$100,000 worth of television advertising at median rates corresponds with only a fraction of a percent change in vote shares in federal legislative elections.<sup>37</sup>

Despite the growing consensus in the political science community that aggregate spending effects exist, the mechanism of those effects is still an area of emerging research in the field.<sup>38</sup> Longstanding conventional wisdom has doubted the ability of campaign communications to directly and immediately persuade voters to change their candidate preference,<sup>39</sup> and the political science community is just beginning to seek out alternative individual-voter-level mechanisms of campaign effects. Some argue that campaigns serve primarily to energize or demobilize particular voters, and much research in the past dozen years has focused – inconclusively – on the role of negative or “attack” advertisements in this dynamic.<sup>40</sup> Debate has also devel-

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401, 409-10 (1998); Thomas Stratmann, *How Prices Matter in Politics: The Returns to Campaign Advertising*, 140 PUB. CHOICE 357 (2009) [hereinafter Stratmann, *Prices*]. Other studies suggest that advertising tends to persuade low-information voters more than high-information voters. *See generally, e.g.*, Nicholas A. Valentino, Vincent L. Hutchings & Dmitri Williams, *The Impact of Political Advertising on Knowledge, Internet Information Seeking, and Candidate Preference*, 54 J. COMM. 337 (2004).

37. *See* Stratmann, *Prices*, *supra* note 36, at 368-71.

38. *See, e.g.*, Gerber, *supra* note 36, at 410 n.29 (“Exactly how campaign spending leads to more votes is an ongoing research question.”); David A.M. Peterson, *Uncovering the Mechanism: How Campaigns Matter and Why* 3 (Apr. 20, 2006) (unpublished manuscript, presented at the annual meeting of the Midwest Political Science Association), available at [http://www.allacademic.com/meta/p137445\\_index.html](http://www.allacademic.com/meta/p137445_index.html) (“We do know that campaigns matter . . . . We do not, however, know how campaigns matter; the mechanism that individuals are influenced by is unknown.”).

39. *See generally* HOLBROOK, *supra* note 29, at 1-19 (summarizing the early line of research supporting the view that individual voting behavior is determined primarily by prevailing economic conditions, party identification, and satisfaction with incumbent performance).

40. *Compare generally, e.g.*, Stephen Ansolabehere, Shanto Iyengar & Nicholas Valentino, *Does Attack Advertising Demobilize the Electorate?*, 88 AM. POL. SCI. REV. 829 (1994) (reporting experimental findings that negative campaign advertisements decrease intentions to vote), with Ken Goldstein & Paul Freedman, *Campaign Advertising and Voter Turnout: New Evidence for a Stimulation Effect*, 64 J. POL. 721, 723-28 (2002) (finding that statistical analysis of the likelihood of exposure to negative political advertising suggests that such ads actually stimulate turnout), and Kim Fridkin Kahn & Patrick J. Kenney, *Do Negative Campaigns Mobilize or Suppress Turnout? Clarifying the Relationship Between Negativity and Participation*, 93

oped as to whether and how campaign ads might affect voters' candidate knowledge and preferences. On this front, researchers have divided into at least two camps. One group of scholars argues that campaign advertising can indirectly influence voter decisions (and thereby, in the aggregate, election outcomes) by "priming" the electorate – setting the agenda by establishing in voters' minds the relevance of certain criteria that are then used to measure the suitability of candidates.<sup>41</sup> Another faction argues that campaign messages influence ultimate votes by fostering "on-line" or "running tally" updates of an overall affect-based candidate preference that persists even after the information that caused the updated preference has faded from memory.<sup>42</sup> In

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AM. POL. SCI. REV. 877 (1999) (distinguishing between appropriately presented negative information and mudslinging attacks and finding that the former mobilizes while the latter demobilizes). For retrospective analyses of the debate, see, e.g., Valentino, Hutchings & Williams, *supra* note 36, at 338 (summarizing scholarship on both sides); Lau, Sigelman, Heldman & Babbitt, *supra* note 31, at 857-58 (concluding based on a meta-analysis of many reported and unreported studies that negative political ads do not appear to depress political participation). Much of the debate over these effects centers on the proper methodology for measuring voter exposure to campaign messages and the adequacy of available data sources. See, e.g., Goldstein & Freedman, *supra*, at 723-28 (discussing methodological issues and problems of survey data and other available data sources); Shaw, *supra* note 29, at 346-47 (contrasting experimental and survey methodologies for measuring campaign effects). Other research in this vein has attempted to identify whether particular campaign activities are effective in mobilizing voters to go to the polls. See generally, e.g., Alan S. Gerber & Donald P. Green, *The Effects of Canvassing, Telephone Calls, and Direct Mail on Voter Turnout: A Field Experiment*, 94 AM. POL. SCI. REV. 653 (2000) (testing the effectiveness of various methods of voter outreach); D. Sunshine Hillygus, *Campaign Effects and the Dynamics of Turnout Intention in Election 2000*, 67 J. POL. SCI. 50 (2005) (finding that advertising and personal contacts tend to increase participation by voters who did not initially intend to vote, while contacts from party and interest group organizations maintain the intent to vote among those who already had the intent to do so).

41. See, e.g., Iyengar & Simon, *supra* note 29, at 157 (arguing in favor of the existence of priming effects); James N. Druckman, *Priming the Vote: Campaign Effects in a U.S. Senate Election*, 25 POL. PSYCHOL. 577 (2004) (arguing in favor of the existence of priming effects based on a comparison of exit poll results and media campaign coverage). In the face of long standing scholarly consensus that there is no direct persuasive effect of campaigns on vote choice, the priming model can be understood as an effort to demonstrate changes in voter preferences as a second-order effect: priming is "tantamount to indirect persuasion in that altering the criteria [by which candidates are evaluated] can alter the choice." Iyengar & Simon, *supra* note 29, at 157.

42. See Milton Lodge, Marco R. Steenbergen & Shawn Brau, *The Responsive Voter: Campaign Information and the Dynamics of Candidate Evaluation*, 89 AM. POL. SCI. REV. 309 (1995) (setting forth this model of campaign effects and voter preference formation). A related and somewhat inverted account framed in terms of learning rather than affect is described in Gabriel S. Lenz, *Learning and Opinion Change, Not Priming: Reconsidering the Evidence for the Priming Hypothesis*, 53

each of these areas of research, political science scholars are still in the early steps of trying to identify the mechanisms by which campaigns might influence voter beliefs, attitudes, and behavior.<sup>43</sup> As they do so, they are beginning to explore terrain already charted (at least preliminarily) by the psychology and marketing literatures.

### B. How Does Campaign Spending Work?

As the search for campaign effects turns to focus on more nuanced questions about voter psychology at the individual level, it is beginning to pick up on the strong role played by affective and emotional responses in judgment tasks.<sup>44</sup> As discussed below, repetition plays a key mediating role in this relationship. The study of the relationships among affect, repetition, and judgment, first identified in the general psychology literature, has crossed over to the marketing literature, where an understanding of the psychological basis of belief, persuasion, and decisionmaking has significant practical applications. Both of these literatures, in turn, have recently begun to influence the political sphere, which over the last few decades has been cross-pollinated with the tools of psychology<sup>45</sup> and mass marketing.<sup>46</sup> This Section describes

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AM. J. POL. SCI. 821 (2009) (arguing that studies purporting to show priming effects are better explained as demonstrating the updating of voters' policy preferences to comport with new knowledge about their preferred party's or candidate's position on an issue).

43. See, e.g., Peterson, *supra* note 38, at 6-8 (noting that studies focused on campaign effects at the level of the individual voter have generally not examined the psychological mechanism of campaign effects).

44. See generally, e.g., GEORGE E. MARCUS, W. RUSSELL NEUMAN & MICHAEL MACKUEN, *AFFECTIVE INTELLIGENCE AND POLITICAL JUDGMENT* (2000) (setting forth a model of political judgment and behavior based on affective responses, particularly responses to emotional states of anxiety, enthusiasm, and anger); Ted Brader, *Striking a Responsive Chord: How Political Ads Motivate and Persuade Voters by Appealing to Emotions*, 49 AM. J. POL. SCI. 388 (2005) (reviewing the literature on the role of affect in political judgment and behavior and arguing, based on an experimental study, that emotional cues such as music and images in political ads can cause changes in judgments of candidates and in motivation to participate in the political process); George E. Marcus, *Emotions in Politics*, 3 ANN. REV. POL. SCI. 221 (2000) (reviewing research into the role of emotion in political evaluation and judgment); Jack Glaser & Peter Salovey, *Affect in Electoral Politics*, 2 PERSONALITY & SOC. PSYCHOL. REV. 156 (1998) (reviewing the state of research into the role of affect in politics and suggesting future research directions). Some of the most current research in this vein suggests that such emotional aspects of campaign messages may spur updating of voters' "running tally" candidate preferences. Brader, *supra*, at 401.

45. See, e.g., POPKIN, *supra* note 27, at 72-95 (reviewing aspects of the cognitive psychology literature and applying it to campaign effects).

46. See generally Margaret Scammell, *Political Marketing: Lessons for Political Science*, 47 POL. STUD. 718 (1999) (describing the development of political marketing as a field of scholarly inquiry); *HANDBOOK OF POLITICAL MARKETING* (Bruce I.



some relevant findings in psychology and marketing that are just beginning to be explored by political scientists.

Psychology researchers have concluded that choices and judgments are often made heuristically based on automatically generated valences of positive or negative affective responses.<sup>47</sup> Put simply, we choose what we like, and only after we have decided do we retroactively try to rationalize our decision.<sup>48</sup> Marketing researchers have similarly concluded that such affect-driven judgments are major determinants of consumer choice.<sup>49</sup> Drawing on

Newman ed., 1999) (collecting scholarship on political marketing theory and practice).

47. See Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 49, 57 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002) [hereinafter PSYCHOLOGY OF INTUITIVE JUDGMENT] (“*Affective valence* is a natural assessment, and therefore a candidate for substitution in the numerous situations in which an affectively loaded response is required.”); Paul Slovic, Melissa Finucane, Ellen Peters & Donald G. MacGregor, *The Affect Heuristic*, in PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra*, at 397 (describing the affect heuristic and the empirical data from which it is inferred); Shane Frederick, *Automated Choice Heuristics*, in PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra*, at 548, 553 (describing the use of the affect heuristic as a means of generating choices without deliberate reasoning). This author and others have previously extended cognitive psychology research into heuristic judgments based on affect to legal issues concerning advertising, trademarks, and consumer protection; much of the discussion in this paragraph and the next is duplicative of the author’s prior work. See Jeremy N. Sheff, *The (Boundedly) Rational Basis of Trademark Liability*, 15 TEX. INTEL. PROP. L. J. 331, 358-61 (2007) (discussing applicability of research into the affect heuristic to debates about the purpose and scope of trademark law); see also Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 732 (1999) (“[O]ur affective responses to products more often than not determine the purchasing decision, regardless of whether we experience the decision as having resulted from ‘reasons.’”).

48. See Frederick, *supra* note 47, at 550; see also R. B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151, 155 (1980) (“Quite often ‘I decided in favor of X’ is no more than ‘I liked X.’ . . . We buy the cars we ‘like,’ choose the jobs and houses that we find ‘attractive,’ and then justify those choices by various reasons . . .”).

49. See generally, e.g., Girish N. Punj & Clayton L. Hillyer, *A Cognitive Model of Customer-Based Brand Equity for Frequently Purchased Products: Conceptual Framework and Empirical Results*, 14 J. CONSUMER PSYCHOL. 124 (2004) (formulating and empirically testing a model of brand equity that is dominated by affectively laden “global brand attitude” and “brand heuristic” as first- and second-level determinants, respectively, of consumer decisionmaking); Tim Ambler, Sven Braeutigam, John Stins, Steven Rose & Stephen Swithenby, *Saliency and Choice: Neural Correlates of Shopping Decisions*, 21 PSYCHOL. & MKTG. 247, 248 (2004) (summarizing research suggesting that emotion and feelings are the primary drivers of consumer decisionmaking). *But see id.* at 257 (noting that brain imaging neither supported nor refuted neurophysiological predictions of one theorist of emotion-based choice).

this work and supplementing it with original research, political scientists over the past twenty years have proposed and tested decisional models based on heuristic cues and affective responses.<sup>50</sup>

The growing interest in heuristics, and particularly affect, as determinants of political behavior should not be surprising in light of the low-information, low-attention conditions of American democratic politics. “[P]eople are not accustomed to thinking hard, and are often content to trust a plausible judgment that quickly comes to mind.”<sup>51</sup> Affective reactions, like heuristics generally, are less cognitively demanding than logical thought processes.<sup>52</sup> Moreover, implanting affective associations is an extraordinarily easy task.<sup>53</sup> Such associations are also persistent: once a stimulus has been tagged with affective value, later contrary information about the stimulus’s actual semantic meaning will often be insufficient to significantly alter the affective response.<sup>54</sup> Indeed, when we rely on any heuristic judgment in our

50. See generally, e.g., POPKIN, *supra* note 27; MARCUS, NEUMAN & MACKUEN, *supra* note 44.

51. Kahneman & Frederick, *supra* note 47, at 57-58 (“[P]eople initially believe whatever they are told. . . . [I]t takes some time and mental effort to ‘unbelieve’ such dubious statements.”). Cf. generally Christian D. Schunn, Lynne M. Reder, Adisack Nhouyvanisvong, Daniel R. Richards & Philip J. Stroffolino, *To Calculate or Not to Calculate: A Source Activation Confusion Model of Problem Familiarity’s Role in Strategy Selection*, 23 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 3 (1997) (demonstrating that people tend to retrieve answers to problems from memory rather than calculate them through logical reasoning when the problem appears familiar to them).

52. See Steven A. Sloman, *Two Systems of Reasoning*, in PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 47, at 379, 380-84 & tbl.22.1, 393-94 (arguing that “associative” reasoning such as heuristic judgment is an automatic form of cognitive processing, to be distinguished from “rule-based” reasoning, which governs more formal logical analysis and requires more taxing deliberate sequential processing). But see Gerd Gigerenzer & Terry Regier, *How Do We Tell an Association From a Rule? Comment on Sloman (1996)*, 119 PSYCHOL. BULL. 23 (1996) (critiquing Sloman’s dual-system theory on grounds of ambiguity, vagueness, and failure to consider alternative explanations of data).

53. As an illustration of our unconscious susceptibility to affective content, consider a study that showed that flashing an affectively charged image (a smiling or frowning face) for 1/250th of a second immediately prior to the display of a stimulus was enough to bias the test subject’s preference for that stimulus, even though the affectively charged “priming” cue was so brief that there was no recognition or recall of it. Slovic, Finucane, Peters & MacGregor, *supra* note 47, at 401 (citing P. Winikelman, R. B. Zajonc & N. Schwarz, *Subliminal Affective Priming Resists Attributional Interventions*, 11 COGNITION & EMOTION 433 (1997)). This effect persisted even when the stimulus was later presented with an affectively opposite “priming” cue. *Id.*

54. For example, in one experiment test subjects were given an affectively charged definition for Chinese pictograms, then told that those definitions were inaccurate and asked to memorize “accurate” affectively neutral definitions for the same

decisionmaking, as political scientists argue is the case for the majority of American voters, it takes considerable time and effort to alter those judgments based on further, more rational consideration, if we can alter them at all.<sup>55</sup>

Heuristic responses based on affect are also heavily mediated by repetition. Studies show that simple familiarity with a stimulus increases positive affective response to it.<sup>56</sup> In other words, the more often we are merely exposed to a stimulus, the stronger our affective response to it will be and the more likely we will be to prefer it.<sup>57</sup> This “mere exposure” effect may help to explain research findings that repetition of positive campaign messages increases positive attitude toward their sponsor<sup>58</sup> and that increased exposure of the electorate to a candidate’s name increases that candidate’s vote share.<sup>59</sup> It

pictograms. *Id.* Even after the new affectively neutral meanings had been learned, the test subjects continued to exhibit the earlier affective reaction to the pictograms. *Id.*

55. See Hanson & Kysar, *supra* note 47, at 646-54 (discussing a host of empirically demonstrated phenomena illustrating the general principle that initial judgments are extremely persistent, even in the face of contradictory or ambiguous hard data). Surprisingly, attempts at rationalization may actually serve to increase confidence in a faulty intuitive judgment, a phenomenon known as confirmation bias. See *id.* at 647-50, 660-62; Nicholas Epley & Thomas Gilovich, *The Anchoring-and-Adjustment Heuristic: Why the Adjustments Are Insufficient*, 17 PSYCHOL. SCI. 311, 312 (2006) (“[P]eople evaluate hypotheses by trying to confirm them.”). This dynamic is prevalent in political learning as well. Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions* (Apr. 22, 2009) (unpublished manuscript), available at <http://www-personal.umich.edu/~bnyhan/nyhan-reifler.pdf> (finding that voters tend to try to fit new information into their preexisting ideological views and not only discount information inconsistent with those views but actually rebel against such information, hewing to their original views even more strongly than before encountering the new information). For a general overview of the empirical and theoretical underpinnings of the confirmatory bias, see Hanson & Kysar, *supra* note 47, at 647-50.

56. Frederick, *supra* note 47, at 553-54; see also Ambler, Braeutigam, Stins, Rose & Swithenby, *supra* note 49, at 253-54 (discussing experimental results showing significant correlation between brand familiarity and selection of the brand and quicker decisionmaking when faced with a familiar brand than with unfamiliar brands).

57. Slovic, Finucane, Peters & MacGregor, *supra* note 47, at 400 (“[W]hen objects are presented to an individual repeatedly, the ‘mere exposure’ is capable of creating a positive attitude or preference for these objects.”); see also, e.g., Robert F. Bornstein, *Exposure and Affect: Overview and Meta-Analysis of Research, 1968–1987*, 106 PSYCHOL. BULL. 265 (1989) (reviewing studies that document the “mere exposure effect”).

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

59. See generally Paul E. Schaffner, Abraham Wandersman & David Stang, *Candidate Name Exposure and Voting: Two Field Studies*, 2 BASIC & APPLIED SOC. PSYCHOL. 195 (1981).

also suggests that the ability to repeat a campaign message or secure repeated exposure for a political candidate has real potential to skew the results of an election in favor of a campaign that leverages that ability.

More generally, repetition threatens the integrity of political decision-making by increasing the susceptibility of low-information, low-attention voters to factual error. With all due respect to Justice Holmes, it turns out that the ability of a thought to get itself accepted in the market is not necessarily a very good test of the empirical truth of that thought. To the contrary, the acceptance of a proposition can be manipulated by processes having little or nothing to do with empirical truth, key among them repetition. Thirty years ago a group of experimental psychologists discovered that, simply by repeating a plausible proposition two or three times, they could impart to their hearers significantly increased confidence in the truth of that proposition, regardless of its actual truth or falsity.<sup>60</sup> Since then, other psychologists have investigated this “illusory truth effect”<sup>61</sup> and found it to be robust, though its underlying causes remain a matter of some debate.<sup>62</sup> Not only does repetition strengthen the belief that a proposition is true, but it also strengthens the belief that the proposition is widely considered to be true.<sup>63</sup> Such belief, in turn, reinforces belief in the truth of the proposition, as we are more inclined to believe that a proposition is true if we believe that it is accepted by a large number of people.<sup>64</sup> Moreover, strength of belief in the truth of a proposition

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60. Lynn Hasher, David Goldstein & Thomas Toppino, *Frequency and the Consequence of Referential Validity*, 16 J. VERBAL LEARNING & VERBAL BEHAV. 107 (1977). For a more recent and rigorous demonstration of this effect, see generally Ian Maynard Begg, Ann Anas & Suzanne Farinacci, *Dissociation of Processes in Belief: Source Recollection, Statement Familiarity, and the Illusion of Truth*, 121 J. EXPERIMENTAL PSYCH.: GEN. 446 (1992).

61. This effect is referred to variously in the literature as the “truth effect,” Scott A. Hawkins & Stephen J. Hoch, *Low-Involvement Learning: Memory Without Evaluation*, 19 J. CONSUMER RES. 212, 215 (1992); the “reiteration effect,” Ralph Hertwig, Gerd Gigerenzer & Ulrich Hoffrage, *The Reiteration Effect in Hindsight Bias*, 104 PSYCHOL. REV. 194, 194-95 (1997); the “repetition effect,” Kimberlee Weaver, Stephen M. Garcia, Norbert Schwarz & Dale T. Miller, *Inferring the Popularity of an Opinion From Its Familiarity: A Repetitive Voice Can Sound Like a Chorus*, 92 J. PERSONALITY & SOC. PSYCHOL. 821, 827 (2007); and the “illusory truth effect,” Jason P. Mitchell, Chad S. Dodson & Daniel L. Schacter, *fMRI Evidence for the Role of Recollection in Suppressing Misattribution Errors: The Illusory Truth Effect*, 17 J. COGNITIVE NEUROSCI. 800, 800 (2005). This Article will use the latter term to encompass all these labels.

62. For a summary of the experimental results and theories concerning the cause of the illusory truth effect, see Anne L. Roggeveen & Gita Venkataramani Johar, *Perceived Source Variability Versus Familiarity: Testing Competing Explanations for the Truth Effect*, 12 J. CONSUMER PSYCHOL. 81, 82-84, 90 (2002).

63. See generally Weaver, Garcia, Schwarz & Miller, *supra* note 61.

64. *Id.* at 822. Similar effects have already been analyzed with respect to the judiciary, where lopsided panel composition can induce minority conformity to a

– even if based solely on the sense of familiarity that results from repetition – leads us to believe that the proposition derives from a credible source,<sup>65</sup> and, in passing along the information to others, attribution to a credible source can increase the likelihood that the proposition will be accepted and further spread.<sup>66</sup>

This potential for cascading effects is further complicated by the fact that, like affective reactions, repetition-based beliefs are easy to implant and difficult to correct. In general, the greatest increase in truth-belief comes with just two to three repetitions, after which the effect levels off.<sup>67</sup> Unfortunately, repetition-based belief in “Proposition X” is not likely to be dissipated by simply informing the belief holder that Proposition X is false. To the contrary, such refutations, because they require repetition of the false proposition, may actually *strengthen* belief in the truth of Proposition X: warnings ultimately become recommendations.<sup>68</sup> This irony is hypothesized to result from the fact that, when we are presented with new information, we record the semantic content of the information in memory separately from information about the context in which the semantic content appeared. Over time, the contextual data fades from memory at a faster rate than the semantic content, and we cannot remember anything about Proposition X other than the fact

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majority position. See CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 67-69 (2006). However, the original social psychology experiments demonstrating conformity effects show that such effects deteriorate significantly when the majority belief is less than unanimous. See Solomon E. Asch, *Opinions and Social Pressure*, 193 SCIENTIFIC AM. 31, 35 (1955). Moreover, there is significant debate in the political science literature as to whether analogous “bandwagon” effects obtain in electoral contexts. See generally, e.g., Catherine Marsh, *Do Polls Affect What People Think?*, in 2 SURVEYING SUBJECTIVE PHENOMENA 565 (Charles F. Turner & Elizabeth Martin eds., 1984).

65. See generally Alison R. Fragale & Chip Heath, *Evolving Informational Credentials: The (Mis)Attribution of Believable Facts to Credible Sources*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 225 (2004).

66. Norbert Schwarz, Lawrence J. Sanna, Ian Skurnik & Carolyn Yoon, *Metacognitive Experiences and the Intricacies of Setting People Straight: Implications for Debiasing and Public Information Campaigns*, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 127, 151 (Mark P. Zanna, ed., 2007), available at [http://sitemaker.umich.edu/norbert.schwarz/files/07\\_aep\\_schwarz\\_et\\_al\\_setting-people-straight.pdf](http://sitemaker.umich.edu/norbert.schwarz/files/07_aep_schwarz_et_al_setting-people-straight.pdf).

67. See Scott A. Hawkins, Stephen J. Hoch & Joan Meyers-Levy, *Low-Involvement Learning: Repetition and Coherence in Familiarity and Belief*, 11 J. CONSUMER PSYCHOL. 1, 2 (2001).

68. Ian Skurnik, Carolyn Yoon, Denise C. Park & Norbert Schwarz, *How Warnings About False Claims Become Recommendations*, 31 J. CONSUMER RES. 713, 713 (2005).

that it is familiar.<sup>69</sup> Familiar information is easier to process than novel information, and the experience of facile cognitive processing gives rise to a belief in the truth of the processed information.<sup>70</sup> As a result, our belief in Proposition X can be strengthened even if the source of the proposition or the proposition itself is discredited, and, in fact, the act of discrediting over time can reinforce belief in Proposition X's truth by force of repetition.<sup>71</sup> For similar reasons, the mere expression of a question as to whether a proposition is true, with the passage of time, tends to be remembered as an assertion that the proposition is true.<sup>72</sup> Accordingly, psychologists and marketing researchers alike warn that, when attempting to refute false or misleading claims, "information campaigns should focus more on what is true than on reiterating what is false."<sup>73</sup>

There are available countermeasures besides direct questioning or refutation of a false premise that can mitigate the illusory truth effect. For example, a repetition-based belief might be successfully countered with a message that does not repeat the challenged proposition and includes features designed for especially fluent processing, such as simple, clear presentation or mnemonic devices such as rhyme or music.<sup>74</sup> More importantly for present purposes, greater attention to the semantic content of a message and the integration of that content with other knowledge, entailing more in-depth cognitive processing than mere passive awareness, can cause hearers to resort to pre-existing knowledge and beliefs in critically assessing the truth of the message, diminishing their reliance on the sense of familiarity that gives rise to the

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69. *Id.* at 713-15. The illusory truth effect becomes increasingly pronounced as we age, both because the decay rate of contextual memory accelerates over the course of our lives and because as we get older we are more likely to believe that new information has been encountered before. *Id.* at 714, 722-23; see generally Sharmistha Law, Scott A. Hawkins & Fergus I. M. Craik, *Repetition-Induced Belief in the Elderly: Rehabilitating Age-Related Memory Deficits*, 25 J. CONSUMER RES. 91 (1998).

70. Schwarz, Sanna, Skurnik & Yoon, *supra* note 66, at 149-51.

71. *Id.* at 151-58. While it is possible to design refutations of repetition-based beliefs, the ability of such refutations to secure popular belief or to reduce belief in the refuted claim is highly contingent on the nature of the refuted claim and the relationship between the original claim and the refutation, such that refutation efforts are not guaranteed success and have the potential to backfire. See generally Gita Venkataramani Johar & Anne L. Roggeveen, *Changing False Beliefs from Repeated Advertising: The Role of Claim-Refutation Alignment*, 17 J. CONSUMER PSYCHOL. 118 (2007).

72. See generally Mario Pandelaere & Siegfried Dewitte, *Is This a Question? Not For Long. The Statement Bias*, 42 J. EXPERIMENTAL SOC. PSYCH. 525 (2006).

73. Skurnik, Yoon, Park & Schwarz, *supra* note 68, at 723.

74. See Schwarz, Sanna, Skurnik & Yoon, *supra* note 66, at 153; cf. Hawkins & Hoch, *supra* note 61, at 223 (noting that such mnemonic devices tend to cause the greatest increases of belief in simple claims).

illusory truth effect.<sup>75</sup> This more attentive and engaged cognitive processing mediates the effects of repetition, such that repeating a message more than a few times can actually cause backlash in the attentive hearer, who becomes increasingly critical of, or bored or irritated with, the repeated claim.<sup>76</sup>

Psychologists have pointed out that the use of familiarity as a cue for measuring truth is a useful heuristic insofar as most of the information we encounter is true.<sup>77</sup> But bringing the analysis back to investigation of mechanisms by which campaigns might influence voters, it becomes apparent that this intuitive judgment can be easily exploited by repeating a claim to an audience that does not expend significant cognitive effort in evaluating that claim. In such a situation, the audience is likely to reflect elevated levels of subjective belief in the truth of the repeated claim, regardless of its actual truth or falsity. Insofar as this model of exploitation is a fair description of the typical American electoral campaign, in which a primary expense is repetitive campaign advertising broadcast over various media for consumption by an unsophisticated American electorate, equality-minded reformers may have a legitimate empirical basis to be concerned about the unequal distribution of campaign funds. It is possible that a well-funded speaker could repeat an empirically false claim that supports the speaker's preferred policy position, thereby increasing popular acceptance of the truth of the claim and making adoption of the policy position through democratic processes more likely.<sup>78</sup> However, even if the aforementioned findings in the psychology and marketing literatures could be extended to political campaigns – and to date they have not been in any systematic or rigorous way – it would not necessarily follow that equalization of campaign funds is either practically feasible or normatively desirable. While others have focused on the practicality of equalizing reforms,<sup>79</sup> the next Part will assume their feasibility and discuss their desirability.

#### IV. A RATIONALE FOR REFORM? EVALUATING EQUALIZATION PROPOSALS

Part II of this Article posed two questions to test a key assumption of equality-based campaign finance reform proposals. Part III answered the first

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75. See generally Hawkins & Hoch, *supra* note 61; Law, Hawkins & Craik, *supra* note 69.

76. See Hawkins & Hoch, *supra* note 61, at 213-14; Hawkins, Hoch & Meyers-Levy, *supra* note 67, at 2.

77. Skurnik, Yoon, Park & Schwarz, *supra* note 68, at 714.

78. Indeed, Justice Stevens appeared to come close to such a realization when he recently observed that the rule of *Buckley* “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.” *Randall v. Sorrell*, 548 U.S. 230, 280 (2006) (Stevens, J., dissenting) (emphasis added).

79. See, e.g., Issacharoff & Karlan, *supra* note 6, at 1708-18.

question – whether political campaigns influence the outcomes of democratic processes – in the affirmative, suggesting that campaign regulation might affect electoral and policy outputs. However, the second question – how campaigns influence the outcomes of democratic processes – is far more important to evaluating the merits (as opposed to the relevance) of equality-motivated reform proposals. The influence of campaigns on ultimate election results is, by definition, an aggregation of campaign effects on the individual level, and such effects must be understood if they are to be manipulated by regulation. The social science research discussed above – which surely does not exhaust the entire universe of possible campaign effects on the individual level – explains several documented and potential effects of campaign activities. From an instrumentalist point of view that sees public debate as a means to the end of enlightened policy, none of these campaign effects can be considered inherently undesirable, and indeed some of them must be considered inherently desirable.

As noted above<sup>80</sup> and elsewhere,<sup>81</sup> the ideal model of deliberative, rational political decisionmaking is undermined by the empirical finding that most American voters lack sufficient information or interest to conform to that model. Yet political advertising ameliorates the informational deficiencies of the least informed portion of the electorate, at least in absolute terms and possibly in relative terms as well<sup>82</sup> – an apparent benefit of campaign activities for democratic processes (from the instrumentalist point of view). Similarly, while repetition of campaign messages could be misused to deceive ill-informed voters into believing false propositions or forming favorable impressions of unfavorable candidates, it could also be an efficient means of perpetuating accurate information throughout an electorate without the inclination or resources to gather that information independently.<sup>83</sup> Moreover, even where campaign effects might be manipulated at the expense of optimal political decisionmaking, remedying those manipulations through regulation may be less effective than alternative approaches. Accordingly, instrumentalist campaign reform proposals should be evaluated in light of what we know about the likely effects of their implementation in order to determine whether they are appropriate means to their stated ends. In this spirit, this Part evaluates three equality-based reform measures – expenditure limits, public matching funds, and equal-dollars-per-voter contribution limits – in light of the campaign effects described in the previous part.<sup>84</sup>

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80. See *supra* notes 24-28 and accompanying text.

81. See, e.g., Ortiz, *supra* note 21, at 26-29.

82. See *supra* note 30 and accompanying text.

83. See generally Kang, *supra* note 24.

84. Given the limited scope of this Article, this Part will not directly examine various campaign reform proposals that are not clearly motivated by an equality rationale, even though the critiques offered in this Part could apply with considerable force to such proposals. While this limitation necessarily omits some current topics in campaign finance law, the focus of this Article is on one particular rationale underlying-



### A. *Undoing Buckley – Expenditure Limits*

One potential campaign finance measure would entail the abrogation of *Buckley's* contribution/expenditure distinction<sup>85</sup> and the imposition of equalizing expenditure limits on candidates and on individuals or groups seeking to influence the outcomes of political campaigns. But a regime of finite, albeit equal, resources at the campaign level is unlikely to generate the rational, informed decisionmaking that is the ostensible end of equality-minded reform. First, as noted above, because campaign activities generally have the effect of increasing the political knowledge of low-information voters, capping the level of campaign funding below levels it would achieve in the absence of such caps will likely depress voter knowledge, increasing the disparity between actual voter behavior and the normative ideal of fully informed, rational, deliberative decisionmaking.

An objection may be raised that this is precisely the point of equalizing regulation in campaign finance law: insofar as the unscrupulous but well-funded speaker can disseminate *false or misleading* information, the knowledge-increasing function of campaign communications threatens to undermine the deliberative decisionmaking process by infecting it with factual error. It should be clear, though, that this objection rests on dubious assumptions. First, it assumes a correlation between amount of resources and tendency to mislead – a correlation that cannot be posited *a priori*. Second, to the extent that the objection rests on an argument that an asymmetric ability to disseminate false or misleading information creates an incentive to do so, the underlying causal reasoning of the assumption warrants scrutiny, and in any case it would not necessarily follow that resource equalization is normatively desirable. To the contrary, the social science findings discussed above seriously undermine the claim that resource equalization will eliminate any incentive to make false or misleading claims in political communications, and the opposite could well be true.

Consider that artificially low ceilings on the financial resources political campaigns can deploy place a strategic premium on campaign tactics that have the most favorable effects on the outcome of an election for the least cost. In a world where the great majority of voters do not have much background political knowledge, do not devote significant attention to politics, and rely largely on heuristic cues rather than deliberative reasoning in making

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ing campaign finance reform efforts rather than a detailed critique of the entire spectrum of campaign finance reform measures.

85. *Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976) (striking the expenditure limitation provisions of the 1974 amendments to the Federal Election Campaign Act as unconstitutional restrictions on First Amendment rights to engage in political expression); *id.* at 23-38 (upholding the act's contribution limits as constitutionally permissible tools to maintain the integrity of the electoral process by preventing actual or apparent improper influence of major campaign contributors over elected officials).

political choices, a rational campaign with finite resources has tremendous incentives to deploy reliable and scalable tactics such as repetitive, affect-laden mass advertising. Given that campaign resources are generally finite even in the absence of expenditure limits, it is unsurprising that such tactics are prevalent in modern political campaigns, to the chagrin of champions of deliberative decisionmaking. However, mandating that campaign funding be not only finite but also equal does nothing to remove this incentive and, given the difficulties in displacing affect- or repetition-based beliefs,<sup>86</sup> may in fact strengthen it.

Nor would expenditure limits provide a check on the incentive to make false or misleading assertions in campaign communications. Campaigns in a world of equal-but-finite financing would have little incentive to expend scarce resources in an attempt to refute debatable or even false beliefs generated by their adversaries' manipulation of repetition and affect for at least two reasons. First, such efforts stand a good chance of further entrenching the belief they are intended to refute.<sup>87</sup> Second, given the ease of implanting affect- and repetition-based beliefs and the difficulty of dispelling them,<sup>88</sup> the cost of refuting such beliefs is extremely likely to exceed the cost of implanting them. Together, these observations suggest that deploying affect- and repetition-based campaign messages – regardless of their objective truth or falsity – would be a dominant strategy in the game of equal-but-finite-resource political campaigning, while directly responding to such messages would be a dominated strategy. Thus, rather than exposing and deterring misleading campaign communications or encouraging rational debate and deliberation on issues of public concern, equal-but-finite campaign funding is likely to turn political debate into a zero-sum contest in which campaigns race to stake out exclusive claims to rhetorical territory and issue space.<sup>89</sup>

At a deeper level, even if expenditure limits were capable of imposing perfect equality of resources for each of the various factions on an issue of public concern, they could not remedy deficiencies in political outcomes where the source of those deficiencies lies not in the balance of campaign

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86. *See supra* notes 54-55, 67-76 and accompanying text.

87. *See id.*

88. *See id.*

89. Indeed, a similar race is the norm in consumer product marketing, where brands generally are “positioned” to create and elicit associations along semantic dimensions that are not already the subject of associations with competitive products – because any attempt to challenge a competitor’s brand associations is unlikely to succeed. *See* DAVID A. AAKER, *MANAGING BRAND EQUITY: CAPITALIZING ON THE VALUE OF A BRAND NAME* 111-12 (1991) (“A differentiating association can be a key competitive advantage. If a brand is well positioned (with respect to competitors) upon a key attribute in the product class, . . . competitors will find it hard to attack. If a frontal assault is attempted by claiming superiority upon that dimension, there will be a credibility issue . . . . Thus, an association can be a formidable barrier to competitors.”).

activity but in the decisionmaking processes of voters.<sup>90</sup> In short, if the goal of reform is to bring the results of democratic decisionmaking processes into better alignment with the results of rational, deliberative, fully informed decisionmaking processes, expenditure limits are probably the wrong tool for the job.

### B. Matching Funds – Raising the Playing Field

Another popular equalization proposal is the allocation of public matching funds to financially disadvantaged candidates, such as those available in state “clean election” statutes<sup>91</sup> or the “fair fight funds” provision in the recently proposed Fair Elections Now Act for U.S. Senate campaigns.<sup>92</sup> While such measures might mitigate somewhat the avoidable information-lowering effects of expenditure limits, they suffer from the same inherent weaknesses of such limits: they do little if anything to alter the incentive to deploy efficient affect- or repetition-based campaign tactics, regardless of whether such tactics mislead.<sup>93</sup> Once again, this incentive arises from the desire to leverage scarce resources to influence the decisions of an electorate, the largest proportion of which responds more strongly and predictably to such tactics than to any others. Matching-funds measures may indeed ameliorate the problem of *only* the wealthiest speakers being able to use such tactics to get their message accepted throughout the electorate (and thereby to influence the political preferences and behaviors of voters). However, these measures cannot deter *any* speaker from propagating *false or misguided* beliefs throughout the electorate, or from using affect-laden appeals to influence the preferences and behavior of voters in a way that would be inconsistent with more considered, rational judgment. Indeed, providing matching funds would likely increase the ability of speakers of modest means to deploy such tactics – which there would be a strong incentive to deploy – without any assurance that the body

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90. BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 166 (2007) (“What happens if *fully rational* politicians compete for the support of *irrational* voters . . . ? It is a recipe for mendacity.”).

91. *See* 16 ARIZ. REV. STAT. ANN. § 16-952 (2006) (providing matching funds to qualifying candidates participating in the public funding regime who face nonparticipating opponents exceeding the regime’s expenditure limits); ME. REV. STAT. ANN. tit. 21-A, § 1125(9) (2006) (same).

92. Fair Elections Now Act, S. 752, 111th Cong. tit. V (2009).

93. Indeed, it is conceivable that matching regimes could generate scarcity pressures similar to expenditure limits to the extent that the availability of public matching funds decreases the incentive for private citizens and interests to expend or donate money for campaign efforts (on the theory that the donation would provide no relative, as opposed to absolute, benefit to their preferred candidate or issue).

of political information made available to the electorate would correlate any more strongly to objective truth.<sup>94</sup>

Thus, to the extent that informed and rational decisionmaking is a goal we want our democratic processes to serve, matching regimes offer little benefit. At best, they might provide surplus resources that would allow for the deployment of campaign tactics *in addition to* repetitive, affect-laden advertising, while increasing the total volume and penetration of campaign communications (and thus the total level of information among voters). Such additional forms of communication might very well have salutary effects like increasing political participation<sup>95</sup> and could be expected to elevate total levels of political information among the electorate somewhat,<sup>96</sup> but by themselves they offer no mechanism either to deter campaign tactics that manipulate or mislead or to bring actual voting behavior into significantly better correlation with a deliberative, rational ideal.

### *C. Equal Dollars per Voter – Aggregation at the Expense of Deliberation*

One final, more radical, equality-based campaign finance reform proposal would allocate to all citizens a fixed and equal amount of money to

94. This consequence of matching regimes may be, in the language of computer programming, a feature rather than a bug. One could argue that if our political process is fated to be influenced by non-rational behavior, potentially based on false and misleading information, then the ability to manipulate and mislead should at least be equally distributed across the economic spectrum. Such equal distribution would do nothing to increase the rationality of political outcomes or to serve any other goals of the deliberative model (and would likely undermine those goals), but it could serve other purposes – particularly to the extent that one doubts the existence of some objective rational standard by which policy outcomes can be judged or views political processes as a kind of competition over economic rents. Under the assumption that the effort to influence political outcomes is simply a competition among self-interested interest groups to secure benefits conferred by the state, allocation of such benefits according to the preexisting distribution of wealth could be considered inconsistent with encompassing notions of equality. *See* Hasen, *supra* note 12, at 14-18. As discussed below, however, this understanding of the political process is in direct contradiction with the goal of rational political decisionmaking in a democratic society with a low-information, low-involvement electorate. *See infra* section IV.C.

95. For example, recent experiments suggest that face-to-face campaign contact with voters increases voter turnout and does so to a greater extent than other forms of outreach such as direct mail or telephone contacts. *See generally* Gerber & Green, *supra* note 40. To the extent that compensating canvassers is more costly on a dollars-per-voter-reached basis than paying for a direct mail or telemarketing campaign (an assumption that ignores volunteer participation in campaign activities), greater campaign resources might have the indirect effect of increasing voter turnout. *See id.* at 661.

96. *See supra* note 30 and accompanying text.

contribute to political campaigns as they see fit and in some cases would limit the financing of political campaigns to these funds.<sup>97</sup> Such proposals share their justificatory reasoning with a recently overruled<sup>98</sup> line of Supreme Court campaign finance decisions: *FEC v. Massachusetts Citizens for Life*,<sup>99</sup> *Austin v. Michigan Chamber of Commerce*,<sup>100</sup> and *McConnell v. FEC*.<sup>101</sup> In *Massachusetts Citizens*, the Court suggested in dicta that regulation of the political activities of business corporations could reflect a legislative judgment that the corporate form permits the accumulation of great wealth through economic pursuits that do not necessarily correlate with popular support for the corporation's political positions;<sup>102</sup> in *Austin* the Court upheld a Michigan law embodying such regulation as a constitutional exercise of legislative judgment.<sup>103</sup> Finally, in *McConnell*, the Court relied on similar reasoning (and invoked *Austin* as precedent) to uphold against a facial challenge a recently enacted federal statute limiting the rights of corporations and labor unions to use general treasury funds to engage in "electioneering communications."<sup>104</sup> This reasoning – based on the premise that, in the absence of the wealth-accumulating advantages of the corporate form, private financial contributions in the aggregate might provide a "rough barometer of public support"<sup>105</sup> – holds that correlation of levels of campaign financing and levels of public

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97. For examples of such proposals, see generally BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002); Foley, *supra* note 12; Hasen, *supra* note 12.

98. *Citizens United v. Federal Election Commission*, No. 08-205, slip op. at 49-50 (U.S. Jan. 21, 2010) (overruling *Austin v. Michigan Chamber of Commerce* and so much of *McConnell v. FEC* as relied on *Austin* as precedent).

99. 479 U.S. 238 (1986).

100. 494 U.S. 652 (1990).

101. 540 U.S. 93 (2003).

102. *Mass. Citizens*, 479 U.S. at 258 ("Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.").

103. *Austin*, 494 U.S. at 658-60 (upholding a state statute that "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"). For the view that small-dollar, grass-roots contributions do not reflect even a "rough barometer of public support," see SMITH, *supra* note 15, at 45-48 (arguing based on recent historical examples that "the ability to raise large sums in small contributions is a sign of fervent backing from an ideologically committed minority, rather than a sign of broad political support").

104. 540 U.S. at 204-07.

105. *Mass. Citizens*, 479 U.S. at 258; see also Hasen, *supra* note 8, at 41-42.

support is normatively preferable to the absence of such correlation insofar as disparate funding can “unfairly influence elections.”<sup>106</sup>

From the moment these cases were decided, their reasoning invited criticism. Dissenting in *Austin*, Justice Scalia pointed out the inconsistency of that case’s holding with the principle, established in *Buckley*, that limiting independent campaign expenditures is constitutionally impermissible.<sup>107</sup> This view has now won the backing of a bare majority of the young Roberts Court, which recently overruled *Austin* and related precedents on the ground that their underlying “antidistortion rationale” did not justify departure from *Buckley* in the specific case of corporate campaign expenditures.<sup>108</sup> Despite *Austin*’s demise, its normative judgment concerning the appropriate relationship between wealth and political participation is and will remain axiomatic to equal-dollars-per-voter arguments.<sup>109</sup> Adherents to this normative position have never depended on *Buckley* for support – and indeed have often denounced *Buckley*’s anti-corruption rationale as cramped and inadequate. To the contrary, such reformers view equalization of campaign resources at the level of the individual citizen as an implementation of the democratic ideal of political equality<sup>110</sup> and further raise the instrumentalist argument that such equalization will lead to legislative outcomes that better reflect the “true dis-

106. *Austin*, 494 U.S. at 660.

107. *Id.* at 682-85 (Scalia, J., dissenting) (criticizing the *Austin* majority’s reasoning and pointing out that, by its logic, there would be no constitutional barrier to restricting the political speech of wealthy individuals simply by virtue of their wealth).

108. *Citizens United*, slip op. at 32-50.

109. Indeed, Professor Hasen – a leading proponent of equal-dollars-per-voter reform measures – concedes that Justice Scalia’s dissent in *Austin* is sound but argues that this merely demonstrates the inadequacy of *Buckley*’s anticorruption rationale to deal with the problem of the influence of wealth on politics. Hasen, *supra* note 12, at 41-42 (“Justice Scalia is correct. . . . But whereas [he] concludes that the Michigan law [at issue in *Austin*] cannot pass muster under *Buckley*, I believe the better approach is to acknowledge the logical implications of the Court’s reasoning and accept political equality as an interest adequate to justify regulating campaign expenditures.”). See also Heather K. Gerken, *The Real Problem with Citizens United*, THE AMERICAN PROSPECT Jan. 22, 2010, available at [http://www.prospect.org/cs/articles?article=the\\_real\\_problem\\_with\\_citizens\\_united](http://www.prospect.org/cs/articles?article=the_real_problem_with_citizens_united) (“It’s not surprising that reformers are outraged. *Austin* has long been the darling of reformers; it’s as close as the Court has ever come to saying Congress can regulate campaign finance to promote ‘equality.’”). The analysis in this Article suggests a somewhat different critique: that the rule of *Buckley*, like most First Amendment jurisprudence, rests on an assumption that is empirically dubious, i.e., that “[f]actions . . . [can] be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false.” *Citizens United*, slip op. at 39 (internal citation omitted), citing THE FEDERALIST NO. 10 (James Madison).

110. Hasen, *supra* note 12, at 42-44 (discussing arguments in favor of egalitarianism as a compelling government interest).

tribution and weight of societal interests.”<sup>111</sup> Whether this instrumentalist claim is supportable depends on the influence of the distribution of campaign resources on the outcomes of elections, particularly of legislative elections. As discussed throughout this Article, the reformist assumption that equalization of campaign finances will align actual voter decisions with optimal, rational decisions is flawed. The equal-funding-per-voter reform model lays bare the source of that flaw. What is the “unfair[] influence [on] elections” that resource equalization – either actual or approximate – would remedy? The instrumentalist First Amendment theory set out at the beginning of this Article suggests that the danger is divergence of voter decisions from a rational, deliberative ideal.<sup>112</sup> The equal-dollars-per-voter proposal, however, suggests that the unfair influence to be remedied by reform is simply deviation from the preferences voters would express in the absence of the effects of campaigning. In bridging this gap, we move from the realm of First Amendment theory into the realm of democratic theory. We must, therefore, briefly consider the differences between two models of democracy: deliberative and aggregational.<sup>113</sup>

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111. *Id.* at 31.

112. *See supra* notes 2-6 and accompanying text.

113. A full explanation of these two modes of thinking about democratic processes is well beyond the scope of this Article. A good collection on the deliberative model and its problems is *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* (James Bohman & William Rehg eds., 1997), in which the first four selections constitute the leading expressions of the basic principles of the model. In the modern era, the aggregational model is a central subject of social choice theory, based largely on the work of Kenneth Arrow and those building on his insights. *See generally* KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); Amartya Sen, *The Possibility of Social Choice*, 89 *AM. ECON. REV.* 349 (1999) (reprinting the author’s Nobel Prize lecture outlining the history and scope of social choice theory). Each model has deep roots in Western thought. *See, e.g.*, ARISTOTLE, *POLITICS* bk. 3, ch. XI (defending democratic governance on grounds that the whole body of the people can arrive at better political results than any of them individually); JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* ch. VIII, §§ 95-99 (1690) (describing the origins of civil society as the entry of individuals into a community to protect collectively their individual interests and to be governed by the will of the majority of the community even where express unanimous consent is not possible). In contemporary discourse, there is considerable debate as to whether the insights of social choice theory can be reconciled with democratic ideals, particularly deliberative democratic ideals. *Compare generally, e.g.*, WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* (Judith Wilson ed., 1982) (arguing that the axiomatic impossibility of aggregating individual preferences consistently with a meaningful conception of democratic choice makes the notion of popular will an empty concept), with John S. Dryzek & Christian List, *Social Choice Theory and Deliberative Democracy: A Reconciliation*, 33 *BRIT. J. POL. SCI.* 1 (2003) (attempting to reconcile social choice critiques of democracy with deliberative democracy principles).

The deliberative model sees democratic processes as a mechanism to engage the political community in building consensus and resolving disagreements as to the scope and content of community policy, all in pursuit of objectively (i.e., rationally) superior outcomes.<sup>114</sup> The aggregational model, in contrast, sees such processes as a mechanism for aggregating and mediating independent and subjective individual preferences to yield a set of acceptable policies to govern the whole community.<sup>115</sup> Much modern work in the aggregational tradition suggests that democratic processes are fundamentally inadequate to the task of producing satisfactory community policies from the individual preferences of community members.<sup>116</sup>

Regulation to ensure a correlation between the units of campaign finance and the units of voting would appear to be consistent with an aggregational agenda, protecting voter preferences against undue contamination from the persuasive activities of others with diverging preferences.<sup>117</sup> How-

114. See Sunstein, *supra* note 13, at 1392 (“Politics should not simply register existing preferences and their intensities, especially as these are measured by private willingness to pay. In the American constitutional tradition, politics has an important deliberative function. The constitutional system aspires to a form of ‘government by discussion.’”).

115. See Hasen, *supra* note 12, at 8-14 (describing two key models in the aggregational tradition: interest group theory and social choice theory).

116. See generally ARROW, *supra* note 113 (demonstrating the logical impossibility of simultaneously satisfying basic reasonable conditions with any non-dictatorial system of aggregating preferences); Allan Gibbard, *Manipulability of Voting Schemes: A General Result*, 41 *ECONOMETRICA* 587 (1973) (same, but adding the additional dimension of the potential to game the preference-aggregation system); Mark Allen Satterthwaite, *Strategy-Proofness and Arrow’s Conditions: Existence and Correspondence Theorems for Voting Procedures and Social Welfare Functions*, 10 *J. ECON. THEORY* 187 (1975) (same).

117. See, e.g., Hasen, *supra* note 12, at 6-7 (touting the equal-dollars-per-voter model as providing “proper incentives and safeguards that channel self-regarding political behavior to produce fair and efficient political outcomes” and ensuring that each voter has roughly equal ability to have his or her preferences enacted into legislation). It is notable that Professor Hasen’s reliance on interest group theory and public choice theory largely ignores questions concerning changes in voters’ political preferences as a result of campaigns – treating such changes essentially as a form of market exchange. See *id.* at 10 & n.32 (“Politicians will attempt to maximize the votes they get by selling access, influence, or positions on legislation to the different interest groups. The interest groups pay for these goods with their political capital: either they deliver votes directly, *or indirectly by manipulating public opinion*; or they make campaign contributions which the politician spends on advertising *to get votes herself.*”) (emphasis added; footnotes omitted). Of course, votes are an expression of the voter’s political preferences, and the very notion that the influence of campaign activities on a voter’s subjective preferences has normative implications suggests the existence of an external standard by which political preferences and behaviors should be judged. If subjective voter preferences are the lodestar of political equality and the function of political processes is simply to aggregate them fairly, how those prefer-



ever, assuming (as reformers appear to do) that such contamination is a function of the magnitude of campaign spending, and further assuming that political preferences are not equally distributed across the electorate, equal-dollars-per-voter regimes would not truly eliminate such contamination. To the contrary, they would merely cause the net effect of such contamination to be consistent with the preexisting distribution of political preferences: they might widen the electoral margin that would have existed absent campaign activities but would not alter the electoral result.

As an example, consider a pre-campaign electorate of one hundred citizens, fifty-five of whom harbor a preexisting preference for candidate Smith and forty-five of whom prefer candidate Jones. Now presume that each of the one hundred citizens has \$100 to spend on campaign activities and that each citizen dedicates the full amount of her \$100 to her preferred candidate's campaign fund. This would leave Jones with \$4,500 to spend and Smith with \$5,500. If, as reformers appear to believe (with some support from the social science literature), higher campaign expenditures correlate to higher vote shares than would be achieved in the absence of such expenditures, the net effect of this equal-dollars-per-voter system could only be to reinforce voter preferences that existed prior to the campaign, as Smith's ability to outspend Jones would increase Smith's vote share to a greater extent than Jones could increase hers. Thus, all else being equal, Jones would be incapable of winning the election under an equal-dollars-per-voter system. Indeed, even if all else were not equal and there were some new information revealed over the course of the campaign that altered pre-existing preferences in Jones's favor, the financing gap would allow Smith to mitigate that shift in preferences and potentially still win the election, even if in the absence of campaign spending the new information would have tipped the election to Jones. While this simple illustration can obviously be complicated in many ways – for example, to account for non-linear campaign effects, for varying degrees of competence across campaigns, or for intermediary campaign groups that use aggregated funds in ways that were not anticipated or intended by their donors – it suffices to demonstrate the essentially aggregational character of equal-dollar-per-voter regimes. More importantly, this example demonstrates the extent to which equal-dollars-per-voter reform proposals are likely to entrench pre-existing majorities and pluralities.

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ences are formed should be of little concern to reformers. To the extent that the formation of subjective preferences *is* a concern, it would seem that the concern would have to be grounded either in some objective standard – such as the rational standard of the deliberative model – or else in a desire – perhaps even an unconscious one – to elevate the subjective preferences of the reformer over those of the voter. *See supra* notes 17-19 and accompanying text; *cf.* SMITH, *supra* note 15, at 139-52 (arguing, somewhat polemically, that those who argue for resource equalization “believe that some views, which they do not like, are heard too much, and others, which they prefer, are heard too little.”).

This scenario is a far cry from the deliberative ideal underlying First Amendment instrumentalism, which views political processes as a means to identify and pursue the public interest. But it is equally inconsistent with an aggregational model that views political processes as a means of reconciling competing private interests. Unless we assume that pre-campaign preferences are inherently superior to post-campaign preferences (an assumption in serious tension with the propositions that campaigns provide information and that deliberation improves decisionmaking), equal-dollars-per-voter regulation would not (except perhaps coincidentally) be consistent with fully informed, rational decisionmaking. Nor would such regulation eliminate the influence of persuasive activity on subjective preferences. Rather, given the low-information and low-attention nature of the American electorate and the resulting incentives with respect to campaign tactics, equal-dollars-per-voter systems would at best amplify the distortions of pre-existing bias and political ignorance with the distortions of potentially misleading affect- and repetition-based campaigning.

## V. CONCLUSION: EQUALITY VS. RATIONALITY

Here we come to the crux of the problem with equality-based campaign finance reforms. As noted at the beginning of this Article, Professor Ortiz has argued that the deliberative ideal of rational decisionmaking is in tension with a commitment to absolute political equality.<sup>118</sup> This Article suggests that these normative values are not merely in tension; they actually work at cross-purposes. Given the decisionmaking patterns of the majority of the electorate, the road of equality does not lead to the destination of rational political outcomes. Accordingly, applying egalitarian principles as the guiding framework for regulation whose end is optimal, rational, fully informed, and deliberative political decisionmaking is not merely unhelpful where most citizens are not rational or deliberative political actors; it is counterproductive. Each of the equality-based reform measures discussed above, when analyzed through the lens of social science research into campaign effects and their analogues in psychology and marketing, appears more likely to exacerbate the non-rational tendencies in our democratic processes than to ameliorate them, creating tremendous incentives for political interests to manipulate and mislead. In short, there is a tradeoff between equality and rationality in our democracy.

This is not to say that equality-based campaign finance regulation can serve no purpose, nor even that it is normatively undesirable. If politics is seen as essentially a distributive exercise – the competition of subjective interests over resources – then equalization may well be desirable in decreasing the correlation between prospective distribution patterns and pre-existing

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118. *See supra* notes 17-19 and accompanying text.

wealth patterns.<sup>119</sup> Such regulation may also constitute an expressive validation by the community of the egalitarian or participatory normative commitments of our democracy, it may work to curb the appearance or even the reality of political corruption or coercion, and it may reduce rent-seeking behavior.<sup>120</sup> But it would appear that these potential benefits of equalizing reform measures come at a cost in terms of the rationality of political outcomes. As such, it is incumbent on reformers – many of whom surely harbor normative commitments to both equality in the body politic and rationality in public policy – to decide which is the more compelling value.

This dilemma is not inevitable. To the contrary, it results not from economic inequality being leveraged into political debate but from the fact that many voters do not make political decisions by means of rational or deliberative processes. Where the problem with our political outcomes lies in the nature of voters' decisionmaking process, the proper target of reform is that process itself, not its inputs (i.e., campaign activities). To escape the normative dilemma, reformers should focus less on legislating ever more formal equality – which would only deepen the dilemma – and more on bringing voter decisionmaking processes closer in line with the rational, deliberative ideal.

There are serious obstacles to such progress. One is the fact that failure to engage in rational, deliberative political decisionmaking is, in economic terms, a rational strategy. Given the low probability of any one vote affecting the outcome of an election, the subjective benefit to any one voter of gathering the information necessary to assure a rational, fully informed decision is far outweighed by the costs of gathering such information – a classic collective-action problem.<sup>121</sup> In order to change this calculus, the individual voter's subjective valuation of being politically active and informed must change – in welfare economics terms, the citizen must derive sufficient subjective utility from the *process* of gathering information and deliberating on issues of public concern to offset the subjective costs of such information gathering and deliberation. It is highly unlikely that this recalibration of subjective utility could be accomplished by legal regulation. Such preferences are more likely a product of culture.

Another obstacle to increased rationality in democratic decisionmaking is the fact that even where political knowledge increases throughout the electorate – a key benefit of campaign activities according to the discussion above<sup>122</sup> – voters' *use* of that knowledge seldom accords with the dictates of reason. Voters have a tendency to discount information that conflicts with their worldview and to accept uncritically information that confirms that

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119. See *supra* note 94 and accompanying text.

120. On this latter target for regulation of the political process, see Hasen, *supra* note 12, at 8-18.

121. See, e.g., DOWNS, *supra* note 33, at 238-59.

122. See *supra* note 30 and accompanying text.

worldview.<sup>123</sup> Indeed, this tendency is so strong that efforts to correct factually inaccurate beliefs held as a matter of ideology often induce the same kind of backlash as efforts to correct factually inaccurate beliefs held as a result of repetition – they can actually increase the strength of the mistaken belief.<sup>124</sup> Thus, simply increasing voters' interest in politics will not do if that interest is driven by ideology; voters must develop a commitment to the deliberative process itself if that process is to yield the benefits promised by deliberative theory. Fostering such a commitment, like fostering political engagement generally, is a problem that moves beyond the design of legal rules and into deeper issues of social norms, education, and cultural change.

Those who believe that our political processes and their outcomes fall short of some rational ideal would therefore seem to have limited options for remedying the situation. With regard to the problem of deterring misleading and false claims that evade correction due to the structural disincentive to engage them, one could conceive of a legal rule punishing the dissemination of such claims in political debate, though it would be difficult to square such a rule with current First Amendment jurisprudence.<sup>125</sup> With regard to the problem of unscrupulous manipulation of the campaign effects described in this Article, reformers dissatisfied with the policy outcomes generated by

123. See generally Kari Edwards & Edward E. Smith, *A Disconfirmation Bias in the Evaluation of Arguments*, 71 J. PERSONALITY & SOC. PSYCHOL. 5 (1996) (finding that people tend to evaluate new information inconsistent with their prior beliefs by trying to disconfirm the new information); Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POL. SCI. 755 (2006) (same, but also finding a tendency to seek out information that confirms prior-held beliefs); see also Ilya Somin, *Knowledge About Ignorance: New Directions in the Study of Political Information*, 18 CRITICAL REV. 255, 260-62 (2006) (noting that the biased interpretation of political information makes sense if the interest of the political "fan" is not necessarily to become a better voter but to increase his or her enjoyment of politics); CAPLAN, *supra* note 90, at 114-65 (arguing that biased interpretation of information is a rational response to the structure of democratic processes and discussing the implications of this "rational irrationality" for political outcomes in democratic societies).

124. Compare Nyhan & Reifler, *supra* note 55 (finding such a backlash effect in response to efforts to correct mistaken beliefs that are tied to political ideology, particularly among conservatives), with discussion *supra* notes 67-73 and accompanying text.

125. See, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254, 271 (1964) ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one that puts the burden of proving truth on the speaker."). But see *Brown v. Hartlage*, 456 U.S. 45, 60-61 (1982) (reversing a judgment voiding a local election under a state law forbidding certain false claims by political candidates, but apparently reaching its result by weighing the First Amendment policy of free and robust political debate against the state's interest in protecting the political process against factual inaccuracy, with particular emphasis on the speaker's state of mind).

such manipulation could certainly dedicate themselves to manipulating campaign effects in furtherance of their preferred policies. Of course, this would imply a considerable level of cynicism in reformers to the extent they harbor normative commitments to either rational policymaking or deliberative democracy. As an alternative to such unworkable or unpalatable options, this Article suggests that reformers should set their sights not on the campaign finance system but on the American citizen – and on raising the baseline level of political interest, engagement, and perspicacity – in the hopes of diminishing the effectiveness of tactics that encourage and leverage non-rational political decisionmaking.

In this regard, this Article closes with two final observations from the social science literature. First, of the most common forms of voter mobilization techniques, the technique with the strongest effect on political engagement as measured by voter turnout is face-to-face contact between a door-to-door canvasser and a voter: we respond more strongly to in-person appeals than impersonal, mass appeals by telephone or direct mail.<sup>126</sup> Second, over the course of the late twentieth century, as political participation steadily declined, there was a similar decline in Americans' participation in voluntary civic organizations: people grew less and less likely to congregate over issues of public or community concern as democratic politics consolidated and became professionalized.<sup>127</sup> Reading these results together suggests that the solution to the normative dilemma presented by this Article may very well lie not in a magic bullet of campaign finance regulation, but in the organic process of engaging with our neighbors and building civic communities.

In the end, faults in the outcomes of our political processes are likely to lie not in our laws, but in ourselves. The process of sifting through various arguments and preferences to arrive at a policy to govern the community inevitably has its winners and its losers. While the idea of a skewed playing

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126. See Gerber & Green, *supra* note 40, at 661 (“[F]alling rates of voter turnout [likely] reflect a decline in face-to-face political activity.”). Indeed, awareness of the comparative advantage of more personal forms of political interaction may be a driving factor behind more recent non-equality-oriented reform measures, such as the BCRA’s regulation of broadcast electioneering communications during the period of weeks preceding an election but not electioneering communications through non-broadcast media. Bipartisan Campaign Reform Act of 2002 § 201, Pub. L. No. 107-155, 116 Stat. 81, 88 (2002) (codified at 2 U.S.C. § 434(f) (2006)).

127. See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); Theda Skocpol, *Voice and Inequality: The Transformation of American Civic Democracy (APSA Presidential Address)*, 2 PERSP. ON POL. 3 (2004). This view of declining American civic participation has been critiqued by some who argue that Americans’ civic engagement has actually increased, albeit through support of professionalized activist lobbying groups representing citizens’ political interests rather than through direct citizen participation in civic activities and institutions. See generally, e.g., JEFFREY M. BERRY, *THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS* (1999); see also *id.* at 164-67 (specifically addressing the argument in PUTNAM, *supra*).

field may give comfort to those who believe in the rightness of their cause but find themselves on the losing end of political processes, the social science literature suggests that such discontents have inverted the causal link between the influence of campaign activities and the nature of the political process. It may simply be that such disgruntled political players, faced with the descriptive failures of the normatively attractive deliberative ideal, have a basic distaste for the nature of the political game itself. Nevertheless, to the extent that we both value electoral democracy as an instrument of policy development<sup>128</sup> and want our social policies to be rational and based on accurate information, attempting to control the flow of information through law appears less likely to fulfill our goals than cultivating a culture where the use of that information by voters is more likely to conform to the dictates of the deliberative model.

Of course, this process of civic and cultural reform may seem utopian. But the difficulty – even the impossibility – of mitigating the effects of ignorance, irrationality, and falsehood on our political processes is no argument in favor of legal regimes that will exacerbate those effects. Sadly, in this process of cultural change the lawyer, the legislator, the academic, and the lobbyist enjoy no comparative advantage over any other citizen and thus have less of an incentive to engage in the serious and inefficient work of forming the personal and civic relationships that can increase political engagement and enforce deliberative norms than they might have to construct a legal regime to regulate money in politics. But this lack of professional advantage is perhaps a truer expression of political equality than the formal notions of equality motivating many resource-equalizing campaign finance reform proposals.

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128. At least one scholar of voter irrationality has apparently decided that the best policy response to it is a significant curtailment of democratic processes – and of the franchise. CAPLAN, *supra* note 90, at 197-99.

