

DEMOCRATIZING DIRECT DEMOCRACY: RESTORING VOTER COMPETENCE THROUGH HEURISTIC CUES AND “DISCLOSURE PLUS”

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Lawmaking by direct democracy, whereby the public votes directly on initiatives and referenda, is an increasingly popular and frequent feature of American politics. But critics of direct democracy point out that voters do not know basic facts about ballot measures, seem confused about the issues, and appear unduly influenced by superficial advertising. I argue that the source of voter confusion in direct democracy is not political ignorance or heavy campaign spending, as commonly alleged, but the scarcity of “heuristic cues”—cognitive shortcuts that voters customarily use to make political decisions. In this Article, I draw on political psychology to describe what heuristic cues are and how they help voters make difficult choices in other contexts, most importantly in candidate elections. I argue that strengthening heuristic cues in direct democracy offers the best means of rehabilitating voter competence pragmatically, at low cost, without trying to force voters to adjust the way they think about politics. I advocate an aggressive approach to direct democracy regulation that advances beyond the basic disclosure regimes currently in place. Under the “disclosure plus” framework presented here, the government should attempt not only to produce heuristic cues in direct democracy through increased campaign finance disclosure, but also to increase public awareness of those heuristic cues by broadcasting them to the public in highly visible ways. Although the U.S. Supreme Court has frustrated attempts in the past to advance voter competence, I introduce a new constitutional approach to campaign regulation of direct democracy that comports better with Buckley v. Valeo and accommodates the government’s significant interest in voter competence.

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INTRODUCTION

Direct democracy¹ is a popular target of contemporary criticism. Commentators have attacked direct democracy as "lousy lawmaking"² in which deliberation is "replaced by bumper-sticker logic and thirty-second television sound bites."³ They claim that voters are ignorant about politics and confused about ballot measures. Sensing a connection between election outcomes and

1. "Direct democracy," as it is used here, refers to the process by which the public votes directly on public policy in the form of initiatives and referenda. Initiatives are legislative proposals or constitutional amendments presented for the voters' approval or rejection after a petition signed by the requisite number of citizens authorizes their placement on the ballot. Referenda are statutes that have been legislatively approved and are then presented on the ballot for electoral decision. I refer to both initiatives and referenda as "direct democracy."

2. A term coined by Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733 (1988), but a sentiment shared by many commentators.

3. Catherine A. Rogers & David L. Faigman, "And to the Republic for Which It Stands": *Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057, 1064 (1996).

campaign spending, many critics also allege that the public's ignorance leaves it vulnerable to misleading campaign advertising. They argue that wealthy interests manipulate election outcomes by spending enormous amounts of money on broadcast advertising.

These critics are correct that the public is uninformed about politics and that disproportionate campaign spending is often decisive to election outcomes. Voters do not know basic facts about ballot measures, seem confused about the issues, and appear unduly influenced by superficial advertising. Many critics of direct democracy have thus concluded that citizens are too uninformed and incompetent to decide questions of public policy directly.

Here the critics are wrong. Voters can be perfectly competent, just not in the way that many commentators would like them to be. Critics cringe when they see direct democracy in practice because they cling to an overly idealistic model of how model citizen-legislators should think about politics. In their view, people ought to gather all relevant information, thoughtfully consider relevant facts and arguments, and deliberate until they reach an inclusive consensus. However, people generally do not have the time to do all this, and even if they did have the time and energy, they reasonably decline to spend so much time thinking about politics. Voters, quite simply, choose rationally to be ignorant about politics.

Despite their rational ignorance, voters can still make competent political choices. They often can use "heuristic cues" as shortcuts to roughly the same conclusions that they would have reached had they been well-informed. Heuristic cues, just like consumer brand names, reliably summarize a wealth of relevant information under an easily understood label. Voters can quickly learn a great deal about ballot measures without investing much time or effort, simply by knowing which favored and disfavored political elites support or oppose those ballot measures. Heuristic cues offer the best means of improving voter competence in direct democracy at low cost.

In fact, when the average voter tries to figure out her opinion about a ballot measure, learning what a political elite like Ralph Nader or Pat Robertson thinks may be more informative, more reliable, and certainly more efficient than learning substantive policy information about the ballot measure. Critics are not wrong in their factual assertions that the public is uninformed about politics and that money is associated with electoral success. Where the critics are wrong is in their assumptions about why political ignorance and campaign spending matter so much to voter competence in direct democracy.

In this Article, I explain that political ignorance and campaign spending lead to voter confusion in direct democracy mainly because voters are deprived of the heuristic cues that help them make difficult decisions. I propose ways

that direct democracy regulation can be directed toward rehabilitating voter competence by disseminating heuristic cues to the public. As I will discuss, people will be able to enhance their political knowledge in a practical, efficient manner that respects the way that people make decisions, without expecting them to become fully informed deliberative democrats. The problem is not that political information is unavailable, but that voters are too busy and uninterested to seek out that information and wade through it. Voters need something more than mere disclosure. They need disclosure, plus more. Efforts to deliver political information to the public must advance beyond the basic disclosure provisions currently in place.

Part I outlines the main criticisms of direct democracy and suggests that they overlook the function of heuristic cues in political decisionmaking. Part II describes what heuristic cues are and how they help voters make difficult decisions in other contexts. I explain that oft-cited problems in direct democracy are actually symptoms of the absence of heuristic cues. In Part III, I argue that focusing on heuristic cues is the best means of rehabilitating voter competence in direct democracy. I propose a more aggressive approach that moves beyond simple disclosure. Part IV shows how the Supreme Court has wrongly frustrated attempts in the past to address voter competence. Finally, Part V suggests a new constitutional approach to voter competence and campaign regulation of direct democracy.

I. CRITICISMS OF DIRECT DEMOCRACY

Citing widespread voter ignorance, critics of direct democracy argue that voters are insufficiently informed to decide the complex policy questions presented by ballot measures. Furthermore, critics allege that wealthy interests control election outcomes by exploiting voter ignorance with overwhelming advertising campaigns.⁴

4. Separate normative arguments may be made about whether direct democracy addresses the wrong issues, discriminates against minority rights, or serves the public better than representative lawmaking. Those arguments are not addressed here. See, e.g., Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI-KENT L. REV. 707 (1991); Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990); Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993).

A. Voter Ignorance

A familiar criticism of direct democracy is based upon a pessimistic assessment of the average voter's competence to make informed decisions about ballot questions.⁵ For decades, scholars have discovered widespread political ignorance about political issues. As Donald Kinder summarized, "[W]hen confronted with policy debates of great and abiding interest to political elites, many Americans can do no better than shrug."⁶

Indeed, discouraging are the many examples of voter ignorance and confusion. Majorities of voters in Arizona, Colorado, Oregon, and Washington agreed that "initiative and referendum measures on the ballot are usually so complicated that one can't understand what is going on."⁷ In a 1998 survey, 79 percent of Californians agreed that ballot measures are often "too complicated and confusing for voters to understand what happens if the initiative passes."⁸ Forty-one percent of Californians thought that "only some" ballot measures are understandable to the average voter, and 29 percent thought "only a few" are.⁹ Even more troubling, substantial numbers of confused voters cast votes that support the opposite outcome from what they actually intended to bring about.¹⁰ For instance, on one rent-control proposition

5. See, e.g., DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 122–44 (1984); Bruce E. Cain & Kenneth P. Miller, *The Populist Legacy: Initiatives and the Undermining of Representative Government*, in *DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA* 33, 38–39 (Larry J. Sabato et al. eds., 2001); Eule, *supra* note 4, at 1555–56; Rogers & Faigman, *supra* note 3, at 1064–66; Fountaine, *supra* note 2, at 738–42.

6. Donald R. Kinder, *Diversity and Complexity in American Public Opinion*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE* 389, 397 (Ada W. Finifter ed., 1983).

7. THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 74 tbl.4.2 (1989) (showing that 74 percent in Arizona, 59 percent in Colorado, 60 percent in Oregon, and 52 percent in Washington agree with the statement).

8. J. FRED SILVA, *THE CALIFORNIA INITIATIVE PROCESS: BACKGROUND AND PERSPECTIVE-RESOURCE MATERIAL FOR THE SPEAKER'S COMMISSION ON THE CALIFORNIA INITIATIVE PROCESS* 31 (2000).

9. John Marelius, *Keep Proposition Process as Is, Voters Say: Poll Reveals Attitude Toward Initiatives*, *SAN DIEGO UNION-TRIB.*, Nov. 3, 1997, at A3.

10. See PHILLIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS, AND COMPARISONS* 118 (1998) (citing examples). This type of voter error differs from voting errors resulting from confusion about the ballot format, evident in Palm Beach County, Florida, during the 2000 presidential election. See Jonathan N. Wand et al., *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 *AM. POL. SCI. REV.* 793, 793–94 (2001). The latter type of error results from misunderstanding about how to record one's choice on the ballot (for example, which hole to punch if one wants to vote for Al Gore rather than Pat Buchanan), rather than a misunderstanding about the identity or substance of the various choices themselves (for example, who are Al Gore and Pat Buchanan). Both issue and candidate elections presumably are equally vulnerable to confusion about the ballot format, but confounding the substantive choices presented is more prevalent in issue elections.

in California, over three-quarters of the electorate either wrongly voted for rent control when they intended to oppose it or wrongly voted against rent control when they intended to support it.¹¹ Assessing similar evidence, Julian Eule concluded that the public has little capacity for deliberation.¹² "Voters may be confused and overwhelmed by the issues placed before them. Any efforts at self-education are thwarted by manipulative campaigns designed to oversimplify the issues and appeal to the electorate's worst instincts."¹³

In addition, ballot questions often address technically challenging issues that are difficult to understand, even for diligent and attentive voters. On occasion, ballot measures address more accessible topics, such as affirmative action, on which voters are more likely to hold longstanding attitudes and need less guidance. However, ballot measures most frequently feature less accessible topics, such as governmental organization, regulation, and taxation, about which the general public knows little and needs more information.¹⁴

To aid voters, election officials in some jurisdictions provide voting pamphlets that present general information about the issues in question, but even these voting aides are often terribly complex. David Magleby's examination of voting pamphlets in four states found that they required the reading level of a third-year college student.¹⁵ In one California referenda election, the voting pamphlets for five related insurance measures ran well over one hundred pages.¹⁶ The ballot measures themselves contained over 26,000 words of total text.¹⁷ A recent Oregon election featured a 376-page pamphlet covering twenty-six measures on a single ballot.¹⁸

B. Excessive Campaign Spending

A chorus of commentators also protests that wealthy interests dominate direct democracy by flooding the public with campaign advertising and drown-

11. See MAGLEBY, *supra* note 5, at 143–44 (describing California Proposition 10 in 1980). Despite an intense campaign, 23 percent of voters reported in an exit poll that they wished to protect rent control, but incorrectly voted for the proposition. Fifty-four percent of voters opposed rent-control, but incorrectly voted against the proposition. *Id.*

12. Eule, *supra* note 4, at 1555–56.

13. *Id.* at 1556.

14. See MAGLEBY, *supra* note 5, at 74.

15. See *id.* at 138–39; see also David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 40 (1995); Eule, *supra* note 4, at 1509.

16. See Vlae Kershner, *Democracy Gone Awry: Explosion of Initiatives Lets Voters, Not Elected Leaders, Steer the State*, S.F. CHRON., May 18, 1998, at A1.

17. See Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 65 (1994).

18. See Elizabeth Garrett, *Political Intermediaries and the Internet "Revolution,"* 34 LOY. L.A. L. REV. 1055, 1066 (2001).

ing out competing points of view.¹⁹ John Shockley argues that corporate expenditures in direct democracy “have influenced, if not bought, public opinion, and managed, if not corrupted, the democratic process.”²⁰ David Broder concludes that the history of “the initiative process at the state level in the last two decades is that wealthy individuals and special interests—the targets of the Populists and Progressives who brought us the initiative a century ago—have learned all too well how to subvert the process to their own purposes.”²¹

It is difficult to deny the prominence of money in direct democracy campaigning. During the 1998 election year, proponents and opponents of ballot measures spent more than \$250 million on campaigning in California alone. This figure matched the amount spent in the same year by all candidates for the California General Assembly and statewide office²² and nearly doubled the amount spent in the same year by all candidates for the U.S. Senate and House of Representatives.²³ The \$250 million total also included approximately \$90 million spent on Proposition 5, a measure authorizing Native American tribes to operate casinos on their reservations.²⁴ Proposition 5 established a national record for campaign spending, narrowly surpassing the \$82 million spent by trial lawyers and insurance interests on five related propositions addressing tort reform and automobile insurance in 1988.²⁵ Even in less populous Colorado, eight ballot measures during 1998 attracted

19. See DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* 163–96 (2000); MAGLEBY, *supra* note 5, at 145–66; Nicole Bremner Cásarez, *Corruption, Corrosion, and Corporate Political Speech*, 70 NEB. L. REV. 689, 726 (1991); David Hadwiger, *Money, Turnout, and Ballot Measure Success in California Cities*, 45 W. POL. Q. 539, 545 (1992); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 507–08 (1982); John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377, 399–400 (1985); Fountaine, *supra* note 2, at 737; Ryan K. Manger, Note, *Buckley v. American Constitutional Law Foundation: Can the State Preserve Direct Democracy for the Citizen, or Will It Be Consumed by the Special Interest Group?*, 19 ST. LOUIS U. PUB. L. REV. 177, 177 (2000).

20. John S. Shockley, *Corporate Spending in the Wake of the Bellotti Decision 4*, paper presented at the American Political Science Association annual meeting, New York, Sept. 1978, quoted in CRONIN, *supra* note 7, at 106.

21. BRODER, *supra* note 19, at 243.

22. See Daniel Smith, *Campaign Financing of Ballot Initiatives in the American States, in DANGEROUS DEMOCRACY?*, *supra* note 5, at 71, 77.

23. See Elisabeth R. Gerber, *The Logic of Reform: Assessing Initiative Reform Strategies, in DANGEROUS DEMOCRACY?*, *supra* note 5, at 145. Candidates for the House spent approximately \$88 million, and candidates for the Senate spent approximately \$49 million in 1998. *Id.*

24. See David S. Broder, *Dangerous Initiatives: A Snake in the Grass Roots*, WASH. POST, Mar. 26, 2000, at B01, available at 2000 WL 2293186.

25. See Lupia, *supra* note 17, at 65.

more than \$10 million in spending, more than twice the total campaign spending for all statewide offices, including the gubernatorial race.²⁶

Many direct democracy elections, particularly on economic measures, attract spectacular disparities in campaign spending between opposing and supporting sides. Indeed, the consensus from empirical research is that spending advantages are nearly outcome-determinative when aimed at defeating a ballot measure. Professor Magleby found in his study of California direct democracy that when opponents spent two-thirds more than supporters, they successfully defeated the proposition 87 percent of the time—only two propositions in twenty-eight years overcame this spending deficit.²⁷ In many elections, the ballot measure was initially popular with the public until advertising by the well-funded opposition raised doubts in the public's mind and support for the measure disintegrated.²⁸

Based on such evidence, Judge Skelly Wright claimed that one-sided media campaigns have the effect of “distorting the expressed will of the people by the sheer inequality of financial resources and the avalanche of campaign messages. Regardless of their message, they simply drown out their opponents when they have the wherewithal to outspend them by margins of up to fifty to one.”²⁹

26. Smith, *supra* note 22, at 78. Dane Waters of the Initiative and Referendum Institute, a nonprofit organization that advocates expansion of direct democracy, estimated that approximately \$400 million was spent nationally on direct democracy campaigning in 1998 and about \$200 million in 2000. See Aimee Welch, *When Voters Are the Legislators*, INSIGHT MAG., Dec. 11, 2000, at 22, available at <http://www.insightmag.com/news/210769.html>.

27. MAGLEBY, *supra* note 5, at 148 tbl.8.1. David Magleby found that more than two-thirds of initiatives in California between 1960 and 1980 featured one-sided campaign spending advantages. *Id.* at 74. Others have similarly found disproportionate influence for money spent in opposition to a ballot measure compared to money spent in support of a ballot measure. See ELISABETH R. GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* 113–16 (1999); Susan A. Banducci, *Direct Legislation: When Is It Used and When Does It Pass?*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 109, 126–29 (Shaun Bowler et al. eds., 1998).

28. See, e.g., MAGLEBY, *supra* note 5, at 151 (“The typical pattern of change in voting intentions on propositions moves from widespread support . . . early in the campaign to one-sided rejection on election day, often by the same margin. The decline in the degree of support appears to begin as the opposition launches its well-financed advertising campaign.”); Eule, *supra* note 4, at 1517; Shockley, *supra* note 19, at 395 (“In many of these campaigns, the impact of money seems to have been crucial to the outcome of the vote. . . . [P]olls showed the measures far ahead until enormous opposition spending hit. . . .”); see also *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 308 n.4 (1981) (White, J., dissenting) (discussing this common pattern of support erosion).

29. J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 624–25 (1982).

C. Are the Critics Right?

These popular criticisms of direct democracy generally miss the point. Voter confusion prevails in direct democracy, but it does not result from inherent voter inability or inordinate campaign spending. Voters routinely prove themselves capable of complex political decisions based on minimal information when they vote in candidate elections despite the same political ignorance and heavy campaign spending. In fact, deciding between candidates for office arguably is more demanding than deciding how to vote on a ballot question. Candidates hold varying positions on a wide spectrum of issues and present for evaluation a universe of individual qualities. If one believes that voters are competent enough to vote on candidates for office, then one ought also to believe that voters are similarly competent to vote on ballot questions, at least under some set of conditions.

What helps voters in candidate elections and simplifies the vote choice are “heuristic cues” that summarize relevant decisionmaking criteria into easily understood choices. The source of voter confusion in direct democracy is not political ignorance or campaign spending, but the scarcity in issue elections of these familiar heuristic cues that voters customarily use to figure out difficult decisions.

II. VOTER COMPETENCE AND HEURISTIC CUES

In this part, I explain that voter confusion in direct democracy can be best understood as stemming from the unavailability of familiar “heuristic cues” that rationalize vote choice and organize political information. The campaign environments of direct democracy elections, for myriad reasons, deprive voters of the heuristic cues that they commonly use in candidate elections to process campaign information. I suggest an alternative source of heuristic cues in direct democracy that could restore voter competence.

A. An Introduction to Heuristic Cues

In the face of immense complexity, people routinely identify and rely on “heuristic cues” to guide their decisionmaking. They seize upon systematic regularities that serve as reliable shortcuts to the decisions that they would have reached had they carefully run through all available information in deliberate and painstaking fashion. Shoppers, for example, routinely rely on product brand names as a signal of quality for unfamiliar products rather than carefully researching each product that they need to buy. As one commentator explained, “When a few, simple pieces of information can lead citizens

to make the same choices that many, complex pieces of information do, citizens can be competent without having detailed information."³⁰

Political scientists have shown that when deciding for whom to vote in candidate elections, the typical voter refers to the heuristic cue of party identification to figure out which candidate is most likely to match her values and share her interests.³¹ Party identification constitutes the "structuring principle' or 'lens' for viewing and understanding politics."³² Voters may not be aware of all the candidates' stances on specific issues, but they know the general orientations of candidates' parties. The average voter "has learned that the Republicans are more conservative and the Democrats more liberal—and he can locate his own sentiments and cast his vote accordingly. . . . [I]f he knows the big thing about the parties, he does not need to know all the little things."³³

First, the party label identifies the candidate in the voter's mind to some degree as hostile or friendly in relation to the voter's personal interests. Second, the party label helps the voter evaluate the credibility of campaign appeals and endorsements. The voter tends to trust information and judgments from friendly partisans and distrust information and judgments from the opposing party. Instead of carefully considering all relevant information about the candidates, citizens leverage their knowledge about the major political parties as an organizing heuristic for understanding who the candidates are, whether the candidates are credible, and which candidate best represents them.

In addition to party identification, political scientists have identified a rich panoply of complementary heuristic cues for candidate elections. Ideological self-identification reflects attitudes toward ideological groups, symbols, and labels, rather than a rational calculation of policy preferences.³⁴ A voter may feel warmly toward liberal leaders and groups, while generally disliking conservative leaders and groups. Consequently, the voter identifies herself as liberal and tends to adopt liberal views on new issues. Other heuristic cues

30. Arthur Lupia, *Dumber than Chimps? An Assessment of Direct Democracy Voters*, in *DANGEROUS DEMOCRACY?*, *supra* note 5, at 67.

31. For classical treatments, see BERNARD R. BERELSON ET AL., *VOTING: A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN* 14–34 (1954); ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* ch. 6 (1980); V.O. Key, Jr. & Frank Munger, *Social Determinism and Electoral Decision: The Case of Indiana*, in *AMERICAN VOTING BEHAVIOR* 281, 281 (Eugene Burdick & Arthur J. Brodbeck eds., 1959).

32. JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 166 (1995).

33. BERELSON ET AL., *supra* note 31, at 321.

34. See Roger W. Cobb & Charles D. Elder, *Symbolic Identifications and Political Behavior*, 4 *AM. POL. Q.* 305, 328–29 (1976); Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, in *IDEOLOGY AND DISCONTENT* 206, 209–13 (David E. Apter ed., 1964); Pamela Johnston Conover & Stanley Feldman, *The Origins and Meaning of Liberal/Conservative Self-Identifications*, 25 *AM. J. POL. SCI.* 617, 644 (1981); Teresa E. Levitin & Warren E. Miller, *Ideological Interpretations of Presidential Elections*, 73 *AM. POL. SCI. REV.* 751, 766–69 (1979).

focus on a candidate's personal characteristics such as likeability and personality.³⁵ Voters also may use the retrospective judgments about a candidate's past performance in office as a heuristic cue about what the candidate may do in the future.³⁶ These candidate-centered heuristic cues help organize complex information into cognitive shortcuts that voters use to translate their preferences into competent vote choices.

B. Heuristic Cues in Direct Democracy?

The question is whether voters can use heuristic cues in issue elections, like they use heuristic cues in candidate elections, to overcome substantive ignorance. In direct democracy, voters may appear incompetent, and money may appear so influential, because voters in direct democracy cannot find heuristic cues to assist them.

Indeed, heuristic cues are not commonly available during issue election campaigning. Most importantly, party identification is generally unhelpful in issue elections.³⁷ Direct democracy by definition asks voters to decide issues directly. Ballot measures do not come to the voter affixed with a partisan label. While candidates almost always adopt a partisan affiliation that provides reliable information about them, voters decide on ballot measures without the brand name of a political party to guide their choice. In fact, direct democracy's original attractiveness to progressive reformers was that it allowed voters to bypass the political parties and speak directly on legislation.³⁸

35. See, e.g., SAMUEL L. POPKIN, *THE REASONING VOTER* 74–81 (1994); PAUL SNIDERMAN ET AL., *REASONING AND CHOICE* 7–8 (1991); Wendy M. Rahn et al., *A Social-Cognitive Model of Candidate Appraisal*, in *INFORMATION AND DEMOCRATIC PROCESSES* 136, 137–41 (John A. Ferejohn & James H. Kuklinski eds., 1990); Henry E. Brady & Paul M. Sniderman, *Attitude Attribution: A Group Basis for Political Reasoning*, 79 *AM. POL. SCI. REV.* 1061, 1076 (1985).

36. Voters need not know about specific policy issues and instead base their votes on global assessments of general socioeconomic conditions or the incumbent's performance in office. See MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* 5–6 (1981); V.O. KEY, JR., *THE RESPONSIBLE ELECTORATE* 150 (1966).

37. See MAGLEBY, *supra* note 5, at 129. Professor Magleby noted that politicians played only a "minor role" in shaping public opinion on ballot measures, principally because "the electorate had trouble identifying the politicians' positions." *Id.* at 158; see also Magleby, *supra* note 15, at 38 ("On ballot propositions, voters must decide their vote without the benefit of party cues, candidate appeal, an incumbent's record of successes or failures, or other candidate comparisons."); Adam Winkler, *Beyond Bellotti*, 32 *LOY. L.A. L. REV.* 133, 184 (1998) ("[Voters] confront many initiative campaigns without the traditional safeguards of party cues.").

38. See, e.g., Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 *MICH. L. & POL'Y REV.* 11, 24–32 (1997) (describing the Progressive intention of reducing the relative power of state assemblies); MAGLEBY, *supra* note 5, at 27–28 (same). Richard Briffault thus explains that the hallmark of direct democracy is "the absence of candidates and party labels from election campaigns." Richard Briffault, *Ballot Propositions and Campaign Finance Reform*, 1996 *ANN. SURV. AM. L.* 413, 414.

Of course, politicians and the major parties are free to endorse or oppose ballot measures, but aggressive involvement by them is relatively rare. Elected officials and the major parties choose to involve themselves in direct democracy campaigning only infrequently and quite selectively.³⁹ One major study found that on only 40 percent of ballot measures did even a single prominent politician take a public stand, typically when there was not any significant opposition.⁴⁰

Even when it occurs, vocal participation by politicians takes place primarily on highly accessible issues about which voters feel they need less guidance in the first place. For example, former California governor Pete Wilson campaigned on California propositions while in office but focused his effort on ballot measures that burnished his conservative bonafides by actively supporting immigration restrictions on Proposition 187 and opposing affirmative action on Proposition 209.⁴¹ For such highly salient issues, most voters already possess standing opinions that make voting on these ballot measures easy.⁴² Although Richard Hasen has argued that the major parties became increasingly

39. See SHAUN BOWLER & TODD DONOVAN, DEMANDING CHOICES: OPINION, VOTING AND DEMOCRACY 31 (1998); Gerber, *supra* note 23, at 147; Jeffrey A. Karp, *The Influence of Elite Endorsements in Initiative Campaigns*, in CITIZENS AS LEGISLATORS, *supra* note 27, at 149, 157; Lee Sigelman, *Voting in Gubernatorial Succession Referenda: The Incumbency Cue*, 51 J. POL. 869, 870 (1989). Furthermore, when politicians participate in campaigning, they usually do so only reluctantly, near the close of the campaign. See BETTY H. ZISK, MONEY, MEDIA, AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS 102 (1987). Party politicians have affirmative incentives to abstain from taking a clear position on policy issues. See Benjamin I. Page, *The Theory of Political Ambiguity*, 70 AM. POL. SCI. REV. 742 (1976); Kenneth A. Shepsle, *The Strategy of Ambiguity: Uncertainty and Electoral Competition*, 66 AM. POL. SCI. REV. 555 (1972). Simply put, "policy stands can create enemies as well as supporters." F. CHRISTOPHER ARTERTON, MEDIA POLITICS: THE NEWS STRATEGIES OF PRESIDENTIAL CAMPAIGNS 113 (1984). To quote Senator William B. Saxbe, "If you don't stick your neck out, you don't get it chopped off." DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 11 (1974). In issue elections, there is even less incentive to clarify one's position because there is no personal connection to the issue, nor does the media or an opposing candidate pressure the politician to take a stand. As Betty Zisk explained, "Except in cases where their position was well-known before the campaign, they had a great deal to lose." ZISK, *supra*, at 102.

40. See ZISK, *supra* note 39, at 101-03. There was only one case in fifty when Democrats and Republicans vocally opposed each other. See *id.* at 102. Betty Zisk found a "near-irrelevance of parties for state ballot controversies." *Id.* at 238; see also GERBER, *supra* note 27, at 17-18.

41. See JOHN M. ALLSWANG, THE INITIATIVE AND REFERENDUM IN CALIFORNIA, 1898-1998, at 187-210 (2000) (describing Wilson's calculated campaigning during the 1990s on politically salient California propositions).

42. See MAGLEBY, *supra* note 5, at 128-29; Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1355 (1985) (reviewing DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984)); Matthew Miller, *Do California Voters Really Know Best?*, SAN DIEGO UNION-TRIB., Dec. 9, 1997, at B7. Professor Magleby points out that campaign spending is lower on average for ballot propositions addressing easy issues such as the death penalty and legalized use of marijuana, because voters already held strong opinions on them. MAGLEBY, *supra* note 5, at 148.

active in direct democracy campaigning during the 1990s, he admits that involvement was restricted to the most salient ballot measures.⁴³ He agrees that “it would be premature to consider parties ‘major players’ in the process.”⁴⁴

C. Criticisms of Direct Democracy Re-Evaluated

1. Voter Ignorance

The source of voter confusion in direct democracy runs deeper than issue complexity or lack of information. After all, voters are not ignorant about politics only in the context of direct democracy. Whether it is an issue election or a candidate election, the electorate is demonstrably uninformed about basic political facts that one might expect an informed voter to know. As one political scientist explained, “[T]he existence of the badly informed voter is now a central part of political science’s intellectual heritage.”⁴⁵

Most citizens are not interested in the details of American politics and see scant instrumental value in learning more. Given that a single vote is extremely unlikely to be decisive in any election, most citizens choose to remain “rationally ignorant.”⁴⁶ It makes sense to stay uninformed in light of the high costs of learning more about politics, the low instrumental utility of a single vote, and the opportunity costs of neglecting life’s other demands.

However, political ignorance is not fatal for voter competence. The trouble in direct democracy is that heuristic cues like party identification and candidate characteristics are unavailable and cannot help voters to overcome their political ignorance. Voters are forced to depart from their trusted way of making political decisions, thus exposing their political ignorance. In his landmark study of direct democracy, David Magleby concluded that because “there is no party cue, the presence of an uninformed electorate is more problematic than in partisan/candidate elections.”⁴⁷ Absent party identification,

43. See Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 COLUM. L. REV. 731, 736–44 (2000).

44. *Id.* at 734.

45. Lupia, *supra* note 17, at 63. A few illustrative examples: Only half of Americans know that each state has two U.S. Senators and less than half can name their Congressman; almost half of America thinks that Israel is an Arab country; none of the 1500 respondents in one survey could name all nine Supreme Court Justices and under 2 percent could name as many as half. See BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS’ POLICY PREFERENCES* 9 (1992).

46. See, e.g., ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 207–37 (1957); JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 262 (3d ed. 1950). In fact, given the rationality of political ignorance, Morris Fiorina suggests the oddity is that people are as politically informed as they are. Morris P. Fiorina, *Information and Rationality in Elections*, in *INFORMATION AND DEMOCRATIC PROCESSES*, *supra* note 35, at 329, 334–41.

47. MAGLEBY, *supra* note 5, at 128.

“voting takes place in an informational vacuum, where voting becomes a form of electoral roulette.”⁴⁸

In fact, when politicians participate visibly in direct democracy campaigns, voters make extensive use of party identification as a heuristic cue for voting on ballot measures.⁴⁹ Jeffrey Karp’s study of the 1991 term-limits referendum in Washington found that the visible opposition of then-Speaker of the House Tom Foley was decisive in its defeat.⁵⁰ Although the referendum enjoyed two-thirds support a few months before the election, Foley underscored to voters that the practical effect of the measure would be to limit current incumbents, including himself, to just one additional term. People responded by voting on the referendum based heavily on their feelings about Foley. Foley’s vocal opposition caused his strongest supporters to be three times more likely to vote against the measure than voters who most disliked Foley, even controlling for other important variables.⁵¹ Similarly, in Lee Sigelman’s study of gubernatorial succession referenda in three states, the incumbent governor’s position on the issue was the critical determinant of voter choice.⁵² When the governor championed the issue, voters relied on the governor’s visible stance on the issue, coupled with their affective feelings for the governor, as a heuristic cue for whether to approve the measure.

Regardless whether voters ought to weight heuristic cues so heavily in their voting decisions, it appears that they take significant account of this information and find it exceedingly instructive about how they should vote.⁵³ Without heuristic cues, voters become more uncertain about what to believe and whom to trust. Voter confusion in direct democracy is a symptom not simply of political ignorance, but also of the absence of heuristic cues that enable voters to overcome political ignorance.

48. *Id.* at 167.

49. In addition to the studies described above, a study of Norwegian and British referenda on European Community membership indicates that partisanship was the “dominant factor” in voting. See Roy Pierce et al., *Referendum Voting Behavior: The Norwegian and British Referenda on Membership in the European Community*, 27 AM. J. POL. SCI. 43 (1983). The study found that partisanship played the same role in the referenda vote that it plays in general elections, provided that the relevant parties took clear and uniform positions on the issue at stake. *See id.* at 61.

50. Karp, *supra* note 39, at 161.

51. *See id.* The following year, with Foley and other politicians uninvolved in the campaign, the same term limits referendum easily passed. *Id.* at 164. For another demonstration of the influence of elite endorsements and partisanship in direct democracy, when such cues are available, see the discussion of California Propositions 131 and 140 in BOWLER & DONOVAN, *supra* note 39, at 129–46.

52. Sigelman, *supra* note 39, at 883.

53. I undertake a more thorough defense of heuristic cuetaking in Part III.

2. Campaign Spending

The absence of heuristic cues also may be helpful to understanding why spending advantages are nearly decisive in opposition to a ballot measure but less successful in support of one.⁵⁴ One explanation offered by researchers is that voters tend to reject ballot measures in the face of confusion or uncertainty, as a default response.⁵⁵ Sustained advertising raises doubts about ballot measures with a steady stream of negative arguments and information.

In the absence of heuristic cues like party identification, voters feel that they lack reliable information and cannot properly evaluate the credibility of advertising claims.⁵⁶ Voters sometimes have little basis for decision other than what they gather from anonymous campaign advertising designed to take advantage of their ignorance. Betty Zisk concluded that there is a "causal relation between spending and outcome in these campaigns, mainly because of the lack of powerful alternative cues (for example, partisan) available to the voter."⁵⁷ She explained that "in the absence of clear partisan cues or ready tools for performing an instrumental calculation of self-interest . . . large numbers of voters fell back on vague ideological references, slogans, or their gut reactions."⁵⁸ Money does not always win, but it can help breed confusion when voters lack the contextual information they need to make sense of campaign information.

54. Campaign spending advantages are less successful when in support of a ballot measure. Professor Magleby found that when the supporters of a proposition spent two-thirds more than the opposition, the proposition won less than half the time. MAGLEBY, *supra* note 5, at 148 tbl.8.1. Likewise, Daniel Lowenstein found in his study of California ballot measures between 1968 and 1980 that nine of ten propositions opposed by large spending advantages were defeated, while seven of fifteen propositions succeeded when aided by disproportionate spending. Lowenstein, *supra* note 19, at 518.

55. See BOWLER & DONOVAN, *supra* note 39, at 43–66 (discussing voting "no" as a default voting strategy); MAGLEBY, *supra* note 5, at 142–44; Cronin, *supra* note 7, at 85–87. Negative information appears to have similar differential effectiveness in candidate elections as well. See, e.g., GARY C. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS 84 (1980). Political psychology research suggests that public opinion is cognitively more receptive to negative political arguments. See Michael D. Cobb & James H. Kuklinski, *Changing Minds: Political Arguments and Political Persuasion*, 41 AM. J. POL. SCI. 88, 110–14 (1997).

56. Sometimes the public identifies lopsided campaign spending as springing from a hostile source. See BOWLER & DONOVAN, *supra* note 39, at 159–61 (suggesting that heavy opposition spending backfired for California Proposition 99 in 1988 because it revealed to voters the financial involvement of tobacco interests).

57. ZISK, *supra* note 39, at 108 (discussing the finding that the higher spending side won forty of fifty elections studied in the 1976–1980 period).

58. *Id.* at 190. John Shockley agrees that "money is all the more influential on ballot proposals because voters do not have the orienting devices of party labels or name familiarity when they vote." Shockley, *supra* note 19, at 393.

Note that it is not excessive campaign spending by itself that injures political equality, representation, and other democratic interests.⁵⁹ In fact, elevated campaign spending can be helpful to voters, provided that it is coupled with prominent disclosure of the sources.⁶⁰ Heavy campaign advertising increases the likelihood that the average voter will hear about the issues, learn where elites stand on them, and find out who will benefit from the proposed ballot measures. As one pair of scholars put it, "Spending brings more attention and more awareness to an issue, which somehow allows voters with different cognitive abilities to see an initiative in partisan or ideological terms."⁶¹ Provided that campaign advocates are readily identifiable, even one-sided campaign advertising is helpful to voters because it enables voters to determine who wins or loses from a particular election result.⁶²

Heuristic cues, by bolstering voter competence, might make it less likely that voters will be so influenced against ballot measures by heavy campaign spending. If heuristic cues were accessible, voters might be better able to understand the ballot question and vote their interests, rather than falling back to the default choice of voting "no" or abstaining.

59. See Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 671–87 (1997) (discussing these values as the main rationales for campaign finance reform); see, e.g., Gary Hart & William Shore, *Corporate Spending on State and Local Referendums: First National Bank of Boston v. Bellotti*, 29 CASE W. RES. L. REV. 808 (1979); Lowenstein, *supra* note 19; David R. Lagasse, Note, *Undue Influence: Corporate Political Speech, Power and the Initiative Process*, 61 BROOK. L. REV. 1347 (1995).

60. It is not clear that increased campaign spending necessarily brings a more substantive or more informed discourse, as the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), appeared to assume. See E. Joshua Rosenkranz, *Judges in the Political Thicket*, in A USER'S GUIDE TO CAMPAIGN FINANCE REFORM 127, 134 (Gerald C. Lubenow ed., 2001). But increased campaigning would tend to increase the likelihood that the identities of major campaign sponsors would find public attention.

61. See BOWLER & DONOVAN, *supra* note 39, at 159 (internal cross-reference omitted); see also ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 209–10 (1998) (discussing how the "costly effort" of campaign spending signals information to voters). Increased spending also augments awareness about the issues and boosts voter turnout. In a study of California initiatives from 1984 to 1990, Todd Bowler and Shaun Donovan found that every \$1 million spent made an additional 1 percent of voters aware of a proposition. See BOWLER & DONOVAN, *supra* note 39, at 152. Voters are significantly less likely to abstain from voting on a measure when campaign spending is greater. See *id.* at 53–54; see also BOWLER & DONOVAN, *supra* note 39, at 157; PETER CLARKE & SUSAN H. EVANS, *COVERING CAMPAIGNS: JOURNALISM IN CONGRESSIONAL ELECTIONS* 99–100 (1983) (discussing the positive impact of campaign spending on political knowledge); Gerber, *supra* note 23, at 159; Elisabeth R. Gerber & Arthur Lupia, *Campaign Competition and Policy Responsiveness in Direct Legislation Elections*, 17 POL. BEHAV. 287, 288 (1995).

62. As a result, Richard Briffault argues that the higher need for information in direct democracy justifies a heavier presumption against legislative limitation of campaign spending in direct democracy compared to comparable limitation of spending in connection with candidate elections. Briffault, *supra* note 38, at 423–24.

D. Interest Group Support as a Heuristic Cue in Direct Democracy

In the absence of politician and party involvement, where can voters find reliable heuristic cues in issue elections? One answer is that voters can derive heuristic cues by looking to which interest groups support and oppose a particular ballot measure. Interest groups are active participants in direct democracy, and the political orientation of many interest groups is well-known.⁶³ In fact, the positions taken by interest groups are particularly informative and consistent because interest groups adhere to natural policy orientations dictated by the defining interests of their memberships.⁶⁴

Campaign activists understand that interest group endorsements can be decisive in issue elections, and they make it standard practice to portray their position as supported by a wide array of public-spirited groups. Even moneyed corporate interests work to draw and publicize endorsements from reputable parties that reflect positively for their position.⁶⁵ Voters might determine their own positions by aligning themselves in relation to favored and disfavored interest groups, just as they refer to party identification during candidate elections.

An important study by Arthur Lupia illustrates how uninformed voters can successfully use heuristic cues from interest group endorsements to overcome political ignorance.⁶⁶ In an exit poll of California voters, Professor Lupia asked voters about their knowledge of the content of five tort reform propositions on the ballot that year (for example, asking which proposition established a no-fault system of insurance; which limited attorney contingency fees, and so on) and tested whether they knew the positions of the insurance industry, trial lawyers, and Ralph Nader on each proposition. Controlling for other important variables, Professor Lupia found that voters who were ignorant about the substantive content of the propositions, but knew the interest group positions, voted almost exactly like substantively knowledgeable voters.⁶⁷ Even in the absence of visible party and politician involvement in the campaign,⁶⁸ poorly informed voters leveraged knowledge of interest

63. See generally GERBER, *supra* note 27, at 18.

64. See James M. Snyder, Jr. & Michael M. Ting, *An Informational Rationale for Political Parties*, 46 AM. J. POL. SCI. 90, 90–91 (2002).

65. Todd Donovan et al., *Political Consultants and the Initiative Industrial Complex*, in DANGEROUS DEMOCRACY?, *supra* note 5, at 101, 114.

66. See Lupia, *supra* note 17, at 69–72.

67. See *id.* at 71.

68. It may be helpful to remember that at the time of the elections studied by Professor Lupia, Nader was best known as a nonpartisan consumer advocate and had not yet become better known as a presidential candidate or Green Party nominee.

group positions as a heuristic cue to reach the same voting decisions as well-informed voters across five propositions.

However, in sharp contrast, voters who were ignorant about both the content of the propositions and the interest group positions reported voting decisions markedly different from those of the substantively knowledgeable voters.⁶⁹ Controlling for other important variables, voters who did not know the interest group positions differed in their support for three of the five propositions by at least 25 percent and in one case by almost 50 percent.⁷⁰ In conclusion, despite the fact that “scholars and pundits propose that we educate the public about politics in order to lessen the impact of uninformed votes,” Professor Lupia recommended instead that “directing our efforts into the provision of credible and widely accessible ‘signals’ may be a more effective and cost-efficient way to ensure the responsiveness of electoral outcomes to the electorate’s preferences.”⁷¹

Currently, the practical problem in direct democracy is that voters struggle to identify which interest groups stand on which side of a ballot question. Interest groups strategically obscure their involvement when they believe identification would hurt their campaigns. Many industry groups form political committees to conduct campaign activities under nondescript names like “Californians for Paycheck Protection” (religious conservatives supporting limitations on labor union political activity), “Alliance to Revitalize California” (Silicon Valley executives supporting a tort reform measure), and “Californians

69. See *id.*

70. See *id.* at 71 tbl.4. The groups that knew the insurance industry positions voted to enact two propositions (Propositions 100 and 103) that the remaining group voted down, and voted down a third proposition (Proposition 106) that the remaining group nearly voted to enact. A table containing Professor Lupia’s findings is reproduced below.

Percent Voting Yes by Information Category

Proposition	Information Category		
	High Knowledge with Knowledge of Insurance Industry Preferences	Low Knowledge with Knowledge of Insurance Industry Preferences	Low Knowledge Without Knowledge of Insurance Industry Preferences
100	53	53	27
101	8	5	15
103	72.5	73	26
104	17	17	34
106	11	12.5	45

Id. at 71 tbl.4.

71. *Id.* at 72. For another study on the central role of elite endorsements as heuristics in direct democracy elections, see James H. Kuklinski et al., *Citizen Knowledge and Choices on the Complex Issue of Nuclear Energy*, 26 AM. J. POL. SCI. 615, 618–19 (1982); see also BOWLER & DONOVAN, *supra* note 39, at 58–65.

for Affordable and Reliable Electrical Service” (industry opponents of utility regulation).⁷² Interposition of these intermediary entities hides the involvement of financial contributors and intentionally removes salient heuristic cues from public view.⁷³ As a result, in California, where direct democracy is most active and well-publicized, most voters feel aware about who stands to benefit from a ballot measure only “some of the time” or less, and about 20 percent of voters feel that they are only “rarely” aware at best.⁷⁴ A majority of Californians also think that the public is not receiving sufficient information to decide how to vote on ballot measures.⁷⁵ Based on this data, one commentator concluded that “it appears that Californians believe that for a majority of the propositions on their ballots, they don’t really know who the supporting and opposing interests are.”⁷⁶

Campaign regulation that helps the public become aware of which interest groups support and oppose a ballot measure can restore voter competence in direct democracy. When information is available about which prominent political actors support and oppose the various electoral options, even the most uninformed voters are capable of enlisting that information as a heuristic cue for voting. Voters intuitively look to the positions of various well-known political actors to infer much about the substantive content of issues, whose interests are at stake for each, and who can be trusted to provide reliable information.

72. See, e.g., Donovan et al., *supra* note 65, at 113–14; Elizabeth Garrett, *Issues in Implementing Referendums in Israel: A Comparative Study in Direct Democracy*, 2 CHI. J. INT’L L. 159, 180–81 (2001).

73. In one case, a tobacco lobby found that 67.2 percent of voters in an issue election said they would be more likely to vote for the proposition merely because the tobacco industry opposed it, whereas only 4.2 percent would be less likely to vote for it. See Shockley, *supra* note 19, at 418 n.151. The tobacco group also found that if a hypothetical group called “Californians Against Regulatory Excess” supported the proposition, then 70.9 percent would either be indifferent or more likely to support the proposition, whereas only 28.9 percent would be less likely to support it. See *id.* The tobacco group, thereby enlightened, formed a campaign committee named “Californians Against Regulatory Excess.” Political action committees in these campaigns “deliberately disguise their names” and “expend considerable effort in arriving at the most electorally potent name.” *Id.* at 418.

74. On a Field Institute survey of Californians conducted in August 1997, 6 percent of respondents felt aware of the interests behind ballot propositions “all of the time,” 29 percent felt aware “most of the time,” 40 percent felt aware “some of the time,” 16 percent “rarely” felt aware, and 3 percent reported “never” feeling they knew the affected interests. See ALLSWANG, *supra* note 41, at 239–41.

75. See Silva, *supra* note 8, at 26–27 (reporting data from a statewide survey conducted during Sept. 2000).

76. ALLSWANG, *supra* note 41, at 241.

III. VOTER COMPETENCE IN DIRECT DEMOCRACY

In this part, I argue that provision of heuristic cues in direct democracy is an efficient and effective means of improving voter competence. Heuristic cues are not a perfect substitute for full information, but they represent a pragmatic shortcut that both improves voter competence and preserves voters' evaluative autonomy.

Current reporting and government disclosure of campaign finance information has not generated heuristic cues that help voters understand ballot measures. Despite the implementation of campaign finance reporting under the Federal Election Campaign Act (FECA)⁷⁷ and by almost every state, voters remain unaware and confused. Voters need more than simple disclosure. The only way to increase the voter competence of most uninformed voters is to deliver information directly to them.

A. Practical Reform, Heuristic Cues, and Voter Autonomy: An Informational Bargain

Although heuristic cues are not a substitute for full information or wisdom, even politically ignorant voters can efficiently achieve "voter competence" by using heuristic cues, in the sense that they will reach the same choices that they would have reached if they were far better informed. My approach accepts voters' understandings of their interests and political preferences. It turns away from idealistic reforms that seek to re-make the rationally ignorant into model citizen-legislators and instead seeks a pragmatic low-cost improvement on the current political circumstances of "lousy lawmaking," without challenging the decisionmaking autonomy of voters. It affirms the ability of average voters to make rational political choices if only given a little assistance.

Admittedly, heuristic cues will not always be as helpful to voters in identifying their interests as they were in Professor Lupia's study. Nor will heuristic cues transform uninformed voters into perfectly informed citizens who are certain to make the "correct" choice in some deeper sense. Heuristic cues may even mislead voters under some circumstances.⁷⁸ But heuristic cues usually provide useful information that voters want. People commonly rely on heuristic

77. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455 (2000)).

78. For instance, one study reported that experimental subjects' reliance on a large collection of heuristic cues, including candidate appearance, candidate popularity in the polls, candidate ideology, and interest group endorsements, often led to less accurate vote choices in a stylized mock election among hypothetical candidates. See Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951, 964-67 (2001).

cues for all types of decisions because heuristic cues efficiently convey probative, if imperfect, signals about how one would decide with full information.

Indeed, reliance on heuristic cues is a learned practice based on past success and accuracy. Voting behavior in candidate elections, when heuristic cues are readily available, is relatively rational, consistent, and well-ordered,⁷⁹ whereas in issue elections, particularly when heuristic cues are difficult to find, voting behavior appears more random, irrational, and contradictory. Without heuristic cues, voters in direct democracy are more confused, money is more influential, and voters more likely to fall back on “vague ideological references, slogans, or their gut reactions.”⁸⁰ Even if they do not cure voter confusion in every instance, voters armed with heuristic cues will be much more likely to vote competently in the face of complexity than will voters without them.

First, heuristic cues may be superior in certain respects to raw political knowledge. Even for sophisticated voters, the raw data of politics—the policy details, statistics, technical analyses, budgetary considerations, and so on—can be impenetrable, notwithstanding great effort and passionate interest. Forming a truly independent position based on objective political information, without input from experts and politicians, requires an inordinate amount of learning, research, and rumination that only a few find profitable to undertake.⁸¹ The basic facts about a policy question and proposed solutions are difficult to integrate and assess even for the most sophisticated non-expert. Despite the theoretical ideal of the deliberative citizen-legislator, on most issues even professional legislators take cues from experts and peers who have established themselves as specialists on the issue at hand.⁸²

Thus, people may be correct to suspect that reliance on heuristic cues will lead to superior results than learning the subject for themselves from scratch, even putting aside the associated costs of acquiring political knowledge. Underlying policy specifics are less useful to the average citizen than knowing the synthesized opinion of a trusted leader. As a result, when they know what an identifiable politician thinks about an issue, people report a

79. See, e.g., Richard R. Lau & David P. Redlawsk, *Voting Correctly*, 91 AM. POL. SCI. REV. 585, 594 (1997) (finding that roughly three-quarters of voters vote “correctly” as if they would have voted with full information and concluding that “[t]his high a level of ‘correct’ voting certainly validates the efficiency of heuristic-based information processing”).

80. ZISK, *supra* note 39, at 190; see also Shockley, *supra* note 19, at 393.

81. See Edward G. Carmines & James H. Kuklinski, *Incentives, Opportunities, and the Logic of Public Opinion in American Political Representation*, in INFORMATION AND DEMOCRATIC PROCESSES, *supra* note 35, at 240, 243–45.

82. See JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 82–85 (1973) (demonstrating legislative cuetaking); Donald R. Matthews & James A. Stimson, *Cue-Taking by Congressmen: A Model and a Computer Simulation*, in THE HISTORY OF PARLIAMENTARY BEHAVIOR 247–73 (William O. Aydelotte ed., 1977) (same); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983) (describing Mikva's experience in Congress).

great deal more certainty about their own attitude, compared to when they base their attitude purely on policy information.⁸³

Second, elite opinion helps one to make best subjective sense of political information. Political information does not lend itself to clean evaluative conclusions. It is subject to manifold interpretations and varying value orientations about normative prescriptions. The subjective interpretation of those data is what matters most and precisely where expertise is most relevant. Knowing all the objective political data underlying an issue is often insufficient for non-experts who have not developed an ideological philosophy with respect to an issue. Politics is about what to do and what subjective conclusions to draw from objective data. Indeed, even identifying what data is relevant can be ideologically contingent because problem definition and criteria for assessing solutions can themselves be controversial. It may miss an important point to say that voters ought to learn about policy issues for themselves, instead of relying on elites. Voters want not only a cue about how they should feel, but also informed advice from trusted counsel about complicated questions.

A normative endorsement of heuristic reasoning thus flows from a realistic acknowledgment of the central role that political elites play in American politics. It is a wishful endeavor to pray that citizens can become better individual democrats, without also considering the powerful function of politicians, activists, interest groups, and other elites. Political scientist John Zaller has demonstrated persuasively that an overwhelming amount of public opinion is shaped by heuristic cue-taking from political elites, on issues ranging from racial toleration to military spending.⁸⁴ In short, citizens depend on political elites to gather political information and synthesize deliberative judgments for them.

Furthermore, even if individual citizens were experts at conducting political research and developing sophisticated positions on the issues, political elites play an indispensable role in coordinating collective action among likeminded citizens. Collective action problems abound among individual citizens with diverse interests. It is immensely difficult for a diffuse public by itself without external coordination to reach mutual agreement within the universe of political possibilities. For public choice, someone must present the public with a simpler subset of clear alternatives from which to choose. Political elites serve this function by winnowing the possible alternatives down to those that might win support, presenting those to the public, and

83. See Carmines & Kuklinski, *supra* note 81, at 261–63 (finding experimentally that people have more confidence in heuristic cues than in their own independent understandings without heuristic cues).

84. See JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 40–52 (1992).

then coalescing roughly likeminded citizens into tangible constituencies for particular political choices. As a result, people naturally look to elites to shape their understandings of public issues.

Deliberative democrats and other idealists aspire for a higher form of democratic politics in which individual citizens are the central loci of political activity, but the real energy in politics, where the strategy and coordination take place, is among political elites and the calculations that they make in shaping collective action. Political elites organize undeveloped and variegated individual preferences into coherent public demands for different courses of action. Inchoate political preferences are translated from disconnected individual predispositions, each standing alone and apart, into coordinated mass behavior in the forms of electoral voting blocs and public opinion constituencies. Reform perspectives must give significant attention to the essential role of elites if reform is to make a practical difference, because politics revolve around the choices elites make.

A heuristic processing perspective can still be consistent with deliberative democratic aspirations. The goal is still to empower voters and equip them with the information they need to participate efficaciously in politics. Heuristic processing perspectives simply offer a more realistic approach. They recognize the role of political elites and accept how people think about politics, rather than denying and hoping to change how people think about politics. This project is directed toward making contemporary politics, as they are, incrementally but materially stronger at a relatively low cost.

This approach addresses Daniel Ortiz's insight that campaign finance reform is at bottom a complaint about the way voters decide how to vote. Campaign finance reformers, he argues, believe that uninformed voters "simply do not exercise political choice in the informed, deliberate, reasoned way [they believe] democracy requires."⁸⁵ By seeking to limit campaign spending and the affective rhetorical appeals funded by campaign spending, reformers seek to deny "civic slackers"⁸⁶ the campaign stimuli that leads them to unreflective, nondeliberative choices. Thus, Professor Ortiz claims that campaign finance reformers "in a deep sense, disrespect[] these voters' evaluative autonomy" because they want to frustrate voters' ability to decide how to vote

85. Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 905 (1998).

86. Professor Ortiz describes "civic slacker[s]" as disengaged, uninformed voters who "make political decisions in a somewhat careless way," learning about politics primarily by "following political advertising without discrimination." *Id.* at 913; see also Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1, 4 (1995) (defining "civic slob[s]" as passive and uninformed voters who do not bother to acquire and evaluate substantive political information and "instead vote largely on the basis of images, feelings, and emotions").

in their normal manner.⁸⁷ Professor Ortiz is correct about reform efforts to control campaign spending. By contrast, a new approach to campaign regulation aimed at the publication of heuristic cues squarely accepts the way that civic slackers decide how to vote.

Delivery of heuristic cues to these civic slackers is an effort to render more meaningful the campaign advertising to which civic slackers respond. For example, source disclosures attached to campaign advertising contextualize advertising and help civic slackers evaluate whether those messages are persuasive in light of their source. The disclosures inform civic slackers who supports which side of a ballot question and help them to understand in a quick, familiar manner what the ballot question is really about. Broadcasting heuristic cues improves voter competence in seamless fashion, without disrupting the way that civic slackers decide how to vote. Rather than replace television and radio advertising with somber written appeals and town hall meetings, reform can make campaign advertising more useful to civic slackers and everyone else.

Some scholars nonetheless respond that voters would be better served if they became fully informed instead of relying exclusively on heuristic cues.⁸⁸ Ian Ayres and Jeremy Bulow argue that it is unclear that reliance on heuristic cues is an advantage to voter competence.⁸⁹ For instance, they argue that “[i]t might be more conducive to democratic deliberation for voters to learn about a candidate’s positions on policy matters rather than to learn whether Jane Fonda or the NRA contributed to the candidate’s campaign.”⁹⁰ Similarly, Jim Kuklinski and Norman Hurley comment that heuristic cues, though generally useful, may on occasion cause “citizens-as-cue-takers [to] focus so heavily on the ‘who’ that the ‘what’ recedes to the background.”⁹¹

However, much of the electorate is rationally ignorant and unlikely to become more engaged in a way that cures concerns about voter confusion. This is a condition that will not soon change. The goal of effective campaign reform must be to deal with the circumstances as they actually stand and improve voter competence as cheaply and efficiently as feasible. Heuristic cues quickly put uninformed voters on roughly equal footing with better-

87. Ortiz, *supra* note 85, at 905.

88. See, e.g., MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 49–55 (1996) (questioning the reliability of heuristic processing); James H. Kuklinski & Norman L. Hurley, *On Hearing and Interpreting Political Messages: A Cautionary Tale of Citizen Cue-Taking*, 56 J. POL. 729, 731–33 (1994) (noting that heuristic cues at times can be misleading and unreliable).

89. Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 877 (1998).

90. *Id.*

91. Kuklinski & Hurley, *supra* note 88, at 732.

informed voters, even if they do not transform civic slackers into infallible or perfectly informed voters.⁹² Heuristic cues are an informational bargain, providing relatively high returns at low cost to voters who need help.

Doris Graber has shown that uninformed citizens learn less from new political information than informed citizens, because uninformed citizens lack pre-existing contextual understandings that help organize incoming information and direct selective attention to the most useful input.⁹³ Heuristic cues help the uninformed catch up by quickly imparting the basic contours of an issue. Fans of Ralph Nader do not automatically adopt all his beliefs; heuristic cues do not mechanically dictate what people will think about an issue. But knowing what political elites think, regardless whether one agrees or disagrees with them, helps voters understand what the issue is about. Heuristic cues cheaply help people understand the relevant interests at stake and help people evaluate the credibility of different arguments and information from a variety of different sources.

B. The Need to Move Beyond Basic Disclosure

Existing campaign finance regulation in direct democracy has been inadequate for providing voters with helpful heuristic cues. Without a doubt, the current regime of basic disclosure and government reporting of campaign finance information has been useful and made important information more widely available. However, simple disclosure does not go far enough in bringing information to voters. People who do not follow politics also do not research campaign financing or follow news reporting about it. Instead, government must deliver information directly to the voters in a highly accessible format for the information to make a practical difference.

Campaign finance disclosure is the principal regulatory mechanism currently directed toward informing the public about who supports and opposes various candidates and ballot measures. The Supreme Court has routinely upheld mandatory reporting and government disclosure of campaign finance information consistent with the FECA scheme sanctioned in *Buckley v. Valeo*.⁹⁴ FECA imposed extensive obligations on both contributors

92. See James H. Kuklinski & Paul J. Quirk, *Conceptual Foundations of Citizen Competence*, 23 POL. BEHAV. 285, 303 (2001) (criticizing the well-informed voters in Professor Lupia's study as not terribly well-informed and not necessarily wise).

93. DORIS GRABER, *PROCESSING THE NEWS: HOW PEOPLE TAME THE INFORMATION TIDE* 117-200 (1984).

94. 424 U.S. 1 (1976) (per curiam). Although the Court has not expressly confirmed the constitutionality of disclosure requirements as applied to direct democracy, the Court implied their permissibility in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298-99 (1981). See *infra* note 143; see also Trevor Potter, *Buckley v. Valeo, Political Disclosure and the First*

and candidates to report contributions and expenditures in connection with federal election campaigns. Each campaign organization and candidate is required to file with the Federal Election Commission quarterly reports containing detailed financial information on campaign contributions.⁹⁵ The government then makes this data available for public inspection. Justice O'Connor has referred to such disclosure schemes as the "essential cornerstone" of campaign finance reform.⁹⁶ Elizabeth Garrett, for one, suggests that reformers shift their focus from attempting to remove the influence of money in politics to adopting the guiding objective of improving voter competence through disclosure.⁹⁷ She argues that disclosure should be the principal means of campaign finance regulation because it empowers voters to get the information necessary to vote in accordance with their preferences and judge for themselves whether money is unduly influencing elected officials and election outcomes.⁹⁸

Likeminded reformers such as California Secretary of State Bill Jones have introduced real-time, online disclosure of campaign contributions to make such data more accessible. The State of California has created a webpage that includes access to the ballot pamphlet, pro- and con-arguments for each ballot measure, and when applicable, the names of a handful of prominent supporters and opponents of each ballot measure.⁹⁹ The Bipartisan Campaign Reform Act of 2002¹⁰⁰ similarly directs the Federal Election Commission to create a website with access to FECA campaign finance disclosures in connection with federal elections. Such developments are likely to benefit voter

Amendment, 33 AKRON L. REV. 71, 84-93 (1999) (discussing constitutional challenges in federal courts to disclosure requirements applied to direct democracy campaigning). Several state courts have held that FECA-type reporting and disclosure requirements can be constitutionally applied to direct democracy. See *Veco Int'l, Inc. v. Alaska Pub. Offices Comm'n*, 753 P.2d 703, 711-15 (Alaska 1988); *Messerli v. Alaska*, 626 P.2d 81, 86-88 (Alaska 1980); *Doe v. Mortham*, 708 So. 2d 929, 931-33 (Fla. 1998); *Bemis Pentecostal Church v. Tennessee*, 731 S.W.2d 897, 903-07 (Tenn. 1987); but see the state court decisions cited *infra* note 147.

95. FECA required federal candidates to file quarterly reports of all contributors who had contributed over \$100 and also to keep detailed records, subject to periodic audits, of all contributors who had donated over \$10. In addition, each contributor was required to file a statement with the Federal Election Commission if the contributor had contributed more than \$100 in the calendar year. Of course, FECA did not apply to direct democracy because FECA regulated only campaigns and elections for federal offices.

96. *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 223 (1999) (O'Connor, J., dissenting in part, concurring in part) (quoting H. ALEXANDER & B. HAGGERTY, *THE FEDERAL ELECTION CAMPAIGN ACT: AFTER A DECADE OF POLITICAL REFORM* 164 (4th ed. 1992)).

97. Elizabeth Garrett, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and in Congress*, 27 OKLA. CITY U. L. REV. 665, 669-75 (2003); see also Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326-27.

98. Garrett, *supra* note 97, at 669-82.

99. See <http://cal-access.ss.ca.gov/> (last visited Apr. 24, 2003).

100. Pub. L. No. 107-155, § 201(b), 116 Stat. 81, 90 (2002) (to be codified at 2 U.S.C. § 434).

competence, at least among those interested enough to inquire about campaign contributions (and with ready access to the Internet).

However, FECA-like disclosure by itself is not enough in direct democracy. Empirical work on direct democracy shows that current disclosure requirements have failed to make the public aware about the sources of campaign support and opposition. Although the current regulatory scheme in many states requires FECA-like reporting of political contributions, government reporting of campaign finance information remains too far removed from public attention to reach many voters. One might expect that campaign activists would research who is providing funding and inform the public through counter advertising, yet as evidenced by voter confusion in many direct democracy elections, this has proved insufficient. A majority of Californians still agree that voters are not receiving enough information to decide how to vote on ballot measures.¹⁰¹ A majority also feels that only some of the time or less are people aware of who stands to benefit from a ballot measure.¹⁰² Consequently, large majorities favor new government measures to improve disclosure to the public of campaign financing in direct democracy.¹⁰³ FECA-style reporting of campaign finance information should be a core component of a regulatory scheme attentive to voter competence, but it has been insufficient to alert the public about interest group positions on ballot measures, a condition made worse by the paucity in direct democracy of other types of heuristic cues.

The trouble is not that campaign finance information is unavailable in the public domain—plentiful information is available to those interested enough to seek it.¹⁰⁴ However, the average voter is unlikely to browse the California Secretary of State's webpage, much less take any more effortful steps to research more about campaign financing. The California Secretary of State's webpage makes it easier to find campaign finance information, but one must be interested enough to seek out such information before the costs of acquisition matter at all. It still requires effort to access government

101. See SILVA, *supra* note 8, at 24 (reporting data from a statewide survey taken in September 2000).

102. See ALLSWANG, *supra* note 41, at 239–41.

103. See MARK BALDASSARE, PUBLIC POLICY INSTITUTE CENTER STATEWIDE SURVEY: CALIFORNIANS AND THEIR GOVERNMENT 4–6 (Jan. 2001) (finding that 78 percent favor increased disclosure of financial backing of signature gathering for initiatives, 77 percent favor a system of review to avoid drafting errors and problems with ballot language, and 88 percent favor a review of initiatives so that voters know if there are any legal or constitutional problems before they vote).

104. As Philip Converse explained, "Today the problem is rather one of superabundance. The voter is bombarded with political information." Philip E. Converse, *Popular Representation and the Distribution of Information*, in INFORMATION AND DEMOCRATIC PROCESSES, *supra* note 35, at 369, 371.

records or follow media reporting of such information. The same lack of time, motivation, and attention that leaves “civic slackers” uninformed in the first place also makes it unlikely that they will have the time, motivation, and attention to research information about contributors and campaign financing.

Internet advocates see limitless potential for new technology to shrink the costs of political information and thereby boost public informedness. For instance, Dick Morris predicts that the Internet “will likely usher in a new era of more direct control of public decisions by the voters themselves”¹⁰⁵ by enabling Americans to become “vastly better informed about politics and issues.”¹⁰⁶ However, similar optimism has surrounded the past introduction of new information technology,¹⁰⁷ and it has repeatedly failed to fulfill hopes of revitalized democratic participation and informedness. Levels of political knowledge have changed little over the course of the past century, despite the introduction of transformative innovations like the telephone, radio, and television.¹⁰⁸

The structural impediment to improving political knowledge is the well-documented disinterest of most American voters in seeking out such information. Remember that the public is rationally ignorant. Interest in politics is the primary determinant of political knowledge,¹⁰⁹ and citizen interest in politics is famously meager, particularly relative to life’s other demands.¹¹⁰ Decreasing the costs of acquiring political information helps in general to encourage political informedness, but lower costs help only marginally in practice because too few voters have the time, motivation, and attention to bother studying politics in the first place.

105. Dick Morris, *Direct Democracy and the Internet*, 34 LOY. L.A. L. REV. 1033, 1046 (2001) (celebrating the Internet’s putative potential to revolutionize politics).

106. *Id.* at 1048; see also LAWRENCE K. GROSSMAN, *THE ELECTRONIC REPUBLIC: RESHAPING DEMOCRACY IN THE INFORMATION AGE* 165 (1996).

107. See, e.g., BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 261–311 (1984). For overviews of past optimism about the democratic consequences from new information technology, see JEFFREY B. ABRAMSON ET AL., *THE ELECTRONIC COMMONWEALTH* (1988); RICHARD DAVIS, *THE WEB OF POLITICS: THE INTERNET’S IMPACT ON THE AMERICAN POLITICAL SYSTEM* 27–34 (1999); ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* (1983); F. CHRISTOPHER ARTERTON, *TELEDEMOCRACY: CAN TECHNOLOGY PROTECT DEMOCRACY?* (1987).

108. See DELLI CARPINI & KEETER, *supra* note 88, at 133–34 (finding that overall levels of political knowledge have not changed significantly during the last half-century).

109. See *id.* at 182–87; Robert C. Luskin, *Explaining Political Sophistication*, 12 POL. BEHAV. 331 (1990).

110. For example, only about one-third of Americans self-report that they are very interested in politics, discuss politics everyday, or enjoy political discussion. See Sidney Verba et al., *Knowing and Caring about Politics: Gender and Political Engagement*, 59 J. POL. 1051, 1055 (1997); see also Graber, *supra* note 93, at 107–10, 117–19 (describing low interest in politics, particularly relative to everyday concerns).

The majority of voters cannot or do not research politics on the Internet, or by other means. They would prefer to receive information from media that they would monitor anyway, irrespective of an interest in politics. As a result, most voters receive their political information, including any information about campaign financing, from their casual viewing of television advertising and news.¹¹¹ The Internet's effect of lowering the costs of political research helps only the minority of voters who are motivated to take advantage of web research—the same voters who already are interested and relatively informed about politics in the first place. Richard Davis confirmed in his empirical study of the Internet that it tends not to increase significantly the political knowledge of most people and helps mainly those who were already well-informed.¹¹²

People have plentiful access to political information, but otherwise busy and semi-interested voters need information disseminated to them in a way that requires them to take no affirmative steps or do anything more than they otherwise would do. Unless campaign finance information is delivered to voters at virtually no cost to them, such information may never reach them and will always remain too difficult for voters to acquire. Voters must be made aware of heuristic cues to take advantage of them.

IV. HOW THE COURT HAS STOOD IN THE WAY OF BRINGING INFORMATION TO THE VOTERS

In this part, I explain that the Supreme Court has repeatedly and wrongly struck down regulations that would have brought information to the voters and moved beyond basic disclosure. Although *Buckley v. Valeo*¹¹³ recognized the importance of heuristic cues and the government interest in voter competence, the Court quickly forgot its insights and developed a misguided focus on corruption prevention as the government's singular regulatory interest. I discuss two instances in which the Court could have alleviated voter confusion in direct democracy simply by recognizing the government's legitimate interest in voter competence.

111. See GERBER, *supra* note 27, at 41; Gerber, *supra* note 23, at 159. Doris Graber argues that people rely heavily on television for information because human neurobiology naturally favors audiovisual learning over reading and verbal comprehension. DORIS A. GRABER, *PROCESSING POLITICS: LEARNING FROM TELEVISION IN THE INTERNET AGE* (2001).

112. DAVIS, *supra* note 107, at 23–27, 182–84 (arguing that the Internet is “a new, more efficient tool primarily for an elite of already politically interested activists”).

113. 424 U.S. 1 (1976) (*per curiam*).

A. *Buckley v. Valeo* and Disclosure

The Supreme Court has already blessed the value of disclosure as a government interest to be promoted through campaign finance regulation. In *Buckley v. Valeo*, the Court upheld the comprehensive campaign-finance reporting obligations imposed by the Federal Election Campaign Act (FECA). *Buckley* recognized that compelled disclosure might infringe upon privacy of association and noted that the right to group association under the First Amendment is diluted if citizens cannot pool funds through contributions.¹¹⁴ Nonetheless, the Court decided that disclosure requirements served important government interests in regulating the electoral process.¹¹⁵

Buckley is remembered primarily for its establishment of the government interest in preventing corruption, but *Buckley* also made clear throughout that the disclosure requirements rested equally (or more so) on the government interest in addressing voter competence. To be sure, the Court held that disclosure served the government's interests in preventing corruption by publicizing political contributions. However, just as importantly, *Buckley* elaborated that mandatory disclosure directly addressed the problem of voters' "campaign ignorance."¹¹⁶ Intuitively describing the function of heuristic cues, the Court averred that information about the sources of a candidate's financial support helps "voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches."¹¹⁷ This aspect of *Buckley* addressing financial disclosure is sometimes overlooked. It anticipated how disclosure of financial contributions supplies voters with heuristic cues about the candidates.

However, in *First National Bank of Boston v. Bellotti*,¹¹⁸ decided shortly after *Buckley*, the Court drew a sharp distinction between issue and candidate elections. The Court declared that the government's regulatory interest in preventing corruption was absent altogether in issue elections.¹¹⁹ While candidates might be corrupted by campaign contributions, the opportunity

114. *Id.* at 64–66.

115. *See id.* at 84.

116. *Id.* at 67.

117. *Id.* at 66–67.

118. 435 U.S. 765 (1978).

119. *See id.* at 790. The government alternatively claimed that the ban was necessary to prevent corporations from dominating elections by virtue of their superior financial resources. The Court rejected this argument, reasoning that "there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda." *See id.* at 789. This latter holding has been much criticized in light of empirical research addressing the gross disparities in campaign spending for referenda elections. But as in *Buckley*, the Court professed faith in a healthy marketplace of ideas, reasoning that "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Id.* at 791.

for quid pro quo corruption disappears in direct democracy because issue elections conclusively decide policy questions rather than elect candidates.¹²⁰ There is no longer any candidate to corrupt in direct democracy. Based on this distinction, the Court struck down the Massachusetts ban on corporate contributions in issue elections. *Bellotti* thus foreclosed justification of campaign regulation in issue elections based on the interest in corruption prevention and forgot the government's important interest in voter competence.¹²¹

The Court failed to recognize that, although the government's interest in preventing corruption might be less in issue elections, the government's interest in promoting voter informedness in issue elections is far greater. Since *Bellotti*, the Court has invalidated various regulations of direct democracy while focusing myopically on the absence of the corruption rationale in that context, resulting in negative consequences for voter competence.

B. The Court's Past Hostility to Advances Beyond Basic Disclosure

Given *Buckley's* insights and the centrality of heuristic cues to voter competence, the Court has been wrong in its hostility to government efforts to publicize heuristic cues in direct democracy. The Court should have supported rather than repudiated early government attempts to provide what I call "disclosure plus": efforts to publicize heuristic cues and increase public awareness of the major supporters and opponents of ballot measures.

"Disclosure plus" need not require heavy-handed government regulation. Take for instance "source disclosure" laws. Source disclosure laws mandate that campaign advertisements include a disclosure about who funded its distribution and production. The name of the sponsor who issued the respective campaign advertisement is displayed on the face of the advertisement and accompanies transmission of the message. As a result, the heuristic cue is disseminated as widely as the advertisement and mediates reception of the campaign message. Source disclosure laws are a productive first step in constructing a regime that promotes disclosure of campaign finance information and builds public awareness of these heuristic cues in the context of direct democracy.

However, the Court has resisted such affirmative attempts to disseminate heuristic cues and move beyond simple reporting of campaign finance information. The Court declared unconstitutional an Ohio source disclosure

120. The Court reasoned that referenda conclusively decided issues, without involving candidates who could be corrupted or influenced. See *id.* at 790.

121. This was true even though the Court reiterated in *Bellotti* itself that the source and credibility of the advocate were important considerations emphasized in *Buckley*. *Id.* at 792.

law in *McIntyre v. Ohio Elections Commission*.¹²² In Margaret McIntyre's case, the elections commission fined her for distributing leaflets that expressed opposition to an upcoming school tax initiative but did not disclose her as their source. The Court held that the government's "simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit."¹²³

The Court undervalued the government's interest in promoting the publication of heuristic cues. The majority opinion in *McIntyre* posited that source disclosure was "nothing more than the provision of additional information that may either buttress or undermine the argument."¹²⁴ The Court emphasized that the author was entitled to let the message speak for itself and readers would be able to evaluate the message's credibility and substance on its merits.¹²⁵ Furthermore, the Court claimed that readers could properly infer about the message's credibility from the fact of its anonymity.¹²⁶ Readers would notice that the author was not willing to stand by the message and would deduce that the message is unreliable. The Court thus focused on how a source disclosure, or the lack thereof, conveyed signals about the credibility of a message.

The Court failed to see how source disclosure itself is critical information about the identities of the major supporters and opponents. In addition to suggesting whether a campaign message is credible, source disclosure serves as a heuristic cue by signaling where favored and disfavored public figures stand on the ballot measure. The powerful benefit of the heuristic cue is forgone when campaign advocates remain anonymous because recipients do not learn about who supports or opposes the ballot measure. Rather than recognizing source disclosure as a means for publicizing this important heuristic cue, *McIntyre* treated the source disclosure as just another incidental piece of data.

122. 514 U.S. 334 (1995). The Ohio statute provided in pertinent part:

No person shall write, print, post, or distribute . . . a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election . . . unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of . . . the person who issues, makes, or is responsible therefore.

OHIO REV. CODE ANN. § 3599.09(A) (West 1995).

123. *McIntyre*, 514 U.S. at 348.

124. *Id.*

125. *Id.* at 349 n.11 (noting that readers "can evaluate its anonymity along with its message") (quoting *New York v. Duryea*, 351 N.Y.S.2d 978, 996 (1974)).

126. *Id.* at 348.

The small informational value that the Court placed on the source disclosure might have reflected the fact that Margaret McIntyre was not a public figure. As the Court explained, “[I]n the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader’s ability to evaluate the document’s message.”¹²⁷ In other words, few voters would have learned much from the knowledge that Margaret McIntyre had authored the leaflet because only a handful of people received her leaflet and knew who she was. The Court was careful to stipulate that its decision did not preclude similar source disclosure requirements “in other, larger circumstances.”¹²⁸ Moreover, the source disclosure law in *McIntyre* was quite broad and covered any communication in connection with an issue or candidate election. The Court noted that its holding did not extend to a different Ohio source disclosure law that applied only to election-related communication uttered over television or radio broadcast.¹²⁹ The decision covered only “written communications and, particularly, leaflets of the kind Mrs. McIntyre distributed.”¹³⁰

As a result, *McIntyre* suggested that a source disclosure law might pass constitutional muster if it was closely tailored to the government’s interest in informing the public with more useful disclosure, particularly if limited to broadcast communications. Nonetheless, even with such cautionary language, *McIntyre* threw into doubt the constitutionality of source disclosure laws as applied to direct democracy in over thirty states,¹³¹ and lower courts are still sorting through how to apply *McIntyre* to different types of source disclosure laws.¹³²

If the Court is to recognize a place for government to promote public awareness of heuristic cues, the Court must move beyond its fixation on the prevention of corruption as the only government interest in significant campaign regulation. On the basis of *Bellotti*, the Court in *McIntyre* noted that the government’s interest in preventing corruption did not apply because the leaflets were in connection with an issue election, not a candidate election.¹³³

127. *Id.* at 348–49.

128. *Id.* at 358 (Ginsburg, J., concurring).

129. *See id.* at 338 n.3 (referring to OHIO REV. CODE ANN. § 3599.09(B)).

130. *Id.* at 338.

131. *See* Thomas H. Dupree, Jr., Comment, *Exposing the Stealth Candidate: Disclosure Statutes After McIntyre v. Ohio Elections Commission*, 63 U. CHI. L. REV. 1211, 1211 n.2 (1996).

132. *See, e.g.,* Fed. Election Comm’n v. Pub. Citizen, 268 F.3d 1283 (11th Cir. 2001) (upholding a FECA source disclosure requirement applicable to communications expressly advocating the election or defeat of a clearly identified candidate); Citizens for Responsible Gov’t State Political Action Comm. v. Davidson, 236 F.3d 1174 (10th Cir. 2000) (invalidating a Colorado source disclosure law); Fed. Election Comm’n v. Survival Educ. Fund, 65 F.3d 285 (2d Cir. 1995) (upholding the FECA source disclosure requirement as it applied to solicitations of political contributions).

133. 514 U.S. at 353–56.

The Court then held that the government interest in voter competence did not support the Ohio source disclosure law.¹³⁴ Regulatory regimes designed to promote public awareness of heuristic cues will require the Court to look beyond the corruption rationale and interpret the government's interest in voter competence as extending beyond disclosure.

Another instance in which the Court undervalued the importance of heuristic cues in direct democracy was when it struck down contribution limits for issue elections in *Citizens Against Rent Control v. City of Berkeley* (CRC).¹³⁵ The City of Berkeley had instituted a \$250 limit on any individual's contributions "with respect to a single election in support of or in opposition to a [ballot] measure."¹³⁶ The City of Berkeley complained that political contributors were funneling contributions through faceless political committees, which in turn would convey the funds to political campaigns. This strategy obscured the identities of the true sources of campaign financing and frustrated the purpose of the City's campaign finance disclosure requirements. The contribution limit forced these would-be contributors to speak directly to the public under their own names, rather than funnel money through proxies and remain anonymous.

However, the Court treated the prevention of corruption as the sole justification for contribution limits, without considering the government interest in voter competence.¹³⁷ The Court forgot *Buckley's* support for government attention to "voter ignorance" as a justification for promoting campaign finance disclosure. As a result, the Court cited *Bellotti* for the proposition that the corruption rationale was unavailable with respect to issue elections, then summarily concluded that the existing campaign-contribution reporting ordinance already provided adequate public disclosure.¹³⁸

The Court was wrong to dismiss the City's disclosure argument out of hand. *Buckley* held that contribution limits entailed only "a marginal restriction upon the contributor's ability to engage in free communication."¹³⁹ In fact, just before deciding *CRC*, the Court in a different case interpreted *Buckley* to hold that "speech by proxy" through political contributions to another party was not entitled to full First Amendment protection.¹⁴⁰ The Court pointed out that contribution limits did not restrict in any way political communication

134. *Id.* at 348–49.

135. 454 U.S. 290, 300 (1981).

136. *Id.* at 292 (quoting section 602 of the Berkeley Election Reform Act of 1974).

137. *See id.* at 296–97.

138. *Id.* at 298–99.

139. *Buckley v. Valeo*, 424 U.S. 1, 20–21 (1976) (per curiam).

140. *Cal. Med. Ass'n v. Fed. Election Comm'n*, 453 U.S. 182, 196 n.16 (1981) (quoting *Buckley*, 424 U.S. at 21).

directly by contributors.¹⁴¹ Those contributors who wished to continue supporting their cause, but had already contributed the maximum amount under the contribution limit, were unlikely to cease participating as a result of the limit. They would instead engage in direct advocacy to the public through independent expenditures. A contribution limit would channel contributions in excess of the limit into direct expenditures, without reducing the total amount of speech.

If coupled with source disclosure requirements, the main effect of contribution limits might have been to induce contributors to speak in their own identifiable voice to the public. Dissenting in *CRC*, Justice White castigated the majority for overlooking the increased transparency generated by contribution limits:

Of course, entities remain free to make major direct expenditures. But because political communications must state the source of funds, voters will be able to identify the source of such messages and recognize that the communication reflects, for example, the opinion of a single powerful corporate interest rather than the views of a large number of individuals.¹⁴²

Importantly, *CRC* did not reject in principle this government interest in voter competence. *CRC* indicated only that the government's interest in public disclosure of financial support was insufficient in the case because the City of Berkeley already required contributors to file disclosure statements, which the City made available for public inspection. The Court explained that these existing reporting provisions adequately addressed the public interest in disclosure without the additional help of contribution limits.¹⁴³

The difficulty in *CRC* might have been that the Berkeley contribution limit in question was set too low at only \$250 per contributor. At such a threshold, the Berkeley limit affected even low-level contributors and prevented them from contributing what they wanted to give. A rent-rebate proposition closely related to the one at issue in *CRC* was placed on the Berkeley municipal ballot during the year after *CRC* was decided. The opposition campaign collected about \$330,000 in contributions, and nearly all the contributions were in amounts over \$250.¹⁴⁴ The *CRC* threshold, if it

141. *Id.*

142. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 308–09 (1981) (White, J., dissenting).

143. *Id.* at 298–99 (“The public interest allegedly advanced by § 602 [the contribution limit]—identifying the sources of support for and opposition to ballot measures—is insubstantial because voters may identify those sources under the [reporting requirements].”).

144. See Shockley, *supra* note 19, at 412. Supporters of the ballot measure raised under \$8,000. The ballot measure won enactment despite the spending disparity. *Id.*

were still in effect, would have prevented most of the contributors from giving their preferred amount and made it far more difficult for the opposition campaign to collect an aggregate amount close to what it ultimately collected.¹⁴⁵ Thus, it remains open whether contribution limits less stringent than the \$250 limit in *CRC* might be constitutionally upheld, based on the government interest in voter competence. Until further notice, however, it appears today that *CRC* bars contribution limits as they apply to issue elections.

In *McIntyre* and *CRC*, the Court rejected arguments by the government that campaign regulation can play a compelling role in publicizing heuristic cues about the sources of support and opposition to ballot measures. Although it is unfair to blame the Court for voter confusion in direct democracy, it is reasonable to say that the Court blocked promising attempts to alleviate voter confusion when it struck down source disclosure laws and contribution limits. A new approach to campaign regulation for issue elections would recognize the government's substantial interest in disclosure, already endorsed in *Buckley*, as having extra force in direct democracy and as supporting government efforts to promote public awareness of heuristic cues.

V. "DISCLOSURE PLUS" WITH MINIMAL BURDENS ON SPEECH

In this part, I propose a new constitutional framework for analyzing campaign regulation of direct democracy aimed at improving voter competence. Regulatory measures consistent with "disclosure plus" are those that identify only the most interested and prolific speakers, while leaving room for collective action and minimizing the overall restrictive effect on speech. Such measures should be upheld under a new constitutional framework for campaign regulation of direct democracy.

Later in this part, I suggest a proposal for implementing "disclosure plus" that combines source disclosure with contribution limits as a mechanism for publicizing heuristic cues. Under the new framework presented here, source disclosure coupled with contribution limits stands as an example of how

145. A federal district court recently agreed that similar contribution limits imposed under California Proposition 208 made it impossible to conduct a meaningful campaign. See *Cal. Prolife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999). Proposition 208 instituted contribution limits on each contributor ranging from \$100 to \$250 per candidate. The district court assessed the factual record on contribution limits offered by the parties and concluded that, at least for the large electoral districts analyzed in that case, such limits "prevent the marshaling of assets sufficient to conduct a meaningful campaign." *Id.* at 1298. The court also agreed that an additional effect of contribution limits in general is to divert campaign contributions from the candidate to direct speech. *Id.* at 1297 n.37. However, the court did not consider the disclosure benefit from direct speech and instead viewed any such diversion of funds, at least in the candidate election context, as distracting from the candidate's cause. See *id.*

regulations can be designed to enhance voter competence while also satisfying constitutional strictures under *Buckley v. Valeo*.¹⁴⁶ My main intention with this proposal is to provoke, by presenting an alternative perspective on campaign regulation and highlighting how familiar regulation might be re-engineered to serve voter competence in unexpected ways.

A. A New Constitutional Framework

The government interest in voter competence demands a new constitutional approach for reviewing campaign regulation of direct democracy. The government must be permitted to move aggressively beyond simple disclosure and promote active dissemination of heuristic cues. However, courts should nonetheless insist that in doing so the government minimize the restrictive effect on speech. The government may implement regulations that have a substantial effect in promoting awareness of heuristic cues only if the regulation does not substantially diminish or chill speech in the process. This approach accommodates the current jurisprudential framework under *Buckley*, which permits a campaign regulation when the government “demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”¹⁴⁷

First, as I have already argued, voter competence is a substantial government interest that warrants reasonable campaign regulation of direct democracy, even if the corruption rationale does not apply. This interest follows from the original recognition in *Buckley* that disclosure of campaign financial support publicizes important information for reinforcing voter competence. To regard voter competence as an important government interest in direct democracy does not open the door to limitless campaign regulation. It simply recognizes that there is a government interest in campaign regulation that moves beyond the current focus on prevention of quid pro quo corruption.

Second, even when the government interest in voter competence is active, courts should nonetheless forbid campaign regulation from employing means that are not closely drawn to avoid unnecessary curtailment or restriction

146. 424 U.S. 1 (1976) (per curiam).

147. *Id.* at 25; see also *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387–88 (2000). Although courts have interpreted state constitutions consistent with the Supreme Court's First Amendment decisions in *Buckley* (and *McIntyre*), the free speech analysis under state constitutions may be more complicated to the degree that courts resist matching application of this new constitutional framework to state constitutional rights. Many state courts have aggressively limited application of disclosure requirements and contribution limits under state constitutional law. See, e.g., *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135, 142 (Ind. 1999); *Osterberg v. Peca*, 12 S.W.3d 31, 57 (Tex. 2000); *Va. Soc'y for Human Life v. Caldwell*, 500 S.E.2d 814, 817 (Va. 1998); *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 4 P.3d 808, 828 (Wash. 2000).

of speech. An enhanced interest in voter competence does not license the government to trample speech, and the Court has rightfully identified a number of First Amendment interests in anonymity that must be accommodated.

Conscious of these concerns, "disclosure plus" campaign regulation should focus on the most active supporters and opponents of a particular ballot measure.¹⁴⁸ Focusing on the most interested speakers minimizes the number of parties affected by the campaign regulation and permits all other speakers to act without any restriction. The Court in *McIntyre* was most concerned about the ability of individuals like Mrs. McIntyre and petition circulators to participate in low-level political speech, but the Court seemed receptive to disclosure requirements directed at large-scale broadcast advertising conducted by publicly prominent parties. The Court in *McIntyre* emphasized the unrestrained scope of the relevant source disclosure law or requirement, expressly withheld judgment about narrower source disclosure requirements, and noted that "a State's enforcement interest might justify a more limited identification requirement" in other circumstances.¹⁴⁹ Source disclosure requirements that apply only to the most active speakers would minimize the restrictive effect on speech by permitting all but the most active speakers to continue their activities anonymously without worry.

Furthermore, regulations directed at the most interested and active speakers are least likely to chill speech. The Court might worry that source disclosure could deter Mrs. McIntyre from distributing her leaflets, but concerns about a chilling effect on speech are greatly diminished when we consider, for example, how source disclosure requirements will affect the biggest contributors who spend the most money on a particular ballot measure campaign. By definition, disclosure requirements that attach only to the most prolific campaign contributors in an election would not affect the overwhelming majority of lesser contributors who are able to give as much as they want. The biggest contributors, who find it in their interest to dedicate such large sums of money toward election advocacy, are unlikely to be deterred by the requirement of disclosure. They are so strongly committed to their cause that they are the least likely to be chilled.

Fortunately, campaign regulation that minimizes the burdens on speech by limiting its scope to the most interested speakers is also the type of regulation that most efficiently reinforces voter competence. Knowledge about where a well-known political actor stands on an issue neatly summarizes salient information in an accessible way. Conversely, knowledge about the stances of those who are not well-known does not produce useful heuristic

148. See Part V.B.2.b. for an example of how to identify the most active and interested speakers.

149. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353 (1995).

cues. Disclosure about Mrs. McIntyre's position on the ballot measure would not have been informative because few voters were likely to know anything about her. Such disclosure tells voters nothing about the ballot measure.

Indeed, newfound information about the views of a constellation of people, organizations, corporations, and other actors is likely to be more confusing than helpful. The useful heuristic cues from salient political actors could be lost in the welter of information about obscure parties who participate only peripherally in campaigning. Effective disclosure measures would publicize the most useful information about the most interested parties, without adding to voter confusion by publicizing distracting information about others.

In sum, the government interest in voter competence applies with special force in direct democracy and supports "disclosure plus" campaign regulations that (1) produce heuristic cues for voters by requiring disclosure from prominent campaign advocates; and (2) increase public awareness of those heuristic cues by broadcasting them to the public in a highly visible way. Nevertheless, the government must pursue its interest in voter competence by using minimally restrictive means that focus the scope of its regulations on disclosure targeted at only the most active and most interested speakers. This close tailoring serves both to insulate against constitutional concerns and to maximize the informational value of heuristic cues.

B. Implementing "Disclosure Plus": One Proposal

The "disclosure plus" framework presented above offers a new legal perspective on campaign regulation of direct democracy and would permit certain regulations that otherwise would be impermissible under the current constitutional framework. In this subpart, I offer a policy proposal that combines source disclosure with contribution limits, both of which appear unconstitutional under current law but which might pass constitutional muster under "disclosure plus." Although there may be many policy alternatives by which to improve voter competence under "disclosure plus," discussion of the specific proposal below demonstrates how the "disclosure plus" framework may permit new and creative approaches to improving voter competence and may direct fresh attention to the previously neglected consequences of campaign regulation on voter competence.

1. A Central Role for Source Disclosure

Source disclosure would provide salient heuristic cues because it would accompany advertising messages and mediate their reception. Any time that a campaign communication reaches the electorate, so too does the source

disclosure. FECA-style disclosure might teach voters about where political elites stand on an issue, but only after the voters have absorbed campaign advertising messages from both sides without the benefit of context. The timing of the source cue is important. People are adept at discounting or crediting the truth of a communication when they already know the credibility of the source, but they are unskilled at re-evaluating previously received, previously encoded communications in light of new disclosures about the source's credibility.¹⁵⁰

Experimental psychology research has discovered that people properly discredit information from noncredible sources only if they were aware of the source's noncredibility when they first received the information.¹⁵¹ If told later, after absorbing a persuasive communication, that the source was not credible, the source cue has no effect on subsequent persuasion. In other words, it is difficult for people to think back and appropriately revise all conclusions they reached on the basis of the discounted information. Moreover, when people are aware of a speaker's credibility while they listen to a persuasive communication, they are more likely to reach reasoned conclusions about the information they learn. For instance, if alerted that a speaker intends to persuade them, people are more likely to think of counterarguments and deliberate about what is being said.¹⁵²

With source disclosure, the voter receives the message simultaneously with the heuristic cue of its source, enabling the voter to decide immediately whether it is credible and worth consideration. Information about the message's source comes from within the message itself, without any question about its truth. The efficiency of receiving the message with the heuristic cue reduces uncer-

150. People tend to remember the content of a persuasive communication, even as they quickly forget the source of that information. See, e.g., Marcia K. Johnson et al., *Time-Course Studies of Reality Monitoring and Recognition*, 20 J. EXPERIMENTAL PSYCHOL. 1409 (1994); Marcia K. Johnson & Carol L. Raye, *Reality Monitoring*, 88 PSYCHOL. REV. 67, 81-82 (1981). Jurors, for example, often remember the content of trial testimony but become confused about or misremember the source of testimony. See SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 106-07 (1988).

151. See Brian Sternthal et al., *The Persuasive Effect of Source Credibility: A Situational Analysis*, 42 PUB. OPIN. Q. 285, 288-89 (1978); Brian Sternthal et al., *The Persuasive Effect of Source Credibility: Tests of Cognitive Response*, 4 J. CONSUMER RES. 252, 259 (1978); Charles D. Ward & Elliott McGinnies, *Persuasive Effects of Early and Late Mention of Credible and Noncredible Sources*, 86 J. PSYCHOL. 17, 20-22 (1974). This research indicates that source disclosure should be given at the same time as the persuasive communication, and more specifically, that source disclosure should occur at the beginning of the advertisement, rather than at the end of the advertisement, for source credibility to have an effect on persuasion.

152. See Richard E. Petty & John T. Cacioppo, *Effects of Forwarning of Persuasive Intent and Involvement on Cognitive Responses and Persuasion*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 173 (1979); Robert A. Osterhouse & Timothy C. Brock, *Distraction Increases Yielding to Propaganda by Inhibiting Counterarguing*, 15 J. PERSONALITY & SOC. PSYCHOL. 344 (1970); Jonathan L. Freedman & David O. Sears, *Warning, Distraction, and Resistance to Influence*, 1 J. PERSONALITY & SOC. PSYCHOL. 262 (1965).

tainty and confusion from weighing competing campaign claims by different anonymous sources at different times.

In addition, source disclosure in connection with campaign speech provides another dimension of information for voters—intensity of interest. Expenditure of political money signals how strongly the speaker feels about the issue as measured by how much the speaker has been willing to spend in broadcasting that message.¹⁵³ Source disclosure publicizes that intensity of preference to the public in a way that the average voter can easily observe and understand. The more someone speaks, the more that speaker will be associated with its cause. Conversely, less interested speakers sponsor fewer campaign communications and will appear less often in source disclosures. Source disclosure therefore scales the dissemination of the heuristic cue in proportion to the speaker's interest in the election. This heightens the informational value of the heuristic cue, and it does so automatically without administrative burden to the speaker.¹⁵⁴

One might guess that the result of mandatory disclosure would be that prominent advocates would simply not speak at all to the public for fear of hurting their cause. Given that certain contributors deem it strategically optimal to obscure their campaign involvement under current law, they might similarly judge it more beneficial to abstain from speech and thus not reveal their involvement if disclosure was required. Although some reduction may occur, it is more likely that major contributors would speak and face source disclosure. Even identifiably self-interested groups remain able to persuade through direct speech. Persuasion becomes more difficult, because listeners scrutinize self-serving arguments from interested parties more closely, but not at all impossible.

Heuristic cues provide information about interests and help structure background understandings of the issues, but they do not preclude persuasion by self-interested advocates. Communications from political candidates and commercial advertising, as two obvious examples, include prominent disclosure of interestedness yet are both common and successful in persuasion. An unpopular tobacco company can persuade the public to its cause, provided it presents compelling arguments that transcend naked self-interest. The public understands that the tobacco company has an interest in gaining votes and scrutinizes more carefully its advertising, but the public would still be responsive to credible information that bears consideration. The task under

153. See, e.g., Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 127.

154. This helps to address the Court's concern in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 255 n.7 (1986), that "the administrative costs of complying with [disclosure] responsibilities may create a disincentive for the organization itself to speak."

disclosure for these interested parties becomes more difficult, but not impossible, and the incentive to speak to the public still remains strong. A handful of the most vocal speakers will have to judge whether the detriment from source disclosure outweighs the benefit from their efforts at persuasion.

In the end, speakers will attempt persuasion through direct speech when they believe that they can muster public-spirited justifications that would sway skeptical listeners. In this way, disclosure pushes campaign dialogue toward a healthier, more public-regarding discourse that conveys more helpful, accurate information to the public, without significantly reducing the amount of information available.¹⁵⁵ Disclosure pushes advocates to redouble their efforts and build a more convincing and objective case in favor of their cause. Even if the amount of speech decreases somewhat, the quality of speech available will be better for it.

2. Combining Source Disclosure with Contribution Limits: It's Not About the Money

a. The Hydraulics of Contribution Limits

Although contribution limits are typically regarded as a means for reducing the flow of money into campaigning, they are unlikely to succeed because they run into the "hydraulics of campaign finance reform" identified by Samuel Issacharoff and Pamela Karlan.¹⁵⁶ Money invariably finds its way into the process. Any attempt to restrict money in one respect quickly leads to re-deployment of the money into new, equally effective methods of advocacy.¹⁵⁷ Limiting contributions would lead not to a reduction in campaign spending, but instead to re-direction of funds from contributions to independent expenditures. Capped contributors would continue spending by relying on direct speech instead of contributions.

If campaign finance regulation can do little more than redirect the flow of money, we ought to evaluate regulatory regimes based on where they will lead money to flow. Kathleen Sullivan argues that campaign regulation of candidate elections ought to encourage contributions rather than independent expenditures. She explains that political spending and speech by candidates

155. Optimistically, this result would resemble the "laundering" of preferences described by Robert E. Goodin, *Laundering Preferences*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 75, 75-77 (Jon Elster & Aanund Hylland eds., 1986).

156. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1713 (1999) (arguing that contribution limits merely encourage contributors to spend funds on independent expenditures because "[t]he money that reform squeezes out of the formal campaign process must go somewhere").

157. See *Buckley v. Valeo*, 424 U.S. 1, 26 n.26 (1976) (per curiam) (surmising the same).

promote accountability, whereas spending and speech by independent advocates do not.¹⁵⁸ She prefers that candidates do the speaking in candidate elections because they can be disciplined for what they say.

However, shifting back to direct democracy, the interest in accountability disappears for the same reason that the risk of quid pro quo corruption disappears—there is no candidate to hold accountable. All we have in direct democracy are the ballot measures and the interested groups who support or oppose them. In this context, the interest is to publicize the identities of those groups and provide the public with that information for use as heuristic cues. The goal, then, is to encourage those interested groups to speak directly to the public and make identifiable their position on the ballot measure. With the limitations of campaign regulation and the hydraulics of reform in mind, the goal in regulating direct democracy should be to channel political money into forms of advocacy that will produce wide dissemination of useful heuristic cues. While we might wish to encourage contributions rather than expenditures in candidate elections, as Professor Sullivan argues, we want to encourage independent expenditures and direct speech rather than contributions in issue elections.

From the standpoint of an individual contributor, Justice Thomas has criticized *Buckley's* lesser constitutional regard for campaign contributions relative to direct speech. Justice Thomas argues that contributions to political candidates deserve the same protection as direct speech because candidates are uniquely qualified and motivated advocates for their own candidacies.¹⁵⁹ Contributors realize that they “may add more to political discourse by giving rather than spending.”¹⁶⁰ But again, this argument applies with much less force in direct democracy where there is no individual candidate in a special position to speak on his or her own behalf. Political discourse in direct democracy is diffused among interested parties. Any advocate may be equally qualified and informed to argue for or against a ballot measure. In the absence of a uniquely qualified campaign spokesperson in issue elections, encouraging direct speech from interested parties empowers voters to take advice from those speakers whom they themselves believe to be most credible and qualified to speak on the issue. At least in direct democracy, direct speech best serves voter competence because it induces the most interested parties to identify themselves to the public.

158. Sullivan, *supra* note 97, at 325–26.

159. *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 638–39 (1996) (Thomas, J., dissenting in part, concurring in part); see also *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 415–18 (2000) (Thomas, J., dissenting).

160. *Nixon*, 528 U.S. at 416–17 (quoting *Colo. Republican*, 518 U.S. at 636 (Thomas, J., concurring in the judgment and dissenting in part)).

b. Using the Hydraulics of Campaign Finance Reform to Generate Heuristic Cues

In direct democracy, contribution limits can be coordinated with source disclosure requirements to exploit the hydraulics of campaign finance for the purpose of generating heuristic cues. Source disclosure should be designed to apply only to direct speech by erstwhile contributors who have tapped the contribution limit for a particular ballot measure. In other words, only those who have already expended a total amount equal to the contribution limit, combining contributions and independent expenditures, would be covered by source disclosure when they continue to advocate through direct speech. As these contributors begin to engage in direct speech, they are required to signal their heavy involvement to the public and provide voters with salient heuristic cues. What is more, identification of only those few major contributors focuses attention on those with the most at stake and produces richer heuristic cues.

Since the goal of this scheme is to affect only the means by which campaign advocates may speak, without reducing the aggregate quantity of campaign speech, the contribution limit ought to be set high enough such that only a few significant contributors to a campaign effort are forced to speak directly to the public.¹⁶¹ Most speakers would remain unaffected, with low-level speakers like Mrs. McIntyre free to advocate and pool funds as they please. Although major contributors are prevented from pooling funds with others above the limit, any contributor who triggers the contribution limit spends so much individually that the contributor would not have received additional economy of scale from pooling funds with others. The contribution limit neatly provides a brightline decision rule for identifying the most active and interested advocates who are least likely to reduce their speech, then source disclosure applies only to them.

To minimize further the restrictive effect on speech, source disclosure laws can be restricted to independent expenditures on broadcast advertising and communications. This stipulation again limits the restrictive ambit of the source disclosure law. However, it captures the most expensive and most widely received communications funded by the biggest campaign spenders in direct democracy. As a result, source disclosure limited to broadcast communications accommodates the Court's concerns in *McIntyre* about its restrictive

161. Under the restriction of the then-effective \$250 contribution limit, the appellant political committee in *CRC* had accepted more than \$108,000 in contributions from roughly 1300 contributors. Only nine contributions violated the \$250 limit, but those contributions totaled \$20,850. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 292-93 (1981).

effect on speech, yet nonetheless provides helpful heuristic cues through source disclosure of the most prolific spenders.

Fortunately, the Court has consistently upheld contribution limits for candidate elections and characterized contributions as mere “speech by proxy” entitled to only partial First Amendment protection.¹⁶² The Court has agreed that contribution limits merely channel into direct speech money in excess of the limit, without necessarily reducing the total amount of speech. Contribution limits restrict just a single avenue of participation and leave erstwhile contributors “free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.”¹⁶³ Indeed, instead of donating political contributions that pay indirectly for campaign advertising, the contributor itself could produce and air the exact same advertisements through independent expenditures.¹⁶⁴ Likewise in direct democracy, contribution limits would not reduce aggregate speech and, when combined with source disclosure, should be justified under *Buckley* as “disclosure plus” regulations consistent with the government interest in voter competence.

This regulatory scheme addresses to some degree the problem of deceptive campaign fronts that obscure the identities of major campaign financiers. As explained earlier, organizations formed solely for campaigning on a particular ballot measure tend to adopt carefully chosen names that rarely indicate the sources of their financial support. For example, Pacific Gas & Electric Company in CRC knew that it was distrusted and anticipated that people would oppose the company’s stance in the election. It purposely concealed its heavy campaign involvement from voters by campaigning successfully under an alias that misleadingly associated its positions with Southwest Berkeley, a liberal, minority section of Berkeley.¹⁶⁵ By limiting the money that can be funneled through such anonymous political entities, contribution limits reduce the efficacy of forming a new organization with a misleading name uniquely tailored to a particular ballot measure.

Under a “disclosure plus” regime, many sponsors may find it less necessary or profitable to operate through an intermediary campaign organization. In

162. *Buckley*, 424 U.S. at 29. Court decisions since *Citizens Against Rent Control* have widened the scope of acceptable government regulation of contributions. Most recently, in *Nixon*, 528 U.S. at 390–97, the Court reduced the standard of scrutiny applicable to contribution limits and appeared to apply an expanded understanding of the government’s interest in campaign regulation.

163. *Buckley*, 424 U.S. at 28.

164. As a result, the Court anticipated little reduction in free expression or the amount of political campaign speech. *Buckley*, 424 U.S. at 21.

165. Pacific Gas & Electric Company provided all the organizational funding for the “Southwest Berkeley No No No on W Committee.” See Shockley, *supra* note 19, at 408.

today's legal environment, a campaign advocate that operates under its real name suffers a competitive disadvantage. Its real name broadcasts a heuristic cue that alerts both friendly and hostile voters. Meanwhile, the advocate's opponents will use bland pseudonyms that at worst are unoffensive and hide their true identities, and at best will attract additional support by virtue of a pleasant sounding name. By making the use of a tailored name less advantageous, source disclosure laws dampen this arms race to use the most misleading and favorable alias. Advocates will be more likely to campaign under their real names when opponents are more likely to do so as well. Even if financial sponsors continued to engage in strategic behavior to mislead voters, the incentives and opportunities could not be greater than they are now. Moreover, source disclosure will become more effective as stricter regulations emerge for disclosing the actual source of financial sponsorship. Reformers have developed tougher "true identity" rules to force campaign advocates to disclose their sponsorship of political advertising, whether through an intermediary or not.¹⁶⁶

In practice, the specification of an appropriate contribution limit is an empirical task within the expertise of legislatures and administrative agencies and subject to deferential review by courts. Determination of the appropriate dollar limit could be made periodically, subject to revision for the changing costs of campaigning and changing dynamics in elections. A quick examination of available contribution figures for the eight statewide ballot measures in California's 2000 general election provides an illustration. Only a handful of contributors for each proposition exceeded \$50,000 in donations.¹⁶⁷ For Proposition 35, which addressed government contracting, two groups provided almost all the \$9.6 million total of opposition financing. Similarly, the Sierra Club was the only contributor to donate over \$50,000 for the opposition to Proposition 37, a measure that would have made it harder to impose certain regulatory charges. Meanwhile, fourteen contributors gave over \$50,000 to the campaign in favor of Proposition 37, led by the Wine Institute (contributing approximately \$400,000), Philip Morris, Inc. (contributing \$351,000), and Anheuser-Busch (contributing \$325,000).

Across the eight propositions, no more than fourteen contributors for any single proposition gave over \$50,000, but that small fraction of all contributors

166. The FCC promulgated a stricter rule that requires broadcast advertising to include disclaimers that "fully and fairly disclose the true identity" of the person or organization who paid for the advertisement. 47 C.F.R. § 73.1212(e). The Bipartisan Campaign Reform Act of 2002 also includes a similar rule to prevent evasion of source disclosure rules. See Pub. L. No. 107-155, § 311, 116 Stat. 81, 105-06 (2002) (to be codified at 2 U.S.C. §441d).

167. See http://cal-access.ss.ca.gov/cballots/ballot_main.asp?SESSION=1999 (last visited on Dec. 5, 2001), and <http://www.calvoter.org/2000/general/propositions/topten.html> (last visited on

provided the predominant share of the financing for nearly every campaign.¹⁶⁸ A contribution limit for that election around \$50,000 would have affected only a handful of contributors, while producing salient heuristic cues for each proposition.¹⁶⁹

Of course, no reform proposal removes every opportunity for evasion. The hydraulics of campaign finance reform may lead to increased issue advocacy, outside the reach of regulation.¹⁷⁰ Contributors might seek to confuse voters by advertising both for and against ballot measures.¹⁷¹ “Disclosure plus” is not a panacea, but heuristic cues provide an efficient way to empower voters with useful information that can be delivered cheaply. “Disclosure plus” moves beyond current disclosure and reporting regimes that have failed dismally to alert voters about who supports and opposes ballot measures.

Dec. 5, 2001), for data on the eight ballot propositions in the 2000 California general election.

168. This fact follows from the logic of collective action. Mancur Olson demonstrated theoretically that a group effort to attain a collective benefit will result in the most interested members of the group providing a disproportionately large share of the financing for the collective effort. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 29 (1971).

169. Proposition 208, approved by California voters in 1996, required issue election advertisements sponsored by a political committee to disclose the committee's two biggest contributors over \$50,000 in aggregate contributions. Enforcement of Proposition 208 was enjoined on First Amendment grounds in *California Prolife Council Political Action Commission v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998), *aff'd* 164 F.3d 1189 (9th Cir. 1999). While the temporary injunction remained in effect, California voters in 2000 approved Proposition 34, which amended several Proposition 208 provisions while retaining the provision requiring disclosure of major contributors in issue election advertisements. Proposition 34 was upheld in *Institute of Governmental Advocates v. Fair Political Practices Commission*, 164 F.Supp.2d 1183 (E.D. Cal. 2001).

170. In the last decade, candidate campaigning has increasingly turned to issue advocacy, exempt from government regulation, and empirical research indicates that observers see little difference between issue advocacy and express advocacy. See Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773, 1789–1801 (2001); see generally Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265 (2000).

171. This scenario is unlikely. First, contributors are free to do this today without contribution limits, but there is no evidence of this behavior as an effective strategy in direct democracy. Second, contributors would need to spend credible amounts of money opposed to their true preference. Third, incentives for spending on both sides of a ballot measure are nil compared to the same in candidate elections. Contributors often elect to become “political hermaphrodites” in candidate elections, contributing to every candidate as a means of guaranteeing ingratiation with the eventual winner. See *LaFalce v. Houston*, 712 F.2d 292, 294 (7th Cir. 1983) (coining the term and describing the concept in the patronage context). The incentive is absent in direct democracy. Rather than spending strategically on the wrong side of the issue, it is more likely that contributors unhappy about disclosing their involvement will advocate vigorously for their cause behind the strongest public-regarding justification possible, or in the absence of any public-regarding justification, simply abstain.

CONCLUSION

The source of voter confusion in direct democracy is not political ignorance or excessive campaign spending. It is the scarcity of familiar heuristic cues that voters customarily use to figure out how they should vote. Current laws requiring campaign finance reporting and government disclosure have not generated the heuristic cues that help voters. Regulatory measures that leave room for collective action, yet force major sponsors to identify themselves prominently to the public, are the best means of restoring these heuristic cues. Such provisions for “disclosure plus” can produce heuristic cues while minimizing the restrictive effect on speech. They should be upheld under a new constitutional framework that recognizes the substantial government interest in voter competence.