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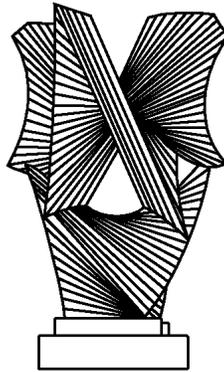
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The Law and Economics of “Informed Voter” Ballot Nominations

Elizabeth Garrett

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

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The Law and Economics of “Informed Voter” Ballot Notations

*Elizabeth Garrett**

The voice of the people is but an echo. The output of an echo chamber bears an inevitable and invariable relation to the input. . . . Even the most discriminating popular judgment can reflect only ambiguity, uncertainty, or even foolishness if those are the qualities of the input into the echo chamber.

V.O. Key, Jr., *The Responsible Electorate*¹

Recognizing the wisdom of V.O. Key’s statement, many political reformers and scholars have sought to improve the quality of the information voters use to decide how to cast their ballots. One challenge lies in the voters themselves; few people are willing to invest significant time and energy to find and understand information about candidates for public office. Given their limited attention to political matters, most people vote on the basis of certain voting cues, such as incumbency or party affiliation. They hope such shortcuts will allow them to vote in the same way that they would if they had full information about the candidates and their positions. In other words, they search for cues that will allow them to vote competently even with limited information.²

* Professor of Law, University of Chicago Law School. I appreciate the valuable comments of Richard Briffault, Dan Fischel, Barry Friedman, Elisabeth Gerber, Scott Greenberg, Rod Kiewiet, Saul Levmore, Bill Marshall, John Manning, Eric Posner, Jeff Rachlinski, Cass Sunstein, Adrian Vermeule, and the participants at the University of Virginia’s Conference on the Law and Economics of Elections and the Law and Economics Workshop at Emory Law School, as well as the exceptional research assistance of Veronica L. Spicer and Alina McLauchlan. I also appreciate the financial support of the James H. Douglas Jr. Fund for the Study of Law and Government at the University of Chicago Law School. I served as an expert witness for the plaintiff challenging an informed voter initiative in *Gralike v. Cook*, 996 F. Supp. 917 (W.D. Mo. 1998), *aff’d*, No. 98-1494, 1999 WL 673158 (8th Cir. Aug. 31, 1999).

¹ V.O. Key, *The Responsible Electorate* 2-3 (1966).

² See Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections*, *in* *Citizen Competence & Democratic Institutions* 147,

Surprisingly, very little of the recent scholarly attention has focused on the ballot itself, even though the information it contains—name and party affiliation—provides the strongest cues for voters seeking shortcuts.³ The information noted on the ballot is so salient that a few entrepreneurial candidates legally change their names to affect voter behavior. Recently, in Chicago, a candidate for alderman legally changed her name to “Carol Moseley-Braun” and tried to appear on the ballot under that name.⁴ Her decision seems to have been an attempt to capture benefits from the former United States Senator’s brand name.⁵ Other enterprising candidates have also changed their names to increase their name recognition. In New York, for example, one candidate wished to run as Grandpa Al

149 (Stephen L. Elkins & Karol Edward Soltan eds., 1999) (terming voters as competent “if they cast the same votes they would have cast had they possessed all available knowledge about the policy consequences of their decision”).

³ See W. Russell Neuman, *The Paradox of Mass Politics* 82 (1986) (noting that for unsophisticated voters, “political part[ly] or the perceived ethnicity of the names of candidates” are the strongest voting cues). In addition, names can often reveal the gender of candidates, which may serve as a cue. See Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 *Sup. Ct. Rev.* 331, 360-61. Of course, one of the strongest voting cues, incumbency, is not apparent from all states’ ballots, although the familiar name may trigger the voter to remember the context in which she encountered the name previously. See Bruce Cain, *The American Electoral System*, in *Developments in American Politics* 37, 43-46 (Gillian Peele et al. eds., 1992) (explaining source and importance of incumbency cue). Incumbents are sometimes listed first on the ballot, providing them further prominence.

⁴ Tracy Boutelle, *Familiar Name Among Alderman Candidates*, Associated Press, Dec. 16, 1998, available in 1998 WL 7471999; Cindy Richards, *Senator Set to Go to Court to Save Name*, *Chi. Trib.*, Dec. 17, 1998, at N1; see also Moseley-Braun: A Name that Won’t be on This Ballot, *Chi. Trib.*, Jan. 20, 1999, at N3 (reporting that the Board of Election Commissioners refused to allow her to appear on the ballot under her new name).

⁵ See John R. Lott Jr., *Brand names and barriers to entry in political markets*, 51 *Pub. Choice* 87, 88 (1986) (defining the concept of a political brand name); John R. Lott, Jr., *The Effect of Nontransferable Property Rights on the Efficiency of Political Markets*, 32 *J. Pub. Econ.* 231, 232-33 (1987) (describing difficulty facing incumbents who wish to transfer their political brand names to new entrants into the political market).

Lewis.⁶ The candidate who legally changed his middle name to “(Low Tax)” no doubt hoped to make his position on a salient issue clear to voters.⁷

Political parties have not neglected the ballot as an avenue to communicate with voters. Professors Beck and Sorauf observe that parties have worked to convince states to adopt the party-column ballot, which encourages straight ticket voting. Beck and Sorauf note that “[n]ow that voting is done uniformly through secret ballot, it is the *format of the ballot itself* that has the greatest impact on the campaigns, especially in how it affects the connection between candidates and their parties in the voter’s mind.”⁸ Recognizing this, minor parties have brought numerous suits seeking the right to appear on the ballot next to their candidates’ names.⁹ Some states’ ballot access laws restrict the ability of third-party or independent candidates to identify their party affiliation (or lack thereof), while at the same time requiring that affiliation with the Democratic or Republican Party appear as a ballot notation.¹⁰ Indeed, Justice John

⁶ See *Lewis v. New York State Bd. of Elections*, 678 N.Y.S.2d 887, 887-88 (Sup. Ct.) (“The use of a nickname on the ballot would lead to unrelenting attempts by candidates to highlight the given name by a nickname, street name, stage name, title, degrees or any other name created by the fertile imagination”), *aff’d per curiam*, 678 N.Y.S.2d 809 (App. Div. 1998); see also *None of the Above v. Hardy*, 377 So. 2d 385, 386-87 (La. Ct. App. 1979) (*per curiam*) (refusing to allow candidate who had changed his name to “None-Of-The-Above” to appear on the ballot under that name because of voter confusion).

⁷ See Leon Alligood, *Politician Has Legal New Name*, *The Tennessean*, May 15, 1998, at 1B. Byron (Low Tax) Looper’s political career was brought to an abrupt halt when he was arrested and indicted for murdering his opponent. See Leon Alligood, *Grand Jury Indicts Looper for Murder*, *The Tennessean*, Jan. 30, 1999, at 6B; Duncan Mansfield, *Candidate Jailed in Foe’s Slaying*, *Wash. Post*, Oct. 24, 1998, at A2.

⁸ Paul Allen Beck & Frank J. Sorauf, *Party Politics in America* 305 (7th ed. 1992).

⁹ See Daniel Hays Lowenstein, *Election Law: Cases and Materials* 391 (1995).

¹⁰ See *Rosen v. Brown*, 970 F.2d 169, 171, 176 (6th Cir. 1992) (finding that Ohio law violated the 14th Amendment rights of independent candidates by providing voting cues to Republicans and Democrats but denying them to independent candidates); *Dart v. Brown*, 717 F.2d 1491, 1491, 1495-97 (5th Cir. 1983) (upholding law that prohibited notation on ballot of candidate’s

Paul Stevens emphasized the importance of the ballot to political parties when he observed that “the right to be on the election ballot is precisely what separates a political party from any other interest group.”¹¹

Smaller interest groups have also realized the power of information provided on the ballot. In 1996, groups financed by U.S. Term Limits, Inc. proposed state constitutional amendments requiring candidates to declare their position on a particular federal term limits amendment.¹² The proposals were made in the form of ballot initiatives because elected lawmakers have been notoriously hostile to proposals that would restrict their time in office.¹³ The ballot questions passed in nine of the fourteen states where voters considered the proposal.¹⁴ Had these constitutional amendments

party affiliation with an unrecognized party, which meant the party had not demonstrated through past elections or petitions a certain degree of voter support).

¹¹ *Timmons v. Twin Cities Area New Party*, 520 U.S. 353, 373 (1997) (Stevens, J., dissenting). Interestingly, other countries do not include party labels on the ballot, but treat political parties like other private associations. See Leon D. Epstein, *Political Parties in the American Mold* 156 (1986) (discussing in particular Australia and Great Britain).

¹² See Peter Schrag, *Paradise Lost: California's Experience, America's Future* 271 (1998). This effort by U.S. Term Limits, although unusual, is not unique. Ballot notations were used in the effort to pass the Seventeenth Amendment allowing the direct election of Senators. In many Western states, ballots revealed whether candidates for the state legislature had promised to support for appointment to the Senate the person who won a popular vote. See Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 *Yale L.J.* 1971, 1978 (1994); Ronald D. Rotunda, *The Aftermath of Thornton*, 13 *Const. Commentary* 201, 209 (1996) (quoting Nebraska notation that read “Promises to vote for people's choice for United States Senator”). These notations were not challenged so no court passed on their propriety. The Supreme Court did prohibit the states from including on the ballot information about the race of the candidate because it “encourage[s] . . . voters to discriminate upon the grounds of race.” *Anderson v. Martin*, 375 U.S. 399, 400, 402 (1964).

¹³ For example, Congress considered numerous term limits proposals in 1993. All were defeated. See Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 *Cornell L. Rev.* 623, 628 n.11 (1996) (discussing these failed proposals).

¹⁴ See Schrag, *supra* note 12, at 271.

gone into effect, future state ballots would have contained a notation next to the name of candidates for the U.S. Senate or House of Representatives reflecting opposition to a term limits amendment. Those who declined to sign the pledge supporting term limitations, or whose actions in Congress were inconsistent with the pledge, would receive the notation that they “DECLINED TO PLEDGE TO SUPPORT TERM LIMITS” or, in the case of incumbents, that they “DISREGARDED VOTERS’ INSTRUCTION ON TERM LIMITS.”¹⁵ The term limits advocacy group responsible for proposing these notations calls them “Informed Voter” ballot notations; opponents refer to them as “Scarlet Letter” notations.¹⁶ Because these mandatory provisions have been ruled unconstitutional in every state in which they were proposed or adopted,¹⁷ U.S. Term Limits is now waging an effort to allow notations on a voluntary basis. In three states candidates for federal legislative office can now sign a pledge to remain in office for no more than three terms in the House or two terms in the Senate.¹⁸ For candidates who sign and follow the pledge, the ballot will indicate that they “SIGNED TERM LIMITS PLEDGE. WILL SERVE NO MORE THAN [3 TERMS] [2 TERMS].” If a candidate executes the pledge and then serves for longer than she promised, future ballots will note next to her name that she “BROKE TERM LIMITS PLEDGE.”¹⁹ The term limits effort may spark wider use of such pledges. In Arizona, a ballot question that was defeated in 1998 would have allowed a notation for candidates who voluntarily pledged to support the abolition of the federal income tax and the adoption of a national consumption tax. By their names on the

¹⁵ See, e.g., Mo. Const. art. VIII, §§ 17, 18.

¹⁶ See Schrag, *supra* note 12, at 270.

¹⁷ See Maura Dolan, Initiative on Term-Limits Loyalty Voided, L.A. Times, July 9, 1999, at A3.

¹⁸ In 1998, the voluntary notation system was adopted by popular vote in three states, Alaska, Colorado, and Idaho. See *By the Numbers*, Idaho Statesman, Nov. 5, 1998, at 10A; *Ballot Count Edges Term-Limit Pledge Over Top*, Anchorage Daily News, Dec. 3, 1998, at 1B; *Renate Robey, Some Legislators Spurn Term Limits*, Denver Post, Nov. 5, 1998, at A14.

¹⁹ See *Compromising the ballot is not the right way to impose term limits*, Idaho Statesman, Oct. 26, 1998, at 8B.

ballot would have appeared the notation “SIGNED THE I.R.S. ELIMINATION PLEDGE.”²⁰

In the decisions striking down the mandatory term limits notation, courts have relied both on federal constitutional arguments, ranging from Article V concerns²¹ to issues of free speech,²² as well as on state law relating to ballot questions.²³ Constitutional issues, however, are not my direct concern in this Article. Instead, I will analyze the effects of the informed voter ballot notations on the electoral system. Because they provide information to voters at a crucial time in the electoral process—when people are actually voting—we would expect that they would have profound effects on voter behavior and the outcome of elections. Even if constitutional doctrine prohibits ballot notations, including those that are linked to voluntary pledges, thinking about their effects on the electoral process may shed new light on the information that ballots routinely provide. Furthermore, although I do not directly address the federal constitutional issues in this article, conclusions about voter response to ballot notations is surely relevant to constitutional determinations about the First Amendment and democratic deliberation.

In Part I of this article I focus on one possible positive effect of ballot notations on the electoral system—that ballot notations will increase voter competence. Considering ballot notations in their best light, we discover that they could serve two salutary objectives. First, they could provide voters with information about candidates’ positions on various issues, giving the electorate a better sense of the candidates’ ideology. Information about candidates’ positions on

²⁰ See Michael Murphy, Prop. 202 A Shot Over Bow of IRS, Ariz. Republic, Oct. 30, 1998, at B4. The ballot proposition was defeated, but 45 percent of those voting favored the notation. See Election Results, Ariz. Republic, Nov. 5, 1998, at A20.

²¹ See, e.g., League of Women Voters v. Gwadosky, 966 F. Supp. 52, 60, 63 (D. Me. 1997); Bramberg v. Jones 978 P.2d 1240, 1231-42 (Cal. 1999); In re Initiative Petition No. 364, 930 P.2d 186, 193 (Okla. 1996).

²² See, e.g., Gralike v. Cook, No. 98-1494, 1999 WL 673158, at *3 (8th Cir. Aug. 31, 1999); Barker v. Hazeltine, 3 F. Supp. 2d 1088, 1095 (D.S.D. 1998).

²³ See, e.g., Advisory Opinion to the Attorney General re Term Limits Pledge, 718 So. 2d 798, 803 (Fla. 1998).

particular issues, rather than the more general cue of party affiliation, may increase voter competence. Not only does it provide specific information about the particular issue, but in many cases a candidate’s position on a high-profile issue can also be a cue that reveals her general ideology. Thus, the notation may allow voters to better predict the behavior of the candidate once she is elected and must make decisions concerning a host of issues unanticipated during the election.

In Part II, I examine the second potential benefit of ballot notations—the possibility that they will empower a broader number of political participants, allowing entities other than the candidates, political parties, and the media to shape the campaign agenda. Under current practices, ballot notations are controlled by groups that exert influence over direct democracy. More particularly, all recent ballot notations have been proposed by grassroots groups that support reforms providing diffuse public benefits relating to governance and often threatening the interests of entrenched political players. Direct democracy is often the only outlet for such groups that advocate reforms presenting conflicts of interest for representatives—reforms like term limits, campaign finance reform, and tax limitations. As long as such outsider groups dominate the selection and drafting of ballot notations, these electoral devices might operate like fusion candidacies have in states that allow them. Groups with intense preferences on a particular issue or set of issues and that feel shut out of the traditional legislative arena could use the ballot to focus candidates’ attention on their agenda. Accordingly, these groups would have a greater ability to influence the public agenda, in the same way that the prospect of an endorsement by a minor party can influence the policies supported by the candidates of the major parties. Moreover, ballot notations could make it harder for candidates to avoid discussing controversial issues during the campaign.

Notwithstanding these possible positive effects of ballot notations, Part III of the Article focuses on substantial problems that have become apparent through experience with the term limits notations. First, as long as ballot notations remain the tools of organized groups who can succeed at direct democracy, they may unduly empower single-issue factions and further weaken traditional political parties. Moreover, if notations continue to be determined

through popular amendments to state constitutions, they will appear on ballots until another popular vote repeals the requirement. In this way, they will entrench the concerns and agendas of past generations and exert unfortunate influence on the policies of the future. Finally, ballot notations, particularly those drafted by interest groups that hope to alter the political agenda in specific ways, pose a serious risk of voter confusion. Indeed, the experience with the U.S. Term Limits ballot notation suggests that interest groups will seek to advance their own particular perspectives without fully informing the public about the consequences or the details of their policies. Moreover, they will phrase the notations so that they evoke immediate and perhaps erroneous voter response. The possibility of voter confusion presents a formidable objection to ballot notations. Because they are such vivid voting cues, voters are likely to be influenced by them. If their use leads to systematic errors on the part of voters, they may undermine rather than enhance voter competence.

I conclude by analyzing potential solutions to the problems of informed voter ballot notations. Given the possibility of improved voter competence, these solutions—to allow the content of ballot notations to be determined by a periodic public opinion poll or to allow each candidate space on the ballot to communicate with voters—are worthy of consideration.

I. The Effect of Ballot Notations on Voter Competence

The initial reaction to ballot notations tends to be one of disapproval—that somehow they are inappropriate, or even an abuse of the electoral process and the ballot. Some of this reaction may stem from a distaste for forced speech, although many of the recent ballot notations rely on voluntary pledges. In addition, much electoral regulation seems related to the notion that a voter should enter the voting booth armed only with her intelligence, civic virtue, memory, and party affiliation. For example, most states prohibit electioneering within a certain radius of the polling booth,²⁴ and,

²⁴ See *infra* notes 132-133 and accompanying text (discussing these buffer zones).

until the Supreme Court struck the laws down, some states forbade newspapers from commenting on elections on voting day.²⁵

We should not dismiss ballot notations on the basis of this initial reaction, however. The objective of many who wish to reform the electoral process is to allow voters the ability to vote more competently. Again, a competent voter is one who can vote on the basis of the information she has in the same way that she would vote with full information.²⁶ Certainly, some reformers adopt a more ambitious goal, hoping to encourage citizens to engage intensively with political ideas and to ensure that political information is equitably distributed among all citizens.²⁷ It is my view that the more limited objective is a significant reform that will be difficult enough to achieve, and it is thus justified, at least as an intermediate goal. Moreover, it may well be the only realistic hope for reformers.

Except for a minority of citizens who follow politics and campaigns closely because they enjoy it or because it is part of their jobs, most Americans will never allocate much of their limited attention to gathering and assessing information about politics, government, and candidates for public office.²⁸ To increase the competence of these citizens, the political environment has to be structured so that relevant information is presented in a way that catches their attention, allows for relatively quick and easy processing, and permits them to make accurate predictions about candidates' future behavior.

²⁵ See, e.g. *Mills v. Alabama*, 384 U.S. 214, 220 (1966).

²⁶ See Gerber & Lupia, *supra* note 2, at 149.

²⁷ See, e.g., Michael X. Delli Carpini & Scott Keeter, *What Americans Know about Politics and Why It Matters* 1 (1996) (“[A] broadly and equitably informed citizenry helps assure a democracy that is both responsive and responsible.”).

²⁸ Dan Ortiz terms these politically disengaged voters “civic slackers.” See Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 *Stan. L. Rev.* 893, 903 (1998). My assumption in this article is that most citizens will continue to behave as civic slackers, despite the hopes of the more idealistic reformers. Meaningful change must account for the way voters actually behave and try to improve conditions in realistic ways. See Robert A. Dahl, *Democracy and its Critics* 339-40 (1989) (acknowledging that “under the conditions of extreme complexity in public policy,” the goal of making all citizens fully informed about politics “exceeds human possibilities”).

Ballot notations relating to candidates' positions on particular issues would seem to provide a helpful shortcut for these voters, as well as more civically engaged citizens. To support the argument that notations might increase voter competence, I first describe why all voters, particularly those who are politically disengaged, seek shortcuts and use heuristics²⁹ to help them decide how to cast their votes. Next, I argue that issue-oriented ballot notations would provide particularly relevant information to voters. Finally, I discuss why such information is likely to change the way some citizens vote, and I identify those citizens who are most likely to alter their behavior on the basis of the notations.

A. The Inevitable Use of Heuristics in Electoral Decisionmaking

The use of heuristics in political decisionmaking is inevitable for a number of reasons. The political environment is complex; it is the kind of environment in which people must use shortcuts to reach decisions.³⁰ Humans have limited abilities to gather, analyze, and use information.³¹ Herbert Simon termed this limitation “bounded rationality.”³² The rational response to the fact of bounded rationality in complex informational environments is to take advantage of heuristics, to simplify so that human intellectual resources can deal with the questions presented.³³

²⁹ “Heuristics are judgmental shortcuts, efficient ways to organize and simplify political choices, efficient in the double sense of requiring relatively little information to execute, yet yielding dependable answers even to complex problems of choice.” Paul M. Sniderman et al, *Reasoning and Choice: Explorations in Political Psychology* 19 (1991).

³⁰ See Carpini & Keeter, *supra* note 27, at 25

³¹ For the classic description of information costs facing voters and the effect on rational behavior, see Anthony Downs, *An Economic Theory of Democracy* 265-66 (1957). See also Bryan D. Jones, *Reconceiving Decision-Making in Democratic Politics* 50 (1994) (noting that recent literature has focused on the use of heuristics in making political decisions because “the combination of low levels of information, limited interest, and limited processing capacity” lead to their use).

³² Herbert Simon, *Models of Man* 199 (1957) (defining bounded rationality as the concept that humans are “limited in knowledge, foresight, skill and time”).

³³ See Arthur Lupia & Mathew D. McCubbins, *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* 24 (1998) (disputing those

Note that the problem for voters is not that there is too little information bearing on their electoral decisions, but precisely the opposite. Voters are bombarded with information, and even more is available to those with the interest and resources to seek it out. Even the most engaged voter will need to use filters to distinguish helpful information from unhelpful data, as well as to create structures that will enable her to make sense of the information that she gathers.³⁴

Yet, many discussions of voter decisionmaking and cognitive capacities proceed from the assumption that voters have little relevant information when they make electoral choices.³⁵ How can that be accurate if the political environment produces more information than any human can be expected to understand and use? The answer lies in the voters themselves: they pay little attention to politics.³⁶ Attention is a scarce resource,³⁷ and most Americans, arguably rationally, would prefer to spend their time and energy on other matters. Furthermore, information is not a costless good; there is cost associated with all information, and, for some data, it can be quite high.³⁸ Thus, most citizens have only the political information that they happen to encounter as they go about their lives. Such information, provided by the media, candidates'

who claim that Simon's theory of bounded rationality denies that humans act in an interest-maximizing way); Wendy M. Rahn, Candidate Evaluation in Complex Information Environments, in *Political Judgment* 43, 43 (Milton Lodge & Kathleen M. McGraw eds., 1995) (arguing that in the complex political environment, people must adopt heuristics to avoid overwhelming their cognitive capacities).

³⁴ See generally Cass R. Sunstein, How Law Constructs Preferences, 86 *Geo. L.J.* 2637, 2650 (1998) (“Heuristic devices are often used when the costs of deliberation are high . . .”).

³⁵ See, e.g., Carpini & Keeter, *supra* note 27, at 52 (characterizing those in the “heuristic” school as providing a model of low-information rationality).

³⁶ See John B. Gilmour, Strategic Disagreement: Stalemate in American Politics 28 (1995).

³⁷ See Jones, *supra* note 31, at 185; Lupia & McCubbins, *supra* note 33, at 22 (“[S]carcity is a ubiquitous feature of the human condition. As a result, people nearly always have *choices* to make.”).

³⁸ See Cass R. Sunstein & Edna Ullmann-Margalit, Second-Order Decisions 17 (Chi. John M. Olin Law & Econ. Working Paper No. 57 (2d Series), 1998).

advertisements, and coworkers chatting about politics on coffee breaks, is not necessarily the most relevant to voter competence.

In short, most voters' political decisions are constrained by two problems that implicate their ability to process information and reach competent decisions. There is simultaneously too much information for any person to use competently, and most people are paying very little attention to the decisions they will make in the voting booth. The use of shortcuts in such an environment is inevitable. The question, then, is how to provide information that voters can use efficiently to accurately reflect their preferences in their votes. The argument for informed voter ballot notations hinges on whether they will provide voting cues that are more helpful than the cues voters currently use. In other words, although all heuristics will reduce decision costs for voters, relative to decisionmaking in a complex environment without recourse to cognitive shortcuts, only some will reduce voters' error costs.³⁹ Again, I am determining error from the baseline of the decision the voter would reach with full information. The case for informed voter ballot notations must rest on whether they reduce error costs without significantly increasing decision costs relative to the status quo. In making this determination, we must have a sophisticated notion of decision costs, one that focuses not only on the costs incurred by the voters, but also on the costs that would be incurred by the entities producing and structuring the information.

B. Issue-Oriented Ballot Notations as Voting Cues

Ideology is often an effective cue to predict a candidate's future behavior.⁴⁰ Voters cannot know at the time of the election the

³⁹ See *id.* at 14-15 (discussing the role of error costs and decision costs in determining second-order strategies).

⁴⁰ See Melvin J. Hinich & Michael C. Munger, *Ideology and the Theory of Political Choice* 99 (1994) (arguing that knowledge of ideology yields predictions that on average will satisfy the needs of citizens making uncertain political choices); *id.* at 89 (arguing that ideologies are "a means of giving form and coherence to the desires of citizens and factions alike, in the face of pervasive uncertainty, lack of information, and difficulty of commitment"); Richard D. McKelvey & Peter C. Ordeshook, *Information and Elections*, *in* *Information and Democratic Processes* 281, 283 (John A. Ferejohn & James H. Kuklinski eds., 1990) (listing as cues relevant to voter competence those that

particular decisions that a legislator will confront during her term of office.⁴¹ Knowing her ideological commitments, however, can provide voters a way to predict generally how she will decide in the future. Furthermore, attempting to get information with respect to the candidates’ positions on every potential issue is overwhelming; even the most sophisticated voter must simplify the decision making process.⁴² One way to simplify is to rely on ideology: the overarching and general political commitments of candidates that inform their decisions on particular matters. For example, knowing that a candidate supports the right of a woman to choose to terminate her pregnancy, instead of espousing views antithetical to choice, reveals more than the candidate’s view of abortion. This information can be used to generalize about her position on a number of other issues implicating the role of women in society and relevant to personal liberties. Combined with information about the candidate’s position on other related issues, the data can begin to flesh out a more general ideology. Indeed, information structured in terms of particular applications of ideological commitments (“I support a woman’s right to choose”) rather than as abstract formulations (“I am a libertarian, a philosophy that encompasses the following political vision”) may be more accessible to voters.⁴³

Of course, issues provide clues about ideology with varying degrees of success. For example, supporters of a woman’s right to

relate to ideology, including the historical record of the candidate and interest group endorsements).

⁴¹ See Samuel L. Popkin, *The Reasoning Voter: Communication and Persuasion in Presidential Campaigns* 11 (2d ed. 1994) (“A politician is promising to deliver a future product about which the voter may have limited understanding, so the vote involves uncertainty about whether the product can be delivered, and, if so, whether it will perform as promised.”).

⁴² See Frank R. Baumgartner & Bryan D. Jones, *Agendas and Instability in American Politics* 25-26 (1993) (“[E]very public policy problem is usually understood, even by the politically sophisticated, in simplified and symbolic terms.”).

⁴³ Sniderman et al., *supra* note 29, at 87 (“There is a warehouse of findings showing that the average citizen is unfamiliar with ideological constructs; is often unable to define or explain them; and is anyway not much interested to make use of them in the actual business of trying to sort out politics Ideology is abstract, difficult to comprehend . . .”).

choose can encompass both committed libertarians who oppose much if not all government interference in society and the economy and feminists who generally support more extensive government intervention into the economy and citizens' lives. Similarly, supporters of term limits for lawmakers come from a number of ideological perspectives. Robert Kurfirst has identified four distinct groups of people supporting term limits: progressives, populists, republicans, and libertarians.⁴⁴ Term limits may not represent any of the four philosophies identified by Kurfirst to most voters; support for term limits may be viewed only as a protest against the government or entrenched interest groups.

Over time, some issues lose their initial meaning and become mere symbols of reputation or patriotism.⁴⁵ In some cases, the political environment may require all viable candidates to take the same position with respect to a particular issue. For example, it is hard to imagine any candidate in Oklahoma opposing the death penalty or supporting gun control. Thus, the signal from positions on certain issues may not be sufficiently precise unless it is coupled with information about positions on related issues where disagreement is politically possible. Drawing accurate conclusions about the ideology of a candidate who supports a woman's right to choose, a vigorous and extensive federal welfare program, increased federal control over education decisions, and a national health program is more likely than when the voter knows only the candidate's position on the abortion issue.

How can a voter accurately determine a candidate's position on issues? First, for candidates with prior public service, the lawmakers' past decisions and the consistency of those decisions provide credible signals. Ballot notations that reveal whether an incumbent has behaved consistently with her promises provide such relevant

⁴⁴ See Robert Kurfirst, *Term-Limit Logic*, 29 *Polity* 119, 119 (1996).

⁴⁵ Eric Posner has described how signals can move from a "separating equilibrium" into a "passive pooling equilibrium." See Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 *J. Legal Stud.* 765, 780-81 (1998) The signal in the latter case is unhelpful for voters attempting to obtain an idea of the candidate's ideology. See *id.* at 780 (arguing that, in situations of passive pooling equilibrium, a signal no longer serves "as a reliable indicator of a person's type").

information in an accessible way, but the information is also currently available from conventional sources. Unlike incumbents, however, challengers find it more difficult to communicate their ideological commitments to voters in a credible fashion. If they have been involved in politics in other capacities, their voting records and past actions may provide helpful information. Other reliable signals of ideology can be relatively scarce during campaigns. Voters know that politicians can present one position to one group and then take an inconsistent position in front of a different group. Because politicians face no real discipline for lying in these situations, some political scientists have termed this behavior “cheap talk.”⁴⁶ In some cases, the media will monitor and reveal hypocritical behavior, but often the public does not learn of it.

Ballot notations make available to a challenger a mechanism to precommit persuasively to voters, and such precommitments provide valuable information about the challenger’s ideology.⁴⁷ They therefore equalize to some extent the asymmetrical position of challengers relative to incumbents to send credible signals. One way to discourage cheap talk by politicians is to force them to talk to all groups at the same time, eliminating their ability to vary their message to fit the audience. Public pledges revealed through ballot notations make the politician’s stance visible to all voters, removing the politically attractive option of making clear and inconsistent statements to private groups and providing the public with ambiguous platitudes. In addition, the threat of a negative ballot notation in future campaigns assures voters that politicians will be punished for breaking their promises. For example, a candidate who runs for a third term in the Senate after signing the term limits pledge will be labeled prominently as someone who broke her promise.

⁴⁶ See, e.g., David Austin-Smith, *Strategic Models of Talk in Political Decision Making*, 13 *Int’l Pol. Sci. Rev.* 45, [PINPOINT NEEDED] (1992); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 *Law & Contemp. Probs.* 3, 3 (1994).

⁴⁷ Cf. Saul Levmore, *Precommitment Politics*, 82 *Va. L. Rev.* 567, 568-69 (1996) (exploring the puzzle of why politicians do not use more precommitment strategies).

Although this sanction improves the reliability of the politician's signal, it does not solve the candidate reliability problem entirely. A politician will discount the cost of a sanction that will be applied in the future. Perhaps, in thirteen years, the voters will no longer care about term limits; perhaps, the candidate will not seek a third term for other reasons; or, perhaps, the notation will no longer appear on the ballot. More importantly, the candidate may reason that the advantages of incumbency will overwhelm any negative repercussions from the notation that she broke her pledge.⁴⁸

Another helpful cue to ideology is information about group affiliation. Indeed, one reason voters rely most heavily on party affiliation when making their electoral decisions is that political parties represent particular political ideologies. Anthony Downs argued that party identification is a shortcut for voters that economizes on information about issues. Parties invest resources in developing and communicating "a verbal image of the good society and of the chief means of constructing such a society"⁴⁹ so that voters can sort candidates on this basis without learning candidates' precise positions on particular issues.

Some have argued that the party cue may not sufficiently allow voters to distinguish among candidates. One result of a two-party system combined with single-member electoral districts is a convergence of the parties with respect to their positions on issues. In the end, voters are left with one party that is slightly to the right of center, and one slightly to the left.⁵⁰ As Professor Hasen has observed: "[I]f both parties tend toward centrist politics, the cues

⁴⁸ See, e.g., Francis X. Clines, Keeping Politicians True to Their Inner Selves, N.Y. Times, Mar. 15, 1999, at A14 (discussing work of U.S. Term Limits to enforce voluntary pledges); Greg Hitt, Once a Warrior for Term Limits, Rep. Nethercutt Resists Falling on His Sword Before 2000 Election, Wall St. J., Mar. 10, 1999, at A24 (discussing effect of Nethercutt's apparent reconsideration of his decision to abide by a term limits pledge); Gil Klein, Pledges Back to Haunt Congress, Richmond Times-Dispatch, Feb. 28, 1999, at A6 (discussing members of Congress who are considering running for another term in violation of term limits pledges and noting that many are expected to win anyway).

⁴⁹ Downs, *supra* note 31, at 96.

⁵⁰ See Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 Stan. L. Rev. 643, 675 (1998).

ultimately are irrelevant for making a meaningful electoral choice.”⁵¹ Moreover, because political parties seek to gain widespread support, they phrase their political commitments in general terms so they can attract candidates and voters of diverse ideologies.⁵² The most recent data, however, suggests that the party cue is increasingly informative as the ideological distinctions between the major parties have become more pronounced.⁵³ But, “[w]ith few exceptions these distinctions between the two major parties are tendencies, not certainties, and differing values are typically matters of emphasis rather than fundamental disagreements.”⁵⁴ Finally, party affiliation is completely uninformative in primary elections although the candidates may hold dissimilar ideological perspectives. For example, a race in New York between Al D’Amato and Rudy Guiliani would doubtlessly implicate very different political philosophies even though both are Republicans.

The information about group affiliation provided by ballot notations is significantly more targeted than that revealed by designations of party affiliation. As I will argue in Part II of this

⁵¹ Hasen, *supra* note 3, at 350; see also Jeffrey M. Berry, *The Interest Group Society* 47 (3d ed. 1997). But see John H. Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America 169-74* (1995) (providing data to suggest that the public perceives parties as distinct and arguing that “[t]his perception has a plausible basis”).

⁵² See Popkin, *supra* note 41, at 52-53; see also Thomas B. Edsall, *GOP’s Own Success Weakens Its Draw, Strategists Say*, *Wash. Post*, Nov. 25, 1998, at A4 (quoting a Republican consultant: “We are at a passing of an era—the paradigm of what separates the two parties is fading away.”).

⁵³ See Aldrich, *supra* note 51, at 170; D. Roderick Kiewiet & Mathew D. McCubbins, *The Logic of Delegation* 42 (1991); Margaret Weir, *Political Parties and Social Policymaking*, *in* *The Social Divide: Political Parties and the Future of Activist Government* 1, 8, 10 (Margaret Weir ed., 1998).

⁵⁴ Aldrich, *supra* note 51, at 8; see also Carpini & Keeter, *supra* note 27, at 55 (“[T]he modestly ideological nature of U.S. parties, the often weak programmatic coherence among candidates and officeholders from the same party, the crosscutting nature of many issues and socioeconomic circumstances, and the rapidly changing nature political agenda in postindustrial America make an unreflective dependency on party affiliation . . . too crude and unreliable a method to assure even minimally competent voting.”); Beck & Sorauf, *supra* note 8, at 475 (noting that American voters “increasingly seek the differentiated cues that party recognition cannot provide”).

paper, most, if not all, ballot notations will likely be the result of the activity by identifiable and organized interest groups. Thus, in a system of voluntary notations, to take a pledge that results in a ballot notation is more than to take a public position on a political issue. It is also a way to associate with the group that supported adding the notation to the ballot. Voters often use group affiliation as a heuristic, relying either on information about a candidate's membership in groups or on knowledge about interest group endorsements.⁵⁵ Reliance on affiliations with groups with better-articulated ideologies than those of the major political parties may provide voters a more effective way to distinguish among candidates. Armed with that information, voters can choose among candidates more competently.

Information provided by informed voter ballot notations, assuming that the information is accurate,⁵⁶ could allow the electorate to take advantage of a shortcut to candidates' ideologies which in turn would help voters predict the behavior of candidates once they are elected. By allowing both incumbents and challengers a credible precommitment opportunity and preventing candidates from taking different positions for different audiences, ballot notations could provide voters with a more accurate signal of ideology than current campaign tactics. Moreover, the information is likely to reveal ideology in a more precise way than cues on which voters now rely, such as party affiliation. How likely is it that voters would use the information provided in ballot notations, and which citizens are likely to alter their behavior on the basis of the information? That is the final question to which we turn in this section.

⁵⁵ See Carpini & Keeter, *supra* note 27, at 51 (describing the use of membership in groups as a shortcut to broader conclusions about ideology); see also Sniderman et al., *supra* note 29, at 113 (noting that voters are particularly effective at determining political views of groups and can draw conclusions about ideology and positions on particular issues from knowledge of the groups to which candidates belong).

⁵⁶ I will discuss this qualification in Part III of this Article.

C. The Salience of the Ballot Notation Cue

Ballot notations, even if they provide a more accurate cue to candidate ideology, will only be effective in increasing voter competence if voters pay attention to them. Determining whether voters will pay attention to ballot notations and, if so, identifying the voters who will be aided by them is the focus of this Section. Because ballot notations appear inside the voting booth, only those showing up to vote will have access to the ballot notation cue. The effects that ballot notations may have on the electoral system as a whole, however, may increase the number of voters who exercise their vote and better inform those who rarely pay much attention to politics.

Providing information about issues and group affiliation through the ballot is likely to have significant effects on some voters' decisions because the information is both salient and framed so that voters are likely to pay close attention to it. Certainly, similar information is currently available to voters, but it is more costly for them to obtain, it is not as credible as information subject to sanctions for lying, and much is not structured in a way to make it particularly salient.⁵⁷ With a system of ballot notations, the procurement cost of the information⁵⁸ is merely coming to the polls to vote. Of course, that requirement—that one must enter the voting booth before receiving the information—means that only those already motivated to vote will directly benefit from informed

⁵⁷ See Rahn, *supra* note 33, at 45-46 (stating that the information environment and the structure of information is important to determining how voters will process and use the information); see also Jones, *supra* note 31, at 81, 89-90, 129 (arguing that voter preferences are relatively stable; inconsistent electoral outcomes result from shifts in attention paid to particular issues as the frame for the information shifts); *id.* at 106 (“In situations where issue salience has changed, we may have a change in voter choice with little or no change in underlying preferences.”).

⁵⁸ See Edward G. Carmines & James H. Kuklinski, Incentives, Opportunities, and the Logic of Public Opinion in American Political Representation, *in* Information and Democratic Processes 240, 246 (John A. Ferejohn & James H. Kuklinski eds., 1990) (defining procurement costs as “the costs of gathering, selecting, and transmitting data,” and contrasting these costs with the analysis costs (“costs of undertaking a factual analysis of data”) and evaluative costs (“costs of relating data or factual analyses to specific goals”).

voter ballot notations.⁵⁹ However, if ballot notations change the content of campaigns, as I suggest below,⁶⁰ the politically disengaged may encounter more information about candidates' positions on issues that concern the general public. Depending on their reaction to this information, they may be more likely to vote.⁶¹ Nevertheless, the more certain conclusion is that ballot notations could provide those who are already willing to make the effort to vote with information more likely to allow them to choose competently. If ballot notations provide helpful and accurate cues about ideology, everyone entering the voting booth may become as competent as those who now pay attention to such information during campaigns, or who vote via absentee ballot so that they can discuss their votes with family and friends and have contemporaneous access to information about candidates' ideologies.⁶²

Communicating political information via the ballot frames the information so that voters are likely to consider it seriously. From the

⁵⁹ If one is worried about the distribution of political information, ballot notations might increase the gap between the information that the politically engaged have access to relative to the information available to civic slackers. See Carpini & Keeter, *supra* note 27, at 287 (“[S]ince knowledge bets knowledge, many . . . suggestions for improving the information environment could easily benefit those who are already well informed to a greater degree than those who are not.”).

⁶⁰ See *infra* Part II.

⁶¹ Cf. Thomas E. Cronin, *Direct Democracy* 67 (1989) (noting that voter “turnon” occurs when controversial and highly visible issues are placed on the ballot). Interestingly, this phenomenon may decrease aggregate voter competence. If those participating as a result of ballot notations are less informed voters, they may be less competent voters. On the other hand, if ballot notations provide information that fosters competence, increased participation will not affect the overall level of competence.

⁶² See Lois Romano, *Growing Use of Mail Voting Puts Its Stamp on Campaigns*, *Wash. Post.*, Nov. 29, 1998, at A1 (describing one absentee voter who “kept a shoe box on her kitchen table, where she put everything she received about the candidates. . . . When she was ready to vote [by absentee ballot], she would dig into her box and study the literature.”); see also Shanto Iyengar et al., *The Stealth Campaign* 7-8 (Sept. 2, 1999) (unpublished manuscript, on file with Virginia Law Review Association) (discussing voter use of slate mailings in the ballot box, as measured by the number of mailing found in garbage cans outside the polling place).

work of Kahneman and Tversky⁶³ and the expansion of their insights by political scientists, economists, and legal scholars,⁶⁴ we are increasingly aware that the presentation of information is as—or more—relevant to its effect on behavior than its content. A variety of factors related to framing increases the salience of ballot notations relative to other sources of information. First, the source of the information—the official ballot—may be perceived as more credible than the media, the interest groups themselves (which are somewhat removed from the notation and certainly not mentioned along with it on the ballot), or the candidates’ political literature and ads. Professors Lupia and McCubbins argue that for information to persuade, or affect behavior, “a listener [must] perceive a speaker to be both knowledgeable and trustworthy.”⁶⁵ Communications made via the official ballot seem likely to be perceived as credible.

Second, the immediate availability of information provided on the ballot means that it is the most salient information “at the climatic moment of choice.”⁶⁶ Voters compare new information against old and then fit the new data as consistently as possible with current views and perspectives.⁶⁷ Some voters have relatively little information when they come to the polls, and the information on

⁶³ See, e.g., Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 *Econometrica* 263, 288 (1979); Amos Tversky & Daniel Kahneman, The Framing of Decisions and the Psychology of Choice, 211 *Science* 435, 457 (1981).

⁶⁴ See, e.g., Shanto Iyengar, Is Anyone Responsible? How Television Frames Political Issues 11 (1991) (“The manner in which a problem of choice is ‘framed’ is a contextual clue that may profoundly influence decision outcomes.”); Christine Jolls et al., A Behavioral Approach to Law and Economics, 50 *Stan. L. Rev.* 1471, 1535-36 (1998).

⁶⁵ Lupia & McCubbins, *supra* note 33, at 9 (emphasis omitted); see also Stephen Ansolabehere & Shanto Iyengar, The Craft of Political Advertising: A Progress Report, *in* *Political Persuasion and Attitude Change* 101, 111 (D. C. Mutz et al., eds., 1996) (finding that a factor in the influence of information from the media is the public’s perception of the credibility of the message).

⁶⁶ *Rosen v. Brown*, 970 F.2d 169, 175 (6th Cir. 1992)

⁶⁷ See Milton Lodge, Toward a Procedural Model of Candidate Evaluation, *in* *Political Judgment* 111, 136 (Milton Lodge & Kathleen M. McGraw eds., 1995) (finding that information “later in the campaign” must be “strong and distinctive to have a measurable impact on” evaluative decisions).

the ballot is the only real data they have to guide their choice. One might suppose, however, that such voters will be the only ones affected substantially by the ballot notations, and it seems likely that only a minority of voters fit this profile. Voting requires an effort, so we might expect that citizens who go to the trouble of voting are more likely to have settled views that are less susceptible to change as a result of new information.⁶⁸ Nevertheless, several factors suggest that ballot notations may exert a significant influence on voting behavior, sufficient to alter electoral outcomes.

First, uncommitted voters who do rely on information provide on the ballot can play a significant role in outcomes.⁶⁹ Furthermore, even intensely motivated voters may be affected by information confronting them at the moment of their choice. Some voters are likely to believe that the election turns on the issues that are placed on the ballot and will behave accordingly. In addition, generally well-informed voters are unlikely to form strong opinions with respect to all races in a particular election; instead, their intense preferences are more often focused on one or two high profile races. Ballot notations relating to the other, relatively obscure races will play a crucial role in voters' decisionmaking; again, in an

⁶⁸ See Beck & Sorauf, *supra* note 8, at 191 (providing data to show that the most partisan members of parties tend to vote and participate in politics); William H. Flanigan & Nancy H. Zingale, *Political Behavior of the American Electorate* 36 (8th ed. 1994) (finding that those who participate in elections most regularly are citizens with relatively high levels of interest in politics); *id.* at 163 (concluding that the most politically individuals aware make up their minds early in the campaign).

⁶⁹ See Flanigan & Zingale, *supra* note 68, at 38 (noting that half of those who say they have “not much” interest in politics vote in presidential elections); Robert Brett Dunham, Note, *Defoliating the Grassroots: Election Day Restrictions on Political Speech*, 77 *Geo. L.J.* 2137, 2158 (1989) (“Pre-election poll results often indicate the importance of undecided voters in determining the outcome of elections, and some of these voters do not make up their minds until they enter the ballot box. While most voters have decided for whom they will vote in major candidate races, or how they will vote on major ballot question, they more frequently are undecided about—or unaware of—less visible offices and ballot questions. Election Day advocacy on these matters has a potentially great impact on voter choices.”).

environment of low information, salient cues like those on the ballot will be influential.⁷⁰

Finally, providing information in the frame of a contest will make it salient to voters. We are fascinated with conflict; we tend to pay more attention to issues where it appears that something is at stake in the resolution of a dispute.⁷¹ Certainly, any information learned during a political campaign relates to a conflict, but information provided at the moment the contest is decided should grab the attention of the public in a different way. Again, this effect results from the way the information is positioned in the larger information environment.

It seems likely (although further empirical research would allow us to reach firmer conclusions) that certain information provided on the ballot about candidates’ views on particular issues could increase voter competence. This conclusion depends on the kind of issue that prompts ballot notations—it must be a cue to a larger ideological preference or to a particular interest group associated with a distinct ideology. Furthermore, providing this kind of information on the ballot may affect voters’ electoral decisions because it will be seen as a credible signal and because it is provided at a crucial time—as the citizen is voting. Certainly, these factors have a great deal to do with the current strength of the party cue in voting decisions, as well as the clues to gender and ethnicity that a candidate’s name provides. Whether ballot notations can live up to this promise in the real world is the critical question, and the one we will return to after assessing a second way in which notations could improve the political environment.

II. Informed Voter Ballot Notations and Interest Groups

I have been focusing on one part of the equation—the use of informed voter notations by voters as shortcuts to increase their competence in an environment of limited information. This Part

⁷⁰ See Iyengar et al., *supra* note 62, at 27 (finding that “under conditions of low information” and the absence of partisan cues, the effects of slate mail on voter choice can be pivotal).

⁷¹ See Baumgartner & Jones, *supra* note 42, at 104.

focuses on the second part of the equation: the extent to which political actors will pay attention to the new voting cue and seek to influence it in ways that benefit them and their goals. I argue that certain groups will best situated to take advantage of this avenue to affect political discourse and action, thus opening up the chance to shape the political agenda to groups outside the traditional political heavyweights of the political parties, candidates, and the media. To understand this dynamic, I first discuss the importance of ballot notations in shaping the public agenda and next suggest which political actors may best take advantage of this new route to shape the public policy agenda. Finally, I note that this analysis, as well as the discussion in Part I, highlights the similarity between the use of informed voter ballot notations and another well-established mechanism that minor parties and interest groups have used to influence the course of politics: fusion candidacies.

A. Ballot Notations and the Political Agenda

The policy agenda is “the list of subjects or problems to which government officials, and people outside of government closely associated with those officials, are paying some serious attention at any given time.”⁷² Before a group can hope for the adoption of a policy that will benefit it, it must make the issue salient to lawmakers and ensure that they spend some of their limited time and attention to resolve it. Although agenda setting is a crucial prerequisite to policymaking,⁷³ the process by which an issue moves onto the political agenda remains somewhat mysterious to scholars.⁷⁴ We can

⁷² John W. Kingdon, *Agendas, Alternatives, and Public Policies* 3 (2d ed. 1995).

⁷³ See Baumgartner & Jones, *supra* note 42, at 20 (describing reasons why “it should not be surprising if periods of agenda access are followed by dramatic changes in policy outputs”).

⁷⁴ See John B. Bader, *Taking the Initiative: Leadership Agendas in Congress and the “Contract with America”* 8-9 (1996) (“Despite the importance of agenda-setting to the political system and to policy making, the very meaning of ‘agendas’ remains clouded in confusion.”); Kingdon, *supra* note 72, at 1 (“Political scientists have learned a fair amount about final enactment of legislation, and more broadly about authoritative decisions made at various locations in government. But predecision processes remain relatively uncharted territory. We know more about how issues are disposed of than we know about

offer *ex post* descriptions in particular cases, but predicting what issues will become salient or what methods of highlighting certain subjects will succeed is difficult.⁷⁵ Activists need a focusing event, preferably after they have laid the groundwork necessary to increase the chances that the event will lead to movement in a direction they support.⁷⁶

Those who study the political agenda argue that these efforts form a number of different streams that occasionally merge, often with the help of a catalyzing event.⁷⁷ Accordingly, much political activity can be seen as efforts by interest groups to shape the agenda, to change the political climate, and to provoke a focusing event.⁷⁸ Sometimes streams connect and issues become salient because of chance; for example, airline safety may become a hot topic after a fatal crash receives intense press scrutiny. In some cases, small events

how they came to be issues on the governmental agenda in the first place.”); cf. Thomas C. Schelling, *The Strategy of Conflict* 57-58 (1960) (discussing notion of a “focal point” as a method of coordination and describing process of finding a focal point as depending on “analogy, precedent, accidental arrangement, symmetry, aesthetic or geometric configuration, casuistic reasoning” and “imagination as much as . . . logic”). But see Timur Kuran, *Private Truths, Public Lies: The Social Consequences of Preference Falsification* 333 (1995) (noting that “[t]he fact that an outcome was unforeseen does not imply that it must remain a complete mystery” and noting that social science can explain *ex post* even if it is not good at predicting *ex ante*).

⁷⁵ But see Kingdon, *supra* note 72, at 206 (“[I]t would be a grave mistake to conclude that the processes explored in this book are essentially random. Some degree of pattern is evident in three fundamental sources: processes within each stream, processes that structure couplings, and general constraints on the system.”).

⁷⁶ See Kingdon, *supra* note 72, at 94-100; see also *id.* at 115 (“Focusing attention on one problem rather than another is often no accident. Activists invest considerable time and energy in their efforts to bring problems to public and governmental attention.”); Jones, *supra* note 31, at 26 (“[T]he function of the policy entrepreneur is to frame an issue so as to move it over the threshold of attention of policymaking institutions.”).

⁷⁷ See Kingdon, *supra* note 72, 145-46, 165-66 (identifying problem streams, policy streams, and political streams); see also Michael D. Cohen et al., *A Garbage Can Model of Organizational Choice*, 17 *Admin. Sci. Q.* 1, 1-2 (1972) (developing a “behavioral theory of organized anarchy” to describe the complex process of choosing problems to solve).

⁷⁸ See, e.g., Berry, *supra* note 51, at 6; Kingdon, *supra* note 72, at 115.

can produce significant policy change if the public overestimates the importance and the extent of public support for a particular course of action.⁷⁹ Political entrepreneurs need not leave matters completely to the vagaries of fate, however; they can manipulate the policy environment to increase receptivity to their objectives. When focusing events do not occur fortuitously, they can be created.⁸⁰

Informed voter ballot notations provide a targeted and potentially powerful weapon with populist credentials to those seeking to influence the political agenda.⁸¹ Given the prominence of a notation at the time voters cast their ballots, the candidates and the media are likely to focus on the subject matter of ballot notations throughout the campaign.⁸² Indeed, one effect of ballot notations would be to transfer the ability to determine the relevant issues in a campaign from candidates, parties, and the media to outside groups. This development could force candidates to address controversial and difficult issues that they attempt to avoid during a campaign in order to avoid alienating groups of voters. Attention during the campaign to such issues may in turn affect voter turnout.⁸³ Those who have

⁷⁹ See Kuran, *supra* note 74, at 80-82 (explaining the phenomenon of preference falsification and how miscalculations of private preferences can distort the agenda).

⁸⁰ But they probably cannot be entirely fabricated. See Posner, *supra* note 45, at 772-73 (arguing that entrepreneurs take advantage of focal points that arise because of history or physical events, encouraging people to coordinate around one).

⁸¹ At least as long as the number of ballot notations remained relatively small. I will discuss how a multitude of ballot notations will change the dynamic in Part III. For a critical discussion of the populist credentials of ballot questions, see Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 *Harv. L. Rev.* 434, 451 (1998) (arguing that direct democratic practices distort popular input by precluding the expression of priorities among issues).

⁸² Cf. Popkin, *supra* note 41, at 108 (discussing the importance of the campaign in framing issues for the electorate). The campaign will be important in determining the effect of the ballot notation because the campaign will provide the information that will anchor the voter's perceptions and that will provide the context into which she will assimilate the information provided on the ballot. See *supra* text accompanying notes 67-71 (discussing the interplay of anchored information and ballot notations).

⁸³ See Cronin, *supra* note 61, at 67 (noting that voter "turnon" occurs when controversial and highly visible issues are placed on the ballot").

strong feelings about the issues may be more likely to vote if they perceive the election to be in part a referendum on those issues. A vote for a candidate who is obviously tied to a position related to a ballot notation is a more targeted message to the candidate and includes an element of political expression that may attract activists and concerned citizens to the polls.⁸⁴

Other voters, who may have not previously been particularly aware of the issue, may develop more intense views because the presence of a notation on the ballot signals that other citizens care about the issue. Once an issue like term limits becomes important enough to appear on the ballot, citizens who were previously inattentive to the issue may see concern about term limits as part of what it means to be an engaged citizen. In other words, the ballot notation will not only increase the public’s attention to the issue, but it may change social norms so people believe others will think less of them if they do not form an opinion (perhaps a particular opinion) and act on it.⁸⁵ Furthermore, a ballot notation demonstrates convincingly to each voter that all other voters will consider this issue as they make their choice. That awareness will not only increase the likelihood that the issue will affect each voter’s immediate choice in the election,⁸⁶ but it may also encourage voters to continue to focus their limited attention on the issue after the election.

Candidates who have taken pledges may feel increased pressure to demonstrate their commitment to the positions after they are

⁸⁴ See Elizabeth Garrett, Money, Agenda Setting, and Direct Democracy, 77 *Tex. L. Rev.* 1845, 1858-59 (1999) (describing related phenomenon of candidates who affiliate themselves with ballot questions considered at the same time as the candidate election in an attempt to shape voter turnout).

⁸⁵ See Kuran, *supra* note 74, at 71-73 (discussing this bandwagon effect); Timur Kuran & Cass R. Sunstein, Availability Cascades and Risk Regulation, 51 *Stan. L. Rev.* 683, 686-87 (1999) (discussing the interrelated phenomena of reputation and availability cascades); see also Posner, *supra* note 45, at 794-95 (arguing that the politicization of signals may flip their meaning, leading people to disregard the signal in order to demonstrate their good reputations).

⁸⁶ See Popkin, *supra* note 41, at 11 (“Voters focus not only on their own concerns and preferences but on those of others as well. Therefore, in deciding which issues to focus on and which candidates to vote for, voters will be affected by information about what other voters are doing.”).

elected.⁸⁷ The fact that a particular issue appears on the ballot and shapes the political campaign disaggregates it from the bundle of political positions represented by each candidate.⁸⁸ Political activists concerned about the issue may be able to argue more credibly that their particular issue made a difference in the electoral outcome, thereby increasing its salience for lawmakers. Moreover, the threat that any action inconsistent with the candidate's pledge will result in a negative notation—and one that proclaims that the candidate **BROKE A PROMISE TO THE VOTERS**—will certainly attract the attention of lawmakers. They may fear that voters who are not particularly concerned about the potential issue will nevertheless be dismayed to discover that the lawmaker has broken a public pledge that she made to her constituents. The electorate may view such a lawmaker as untrustworthy or lacking in good character and vote on that basis, regardless of the subject of the promise. The evidence from the experience with the term limits ballot notation suggests that candidates seriously assessed the consequences of their legislative actions on future ballot notations. Before they voted on particular term limits proposals in Congress, several members sought guidance from their states' Secretaries of State (who would determine what notation was appropriate).⁸⁹ Others sought the opinion of a law professor involved with U.S. Term Limits.⁹⁰

⁸⁷ For example, some commentators suggest that the term limits movement has led to more retirements, although the phenomenon has not been tied directly to the term limits pledges. See *The Never-Ending Campaign*, National Journal's CongressDaily, Jan. 6, 1999, available in LEXIS, News Library, National Journal's CongressDaily File.

⁸⁸ See Jones, *supra* note 31, at 188 (noting the problem for those seeking to focus political attention on a particular issue of the "multiple attributes [that] always underlie candidates or parties in an election, and the [fact that the] particular dimension that determines the vote direction for critical groups in the electorate may not correspond to the dimensions that are interjected into the policymaking debate between elections"). But see Clark, *supra* note 81, at 463-64 (1998) (arguing that voters make better decisions in candidate elections that operate as multi-issue referenda, rather than in direct democracy where the decisions focus on single issues because the former forces voters "to weigh the relative intensity of their concerns").

⁸⁹ See, e.g., Fax Cover sheet from Gregg Hartley, Staff Member in Congressman Blunt's office, to Missouri Secretary of State Cook (Feb. 3, 1997) (on file with Virginia Law Review Association) (seeking "advice and counsel")

Given the possibility that the issues raised in ballot notations will change the political agenda, we need to identify the groups that are likely to influence the content of the notations. “Any political process is largely the domain of organizations; politics is not an environment where individuals acting alone often can have much impact.”⁹¹ Unorganized interests and individuals can seldom take advantage of expanded opportunities to shape political discourse. Currently, states that have adopted ballot notations have done so through popular elections. Accordingly, those groups that succeed at lawmaking via direct democracy will be best able to take advantage of this tool to shape the political agenda. I turn now to a brief discussion of such groups and conclude by comparing a system of ballot notations to an electoral system that allows fusion candidacies.

B. Ballot Notations: Empowering Grassroots Politics

Particular kinds of groups tend to succeed in the domain of direct democracy, the avenue through which notations have been added to state ballots.⁹² Currently, ballot notations have been placed on the ballot as a result of a popular vote enacting a state

regarding Blunt’s term limits proposal and its compatibility with the term limits amendment referred to in the informed voter ballot notation).

⁹⁰ See Memorandum from Professor Stephen J. Safranek, University of Detroit, Mercy School of Law, to Members of Congress regarding Ballot Information Laws (Feb. 11, 1997) (on file with Virginia Law Review Association) [hereinafter “Safranek Memo”] (purporting to “set forth how legislators should vote if they want to avoid ballot information language and . . . reasons for the instruction”).

⁹¹ Garrett, *supra* note 84, at 1863; see David K. Ryden, Representation in Crisis 6 (1996) (stating that “[i]ndividual political activity becomes meaningful only when one’s voice is joined with others who share interests”); Peter H. Schuck, Against (and for) Madison: An Essay in Praise of Factions, 15 Yale L. & Pol’y Rev. 553, 580-88 (1997) (arguing that groups serve certain democratic values, such as participation, social intelligence, liberty, and the public interest).

⁹² See Elizabeth Garrett, Who Directs Direct Democracy?, 4 U. Chi. L. Sch. Roundtable 17, 19-24 (1997) (arguing that wealth groups with small membership are likely to dominate in a system of direct democracy); Garrett, *supra* note 84 at 1864-66 (noting that the modern difficulties of qualifying a ballot question and conducting the campaign to get it approved cause organized groups to dominate the ballot question agenda).

constitutional amendment that requires such a notation. The groups that have focused on the ballot notation tool in this environment have been those characterized as grassroots: the term limits movement and the organized effort to replace the income tax with some form of consumption tax. Grassroots groups are those whose clout comes from their ability to attract large groups of supporters because the issues they support resonate with a substantial portion of the public.⁹³

In addition, the groups that have used the ballot notation tool so far have been interested in effecting procedural reforms of the political system.⁹⁴ Such governance reforms tend to be opposed by entrenched political interests that benefit from current arrangements.⁹⁵ Indeed, without such opposition, reformers might

⁹³ Consistent with previous analysis of groups that exert the most influence over direct democracy, both these groups have been able to raise significant amounts of money, but not all in small amounts from lots of people as one would expect from grassroots groups. There is some evidence, particularly with respect to the tax reform group, that money has been provided by a few, well-financed entities or individuals. See Steve Yozwiak, Much Proposition Cash from Out of State, *Ariz. Republic*, Oct. 27, 1998, at B1 (finding that “Arizonans for Fair Tax Reform” received much of its \$354,000 in contributions from a few wealthy individuals who lived outside the state). Although I have characterized the term limits organizations as grassroots in previous articles, see, for example, Garrett, *supra* note 84, at 1864, some information suggests that the term limits proposals have been financed by one or a few wealthy entities. See, e.g., Schrag, *supra* note 12, at 271 (noting a major source of money for California ballot question was U.S. Term Limits, and that it would not reveal how it raised the \$300,000 it donated); Betsy Z. Russell, Grass-Roots Ballot Initiatives Withering; *Spokesman Rev.* (Spokane, WA), July 8, 1998, at A1 (reporting that term limits question qualified for the ballot after one person paid between \$60,000 and \$70,000 of her own money to gather signatures); Schrag, *supra* note 12, at 271 (a major source of money for California ballot question was U.S. Term Limits, and it would not reveal how it raised the \$300,000 it donated).

⁹⁴ Other scholars have noticed the prevalence of these governance issues in direct democracy generally. See, e.g., Caroline J. Tolbert, Changing Rules for State Legislatures: Direct Democracy and Governance Policies, *in* *Citizens as Legislators* 171 (S. Bowler et al. eds., 1998).

⁹⁵ See Issacharoff & Pildes, *supra* note 50, at 644 (arguing that “in increasingly sophisticated ways . . . the two dominant political parties [have] managed to manipulate and capture the ground rules of political competition so as to freeze out serious challengers”).

use traditional methods of policymaking rather than resorting to ballot initiative. Not only does the term limits debate exhibit this characteristic, but so did a campaign finance and ethics reform initiative in California that required notations on the sample ballot to designate candidates who voluntarily abided by expenditure ceilings.⁹⁶

Groups advocating ballot notations have also primarily focused on reforms to be implemented at the national level, such as federal term limits and the federal income tax system. This choice of tactics makes sense. If their goal were to change a state law, and the people had the power to enact direct legislation, groups would work to enact direct substantive changes in state constitutions and statutes, rather than indirectly influence outcomes through notations.⁹⁷ Thus, term limits activists have pushed laws directly limiting the terms of state and local legislators, but they are forced to the ballot notation tactic for national lawmakers. The state-focused California Fair Political Practices initiative included a range of substantive reforms; the ballot notation was an enforcement mechanism that complemented the comprehensive package.⁹⁸ Similarly, groups advocating social policies like the death penalty, abortion laws, and changes to affirmative action should use ballot notations only in circumstances where direct change is impossible, perhaps at the federal level.

⁹⁶ See Proposition 208, Text of Proposed Law, <<http://vot.96.ss.ca.gov/BP/208text.htm>> (visited Sept. 24, 1999) [hereinafter “Proposition 208”]. The initiative passed but was held unconstitutional. See *California Pro-life Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1302 (E.D. Cal. 1998), *aff’d mem.* 164 F.3d 1189, 1190 (9th Cir. 1999). Of course, not all ballot notations exhibit this quality, although even the substantive proposal of replacing the income tax with a consumption tax was phrased procedurally on the ballot, that is, as the pledge to eliminate the tax collection agency. See Murphy, *supra* note 20.

⁹⁷ Groups might seek ballot notations relating to state issues if notations were easier to enact than substantive changes in law. Because ballot notation initiatives are amendments to state constitutions, however, it seems unlikely that there will be differential rates of enactment. See Elizabeth Garrett, *supra* note 92, at 34 (noting that constitutional amendments pass as easily as statutory changes even with higher hurdles to enactment).

⁹⁸ See Proposition 208, *supra* note 96.

For purposes of this analysis, one interesting characteristic of the groups that succeed at direct lawmaking is that they tend to focus on one or a few issues on which their members have intense preferences. Accordingly, they are seldom strong enough to elect their own candidates, but they can influence elections by convincing the candidates of the major parties to support their positions. In some cases, they can exert this influence because they can credibly promise to provide the margin of victory in close elections. In other cases, their intense interest in an issue and their organizational abilities catch the attention of the media, which in turn enhances the prominence of their issue for the public.⁹⁹ They also have direct routes to influence public attention, either through issue ads unrelated to a particular candidate and thus unregulated by current campaign finance law or by qualifying a ballot question for a popular vote at the same time a candidate election is held.

Ballot notations provide these groups yet another way to make their voices heard. If the major parties and candidates refuse to address their concerns—perhaps because the proposed reform conflicts with their interests—ballot notations serve as a method for such groups to circumvent those more established entities and to bring their issues and perspectives directly to the voters. And, they provide an avenue that makes it difficult for established candidates to continue to ignore the issue. Even when the candidate pledge associated with a notation is voluntary, some candidates, such as challengers seeking to dislodge firmly entrenched incumbents, are bound to seek the support of a group organized enough to obtain a ballot notation. Thus, the issue will appear on the ballot beside at least some of the candidates' names. All candidates will therefore know that silence may provide voters information that they will use to draw inferences about a candidate's position on an issue made salient by the campaign.

C. Ballot Notations: Fusion Politics in a Different Form

The description of the groups that take advantage of ballot notations, as well as the argument in Part I that ballot notations

⁹⁹ See Jones, *supra* note 31, at 73 (discussing work of Iyengar and Kinder suggesting that the media currently plays the key role in communicating frames of reference to voters and shaping their attentiveness).

provide voters information about candidates, sounds strikingly similar to the descriptions of the role of fusion candidacies in the few states that allow them.¹⁰⁰ Fusion, which is also called multi-party nomination, is “the electoral support of a single set of candidates by two or more parties.”¹⁰¹ Third parties that endorse candidates of major parties also tend to be issue-oriented or ideologically driven.¹⁰² Like groups that can succeed in direct democracy, they represent a collection of people with similar preferences who have overcome collective action hurdles to organize and participate in the political system. Although some minor parties may hope to elect their own candidates, particularly in local elections,¹⁰³ their primary objective is to garner attention for their issues and convince the major party candidates to expand or shift their agendas to encompass the position.¹⁰⁴

An analogy from corporate law may further illuminate this shared characteristic of fusion candidacies and informed voter ballot notations. Shareholders have the ability to present proposals for a shareholder vote; these proposals recommend or require that a company take a particular action. Shareholder proposals appear on

¹⁰⁰ Professor Cain’s observation that fusion candidacies are more similar to voluntary ballot notations, rather than the mandatory notations that have been ruled unconstitutional, is clearly correct. See Bruce Cain, “Garrett’s Temptation,” 95 Va. L. Rev. ___, ___ (1999). However, even voluntary notations may essentially be mandatory if politicians believe that voters will draw inferences about their positions on the issues from their silence.

¹⁰¹ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 353 n.1 (1997) (quoting Argersinger, “A Place on the Ballot”: Fusion Politics and Antifusion Laws, 85 Am. Hist. Rev. 287, 288 (1980)).

¹⁰² See Beck & Sorauf, *supra* note 8, at 50.

¹⁰³ See *id.* at 52.

¹⁰⁴ See Issacharoff & Pildes, *supra* note 50, at 681-82; see also *Munro v. Socialist Workers Party*, 479 U.S. 189, 202 (1986) (Marshall, J., dissenting) (“[M]inor-party participation in electoral politics serves to expand and affect political debate. Minor parties thus seek influence, if not always electoral success. . . . Their contribution to diversity and competition in the marketplace of ideas . . . does not inevitably implicate their ability to *win* elections.”) (internal quotation marks and citations omitted). Courts have misunderstood this primary objective of minor parties, viewing their goal instead as electing their own candidates. See, e.g., *Timmons*, 520 U.S. at 363; *Dart v. Brown*, 717 F.2d 1499, 1504-05 (5th Cir. 1983).

proxy statements, often with an explanatory statement and sometimes with the company's statement explaining why shareholders should not support the proposal. Like ballot notations, some of these proposals deal with governance issues; in particular, they deny managers the ability to adopt anti-takeover policies such as poison pills. Such governance proposals are the only ones that are regularly adopted by the shareholders.¹⁰⁵ Other proposals, frequently dealing with issues of social policy, usually receive only a fraction of the vote. Nonetheless, some scholarship argues that even these proposals have an important indirect effect on company policy because managers will take action in the direction of the proposal to avoid either adverse publicity or the risk of a more extreme proposal's adoption.¹⁰⁶ Like third parties or groups advocating ballot notations, shareholders proposing issues for a vote seek to shift the agenda and to influence policy outcomes, not to take over management themselves.

Ballot notations resemble fusion candidates in another way. Ballot notations provide a particularized voting cue similar to that provided by third party endorsements reflected on the ballot.¹⁰⁷ Ballot notations may provide even better information to those voters who may be unaware of the platform of the Liberal Party or how it differs from that of the Democratic Party. Of course, some minor parties in states that allow fusion candidacies—like the Right to Life Party in New York—have adopted names that operate in the same way that ballot notations do. Interestingly, the group that has most aggressively used ballot notations, U.S. Term Limits, is also taking

¹⁰⁵ See Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Action*, 79 *Geo. L.J.* 445, 482 (1991).

¹⁰⁶ Compare Marleen A. O'Connor, *Organized Labor as Shareholder Activist: Building Coalitions to Promote Worker Capitalism*, 31 *U. Rich. L. Rev.* 1345, 1361-62 (1997) (arguing that proposals "prompt executives to change corporate practices"), with George W. Dent, Jr., *SEC Rule 14a-8: A Study in Regulatory Failure*, 30 *N.Y.L. Sch. L. Rev.* 1, 20-22 (1985) (stating that the publicity value of the rule which allows shareholder proposals dealing with social policy is minimal).

¹⁰⁷ See Hasen, *supra* note 3, at 342-343 ("Favoring the two-party system ultimately provides voters with less information about the choices available to them in terms of candidates, parties, and issues [than does a system that allows fusion candidacies].").

advantage of fusion ballots in Connecticut and New York by forming its own political party.¹⁰⁸ Most third parties are less clearly identified with a particular issue, however. Moreover, to the extent that voters find ideology too abstract and thus obtain better information about the candidates’ likely behavior when in office from their positions on particular issues, informed voter ballot notations will provide more helpful cues. Finally, ballot notations can provide information about all the candidates (or all who volunteer to take the pledge), while minor parties can endorse only one candidate in each race.

Ballot notations may be a more promising option for these groups for another very important reason: very few states allow fusion candidacies, and it is a vital part of the electoral system only in New York.¹⁰⁹ Moreover, in *Timmons v. Twin Cities Area New Party*,¹¹⁰ the U.S. Supreme Court held that states can continue to ban fusion candidacies¹¹¹—a prospect that seems likely given the control exerted by the two major parties over the electoral process. Professors Issacharoff and Pildes have intriguingly termed this control a “partisan lockup.”¹¹²

In the end, ballot notations could be the functional equivalents of fusion ballots, offering the same promise and the same dangers—and prompting similar attacks from entrenched interests. However, ballot notations may offer groups that have been ignored by the major political parties a new way to expand the political dialogue in a way that is less threatening to the major parties than fusion candidacies. After all, groups supporting ballot notations are often not as organized as third parties.¹¹³ They may not intend to field their own candidates in the future; rather, they limit their

¹⁰⁸ See *The Legal Limit*, Aug. 1998, at 4.

¹⁰⁹ See *Timmons*, 520 U.S. at 357 & nn. 6-7.

¹¹⁰ 520 U.S. 351 (1997).

¹¹¹ See *id.* at 353-54.

¹¹² See Issacharoff & Pildes, *supra* note 50, at 648-49.

¹¹³ To the extent that one sees an advantage in the institutional arrangements that political parties provide, then channeling such activity into less formally organized groups, rather than minor parties, may be a disadvantage of a ballot notation system.

objectives to the influence they can exert through ballot notations and other ways of harnessing targeted popular support.

The initial reaction to ballot notations—which tends to be an outraged exclamation that the ballots are not supposed to provide that sort of information, even though we accept ballots as a means to communicate party affiliation and other informational cues—seems wrong on further analysis. Part I of my discussion suggests that expanded use of ballot notations could increase voter competence at relatively low cost by providing information for voters at a crucial time in the electoral process. Part II suggests that ballot notations expand the political agenda to reflect a more diverse set of issues and involve a larger set of actors. Before we embrace notations enthusiastically, however, we must assess some of the problems they pose.

III. Problems Associated with Notations Placed on the Ballot Through the Avenue of Direct Democracy

Just as the foregoing discussion focused first on voters and then on the groups that would use the ballot notation to influence the political agenda, the analysis of the problems notations pose also can be divided into two realms. I will approach them from the opposite direction in this section, discussing first the consequences of opening a new avenue into the political process for relatively narrow, issue-oriented special interest groups. Next, I will discuss the possibility that ballot notations will confuse voters and thus serve as inaccurate cues that exacerbate the problem of an uninformed electorate.

We need not spend much time on the first problem in the ballot notation context because the arguments are the familiar ones made in studies and articles that discuss generally the rise of organized special interest groups and the declining influence of the major parties. The similarity of the arguments is no surprise; many have noted that one factor in the decline of party influence over candidates and the rise of the personal vote is the increasing importance of mechanisms of direct democracy.¹¹⁴ And, of course, fusion candidacies, the close cousin of informed voter ballot notations, have been indicted as reducing the role of the major

¹¹⁴ See, e.g., Cain, *supra* note 3, at 58.

parties as mediating influences on political outcomes.¹¹⁵ We devote more time however, to the second problem focusing on recent experience with the term limits ballot notations as a case study in how these notations may not convey accurate information to voters.

A. The Argument that Ballot Notations Dangerously Empower Factions

Many commentators have argued that the major political parties serve as channeling institutions, allowing political actors to compromise and reach consensus outcomes. Rather than reacting to the unfiltered voices of dozens, or even hundreds, of interest groups, politicians can react to the message of the political party and of party leaders.¹¹⁶ Defenders of a vigorous two-party system argue that “[s]trong parties will not be immune to the demands of special interests, but they will be better positioned to balance these demands against competing interests than are individual candidates in a system in which parties play a less central role.”¹¹⁷ In a way, this defense of parties makes a virtue of a problem I noted earlier.¹¹⁸ Political parties work to be inclusive vehicles of moderation, a characteristic which may lead to political stability and compromise at the same time it undermines the party label as a targeted voting cue.

Certainly, ballot notations will increase the tendency of candidates to pay attention to organized groups with intense preferences on particular issues. In addition to seeking their monetary support and endorsements, candidates will have an incentive to take public positions on ballot notations and then to act

¹¹⁵ See, e.g., *Timmons*, 520 U.S. at 366-67.

¹¹⁶ See Ryden, *supra* note 91, at 120-21 (“Parties provide a release for the pressures of competing groups on the system. They become the conduit for focusing and reconciling the competing claims of groups. . . . [P]latfoms and party proposals permit a comprehensive program sensitive to the diverse needs of different groups. In this way, parties act as a palliative, moderating and diffusing group conflict.”); Samuel Issacharoff & Daniel Ortiz, *Governing Through Intermediaries*, 85 Va. L. Rev. __, __ (1999) (identifying parties as superintermediaries that reconcile conflicting interest group pressures).

¹¹⁷ Daniel Hays Lowenstein, *American Political Parties*, *in* *Developments in American Politics* 63, 80-81 (Gillian Peele et al. eds., 1992).

¹¹⁸ See discussion *supra* at Part I.B.

consistently with their public pledges. Once in office, they may well be more willing to resist the requests and blandishments of party leaders attempting to forge coalitions to pass legislation or otherwise pursue larger policy goals. If they perceive ballot notations as relevant to electoral outcomes, lawmakers will view their election as the consequence of the support of various and disparate interest groups, rather than as the result of party support. The literature detailing the effect of the rise of the personal vote is substantial and convincing with respect to the proposition that policy outcomes are different in a world where voters are seen as responding to party appeals rather than to the agendas of narrow, issue-oriented pressure groups.¹¹⁹ Thus, one's view of informed voter ballot notations may hinge in part on one's view of the need for strong political parties to channel the demands of various and competing interest groups. In fairness, however, ballot notations alone are unlikely to destroy the two major parties;¹²⁰ they are merely a marginal move in the direction away from strong political parties.

Because of the way they have been adopted, ballot notations offer several new twists on the long-standing debate about the relative strength of factions and major parties. First, ballot notations have been enacted by popular votes as amendments to state constitutions.¹²¹ As part of state constitutions, ballot notation requirements cannot be changed except by another popular vote that repeals the constitutional provision.¹²² Ballot notations in the form

¹¹⁹ See, e.g., Bruce Cain et al., *The Personal Vote: Constituency Service and Electoral Independence* 197-213 (1987); Gilmour, *supra* note 36, at 28-37; Stephen C. Craig, *Change and the American Electorate, in Broken Contract? Changing Relationships Between Americans and their Government* 1, 11-14 (Stephen C. Craig ed., 1996).

¹²⁰ See Epstein, *supra* note 11, at 344-45 (arguing that radical change in the two-party system is unlikely); Hasen, *supra* note 3, at 370-71 (“[I]t is difficult to imagine election laws that do less than eliminate plurality voting or single-member districts seriously undermining the two-party duopoly.”).

¹²¹ See, e.g., Mo. Const. art. VIII, §§ 15-22.

¹²² For this reason, many of the Term Limits provisions adopting mandatory ballot notations included an automatic repeal “at such time as the Congressional Term Limits Amendment set forth above has become part of the U.S. Constitution.” See, e.g., *id.* at § 20. Otherwise, the notation would have

of constitutional amendments thus entrench current political issues so that they may influence electoral outcomes long after any group continues to care about the particular issue. Although, after a time, virtually everyone may agree that a ballot notation no longer serves any important communicative purpose, the notation will continue to appear on the ballot unless there is either a sunset provision or another popular vote. It is hard to imagine any group becoming motivated enough about eliminating a notation for reasons of desuetude to surmount the hurdles to enact an initiative repealing the outdated constitutional provision.¹²³ Notations therefore empower the factions of today long after they disband or shift their attention to other matters.

Perhaps entrenchment of old ballot notations will not matter. If the issue is entirely irrelevant in the contemporary political landscape, then voters will simply disregard the ballot notation. Relying on voters and politicians to ignore a stale notation, however, is hardly a satisfying answer to the problem of entrenchment. Issues do not move from the political agenda into obscurity quickly and cleanly. The mere presence of a particular issue on the ballot may allow it to retain the attention of lawmakers and the public long after it would have faded from view if it was not so prominently displayed in the polling booth. This possibility flows from the nature of the political agenda itself. One reason groups seek to use ballot notations is to affect the policy agenda; once they have successfully deployed that tool, it may continue to influence legislators and policymakers. It is a durable tool and thus it is an appealing one for interest groups who may be able to maintain their organization for only one election.

This entrenchment problem is similar to a problem faced in the context of shareholder proposals on proxy statements. Under Securities and Exchange Commission regulations, corporations can exclude resubmitted proposals that failed to garner a certain level of

continued to appear on the ballot even after supporters had succeeded in their ultimate objective.

¹²³ Repeal might take place as part of a new ballot question that seeks also to implement a new ballot notation or to change other laws. It seems less likely that a group will work to pass a ballot question that only removes a ballot notation.

support in previous votes.¹²⁴ This solution is unavailable to regulate ballot notations because voters do not vote for notations directly after the initial election adopting the notation. One way to ameliorate the problem of ballot notation entrenchment is to require that all amendments relating to ballot notations expire after a period of time, perhaps after five to ten years. Alternatively, an innovation I describe in Part IV, using periodic public opinion polls to determine the content of ballot notations, would also allow updating the content of notations to reflect changing public priorities.

Another twist on the long-standing debate focusing on the relative strength of factions and political parties stems from the identity of the groups that use ballot notations. Again, these have been grassroots groups with relatively broad popular appeal, sufficient to qualify and pass ballot initiatives. Thus, their ballot notations have forced politicians to pay attention to issues after there has been convincing proof that the issue resonates with large segments of the citizenry.¹²⁵ The problems they pose are different ones from, for example, those that arise from the interaction in the campaign finance reform arena between parties and interest groups representing a few well-funded entities. Similarly, they differ from shareholders who can force companies to include their proposals on proxy statements. Under current regulations, a shareholder need hold only \$2,000 in market value, or 1%, of the company's securities for a year before she can submit a proposal for a vote.¹²⁶ At one time, a person holding only one share of stock could force a shareholder vote,¹²⁷ allowing activists who had not demonstrated a broad level of

¹²⁴ See 17 C.F.R. § 240.14a-8(i)(12) (1999). This is one of several grounds for exclusion of a proposal from the proxy statement. See 17 C.F.R. § 240.14a-8(i)(1-13) (1999).

¹²⁵ I will suggest, *infra* text accompanying notes 135- 144, that the groups supporting issues with significant popular support draft the ballot notations to further their particular vision of the appropriate policy. The majority of voters may not agree with the narrower objectives of the drafters of the ballot notation; thus, even notations with grassroots support may in reality represent only the position of a minority faction with intense and idiosyncratic preferences. In this case, the notations present problems of minority not majority factions.

¹²⁶ See 17 CFR § 240.14a-8 (b)(1) (1999)

¹²⁷ See 17 CFR § 14a-7 (1942).

shareholder support to influence corporate policy.¹²⁸ But, even though they often represent broader social consensus on policies, grassroots groups are not unproblematic. Concern with majoritarian factions goes back to the Federalist Papers and Madison’s desire to constrain the “mischief of faction[s]” through the structures of representative democracy.¹²⁹ The ability of majority factions to pass ballot notations requires that we think seriously about balancing our desire for responsive and reflective lawmakers, as well as about the nature of our democratic institutions.¹³⁰ These issues deserve greater treatment than I provide here; however, the concerns may be responsible for the decision of some courts to strike down the first generation of term limits notations on the ground that they interfered with the deliberative process of the legislature.¹³¹

B. Ballot Notations and Voter Confusion and Alienation

The second, and more serious, problem with the increased use of ballot notations is that the cue may not increase, and may actually decrease, voter competence. The limited experience we have with ballot notations suggests that, in practice, the cue may be misleading to voters. The danger of widespread voter confusion is a significant problem in part because a notation is so prominent and provides information at such a crucial time in the electoral process. The

¹²⁸ See Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 Ala. L. Rev. 879, 912 & n.148 (1994); see also Susan W. Liebeler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 Ga. L. Rev. 425, 439 (1984) (arguing that the users of the proposal mechanism have been “professional proponents or religious groups” whose interests “are not related to the interests of the shareholders at large”).

¹²⁹ The Federalist No. 10, at 130 (James Madison) (Benjamin Fletcher Wright ed., 1961).

¹³⁰ For recent treatments of these issues in related contexts, see Frank I. Michelman, “Protecting the People From Themselves,” or How Direct Can Democracy Be?, 45 UCLA L. Rev. 1717, 1719 (1998) (exploring “whether the democratic ideal itself, let alone a republican competitor, is fully realizable through direct democracy”); Dan M. Kahan, *Democracy Schmemocracy*, 20 Cardozo L. Rev. 795, 796-97 (1999) (noting the tension between pluralist and civic republican conceptions of democracy).

¹³¹ See, e.g., *League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 60 (D. Me. 1997); *In re Initiative Petition*, 930 P.2d 186, 193 (Okla. 1996).

vividness of this cue may cause it to drown out all other information that voters would otherwise rely on. For Americans with little information before they enter the voting booth, this effect may decrease voter competence if they would have voted more competently using only the cues of party affiliation, candidate name, and incumbency. The effect on more informed voters may be equally troubling. The salient ballot notation may convince them to revise their previous opinion on the candidates. If the ballot notation provides less helpful information than the information they would have used and crowds out more effective voting strategies, these voters will be less likely to vote competently.

By way of analogy, restrictions on campaigning within a certain radius of the polling booth are often justified as ways to prevent voter intimidation and fraud.¹³² It seems that courts have concluded that the states can severely burden political speech by candidates and their advocates when the information is apt to influence voters unduly and poses the risk of fraudulent, or perhaps confused, voting.¹³³ Similarly, we should be wary of providing information to voters on the official ballot if that information either has no effect on voter competence or actually undermines it by providing misleading information. While the use of heuristics can lead to better decisions

¹³² See *Burson v. Freeman*, 504 U.S. 191, 205-06 (1992) (plurality opinion); see also *Dunham*, supra note 69, at 2143 (finding that all states except Vermont regulate speech in a zone around the polling place). Similarly, the state interest offered to justify restrictions on ballot access usually concerns an interest in preventing voter confusion. See, e.g., *Storer v. Brown*, 415 U.S. 724, 732 (1974).

¹³³ It may also be the case that the prevalence of restrictions on campaigning within a certain radius around the polling place is merely another example of the partisan lockup. See Richard A. Schurr, Note, *Burson v. Freeman*: Where the Right to Vote Intersects with the Freedom to Speak, 15 *Whittier L. Rev.* 869, 909-10 (1994) (arguing that a “campaign-free” zone primarily helps incumbents and harms grassroots and other less-well-financed efforts). Again, ballot access provisions may well be designed more to protect the partisan lockup than to alleviate alleged but usually unproven voter confusion. See Issacharoff & Pildes, supra note 50, at 670-74 (discussing example from Hawaii).

at lower cost to voters, if the information provided is inaccurate, cognitive shortcuts may well lead to systematic errors.¹³⁴

The brief experience with term limits ballot notations in the last few years illuminates the ability of interest groups to use notations strategically so that voters are confused and vote in ways beneficial to the group but inconsistent with voters’ actual preferences. These notations were purposively misleading in two ways. First, they were phrased so that the issue of term limits appeared to be binary, rather than relatively complicated. As I explained previously,¹³⁵ these amendments required that certain notations be placed by the names of those running for the U.S. Congress. Non-incumbents declining to sign a pledge to support a particular term limits proposal would receive the designation “DECLINED TO PLEDGE TO SUPPORT TERM LIMITS.” Incumbents who did not support term limits, as defined in the state constitution, would receive the designation “DISREGARDED VOTERS’ INSTRUCTION ON TERM LIMITS.” Both these notations were very general; the ballot would not have revealed what the phrase “term limits” meant for purposes of the designation.

The constitutional provision was not similarly ambiguous, however. The only kind of term limitation that was satisfactory was one that restricted members of the House to no more than three terms (six years) and Senators to no more than two terms (twelve years), with limited grandfathering provisions. Moreover, incumbents could receive the negative notation if they “fail[ed] to vote against any proposed constitutional amendment that would establish longer term limits than those in the proposed Congressional Term Limits Amendment.”¹³⁶ This emphasis on the six year/twelve year formulation resulted from the substantial involvement of one interest group, U.S. Term Limits, Inc., in the passage of the amendment. U.S. Term Limits has long insisted on this particular term limits amendment as its litmus test to determine

¹³⁴ Cf. Kuran & Sunstein, *supra* note 85, at 2 (defining “availability error” as that which arises when the heuristic, combined with other social mechanisms, produce mistaken beliefs about underlying facts).

¹³⁵ See *supra* text accompanying notes 12-15.

¹³⁶ Mo. Const. art. VII § 17(f).

who is *really* a supporter of federal term limits.¹³⁷ Because ballot questions are drafted by the group that circulates the petitions and typically cannot be amended or changed once the requisite number of signatures are obtained, such interest groups have enormous control over the phrasing of the questions and the details of the language.¹³⁸ In this way, an issue that appears to be one that resonates with a majority of the populace becomes merely another vehicle used by a minority faction with intense preferences to shape the public agenda.

Generally, however, the phrase “term limits” need not mean only a proposal to restrict members of the House to no more than three terms and members of the Senate to no more than two terms. For example, other advocacy groups have supported twelve year limits in each chamber.¹³⁹ When the House voted in 1993 on a constitutional amendment limiting congressional terms, it considered several different versions, some with different grandfathering provisions, one allowing states to set shorter terms than the limit provided in the amendment, the twelve/twelve proposal, and the six/twelve proposal.¹⁴⁰ Similarly, when the House again debated a term limits amendment in 1997, there were eleven iterations, including most of those in 1993 as well as one imposing a twelve-year lifetime cap on congressional service in either chamber and another proposing an eight year limit for Representatives.¹⁴¹ The most successful amendments in the House (i.e., the ones receiving majority support, although not a two-thirds vote in favor) have been twelve/twelve provisions and have not counted service before the limitations would go into effect against the cap.¹⁴² In

¹³⁷ See Schrag, *supra* note 12, at 270.

¹³⁸ See Garrett, *supra* note 92, at 31.

¹³⁹ See John E. Yang, Term Limits Fail Again in the House, *Wash. Post*, Feb. 13, 1997, at A1 (mentioning the Term Limits Legal Institute, which supports longer term limits in the House than U.S. Term Limits); David Hess, House Rejects Term Limit Proposals, *Star-Ledger* (Newark, N.J.), Feb. 13, 1997, at 6 (discussing rivalry between U.S. Term Limits and Term Limits Legal Institute).

¹⁴⁰ See Garrett, *supra* note 13, at 628 n.11.

¹⁴¹ See House Votes, Cong. Q., Feb. 15, 1997, at 456-59.

¹⁴² See Garrett, *supra* note 13, at 628 n.11; House Votes, *supra* note 141, at 458

short, a notation that refers vaguely to “term limits” is susceptible to many interpretations, and one of the most prevalent interpretation (twelve/twelve) does not comport with Congressional Term Limits Amendment set forth in the constitutional amendments.

U.S. Term Limits did not draft the ballot notations so that they provided clear and helpful information to voters. The notations neither informed the electorate that “term limits” in this context meant only one version of a term limits amendment, nor did the notations communicate whether a candidate had supported another slightly different version of term limits. For example, a candidate who supported the twelve/twelve formulation, perhaps on the ground that it was the more politically feasible alternative, would be designated as someone who disregarded the voters’ wishes concerning term limits. To label such a candidate in a way that suggested she opposed term limits is inaccurate. She supported term limits for federal legislators; she simply did not support the precise formulation that forms the core of a special interest group’s agenda.

Ironically, the ballot designation for our hypothetical candidate (who supported term limits but not the precise form required by the state constitution) would be identical to the notation that would be placed next to the name of a candidate who opposed term limits in all its forms. Neither supported “term limits,” as that term had been defined by the drafters of the provision. Voters would not be able to distinguish between the two on the basis of the ballot, even though their positions were relevantly different. Although both could have attempted to explain their positions in television advertisements and other campaign appearances, it is unlikely that such efforts would have been able to overcome the impact of a clear, short (and ultimately misleading) notation provided on the official ballot. Rather than ensuring an orderly electoral process, the designations threatened to spawn voter confusion.

It is unlikely that voters knew that the term limits notation they voted for in 1996 used “term limits” in such a specialized way. Very few of the articles I have seen (most provided in mailings sent out by the U.S. Term Limits organization) specify that the only version of the term limits amendment that would have satisfied the constitutional requirements is the six/twelve version. In the state with which I am most familiar, Missouri, the question posed to the electorate to adopt the ballot notation did not specify the length of

terms that satisfied the definition of “term limits.” Rather, it spoke only generally of informing voters via a ballot notation of “whether candidates for Congress support Congressional term limits.” Although the text of the amendment itself specified that only six/twelve would suffice,¹⁴³ those who have studied direct democracy have found that very few voters read the text or any other official explanations, relying instead on the themes sounded in paid advertisements and in the popular media.¹⁴⁴ Thus, there is no reason to believe that most who voted for the constitutional amendment concerning the ballot notation knew its details, and those who knew and forgot before the next election would find no reminder in the notation next to the candidates’ names.

The evidence suggests that U.S. Term Limits purposively framed the notation in this way so that lawmakers would be required to favor its precise agenda rather than alternative proposals. But ballot notations may inherently present issues in a binary fashion, or at least in a relatively simplistic way. First, they are adopted by direct democracy, where voters are presented with the possibility of voting for or against a proposition that cannot be changed or amended during the lawmaking process. Second, the candidate’s position on the underlying pledge, which itself can be complex, must be communicated to the voters through a short ballot notation that is unlikely to capture the nuances of complicated issues. Furthermore, the notations tend to work in an on-off fashion; that is, either the candidate receives a label or she doesn’t, or she receives one of two opposing labels.

The term limits notations provide a good example of the second way in which interest groups try to influence voter behavior unfairly. U.S. Term Limits drafted the notations to evoke the strongest possible reaction from voters.¹⁴⁵ Those who disagreed with the particular position advocated by the group “DISREGARDED VOTERS’ INSTRUCTIONS”—a label likely to irritate any

¹⁴³ See, e.g., Mo. Const. art. VIII, §§ 16-17.

¹⁴⁴ See Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 *Yale L.J.* 107, 130-31 (1995)

¹⁴⁵ For a related context in which interest groups work to control the wording of signals placed on the ballot, see William A. Lund, *Note, What’s in a Name? The Battle Over Ballot Titles in Oregon*, 34 *Willamette L. Rev.* 143 (1998).

citizen in the voting booth long before she reads on to discover the precise issue that prompted the lawmaker’s disregard. In part because of the loaded wording, those opposing these amendments have labeled them as Scarlet Letters that are designed to punish and stigmatize candidates who do not follow the interest group’s directions. Similarly, the voluntary notations are phrased so that the noncompliant legislator is identified as someone who BROKE a PLEDGE. It is no coincidence that the Arizona proposal referred to an I.R.S. ELIMINATION pledge and not a CONSUMPTION TAX pledge.¹⁴⁶ One can imagine that single-issue interest groups consult with marketing and public relations firms to draft the most compelling notation, one that will elicit certain behavior even from those who might not care much about term limits. The slogan will be tested in a series of focus groups so that it is refined to produce the maximum effect. A politician that disregards voters and breaks her pledge has bad character, the typical voter will reason, and ought not to be returned to office regardless of the issue.¹⁴⁷ In short, these notations are framed so that the interest group can take advantage of references to hot button issues to convince voters that a politician who acts irresponsibly in one instance is invariably a bad actor.

The ability of interest groups that are accountable only to their members to control the wording of ballot notations is disturbing.¹⁴⁸ Not only do we have evidence that they will use their superior information and their virtually absolute control over drafting to

¹⁴⁶ See supra note 20 and accompanying text.

¹⁴⁷ Voters’ decision to use character as a voting cue may not be irrational. Voters could believe that character, like ideology, may be a good signal to predict the candidate’s behavior in office. See Popkin, supra note 41, at 61. If this is the case, then the notation introduces an asymmetry between incumbents, for whom such information will be available, and challengers, who will not yet have had the opportunity to abide by or break their pledges. See supra text accompanying notes 46-47 (identifying a different asymmetry in the current system that ballot notations may ameliorate).

¹⁴⁸ See Elisabeth R. Gerber & Arthur Lupia, Campaign Competition and Policy Responsiveness in Direct Legislation Elections, 17 *Pol. Behav.* 287 (1995) (observing that temporary nature of organizations involved in initiative campaigns may allow them to mislead voters more easily than other political institutions that face greater long-term costs if discovered).

confuse voters in a way that furthers their narrow agenda, but there are aspects of this means of communication that make such strategic behavior particularly unsavory. First, because the notation is placed on the official ballot, the group exposed to the misleading information is a captive audience placed in an environment where they ascribe heightened credibility to the information. Second, mandatory notations force candidates to participate, and even voluntary notations may effectively force candidates to take pledges if they believe voters will ascribe meaning to silence. Finally, elected representatives probably will not be confused and are likely to act in ways that meet the interest group's approval, even if it is not consistent with the public interest or the desires of their constituents. Perhaps this concern is lessened when the notations are voluntary, but candidates will understand that even their silence will be interpreted as meaningful by some voters.

The term limits experience provides a very clear indication of the influence of the details of the ballot notation on lawmakers' behavior. The unseemly private dialogue between U.S. Term Limits and members of Congress did not cease with the election. A letter from Paul Jacob, the executive director of U.S. Term Limits, reveals that several members of Congress had asked his office whether particular term limits proposals conformed to the details of the constitutional amendments that had been enacted in their states. The questions apparently revolved around a fairly technical determination, whether a provision that would allow states to enact House limits longer than six years was consistent with the voters' instructions. Jacob concluded that there was no conflict.¹⁴⁹ At another point in the deliberations, a law professor associated with the organization provided his legal opinion to House members.¹⁵⁰ Privileging the interest group's views in this way vests significant political power in a private organization that lacks public accountability.

In the long run, however, this concern about confusing or misleading ballot notations may prove to have focused only on

¹⁴⁹ See Letter from Paul Jacob, Executive Director U.S. Term Limits, to Representative Roy Blunt (Jan. 20, 1997) (on file with Virginia Law Review Association).

¹⁵⁰ See Safranek Memo, *supra* note 90.

transitional issues. If ballot notations are perceived as powerful tools for interest groups to communicate with voters and policymakers, perhaps more such groups will take advantage of them. After a period where only a few notations appeared on the ballot, the system would settle into a new equilibrium. Each candidate's name might be accompanied by dozens of notations, and, as a result of all this information, none of the notations would be useful. Most voters, with relatively limited interest in politics and limited time to spend in the voting booth, would ignore the notations, and they would again rely on the old voting cues—party affiliation and clues about gender, ethnicity and incumbency gleaned from the candidates' names. Much as happens now with long product warnings listing all possible menaces from even implausible uses of the product,¹⁵¹ the information would be tuned out by harried voters.

A plethora of ballot notations might do more than cancel out all the ballot notations, allowing voters to rely on the traditional voting cues. The noise on such a ballot might keep any information from being heard, even the cue of party or incumbency that is so clear now. Voters would therefore be worse off than they were before the ballot was teeming with information. Or, the long and complicated ballot could result in voter fatigue, causing voters to stop voting for offices and questions before they reached the end of the ballot.¹⁵² At the extreme, voters might become increasingly alienated from politics and turned off by voting if the ballot began to look like an advertisement for every narrow interest group. Such a ballot

¹⁵¹ See *Cotton v. Buckeye Gas Products Co.*, 840 F.2d 935, 937-38 (D.C. Cir. 1988) (“The primary cost [of additional warnings] is, in fact, the increase in time and effort required for the user to grasp the message. The inclusion of each extra item dilutes the punch of every other item. Given short attention spans, items crowd each other out; they get lost in the fine print.”). But see David M. Grether et al., *The Irrelevance of Information Overload*, 59 S. Cal. L. Rev. 277, 279 (1986).

¹⁵² See Jack L. Walker, *Ballot Forms and Voter Fatigue: An Analysis of the Office Block and Party Column Ballots*, 10 *Midwest J. Pol. Sci.* 448, 456-61 (1966) (finding a voter fatigue effect depending on the length and complexity of the ballot, and finding that the poorly educated are disproportionately affected). There is some evidence of voter fatigue in the context of ballot questions. See Cronin, *supra* note 61, at 66-67 (discussing studies that show 5-15 percent drop-off of voter participation, which means that voters come to the polls but fail to vote on candidates or issues at the bottom of the ballot).

would only confirm the average voter's worst fears: that politics is run entirely by special interests and professional politicians, with little regard for the interests of the electorate.¹⁵³ The grassroots nature of the involved interest groups might mitigate their fears, but any appearance of influence by extreme groups could produce some alarm.

In the end, it seems unlikely that dozens of ballot notations would litter a ballot, although we might expect to see more than one or two. First, surmounting the hurdle of succeeding in an initiative election is a difficult task. Even if the group collects enough signatures to appear on the ballot,¹⁵⁴ most ballot questions fail.¹⁵⁵ Moreover, not all groups likely to succeed at direct democracy will seek ballot notations. Only those who hope to effect change that they cannot accomplish directly by amending state constitutions and legislation will consider the tool of ballot notations.¹⁵⁶

Second, interest groups may realize that too many ballot notations will result in none playing a role in the election; accordingly, many may decide not to engage in the costly behavior of obtaining a notation. That strategy seems unlikely to be universally adopted, however, because defection would provide significant benefits for the defector. If most groups decided not to play the ballot notation game, then the few that did seek to obtain beneficial notations would be able to exert significant influence over voters' decisions. Although each group is worse off when the ballot is cluttered with notations, because they have spent resources without

¹⁵³ See Garrett, *supra* note 13, at 684. But see Grether et al., *supra* note 152, at 285-86 (disputing notion that long warnings on products produce consumer frustration).

¹⁵⁴ See David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 66 (1984) (noting that less than 20 percent of ballot questions filed with secretary of state of California since 1960 have successfully qualified for the ballot); Richard Briffault, *Distrust of Democracy*, 63 *Tex. L. Rev.* 1347, 1350-52 (1985) (summarizing the great expense and difficulty of qualifying a ballot question and noting that only 12% have succeeded in California since 1970).

¹⁵⁵ See Magleby, *supra* note 154, at 73, tbl. 4.4 (showing that the majority of ballot questions that qualify for the ballot through popular petition fail to gain approval).

¹⁵⁶ See *supra* text accompanying note 97.

producing useful information, groups lack the ability to coordinate and therefore cannot rely on universal forbearance. Furthermore, at least some of the information overload literature in the torts context suggests that consumers can use information opportunistically, searching for the cues that they find most relevant.¹⁵⁷ Certainly, this situation would increase the costs for voters of using the ballot information, but only slightly as people are required to spend more time in the voting booth sifting through the notations for relevant ones and comparing them to discern a credible and clear signal about ideology. Thus, my intuition is that the more effective bar to a cluttered ballot is the difficulty of winning in the initial popular vote to adopt the ballot notation.

III. Solving the Problems while Retaining the Promise of Ballot Notations: Public Opinion Polls and Candidate Statements on Ballots

The foregoing discussion has suggested several problems produced by the current structure of ballot notations. Perhaps the only reaction to these problems is to oppose ballot notations, using constitutional attacks and the ballot access precedents to keep them out of the electoral system. But, a different system for regulating ballot notations would solve at least some of the problems that I have identified. Most of the problems stem from the way ballot notations are selected for the ballot—as state constitutional initiatives drafted entirely by private groups and without provisions to sunset them after a relatively short period of time. Thus, the solution may lie in changing that process, a possibility compatible with the ballot access jurisprudence that allows states to regulate the electoral process to reduce voter confusion and ensure the integrity of elections.¹⁵⁸ Unfortunately, one alternative method of selecting ballot notations—state-run surveys of popular opinion—is also fatally flawed. A second proposal modeled on the analogy in securities

¹⁵⁷ See Grether et al., *supra* note 152, at 283, 294 (discussing consumer strategies that undermine arguments that information overload reduces the value of all information to consumers).

¹⁵⁸ See, e.g., *Storer v. Brown*, 415 U.S. 724, 730 (1974) (quoting U.S. Const. art. I, § 4, cl. 1).

law—shareholder proposals on proxy statements—deserves further consideration and empirical testing.

Before we turn to the problems of the poll proposal, we should understand how it might work. States could conduct public opinion polls, or use other methods of discovering widely held popular views, to determine which issues concerned the electorate.¹⁵⁹ State officials could then draft ballot notations and candidate pledges that would correspond to these issues, rather than leaving these responsibilities to interest groups.¹⁶⁰ Such polls would be conducted every three or four years so that the issues in ballot notations would change as voter priorities changed over time. In addition, each state could limit the number of ballot notations to a handful, perhaps no more than five, so that any problems of overcrowding would be alleviated. States could experiment with the format of the poll and the number of ballot notations, learning with experience what format and procedure is most successful.

This proposal appears to eliminate many of the problems that I have identified with the current system of ballot notations, while retaining most of the informational advantages. The benefit that seems reduced, perhaps substantially, is the voting cue that ties a candidate with particular interest groups. Because groups would no longer be required to qualify and pass an initiative to create a ballot notation, they would not be closely associated with particular notations. But, this benefit does not entirely disappear with the use of polls. After all, most issues become salient to the public because political entrepreneurs, often interest groups, work to make them prominent. Thus, many of the issues that would be identified by the

¹⁵⁹ James Fishkin has devised a different sort of public opinion poll designed to prescribe policy choices for lawmakers, rather than merely to reflect the initial views of people asked questions about which they have no settled opinions. He calls this a deliberative poll, and it has been used in an experiment in England. See James S. Fishkin, *Britain Experiments with the Deliberative Poll*, *Pub. Perspective*, July/Aug. 1994, at 27; see also Dahl, *supra* note 28, at 340 (describing the “minipopulus” where a group of citizens, selected randomly, would meet for a year and deliberate on important public policy issues, thereby complementing representative bodies).

¹⁶⁰ Cf. Lund, *supra* note 145, at 159-60 (noting that most ballot question titles are written by state officials).

public opinion poll would doubtlessly also be associated with particular groups.

An opinion poll might provide one benefit that the ballot notations as currently envisioned do not. The polling process itself might increase voter interest in the electoral process and the issues raised during the polling period. Not only would interested groups be likely to use advertisements and other techniques to increase public awareness of their issues, but citizens might feel more involved in a process where their input had such an effect on the official state ballot and the tone of the campaign. Others who have suggested poll-like vehicles to increase citizen participation in government have suggested that they might increase political knowledge indirectly “by stimulating interest in politics and providing a greater sense of efficacy to the public.”¹⁶¹ By increasing citizen participation in political activity, the public opinion polls might increase the number of people who take the time to vote and thus who benefit from the ballot notation cues in casting their votes.

The use of public opinion, whether elicited through state-run polls or focus groups, to determine the content of the ballot poses its own serious problems, however. Such a system does not eliminate the role of interest groups in ballot notation selection, nor does it necessarily reduce the amount of resources they would spend to influence the public. One would expect that the groups would try to lobby state officials to ensure their issues were part of the opinion poll. Moreover, groups would use sophisticated advertisements and other methods of persuasion during the polling period to encourage the public to choose their issue as a pressing one worthy of a ballot notation. Rather than spending money on and devoting human resources to a state initiative to establish a ballot notation, groups would merely shift their expenditures to a new forum.¹⁶² Perhaps a limitation on the number of years any one ballot notation could appear on the ballot would reduce the value of this policy tool to interest groups. On the other hand, groups will have discounted the

¹⁶¹ Carpini & Keeter, *supra* note 27, at 283-84 (discussing Dahl’s minipopulus and Fishkin’s deliberative opinion poll).

¹⁶² See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 *Tex. L. Rev.* 1705, 1708 (1999) (“[P]olitical money, like water, has to go somewhere. It never really disappears into thin air.”).

value of later effects of a more durable ballot notation, so the reduction in the price they are willing to pay for a more short-lived notation may not be substantial.

Additionally, the involvement of the state in the selection of the ballot notations is very likely to undermine the ability of the system to empower groups unable to influence the political agenda except through direct democracy. Any system that relies on state political officials to implement will largely serve the interests of the entrenched political parties, incumbents and already powerful interests. Activists on issues like term limits, campaign finance reform, and government ethics reforms have found that they are ignored or thwarted by established political players; thus, they are forced to effect change through alternative routes. Historically, ballot access restrictions have been devices to ensure the dominance of the major parties and restrict the ability of minor parties and issue-oriented groups to influence policy outcomes. We have no reason to believe that this proposed system would operate differently. Furthermore, politicians would seek to reduce the strength of the new voting cue so they could return to a world where they could avoid taking positions on controversial issues that might reveal their ideology. Ballot notations can be drafted using ambiguous language designed to appeal to most of the public in the same way that party platforms and public statements by politicians are now.

One way around this problem would be to allow groups to place issues on the public opinion poll if they presented a petition of signatures to the relevant state official. The signature threshold should be placed below that required to qualify a question for the ballot so that truly grassroots groups without access to large political war chests could surmount the threshold.¹⁶³ This method of selecting questions is also better than a traditional poll because it ensures that the issues serving as the basis of ballot notations are the product of relatively intense public support rather than issues that happen to catch the fancy of people participating in a public opinion poll. The top five or so questions in the poll would then be formulated as ballot notations and pledges, and candidates would have the option to participate in the system or to decline to have

¹⁶³ See Garrett, *supra* note 84, at 1860, 1863-66 (discussing the role of money in gathering signatures to qualify a question for the ballot).

some or all of the notations next to their names. To avoid the problem of notations that are phrased in ways that mislead the public, state officials would be responsible for drafting the pledges and notations. Again, however, established political players and parties would no doubt attempt to manipulate any power to determine the wording of survey questions and ballot notations in order to solidify their power and to exclude other voices from being heard clearly.

The similarity between shareholder proposals on proxy statements and direct democracy suggests another possible ballot reform. Just as those who propose initiatives for proxy statements can include 500 words of description and explanation,¹⁶⁴ candidates could be allowed the opportunity on the ballot to publish a short statement. Such a reform might benefit minor party candidates and challengers; they could provide information costlessly in a way that would be salient to voters because of their form and timing. Some candidates currently use slate mailing to achieve the same purpose; the mailings have very short descriptions of the candidates' positions on issues or lists of endorsements from interest groups. Slate mailings also provide another form of information about group affiliations because they offer a single forum for a group of candidates, perhaps members of the same party or people with similar views on issues like the environment or reproductive rights. To participate in a slate mailing campaign is to affiliate with a particular ideological perspective. Evidence suggests that some voters bring this information into the polling booth with them and that the information affects their votes in races that have not been covered widely in the media.¹⁶⁵ Using the ballot to impart the candidate statements instead would increase the audience and the impact because of the salience of information on the ballot. Certainly, the reform is a major departure from the status quo, which is characterized by laws designed to prevent any information from reaching voters once they enter the buffer zone around the polling place.

Again, this proposal is problematic. First, the candidate statements might not be particularly informative. Just as now,

¹⁶⁴ 17 C.F.R. § 240.14a-8(d) (1999).

¹⁶⁵ See Iyengar et al., *supra* note 62, at 7-8, 25-27.

candidates, particularly incumbents, would have an incentive to avoid taking positions on tough issues and to include only meaningless platitudes and generalities. One advantage of the ballot notations selected through direct democracy or opinion polls is that they remove some of the control over the content of political messages from candidates and major parties. On the other hand, challengers, particularly those from minor parties or independent movements, have an incentive to provide specific information, which may in turn affect the message of the established players. Second, candidates might well include information that is offensive or raises constitutional concerns, such as providing their race or scandalous information about other candidates. Given the official nature of the ballot, we should be concerned about the content of candidate statements in these extreme cases. Regulation, however, would almost certainly be the responsibility of state officials who represent the interests of currently entrenched interests. Finally, a ballot full of candidate statements and slogans would be a much longer ballot and pose the possibility of voter fatigue or backlash. One can imagine even longer lines at the ballot box as every voter reads through statements, even relatively short ones, connected with every candidate and issue.

At the least, the concern for voter competence and the relevance of information on the ballot to the electorate's decisions at the polls should prompt us to consider seriously reforms along the lines suggested above. Reforms similar to the candidate statement proposal may be inevitable when voting moves from the ballot box to the Internet. One can imagine hyperlinks from candidates' names on the electronic ballot to their websites along the electronic highway. In addition to the constitutional and governance issues, a variety of empirical questions remain to be answered that would shed light on the effect of such reforms on the decisions costs and error costs facing voters. Unlike the courts, which have accepted claims of voter confusion without demanding proof in cases relating to the regulation of the ballot,¹⁶⁶ the academic community should be more rigorous and principled.

¹⁶⁶ See, e.g., *Timmons*, 520 U.S. at 375 n.3 (Stevens, J. dissenting) (criticizing majority's approach); *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-196 (1986);

IV. Conclusion

By summarily rejecting ballot notations as incompatible with our electoral system or as unconstitutional interference with the deliberative process, those who have noticed this emerging part of the electoral process have overlooked some of their most intriguing features. At the least, ballot notations make us think differently about the information costs facing voters and the effectiveness of the voting cues currently on the ballot in increasing voter competence. Improving such shortcuts is crucial once we recognize that most citizens will never invest substantial time and energy in making their political choices. To work, reforms must account for this reality. Moreover, we should always be willing to entertain the notion that changes in the content of the ballot may face resistance because such reforms challenge the lockup of the two major parties over the electoral system, rather than because they are inherently flawed or dangerous to political stability.

Our limited experience with ballot notations, however, reveals that they have been used to mislead voters, rather than to empower them. The term limits notations, for example, have become part of a distasteful private conversation between intensely motivated activists and politicians, where the people have been purposefully left in the dark about many of the details of that discussion. Changing the ballot notation system so that state actors rather than interest groups draft the ballot notations, which are selected according to public opinion polls conducted by the state, is unlikely to alter current political arrangements significantly. Just as they do now, entrenched interests will use the new mechanism to preserve their control over political institutions. At the least, however, the study of ballot notations has provided a new way to think about information in elections and communication among voters, interest groups, political parties, and candidates. It has also raised the possibility of providing candidates a means of communication on the ballot or near the polling place, a reform worthy of further consideration and testing.

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Readers with comments should address them to:

Elizabeth Garrett
Professor of Law
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637

e-garrett@uchicago.edu