

## BEHAVIORAL PUBLIC CHOICE AND THE LAW

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#### ABSTRACT

Behavioral public choice is the study of irrationality among political actors. In this context, irrationality means systematic bias, a deviation from rational expectations, or some other departure from economists' conception of rationality. Behavioral public choice scholars extend the insights of behavioral economics to the political realm and show that irrational behavior is an important source of government failure. This Article makes an original contribution to the legal literature by systematically reviewing the findings of behavioral public choice and explaining their implications for the law and legal institutions. We discuss the various biases and heuristics that lead political actors to support and adopt bad laws and describe how irrationality influences specific areas of the law, including tax, antitrust, consumer protection, corporate, and employment law. We also discuss various proposals for minimizing the effects of irrationality on public policy. Our goal is to introduce this new field of research to legal scholars, most of whom have previously ignored it. Familiarity with behavioral public choice will help legal scholars better understand the types of policies that are likely to emerge from real-world political processes and will facilitate efforts to promote realistic policy reform.

#### I. INTRODUCTION

Scholars in the emerging field of behavioral public choice study irrationality<sup>1</sup> among political actors, including voters, and analyze its

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<sup>1</sup> For purposes of this Article, we define irrationality as systematic bias, a deviation from rational expectations, or some other departure from economists' conception of rationality. This definition is consistent with the way in which the term is used in the behavioral public choice literature. For further discussion on this point, see *infra* Part II.

consequences for political decision making.<sup>2</sup> Their research explains many otherwise puzzling aspects of law and policy. For example, many economists and economically oriented legal scholars argue that a carbon tax is the most efficient policy for addressing global warming.<sup>3</sup> Yet opinion research indicates that the public strongly prefers less efficient forms of regulation such as fuel economy standards.<sup>4</sup> As we explain later, the behavioral public choice literature explains why the public disagrees with economists on this important issue.<sup>5</sup>

A second example, drawn from recent headlines, pertains to statements made by Jonathan Gruber about the Affordable Care Act (ACA). Gruber is a prominent health economist and former adviser to the Obama administration. At an academic conference, Gruber described the reasons that Congress incorporated into the ACA a complex scheme that conceals both the law's cost as well as who pays for the healthcare subsidies that allow low-income persons to purchase health insurance through the ACA's insurance exchanges.<sup>6</sup> Gruber stated bluntly that the ACA's "[l]ack of transparency is a huge political advantage" and argued that due to the "stupidity of the American voter," a more transparent funding scheme would likely have precluded Congress from adopting the law.<sup>7</sup> While Gruber's crude comments ignited a firestorm of controversy, research in behavioral public choice supports his claim that

<sup>2</sup> Some scholars refer to this field of study as behavioral political economy rather than behavioral public choice. See, e.g., Niclas Berggren, *Time for Behavioral Political Economy? An Analysis of Articles in Behavioral Economics*, 25 REV. AUSTRIAN ECON. 199, 199 (2012). Labels aside, this Article focuses on irrationality among political actors, which sometimes leads to government failure as defined *infra* Part II. We distinguish our subject matter from behavioral economics, which focuses on irrationality among market actors and uses evidence of it to justify paternalistic government intervention. E.g., RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2009).

<sup>3</sup> For an explanation of why emissions fees, including carbon taxes, are more efficient than command-and-control regulations, see HARVEY S. ROSEN & TED GAYER, *PUBLIC FINANCE* 86–88, 94–96 (8th ed. 2008).

<sup>4</sup> FREDERICK MAYER ET AL., NICHOLAS INST. FOR ENVTL. POLICY SOLUTIONS, *AMERICANS THINK THE CLIMATE IS CHANGING AND SUPPORT SOME ACTIONS* 2–4 (2013), [http://nicholasinstitute.duke.edu/sites/default/files/publications/ni\\_pb\\_13-01\\_0.pdf](http://nicholasinstitute.duke.edu/sites/default/files/publications/ni_pb_13-01_0.pdf) (finding that over 60% of adults support regulations on power plants and factories and requiring more fuel-efficient cars, but only 29% support a carbon tax); Anthony Leiserowitz, *Climate Change Risk Perception and Policy Preferences: The Role of Affect, Imagery, and Values*, 77 CLIMATIC CHANGE 45, 55–56 (2006) (finding strong support for vehicle fuel economy standards and similar regulations, but finding strong opposition to addressing global warming via a gas tax or business energy tax); Matthew C. Nisbet & Teresa Myers, *The Polls—Trends: Twenty Years of Public Opinion About Global Warming*, 71 PUB. OPINION Q. 444, 460–68 (2007) (discussing evidence that the public strongly supports government regulation in response to global warming, but is much less supportive of taxes on electricity and gasoline).

<sup>5</sup> See *infra* Part III.

<sup>6</sup> Jose A. DelReal, *Obamacare Consultant Under Fire for "Stupidity of the American Voter" Comment*, WASH. POST (Nov. 11, 2014), <http://www.washingtonpost.com/news/post-politics/wp/2014/11/11/obamacare-consultant-under-fire-for-stupidity-of-the-american-voter-comment/>.

<sup>7</sup> *Id.*

Congress is more likely to adopt expensive legislation (such as the ACA) if its congressional sponsors construct it so as to conceal costs and who has to pay them.<sup>8</sup>

As these examples make clear, behavioral public choice is highly relevant to legal scholarship. Yet most legal scholars have ignored it. This Article attempts to remedy that problem by systematically reviewing the findings of behavioral public choice and discussing their implications for the law and legal institutions.<sup>9</sup> Our goal is to introduce legal scholars to behavioral public choice and to stimulate their involvement in future research.

Behavioral public choice is both an extension of and a reaction to behavioral economics and its counterpart in legal scholarship, behavioral law and economics.<sup>10</sup> Psychologists and behavioral economists have documented imperfections in human reasoning, including mental limitations and cognitive and emotional biases.<sup>11</sup> Their research challenges the rational actor model of conventional economics, especially the idea that individuals acting in a free market can make optimal decisions without the government's assistance. Behavioral economists and legal scholars in the behavioral law and economics movement have used this research to justify paternalistic government interventions, including cigarette taxes and consumer protection laws, that are intended to save people from their own irrational choices.<sup>12</sup> Because of their focus on market participants and paternalism, most behavioral economists and

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<sup>8</sup> See *infra* Part III.

<sup>9</sup> Two economists, Jan Schnellenbach and Christian Schubert, have recently written two related papers surveying the behavioral public choice literature. Jan Schnellenbach & Christian Schubert, *Behavioral Public Choice: A Survey* (Univ. of Freiburg, Working Paper No. 14/03, 2014) [hereinafter Schnellenbach & Schubert, *Behavioral Public Choice*]; Jan Schnellenbach & Christian Schubert, *Behavioral Political Economy: A Survey* (Ctr. for Econ. Stud. & Ifo Inst., Working Paper No. 4988, 2014). Our Article differs from their work in several ways. First, we focus specifically on the implications of behavioral public choice for law and legal institutions, and we view our primary audience as legal scholars and lawyers rather than economists. Second, our discussion of the biases and heuristics affecting political actors is more detailed. Finally, we discuss in greater depth the various proposals for coping with irrationality among political actors.

<sup>10</sup> For an introduction to behavioral law and economics, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

<sup>11</sup> E.g., Colin Camerer, *Individual Decision Making*, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 587, 587–703 (John Kagel & Alvin Roth eds., 1995); THOMAS GILOVICH ET AL., HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (2002); Cass R. Sunstein, *Introduction*, in BEHAVIORAL LAW AND ECONOMICS 1, 1–10 (Cass R. Sunstein ed., 2000); Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1, 30–50 (2007).

<sup>12</sup> E.g., Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008); Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1, 30–50 (2007); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211 (2003); Jonathan Gruber, *Government Policy Toward Smoking: A View from Economics*, 3 YALE J. HEALTH POL'Y L. & ETHICS 119 (2002); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

behavioral law and economics scholars ignore the possibility that irrationality also increases the risk of government failure.<sup>13</sup> Behavioral public choice addresses that oversight by extending the findings of behavioral economics to the political realm.<sup>14</sup>

A key insight of behavioral public choice is that people have less incentive to behave rationally in their capacity as political actors than in their capacity as market actors. Elections are rarely decided by a single vote, so voters have little reason to take them seriously. Moreover, the voters, politicians, and bureaucrats who participate in the political process know that the costs and benefits of their decisions fall largely upon others. So these political actors have less at stake than consumers, investors, and other market participants who make decisions that primarily affect themselves.

Because political actors have little incentive to behave rationally, irrationality is common in politics, and it has a substantial negative effect on the law. It frequently causes voters and other political actors to favor policies that they would not support if they were rational. For example, the economist Bryan Caplan has presented evidence that the public suffers from “antiforeign bias, a tendency to underestimate the economic benefits of interaction with foreigners.”<sup>15</sup> Antiforeign bias stems from suspicion of people who are different, and it creates support for tariffs and other protectionist policies that reduce social welfare.

In some instances, antiforeign bias and other forms of irrationality cause government to take action even though the costs of doing so exceed the benefits. In other instances, government intervention is beneficial but suboptimal. Suboptimal interventions occur when irrationality influences the government’s choice of policy instruments, which leads to laws that are less efficient (and perhaps less fair) than alternatives that the government might otherwise pursue.

Research in behavioral public choice suggests a cautious approach to policy making and a healthy skepticism of government action whether it is

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<sup>13</sup> Some behavioral law and economics scholars have made important contributions to the study of irrationality among political actors. *E.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Jolls et al., *supra* note 10; Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999); Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059 (2000) [hereinafter Sunstein, *Cost-Benefit Analysis*]. But the behavioral law and economics movement has focused mainly on irrationality and market failure. In addition to legal scholars, economists also tend to focus on irrationality and market failure while ignoring government failure. Berggren, *supra* note 2.

<sup>14</sup> *See, e.g.*, Berggren, *supra* note 2 (stating that behavioral political economy involves the application of the analytical tools of behavioral economics to political decision makers).

<sup>15</sup> BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES 36 (2007) [hereinafter CAPLAN, MYTH] (emphasis omitted); Bryan Caplan, *Rational Ignorance Versus Rational Irrationality*, 54 KYKLOS 3, 15–16 (2001) [hereinafter Caplan, *Rational Irrationality*].

motivated by market failures or by paternalism.<sup>16</sup> By ignoring this research, legal scholars risk exaggerating the appropriate scope of government as well as failing to understand the types of policies that are likely to emerge from real-world political processes. Moreover, because the behavioral public choice literature points to possibilities for improving government decision making, a lack of familiarity with that literature means that legal scholars will miss opportunities to promote beneficial policy reforms.

Part II of the Article explains in general terms why irrationality is so prevalent in and problematic for democratic government. Part III describes specific types of irrationality that cause government to fail and provides examples that illustrate how irrationality has led to bad laws. These examples draw from various areas of law, including tax, antitrust, consumer protection, corporate, and employment law. Part IV discusses several proposals for coping with irrationality among political actors and minimizing the damage caused by it.

## II. HOW IRRATIONALITY CAUSES GOVERNMENT FAILURE

Economists and law and economics scholars use the rational actor model to analyze legal institutions and legal rules.<sup>17</sup> According to that model, “all human behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets.”<sup>18</sup> Rational actors also have rational expectations, meaning that they do not make systematic mistakes.<sup>19</sup> People are not omniscient and information is costly,<sup>20</sup> so they will sometimes make poor decisions. But any mistakes attributable to lack of information will be random and not biased in a particular direction.

The rational actor model is useful for various purposes, but psychological research suggests that it does not always accurately describe human decision making or behavior. More specifically, psychologists and behavioral economists have amassed evidence that people suffer from biases

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<sup>16</sup> E.g., James C. Cooper & William E. Kovacic, *Behavioral Economics: Implications for Regulatory Behavior*, 41 J. REG. ECON. 41, 43 (2012) (“Our analysis suggests that careful thought be given to calls for greater state intervention, especially when those calls are directed at firm biases.”); David Hirshleifer, *Psychological Bias as a Driver of Financial Regulation*, 14 EUR. FIN. MGMT. 856, 856 (2008) (“[T]he behavioural approach in some ways *strengthens* the case for *laissez-faire*, and raises some new doubts about the value of regulation, because much regulation is driven by psychological bias—on the part of the *proponents*, not necessarily the regulated.”).

<sup>17</sup> The discussion in this Part and Part III.A draws upon material first developed in Gary M. Lucas, Jr., *Out of Sight, Out of Mind: How Opportunity Cost Neglect Undermines Democracy*, 9 N.Y.U. J.L. & LIBERTY 249 (2015) [hereinafter Lucas, *Opportunity Cost Neglect*].

<sup>18</sup> GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976).

<sup>19</sup> On rational expectations, see generally STEVEN M. SHEFFRIN, *RATIONAL EXPECTATIONS* (2d ed. 1996).

<sup>20</sup> See George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 213 (1961).

and make use of decision heuristics that cause them to err systematically in certain circumstances.<sup>21</sup> Behavioral public choice examines the implications of this research for democratic government.

This Part explains in general terms why irrationality is prevalent in a democracy. It also explains how irrationality causes government failure, which we define as the deviation of public policy from what it would be in a world populated by rational, i.e., unbiased, political actors.<sup>22</sup> Section A discusses irrationality among voters, and Section B discusses irrationality among politicians. We discuss irrationality among bureaucrats in Part IV.

### A. Irrationality Among Voters

In an election with many voters, the probability that one vote will determine the result is virtually zero.<sup>23</sup> So voting with the goal of influencing the outcome makes little sense. Why then do people bother to vote? Some voters may overestimate the likelihood that their vote will prove decisive.<sup>24</sup> But most people vote to comply with a social norm of voting,<sup>25</sup> to adhere to the demands of morality, to gain a sense of participation in democratic government, to express their opinion,<sup>26</sup> or to be able to truthfully tell others that

<sup>21</sup> See *supra* note 11.

<sup>22</sup> While this definition suffices for our purposes, we readily acknowledge its limitations. For example, people's preferences may be subject to framing effects, time inconsistency, and similar forces, which means that they may not have a single set of fixed policy preferences. An important objective of future research should be to establish a more compelling and defensible normative benchmark for assessing policies than the one that we use here. A literature on behavioral welfare economics is emerging and provides a good starting point. See B. Douglas Bernheim & Antonio Rangel, *Behavioral Public Economics: Welfare and Policy Analysis with Nonstandard Decision-Makers*, in *BEHAVIORAL ECONOMICS AND ITS APPLICATIONS 7* (Peter Diamond & Hannu Vartiainen eds., 2007); B. Douglas Bernheim & Antonio Rangel, *Beyond Revealed Preference: Choice-Theoretic Foundations for Behavioral Welfare Economics*, 124 Q.J. ECON. 51 (2009); Ariel Rubinstein & Yuval Salant, *Eliciting Welfare Preferences from Behavioural Data Sets*, 79 REV. OF ECON. STUD. 375 (2012).

<sup>23</sup> DENNIS C. MUELLER, *PUBLIC CHOICE III* 304–05 (2003).

<sup>24</sup> Ingolf Dittman et al., *Why Votes Have Value: Instrumental Voting with Overconfidence and Overestimation of Others' Errors*, 84 GAMES & ECON. BEHAV. 17 (2014); George A. Quattrone & Amos Tversky, *Contrasting Rational and Psychological Analyses of Political Choice*, 82 AM. POL. SCI. REV. 719, 732–34 (1988). *But see* Fredrik Carlsson & Olof Johansson-Stenman, *Why Do You Vote and Vote as You Do?*, 63 KYKLOS 495, 501–03 (2010) (suggesting that this is not likely the reason that most people vote).

<sup>25</sup> Carlsson & Johansson-Stenman, *supra* note 24, at 501–03; Gordon Tullock, *Some Further Thoughts on Voting*, 104 PUB. CHOICE 181, 181 (2000); cf. Bruno S. Frey & Stephan Meier, *Social Comparisons and Pro-Social Behavior: Testing "Conditional Cooperation" in a Field Experiment*, 94 AM. ECON. REV. 1717, 1720–21 (2004) (finding that students in a field experiment were more willing to contribute to charity when informed that a large percentage of other students also contributed).

<sup>26</sup> For a recent review of the literature on the importance of a sense of participation as a motivation to vote, see Schnellenbach & Schubert, *Behavioral Public Choice*, *supra* note 9, at 5–

they voted.<sup>27</sup> In other words, voting confers psychological and reputational benefits that often outweigh the small cost in terms of time and effort.<sup>28</sup> Moreover, these benefits, though important, are apparently not large for most people. Substantial evidence suggests that even small increases in the cost of voting (in the form of poll taxes, for example) are sufficient to significantly reduce voter participation.<sup>29</sup>

The unimportance of a single vote to the outcome of most elections explains an important feature of voter behavior—altruistic voting. Voters frequently support policies that they perceive to be in the public interest even though those policies do not advance their own narrow self-interest.<sup>30</sup> Young voters, for example, express strong support for old-age programs even when they themselves do not have elderly parents and do not anticipate relying heavily on these programs when they retire.<sup>31</sup> More generally, political party identification is not strongly associated with income.<sup>32</sup> Both major political parties attract voters across the income scale despite the perception among

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6. For a review of the expressive voting literature, see *id.* at 6–10. The utility gained from expressive voting is analogous to the utility gained from cheering for a sports team. See Geoffrey Brennan & James Buchanan, *Voter Choice: Evaluating Political Alternatives*, 28 AM. BEHAV. SCI. 185, 186–87, 196 (1984).

<sup>27</sup> Stefano DellaVigna et al., *Voting to Tell Others* (Nat'l Bureau of Econ. Research, Working Paper No. 19832, 2014). For a recent review of the literature on why people vote as well as the results of a survey that asked voters why they vote, see Carlsson & Johansson-Stenman, *supra* note 24, at 501–03.

<sup>28</sup> For an early discussion of this idea, see William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25, 27–28 (1968). For a more recent discussion, see Tyler Cowen, *Self-Deception as the Root of Political Failure*, 124 PUB. CHOICE 437, 440–42 (2005). For an argument that emotions provide a strong impetus to vote, see Frans van Winden, *Affective Public Choice*, in PUBLIC CHOICE AND THE CHALLENGES OF DEMOCRACY 45, 54–56 (José Casas Pardo & Pedro Schwartz eds., 2007).

<sup>29</sup> MUELLER, *supra* note 23, at 329; ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER 220 n.23 (2013) [hereinafter SOMIN, SMALLER GOVERNMENT].

<sup>30</sup> E.g., Jack Citrin & Donald Green, *The Self-Interest Motive in American Public Opinion*, in 3 RESEARCH IN MICROPOLITICS 1, 10–17 (Samuel Long ed., 1990); LEIF LEWIN, SELF-INTEREST AND PUBLIC INTEREST IN WESTERN POLITICS 29–45 (Donald Lavery trans., 1991); David O. Sears & Carolyn L. Funk, *Self-Interest in Americans' Political Opinions*, in BEYOND SELF-INTEREST 147 (Jane J. Mansbridge ed., 1990); Alan S. Blinder & Alan B. Krueger, *What Does the Public Know About Economic Policy, and How Does It Know It?*, 1 BROOKINGS PAPERS ON ECON. ACTIVITY 327, 362–86 (2004); Bryan Caplan, *Libertarianism Against Economism: How Economists Misunderstand Voters, and Why Libertarians Should Care*, 5 INDEP. REV. 539 (2001) [hereinafter Caplan, *Economism*]; Carolyn L. Funk, *The Dual Influence of Self-Interest and Societal Interest in Public Opinion*, 53 POL. RES. Q. 37, 52–54 (2000); Leonie Huddy et al., *Compassionate Politics: Support for Old-Age Programs Among the Non-Elderly*, 22 POL. PSYCHOL. 443 (2001).

<sup>31</sup> Huddy et al., *supra* note 30, at 444, 451–62.

<sup>32</sup> Caplan, *Economism*, *supra* note 30, at 543.



some scholars and other elites that Democrats favor policies that would disproportionately benefit the poor.<sup>33</sup>

Altruistic voting conflicts with evidence that suggests that people are generally selfish.<sup>34</sup> Americans donate only about two percent of their incomes to charitable purposes.<sup>35</sup> The question arises then why people appear to be more generous when acting as voters than in their private lives.

Scholars have proffered two explanations. First, altruism is a consumption good that confers psychological and reputational benefits.<sup>36</sup> In addition, because a single vote rarely matters, altruism in voting has almost no cost for the individual voter. As one scholar put it, “[v]oting to raise your taxes by a thousand dollars when your probability of decisiveness is 1 in 100,000 has an expected cost of a penny.”<sup>37</sup> So voters are willing to support policies (and the politicians who advocate them) even when those policies are contrary to the voters’ self-interest. This means that “we should expect voters to ‘stuff themselves’ with moral rectitude.”<sup>38</sup> Voting to promote the public interest confers the benefits of altruism but at a much lower personal cost than donating your own time and money to charity.

Second, because of the insignificance of a single vote, the personal consequences of many policies are not salient for voters. Moreover, “when the cost and benefits are obscure, support becomes increasingly unrelated to the personal ‘price.’”<sup>39</sup> This hypothesis explains why the few instances in which researchers have found that self-interest plays a significant role in voter’s policy judgments usually involve policies for which the effects on particular voters are “1. visible, 2. tangible, 3. large, and 4. certain.”<sup>40</sup> In particular, David

<sup>33</sup> Alan Abramowitz found that after controlling for race, income had minimal impact on the decision to vote for Barack Obama or Mitt Romney in the 2012 presidential election. Alan I. Abramowitz, *The Minimal Class Divide in American Politics: Why Growing Economic Inequality Does Not Explain Partisan Polarization*, SABATO’S CRYSTAL BALL (May 1, 2014), <http://www.centerforpolitics.org/crystalball/articles/the-minimal-class-divide-in-american-politics/> (“African Americans, regardless of income, voted overwhelmingly for Barack Obama. Whites with family incomes of greater than \$150,000 were only slightly more likely to vote for Mitt Romney than whites with family incomes of less than \$30,000.”).

<sup>34</sup> We generally agree that “altruism toward blood relatives in proportion to shared genetic inheritance [is] an expression of self-interest.” Caplan, *Economism*, *supra* note 30; *see also* RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 310–11 (1995) [hereinafter EPSTEIN, *SIMPLE RULES*] (making a similar argument).

<sup>35</sup> Suzanne Perry, *The Stubborn 2% Giving Rate*, *CHRONICLE OF PHILANTHROPY* (June 17, 2013), <https://philanthropy.com/article/The-Stubborn-2-Giving-Rate/139811/>.

<sup>36</sup> CAPLAN, MYTH, *supra* note 15, at 150. Voting altruistically may help a person maintain a positive self-image.

<sup>37</sup> *Id.* at 150; *see also* Gordon Tullock, *Charity of the Uncharitable*, 9 *WESTERN ECON. J.* 379, 388–89 (1971) (making a similar argument).

<sup>38</sup> CAPLAN, MYTH, *supra* note 15, at 151.

<sup>39</sup> Citrin & Green, *supra* note 30, at 18.

<sup>40</sup> *Id.*

Sears and Carolyn Funk argue that self-interest influences taxpayer support for tax cuts that are large and highly publicized and where the benefit to particular taxpayers is clear.<sup>41</sup> But in general, Sears and Funk find that the “public thinks about most political issues, most of the time, in a disinterested frame of mind.”<sup>42</sup>

In a world populated by rational voters, altruistic voting would have desirable effects. Altruistic voters support the policies and politicians they believe will maximize social welfare. Of course, even if they are rational, these voters might make mistakes. In particular, because one vote is usually unimportant and gathering information is costly, rational voters may remain “rationally ignorant” about politics.<sup>43</sup> Indeed, for most voters, the cost of gathering and processing political information appears to exceed any benefits (psychological or otherwise) that might result from becoming informed.<sup>44</sup> While some voters are informed, e.g., because political information is relevant to their jobs or because they view politics as a hobby, empirical evidence confirms that the typical voter is not, and many voters are woefully ignorant.<sup>45</sup>

Democracy suffers from a collective action problem. An informed electorate is a public good, so each voter has an incentive to free ride on the knowledge of others.<sup>46</sup> He can enjoy the benefits of an informed electorate without becoming informed himself. In addition, he has no incentive to become informed because his efforts are unlikely to make any difference. Given that his vote will not affect the outcome, even a voter who is civic-minded or who cares deeply about his fellow citizens has little reason to seek political knowledge.<sup>47</sup>

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<sup>41</sup> Sears & Funk, *supra* note 30, at 159–70.

<sup>42</sup> *Id.* at 170.

<sup>43</sup> For a recent review of the vast literature on rational ignorance, see SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 62–89.

<sup>44</sup> Cf. Michael Wallerstein, *Behavioral Economics and Political Economy*, 30 NORDIC J. POL. ECON. 37, 46 (2004) (“Voters are rational not to invest in acquiring information about politics, unless they derive enjoyment from following the twists and turns of political competition.”).

<sup>45</sup> E.g., BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 5 (2004) (“If six decades of modern public opinion research establish anything, it is that the general public’s political ignorance is appalling by any standard.”); MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 62–104 (1996); SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 17–61; Benjamin I. Page & Robert Y. Shapiro, *The Rational Public and Democracy*, in RECONSIDERING THE DEMOCRATIC PUBLIC 35, 37–39 (George E. Marcus & Russell L. Hanson eds., 1993).

<sup>46</sup> SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 64.

<sup>47</sup> We believe that psychological and reputational benefits play a significant role in motivating people to vote. But we acknowledge that people might vote for instrumental reasons if they are altruistic and value the welfare of their fellow citizens. In that case, the benefits of voting would include the expected value to the entire nation of victory by the individual voter’s preferred candidate. The altruistic voter would discount the benefits to others insofar as he does not value the welfare of others as much as his own. Nonetheless, the expected benefits of voting would be much larger than if the voter were purely self-interested. They might in fact be large enough so that instrumental voting is rational even if the probability of influencing the outcome

He can contribute more to society by devoting his time to charitable activities than to gathering and processing political information.

Rational ignorance might cause voters to favor politicians and policies that they would oppose if they had complete information. That said, rational ignorance may be less harmful than many scholars assume.<sup>48</sup> To see why, imagine an election between Smith and Jones. Assume that Smith is the better candidate, but many voters do not know this for certain because they are rationally ignorant. These voters must guess randomly in choosing between the two. Because the voters are rational, their guesses will not be biased in favor of either candidate. If the electorate is large, the two candidates will split evenly the vote of the rationally ignorant. Fortunately, as we already mentioned, not all voters are ignorant. The informed voters will know which candidate is better, and they will break the resulting tie in favor of Smith—a laudable outcome.

As this example illustrates, because rationality means lack of systematic bias, rationally ignorant voters will make only random errors that tend to offset each other in the aggregate. This means that informed voters, even if they are few in number, will have disproportionate influence over government policy.<sup>49</sup> In effect, their views will prevail, a result that some scholars refer to as the miracle of aggregation.<sup>50</sup>

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is quite small. We are not convinced that this sort of cost-benefit reasoning explains why so many people vote. But even if instrumental voting is rational for this reason, it is unlikely that becoming informed would also be rational. As we argue in the text, the cost of voting is quite small relative to the cost of becoming informed. So it could be rational to vote, but not rational to become informed. Regardless, the empirical evidence shows that voters are generally uninformed. For further discussion of this point, see SOMIN, *SMALLER GOVERNMENT*, *supra* note 29, at 63–71.

<sup>48</sup> DONALD WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE: WHY POLITICAL INSTITUTIONS ARE EFFICIENT 1* (1995).

<sup>49</sup> A potential problem with this view is that the small group of informed voters is not demographically representative of the electorate, so they may have different priorities or be influenced by racial prejudice. SOMIN, *SMALLER GOVERNMENT*, *supra* note 29, at 113.

<sup>50</sup> This phenomenon is also referred to as the wisdom of crowds. For a recent review of the literature on this topic, see Joseph P. Simmons et al., *Intuitive Biases in Choice Versus Estimation: Implications for the Wisdom of the Crowds*, 38 *J. CONSUMER RES.* 1, 1–2 (2011); see also HÉLÈNE LANDEMORE, *DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY* 145–66 (2013); JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2005); Philip E. Converse, *Popular Representation and the Distribution of Information*, in *INFORMATION AND DEMOCRATIC PROCESSES* 369, 377–85 (John J. Ferejohn & James H. Kuklinski eds., 1990); Tom Hoffman, *Rationality Reconceived: The Mass Electorate and Democratic Theory*, 12 *CRITICAL REV.* 459, 470 (1998); Page & Shapiro, *supra* note 45, at 40–41. For critiques of the miracle of aggregation, see SOMIN, *SMALLER GOVERNMENT*, *supra* note 29, at 110–16; Bryan Caplan, *Majorities Against Utility: Implications of the Failure of the Miracle of Aggregation*, 26 *SOC. PHIL. & POL'Y* 198 (2009) [hereinafter Caplan, *Majorities Against Utility*]. The Condorcet Jury Theorem is related to the miracle of aggregation. It shows that the probability that a majority will reach the correct outcome in an election increases with the number of voters if we assume that each voter is at least slightly more likely to vote for the better candidate than the worse one. See WITTMAN, *supra* note 48, at 15–17; David Austen-Smith & Jeffrey S. Banks, *Information Aggregation, Rationality, and the Condorcet Jury Theorem*, 90 *AM. POL. SCI. REV.* 34, 34 (1996);

Moreover, rational voters, even if they are uninformed, should not be vulnerable to propaganda. They will be skeptical of well-informed political actors who have a motive to deceive them, and they will rationally discount self-serving messages communicated by special interest groups and the politicians who represent those groups.<sup>51</sup> The economist Gary Becker has made a similar point:

I find it difficult to believe that most voters are systematically fooled about the effects of policies like quotas and tariffs that have persisted for a long time. I prefer instead to assume that voters have unbiased expectations, at least of policies that have persisted. They may overestimate the dead weight loss from some policies, and underestimate it from others, but on the average they have a correct perception.<sup>52</sup>

In sum, a strong case can be made that democracy will work well even if most voters know little about politics as long as voters are also rational. Altruistic voters support policies that they perceive to be in the public interest, and rationality ensures that voters' judgments are not systematically biased.

The problem with this story is that voters are not rational. The behavioral economics and behavioral public choice literature generally defines irrationality as bias or a deviation from rational expectations.<sup>53</sup> In this sense, voters regularly exhibit irrationality. For example, as we mentioned in the Introduction, voters suffer from antforeign bias, which causes them to support harmful economic protectionism. Another source of voter bias is the availability heuristic, which is the tendency to estimate the importance and

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Sven Berg, *Condorcet's Jury Theorem, Dependency Among Jurors*, 10 SOC. CHOICE & WELFARE 87 (1993); Krishna K. Ladha, *Condorcet's Jury Theorem in Light of de Finetti's Theorem: Majority-Rule Voting with Correlated Votes*, 10 SOC. CHOICE & WELFARE 69 (1993). Unfortunately, the Condorcet Jury Theorem does not suggest that democracy will function well if voters are irrational. For a critique, see SOMIN, *SMALLER GOVERNMENT*, *supra* note 29, at 116–17.

<sup>51</sup> See WITTMAN, *supra* note 48, at 15; see also Reiner Eichenberger & Angel Serna, *Random Errors, Dirty Information, and Politics*, 86 PUB. CHOICE 137, 142 (1996) (arguing that “systematic errors [by voters] are inconsistent with rational expectations”).

<sup>52</sup> Gary Becker, *Toward a More General Theory of Regulation: Comment*, 19 J.L. & ECON. 245, 246 (1976); see also GEORGE STIGLER, *Economics or Ethics?*, in THE ESSENCE OF STIGLER 303, 309 (Kurt R. Leube & Thomas Gale Moore eds., 1986) (“[T]he assumption that public policy has often been inefficient because it was based on mistaken views has little to commend it. To believe, year after year, decade after decade, that the protective tariffs or usury laws to be found in most lands are due to confusion rather than purposeful action is singularly obfuscatory.”).

<sup>53</sup> E.g., CAPLAN, *MYTH*, *supra* note 15, at 98–99; Hirshleifer, *supra* note 16, at 857 (“[R]ational ignorance alone cannot explain systematic bias. It cannot explain why voters would continually make the same mistakes, such as approving protectionism and farm subsidies.”); Jolls et al., *supra* note 10, at 1473–74.

frequency of an event based upon how easy it is to recall examples of it.<sup>54</sup> The availability heuristic focuses the public's attention on problems that receive significant media coverage, which causes the government to neglect more important but less newsworthy issues.<sup>55</sup>

Irrational voter behavior should come as no surprise.<sup>56</sup> Empirical evidence suggests that as the cost of irrationality decreases, decision making becomes less rational.<sup>57</sup> Rationally evaluating new information requires effort, and failure to exert that effort increases the influence of various biases.<sup>58</sup> Given the low personal stakes involved, voters have little incentive to think rationally. In particular, voters have less incentive to recognize their irrationality and to find ways to overcome it than do private actors making decisions that directly affect themselves and their families. In other words, "[t]he same people who practice intellectual self-discipline when they figure out how to commute to work, repair a car, buy a house, or land a job 'let themselves go' when they contemplate the effects of protectionism, gun control, or pharmaceutical regulation."<sup>59</sup> Moreover, "voting for bad policies has a built-in *negative externality*" because most of the costs of those policies will be borne by other people.<sup>60</sup>

Voter irrationality is not only prevalent, it is also important. It biases elections and government policy. Returning to our hypothetical election, if uninformed voters are biased in favor of Jones, then the better candidate (Smith) may lose. Moreover, Jones can win even if only a small group of voters are irrationally biased in his favor. To see why, assume that the electorate consists of one million voters.<sup>61</sup> Assume also that the votes of 990,000 of them cancel out. This might occur because these voters are unbiased and choose

<sup>54</sup> Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1127 (1974).

<sup>55</sup> See *infra* Part III.B.

<sup>56</sup> Cf. Edward J. McCaffery & Jonathan Baron, *Thinking About Tax*, 12 J. PSYCHOL. PUB. POL'Y & L. 106, 111–12 (2006) [hereinafter McCaffery & Baron, *Thinking About Tax*] ("The general complexity of the subject matter; the low benefits for any individual to obtain on a personal level from fully understanding it; the absence of any general, widely available mechanism to educate people about tax; and the lack of incentives for lawmakers to implement any debiasing or arbitrage mechanism can all be expected to, if anything, make the usual heuristics and biases more acute in the field of tax.").

<sup>57</sup> See *infra* Part IV.B.3.

<sup>58</sup> DANIEL KAHNEMAN, THINKING, FAST AND SLOW 31–49 (2011).

<sup>59</sup> CAPLAN, MYTH, *supra* note 15, at 133; cf. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 262 (1942) [hereinafter SCHUMPETER, CAPITALISM] ("[T]he typical citizen drops down to a lower level of mental performance as soon as he enters the political field. He argues and analyzes in a way he would readily recognize as infantile within the sphere of his real interests. He becomes a primitive again.").

<sup>60</sup> Caplan, *Majorities Against Utility*, *supra* note 50, at 207–08.

<sup>61</sup> This hypothetical is based on an example found in SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 116.

randomly or because the biases of individual voters offset in the sense that they cause some voters to favor Jones but just as many to favor Smith. Under these circumstances, the remaining 10,000 voters will decide the election. If just 6,000 of them are biased in Jones's favor, then Jones will almost certainly win. In other words, 6,000 biased voters in an electorate of one million can be enough to tilt the election in favor of the inferior candidate.

This analysis shows that despite their good intentions, altruistic voters may cause government to fail by introducing systematic bias into the policymaking process.<sup>62</sup> As a result, even if politicians generally give voters what they want, government may fail to promote the public interest. Voters will support harmful policies that they would not favor if they were rational.<sup>63</sup> For example, the availability heuristic sometimes leads the public to demand costly regulation of highly publicized risks even when scientists believe that those risks are minimal and not worth addressing.

In addition, irrationality opens up an opportunity for politicians, bureaucrats, and special interest groups to take advantage of voters. Irrational voters may not rationally discount propaganda and other appeals to emotion, making them susceptible to deceptive forms of persuasion.<sup>64</sup>

### B. Irrationality Among Politicians

The fact that voters have irrational policy preferences is important because public opinion significantly influences government policy.<sup>65</sup> Nonetheless, politicians have some slack to deviate from what voters want and to implement the politicians' own preferred policies. One source of slack is a

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<sup>62</sup> CAPLAN, MYTH, *supra* note 15, at 152–53.

<sup>63</sup> Cf. Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 554 (2002) (“A key lesson of cognitive psychology is that even people with good motives tend to make bad choices in certain, predictable circumstances.”).

<sup>64</sup> CAPLAN, MYTH, *supra* note 15, at 178–79; Bruno S. Frey & Reiner Eichenberger, *Anomalies in Political Economy*, 68 PUB. CHOICE 71, 78–79 (1991) [hereinafter Frey & Eichenberger, *Anomalies*]; Hirshleifer, *supra* note 16, at 857 (“[C]ertain beliefs about regulation are especially good at exploiting psychological biases to attract attention and support.”); McCaffery & Baron, *Thinking About Tax*, *supra* note 56, at 128 (“Our findings further suggest that politicians more skilled at framing public political issues such as tax will have more success in both getting elected and advancing their agendas than those not so skilled.”); van Winden, *supra* note 28, at 55 (arguing that emotionally intelligent politicians can appeal to the public's emotions to garner support for their policy proposals); cf. SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 65–68 (1993) (presenting evidence that responses to public opinion polls depend greatly on how questions and answers are framed and concluding that “[w]hen people do not have deep convictions about an issue, they respond to ‘catch phrases’ that point them in a socially desirable direction”).

<sup>65</sup> E.g., ACKERMAN & FISHKIN, *supra* note 45, at 9–10; SOMIN, *SMALLER GOVERNMENT*, *supra* note 29, at 6, 97; JAMES A. STIMSON, *TIDES OF CONSENT: HOW PUBLIC OPINION SHAPES AMERICAN POLITICS* 9 (2004); Blinder & Krueger, *supra* note 30, at 328.

lack of vigilance on the part of voters who may simply be unaware of the laws that politicians adopt. In addition, rather than focusing on policy, some voters become distracted by seemingly irrelevant personal attributes of political candidates, e.g., physical attractiveness.<sup>66</sup> Moreover, charismatic politicians can influence voters' policy preferences. In particular, voters sometimes modify their beliefs simply because they trust a politician ("I believe because *he* said it.") or because a politician is an eloquent speaker ("I believe because he said it *so well*.").<sup>67</sup>

If voters were rational, slack among politicians would arguably be undesirable because it would undermine democratic self-governance. But because voters are not rational, public-spirited politicians might use their slack to save the public from itself. Paradoxically, by refusing to adhere to the public's misguided policy preferences, politicians might cause democracy to work better. Similarly, a charismatic politician could use his political skills to persuade voters that their biases cause them to support policies that, though well-intentioned, are not consistent with the public interest.<sup>68</sup>

There are, however, several reasons to believe that slack among politicians cannot save democracy from an irrational public. First, while politicians have some slack to pursue their own agenda, their ability to defy voters is limited.<sup>69</sup> In particular, politicians can probably ignore voters with

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<sup>66</sup> Niclas Berggren et al., *The Looks of a Winner: Beauty and Electoral Success*, 94 J. PUB. ECON. 8 (2010); Amy King & Andrew Leigh, *Beautiful Politicians*, 62 KYKLOS 579 (2009); Gabriel S. Lenz & Chappell Lawson, *Looking the Part: Television Leads Less Informed Citizens to Vote Based on Candidates' Appearance*, 55 AM. J. POL. SCI. 574, 574 (2011). One study finds that election outcomes can be predicted with alarming success based upon study subjects' judgments about the two candidates' competence determined after viewing pictures of them for only one second. Alexander Todorov et al., *Inferences of Competence from Faces Predict Election Outcomes*, 308 SCIENCE 1623, 1624 (2005). Psychologists who study persuasion contrast the peripheral route to attitude change with the central route. Whereas the central route focuses on the quality of arguments, the peripheral route focuses on superficial aspects of a message such as the attractiveness or fame of the source or the number of arguments. These superficial factors are more likely to persuade people for whom the message is not personally relevant (because they are not motivated to process it deeply) and who do not have the ability to process it, e.g., because they lack the knowledge or time. THOMAS GILOVICH ET AL., SOCIAL PSYCHOLOGY 281–93 (Sheri Snively ed., 3d ed. 2013) [hereinafter GILOVICH ET AL., SOCIAL PSYCHOLOGY]. As discussed in Part II.A., the typical voter lacks both the motivation and knowledge to process political information deeply, so it is not surprising that peripheral cues such as the beauty of politicians play a significant role in political persuasion.

<sup>67</sup> CAPLAN, MYTH, *supra* note 15, at 170. A third important source of slack exists if voters underestimate the ability of politicians to control administrative agencies. *See infra* Part IV.

<sup>68</sup> Cf. WITTMAN, *supra* note 48, at 10 (arguing that political entrepreneurs are rewarded for providing the public with new information).

<sup>69</sup> *Id.* at 20–30; Paul Burstein, *The Impact of Public Opinion on Public Policy: A Review and an Agenda*, 56 POL. RES. Q. 29, 36 (2003) ("Public opinion affects policy three-quarters of the times its impact is gauged; its effect is of substantial policy importance at least a third of the time, and probably a fair amount more."); Brandice Canes-Wrone et al., *Out of Step, Out of Office: Electoral Accountability and House Members' Voting*, 96 AM. POL. SCI. REV. 127, 138

respect to issues that do not arouse intense public interest. But when voters care deeply about an issue, they will punish politicians who shirk. Second, politicians might use their slack to promote the public interest, but they might also abuse it and cater to the demands of special interest groups that support their campaigns or supply them with bribes.<sup>70</sup>

Finally, politicians themselves may be irrational and therefore unable to identify policies that are in the public interest. No reason exists to believe that politicians are immune to the biases that afflict ordinary citizens. On the one hand, politicians do have a strong personal incentive to think rationally about matters that affect their chances of winning an election.<sup>71</sup> On the other hand, they often have no greater incentive than voters to identify and oppose bad policies. After all, the adverse consequences of those policies fall primarily on other people. Moreover, selection pressure favors politicians who share the same biases as the public.<sup>72</sup> Not only will their message resonate, but these politicians will appear more genuine than will rational, well-informed politicians who recognize bad policies but pretend otherwise in order to get elected. In the words of Thomas Sowell,

When most voters do not think beyond stage one, many elected officials have no incentive to weigh what the consequences would be in later stages—and considerable incentives to avoid getting beyond what their constituents think and understand, for fear that rival politicians can drive a wedge between them and their constituents by catering to short-run public perceptions.<sup>73</sup>

An important qualification to this analysis stems from the fact that voters not only support candidates who share their policy preferences, but they

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(2002) (“[W]e show that, holding district ideology constant, in every election between 1956 and 1996 an incumbent’s vote share decreased the more he voted with the extreme of his party . . . [and] the probability [of reelection] decreases significantly as an incumbent’s voting support for his party increases.”). *But see* Steven D. Levitt, *How Do Senators Vote? Disentangling the Role of Voter Preferences, Party Affiliation, and Senator Ideology*, 86 AM. ECON. REV. 425, 438 (1996) (concluding that “ideology is the primary determinant” of voting patterns for U.S. senators, that “[l]ess than one quarter of the weight in the [senator’s] decision function is devoted to voter preferences,” and that senators pay more attention to what voters want in election years and when the senator holds a marginal seat).

<sup>70</sup> ACKERMAN & FISHKIN, *supra* note 45, at 79–80 (“When a politician believes that her conduct will gain broad attention back home, interest group pressures will be attenuated. . . . Interest groups are far more powerful when the general public is asleep.”); CAPLAN, MYTH, *supra* note 15, at 180 (“Do what the public wants when it cares; take bids from interested parties when its [sic] doesn’t.”).

<sup>71</sup> CAPLAN, MYTH, *supra* note 15, at 167.

<sup>72</sup> *Id.* at 168.

<sup>73</sup> THOMAS SOWELL, *APPLIED ECONOMICS: THINKING BEYOND STAGE ONE* 4 (2d ed. 2004).



also focus on outcomes in deciding for whom to cast their votes.<sup>74</sup> This means that politicians seeking reelection must balance the need to give voters the policies that they want against the need to avoid noticeably bad outcomes before the next election.<sup>75</sup> In particular, politicians need to avoid policies that will substantially damage the economy in the near future.<sup>76</sup>

To illustrate the benefits of outcome-based voting, consider President Obama's reversal on trade policy.<sup>77</sup> Because of antiforeign bias, the public favors economic protectionism despite opposition from economists across the political spectrum.<sup>78</sup> Perhaps as a result of strong public support for protectionism, during the 2008 presidential campaign, President Obama promised to renegotiate existing free trade agreements.<sup>79</sup> But after winning the election, the President changed his position, and he did so apparently because of concerns that protectionism would exacerbate the global economic crisis.<sup>80</sup> The President suffered little if any political damage from failing to follow through on his campaign promise, and he was reelected by a comfortable margin. Most probably, the public was simply unaware that he broke his promise.<sup>81</sup> This provides a nice example of how a rational politician concerned about reelection can use his slack to avoid irrational policies.

Despite this example, outcome-based voting is no panacea for the effects of irrationality on democracy. On the one hand, politicians concerned about outcomes may save voters from themselves by refusing to adopt policies that voters irrationally support and that would have obvious harmful effects. On

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<sup>74</sup> SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 100–05. Political scientists use the term retrospective voting to refer to voting based on outcomes rather than policy preferences. *See, e.g.*, Wayne L. Francis et al., *Retrospective Voting and Political Mobility*, 38 AM. J. POL. SCI. 999 (1994); David J. Lanoue, *Retrospective Voting and Prospective Voting in Presidential-Year Elections*, 47 POL. RES. Q. 193 (1994); Brad Lockerbie, *The Influence of Levels of Information on the Use of Prospective Evaluations*, 13 POL. BEHAV. 223 (1991); Richard Nadeau & Michael S. Lewis-Beck, *National Economic Voting in U.S. Presidential Elections*, 63 J. POL. 159 (2001).

<sup>75</sup> *See* SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 103.

<sup>76</sup> For a formal analysis of the tradeoff involved in promoting economic growth while also catering to voters' biased economic beliefs, see Ivo Bischoff & Lars-H.R. Siemers, *Biased Beliefs and Retrospective Voting: Why Democracies Choose Mediocre Policies*, 156 PUB. CHOICE 163, 175 (2013) (arguing that politicians respond to this tradeoff by choosing a mix of good and bad, but popular, economic policies, which leads to mediocre outcomes).

<sup>77</sup> SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 59.

<sup>78</sup> An overwhelming majority of economists agree that the United States should eliminate tariffs and other trade barriers. Robert Whaples, *Do Economists Agree on Anything? Yes!*, 3 ECON. VOICE 1, 1 (2006).

<sup>79</sup> Susan Ferrechio, *Obama Backs Away from Reforming Free Trade Deal*, WASH. EXAMINER (May 17, 2009, 12:00 AM), <http://www.washingtonexaminer.com/obama-backs-away-from-reforming-free-trade-deal/article/99602>.

<sup>80</sup> *Id.*; Jonathan Weisman, *Obama, in Canada, Warns Against Protectionism*, WALL ST. J. (Feb. 20, 2009, 12:01 AM), <http://www.wsj.com/articles/SB123504260038621641>.

<sup>81</sup> SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 59.

the other hand, the empirical evidence suggests that voters cannot adequately assess politicians' performance. Voters frequently do not have enough political knowledge to determine which problems government policy can feasibly address, which politicians are responsible for what issues, and whether alternative policies would have been more desirable than the ones that incumbent office holders actually adopted.<sup>82</sup> In particular, voters tend to reward or punish politicians for changes in conditions (particularly economic conditions) over which politicians have little or no control.<sup>83</sup> Voters also have biased views as to what constitutes a good outcome, e.g., equating passing legislation to a good outcome regardless of the new law's consequences.<sup>84</sup> Moreover, many of the irrational policies that voters demand produce bad outcomes that are delayed in time or that are otherwise difficult to observe. For this reason, short-sighted politicians focused on the next election are likely to acquiesce in these policies, especially if they can plausibly deny responsibility for their effects.<sup>85</sup> Finally, if, as seems likely, voters are biased in favor of incumbents, then that will weaken the link between an incumbent's performance and his election prospects.<sup>86</sup>

### III. SPECIFIC TYPES OF IRRATIONALITY THAT CAUSE GOVERNMENT FAILURE

Part II described in general terms how irrationality causes government failure. This Part explains specific types of irrationality and provides examples of how irrationality has led the government to adopt bad laws.

Although we discuss various failures of rationality, many of them have two related features in common. First, they involve a failure to rationally assess the likely consequences, including potential costs and benefits, of government policies. In some cases, voters and politicians completely ignore costs and benefits and focus instead on factors that are irrelevant to rational analysis. In

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<sup>82</sup> *Id.* at 40–43, 100–05.

<sup>83</sup> *Id.* at 100–03; Wallerstein, *supra* note 44, at 44–45 (citing evidence that voters punish incumbent politicians for natural disasters and other events that are completely outside the incumbents' control). In some cases, this phenomenon may result from hindsight bias, which is the tendency, after an outcome has occurred, to view it as having been easily predictable when it in fact was not. Frey & Eichenberger, *Anomalies*, *supra* note 64, at 75 (“If politics leads to unfavourable results, people wrongly believe that this was foreseeable. Therefore they blame government for having committed a grave mistake.”).

<sup>84</sup> CAPLAN, MYTH, *supra* note 15, at 158–60.

<sup>85</sup> Bischoff & Siemers, *supra* note 76, at 175 (“If . . . the positive effects of good policies (or the negative effects of poor policies) do not become apparent within one term, the incentives to offer good policies are weak and outcomes are expected to be poor.”); SOWELL, *supra* note 73, at 4 (“[P]olicies that will produce good results before the next election may be preferred even if they can be expected to produce bad results afterwards.”).

<sup>86</sup> Bischoff & Siemers, *supra* note 76, at 175. On the potential causes of incumbent bias, see Quattrone & Tversky, *supra* note 24, at 723–26.

other cases, political actors consider costs and benefits but err systematically in calculating them.

Second, many of the instances of irrationality that we identify are examples of a more general phenomenon that psychologists sometimes refer to as focusing illusion.<sup>87</sup> People often fail to consider all relevant aspects of a particular problem. They passively accept the frame or characterization of the problem that is provided to them. They tend to restrict their thoughts to salient situational elements, especially information that is explicitly presented.<sup>88</sup> They often ignore relevant information that remains implicit and therefore “off screen.”

As a result of focusing illusion, voters and politicians do not evaluate policies globally by considering all angles, including interrelationships among policies. Instead, their analyses are subject to pervasive framing, salience, and vividness effects.<sup>89</sup> In particular, they frequently fail to see past the superficial effects of government policy, which is why so many policies are undermined by unintended consequences.<sup>90</sup> In addition, because vivid stimuli, including personal experiences and emotionally arousing information, are easier to encode and retrieve,<sup>91</sup> extreme events and compelling personal accounts of pain and suffering are often given too much weight in the cost-benefit calculus.<sup>92</sup>

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<sup>87</sup> Rather than using the phrase “focusing illusion,” some scholars refer to “focusing effects,” “focusing failures,” “focusing bias,” “focusing,” “isolation effects,” or “isolation errors.” Lorraine Chen Idson et al., *Overcoming Focusing Failures in Competitive Environments*, 17 J. BEHAV. DECISION MAKING 159, 160 (2004); Steven K. Jones et al., *Choices and Opportunities: Another Effect of Framing on Decisions*, 11 J. BEHAV. DECISION MAKING 211, 213–14 (1998); Daniel Kahneman & Dan Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking*, 39 MGMT. SCI. 17, 17 (1993); P. Legrenzi et al., *Focussing in Reasoning and Decision Making*, 49 COGNITION 36, 58–64 (1993); McCaffery & Baron, *Thinking About Tax*, *supra* note 56, at 107.

<sup>88</sup> For reviews of the literature on this point, see Shane Frederick et al., *Opportunity Cost Neglect*, 36 J. CONSUMER RES. 553, 553–54 (2009); Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1458–60 (2003); Stephen A. Spiller, *Opportunity Cost Consideration*, 38 J. CONSUMER RES. 595, 596 (2011). Frédéric Bastiat recognized the importance of salience in politics over 160 years ago. See CLAUDE FRÉDÉRIC BASTIAT, *That Which Is Seen, and That Which Is Not Seen*, in 1 THE BASTIAT COLLECTION 1 (Ludwig von Mises Institute 2d ed. 2007).

<sup>89</sup> E.g., Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103 (2007) (discussing the influence of framing effects on public opinion); Quattrone & Tversky, *supra* note 24, at 727–30.

<sup>90</sup> E.g., Edward J. McCaffery & Jonathan Baron, *Isolation Effects and the Neglect of Indirect Effects of Fiscal Policies*, 19 J. BEHAV. DECISION MAKING 289, 300–01 (2006). Thomas Sowell refers to this phenomenon as a failure to think beyond stage one. SOWELL, *supra* note 73, at 6–19.

<sup>91</sup> RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 45–53 (1980).

<sup>92</sup> Hirshleifer, *supra* note 16, at 858.

A. *The Intentions Heuristic: Elevating Intentions Over Consequences*

As discussed in Part II, voters are generally altruistic, which raises the question of how voters determine which policies promote the public interest. Rationally evaluating policies would require voters to think about their consequences, including costs and benefits. Unfortunately, cost-benefit analysis is difficult.<sup>93</sup> So in evaluating policies, voters sometimes invoke simple heuristics, many of which developed in other contexts and have been transplanted into politics. Used in the proper context, these heuristics often facilitate fast and accurate decisions with limited information and processing. But when applied to policy analysis, they frequently lead to systematic errors, including ignoring relevant information.<sup>94</sup>

One such heuristic is the intentions heuristic, which is the tendency to judge a policy based on the intentions of its advocates rather than on the policy's actual consequences.<sup>95</sup> The implicit assumption is that good results follow from good intentions and bad results follow from bad intentions.<sup>96</sup> This assumption is often true, but it is sometimes misleading, especially with respect to public policy.<sup>97</sup> In particular, voters using the intentions heuristic will favor policies that make them feel good without first considering costs and benefits.<sup>98</sup> Once the government adopts feel-good policies, they are often difficult to repeal because the beneficiaries of these policies are easier to identify than those who are harmed by them.<sup>99</sup>

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<sup>93</sup> See KAHNEMAN, *supra* note 58, at 31–38 (discussing the effort required to engage in conscious reasoning).

<sup>94</sup> Jonathan Baron refers to this problem as involving an overgeneralized heuristic. Jonathan Baron, *Why Teach Thinking?—An Essay*, 42 APPLIED PSYCHOL.: INT'L REV. 191, 197–99 (1993); McCaffery & Baron, *Thinking About Tax*, *supra* note 56, at 109.

<sup>95</sup> Jeffrey Friedman, *Popper, Weber, and Hayek: The Epistemology and Politics of Ignorance*, 17 CRITICAL REV. i, xix–xxi (2005) [hereinafter Friedman, *Ignorance*]; see also CLIFFORD WINSTON, GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE 2 (2007) (“[S]ome commentators and policymakers are outright dismissive of policy assessments based on cost-benefit analysis, apparently willing to substitute good intentions—or their own political agenda—for analysis.”); Slavisa Tasic, *Are Regulators Rational?*, 17 J. DES ECONOMISTES ET DES ETUDES HUMAINES 1, 8–9 (2011) [hereinafter Tasic, *Are Regulators Rational?*].

<sup>96</sup> Friedman, *Ignorance*, *supra* note 95, at xx.

<sup>97</sup> Tasic, *Are Regulators Rational?*, *supra* note 95, at 8–9.

<sup>98</sup> Cf. Cowen, *supra* note 28, at 445 (“[A]ll voters will be excessively attracted to policies that make citizens ‘feel good about themselves.’ Individuals on all sides of the political spectrum will be unwilling to confront difficult trade-offs.”).

<sup>99</sup> Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 45 (2003) (arguing that securities regulations that are on net harmful are still difficult to repeal because a minority of investors reap concentrated and highly visible benefits while the losses suffered by others are dispersed and obscure); Sam Peltzman, *Regulation and the Wealth of Nations: The Connection Between Government Regulation and Economic Progress*, 3 NEW PERSP. ON POL. ECON. 185, 194 (2007) (making this point with respect to the Americans with

The intentions heuristic is especially likely to play a role in policy areas that are emotionally charged.<sup>100</sup> A frequently cited example is the Americans with Disabilities Act (ADA).<sup>101</sup> Congress's purpose in adopting the ADA was to increase employment among people with disabilities by outlawing discrimination against them. Unfortunately, the Act unintentionally increased the cost of hiring the disabled by requiring that their employers provide them with expensive accommodations and by exposing employers to lawsuits when they fire disabled employees.<sup>102</sup> Consequently, the ADA backfired and actually decreased employment rates among disabled persons.<sup>103</sup>

In addition, the intentions heuristic plays a large role in welfare policy.<sup>104</sup> The public strongly supports welfare programs,<sup>105</sup> despite evidence that the programs have perverse consequences and make the poor worse off in the long run.<sup>106</sup> From a societal perspective, perhaps the most important of these consequences is the erosion of the social norm that people should work and provide for themselves.<sup>107</sup> Nonetheless, because the stated intent of welfare programs is to help the poor, opposition to them is often portrayed as immoral.<sup>108</sup>

The intentions heuristic also helps explain what economist Bryan Caplan refers to as antimarket bias. Antimarket bias is “a tendency to underestimate the economic benefits of the market mechanism.”<sup>109</sup> Economists

Disabilities Act); Rachlinski & Farina, *supra* note 63, at 604–05 (attributing “regulatory stickiness” partially to loss aversion, which causes those harmed by regulatory reform to fight harder against it than those who would benefit are willing to fight for it).

<sup>100</sup> Tasic, *Are Regulators Rational?*, *supra* note 95, at 8–9.

<sup>101</sup> Slavisa Tasic uses this example to illustrate the intentions heuristic. *Id.* at 9.

<sup>102</sup> Peltzman, *supra* note 99, at 192–94.

<sup>103</sup> Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 948–50 (2001); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693, 711 (2000).

<sup>104</sup> Tasic, *Are Regulators Rational?*, *supra* note 95, at 8–9.

<sup>105</sup> *E.g.*, PEW RESEARCH CTR., AS SEQUESTER DEADLINE LOOMS, LITTLE SUPPORT FOR CUTTING MOST SPENDING 1 (2013) (finding that only 24% of adults are in favor of decreasing federal government spending on aid to the needy in the United States).

<sup>106</sup> *E.g.*, THOMAS SOWELL, THE VISION OF THE ANOINTED: SELF-CONGRATULATION AS A BASIS FOR SOCIAL POLICY 8–15 (1995).

<sup>107</sup> Schnellenbach & Schubert, *Behavioral Public Choice*, *supra* note 9, at 33–34 (discussing evidence that this norm has eroded and suggesting that one reason is that in recent years, “politicians have framed the reception of transfers as basic citizen’s rights, rather than as a stigma”).

<sup>108</sup> *See* SOWELL, *supra* note 106, at 14 (noting that one “defense of failed [welfare] policies has been to claim moral merit for their good intentions”).

<sup>109</sup> CAPLAN, MYTH, *supra* note 15, at 30 (emphasis omitted); *see also* Slavisa Tasic, *The Modern Growth of Government Springs More from Ideas Than from Vested Interests*, 14 INDEP. REV. 549, 554–58 (2010) [hereinafter Tasic, *Growth of Government*].

think of most market exchanges as benefiting both buyer and seller, but many non-economists view the market as a place in which large corporations exploit consumers.<sup>110</sup> Antimarket bias stems at least in part from the intentions heuristic. Firms are motivated by profit, so consumers conclude that they can charge exorbitant prices for low quality products.<sup>111</sup> As Joseph Schumpeter noted, people suffer from an “ineradicable prejudice that every action intended to serve the profit interest must be anti-social by virtue of this fact alone.”<sup>112</sup>

Antimarket bias likely has other sources as well. It helps people make sense of a world that seems unjust. According to Caplan, “seeing trade as disguised exploitation soothes those who dislike the market’s outcome.”<sup>113</sup> More broadly, antimarket bias may be a product of our evolutionary past.<sup>114</sup> Paul Rubin argues that because humans evolved in small hunter-gatherer societies, our minds do not intuitively understand how modern-day markets work.<sup>115</sup> Among early humans, the sharing of limited food and other resources was common, and catching cheaters required close monitoring.<sup>116</sup> The division of labor and capital accumulation were virtually nonexistent.<sup>117</sup> Trade was a zero-sum game.<sup>118</sup> People focused primarily on how to divide the existing economic pie because significantly enlarging it was not an option.<sup>119</sup> As a result, modern humans find it difficult to view market exchanges as positive-sum in nature. Prices appear to be ways of allocating existing wealth rather than incentivizing new production. In thinking about the economy, most people are concerned primarily with distributional issues, not economic growth. The idea is that gains experienced by one person necessarily come at the expense of others.

Caplan presents survey evidence that the public is substantially more suspicious of the market than the typical economist.<sup>120</sup> Controlling for income, ideology, and several other variables, Caplan shows that relative to economists, non-economists are much more likely to believe that business tax breaks significantly harm the economy; that gas prices increase, not because of

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<sup>110</sup> CAPLAN, MYTH, *supra* note 15, at 32; Tasic, *Growth of Government*, *supra* note 109, at 556–67.

<sup>111</sup> Tasic, *Are Regulators Rational?*, *supra* note 95, at 8.

<sup>112</sup> JOSEPH A. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* 234 (Elizabeth Bloody Schumpeter ed., 1954).

<sup>113</sup> CAPLAN, MYTH, *supra* note 15, at 119.

<sup>114</sup> See Paul H. Rubin, *Folk Economics*, 70 S. ECON. J. 157, 160–66 (2003); Tasic, *Growth of Government*, *supra* note 109, at 554–58.

<sup>115</sup> Rubin, *supra* note 114, at 160–67.

<sup>116</sup> *Id.* at 160–64.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 164.

<sup>120</sup> CAPLAN, MYTH, *supra* note 15, at 50–93.

changes in supply and demand, but because oil companies are trying to increase profits; that profits are excessive and executives are overpaid; that gas is overpriced; and that trade agreements reduce American jobs.<sup>121</sup>

Moreover, this antimarket view is not limited to liberal Democrats. Stephen Miller analyzed survey evidence of attitudes toward the market and government regulation.<sup>122</sup> He found that “the differences between conservatives and liberals are often fairly small, and . . . most conservatives, too, are wary of free markets, bordering on being hostile to them—especially when it comes to particulars, rather than abstractions.”<sup>123</sup> In particular, 69% of conservatives believe that shareholders receive an excessive share of profits relative to workers; 65% favor government price controls; 63% support government-provided jobs and aid to growing industries; 45% support government aid of declining industries; 44% believe that business is too powerful; and 39% view management and workers as fundamentally at odds with one another.<sup>124</sup>

From the perspective of economists, the public’s thinking about the market is misguided because it ignores the role of competition.<sup>125</sup> Competition limits prices and generally ensures that in the long run, the most profitable firms are those that provide valuable products at a relatively low cost. As a result, economists have long recognized that individuals pursuing their own self-interest can enhance social welfare.<sup>126</sup> The public apparently disagrees.

In addition to the intentions heuristic, overconfidence in government is another source of antimarket bias. The Dunning-Kruger effect is a cognitive bias that leads people with a superficial understanding of a subject to overestimate their competence and underestimate what they do not know.<sup>127</sup> This can cause voters and politicians who lack a detailed understanding of the economy to conclude wrongly that the government can easily fix problems that they perceive with the market.<sup>128</sup>

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

<sup>122</sup> Stephen Miller, *Conservatives and Liberals on Economics: Expected Differences, Surprising Similarities*, 19 *CRITICAL REV.* 47 (2007).

<sup>123</sup> *Id.* at 53.

<sup>124</sup> *Id.* at 53–54.

<sup>125</sup> CAPLAN, MYTH, *supra* note 15, at 30.

<sup>126</sup> ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 7 (Wallace Brockway ed., 1952) (1776) (“It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own self-interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.”).

<sup>127</sup> Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One’s Own Incompetence Lead to Inflated Self-Assessments*, 77 *J. PERSONALITY & SOC. PSYCHOL.* 1121 (1999).

<sup>128</sup> *Cf.* Tasic, *Are Regulators Rational?*, *supra* note 95, at 9–13 (arguing that regulators are overconfident in their ability to manage the economy).

David Hirshleifer argues that overconfidence causes voters and politicians to “too readily assume that a perceived social problem has not been addressed by the market, and [to be] too sure of proposed remedies.”<sup>129</sup> As an example, consider proposals for transaction taxes to limit speculation in asset markets. Hirshleifer describes numerous ways in which the market addresses speculation and excessive trading, but which are rarely discussed by proponents of transaction taxes.<sup>130</sup>

Caplan argues that antimarket bias leads to two fallacies in particular that have an important influence on the law. First, people often ignore the incentive effects of market payments and think of them instead as mere transfers.<sup>131</sup> This causes profits to appear as a gift to the rich rather than a reward for cutting costs, improving resource allocation, and inventing products that people want to buy. In particular, people view interest payments with intense suspicion because they see that the payments involve a transfer from the debtor, who is often poor, to the lender, who is often rich. What they fail to notice is that the prospect of earning interest incentivizes people to save money and to make loans, including loans to the poor, which alleviate poverty. The tendency to ignore the incentive effects of market payments contributes to the prevalence of windfall profits taxes, usury laws, and laws against price gouging, the latter of which sometimes create shortages of essential goods following disasters.<sup>132</sup>

Second, people believe that the market is dominated by monopolists and that firms can take advantage of their customers and workers by raising prices and suppressing wages whenever business executives are feeling especially greedy.<sup>133</sup> In fact, in the United States, most markets, including labor markets, are highly competitive.<sup>134</sup> The false belief that they are not helps explain antitrust laws, price controls, and other consumer protection laws, many of which do more harm than good.<sup>135</sup>

### *B. The Availability Heuristic: Miscalculating Risk*

In addition to the intentions heuristic, voters and politicians also invoke the availability heuristic, which is the tendency to estimate the importance and frequency of an event based upon how easy it is to recall examples of it.<sup>136</sup> The

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<sup>129</sup> Hirshleifer, *supra* note 16, at 864.

<sup>130</sup> *Id.* at 864–65.

<sup>131</sup> CAPLAN, MYTH, *supra* note 15, at 32–33.

<sup>132</sup> *Id.*; Hirshleifer, *supra* note 16, at 870.

<sup>133</sup> CAPLAN, MYTH, *supra* note 15, at 34–35.

<sup>134</sup> *Id.* at 34–36; WINSTON, *supra* note 95, at 15 (summarizing evidence that the U.S. economy does not suffer “from any serious underlying anticompetitive problems”).

<sup>135</sup> On the harm caused by certain regulations, see WINSTON, *supra* note 95.

<sup>136</sup> Tversky & Kahneman, *supra* note 54, at 1127.



availability heuristic exaggerates the importance of risks that are vivid and salient. Timur Kuran and Cass Sunstein argue that this heuristic can cause availability cascades, which are “self-reinforcing process[es] of collective belief formation by which an expressed perception triggers a chain reaction that gives the perception increasing plausibility through its rising availability in public discourse.”<sup>137</sup>

In an availability cascade, people with imperfect information accept something as true because others believe it. Moreover, people feel social pressure to accept a particular belief and become reluctant to publicly express their skepticism.<sup>138</sup> Special interest groups and other availability entrepreneurs attempt to create availability cascades to advance their agendas.<sup>139</sup> In an availability cascade, media and public opinion may swing to a particular position, which then leads to an increasingly one-sided presentation of evidence favoring that position.<sup>140</sup> Because people do not adequately discount one-sided evidence,<sup>141</sup> pressure for the government to respond to the perceived threat can become enormous.<sup>142</sup>

Kuran and Sunstein present evidence that availability cascades can transform minor risks into mass scares. Among the examples they provide are public panics related to Alar, a pesticide used on apples, and the Love Canal chemical waste site.<sup>143</sup> Kuran and Sunstein suggest that science did not support that these panics were justified by real risks; rather, they resulted largely from the efforts of availability entrepreneurs.<sup>144</sup>

W. Kip Viscusi and Ted Gayer have identified a common instance in which risks become particularly salient and available.<sup>145</sup> They argue that newly discovered risks or an increase in the level of a familiar risk “tend to generate extreme responses” and “create pressure for alarmist government regulations.”<sup>146</sup> As evidence for this claim, they discuss the arguably excessive reactions on the part of various governments to the mad cow disease outbreak in the United Kingdom as well as alarmist responses to the recent Ebola threat in the United States.<sup>147</sup>

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<sup>137</sup> Kuran & Sunstein, *supra* note 13, at 683.

<sup>138</sup> *Id.* at 720–28.

<sup>139</sup> *Id.* at 713–14.

<sup>140</sup> Hirshleifer, *supra* note 16, at 866.

<sup>141</sup> Lyle A. Brenner et al., *On the Evaluation of One-Sided Evidence*, 9 J. BEHAV. DECISION MAKING 59, 68 (1996).

<sup>142</sup> Hirshleifer, *supra* note 16, at 866.

<sup>143</sup> Kuran & Sunstein, *supra* note 13, at 691–701.

<sup>144</sup> *Id.* at 720–21.

<sup>145</sup> W. Kip Viscusi & Ted Gayer, *Behavioral Public Choice: The Behavioral Paradox of Government Policy*, 28 HARV. J.L. & PUB. POL’Y 973, 994–95 (2015).

<sup>146</sup> *Id.* at 994.

<sup>147</sup> *Id.* at 994–95.

The adverse effects of the availability heuristic are exacerbated by a related phenomenon that George Loewenstein and his colleagues refer to as “risk as feelings.”<sup>148</sup> In coping with risks, rational actors would process risks cognitively, focusing on the consequences of their decisions.<sup>149</sup> They would compute the expected utility of each option taking into account the likelihood of particular outcomes, including unwanted contingencies. But Loewenstein argues that, in some instances, emotions influence decisions more than cognitive assessments of risk.<sup>150</sup> Moreover, the factors that trigger a strong emotional response to a particular risk often have little to do with cognitive processing.<sup>151</sup> Cognitive assessments of risk depend on expected utility whereas emotional responses are heavily influenced by mental images of possible outcomes.<sup>152</sup> Thus, the notion of risk as feelings helps explain regulatory overreaction to otherwise minor risks that are particularly vivid and prominent in public discourse.

Although not directly related to risk regulation, the distribution of U.S. disaster relief funds also demonstrates the importance of salience and vividness effects on public policy. Thomas Eisensee and David Stromberg find that the allocation of these funds to victims of natural disasters in foreign countries depends significantly on news coverage of the disaster.<sup>153</sup> As a result, disasters that occur at the same time as other newsworthy events such as the Olympics are less likely to prompt relief efforts.<sup>154</sup> Additionally, disasters such as volcanoes that are accompanied by spectacular events that make them more newsworthy are more likely to prompt relief efforts than disasters that are less spectacular and therefore less newsworthy such as famines.<sup>155</sup>

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<sup>148</sup> George F. Loewenstein et al., *Risk as Feelings*, 127 PSYCHOL. BULL. 267, 274 (2001).

<sup>149</sup> For a discussion of the standard economic model of risky choices, see DAVID BESANKO & RONALD R. BRAEUTIGAM, MICROECONOMICS 627–33 (4th ed. 2011); see also Loewenstein et al., *supra* note 148, at 267.

<sup>150</sup> Loewenstein et al., *supra* note 148, at 274.

<sup>151</sup> *Id.* at 271.

<sup>152</sup> *Id.*; cf. PLOUS, *supra* note 64, at 139–40 (reviewing evidence that the general public fears nuclear power more than experts because lay people assess risks by focusing on “catastrophic potential” and “threat to future generations,” whereas experts focus on annual fatalities); CASS R. SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT 45 (2002) [hereinafter SUNSTEIN, RISK AND REASON] (discussing how emotions influence reactions to risks and concluding that “people’s reactions to risks are often based mostly on the badness of the outcome and the vividness of that outcome rather than on the probability of its occurrence”).

<sup>153</sup> Thomas Eisensee & David Strömberg, *News Droughts, News Floods, and U.S. Disaster Relief*, 122 Q.J. ECON. 693, 721–22 (2007).

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

<sup>155</sup> *Id.* at 722–23. What makes an event newsworthy? Evidence suggests a bad-news bias. Media coverage is skewed in favor of reporting negative events such as crimes, which we find more interesting because of our naturally evolved tendency to pay more attention to threats and negative information than to positive information. GILOVICH ET AL., SOCIAL PSYCHOLOGY, *supra* note 66, at 114–19.

### C. Ideological Bias: Clinging to Certain Beliefs

Most people are not neutral analysts who rationally evaluate the costs and benefits of government policies in an open-minded way. Instead, they are attached to certain preconceived ideas which constitute their worldview or more narrowly their political ideology. Ideology distorts their view of reality and shapes their policy preferences, a phenomenon that we refer to as ideological bias. Ideological bias sometimes manifests itself as a mild form of confirmation bias, which involves “the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.”<sup>156</sup> At other times, ideological bias involves a passionate commitment to particular ideas, which may rival religious devotion.<sup>157</sup>

What causes ideological bias? One possibility is that some of the beliefs that people hold result from motives other than a love for the truth.<sup>158</sup> People may have preferences over beliefs meaning that they enjoy holding those beliefs.<sup>159</sup> In some cases, holding certain beliefs furthers our material self-interest or enhances our reputation and social standing. In other cases, specific beliefs improve our self-image or confer other important psychological benefits, including feelings of comfort, flattery, and excitement, so we resist changing them.

If people cherish certain beliefs, then they may also engage in motivated reasoning.<sup>160</sup> People often search for and interpret information in a way that confirms their prior views, they ignore disconfirming information, and they rationalize conclusions that they in fact reached for other reasons.<sup>161</sup>

<sup>156</sup> For a detailed review of the literature on confirmation bias, see Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

<sup>157</sup> See CAPLAN, MYTH, *supra* note 15, at 14–16.

<sup>158</sup> For a review of the evidence regarding various sources of beliefs, see *id.* at 14–16, 115–19.

<sup>159</sup> *Id.* at 14–18, 114–41; George A. Akerlof, *The Economics of Illusion*, 1 ECON. & POL. 1 (1989) (discussing the implications for public policy of evidence suggesting that people choose their beliefs partially to feel good about themselves); George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307, 307 (1982) (arguing that “persons not only have preferences over states of the world, but also over their beliefs about the state of the world”); *cf.* ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 39–45 (Indep. Inst. 2013) (arguing that people adhere to an ideology due to a need for identity and belonging to a group).

<sup>160</sup> For a discussion of motivated reasoning in the context of political beliefs, see generally Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POL. SCI. 755 (2006).

<sup>161</sup> *Id.* at 760–67. See generally GILOVICH ET AL., SOCIAL PSYCHOLOGY, *supra* note 66, at 299–300; Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990) (providing a detailed discussion of motivated reasoning); Drew Westen et al., *Neural Bases of Motivated Reasoning: An fMRI Study of Emotional Constraints on Partisan Political Judgment in the 2004 U.S. Presidential Election*, 18 J. COGNITIVE NEUROSCIENCE 1947 (2006) (providing neuroscientific evidence of motivated reasoning).

Motivated reasoning is constrained by the ability to think of apparently reasonable justifications for particular views.<sup>162</sup> In other words, people can be persuaded by strong counterevidence to change their minds, but once a view becomes firmly rooted, persuasion is difficult, especially if the person in question is knowledgeable about the issue, has publicly committed to a particular position, and has defended it from prior attacks.<sup>163</sup>

If ideological bias is a form of motivated reasoning, then its prevalence in politics can be explained by the low personal stakes in voting.<sup>164</sup> In some contexts, rigid adherence to erroneous beliefs comes at a high price. If you believe that the world will end tomorrow, you will find yourself in trouble if you quit your job today and your prediction then proves false. People have an incentive to avoid mistaken beliefs that impose substantial personal costs. But in politics, false beliefs generally do not entail negative consequences for those who hold them. In particular, because a single vote rarely affects election outcomes, voters who hold false beliefs about political matters suffer no personal harm as a result. Moreover, most or all of the damage falls on others who are adversely affected by the bad laws that these beliefs engender.

An alternative explanation of ideological bias is that it results from path dependent filtering of information over time.<sup>165</sup> According to this view, an ideology is a schematic template that allows a person to make sense of the complex environment in which he finds himself. The particular ideology that a given person embraces may result from random events, such as having read Karl Marx at a young age as opposed to Ayn Rand. But once it takes root, the ideology constitutes the interpretive framework through which people process (filter and organize) new information. An ideology facilitates comprehension of otherwise confusing events by allowing a person to focus on “the relatively small class of information that fits the schemas.”<sup>166</sup> People notice information congruent with their ideology, but dismiss incongruent information as unimportant or incomprehensible. Over time, this process becomes self-reinforcing as a growing database of congruent information confirms that the person’s ideology is correct, possibly leading to a spiral of conviction.<sup>167</sup> This may explain why those who are most informed about politics tend to be the

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<sup>162</sup> Kunda, *supra* note 161, at 480.

<sup>163</sup> GILOVICH ET AL., *SOCIAL PSYCHOLOGY*, *supra* note 66, at 299–303; Taber & Lodge, *supra* note 160, at 757.

<sup>164</sup> See CAPLAN, *MYTH*, *supra* note 15, at 114–40.

<sup>165</sup> See Jeffrey Friedman, *Motivated Skepticism or Inevitable Conviction? Dogmatism and the Study of Politics*, 24 *CRITICAL REV.* 131, 134 (2012) [hereinafter Friedman, *Dogmatism*]; cf. Baron, *supra* note 94, at 195–97 (discussing “myside bias,” which is a bias toward possible answers that initially seem correct; which results in biased search for, recall of, and interpretation of new information; and which explains both motivated and unmotivated errors).

<sup>166</sup> Friedman, *Dogmatism*, *supra* note 165, at 133.

<sup>167</sup> *Id.* at 134.

most biased in evaluating political information.<sup>168</sup> Becoming informed often means becoming close-minded. Viewed in this way, ideological bias is a sort of inadvertent dogmatism that is inevitable even for those motivated to hold accurate beliefs.<sup>169</sup>

Whatever its causes, ideological bias affects policy preferences as well as how people interpret new information. In one study, researchers sorted subjects into two groups based upon whether they favored capital punishment or not.<sup>170</sup> The researchers then described to the subjects two studies that reached opposing conclusions about whether capital punishment deters crime.<sup>171</sup> The subjects tended to criticize the study that disconfirmed their prior position while showing less skepticism toward the other study.<sup>172</sup> Surprisingly, the subjects became more polarized in their views of capital punishment after participating in the experiment.<sup>173</sup>

Ideological bias also influences the sources of political information that people turn to. People (especially those who are well-educated or who are knowledgeable about and interested in politics) tend to discuss politics only with those who agree with them.<sup>174</sup> This phenomenon has consequences because reasoning improves when a person knows that he will have to present his case to a well-informed audience who might not share his views. The tendency to talk only to those who agree leads to intellectual laziness and irrational thinking.<sup>175</sup>

<sup>168</sup> For a discussion of bias among informed voters, see Taber & Lodge, *supra* note 160, at 760–67.

<sup>169</sup> Ivo Bischoff and Lars-H.R. Siemers offer a third possible explanation for why people cling to particular views, specifically with respect to economic policy. They argue that people have simple mental models that represent how the economy works. People use these models to predict the economic effects of particular policies such as free trade. So views about free trade stem from conclusions reached based upon these simple models. Even when the evidence suggests that a person's economic model is wrong, he will not be quick to change it because he has little incentive to ensure the model is a good one. In addition, elements of the economic model (e.g., the beliefs and assumptions on which it is based) may be relevant to models of other fields in life so that changing the economic model would require updating these other models, many of which may have greater personal significance for the person than the economic model. Bischoff & Siemers, *supra* note 76, at 175.

<sup>170</sup> Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2100 (1979).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 2101–03.

<sup>173</sup> *Id.* at 2102–04.

<sup>174</sup> DIANA C. MUTZ, HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY 9–10, 29–41 (2006).

<sup>175</sup> JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 74–76 (2013); *cf.* Baron, *supra* note 94, at 196 (discussing experimental evidence that subjects instructed to think of reasons supporting both sides of an argument tend to exhibit better judgment and fewer biases).

In addition, ideological bias impacts media coverage of politics. People prefer media sources that are biased in favor of their ideology.<sup>176</sup> Apparently, people wish to be entertained, to have their existing beliefs confirmed, and to take part in bashing the opposition. As a result, little demand exists for neutral media sources that objectively evaluate policy proposals.<sup>177</sup> As with politicians, journalists probably have some slack to challenge their audience's preconceived ideas. But this slack is limited and may be diminishing over time as a more competitive marketplace produces news outlets that carefully cater to consumers' preferences, including their ideological preferences.<sup>178</sup> Moreover, journalists may abuse any slack that they possess, e.g., by promoting their own biased views.<sup>179</sup>

As a result of ideological bias, the legislative process will often produce laws that result more from the prevailing ideology than from careful analysis of costs and benefits.<sup>180</sup> Robert Higgs describes an important example of this phenomenon.<sup>181</sup> Higgs notes that the major crises in American history, including the two world wars and the Great Depression, coincided with rapid government growth.<sup>182</sup> After these crises ended, government shrank but the retrenchment was incomplete. Higgs argues that each crisis broke down ideological resistance to bigger government and increased willingness to tolerate programs and a level of government power that would have been unthinkable before the crisis.<sup>183</sup> In the 1890s, the dominant ideology in the United States held that government had a very limited mission. But by the end of the 20th century, that view had changed dramatically. In particular, Higgs

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<sup>176</sup> Shanto Iyengar & Kyu S. Hahn, *Red Media, Blue Media: Evidence of Ideological Selectivity in Media Use*, 59 J. COMM. 19, 19 (2009).

<sup>177</sup> SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 88.

<sup>178</sup> Daniel Sutter, *Can the Media Be So Liberal? The Economics of Media Bias*, 20 CATO J. 431, 448–49 (2001).

<sup>179</sup> See Valentino Larcinese, Riccardo Puglisi & James M. Snyder Jr., *Partisan Bias in Economic News: Evidence on the Agenda-Setting Behavior of U.S. Newspapers*, 95 J. PUB. ECON. 1178, 1188 (2011) (finding “strong evidence that newspapers endorsing Democratic candidates give less coverage to high unemployment (and more coverage to low unemployment) under Clinton than under George W. Bush, as compared to Republican-leaning newspapers”); Sutter, *supra* note 178, at 441–45 (presenting evidence of liberal bias among journalists and describing how it may affect news coverage).

<sup>180</sup> See, e.g., HIGGS, *supra* note 159, at 43–44 (arguing that debates over the essential character of the economic order and distributional conflicts within the existing economic order “involve not simply questions of what is technically better or worse; rather, they are seen to involve good and evil”).

<sup>181</sup> See generally *id.* at 123–257.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 67–72; cf. Choi & Pritchard, *supra* note 99, at 30–33 (arguing that bureaucrats at the Securities and Exchange Commission are biased in favor of interpreting new evidence as justifying the agency's prior regulatory actions); Cooper & Kovacic, *supra* note 16, at 46–47 (arguing that once adopted, policies are hard to change due to status quo bias).

provides evidence that crises and the ideological changes that they brought about substantially and permanently increased the scope and importance of the military-industrial complex, labor laws, the welfare state, the federal income tax, agricultural policy, and numerous other government activities and programs.<sup>184</sup>

Given that ideologies are so important, the question arises which types of ideas are likely to crystallize into an influential ideology. David Hirshleifer argues that “ideologies are assemblies of more basic memes—very simple propositions or ideas that affect our thoughts and actions.”<sup>185</sup> In addition, “[i]deologies exist because they are good at catching our cognitive and emotional hooks, which enables them to spread from person to person.”<sup>186</sup>

To illustrate how ideologies form and spread, Hirshleifer describes the financial ideology of anti-short-termism, which is the belief that public companies in the United States are too focused on the short run.<sup>187</sup> Hirshleifer argues that anti-short-termism stems from five simple propositions: “that firms are focused on short-term stock prices, that firms underinvest, that firms don’t innovate enough, that firms are overleveraged, and that the stock market is fixated upon short-term information signals (an informational inefficiency).”<sup>188</sup> Hirshleifer presents evidence that these propositions are incorrect. Yet anti-short-termism has been popular for decades and persists to this day.

Hirshleifer argues that anti-short-termism is impervious to the evidence against it because its basic memes manipulate our psychological biases. They exploit the high esteem in which we hold self-discipline and foresight, and they recruit “our preexisting mental equipment for thinking about morality and sin, folly and wisdom, ant and grasshopper.”<sup>189</sup> This is why public discussions of short-termism are often framed in moral language. Moreover, at the individual firm level, it is easy to attribute virtually any bad outcome to short-termism despite the general lack of evidence in support of its fundamental tenets.<sup>190</sup>

As this example illustrates, ideologies can be problematic because they often have little connection with reality. Their premises may not be supported by evidence, and the policies that they lead their adherents to support can have adverse (sometimes disastrous) consequences. Yet people (consciously or

<sup>184</sup> See generally HIGGS, *supra* note 159, at 123–236. In addition, Higgs describes in detail how the world wars and the Great Depression produced changes in constitutional law that dramatically and permanently increased the government’s power to interfere with private property rights and freedom of contract.

<sup>185</sup> Hirshleifer, *supra* note 16, at 867.

<sup>186</sup> *Id.*; cf. Tasic, *Growth of Government*, *supra* note 109, at 554 (“[M]any common misconceptions and fallacies are intuitively appealing to and immediately accepted by most people and, as a result, are very easily spread.”).

<sup>187</sup> Hirshleifer, *supra* note 16, at 867–68.

<sup>188</sup> *Id.* at 868.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 869.

unconsciously) cling to their respective ideologies, which are very difficult to dislodge.

*D. Action Bias: Irrationally Demanding Action*

Rather than focusing on the expected costs and benefits of their behavior, people sometimes succumb to an irrational penchant for action—a phenomenon known as action bias.<sup>191</sup> In some instances, taking action simply seems normal. In particular, people often feel compelled to take action following a bad outcome.<sup>192</sup> Problems demand solutions. As a result, if a sports team loses two consecutive games, people predict that the team's coach will feel more responsible for the second loss if he failed to make changes as a result of the first.<sup>193</sup> This bias in favor of action can impair judgment because inaction is sometimes the best response to a perceived problem.

Action bias also manifests itself in situations in which taking action facilitates claiming credit for a good outcome. In one experiment, Anthony Patt and Richard Zeckhauser gave subjects the option of using limited funds to either clean up a polluted resource (water or air) or to preserve a resource that was currently unpolluted but that was threatened by pollution.<sup>194</sup> The results indicated that people generally favor cleaning up a polluted resource over preserving an unpolluted resource.<sup>195</sup> Patt and Zeckhauser concluded that cleaning up a polluted resource has an obvious impact that is easy to visualize, whereas preserving an unpolluted resource avoids a nondemonstrable loss.<sup>196</sup> People are biased in favor of taking action when doing so allows them to claim credit for demonstrable gains.<sup>197</sup>

Action bias sometimes leads to unwarranted government intervention. If a problem arises, the public demands that government respond without much concern over whether action is better than inaction.<sup>198</sup> By the same token,

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<sup>191</sup> Michael Bar-Eli et al., *Action Bias Among Elite Soccer Goalkeepers: The Case of Penalty Kicks*, 28 J. ECON. PSYCHOL. 606, 608 n.2 (2007); see also Anthony Patt & Richard Zeckhauser, *Action Bias and Environmental Decisions*, 21 J. RISK & UNCERTAINTY 45, 45–47 (2000); Marcel Zeelenberg et al., *The Inaction Effect in the Psychology of Regret*, 82 J. PERSONALITY & SOC. PSYCHOL. 314, 317–24 (2002). For further discussion of action bias and government failure, see Tasic, *Are Regulators Rational?*, *supra* note 95, 3–4.

<sup>192</sup> Zeelenberg et al., *supra* note 191, at 317.

<sup>193</sup> *Id.* at 317–23.

<sup>194</sup> See Patt & Zeckhauser, *supra* note 191, at 55–59.

<sup>195</sup> *Id.* at 58.

<sup>196</sup> *Id.* at 64–65.

<sup>197</sup> *Id.* at 50–52.

<sup>198</sup> Cf. Hirshleifer, *supra* note 16, at 864 (“The public wants government to do something about problems, which implicitly assumes that a useful intervention exists.”); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1591–94 (2005) (describing how various economic crises have led to the adoption of financial regulation that is arguably ineffective and excessively costly). On the other hand, status quo bias



politicians are often quick to supply legislation, which allows them to take credit for addressing the problem that has captured the public's attention.

A prominent example of a law that resulted from action bias is the Sarbanes-Oxley Act (SOX). Roberta Romano describes in detail how SOX was hastily adopted in response to the scandals related to Enron and WorldCom, two companies that collapsed amidst allegations of accounting fraud and insider self-dealing.<sup>199</sup> Romano argues that Congress was overly eager to pass legislation in the wake of the Enron and WorldCom scandals.<sup>200</sup> As a result, SOX “was not the focus of careful deliberation by Congress . . . [and] was emergency legislation enacted under conditions of limited legislative debate, during a media frenzy involving several high-profile corporate fraud and insolvency cases.”<sup>201</sup> Moreover, Congress ignored evidence that SOX's corporate governance provisions simply would not work.<sup>202</sup> As a result, Congress adopted a law that is arguably ineffective and excessively costly. In particular, it diverts the attention of corporate managers and directors from providing business guidance to overseeing legal compliance,<sup>203</sup> and it may also contribute to a reduction in cross listings by foreign firms on U.S. stock exchanges.<sup>204</sup>

#### *E. Extremeness Aversion: Gravitating Toward “Moderate” Policies*

The rational actor model assumes that choices are not affected by irrelevant options. Imagine a choice between options A and B. If a rational decision maker would choose A when a third option, C, is not available, then she would not choose B simply because C becomes available. In reality, by changing the decision frame, irrelevant options sometimes alter decisions.

One instance of this phenomenon is extremeness aversion: “The attractiveness of an option is enhanced if it is an intermediate option in the

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creates reluctance to modify existing policies. Cooper & Kovacic, *supra* note 16, at 46–47. In other words, crises motivate the adoption of policies that, once adopted, become difficult to dislodge absent another crisis. Stephen Choi and Adam Pritchard provide evidence of this phenomenon in regulatory action (and inaction) by the Securities and Exchange Commission. Choi & Pritchard, *supra* note 99, at 27 (describing this regulatory approach as “put out fires and ‘don’t fix what ain’t broken’”).

<sup>199</sup> Romano, *supra* note 198, at 1523.

<sup>200</sup> *Id.* at 1525–26 (“The suggestion from the media was that the priority of members of Congress was to enact something, with the specific content of less concern and importance.”).

<sup>201</sup> *Id.* at 1528.

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

<sup>203</sup> See, e.g., *id.* at 1587–91 (discussing the costs imposed on firms as a result of Sarbanes-Oxley); Tom Perkins, *The “Compliance” Board*, WALL ST. J. (Mar. 2, 2007), <http://online.wsj.com/articles/SB117280725006124469>.

<sup>204</sup> Joseph D. Piotroski & Suraj Srinivasan, *Regulation and Bonding: The Sarbanes-Oxley Act and the Flow of International Listings*, 46 J. ACCT. RES. 383, 387–88 (2008) (finding that Sarbanes-Oxley led to fewer cross listings by small foreign firms).

choice set and is diminished if it is an extreme option.”<sup>205</sup> For example, in one study, participants choosing between a cheap, low-quality camera and a higher-priced, medium-quality camera were equally split. But when researchers added an even more expensive, high-quality camera to the choice set, participants became substantially more likely to choose the medium-quality camera.<sup>206</sup>

In politics, extremeness aversion is yet another reason that voters and politicians fail to focus on the consequences of policies. Regardless of their likely consequences, moderate policies are attractive simply because voters and politicians perceive them as lying between two extremes.

Mario Rizzo and Douglas Whitman argue that extremeness aversion facilitates the slide down the slippery slope toward more intrusive government.<sup>207</sup> Political activists favoring regulation initially propose a policy that represents a minor intrusion with relatively low costs imposed on the regulated party. They frame the proposal as a middle ground between extreme laissez-faire and more burdensome interventions. But once adopted, the moderate policy now becomes the new laissez-faire position and the middle ground shifts in the direction of greater intervention creating a dynamic that leads to additional regulation.

To illustrate this dynamic, Rizzo and Whitman describe the gradual progression of smoking restrictions related to air travel.<sup>208</sup> In 1973, the Civil Aeronautics Board mandated separate sections on airplanes for smokers and nonsmokers. This step was a compromise between the extreme positions of laissez-faire and a smoking ban, which would have imposed significant costs on smokers. In subsequent debates, the separation of smokers from nonsmokers became the new laissez-faire position, and the middle ground shifted in the direction of a total ban. In 1988, the Federal Aviation Administration (FAA) increased the costs imposed on smokers by banning smoking on all scheduled domestic flights shorter than two hours. In 1990, the FAA banned smoking on all scheduled domestic flights no matter their duration, and in 2000, the Department of Transportation extended the ban to all U.S. international flights. Rizzo and Whitman argue that incremental shifts in the middle ground led to a policy that once would have been politically unacceptable.

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<sup>205</sup> Itamar Simonson & Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 J. MARKETING RES. 281, 281 (1992).

<sup>206</sup> *Id.* at 290.

<sup>207</sup> Mario J. Rizzo & Douglas Glen Whitman, *Little Brother Is Watching You: New Paternalism on the Slippery Slopes*, 51 ARIZ. L. REV. 685, 729–32 (2009).

<sup>208</sup> *Id.* at 731–32.

F. *In-Group Bias: Us Versus Them*

In-group bias (sometimes called ethnocentrism) “is a predisposition to divide the human world into in-groups and out-groups . . . a readiness to reduce society to us and them.”<sup>209</sup> Stated succinctly,

Members of in-groups (until they prove otherwise) are assumed to be virtuous: friendly, cooperative, trustworthy, safe, and more. Members of out-groups (until they prove otherwise) are assumed to be the opposite. . . . Symbols and practices become objects of attachment and pride when they belong to the in-group and objects of condescension, disdain, and (in extreme cases) hatred when they belong to out-groups.<sup>210</sup>

In-group bias has multiple sources. First, it has a strong genetic component, which is likely the result of human evolution and the fact that early humans sought security and survival through group living.<sup>211</sup> Second, stereotyping of out-groups may result from cognitive processes that are often automatic and that stem from the need to rely upon simplified categories (such as us versus them) to conserve mental resources while processing otherwise complex stimuli.<sup>212</sup> Third, people are motivated to engage in in-group bias when groups are competing for scarce resources.<sup>213</sup> Fourth, because group membership influences our sense of identity, we can increase our self-esteem by boosting the status of the groups to which we belong and denigrating the members of out-groups.<sup>214</sup> Similarly, in-group bias is related to self-serving attribution bias.<sup>215</sup> People tend to think that they are right and others are wrong. By extension, people also tend to think that their in-group is right and that out-groups are wrong.<sup>216</sup> Fifth, people who are frustrated by some setback may displace the accompanying aggression that they experience onto relatively powerless out-groups because those groups make safe targets.<sup>217</sup> Finally, in-group bias may be partially an outgrowth of the authoritarian personality.

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<sup>209</sup> DONALD R. KINDER & CINDY D. KAM, *US AGAINST THEM: ETHNOCENTRIC FOUNDATIONS OF AMERICAN OPINION* 8 (2010). For a neuroscientific analysis of in-group bias, see generally Pascal Molenbergs, *The Neuroscience of In-Group Bias*, 37 *NEUROSCIENCE & BIOBEHAVIORAL REVS.* 1530 (2013).

<sup>210</sup> KINDER & KAM, *supra* note 209, at 8.

<sup>211</sup> *Id.* at 22–29, 32–35.

<sup>212</sup> GILOVICH ET AL., *SOCIAL PSYCHOLOGY*, *supra* note 66, at 428–43.

<sup>213</sup> *Id.* at 415–20.

<sup>214</sup> *Id.* at 422–25.

<sup>215</sup> Hirshleifer, *supra* note 16, at 861.

<sup>216</sup> *Id.*; AARON T. BECK, *PRISONERS OF HATE: THE COGNITIVE BASIS OF ANGER, HOSTILITY, AND BIAS* 141–54 (1999).

<sup>217</sup> GILOVICH ET AL., *SOCIAL PSYCHOLOGY*, *supra* note 66, at 426–27.

Authoritarians favor group authority and uniformity over individual autonomy and diversity, and they are also somewhat more likely to exhibit in-group bias.<sup>218</sup>

Whatever its sources, in-group bias is empirically important in politics. For example, Donald Kinder and Cindy Kam present evidence that even after controlling for various other explanatory variables, people who tend to view their race as superior to other races are more likely to support the war on terrorism.<sup>219</sup> In-group bias also causes people to interpret information in a way that serves their in-group. And in combination with the desire to blame others for bad outcomes, in-group bias leads to scapegoating of out-groups.<sup>220</sup>

Scholarship in behavioral public choice has devoted particular attention to two forms of in-group bias—partisan bias and xenophobia. We discuss each of these in turn.

### 1. Partisan Bias

Ilya Somin argues that among the group of well-informed voters, many are “political fans,” whom he analogizes to sports fans.<sup>221</sup> Political fans acquire political information not because they want to contribute to the public good of a well-informed citizenry or because they expect to influence the outcome of elections. Instead, they view political information as a consumption good. They “derive enjoyment from rooting for their preferred parties, candidates, ideologies, and interest groups, while deriding the opposition.”<sup>222</sup> In addition, “[t]hey may also derive satisfaction from having their preexisting views validated, and from a sense of affiliation with a group of like-minded people.”<sup>223</sup> We refer to the phenomenon of political fandom as partisan bias, and it helps explain why the most important determinant of political knowledge is not education, but the person’s level of interest in politics.<sup>224</sup>

In Section C of this Part, we discussed how people cling to their ideology. Ideological bias is an aspect of partisan bias, but partisan bias is a broader phenomenon. Partisans are attached not only to certain ideas, but also

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<sup>218</sup> KINDER & KAM, *supra* note 209, at 64–65.

<sup>219</sup> *Id.* at 73–104, 182–99; *see also* Wallerstein, *supra* note 44, at 43–44 (discussing evidence that voters “attach greater weight to the welfare of their own racial group than to members of other racial groups”).

<sup>220</sup> Hirshleifer, *supra* note 16, at 861.

<sup>221</sup> SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 78.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 78–79; *see also* Cowen, *supra* note 28, at 437–40. This point is consistent with what social psychologists refer to as the value-expressive function of attitudes. We belong to certain reference groups whose opinions matter to us and which we join in part to express our attitudes and values. GILOVICH ET AL., SOCIAL PSYCHOLOGY, *supra* note 66, at 277.

<sup>224</sup> SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 82–83.

to a particular political party and to certain politicians and special interest groups. As a result, partisan bias is a type of in-group bias.

Partisan bias influences how people interpret new information and even what facts they remember.<sup>225</sup> Somin cites evidence that “Republican partisans tend to assign credit to Republican office-holders for any positive events that occur, while being reluctant to blame them for negative ones. Democratic partisans, of course, have the opposite bias.”<sup>226</sup> Voters also claim that unemployment and inflation rates are higher when the sitting president is from the party opposite their own.<sup>227</sup> And voters are more likely to remember facts that reflect poorly on a president from the opposite party.<sup>228</sup>

Partisan bias further undermines the argument discussed in Part II that democracy works better when voters focus on outcomes rather than policies. Partisan bias prevents voters from accurately assessing the performance of incumbent politicians. Moreover, independents are not in a good position to offset the effects of partisan voters because independents tend to have the lowest levels of political knowledge.<sup>229</sup>

Partisan bias, combined with political ignorance, also makes the public susceptible to misinformation and, in particular, contributes to a proliferation of conspiracy theories.<sup>230</sup> For example, many Republicans believe that President Obama was not born in the United States and is therefore ineligible to be president.<sup>231</sup> And many Democrats believe that President Bush knew in advance about the 9/11 terrorist attacks.<sup>232</sup>

In addition, partisan bias helps in understanding the behavior of lobbyists. In some cases, lobbyists may attempt to persuade those who disagree with them. But the primary function of lobbying may be to cement and maintain ties among people who already agree with one another.<sup>233</sup> In other words, lobbyists seek to reinforce and exploit in-group bias. This is consistent with the surprising finding that legislators generally do not receive large

<sup>225</sup> More generally, psychologists have shown that our existing attitudes influence what we pay attention to and remember. GILOVICH ET AL., *SOCIAL PSYCHOLOGY*, *supra* note 66, at 279–80.

<sup>226</sup> *Id.* at 104–05 (citations omitted).

<sup>227</sup> *Id.* at 105.

<sup>228</sup> *Id.* at 96.

<sup>229</sup> *Id.* at 105, 112.

<sup>230</sup> *Id.* at 84–88; *cf.* HIGGS, *supra* note 159, at 48–49 (discussing the influence of opinion leaders on public opinion and of the emotional character of ideological rhetoric).

<sup>231</sup> Humphrey Taylor, “Wingnuts” and President Obama, THE HARRIS POLL (Mar. 23, 2010), [http://www.harrisinteractive.com/vault/Harris\\_Interactive\\_Poll\\_Politics\\_Wingnuts\\_2010\\_03.pdf](http://www.harrisinteractive.com/vault/Harris_Interactive_Poll_Politics_Wingnuts_2010_03.pdf).

<sup>232</sup> 22% Believe Bush Knew About 9/11 Attacks in Advance, RASMUSSEN REPORTS (May 4, 2007), [http://www.rasmussenreports.com/public\\_content/politics/current\\_events/bush\\_administration/22\\_believe\\_bush\\_knew\\_about\\_9\\_11\\_attacks\\_in\\_advance](http://www.rasmussenreports.com/public_content/politics/current_events/bush_administration/22_believe_bush_knew_about_9_11_attacks_in_advance).

<sup>233</sup> Schnellenbach & Schubert, *Behavioral Public Choice*, *supra* note 9, at 13; Frans van Winden, *On the Economic Theory of Interest Groups: Towards a Group Frame of Reference in Political Economics*, 100 *PUB. CHOICE* 1, 20–21 (1999).

campaign contributions for their votes and that lobbyists devote substantial resources to legislators who are already favorable to their preferred policy position.<sup>234</sup>

## 2. Xenophobia

Xenophobia, or fear of and hostility toward foreigners, is an intense form of in-group bias. Xenophobia manifests itself in many ways, including economic policy. As discussed in the Introduction, Bryan Caplan provides evidence that voters suffer from “antiforeign bias, a tendency to underestimate the economic benefits of interaction with foreigners.”<sup>235</sup> Antiforeign bias causes voters to support harmful protectionist policies.<sup>236</sup> And the temptation to scapegoat foreign competitors for domestic economic ills becomes especially powerful during recessions when unemployment is high.<sup>237</sup>

In addition, exploiting xenophobia is a popular technique for marketing special interest legislation to the public. Consider farm subsidies. As discussed in more detail below, these subsidies persist despite staunch opposition by economists, who argue that they inefficiently transfer money from consumers and taxpayers to large corporations and farmers, many of whom are wealthy. One reason why farm subsidies are so popular is that politicians present them in a way that exploits xenophobia. A popular argument is to suggest that farm subsidies are important to national defense because they reduce reliance on food imports and ensure “a safe and reliable food supply that is home grown.”<sup>238</sup>

### G. Ignoring Hidden Taxes

Advocates of limited government have long argued that the government’s use of hidden or low-salience taxes causes voters to systematically underestimate the cost of government programs.<sup>239</sup> The idea is

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<sup>234</sup> For evidence supporting these findings, see Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 69–71 (2006).

<sup>235</sup> CAPLAN, MYTH, *supra* note 15, at 36; Caplan, *Rational Irrationality*, *supra* note 15, at 15–16.

<sup>236</sup> In a survey of members of the American Economic Association, 87.5% agreed that the United States should eliminate tariffs and other trade barriers. Whaples, *supra* note 78, at 1. On the other hand, the public generally opposes free trade. See CAPLAN, MYTH, *supra* note 15, at 51.

<sup>237</sup> CAPLAN, MYTH, *supra* note 15, at 37. In addition, the degree of antiforeign bias varies by country depending on physical, linguistic, and cultural similarity. Americans worry more about economic competition from Japan and Mexico than from Canada and England. *Id.* at 39.

<sup>238</sup> Mary Clare Jalonick, *Inside Washington: Farm Subsidies’ Staying Power*, BOSTON.COM (Nov. 14, 2010), [http://www.boston.com/business/articles/2010/11/14/inside\\_washington\\_farm\\_subsidies\\_staying\\_power/](http://www.boston.com/business/articles/2010/11/14/inside_washington_farm_subsidies_staying_power/) (quoting Representative Vicky Hartzler of Missouri).

<sup>239</sup> For reviews of the literature on tax salience and the related concept of fiscal illusion, see MUELLER, *supra* note 23, at 527–29; Brian E. Dollery & Andrew C. Worthington, *The Empirical*

that politicians use deceptive techniques such as complex tax structures, deficit spending, and indirect taxes to conceal costs and expand government to a size that informed voters would not condone.<sup>240</sup>

Despite its intuitive appeal, the notion that hidden taxes are dangerous and deceptive becomes difficult to sustain if we assume that voters are rational. Rational voters would not systematically underestimate their taxes even if the amount paid was less than obvious. Some might overestimate and some might underestimate, but in the aggregate, rational voters would accurately perceive government's true cost.

That conclusion changes, however, once we acknowledge irrationality. Scholars have only recently begun to identify the psychological mechanisms underlying tax salience effects.<sup>241</sup> But the simplest explanation is that, as with other information, voters tend to ignore taxes that are implicit or otherwise less than obvious. They do not consider who actually pays hidden taxes.<sup>242</sup> In other words, when taxes are hidden using the techniques described above, more voters underestimate these taxes than overestimate them. In the aggregate, errors by individual voters do not cancel, and hidden taxes cause voters to conclude that government costs less than it in fact does.

Unlike most topics in behavioral public choice, hidden taxes have attracted significant attention from legal scholars and mainstream economists. As a result, the tax salience literature is large and growing, and we will not review it in detail. We simply note that the empirical evidence suggests that tax salience effects are real, but the size and policy significance of these effects remains uncertain.

#### *H. Ignoring Hidden Regulatory Costs*

The costs of regulation may be even less salient than hidden taxes. Richard Posner made a similar observation over 40 years ago.<sup>243</sup> Posner pointed out that regulation often substitutes for taxation. When the government mandates that a regulated firm provide a service to someone at less than its cost, the firm generally passes on the resulting loss to its customers by charging

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*Analysis of Fiscal Illusion*, 10 J. ECON. SURVS. 261, 290–93 (1996); Brian Galle, *Hidden Taxes*, 87 WASH. U. L. REV. 59 (2009); David Gamage, *On the Future of Tax Salience Scholarship: Operative Mechanisms and Limiting Factors*, 41 FLA. ST. L. REV. 173, 176–79 (2013); David Gamage & Darien Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 TAX L. REV. 19, 33–54 (2011).

<sup>240</sup> As discussed in Section I of this Part, deficit spending may not be forced upon the public by deceitful politicians eager to expand government. Rather, it may be a byproduct of the public's strong demand for government programs that the public is not willing to pay for in higher taxes.

<sup>241</sup> Gamage & Shanske, *supra* note 239, at 179–93; McCaffery & Baron, *Thinking About Tax*, *supra* note 56, at 119–20.

<sup>242</sup> McCaffery & Baron, *Thinking About Tax*, *supra* note 56, at 127.

<sup>243</sup> Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22, 43 (1971).

higher prices for the products they purchase.<sup>244</sup> This creates “internal subsidization,” which can “be viewed as an exertion of state power whose purpose, like that of other taxes, is to compel members of the public to support a service that the market would provide at a reduced level, or not at all.”<sup>245</sup> Posner recognized that “[a] troubling characteristic of the internal subsidy is its low visibility, which impedes responsible review. The amounts and recipients of direct subsidies are ordinarily specifically stated, but this is not the case with internal subsidies.”<sup>246</sup>

The Adamson Act provides an interesting historical example of taxation by regulation.<sup>247</sup> Congress adopted the Act during the Woodrow Wilson administration, and its purpose was to avert a threatened strike by railroad workers. The Act temporarily required railroad companies to increase the wages they paid. Congress could have accomplished its objective by having the Treasury write checks to railroad workers to supplement their pay. But doing so would have made the cost of the Act explicit and would have clearly identified who would foot the bill for the scheme (i.e., federal taxpayers).

The problem of low-salience regulatory costs is also reflected in a tendency to focus on isolated aspects of government interventions, ignoring their systemic effects. As a result, political actors systematically underestimate the unintended consequences of regulation.<sup>248</sup> In particular, they frequently fail to account for the fact that intervention is subject to unraveling, which occurs when individuals take steps to offset the effects of regulation (usually at some

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<sup>244</sup> *Id.* at 29.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 43; *cf.* Gamage & Shanske, *supra* note 239, at 51–53 (“[V]oters may not appreciate the burdens imposed by regulation to the same degree as they would the burdens imposed by taxes, such that using regulation as a substitute for tax-financed spending may have less political salience.”). Richard Epstein goes even further than Posner. He argues that the government should not redistribute wealth, for example, by requiring that employers provide health insurance to their employees or that landlords supply apartments at below-market rents. EPSTEIN, *SIMPLE RULES*, *supra* note 34, at 145–46. Epstein views this as a form of “off-budget financing” that undermines democratic accountability. *Id.* Epstein’s position is that the government should finance this type of benefit out of general tax revenues: “When the expenditures are made explicit through the budget process, the public is better able to make an informed choice about the costs and benefits of the program.” *Id.* at 146.

<sup>247</sup> This example comes from HIGGS, *supra* note 159, at 116–21.

<sup>248</sup> STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 22–23 (1993); SUNSTEIN, *RISK AND REASON*, *supra* note 152, at 39–40; Hirshleifer, *supra* note 16, at 859; Sunstein, *Cost-Benefit Analysis*, *supra* note 13, at 1068–69; *see also* Peter J. Boettke, Christopher J. Coyne & Peter T. Leeson, *Takings*, 8 *GEO. J. L. & PUB. POL’Y* 327, 337 (2010) (“[T]he key costs of takings are ‘hidden.’ They involve foregone entrepreneurial opportunities—discoveries never made and new forms of wealth never produced—because intervention directed the market process down some alternative, politically determined path.”).



cost).<sup>249</sup> For example, people respond to legally mandated automobile safety devices by taking more risks when driving, which substantially reduces the number of lives saved.<sup>250</sup> Similarly, smokers respond to cigarette taxes by switching to cigarettes that are higher in tar and nicotine and by smoking each cigarette more intensely—both of which make smoking more dangerous.<sup>251</sup> A third example is the increase in air travel regulations occurring after the 9/11 terrorist attacks. The regulations increased the cost of flying, which shifted travelers toward driving. Because driving is riskier than flying, the regulations likely contributed to a large number of deaths.<sup>252</sup>

Failure to account for the hidden costs of regulation is exacerbated by the fact that legislation is often adopted in response to a perceived emergency. David Hirshleifer notes that “the costs of regulation, though widely incurred, are often far less salient than the exceptional wrongdoings that incited it.”<sup>253</sup> As a result, salient events can create an intense demand for legislation that precludes careful consideration of regulatory costs. Stephen Choi and A.C. Pritchard colorfully describe this phenomenon at work in the context of financial regulation: “‘Fraud led to the market crash that wiped out your savings!’ is easier to sell to voters . . . than ‘[e]xcessive regulations will reduce your investment gains by one-half of one percent per year!’”<sup>254</sup>

The Sarbanes-Oxley Act (SOX), discussed above, provides a prominent example of legislation resulting from salient events and less salient regulatory costs.<sup>255</sup> The Enron debacle that led to SOX was particularly compelling because it provided vivid narratives, including greedy executives who sold their own Enron stock prior to the collapse while telling lower-level employees that the stock was a great investment for their retirement accounts.<sup>256</sup> Many Enron employees were heavily invested in the company’s stock and were ruined financially when the company imploded. Consistent with the hypothesis that salient events lead to legislation that ignores regulatory costs, Roberta Romano argues that in adopting SOX, Congress ignored

<sup>249</sup> See, e.g., SUNSTEIN, RISK AND REASON, *supra* note 152, at 133–34 (discussing “health-health tradeoffs,” which occur when a regulation designed to reduce one risk causes people to respond in a way that increases some other risk).

<sup>250</sup> Sam Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. POL. ECON. 677, 717 (1975).

<sup>251</sup> Gary Lucas, Jr., *Saving Smokers from Themselves: The Paternalistic Use of Cigarette Taxes*, 80 U. CIN. L. REV. 693, 733–34 (2012) [hereinafter Lucas, *Cigarette Taxes*] (reviewing the evidence).

<sup>252</sup> Garrick Blalock, Vrinda Kadiyali & Daniel H. Simon, *The Impact of Post-9/11 Airport Security Measures on the Demand for Air Travel*, 50 J. L. & ECON. 731, 751–52 (2007).

<sup>253</sup> Hirshleifer, *supra* note 16, at 859.

<sup>254</sup> Choi & Pritchard, *supra* note 99, at 39.

<sup>255</sup> Hirshleifer, *supra* note 16, at 858.

<sup>256</sup> *Id.* at 858.

substantial evidence that the law's corporate governance provisions were ill-conceived and would not work.<sup>257</sup>

### I. *Opportunity Cost Neglect: Ignoring Implicit Tradeoffs*

Some scholars are skeptical of certain government interventions on the grounds that they are ineffective, excessively costly, and inimical to economic growth.<sup>258</sup> But opinion research shows that the public enthusiastically embraces government spending, tax expenditures, and regulation.<sup>259</sup> Moreover, affection for government is not limited to liberals and Democrats. Conservatives and Republicans also express strong support for government as long as researchers ask them about specific programs rather than asking about government in abstract or general terms.<sup>260</sup>

Nonetheless, opinion research also reveals that support for many government programs declines (often substantially) when researchers draw attention to the programs' opportunity costs.<sup>261</sup> The opportunity cost of a government program consists of the private and public goods that society must forgo to make that program possible. Opinion research suggests that unless explicitly prompted to consider these costs, the public often ignores them.<sup>262</sup> Opportunity cost neglect is consistent with the finding that decision makers focus on salient situational elements and irrationally ignore implicit information. The benefits of many government programs are obvious, but their opportunity costs are often implicit and therefore easy to overlook. In particular, because the payment of taxes is usually not tightly connected to the receipt of government benefits, those benefits often appear to be free.

Opportunity cost neglect is related to but distinct from the tendency to ignore hidden taxes and regulatory costs. When taxes and regulatory costs are hidden, voters underestimate their amount in dollar terms, which also conceals the opportunity costs of government programs. Making the dollar cost of particular programs explicit increases the likelihood that voters will then think about opportunity costs. But even when voters know a program's cost in dollar

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<sup>257</sup> Romano, *supra* note 198, at 1528.

<sup>258</sup> E.g., ROBERT J. BARRO, DETERMINANTS OF ECONOMIC GROWTH: A CROSS-COUNTRY EMPIRICAL STUDY 26 (1997) (finding that greater government spending, and the associated taxation, reduces economic growth); WINSTON, *supra* note 95; Simeon Djankov et al., *The Regulation of Entry*, 117 Q. J. ECON. 1, 35 (2002) ("We find that heavier regulation of [business] entry is generally associated with greater corruption and a larger unofficial economy, but not with better quality of private and public goods . . . . Entry is regulated more heavily by less democratic governments . . . [and the] principal beneficiaries appear to be the politicians and bureaucrats themselves.").

<sup>259</sup> Lucas, *Opportunity Cost Neglect*, *supra* note 17, at 296; Tasic, *Growth of Government*, *supra* note 109, at 552–53.

<sup>260</sup> See Lucas, *Opportunity Cost Neglect*, *supra* note 17, at 308.

<sup>261</sup> *Id.* at 270–81.

<sup>262</sup> *Id.* at 288.

terms, they do not always take the next step and consider that incurring that cost entails sacrificing specific public and private goods. Considered in the abstract, a program's dollar cost is simply a number that voters may fail to link to sacrificed resources. To illustrate, imagine the difference in psychological impact of notifying voters that ten F-35 Joint Strike Fighter jets cost \$700 million versus notifying them that purchasing the ten jets means that the government would have to cancel plans to build 50 new elementary schools.<sup>263</sup> The latter formulation is more likely to trigger consideration of opportunity costs because it makes those costs explicit.

Widespread neglect of the opportunity costs of government programs has several implications.<sup>264</sup> First, it artificially increases the demand for direct spending, tax expenditures, and regulation above the level that voters would otherwise support. In particular, opportunity cost neglect helps explain chronic budget deficits. Voters express strong support for government spending, but at the same time, they are also unwilling to pay for it. Second, opportunity cost neglect results in a misallocation of government funds. Specifically, opinion research suggests that the federal government spends more on the military and less on other programs than it would if voters were cognizant of the tradeoffs involved. Finally, opportunity cost neglect affects the government's choice of policy instruments. Voters are attracted to policies that conceal tradeoffs. This explains why voters generally prefer tax expenditures to similar direct spending programs.<sup>265</sup> It also explains why, despite economists' objections, voters prefer to address global warming through command-and-control regulations, which conceal the opportunity costs of environmental protection, rather than a carbon tax, which would make those costs more salient.<sup>266</sup>

In combination with the intentions heuristic, opportunity cost neglect also helps explain why the government often structures transfers to special interest groups in inefficient ways.<sup>267</sup> Many government programs transfer money from one group (consumers or taxpayers) to another (producers or other special interests).<sup>268</sup> Farm subsidies are an example.<sup>269</sup> Transfers to special interests are usually structured inefficiently, meaning that they create a larger deadweight loss than necessary.<sup>270</sup> A transfer program creates a deadweight

<sup>263</sup> This example comes from *id.*

<sup>264</sup> *Id.* at 270–81.

<sup>265</sup> *Id.* at 250.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 302–03.

<sup>268</sup> *E.g.*, BESANKO & BRAEUTIGAM, *supra* note 149, at 417–21.

<sup>269</sup> *E.g.*, WINSTON, *supra* note 95, at 23 (“[C]ommodity price support programs basically amount to transfers from consumers to producers that generate annual net welfare losses of \$3.0 billion to \$12.4 billion.”).

<sup>270</sup> BESANKO & BRAEUTIGAM, *supra* note 149, at 417–21; GORDON TULLOCK, *THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING* 18–22 (1989).

loss when the benefit of the program to the special interest group is less than the harm to consumers and taxpayers. Government could structure transfers efficiently by imposing a tax and transferring the revenue collected to the favored special interest group.<sup>271</sup> This would minimize the deadweight loss and potentially make everyone better off. But the government rarely uses taxes and direct payments to carry out special interest transfers; instead, it relies on less efficient means such as acreage limitations.<sup>272</sup>

While inefficient transfers are puzzling to economists, politicians find them useful because these devices make it possible to conceal special interest legislation using public interest rhetoric.<sup>273</sup> Although a significant portion of farm subsidies go to wealthy farmers and large corporations,<sup>274</sup> politicians claim that the subsidies are necessary to provide farmers with a stable income and to protect the national interest by reducing food imports.<sup>275</sup> This claim suggests to the public that the subsidies are motivated by good intentions. Moreover, the use of inefficient transfer mechanisms hides the true recipients of the transfers from public view while making the opportunity costs less salient than they would be if the government used taxes and direct payments.

Opportunity cost neglect also interacts with action bias.<sup>276</sup> As discussed in Section C of this Part, Robert Higgs has shown that crises contribute significantly to government growth.<sup>277</sup> Higgs concludes that “[u]nder conditions widely agreed to constitute a national emergency . . . Americans both expect and desire the government to ‘do something,’ and to do it immediately.”<sup>278</sup> Politicians respond by adopting legislation, which is often structured so as to conceal the true cost of intervention.<sup>279</sup> Once the government intervenes, the benefits (and beneficiaries) of the intervention become obvious, but the opportunity costs remain hidden, which makes the new program virtually impossible to eliminate.<sup>280</sup>

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<sup>271</sup> BESANKO & BRAEUTIGAM, *supra* note 149, at 418; TULLOCK, *supra* note 270, at 19–22.

<sup>272</sup> For a review of the literature on inefficient transfers, see Stephen Coate & Stephen Morris, *On the Form of Transfers to Special Interests*, 103 J. POL. ECON. 1210, 1210–12 (1995).

<sup>273</sup> Cf. McCaffery & Baron, *Thinking About Tax*, *supra* note 56, at 129–30 (“[T]he fact that subjects seem to care about the stated intents behind policies . . . apart from their objective effects, means that rhetorically facile politicians can influence nonwelfarist outcomes.”).

<sup>274</sup> WINSTON, *supra* note 95, at 22 (“Generally, subsidies mainly go to Big Agribusiness corporations and the richest farmers.”).

<sup>275</sup> Jalonick, *supra* note 238.

<sup>276</sup> Lucas, *Opportunity Cost Neglect*, *supra* note 17, at 69–74.

<sup>277</sup> HIGGS, *supra* note 159, at 123–257. Higgs defines government growth as a widening of the scope of the government’s “effective authority over economic decision making.” *Id.* at 32.

<sup>278</sup> *Id.* at 63–64.

<sup>279</sup> *Id.* at 62–67. For discussion of how politicians can conceal the cost of government intervention, see Part III.G–H.

<sup>280</sup> See HIGGS, *supra* note 159, at 69 (“People are less likely to object to an established policy, complete with an administrative bureaucracy and a group of dependent beneficiaries, than to an

### J. Ignoring the Hidden Benefits of Government

Many of the failures of rationality that we have discussed up to this point suggest that voters and politicians are overly eager to embrace government intervention and that government is likely larger and more powerful than it would be in a world populated by rational actors. But some scholars argue that government is too small.<sup>281</sup> The idea is that the benefits of government are hidden because they are indirect or occur in the future, so voters underestimate them.<sup>282</sup> Yair Listokin and David Schizer argue that the government should combat this problem by taking steps to make the benefits that it provides more salient, including engaging in advertising campaigns that highlight popular government programs.<sup>283</sup> While Listokin and Schizer's proposal is open to criticism,<sup>284</sup> the claim that people ignore some of the benefits of government warrants further research. If this claim is true, then the failure to fully account for hidden benefits could at least partially counteract the biases that lead voters to ignore the cost of government programs.

## IV. PROPOSALS FOR COPING WITH IRRATIONALITY IN GOVERNMENT

Despite the problems identified in this Article, democracy generally performs better than alternative systems of government.<sup>285</sup> Compared to dictatorships and oligarchies, democracies are relatively prosperous and peaceful, and democratic governments are less likely to adopt catastrophic policies and to murder their own citizens. So democracy is here to stay. Nonetheless, we have shown that irrationality can cause democracies to adopt bad laws. What can be done to avoid this problem or at least limit the damage?

This Part discusses various proposals for coping with irrationality in a democracy. For ease of exposition, we organize our discussion around two

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equally costly proposed policy.”); cf. McCaffery & Baron, *Thinking About Tax*, *supra* note 56, at 128 (“Cognitive psychology predicts that programs, once established and funded, can be hard to cut—a standard application of the endowment effect or, equivalently, loss aversion.”). McCaffery and Baron claim that high-income Americans continue to receive Social Security benefits despite Social Security’s funding problem because the endowment effect and loss aversion make it hard for the government to take these benefits away. One of the costs of some government programs is slower economic growth. But in evaluating these programs, people are very unlikely to take into account the absence of growth that would have otherwise occurred. See PLOUS, *supra* note 64, at 164 (“People seldom pay as much attention to events that do not occur as those that do.”) (internal citation omitted).

<sup>281</sup> E.g., Gamage & Shanske, *supra* note 239, at 91–95; Anthony Downs, *Why the Government Budget Is Too Small in a Democracy*, 12 *WORLD POL.* 541 (1960).

<sup>282</sup> E.g., SUNSTEIN, *RISK AND REASON*, *supra* note 152, at 41 (suggesting that in some instances, the public ignores the benefits of government regulation).

<sup>283</sup> Yair Listokin & David M. Schizer, *I Like to Pay Taxes: Taxpayer Support for Government Spending and the Efficiency of the Tax System*, 66 *Tax L. Rev.* 179, 204–15 (2013).

<sup>284</sup> Lucas, *Opportunity Cost Neglect*, *supra* note 17, at 284.

<sup>285</sup> SOMIN, *SMALLER GOVERNMENT*, *supra* note 29, at 9.

categories of proposals. The first category aims to reduce irrationality in policymaking without severely restricting the scope of government. The second category assumes that irrationality presents an insurmountable obstacle to effective government and for that reason, aims to limit government's scope. Our discussion of these proposals is not exhaustive. Our goal is simply to highlight the most important proposed solutions to the problem of irrationality among political actors as well as the primary criticisms of each proposal.

Before turning to the various proposals, we first address a possible objection that applies to all of them to a greater or lesser extent. Some scholars may view these proposals as undemocratic or even paternalistic. Perhaps the public should be free to choose policies and politicians for any reason even if its choices are irrational.

We will revisit this objection throughout our discussion in this Part. For now, we merely suggest that despite this objection, taking steps to address irrationality might be justified on two grounds.<sup>286</sup> First, a voter who supports harmful policies and dangerous politicians imposes an externality on the rest of society. Irrational voting is therefore a matter of public concern and steps to remedy it are not necessarily paternalistic. Second, we have seen that irrational voters may favor policies that frustrate the voters' intended objectives. For example, antiforeign bias may cause voters to support protectionist policies because they erroneously believe those policies are good for the economy. Arguably, voters would want to avoid this type of error if they understood that they were making it.

#### A. *Reducing Irrationality in Policymaking*

This Section discusses proposals for achieving more rational policies. These range from educating voters on important issues to ceding control of particular policy areas to government bureaucrats and other experts.

##### 1. Deliberation Day

Recognizing the general public's political ignorance, Bruce Ackerman and James Fishkin have proposed Deliberation Day as a remedy.<sup>287</sup> Deliberation Day would be a national holiday that would occur prior to presidential (and possibly congressional) elections with all registered voters invited to attend and to discuss important issues at meetings that would be held at various venues throughout the country.<sup>288</sup> The proceedings would begin with a televised debate between the candidates that would be followed by a series of

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<sup>286</sup> This argument is based upon SOMIN, *SMALLER GOVERNMENT*, *supra* note 29, at 4–7. Somin makes the argument to justify his concerns about voter ignorance. But the argument also applies to concerns about irrationality among political actors.

<sup>287</sup> ACKERMAN & FISHKIN, *supra* note 45, at 5–9.

<sup>288</sup> *Id.* at 3.

small- and large-group discussions, with some of the discussions involving input from local political officials and party representatives. To encourage participation, the government would pay \$150 to citizens who participate.<sup>289</sup> Ackerman and Fishkin have worked out their proposal in some detail, including estimating its cost. Their primary evidence for the potential effectiveness of Deliberation Day stems from experiments involving deliberative polls.<sup>290</sup> In these experiments, a small group of subjects meet for several days with experts and political officials to discuss one or more political issues. The results show that many subjects change their minds on important issues as a result of the deliberative process.

Although Ackerman and Fishkin present Deliberation Day primarily as a response to widespread political ignorance, it also has the potential to reduce voter irrationality. For example, if deliberating groups are politically heterogeneous, then exposure to arguments on both sides of an issue might mitigate ideological bias and make it psychologically difficult for voters to cling to cherished (but false) beliefs.<sup>291</sup> Similarly, Deliberation Day might result in voters having better information about various risks relevant to public policy, which might in turn reduce the negative influence of the availability heuristic.

Despite its promise, Deliberation Day has drawbacks. First, the proposal may never be adopted. The politicians who would have to vote to create it would also be people who have succeeded in politics without it.<sup>292</sup> Why would they support a major change to the status quo? Second, the number of issues deliberated and the depth in which they could be considered would necessarily be severely limited.<sup>293</sup> So even if we assume that deliberation mitigates irrationality, irrationality would still influence public opinion on many important matters.

Finally, deliberation will not necessarily mitigate irrationality. In support of their claim of deliberation's salutary effects, Ackerman and Fishkin cite evidence that deliberative polling influences opinion and in particular that it increases support for interventionist policies, such as more stringent fuel-

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<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 44–59.

<sup>291</sup> See MUTZ, *supra* note 174, at 74 (finding that “exposure to oppositional viewpoints [i.e., political disagreement] significantly increases awareness of legitimate rationales for opposing views”); Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103, 111–12 (2007) (discussing evidence that deliberation reduces the influence of framing effects); Baron, *supra* note 94, at 196 (discussing experimental evidence that subjects instructed to think of reasons supporting both sides of an argument tend to exhibit better judgment and fewer biases).

<sup>292</sup> SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 179–80.

<sup>293</sup> *Id.*

economy standards, as well as a strong welfare state.<sup>294</sup> Unfortunately, evidence that deliberation would increase support for policies that Ackerman and Fishkin apparently find appealing does not prove that deliberation promotes rationality.<sup>295</sup>

In fact, a recent experiment by David Schkade and his colleagues suggests that the opposite may be true.<sup>296</sup> Ackerman and Fishkin place great value on deliberative polls, but the results of those polls may be misleading. Deliberative polls are often structured so as to create a diverse group of subjects representative of the national electorate, a feature that ensures heterogeneity along many dimensions. But the Deliberation Day meetings proposed by Ackerman and Fishkin would occur at local venues where participants would be more homogeneous than the subjects in carefully designed deliberative polls. Schkade's study replicated this condition by asking groups of people from Colorado to deliberate three controversial political issues.<sup>297</sup> Subjects in some of the groups lived in Boulder, a predominantly liberal city, while subjects in other groups lived in Colorado Springs, a predominantly conservative city. Schkade found that with respect to all three issues, deliberation caused the groups from Boulder to become more liberal and the groups from Colorado Springs to become more conservative.<sup>298</sup> In other words, when liberals and conservatives deliberated with like-minded people, they moved further apart from one another. Deliberation also significantly reduced diversity of opinion within the various groups so that even anonymous opinions expressed by subjects became more extreme and less diverse.<sup>299</sup>

Based on these results, Schkade concluded "that deliberation among like-minded people produced *ideological amplification*—an amplification of preexisting ideological tendencies, in which group discussion leads to greater extremism."<sup>300</sup> In this instance, rather than mitigating ideological bias, deliberation exacerbated it. Moreover, Schkade's findings are consistent with a more general phenomenon that social psychologists refer to as group polarization—the tendency for group discussion to push the opinions of a group of people further in the direction in which the group initially leaned.<sup>301</sup>

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<sup>294</sup> ACKERMAN & FISHKIN, *supra* note 45, at 55–57 (“[D]iscussion leads respondents to take some responsibility for the solution of public problems . . . [and] to support the provision of public goods.”).

<sup>295</sup> For additional criticisms of deliberative polling, see MUTZ, *supra* note 174, at 57–61.

<sup>296</sup> David Schkade, Cass R. Sunstein & Reid Hastie, *What Happened on Deliberation Day?*, 95 CAL. L. REV. 915, 915 (2007).

<sup>297</sup> *Id.* at 918–21.

<sup>298</sup> *Id.* at 921.

<sup>299</sup> *Id.* at 923–24.

<sup>300</sup> *Id.* at 917.

<sup>301</sup> GILOVICH ET AL., SOCIAL PSYCHOLOGY, *supra* note 66, at 471–75.



## 2. Encouraging Reliance on Political Activists

Attempts to educate and debias the general public may mitigate irrationality to some extent but are unlikely to have a large effect because biases are deeply ingrained and voters are busy people with limited capacity for processing political information.<sup>302</sup> Nonetheless, democracy might still work well if voters rely on informed activists who take the time to carefully evaluate political issues.<sup>303</sup> These activists could be political junkies, celebrities, members of special interest organizations, or experts in fields related to public policy.<sup>304</sup>

Reliance on political activists can, however, be problematic. First, activists differ demographically from the rest of the population and tend to be more extreme in their views.<sup>305</sup> Second, to increase their own power, status, and wealth, activists often have an incentive to exaggerate political problems and to emphasize governmental solutions over the free market.<sup>306</sup> Third, voters have little incentive to determine which activists are reliable and often have no way of evaluating their performance since it is difficult to determine the effects of the policies that activists advocate.<sup>307</sup> In this respect, contrast activists with private sector specialists such as doctors who risk ruining their reputations if they perform poorly as measured by objectively verifiable outcomes. Finally, the public often listens to particular activists, not because of their expertise, but because they are entertaining or confirm existing views.<sup>308</sup> For example, one study found that subjects respected the views of Rush Limbaugh and Phil

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<sup>302</sup> See, e.g., McCaffery & Baron, *Thinking About Tax*, *supra* note 56, at 129 (“There is reason to be skeptical, however, that debiasing techniques alone will fully succeed, given the depth of some of the mental habits, the complexity of tax, and the low payoffs for individuals for fully understanding tax law.”).

<sup>303</sup> See generally ARTHUR LUPA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* (1998). For critical reviews of the literature supporting voter reliance on political activists, see SOMIN, *SMALLER GOVERNMENT*, *supra* note 29, at 97–100; Ilya Somin, *Resolving the Democratic Dilemma?*, 16 *YALE J. REG.* 401, 405–11 (1999) [hereinafter Somin, *Democratic Dilemma*].

<sup>304</sup> For an argument that experts can use persuasion to overcome voter irrationality, see Bryan Caplan, *Persuasion, Slack, and Traps: How Can Economists Change the World?*, 142 *PUB. CHOICE* 1, 2–4 (2010).

<sup>305</sup> SOMIN, *SMALLER GOVERNMENT*, *supra* note 29, at 98.

<sup>306</sup> *Id.*; Gary Lucas, Jr., *Paternalism and Psychic Taxes: The Government’s Use of Negative Emotions to Save Us from Ourselves*, 22 *S. CAL. INTERDISC. L.J.* 227, 292–94 (2013) [hereinafter Lucas, *Psychic Taxes*].

<sup>307</sup> SOMIN, *SMALLER GOVERNMENT*, *supra* note 29, at 98–99; Lucas, *Opportunity Cost Neglect*, *supra* note 17, at 260.

<sup>308</sup> SOMIN, *SMALLER GOVERNMENT*, *supra* note 29, at 99.

Donahue on new prison construction,<sup>309</sup> even though there is little reason to believe that these two talk show hosts know much about the subject.<sup>310</sup>

### 3. Literacy Tests and Voting Restrictions

Although the evidence is mixed, some research indicates that rational behavior increases with cognitive ability.<sup>311</sup> In addition, researchers have found that training can be an effective tool for improving people's ability to reason.<sup>312</sup> For example, Richard Larrick and his colleagues find that formal training in economics is associated with the use of cost-benefit rules in every-day decision making.<sup>313</sup>

This research strengthens the case for literacy tests and other voting restrictions designed to limit the vote to those with relatively high cognitive ability and education levels. It also partially undermines the rationale for get-out-the-vote drives and other efforts to increase voter participation in elections.<sup>314</sup> People who already vote are more educated than those who do not, so increasing voter turnout will likely produce a less educated electorate.

Nonetheless, even if intelligence and education increase the likelihood that a person will act rationally when making decisions that directly affect him personally, that does not imply that those characteristics lead to rational voting. As noted in Part II, one of the reasons that voters are so often uninformed and irrational is that they have little incentive to take voting seriously. That is true whether they are educated or not. In fact, since educated people generally earn higher incomes, devoting time to politics imposes greater opportunity costs upon them than upon the uneducated.<sup>315</sup>

Moreover, the empirical evidence directly pertaining to the effects of education on voter rationality is mixed. With respect to economic policy, there is evidence suggesting that people who are more educated tend to think more like economists even after controlling for confounding variables such as

<sup>309</sup> LUPIA & MCCUBBINS, *supra* note 303, at 184–201.

<sup>310</sup> Somin, *Democratic Dilemma*, *supra* note 303, at 410–11.

<sup>311</sup> See generally Keith E. Stanovich & Richard F. West, *On the Relative Independence of Thinking Biases and Cognitive Ability*, 94 J. PERSONALITY & SOC. PSYCHOL. 672 (2008) (presenting experimental evidence that some thinking biases are negatively correlated with cognitive ability while others are uncorrelated).

<sup>312</sup> For a review of the literature, see Richard P. Larrick, *Debiasing*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 316, 324–25 (Derek J. Koehler & Nigel Harvey eds., 2004).

<sup>313</sup> Richard P. Larrick, Richard E. Nisbett & James N. Morgan, *Who Uses the Cost-Benefit Rules of Choice? Implications for the Normative Status of Microeconomic Theory*, 56 ORG. BEHAV. & HUM. DECISION PROCESSES 331, 344 (1993); Richard P. Larrick, James N. Morgan & Richard E. Nisbett, *Teaching the Use of Cost-Benefit Reasoning in Everyday Life*, 1 PSYCHOL. SCI. 362, 365–66 (1990).

<sup>314</sup> CAPLAN, MYTH, *supra* note 15, at 158 & 231 n.63.

<sup>315</sup> Of course, educated people may process political information more easily.

income and partisan affiliation.<sup>316</sup> On the other hand, those who are most informed about political matters tend to be the most biased in evaluating political information.<sup>317</sup> In addition, in recent decades, education levels have risen and advances in information technology have made political information easier to obtain, yet political ignorance and voter irrationality remain widespread.<sup>318</sup>

Even if we assume that educated people vote more rationally than the uneducated, restricting the vote to educated persons presents serious problems. Education levels vary across demographic categories. In particular, the politically well-informed differ from the rest of the public in terms of race, income, gender, religion, ideology, and other attributes.<sup>319</sup> So the group of educated voters, and especially of those who are politically well-informed, is not demographically representative of the public generally. Given this fact, excluding the uneducated and the uninformed would likely undermine the perceived legitimacy of elections and of the laws adopted by elected officials.<sup>320</sup> More importantly, it would mean that the interests of excluded groups would be underrepresented. Altruistic voting by the educated minority would partially alleviate this problem. But voters do not always vote altruistically. And even when they do, they might not give the same weight to the interests of all members of society.<sup>321</sup> As we discussed in Part III, in-group bias causes people to value their own in-groups (including racial and ethnic in-groups) more than others, and it affects public opinion on political matters.

#### 4. Reliance on Bureaucrats and Other Experts

Scholars who study irrationality among voters and politicians sometimes recommend that the government rely more on bureaucrats and other experts to design policies and write rules.<sup>322</sup> Jeremy Blumenthal reviews

<sup>316</sup> CAPLAN, MYTH, *supra* note 15, at 152.

<sup>317</sup> Taber & Lodge, *supra* note 160, at 760–67; *see also* Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection*, 8 JUDGMENT & DECISION MAKING 407, 415–16 (2013) (presenting experimental evidence that people who do well on a test that is designed to measure the tendency to engage in cognitive reflection are also more likely to engage in ideologically motivated reasoning).

<sup>318</sup> SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 20.

<sup>319</sup> *E.g.*, SCOTT L. ALTHAUS, COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS: OPINION SURVEYS AND THE WILL OF THE PEOPLE 15–17 (2003); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the “Central Obsession” of Constitutional Theory*, 89 IOWA L. REV. 1287, 1354–64 (2004).

<sup>320</sup> People place inherent value on the ability to participate in democratic decision making. *E.g.*, Bruno S. Frey & Alois Stutzer, *Happiness and Public Choice*, 144 PUB. CHOICE 557, 566–67 (2010).

<sup>321</sup> SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 113.

<sup>322</sup> The primary argument for delegating authority to bureaucrats and other experts is that they possess more and better information than voters and politicians. JOHN F. MANNING & MATTHEW

evidence that within their particular domains, experts often make better decisions than lay persons in part because experts have techniques for avoiding the effects of cognitive limitations and biases.<sup>323</sup> Experts appear to have a number of advantages over novices, including greater ability to integrate information and make consistent judgments.<sup>324</sup>

Because of the advantages that come with expertise, delegating power to administrative agencies could mitigate the effects of irrationality on public policy. More specifically, the bureaucracy creates some slack that could allow the government to ignore voters when the policies that they demand are irrational. Voters may underestimate the ability of politicians to control bureaucratic decision making.<sup>325</sup> If so, politicians can delegate difficult decisions to bureaucrats and then plausibly deny responsibility for those decisions.<sup>326</sup> Employing this technique, civic-minded politicians could use the bureaucracy to improve the law.<sup>327</sup> In particular, because administrative agencies generally have to conduct cost-benefit analyses in connection with major regulatory actions,<sup>328</sup> delegating more authority to them might facilitate rational decision making.

Despite these potential benefits, shifting power to the bureaucracy is fraught with problems. First, it is unlikely that experts will ever be given complete control. Instead, they face political constraints.<sup>329</sup> Top-level bureaucrats in particular are selected by and generally held accountable to

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C. STEPHENSON, LEGISLATION AND REGULATION 351–52 (2d ed. 2013). But recent scholarship also cites voter irrationality as a justification. *E.g.*, BREYER, *supra* note 248, at 59–80; SUNSTEIN, RISK AND REASON, *supra* note 152, at 54–55; McCaffery & Baron, *Thinking About Tax*, *supra* note 56, at 130.

<sup>323</sup> Jeremy A. Blumenthal, *Expert Paternalism*, 64 FLA. L. REV. 721, 749–55 (2012). For additional cites to the literature on experts and irrationality, see Bruno S. Frey & Reiner Eichenberger, *Economic Incentives Transform Psychological Anomalies*, 23 J. ECON. BEHAV. & ORG. 215, 224 (1994) [hereinafter Frey & Eichenberger, *Economic Incentives*].

<sup>324</sup> K. Anders Ericsson & Jacqui Smith, *Prospects and Limits of the Empirical Study of Expertise: An Introduction*, in TOWARD A GENERAL THEORY OF EXPERTISE: PROSPECTS AND LIMITS 1, 20–33 (K. Anders Ericsson & Jacqui Smith eds., 1991); Baron, *supra* note 94, at 203–04.

<sup>325</sup> CAPLAN, MYTH, *supra* note 15, at 172–73. For a discussion of the mechanisms that politicians use to control administrative agencies, see generally MANNING & STEPHENSON, *supra* note 322, at 406–544.

<sup>326</sup> MANNING & STEPHENSON, *supra* note 322, at 353–54.

<sup>327</sup> See CAPLAN, MYTH, *supra* note 15, at 172–76; *cf.* Kuran & Sunstein, *supra* note 13, at 737 (arguing that when voters are biased, politicians should ignore their demands for regulation and defer to experts).

<sup>328</sup> MANNING & STEPHENSON, *supra* note 322, at 515.

<sup>329</sup> *Cf.* SUNSTEIN, RISK AND REASON, *supra* note 152, at 126–28 (arguing in favor of cost-benefit analysis of proposed government regulations but noting that the public often disapproves of the procedure because it requires making “taboo tradeoffs,” such as stating explicitly that the costs of some regulations are too high even if they save lives).

politicians,<sup>330</sup> who may themselves be irrational. Moreover, while the public may underestimate politicians' control over bureaucrats, agencies do not have free reign to ignore voters.<sup>331</sup> As a result, voter ignorance and irrationality are "likely to reduce the quality of any delegations to experts that are enacted into law."<sup>332</sup>

Second, to the extent that bureaucrats do in fact have the power to act independently, they may abuse it. In particular, they might be motivated to protect their jobs and salaries, to enhance their reputations, to maximize the budget and power of their respective agencies, or to advance the agenda of special interest groups to which they are sympathetic.<sup>333</sup>

Finally, while bureaucrats and other experts may be less prone than non-experts to exhibit certain types of irrationality, they are not fully rational. Experts suffer from many of the same biases as lay people; indeed, they are likely to be especially susceptible to certain biases.<sup>334</sup> This helps explain why experts in a particular subject area are frequently no better than non-experts in making predictions relevant to that area.<sup>335</sup> Procedural safeguards such as notice-and-comment rulemaking and judicial review of agency decisions may reduce the influence of irrationality in bureaucratic decision making.<sup>336</sup> But

<sup>330</sup> See generally *id.* at 406–539.

<sup>331</sup> BREYER, *supra* note 248, at 20 ("Agency priorities and agendas may more closely reflect public rankings [of environmental risks], politics, history, or even chance than the kind of priority list that environmental experts would deliberately create. To a degree, that is inevitable.").

<sup>332</sup> SOMIN, *SMALLER GOVERNMENT*, *supra* note 29, at 184.

<sup>333</sup> For a review of several models of bureaucratic behavior, see MUELLER, *supra* note 23, at 359–85.

<sup>334</sup> *E.g.*, Choi & Pritchard, *supra* note 99, at 25–27 (discussing the influence of the availability heuristic on bureaucrats within the Securities and Exchange Commission); Daniel Kahneman & Jonathan Renshon, *Why Hawks Win*, *FOREIGN POL'Y*, Jan.–Feb. 2007, at 34–38 (presenting historical evidence that in international conflicts, political decision makers are biased in favor of war and against non-military solutions); Colin R. Kuehnhanss, Bruno Hyndels & Katharina Hilken, *Choice in Politics: Equivalency Framing in Economic Policy Decisions and the Influence of Expertise*, *EUR. J. POL. ECON.* (forthcoming 2015) (manuscript at 5–11) (presenting experimental evidence that experts are as susceptible as novices to framing effects in making economic policy decisions); Rachlinski & Farina, *supra* note 63, at 558–61.

<sup>335</sup> For an empirical study of expert performance with respect to political judgment, see generally PHILIP E. TETLOCK, *EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW?* (2005). Tetlock finds that experts generally do not perform much better than simple algorithms or dilettantes in the field and that it is especially hard to discern who the real experts are. *Id.* at 54–59. The conventional yardsticks such as academic training and professional experience do not correlate strongly with expert performance. *Id.* at 54. Similarly, Loren Lomasky points out that the 2008 financial crisis demonstrates that the activities of economic and financial experts may do more economic damage than policies supported by the typical voter. Loren Lomasky, *Swing and a Myth: A Review of Caplan's The Myth of the Rational Voter*, 135 *PUB. CHOICE* 469, 478–79 (2008).

<sup>336</sup> Rachlinski & Farina, *supra* note 63, at 588–600.

these safeguards are not perfect and can in fact introduce new biases of their own.<sup>337</sup>

A comprehensive catalogue of experts' biases lies outside the scope of this Article.<sup>338</sup> Here, we simply highlight a few of the most important sources of expert irrationality and discuss how they influence the law. In particular, we discuss the tendency of bureaucrats and other experts (1) to suffer from tunnel vision, which contributes to cognitive regulatory capture; (2) to engage in motivated reasoning or path-dependent filtering of information, leading to spirals of conviction; and (3) to succumb to the illusion of regulatory competence, which results in policies that have unanticipated and unintended consequences.

*i. Tunnel Vision and Cognitive Regulatory Capture*

Experts sometimes suffer from tunnel vision,<sup>339</sup> which is a form of focusing illusion that works in combination with opportunity cost neglect.<sup>340</sup> Bureaucrats who believe strongly in their agency's mission and other experts who are focused upon the particular problems addressed in their respective fields sometimes ignore relevant information and competing interests and adopt or advocate policies that do more harm than good.<sup>341</sup> For example, public health advocates are so focused on health issues that the policies they advocate may give disproportionate weight to health concerns and ignore competing factors such as autonomy.<sup>342</sup> In particular, they may discount the possibility that some people might rationally sacrifice good health to pursue other objectives.

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<sup>337</sup> Choi & Pritchard, *supra* note 99, at 37.

<sup>338</sup> For detailed discussions of irrationality among bureaucrats and experts, see generally Choi & Pritchard, *supra* note 99, at 21–40; Cooper & Kovacic, *supra* note 16; Rachlinski & Farina, *supra* note 63; Tasic, *Are Regulators Rational?*, *supra* note 95.

<sup>339</sup> For discussions of tunnel vision among bureaucrats, see generally MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 363–66 (2009); BREYER, *supra* note 248, at 11–19.

<sup>340</sup> See Lucas, *Opportunity Cost Neglect*, *supra* note 17, at 324.

<sup>341</sup> See Choi & Pritchard, *supra* note 99, at 33–35 (discussing the tendency of bureaucrats at the Securities and Exchange Commission to engage in groupthink and criticizing “the SEC’s single-minded focus on investor protection”); Rachlinski & Farina, *supra* note 63, at 580 (“[A]gencies can become myopically focused on their missions.”); Tasic, *Are Regulators Rational?*, *supra* note 95, at 6 (arguing that focusing illusion may cause regulators to “be deluded that they are doing the right thing because they are unable to see the wider context”); *cf.* Sunstein, *Cost-Benefit Analysis*, *supra* note 13, at 1071–72 (arguing that when people consider in isolation questions such as how much they would be willing to pay to protect coral reefs or to protect the elderly, the resulting answers are often incoherent in the sense that they differ from the answers given when people consider these questions simultaneously).

<sup>342</sup> Lucas, *Psychic Taxes*, *supra* note 306, at 294.

Similarly, W. Kip Viscusi and Ted Gayer have argued that administrative agencies systematically overstate certain risks,<sup>343</sup> which is a tendency that stems from bureaucratic tunnel vision. For example, in administering the Superfund hazardous waste cleanup program, the Environmental Protection Agency (EPA) conducts formal risk assessments to determine the risk level posed by particular hazardous waste sites. Viscusi and Gayer explain how various assumptions and procedures that the EPA incorporates into its risk assessments contribute to a conservatism bias that causes the EPA to significantly exaggerate the risks posed by these sites.<sup>344</sup> The bias in favor of overstating risks would not occur if the agency took a broader view and considered the opportunity cost of excessive environmental regulation.

In extreme cases, tunnel vision can lead to cognitive regulatory capture, which occurs when bureaucrats “internalize, as if by osmosis, the objectives, interests and perception of reality of the vested interest they are meant to regulate and supervise in the public interest instead.”<sup>345</sup> Willem Buiter has argued that cognitive regulatory capture caused the Federal Reserve to respond to the 2008 financial crisis with policies that helped the financial sector to the detriment of the broader economy. According to Buiter, the Federal Reserve pursued obviously inferior policies because it “listens to Wall Street and believes what it hears . . . [and] is too close to the financial markets and leading financial institutions, and too responsive to their special pleadings, to make the right decisions for the economy as a whole.”<sup>346</sup>

#### *ii. Ideological Bias and Spirals of Conviction*

Recall that ideological bias influences policy preferences as well as how people interpret new information. Recall also that ideological bias has at least two potential causes—(1) cherishing certain beliefs and engaging in motivated reasoning to preserve them; and (2) path-dependent filtering of information over time. Both of these explanations of ideological bias suggest that experts will not be immune to it and may in fact be particularly vulnerable.

First, experts may cherish certain beliefs because of the material and psychological benefits of doing so. Take, for example, the recent wave of paternalistic proposals such as cigarette and soda taxes intended to save people from what certain experts deem to be irrational behavior.<sup>347</sup> Implementing these

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<sup>343</sup> Viscusi & Gayer, *supra* note 145, at 991.

<sup>344</sup> *Id.* at 991–93.

<sup>345</sup> Willem H. Buiter, *Lessons from the North Atlantic Financial Crisis* (May 28, 2008) (unpublished manuscript) (on file with the Federal Reserve Bank of New York), <http://newyorkfed.org/research/conference/2008/rmm/buiter.pdf>.

<sup>346</sup> *Id.* at 36.

<sup>347</sup> For a discussion of paternalistic cigarette taxes, see generally Lucas, *Cigarette Taxes*, *supra* note 251.

proposals would come at a cost, including loss of freedom and potential for government abuse. The cost may or may not be worth it, but what cannot be denied is that many experts have strong personal and professional incentives to support paternalistic policies.<sup>348</sup> The work of academics who study irrationality becomes more important if it lays the foundation for government action.<sup>349</sup> Moreover, paternalistic intervention allows bureaucrats to assert greater control over market exchanges and enhance their power. In addition, bureaucrats and other experts can enhance their self-esteem and reputations by advocating policies that will prevent people from making what the experts themselves regard as bad choices.

Having a strong incentive to favor paternalistic policies may cause experts to wrongly conclude that paternalism is desirable—an instance of motivated reasoning.<sup>350</sup> Experts who advocate paternalism may focus on its potential benefits while ignoring the costs, particularly those that are not obvious.<sup>351</sup> Stephen Choi and A.C. Pritchard make a similar point about bureaucrats:

[C]ognitive illusions may magnify the harm caused by the more self-interested regulators. Regulators do not fit neatly into either the opportunistic or completely selfless boxes—a range of motivations exists. Within this range, cognitive biases may encourage regulators to equate self-interest and the public interest. An overoptimistic regulator, for example, may be able to delude himself into believing that a regulatory change, which coincidentally increases the prestige and power of the regulator's position, also benefits the market.<sup>352</sup>

The views of experts may also be biased due to path-dependent filtering of information over time. Jeffrey Friedman argues that experts may be particularly prone to the spirals of conviction discussed in Part III. If so, then the choice between democracy and government by experts involves placing

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<sup>348</sup> Lucas, *Psychic Taxes*, *supra* note 306, at 294.

<sup>349</sup> See Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 72 (2002) (“Behavioral law and economics scholars simplify and overgeneralize findings on human cognition and rationality to make these findings seem simultaneously important and simple enough to be incorporated into legal policy.”).

<sup>350</sup> See Cooper & Kovacic, *supra* note 16, at 47–48 (discussing the tendency of bureaucrats to interpret information in a way consistent with their mental model of how the world works); Tasic, *Are Regulators Rational?*, *supra* note 95, 4–5.

<sup>351</sup> Cf. Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1639 (2006) (“If the paternalist invests significant political capital to advance paternalistic policies, the pressure to find evidence confirming the need for paternalism is likely to be significant as well, making the likelihood of a self-fulfilling prophecy quite high.”).

<sup>352</sup> Choi & Pritchard, *supra* note 99, at 41.



authority either in the hands of the relatively open-minded but ignorant masses or the informed but closed-minded elite:

The social sciences offer theoretical “ideologies” in abundance. . . . Social scientists are likely to come to see the world in the very distinct manners that are typical of these disciplines, and to dismiss the literature of the other disciplines—if they even read it—as hopelessly naive or self-absorbed. . . . The implications may be quite disturbing: the experts on whom a technocracy relies may be locked into their theoretical biases, their opinions constrained by the mountains of information these biases allow them, over time, to perceive and register as significant.<sup>353</sup>

### iii. *The Illusion of Regulatory Competence*

Leonid Rozenblit and Frank Keil have identified a form of overconfidence that they refer to as the illusion of explanatory depth (IOED).<sup>354</sup> The IOED causes people to overestimate their understanding of phenomena that seem simple on the surface but that are in fact complex.<sup>355</sup> In some cases, people may understand the immediate causes of an event, but fail to appreciate the root causes. Rozenblit and Keil present evidence that people overestimate their understanding of phenomena such as the mechanics of helicopter flight and how tides occur.<sup>356</sup>

Slavisa Tasic has used this research to argue that bureaucrats and other experts suffer from a special form of IOED, which he refers to as the illusion of regulatory competence.<sup>357</sup> Tasic argues that the problems targeted by government policy, and especially economic policy, often seem simple and easy to address, but in fact turn out to be more complicated than expected. As a result, experts overestimate what government intervention can accomplish. Tasic summarizes a large body of evidence that suggests that many policies are undermined by unintended and unanticipated consequences.<sup>358</sup> He also argues

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<sup>353</sup> Friedman, *Dogmatism*, *supra* note 165, at 134.

<sup>354</sup> Leonid Rozenblit & Frank Keil, *The Misunderstood Limits of Folk Science: An Illusion of Explanatory Depth*, 26 COGNITIVE SCI. 521, 522 (2002).

<sup>355</sup> *Id.* at 523–24.

<sup>356</sup> *Id.* at 526–46.

<sup>357</sup> Slavisa Tasic, *The Illusion of Regulatory Competence*, 21 CRIT. REV. 423, 428–33 (2009) [hereinafter Tasic, *Regulatory Competence*]; see also Choi & Pritchard, *supra* note 99, at 28–29 (providing examples of overconfidence among bureaucrats at the Securities and Exchange Commission).

<sup>358</sup> Tasic, *Regulatory Competence*, *supra* note 357, at 428–33. Though he did not have the benefit of modern psychology, Friedrich Hayek made an argument similar to Tasic. He accused economists of underestimating the complexity of the problems they faced when attempting to

that the illusion of regulatory competence presents a major obstacle to effective cost-benefit analysis.<sup>359</sup> If experts are overconfident in their understanding of the economy and other complicated social phenomena, then they will fail to identify and quantify all of the costs and benefits of their policy proposals.

### B. *Limiting Government's Scope*

As we saw in the last Section, the proposals designed to overcome irrationality and to yield better policies are all open to significant criticism. To the extent that irrational policies are inevitable, it makes sense to consider limiting the scope of government.<sup>360</sup> This Section briefly discusses various proposals for achieving that objective.

#### 1. Constitutional Limitations and Legislative Roadblocks

Irrationality provides a rationale for constitutional limitations on government power. For example, Edward McCaffery and Jonathan Baron argue that balanced-budget amendments help combat focusing illusion and improve public finance “by undermining the tendency to isolate out logically relevant factors.”<sup>361</sup> A second technique for restraining government action involves the use of legislative roadblocks that make it difficult to enact new laws or that limit the scope of laws that have been enacted. These roadblocks include the separation of powers, supermajority voting rules, and sunset provisions.<sup>362</sup> Similar to balanced-budget amendments, pay-go rules can assist in overcoming focusing illusion by forcing the legislature to match spending increases (or tax cuts) with tax increases (or spending cuts).<sup>363</sup>

A major drawback of using constitutional limitations and legislative roadblocks to combat irrationality is that they can be difficult to adopt and in some cases are easy to circumvent. For example, the U.S. Constitution is rarely amended. Moreover, since the end of the *Lochner* Era in the late 1930s, the Supreme Court has been reluctant to use the Constitution as a means to severely restrict the federal government's power, especially its power to adopt economic regulations. In fact, a number of judges and scholars on both the political left and right have objected that it would be antimajoritarian for an

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improve upon outcomes that emerged spontaneously from market interactions. *See generally* Friedrich Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

<sup>359</sup> On the notion that cost-benefit analysis can serve as a remedy to irrationality in politics, see generally Sunstein, *Cost-Benefit Analysis*, *supra* note 13 and SUNSTEIN, RISK AND REASON, *supra* note 152.

<sup>360</sup> Hirshleifer, *supra* note 16, at 870–71.

<sup>361</sup> *See* McCaffery & Baron, *Thinking About Tax*, *supra* note 56, at 131.

<sup>362</sup> *See, e.g.*, Romano, *supra* note 198, at 1599–602 (advocating the use of sunset provisions in emergency financial legislation).

<sup>363</sup> McCaffery & Baron, *Thinking About Tax*, *supra* note 56, at 131.

unelected judiciary to declare laws unconstitutional on a regular basis.<sup>364</sup> This view arguably ignores the role that irrationality plays in democracy.<sup>365</sup> Nonetheless, judges may be unlikely to aggressively strike down laws as unconstitutional out of fear that they do not have the power to impose their will on the other branches of government or that they will undermine their own legitimacy.<sup>366</sup>

## 2. Decentralization

Decentralization of government power entails a smaller scope for higher levels of government, possibly including constitutional limits on the federal government's power, and a larger scope for lower levels. One of the virtues of decentralization is that it allows citizens to vote with their feet by moving to a jurisdiction where conditions are better and where the government pursues policies that the individual citizen finds appealing.<sup>367</sup> In particular, as Ilya Somin emphasizes, relative to ballot box voting, foot voting gives people greater incentive to acquire information and to use it rationally.<sup>368</sup> Unlike ballot box voting, the decision to move to a different city or state has significant personal consequences for the person making it. The personal importance of the decision eliminates the collective action problem that plagues ballot box voting and justifies the time and effort to collect and process information and to overcome any tendency to interpret that information in a biased way. Somin presents evidence that people moving across jurisdictions are generally well informed compared to ballot box voters.<sup>369</sup>

While decentralization has advantages, its benefits are limited. The primary problem is that moving costs, which include the burden of changing jobs and leaving behind friends and family, often exceed the benefits of relocating to a jurisdiction with more appealing government policies.<sup>370</sup> Nonetheless, evidence from the United States and Europe suggests that many people do move because of variation in public policy among jurisdictions.<sup>371</sup> In particular, people in the United States tend to migrate to states with relatively

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<sup>364</sup> For a review and critique of this literature, see SOMIN, *SMALLER GOVERNMENT*, *supra* note 29, at 155–62.

<sup>365</sup> For a similar argument defending judicial review on the basis of widespread public ignorance on political matters, see *id.* at 155–69.

<sup>366</sup> *Id.* at 156–59.

<sup>367</sup> See, e.g., Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416, 418 (1956).

<sup>368</sup> SOMIN, *SMALLER GOVERNMENT*, *supra* note 29, at 119–35.

<sup>369</sup> *Id.* at 128–35.

<sup>370</sup> Other criticisms of decentralization include the claim that it will set off destructive races to the bottom, especially in environmental law, and the claim that it leads to the oppression of minorities. For an argument that these criticisms are vastly overstated, see *id.* at 145–50.

<sup>371</sup> See *id.* at 144–45 for a review of the evidence.

high government consumption expenditures, relatively low tax rates, and relatively more freedom with respect to labor market decisions.<sup>372</sup> Moreover, people often move because of job-related considerations, and public policy likely plays a large role in the variation in employment conditions across countries, states, and cities.<sup>373</sup>

Another potentially significant drawback of decentralization is that in practice, it likely requires constitutional limits on the federal government's power.<sup>374</sup> Members of the federal government have an incentive to expand its power and revenue so that they can buy political support, and members of state and local governments have an incentive to lobby for grants from the federal government and for national laws that reduce political competition among lower-level jurisdictions.<sup>375</sup> Voters are not in a good position to oppose these forces because they are uninformed both about the degree of centralization as well as its benefits.<sup>376</sup> As a result, ordinary political processes are likely to lead to overcentralization.

### 3. Greater Reliance on the Free Market

Some behavioral public choice scholars conclude that irrationality among political actors is so serious a problem that it greatly strengthens the case for a free market in which the government plays only a limited role.<sup>377</sup> Skeptics of the free market might respond that irrationality affects private actors as well. How do we know then whether society will be better off with more government or less? This Article does not attempt to resolve that question definitively. Instead, we simply discuss three reasons why irrationality might be more detrimental to democracy than to the free market.<sup>378</sup> We then raise a practical consideration: even if irrationality makes limited government more desirable, limited government may be difficult to achieve and sustain in a world populated by irrational political actors.

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<sup>372</sup> Nathan J. Ashby, *Economic Freedom and Migration Flows Between U.S. States*, 73 S. ECON. J. 677, 694 (2007).

<sup>373</sup> SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 145.

<sup>374</sup> *Id.* at 150–52.

<sup>375</sup> *Id.*

<sup>376</sup> *Id.* at 166–68.

<sup>377</sup> *E.g.*, Hirshleifer, *supra* note 16, at 856 (“[T]he behavioral approach in some ways *strengthens* the case for *laissez-faire*, and raises some new doubts about the value of regulation, because much regulation is driven by psychological bias—on the part of the *proponents*, not necessarily the regulated.”); CAPLAN, MYTH, *supra* note 15, at 195–97.

<sup>378</sup> *Cf.* Lucas, *Opportunity Cost Neglect*, *supra* note 17, at 264–75 (arguing that opportunity cost neglect is a more serious problem for voters than for consumers); Hirshleifer, *supra* note 16, at 857 (“[A] behavioral approach suggests that even though markets work imperfectly, the political process usually works even worse.”).

i. *Private Actors Are Probably More Rational Than Political Actors*

There are at least three reasons to suspect that private actors are more likely to be rational than political actors. Private actors (1) have greater incentives to act rationally, (2) have more opportunities to identify and learn from mistakes, and (3) face less complex and more familiar problems.

Political actors, especially voters, generally have less incentive to recognize their irrationality and to find ways to overcome it than do private actors.<sup>379</sup> As we have noted repeatedly, one vote rarely decides an election. In addition, the consequences of most market decisions are largely confined to the person responsible for them, while the costs and benefits of public policy are mostly external to the decision makers.<sup>380</sup> The fact that political actors have less incentive to behave rationally is potentially important. Rationally evaluating new information requires conscious effort, and failure to exert that effort increases the influence of various biases.<sup>381</sup>

Not only do private actors have greater incentive to behave rationally, they are often making less complex decisions. Consumers usually have significant experience with the goods and services that they purchase, so they are in a good position to evaluate their costs and benefits. Effective policy making, on the other hand, requires detailed knowledge of esoteric subjects like economics, national defense, and health care, and most people find these subjects unfamiliar and daunting.<sup>382</sup> Even experts in these fields struggle with their complexity and often disagree about the best policies. Moreover, as we have seen, government policies are frequently plagued by unforeseen consequences, and there are reasons to believe that political actors greatly underestimate the complexities of policy making.

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<sup>379</sup> Kent Daniel et al., *Investor Psychology in Capital Markets: Evidence and Policy Implications*, 49 J. MONETARY ECON. 139, 181 (2002) (stating that “the incentives of officials to overcome their biases in evaluating the value of alternative policies are likely to be weak, as contrasted with the incentive of market participants to improve their judgments to make trading gains or avoid losses” and “individual voters have very weak incentives to avoid being fooled” by special interest groups and political entrepreneurs).

<sup>380</sup> Caplan, *Majorities Against Utility*, *supra* note 50, at 207–08 (pointing out that “voting for bad policies has a built-in *negative externality*” because it hurts everyone).

<sup>381</sup> KAHNEMAN, *supra* note 58, at 31–49.

<sup>382</sup> Effective policy making is difficult when the government is addressing purported market failures, such as externalities or monopolies. But it becomes even more complex when the government acts paternalistically. Attempts to justify paternalism are the primary theme running throughout the behavioral law and economics literature. But paternalistic policy making often requires an enormous amount of information about the people whom the government is regulating, including identifying their “true” preferences. *See generally* Lucas, *Cigarette Taxes*, *supra* note 251.

In addition to bad incentives and complex decisions, political actors have less opportunity than private actors to learn from errors.<sup>383</sup> If a consumer purchases a Dr. Pepper and finds out that she does not like the taste, she is unlikely to make the same mistake again. But if a voter supports protectionism or price controls believing that these policies are good for the economy, how will she know if she was wrong? She has little incentive to identify and evaluate the consequences of her preferred policies. And even if she did, the effects are so complex that an adequate and objective assessment would require expert help, which she is unlikely to seek.<sup>384</sup> Moreover, any assessment in which she does engage will almost certainly suffer from ideological bias and motivated reasoning. Similarly, the ability of politicians and bureaucrats to learn from prior policy decisions is inhibited by poor feedback and a tendency to interpret subsequent events as vindicating the adopted policy.<sup>385</sup>

Better incentives, less complex decisions, and greater opportunities to learn all suggest that private actors will make more rational decisions than political actors. This conclusion is consistent with empirical evidence.<sup>386</sup> Psychologists and behavioral economists have spent decades demonstrating that test subjects err predictably in low-stakes laboratory experiments, which frequently involve unfamiliar problems and novel decision environments. But these findings often conflict with evidence from laboratory experiments that incorporate substantial incentives for good performance, from field experiments that closely mimic real-world decision environments, and from studies of real-world behavior. People generally make more rational decisions when faced with greater incentives to do so, when dealing with familiar problems in their natural setting, and when given opportunities to learn and

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<sup>383</sup> Peter J. Boettke et al., *Saving Government Failure Theory from Itself: Recasting Political Economy from an Austrian Perspective*, 18 CONST. POL. ECON. 127, 138 (2007) (“[D]ecisions in the market to either buy or abstain from buying are a direct signal to sellers, whereas in the political process voters do not have the same extent of feedback opportunities with respect to public policy offerings because they vote only periodically for representatives and their vote is rarely decisive.”); Frey & Eichenberger, *Economic Incentives*, *supra* note 323, at 224. On the relationship between learning and rational behavior, see Klick & Mitchell, *supra* note 351, at 1627–38.

<sup>384</sup> Cf. SCHUMPETER, CAPITALISM, *supra* note 59, at 263 (“The picture of the prettiest girl that ever lived will in the long run prove powerless to maintain the sales of a bad cigarette. There is no equally effective safeguard in the case of political decisions. Many decisions of fateful importance are of a nature which makes it impossible for the public to experiment with them at its leisure and at moderate cost. Even if that is possible, however, judgment is as a rule not so easy to arrive at as it is in the case of the cigarette, because effects are less easy to interpret.”).

<sup>385</sup> E.g., Choi & Pritchard, *supra* note 99, at 44–45.

<sup>386</sup> SOMIN, SMALLER GOVERNMENT, *supra* note 29, at 135–37; Caplan, *Rational Irrationality*, *supra* note 15, at 14–20 (citing evidence that a low private cost increases irrationality); Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133, 139–42 (2006) (citing evidence that increased incentives reduce cognitive errors and concluding that “political beliefs should be particularly erroneous because voters lack the incentives to learn the truth (after all one vote doesn’t determine anything)”).

seek assistance.<sup>387</sup> To be sure, real-world market participants do sometimes act irrationally. But irrational behavior appears to be more common in the laboratory than in the market. By contrast, political actors often make decisions in settings that resemble laboratory experiments in key respects—low personal stakes for the decision maker, unfamiliar problems, and little opportunity to learn from mistakes. This suggests that political actors will make low-quality decisions.

*ii. Arbitrage Mechanisms Mitigate Irrationality in Private Markets*

Arbitrage mechanisms often limit the effects of irrationality in private markets. As Edward McCaffery and Joel Slemrod point out, “competition in consumer markets keeps prices at marginal cost, however much some

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<sup>387</sup> RICHARD EPSTEIN, SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM 213–18 (2003) (reviewing evidence that the endowment effect influences market transactions less than laboratory experiments); Frey & Eichenberger, *Economic Incentives*, *supra* note 323, at 225–26 (reviewing the literature on irrationality and incentives); Erik Hoelzl & Aldo Rustichini, *Overconfident: Do You Put Your Money on It?*, 115 ECON. J. 305 (2005) (finding that overconfidence bias manifests itself less when people bet real money on their beliefs); Klick & Mitchell, *supra* note 351, at 1633–36 (reviewing evidence that incentives reduce irrational behavior); John List, *The Behavioralist Meets the Market: Measuring Social Preferences and Reputation Effects in Actual Transactions*, 114 J. POL. ECON. 1, 5–6 (2006) (finding that market participants observed in their natural environment behave more like self-interested rational actors than subjects in laboratory experiments); John List, *Neoclassical Theory Versus Prospect Theory: Evidence from the Marketplace*, 72 ECONOMETRICA 615, 624 (2004) (finding that consumers with significant market experience are less prone to the endowment effect); John List, *Does Market Experience Eliminate Market Anomalies?*, 118 Q. J. ECON. 41, 70–71 (2003) (finding that market experience plays a significant role in eliminating the endowment effect); Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033 (2012); Joshua D. Wright, *Behavioral Economics, Paternalism, and Consumer Contracts: An Empirical Perspective*, 2 N.Y.U. J.L. & LIBERTY 470, 477–82, 492–98 (2007) (discussing the lack of evidence of consumer irrationality in the credit card market and with respect to standard form contracts). Colin Camerer and Robin Hogarth review 74 experimental studies and find evidence that incentives improve performance on certain tasks but not others. In particular, they conclude that incentives matter most in judgment and decision tasks, where they “improve performance in easy tasks that are effort-responsive, like judgment, prediction, problem-solving, recalling items from memory, or clerical tasks.” Colin F. Camerer & Robin M. Hogarth, *The Effects of Financial Incentives in Experiments: A Review and Capital-Labor-Production Framework*, 19 J. RISK & UNCERTAINTY 7, 34 (1999). And when the stakes become higher, people move away from “favorable ‘self-presentation’ behavior toward more realistic choices.” *Id.* Moreover, Camerer and Hogarth suggest that experimental evidence understates the effect of incentives over long periods:

Our view is that experiments measure only short-run effects, essentially holding capital fixed. The fact that incentives often do not induce different (or better) performance in the lab may understate the effect of incentives in natural settings, particularly if agents faced with incentive changes have a chance to build up capital—take classes, seek advice, or practice.

*Id.* at 35.

individual agents might be able to be tricked into paying more.<sup>388</sup> Similarly, even if most stock market participants tend to buy high and sell low, stocks will be valued appropriately as long as there is at least one rational actor who does not face liquidity constraints.<sup>389</sup> In other words, some irrational individuals will suffer losses, but in the aggregate, the pricing system will be efficient.

Unfortunately, no general arbitrage mechanisms exist in the public sector, and politicians have little incentive to develop them.<sup>390</sup> For example, a politician attempting to educate the public about hidden regulatory costs—even if he could somehow attract voters' attention—cannot be sure that he or his political party will benefit from the resulting efficiency gains.<sup>391</sup> In fact, the effort may backfire because voters are not partial to politicians who deliver bad news.<sup>392</sup>

### *iii. Irrationality Among Political Actors Imposes Significant Damage*

The damage resulting from irrational decisions will often be greater when the decision maker is a political actor rather than a private actor. Private actors who behave irrationally harm themselves and perhaps those close to them. Political actors, on the other hand, can harm thousands or even millions of people by causing the government to pursue irrational policies such as unnecessary wars.

### *iv. Is Sustaining Small Government Impossible?*

Even if we assume that greater reliance on the free market is desirable, a practical problem presents itself. As we have seen, irrationality often biases political actors in favor of government intervention, and substantial limitations on government power are usually difficult to adopt and easy to circumvent.

One potential way to overcome this problem is to take advantage of ideological bias.<sup>393</sup> Indoctrinating voters and other political actors with free

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<sup>388</sup> Edward McCaffery & Joel Slemrod, *Toward an Agenda for Behavioral Public Finance*, in *BEHAVIORAL PUBLIC FINANCE* 3, 11 (Edward McCaffery & Joel Slemrod eds., 2006).

<sup>389</sup> *Id.*

<sup>390</sup> In some cases, intergovernmental competition may perform an arbitrage-like role in the public sector. For example, Edward McCaffery and Jonathan Baron point out that while it may be economically inefficient, the corporate income tax is cognitively appealing because its effects are largely hidden from view. Yet the U.S. corporate income tax accounts for only a small part of federal government revenues. A likely reason is that the United States faces competition for corporate citizens from other countries. See McCaffery & Baron, *Thinking About Tax*, *supra* note 56, at 131.

<sup>391</sup> *Id.* at 130 (“Arbitrage mechanisms in the public sector are . . . largely public goods.”).

<sup>392</sup> *Id.*

<sup>393</sup> See *supra* Part III.C.



market ideology might create a bulwark against government encroachment.<sup>394</sup> Consistent with this hypothesis, Robert Higgs has argued that laissez-faire was the predominant ideology in the United States in the late 19th century, which made significant government expansion unthinkable. During the 20th century, an ideological shift occurred and with it came a more interventionist state.

Nonetheless, attempts to manipulate the public through ideological bias can be problematic. In addition to possible abuse, the practice may backfire. For example, Republican politicians generally present themselves as favoring lower taxes, less government spending, and less regulation. Not surprisingly, Republican voters express more negative attitudes than Democratic voters toward taxes, government spending, and regulation. However, Republican hostility toward government spending and regulation is more apparent than real. When poll questions are worded in abstract and general terms, many Republicans say that they favor reductions in government spending and regulation. But when asked about specific spending programs and particular types of regulation, Republicans express a high level of support.<sup>395</sup> Many Republicans do have a strong aversion to taxes.<sup>396</sup> But this hostility often manifests itself in the form of tax-label aversion,<sup>397</sup> and not opposition to government generally. Republicans generally support interventions for which the costs are hidden, including tax expenditures<sup>398</sup> and regulations. And while they claim to support deficit reduction, they do not favor the spending cuts necessary to make it happen. In other words, the primary effect of the anti-tax, free-market rhetoric prominent in Republican propaganda appears to be a dislike among Republicans of government in the abstract that does not translate into the desire to reduce the size and scope of specific programs. Republican

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<sup>394</sup> Richard Layard makes a similar argument for purposefully shaping people's beliefs and preferences. He argues that the school system should take advantage of happiness research and indoctrinate students with beliefs and values that he believes will lead to happier lives. Richard Layard, *Happiness and the Teaching of Values*, 12 CENTREPIECE 18, 20–23 (2007).

<sup>395</sup> For a review of public opinion research on the attitudes of Republicans toward government, see Lucas, *Opportunity Cost Neglect*, *supra* note 17, at 280–83.

<sup>396</sup> For a discussion of the psychological mechanism underlying Republicans' disdain for taxes, see *id.* at 339–41.

<sup>397</sup> See Gamage & Shanske, *supra* note 239, at 49–54 (reviewing the empirical evidence for tax-label aversion).

<sup>398</sup> For experimental evidence that Republicans are more likely to support tax expenditures than similar direct spending programs, see Christopher Faricy & Christopher Ellis, *Public Attitudes Toward Social Spending in the United States: The Difference Between Direct Spending and Tax Expenditures*, 36 POL. BEHAV. 53, 71–72 (2014) (“[W]e find that the effects of the delivery-mechanism frame on support for social programs was conditioned by partisanship. The fact that the effects of the delivery-mechanism frame were stronger for Republicans than Democrats could serve as an explanation for why Republicans, generally opposed to the idea of ‘big government,’ also on balance report preferences for higher levels of government spending on specific social programs . . . [a]t least some Republicans might view tax expenditure policy as a way to have its policy cake and eat it, too: providing desirable social benefits while still adhering to the values of individual initiative and support for the private sector.”).

propaganda also has produced a disdain for taxes that increases the appeal of tax expenditures, regulation, and deficit spending vis-à-vis traditional tax and spending programs.<sup>399</sup>

## V. CONCLUSION

Our goal in this Article was to introduce legal scholars to behavioral public choice. We have reviewed the major findings in the field, including a discussion of the various biases and heuristics that impair the judgment of political actors and that cause government failure. We have also described the effects of irrationality on several specific areas of law and explained the important proposals for mitigating the influence of irrationality on public policy. Our hope is that our efforts will promote more realistic policy reforms by helping legal scholars better understand the types of policies that are likely to emerge from real-world political processes.

We also hope that this Article will facilitate participation by legal scholars in future behavioral public choice research. Much remains to be learned. In particular, future research should seek to provide stronger empirical evidence linking particular types of irrationality to the adoption of bad laws. Future research should also focus on improving the various proposals for reducing the effects of irrationality on the law. For example, those who argue in favor of greater reliance on bureaucrats and other experts have yet to demonstrate that the benefits of such reliance outweigh the costs. Nonetheless, there may be ways to reduce the problems presented by expert decision making and thereby to improve at least some areas of policy.

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<sup>399</sup> Cf. Jonathan Baron & Edward McCaffery, *Starving the Beast, The Psychology of Budget Deficits*, in *FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY* 221–39 (Elizabeth Garrett et al. eds., 2008) (presenting experimental evidence that the Republican strategy of starve the beast, i.e., enacting tax cuts now to force spending cuts later, is likely to cause budget deficits without having the intended effect of reducing the size of government).