

Chapter Three: The Costs of Voting—Bridging Theory and Practice

“The greatness of democracy is that it denies nothing and renounces nothing of humanity.”
–Victor Hugo (1987 [1862], 517)

“Democracy was made for the people, not the people for democracy.”
–E. E. Schattschneider (1960, 135)

1) INTRODUCTION

What are the costs of casting a vote, and how and why do these costs matter? Employing the framework of the calculus of voting, this chapter examines the legal and policy implications of varying theoretical perspectives on the costs of participating in democratic elections. Assessments and interpretations of the costs of voting not only implicate important practical problems in election law and policy; they simultaneously involve crucial normative issues in democratic theory. This chapter seeks to integrate these two perspectives through a unified analytical focus, which it does by employing the concept of voting costs as a link between electoral institutions and the norms of liberal representative democracy. As mentioned in the introduction to this dissertation, and as discussed below, theory and practice in election law and policy appear to be suffering from something of a “disconnect,” as evidenced on the one hand by the intense partisan conflict surrounding electoral rules and procedures, and on the other by the dearth of guidance from existing legal doctrine concerning individual voting rights and government responsibilities for election administration. This work represents an attempt to address this disconnect by examining these issues through the lens of voting costs.

The costs associated with the act of voting—represented by the C term of the voting calculus—can be difficult to measure or assess, and they are subject to wide variation and uncertainty from at least three sources: First, voting costs vary significantly as an empirical matter related to institutional differences in election law and policy, as implemented through particular rules and procedures of election administration. Second, the evaluation of voting costs and their effects on turnout decisions in the calculus is a function of the subjective perspective of individuals deciding whether to participate in a given election, which may involve highly idiosyncratic assessments. Third, the normative characterization of voting costs—and in particular the interpretation of the costs of voting “well,” or at least competently—is a matter of contentious debate, and so any attempt to describe what these types of costs actually entail in theory or in practice will not be simple.

The costs of voting can be divided into two general categories: *substantive* costs and *information* costs (Aldrich 1993, 248; Dowding 2005, 446). Substantive costs represent the administrative and logistical burdens of electoral participation, including registering as required, accessing the polling place or otherwise obtaining and casting a ballot, as well as any time or opportunity costs attributed to the act of voting. Information costs, on the other hand, reflect the evaluative and decisional burdens faced by individuals in obtaining and using information to assess the options on the ballot and choose how to vote. These are the types of costs that were first formulated by Anthony Downs as subject to the now well-known theory of “rational ignorance” (Downs 1957a, 246). The costs of information are generally considered more significant from the perspective of normative theory, even if they are not viewed empirically as strongly determinative of turnout decisions within the calculus (see Dowding 2005, 447; Somin 2006, 258-259). As noted, the characterization of information costs raises complex

issues, for interpretations of these costs implicate intense and long-running debates about whether mass democratic electorates have the knowledge and reasoning abilities deemed necessary for competent use of the ballot.

This chapter explores opposing schools of democratic theory that frame the dominant approaches to understanding the functions and abilities of voters under modern political conditions. The fundamental dispute about the purpose and meaning of mass electoral participation is shown to motivate opposing positions in the voter competence debates, yielding wide differences of opinion about the costs of casting a reasonably informed vote. The chapter will then proceed to demonstrate how these fundamentally different views about *information* costs have important policy implications for current problems in election law and administration related to *substantive* costs. These range from constitutional level issues involving institutions of representational versus direct democracy and voting rights; to the so-called “nuts and bolts” (Lowenstein 1999, 1202; Hasen 2001, 378) of election administration, including registration and documentation requirements, convenience voting reforms, and other rules and procedures that affect the costs of casting a ballot; to procedural problems particular to “second-order” elections, such as whether to hold local races concurrent with or separate from higher-turnout national contests. These theoretical debates over the information costs of mass democracy may also illuminate the ongoing political battles over the rules for voting in U.S. elections—what Richard Hasen has termed, “The Voting Wars” (Hasen 2012).

As discussed in this dissertation’s introduction, the issues raised by a focus on voting costs are clearly highly charged politically, particularly in the polarized environment currently dominating American politics, where changes to electoral rules are generally perceived as intended to influence the outcomes of elections and the distribution of political power (Hasen 2012, x; Levitt 2014, 1787; Tokaji 2009b, 133;

James 2011, 225-227). Furthermore, beyond the partisan struggles over the implementation of specific voting costs there is a more principled debate over where the power to determine the rules for voting should reside. State and local authorities continue to fight to maintain the historically “hyper-decentralized” (Tokaji 2009b, 146) administration of American elections against perceived federal encroachment (see Hasen 2012, 7), while scholars consider whether greater uniformity should be established through new federal laws and administrative procedures (Hasen 2005, 969; Tokaji 2014, 100-104; Ewald 2009).¹ This debate may in fact date back to the founding era, as demonstrated by the somewhat ambivalent Elections Clause of the U.S. Constitution, which gives initial authority to the states to regulate the “Times, Places, and Manner” of federal elections, but then gives Congress the power to “at any time by Law make or alter such Regulations.”²

It might thus seem pointless to probe for foundational normative principles underlying these complex and highly politicized debates. However, while understanding that reaching consensus may be difficult or even impossible, these issues are nevertheless important to study and discuss. There may even be some reforms to which opposing theoretical schools can agree (see Cain 2015, 199-200), or opportunities for partisans to reach political compromises (Tokaji 2014; Hasen 2005, 969). Scholars should not evade these important issues simply because they are politically sensitive or philosophically contentious. The central premise of this chapter—and indeed of this dissertation as a whole—is that electoral institutions represent democracy in action, and that research in

¹ Hasen and Tokaji suggest new federal standards to provide increased uniformity (see *infra* n. 82), while Ewald generally defends existing patterns of decentralization and local control over the administration of elections.

² Article I, Section 4. The case of *Arizona v. Inter Tribal Council* 133 S. Ct. 2247, 2253 (2013) emphasizes the broad federal power to preempt state regulations under the Elections Clause, but see *infra* n. 82 for questions regarding the reach of federal authority in this area.

law and policy may be particularly well suited to bridging the gap between democratic theories and practices (see Gardner 2012, 690). Election laws and policies—from Supreme Court doctrine down to the actions of state and local administrators—are inevitably linked to basic democratic values and ideals, and so any critical evaluation of electoral institutions requires fundamental normative assumptions about the meaning and purpose of voting in a system of representative democracy (Thompson 2002, vii-viii; Gardner 1997, 897; McCaffery et al. 2004, 9).

While political scientists have extensively examined electoral institutions in the United States and elsewhere for empirical effects on voting behavior and political outcomes, they have focused far less on exploring how basic assumptions in democratic theory serve to undergird the choices of rules and procedures for participating in elections (Gardner 2012, 691). The primary emphasis of institutional analysis in political science has thus focused mostly on how and whether institutions “matter” to political outcomes, rather than exploring their normative foundations (e.g. Norris 2004; Przeworski 2004).³ Political theorists have been somewhat more open to the idea that democratic theory should have consequences for the design of electoral institutions (e.g. Estlund 1990, 402; Kelly 2012, 97; Rehfeld and Schwartzberg 2013, 56; Beitz 1989, 4), but they too have often failed to draw clear connections between normative ideals and specific institutional reforms (see Waldron 2013, 6; Peonidis 2013, 37; Beitz 1989, ix). Those who do suggest reforms often focus mainly on campaign finance or high-level institutional design (e.g. Kelly 2012, 97-120; Rehfeld and Schwartzberg 2013, 58-60),⁴ or they may suggest

³ But see March and Olsen (1986), as well as Lowndes and Roberts (2013, 187), in support of a more normative focus for institutional analysis in political science.

⁴ Kelly advocates for increasing the number of political parties and for campaign finance reform, as well as robust judicial review and reforms in public education, while Rehfeld and Schwartzberg recommend alternatives for the design of electoral constituencies and new non-electoral forms of accountability. See also Shapiro (2003, 108-112), advocating for reforms to increase political competition and economic

relatively extreme changes that reach beyond the existing institutional framework of liberal representative democracy (e.g. Landmore 2013, 117; Peonidis 2013, 38-47; Fishkin 2009, 13-15; Beerbohm 2012, 257-274).⁵ The essential relationship between different schools of thought in democratic theory and specific democracy-implementing institutions of election law and policy is thus an understudied area in both positive and normative scholarship on electoral institutions.⁶

Legal scholarship has generally focused more attention on these gaps between democratic theory and practice, presumably because the need for normative fundamentals has been so readily apparent to scholars analyzing and critiquing judicial decisions on election law (Michelman 1989, 444; Pildes 2001, 696; Charles 2002, 1107; Gardner 2015, 62). Many—if not most—election law scholars thus explicitly fault the Supreme Court’s jurisprudence for lacking the doctrinal coherence necessary for principled application of the “law of democracy” (Karlan 1993, 1708; Issacharoff and Pildes 1998, 644; Gerken 2002, 1413; Charles 2007, 602; Schultz 2014, 7; Gardner 2015, 61).⁷ However, the relatively few efforts to offer more comprehensive theories and

redistribution—including campaign finance reform, reducing veto points, and proportional representation—as well as “political antitrust measures” that include nonpartisan regulation and administration of elections.

⁵ Landmore, as discussed later in this chapter, endorses random selection of political representatives—or sortition—as preferable to holding elections, while Peonidis suggests direct democratic participation in legislation through randomly selected citizen assemblies, and also partially endorses sortition, in addition to other reforms. James Fishkin famously advocates for new institutions of deliberative democratic participation over traditional institutions said to yield “debilitated” or “unrefined” public opinion, and Beerbohm goes even further in suggesting non-secret voting, advisory citizen juries, and other non-electoral forms of participation, while also discussing limits on judicial review and its supremacy in constitutional interpretation.

⁶ Thompson (2002) provides a notable exception as a work of political theory that draws specific implications for various issues in election law and policy. See also Cain (2015) on the implications of “pluralist” versus “populist” reform agendas for different aspects of voting rules and procedures.

⁷ A few scholars do maintain it is better for the Supreme Court to avoid “lockins of particular theories of representation” (Cain 1999, 1590), or that the Court should avoid precise legal standards in cases that involve a “controversial... normative political theory” (Hasen 2002, 1473; see also Lowenstein 2002, 283). The term “law of democracy” can be attributed to the title of the election law casebook by Issacharoff et al. (2016).

accompanying institutional arrangements have tended to address the so-called “second generation” of voting rights issues (see Guinier 1991, 1094; Karlan 1998, 122), which involve aggregate or “structural” representational interests—such as gerrymandering or other forms of vote dilution—or to focus generally on campaign finance and other candidate-oriented areas of election law (e.g. Issacharoff and Pildes 1998; Gerken 2001, Charles 2007; Gardner 2009; Post 2014).⁸ Somewhat neglected have been the theoretical underpinnings for cases raising “new vote denial” issues (see Tokaji 2006, 691-692)—such as challenges to voter identification laws or other administrative procedures claimed to burden voting rights. These issues are seen as representing a return to “first-generation” claims involving interests in participation (Tokaji 2006, 718), which invite a more individualized approach to rights adjudication than the structural interests at stake in vote dilution cases (see Fishkin 2011, 1290). In particular, the literature is largely lacking any coherent normative theory of vote denial that would entail stricter protection of the right to vote at the individual level, and which could lend support to electoral reforms aiming to minimize substantive costs in order to raise turnout and broaden electoral participation.⁹

In fact, scholarship in election law and policy contending that major reforms to U.S. election law and policy are needed to increase and equalize voter turnout may appear to have neglected somewhat the need to fully explicate normative theories in

⁸ Issacharoff and Pildes set forth a competition-based “structural” theory of democratic politics and draw implications for ballot access, campaign finance, and vote dilution, while Gerken discusses normative theories of vote dilution and structural conceptions of voting rights, and Charles develops and applies a theory of institutional distortion caused by gerrymanders. Works by Gardner and Post deal mostly with theoretical foundations for campaign finance and other regulatory issues involving candidates and parties.

⁹ Joseph Fishkin appears to be one of the few legal scholars to have formulated a comprehensive theory that supports the individual interest in electoral participation, which he derives from norms of inclusion and equal citizenship (Fishkin 2011, 1333). Other proposals for normative theories applying to cases alleging vote denial rely mainly on structural concerns related to election outcomes, rather than individual-level voting rights claims (e.g. Stephanopoulos 2014, 325; Gardner 2009, 181; see also Posner 2003, 202, 222).

support of their participatory proposals (see e.g. Overton 2006; 14-15, 168-169; Wang 2012, 1-13; Sample 2015).¹⁰ Suggestions for reform of judicial procedure in election law cases or accountability-based policy reform may also appear to have overlooked the need for normative theory (see e.g. Hasen 2009; Gerken 2009).¹¹ In particular, proponents of reforms to reduce the administrative burdens of casting a ballot have not adequately addressed counter-arguments for higher voting costs intended generally to improve democratic competence—arguments that potentially militate against a strongly protected individual interest in participation. Those who favor making the voting process easier may tend to summarily dismiss such arguments out of hand, claiming that raising costs to improve competence is structurally inequitable or motivated by partisanship (Wang 2012, 7-8; Hasen 2005, 971; Cain 2015, 175). In fact, Hasen goes as far as asserting that “little can be said” against arguments for higher costs in the name of voting competence, as differences on this issue seem to represent “an irreducible ideological divide” (Hasen 2005, 972).¹² However, even if consensus on this topic remains elusive, there is still

¹⁰ The works by Overton and Wang each describe administrative burdens on participation and argue for law and policy reforms to increase turnout, but they provide only limited theoretical background for their analyses and proposals. Sample likewise proposes participatory reforms without detailed discussion of normative foundations. Overton has in fact written elsewhere of how “inclusionary” versus “merit-based” assumptions in democratic theory support different legal approaches to the administrative burdens on participation; however, he identifies merit-based approaches with an “individualized focus,” which he rejects because it “fails to recognize that politics involves not simply individual rights but also associational and structural concerns” (Overton 2001, 473-480). In contrast, the argument of this chapter is that merit-based approaches can and should be rejected on individual rights grounds, and that an individualized focus can also support inclusionary practices in law and policy.

¹¹ Hasen argues for a canon of statutory construction in favor of voter enfranchisement, but he appears to omit discussion of any basis in democratic theory for this rule of judicial interpretation. Similarly, Gerken’s work proposes performance measures to rank state and local administrative procedures, but it does not seem to discuss theoretical foundations for any standards of best practices. See Elmendorf (2010, 1058); Kang (2009, 795).

¹² Hasen elsewhere refers to a conflict between liberals and conservatives about the purpose of voting in a democracy, stating, “Conservatives see voting as about choosing the ‘best’ candidate or ‘best’ policies... and liberals see it as about the allocation of power among political equals” (Hasen 2014). This substantive distinction comes close to the approach of this chapter, as detailed below, but it is not so clear that this division separates neatly along conservative/liberal lines, notwithstanding the clear partisan rift on these matters in practice (see *infra* n. 77). Nevertheless, the assertion that efforts to make voting more costly

much that *can*—and arguably *must*—be said to counter proposals for higher costs in the name of democratic competence. It is important to recognize that such proposals may actually draw support from empirical research on political knowledge levels and from prominent theories of the role of voting in democratic theory.¹³ Opposition to such arguments ought therefore not be taken for granted; their underlying reasons and principles should be directly addressed.

In sum, there is a pressing need—in the courts, in the academy, and in the general public discourse—for increased attention to the normative foundations of election law and policy. This chapter points in that direction through its focus on individualized assessment of the costs of voting in the calculus of turnout. In seeking foundational principles behind varying interpretations of voting costs, this work engages in a broader project of analyzing electoral rules and procedures through what Dennis Thompson calls institutional political theory, which “seeks principles informed enough by actual practice to connect to political agents, but detached enough to provide a critical perspective on their actions” (Thompson 2002, ix). Regardless of whether it may ever be possible to reach consensus on the normative principles or the legal and policy implications suggested in this chapter, this approach of this work could still prove useful. In Thompson’s words: “[T]he point of institutional theorizing is not to force choices

represent a conservative—even a reactionary—position does have a sound basis in historical perspective, given the extended record of voting restrictions in the U.S., and the slow, unsteady progression toward the universal franchise in this country (see Keyssar 2000).

¹³ See generally Sections 3 & 4 below. For a specific discussion of how legal theory may support ensuring competence through voting rules, see Michelman 1989 (450-452, 480-485), describing “dialogic” conception of deliberative democratic politics, and its possible support for standards of competence to ensure the “constitutive value” of voting as engagement in political dialogue. See also Ortiz (2004, 210, 221-222), suggesting that higher voting costs may be useful for “discouraging unthoughtful participation,” but concluding that this approach is problematic from a structural perspective, since the resulting electorate may be “more thoughtful but at the same time less representative.”

between theories, but to facilitate interpretations of the principles themselves” (id.).¹⁴ In this manner, focusing on the institutional implications of differing interpretations of voting costs could contribute to a more deliberative conversation about election law and policy, perhaps even with the potential to transcend some of the entrenched partisan positions and interests in this area (see Thompson 2002, 186-187; see also Ewald 2012, 196).¹⁵

This chapter proceeds as follows: Section 2 provides a background on the varieties of substantive voting costs in American elections and reviews some of the political science literature on their empirical effects. Although substantive costs are subject to wide variation in practice, and their empirical effects on voter turnout are matters of debate, these costs have generally not been viewed as highly determinative to the calculus of voting, and their normative significance has not been fully explored. Information costs, which are discussed in Section 3, have generally been viewed as more important from a theoretical perspective, as indicated above. While these costs also exhibit wide variation, they are subject to a more fundamental assessment problem due to underlying normative uncertainty about what the informational costs of voting actually entail. The discussion of these costs thus proceeds with a view toward debates on voter competence and how information costs are characterized by different strands of research on the political knowledge and reasoning abilities of American citizens.

In order to address the fundamental question of what kind of knowledge, and how much of it, is needed to vote competently, Section 4 explores the role of information in

¹⁴ See also Beitz (1989, xi), stating, “Although it would be naive to expect a philosophical theory, by itself, to resolve controverted questions of institutional design, an adequate theory should at least identify the central values at issue and provide a structure that informs their application.”

¹⁵ Ewald in fact specifically states that “the language of cost is useful” in addressing politicized arguments about voting rules and procedures (Ewald 2012, 196).

two broadly opposing democratic theories, drawing on William Riker's seminal distinction between "liberalism" and "populism." The populist interpretation of voting, which relies on an epistemic assumption of independent standards for judging the substantive correctness of voting decisions, is shown to be associated with deliberative democratic theory and its overall skepticism about mass electoral participation due to competency concerns. As an alternative to epistemic-deliberative populism, this chapter elaborates and extends Riker's liberalism into a general theory that incorporates the value of participation within a framework of competitive democratic theory, while also allowing for the expression of deliberative values. Although weak epistemic standards are retained under this approach, mass democratic competence is shown to be viable through a more procedural epistemology of voting decisions based on perceptions of political character and leadership, and through choices of representation based on value congruence that entail lower information costs. This provides the normative foundation for analyzing particular impositions of substantive voting costs in Section 5, which discusses some institutional implications of the opposing theories in three areas: constitutional design, election law doctrine, and electoral policy reform. The approach in this work lends support to legal arguments for stricter standards of judicial review in cases alleging individual rights-based claims of vote denial, as well as supporting policy reform proposals that aim to minimize substantive voting costs. The broad standard of electoral competence articulated here thus frames the relationship between information costs and substantive costs in a way more consistent with efforts to realize an inclusive vision of mass participation in elections.

2) SUBSTANTIVE VOTING COSTS

As indicated previously, the substantive costs of voting in American elections vary widely. At the lower end, the act of voting might entail simply spending some free time in the evening completing a ballot that was delivered by mail to the voter's home, and then returning the ballot by mail—at the cost of a postage stamp—or otherwise delivering the ballot to election officials in a timely matter. At the other extreme, voting could conceivably involve the following drawn-out process: first traveling to a government records office during business hours, waiting and paying a fee to obtain documentation of eligibility—such as a birth certificate, for example; then traveling, waiting, and likely paying a fee at another government office to obtain an official identification card—such as a driver's license, possibly registering to vote during that process, but if not making sure to register as required, which could involve more travel; then traveling to the polls during opening hours and perhaps waiting in line—conceivably for a long time—until finally reaching the point of completing and casting a ballot.

On average, the sum of substantive costs should generally fall somewhere between these two extremes, presumably closer to the lower end for most prospective voters, but the examples illustrate some of the sources of potential variation. As indicated, the distribution of voting costs is a function of a combination of factors: First are the institutional differences in election law and administration in different states and localities, a consequence of the hyper-decentralization of control over American elections. In some states all registered voters can vote absentee without ever having to appear at a polling place, or they may vote early in person, while in other states voters have no choice but to appear on Election Day in order to cast a ballot.¹⁶ In some states

¹⁶ As of the 2016 elections, no-excuse absentee balloting (by request), along with options for early voting, was permitted in 27 states and the District of Columbia, while 7 states allowed early voting but required a

voters must register separately in advance of voting, while in others they may register and vote simultaneously.¹⁷ Some states require voters to provide an official identification document before voting, while others allow simply a signature or other attestation of identity.¹⁸ There is also the matter of the scheduling of elections: Substantive costs for voting in local elections are largely determined by whether they are administered together with races for higher office, just as the costs for voting in state elections are strongly affected by whether they are scheduled together with federal races or held separately in odd calendar years.¹⁹ When local and state elections are consolidated with higher races it yields “economies of scale” (Aldrich 1993, 261) that reduce the substantive costs of voting in down-ballot races essentially to zero—apart from any added time needed to mark the ballot, while holding these elections separately greatly increases costs by imposing a wholly separate calculus on prospective voters.

Another source of variation in substantive costs results from the interaction of electoral rules with individual situations and circumstances. Thus, only a prospective

valid excuse for voting absentee. Oregon, Washington, and Colorado use all-mail voting, or vote-by-mail (VBM), in which registered voters automatically receive absentee ballots for all elections. There were 13 states allowing neither early voting nor absentee balloting without excuse. See NCSL (2016a).

¹⁷ As of 2016, “same-day” registration (SDR), including Election Day registration (EDR), was provided in 11 states and in the District of Columbia, while 3 more states had enacted SDR but not yet implemented it. The state of Maryland permitted SDR during the early voting period, but not EDR, while Ohio allowed for 5 days of SDR at the beginning of the 35-day early voting period. See NCSL (2016b).

¹⁸ There were 17 states and D.C. with no documentary identification requirements for voting in 2016. At the opposite extreme, 11 states enforced “strict” voter ID laws that required individuals without specified forms of ID to vote by provisional ballot and to provide an acceptable document within a few days after the election in order to have their votes counted. The remaining 22 states enforced “non-strict” identification requirements with provisions for allowing individuals lacking proper ID to have their votes counted with no additional action required. See NCSL (2016c).

¹⁹ Data on the scheduling of local elections are somewhat scarce, but Anzia reports that about 80 percent of municipal elections in the U.S. are held separately from even-year general elections in November (Anzia 2012a, 24). According to Berry and Gersen (2010, 38), “The timing of local government elections can only be described as chaotic.” The scheduling of state elections is easier to assess, with 34 states holding regular gubernatorial elections together with off-year congressional races, while 11 states hold them in presidential election years (including Vermont and New Hampshire, which hold gubernatorial elections biennially). Kentucky, Louisiana, Mississippi, New Jersey, and Virginia hold gubernatorial elections in odd years. See generally state election data by Leip (2016).

voter who lacks the required official documentation will bear the costs of obtaining it where required. More generally, the time and opportunity costs of casting a ballot will vary greatly depending on how individual conditions interact with the administrative arrangement; for example, an individual's transportation resources and availability of free time interact with the location of polling places and early voting opportunities to influence the overall cost of voting (Dyck and Gimpel 2005). Individual and institutional factors may then further interact with other external factors, such as perhaps the weather (Gomez et al. 2007). Furthermore, as expressed by the framework of the voting calculus, the *C* term represents an individual assessment of perceived costs and willingness to bear them. Such highly idiosyncratic evaluations of negative utility are difficult to quantify, and this subjectivity presumably provides another significant source of variation in voting costs.

Despite all this potential variation, however, the dominant view on substantive costs appears to be that in practice they are relatively minimal for the average voter (Niemi 1976, 115; Blais 2000, 87; Dowding 2005, 446). These types of costs might therefore be seen as not representing significantly determinative factors in the voting calculus (Highton 2004, 508; Dowding 2005, 446).²⁰ Furthermore, political scientists emphasize that substantive voting costs in American elections seem clearly to have declined substantially over the past few decades (e.g. Berinsky 2005, 483; Leighley and Nagler 2014, 92). Accordingly, John Aldrich concluded back in the early 1990s that registration and voting costs were “relatively low and getting lower,” referencing the liberalization of voting laws as a result of congressional legislation and Supreme Court decisions in the 1960s and 1970s (Aldrich 1993, 261). Given further reforms under the

²⁰ But see Aldrich (1993, 261), indicating that because voting is a “low-cost, low-benefit action... [s]mall changes in costs and benefits alter the turnout decision for many citizens.”

National Voter Registration Act of 1993 (also known as the “Motor Voter Act”),²¹ and the more recent popularization of the various forms of convenience voting in many states, it seems reasonable to conclude that the overall process of registering and voting in U.S. elections is now easier than it has ever been in modern times (Highton 2004, 511). Substantive costs might thus be expected to have little weight in the contemporary voting calculus.

Nevertheless, Aldrich notes, “This is not to say that the costs of registration and voting are low in some absolute sense or that they are equally low for all people.... [L]aws may still be manipulated to regulate who is more and who is less likely to vote” (Aldrich 1993, 262, n. 17). There is indeed substantial evidence that differences in substantive costs affect voter turnout, both in the aggregate and at the individual level (Dowding 2005, 444-445; Harder and Krosnick 2008, 528-530; Smets and van Ham 2013, 352).²² In fact, a few early studies found a significant correlation between measures of substantive costs and the propensity to vote, challenging the notion that these costs are negligible to the calculus (Sigelman and Berry 1982; Sanders 1980).²³ Additionally, the comparative turnout literature has demonstrated that turnout differences between the U.S. and other established democracies are predominantly explained by variation in substantive voting costs—most notably the voluntary registration regime that exists in most of the U.S. but is absent in other democracies, where voter registration is generally undertaken by the government (Burnham 1971, 337; Powell 1986; Wolfinger et al. 1990; Tokaji 2008, 503). Furthermore, at the state level within the U.S., studies have

²¹ 52 U.S.C. §§ 20501-20511.

²² But see Blais (2006, 116), indicating that while making voting easier does generally raise turnout, which specific electoral rules to facilitate voting have significant turnout effects—as well as the size of any effects—remains unclear.

²³ The cost variable in Sanders’ study includes proxies for both substantive and information costs (Sanders 1980, 858-859).

consistently found that the closing date of registration is a significant factor influencing turnout, both individually and in the aggregate (Wolfinger and Rosenstone 1980, 78; Rosenstone and Hansen 1993, 208; Mitchell and Wlezien 1995, 195; Highton 2004, 512, n. 32).

More recently, focus has converged on Election Day registration or same-day registration (EDR or SDR) as a significant factor in turnout differences between U.S. states (Brians and Grofman 2001; Fitzgerald 2005, 856; Larocca and Klemanski 2011; Burden et al. 2014; Leighley and Nagler 2014, 101). There is somewhat less consensus, however, regarding the effects of convenience voting reforms, including vote-by-mail (VBM), no-excuse absentee balloting, and early in-person voting, with several studies finding positive effects on turnout (Southwell and Burchett 2000; Berinsky et al. 2001; Gerber et al. 2013; Larocca and Klemanski 2011; Leighley and Nagler 2014, 115), but others finding little or no effects from these types of reforms (Fitzgerald 2005; Gronke et al. 2007, 643; Gronke and Miller 2012).²⁴ There is also an ongoing dispute about the turnout effects of strict voter identification laws, with some studies finding negative effects on turnout (Alvarez et al. 2008; Hood and Bullock 2012; Hajnal et al. 2017), while other have failed to find any statistically significant effects from these requirements (Mycoff et al. 2009; Ansolabehere 2009; Erikson and Minnite 2009, 96-97).²⁵

Perhaps more important than aggregate or individual-level turnout effects is the question of how substantive cost allocations affect the *composition* of the electorate. This is in fact what Aldrich alludes to in mentioning the possibility of manipulating electoral laws through attempts to “regulate who is more and who is less likely to vote” (Aldrich

²⁴ For early voting in particular, most of these studies have found a null or even a negative effect on turnout. See also Giammo and Brox (2010).

²⁵ The empirical methods of Hajnal et al. (2017) have also recently been challenged by Grimmer et al. (2017), which finds no turnout effects using the same data as Hajnal et al.

1993, 262, n. 17). The prevalence of demographic bias in the American electorate is well established (see e.g. Leighley and Nagler 1992), and some argue further that registration rules in this country have been systematically exploited to demobilize lower socioeconomic groups in pursuit of partisan political gains (Piven and Cloward 1988; 2000). However, the dominant view among political scientists is that any differences in turnout produced by variation in registration and voting procedures have little to no effect—or in some cases the opposite intended effect—on the demographic bias of the electorate. Earlier empirical studies are skeptical about the compositional effects of more lenient registration rules such as later closing dates (Wolfinger and Rosenstone 1980, 83; Mitchell and Wlezien 1995, 179). More recent research reports only minimal compositional effects from EDR (Knack and White 2000; Brians and Grofman 2001, 170; Hanmer 2009), and no significant change—or even a possible *increase*—in turnout inequality as a result of convenience voting reforms like VBM, no-excuse absentee, and early voting (Berinsky et al. 2001, 178; Karp and Banducci 2001, 190; Berinsky 2005). Nevertheless, a few studies disagree, finding some evidence that cost-reducing electoral rules—with the notable exclusion of early voting—may in fact be associated with reduced socioeconomic inequality in the electorate (Avery and Peffley 2005; Rigby and Springer 2011; Franko and Tolbert 2010).

This issue forms part of a broader debate as to whether the preferences of actual voters are fairly representative of the voting-eligible population in the U.S., a question of crucial concern at the crossroads of empirical and normative political science. If the views of non-voters are in fact fairly well represented by those who turn out to vote, there is presumably less need to worry about the implications of low turnout for the democratic system, and there would be less justification for electoral reforms aimed at reducing voting costs and increasing participation. However, if higher turnout might produce

different electoral—and ultimately political and policy—outcomes, this could potentially pose a problem for democratic legitimacy, and it would provide more support for electoral reform. Here again, the prevailing wisdom seeks to allay the normative concern and mitigate the demand for reform by demonstrating that non-voters are in fact reasonably well represented by those who vote, at least in major elections. Several studies have thus concluded that even a dramatic increase in turnout—counterfactually or prospectively—would be unlikely to yield significant changes in political outcomes, since the opinions and preferences of nonvoters appear to be substantially similar to those of voters (Wolfinger and Rosenstone 1980, 111; Bennett and Resnick 1992, 799; Gant and Lyons 1993, 199; Nagel and McNulty 1996, 793; Highton and Wolfinger 2001, 192; Sides et al. 2008). However, other studies do find evidence that non-voters differ from voters in significant ways and that electoral outcomes might indeed change under higher turnout (Martinez and Gill 2005, 1270; Hansford and Gomez 2010; Leighley and Nagler 2014, 175).²⁶ Many scholars thus continue to argue that low turnout and demographic biases in the electorate have important consequences for both politics and policy (Hill et al. 1995; Martin 2003; Avery and Peffley 2005; Griffin and Newman 2005; Franko et al. 2016).

The question of how political outcomes might differ under elections with higher and more equal turnout is exceedingly complex. For one thing, even if data show non-voters to be fairly similar on average to voters, the non-voters who would decide to

²⁶ Notably, even the more skeptical studies do generally find evidence of differences between voters and nonvoters, but they characterize these differences as slight and insufficient to alter results except in very close elections (Wolfinger and Rosenstone 1980, 111; Bennett and Resnick 1992, 799; Highton and Wolfinger 2001, 185; Sides et al. 2008, 523). Moreover, almost all of these studies examine presidential elections; Nagel and McNulty analyze senatorial and gubernatorial races, and they do find evidence of turnout effects in non-presidential years (Nagel and McNulty 1996, 785). Similarly, Citrin et al. find in senatorial elections that “there are indeed meaningful differences in the partisan leanings of voters and nonvoters,” emphasizing that their result at least partially “departs from...previous scholarship maintaining that universal turnout would make no political difference” (Citrin et al. 2003, 88).

participate under higher turnout might not necessarily represent non-voters on average (Grofman et al. 1999, 371). More fundamentally, the overall political context could be altered significantly if politicians and parties changed their campaign strategies in response to new patterns of turnout (Lijphart 1997, 4). Attempting to extend the causal chain from elections through to policy outputs presents additional analytical challenges. Furthermore, even if the prevailing wisdom proved correct about turnout effects in major elections, scheduling state or local elections separately, which results in greatly reduced turnout, makes it more likely that the preferences of non-voters might differ significantly from the preferences of the electorate (Hajnal and Lewis 2003, 661; Hajnal and Trounstein 2005, 517; Streb 2011, 13; Sides et al. 2008, 536). There is therefore more reason to worry that extremely low turnout in separately scheduled “second-order” elections may have critical consequences for politics and policy (Anzia 2012).²⁷

The timing of second-order elections—which, as indicated previously, is an important factor in the allocation of substantive voting costs—represents another key element of institutional design having both empirical and normative implications (see Dunne 1997; Wood 2002, 228; Meredith 2009; Anzia 2014, 3-4). One might thus generally ask, are there good reasons for instituting voting rules and procedures that elicit different turnout levels in elections at different levels of government? This directly implicates the larger question of whether substantive costs should ever be used to regulate the *quality* of the electorate. Perhaps the scheduling of local elections separate from higher-order races might seem reasonable even to those who reject the imposition of

²⁷ But see Berry and Gersen (2011, 129), failing to find significant policy effects from timing of school board elections in California, and indicating that these findings “support the conventional view that outcomes would not change importantly if everyone voted.” Elsewhere, however, these same authors express a somewhat different view, stating, “Off-cycle elections generate systematically lower turnout[,] and shifts in electoral timing produce identifiable shifts in voter participation and ultimately changes in public policy” (Berry & Gersen 2010, 55).

administrative burdens for the ostensible purpose of increasing voter competence. Indeed, one of the main reasons cited by state and local officials against consolidating their elections with federal races is that “only those citizens who care enough to inform themselves will vote” in these elections (Streb 2011, 15).²⁸

In sum, as a policy matter, and as a matter of legal theory and doctrine, how substantively easy or hard should it be to cast a ballot? Should the logistics of voting be set up in such a way as to encourage participation, discourage it, or perhaps somehow treat it neutrally? As should be clear by now, the relationship between substantive voting costs and voter turnout raises crucial issues for both empirical political science and for political theory. As indicated, however, while there has been abundant research into the practical effects of electoral institutions, there has been far less examination of their normative foundations. Moreover, even empirical political scientists may acknowledge that the notion that “turnout matters” should not necessarily depend on evidence of institutional effects on political outcomes (Leighley and Nagler 2014, 156).²⁹ Much of the empirical literature thus seems implicitly to assume that higher and more demographically equal turnout is normatively preferable. This assumption may be justified by participatory democratic theory, but it does require justification, and other schools of democratic thought may in fact challenge that premise—a challenge that must

²⁸ Streb himself concludes that “while in a democracy the quality of a person’s vote is always a concern, separating state and local elections from federal elections is not a guarantee of smart voting; and it is not a reason to purposely lessen voter turnout” (Streb 2011, 15). See also Ortiz (2004, 221), discussing—though ultimately rejecting—the argument that raising voting costs by holding local elections separately ensures more competent voting. But see Orr (2013, 426), discussing the “deliberative benefit” of scheduling elections separately for different levels of government. It is worth noting that separate scheduling of local elections was originally a Progressive Era reform, among other reforms made in the name of “good government” in the early 20th century (see Anzia 2012a, 24; Bernstein 2014).

²⁹ According to Leighley & Nagler (2014, 156), “The substantive conclusion that it does not matter who votes seems especially inconsistent with our basic beliefs about how representative politics work.”

be answered. To begin doing so, the focus now shifts from the substantive costs of voting to the costs of information.

3) INFORMATION COSTS

As indicated previously, the information costs of voting are the evaluative and decisional burdens associated with examining the options on the ballot and choosing how to vote. Any discussion of information costs generally begins with the well-known theory of rational ignorance, which Downs first formulated as follows:

[I]t is irrational for most citizens to acquire political information for purposes of voting.... The probability that [one's] vote will determine which party governs is so low that even a trivial cost of procuring information outweighs its return. Hence ignorance of politics is...a highly rational response to the facts of political life in a large democracy (Downs 1957b, 147).

The theory of rational ignorance thus emerged from the problem associated with a purportedly minuscule value of p in the voting calculus—the so-called “paradox of nonvoting,” which is grounded in the assumption that an individual vote matters to an election outcome only to the extent that it might be *pivotal* to breaking (or making) a tie—a vanishingly small probability in even the most competitive of large elections (Owen and Grofman 1984). According to Downs, this results in a collective action problem that deters acquisition of the information needed for the public good of democracy, because “it is rational for every individual to minimize [the] investment in political information, in spite of the fact that most citizens might benefit substantially if the whole electorate were well informed” (Downs 1957b, 148).

This application of the pivotal vote problem to information costs is often cited as a critical weakness of mass participatory democracy. Russell Hardin, for example, indicates that while many people seem to overcome the pivotal vote problem with respect to participating, “the problem of investing in enough knowledge to vote intelligently may well be the more fundamentally serious issue in democratic theory” (Hardin 2002, 225).³⁰ Public choice scholarship in particular has seized on the pivotal vote problem as a major obstacle to rationally informed decision-making in politics. Brennan and Buchanan have famously argued that if individual votes in large elections have no instrumentally efficacy, there is no logical connection between electoral choices and voter preferences over outcomes, which provides “widespread scope for electoral irrationality of the most basic kind” (Brennan and Buchanan 1984, 199). Ilya Somin extends this argument by applying rational ignorance even to altruistic voters with idealistic motives, concluding that the lack of incentive to become well informed “stands as a particularly imposing obstacle to effective democratic control of government” (Somin 1998, 436). Bryan Caplan appears to take rational ignorance to its logical conclusion in his account of “rational irrationality,” which asserts that since individual votes have no instrumental efficacy, it is actually rational to vote based on any beliefs that are psychologically satisfying, even if such beliefs happen to be based on clear factual errors (Caplan 2007, 123-126). Notably, however, these concerns about the quality of electoral participation are not exclusive to scholars in the public choice tradition of economic approaches to politics (see Hauptman 2001). James Fishkin, for example, also relies on pivotal theory and rational ignorance in his criticism of mass electoral democracy for its failure to meet deeper deliberative ideals (Fishkin 2009). As a result of the Downsian collective action

³⁰ Hardin traces the modern treatment of the information problems of mass democracy not only to Downs, but also to Schumpeter (Hardin 2002, 217). See also Somin (2006, 256-257), indicating that rational ignorance “poses a major challenge to normative theories of democratic participation.”

problem associated with acquiring political information, Fishkin concludes that “if we include everyone, it seems that we are unlikely to get a thoughtful public input from our democratic institutions” (7).³¹

Chapter 1 of this dissertation argued for rejecting pivotal theory and resolving the apparent paradox of instrumentally motivated turnout through an alternate interpretation of the causal efficacy of individual votes—an interpretation that allows the probability of an individual vote contributing to an election outcome to be quite high, at least in competitive elections. This argument, if accepted, fundamentally undermines the conventional theory of rational ignorance, which as indicated, is founded upon the existence of the pivotal voting problem.³² However, even if ignorance about politics were no longer considered perfectly rational in theory, empirical evidence of ignorance about politics might continue to pose a serious normative problem. Accordingly, the deeper difficulty for democratic theory, as Jeffrey Friedman suggests, is not that political ignorance is rational, but simply that it is prevalent—and not as a result of calculated decisions to remain under-informed about politics, but more likely as a direct result of the profound complexity of modern government (Friedman 1998, 407-409; 2013b).

The literature describing the political knowledge of average Americans is vast and enduring, and the evidence of informational deficiencies appears overwhelming at first glance (e.g. Berelson 1952; Converse 2006 [1964]; Luskin 1987; Delli Karpini and Keeter 1996; Somin 2004). There are generally two schools of thought, however, in

³¹ Fishkin also apparently agrees with Somin that rational ignorance is a problem even if voters have altruistic motives, stating, “This problem—that there is little rational motivation for citizens to deliberate about public issues in mass democracies—does not depend on citizens being selfish or merely self-interested” (Fishkin 2009, 49).

³² At the very least, a rejection of pivotal voting theory limits the application of rational ignorance to situations where the cost of acquiring information outweighs other elements of the calculus, such as where the pB term is valued at zero because an election is perceived to be uncompetitive and/or because the expected benefit differential between candidates is negligible.

interpreting the implications of this evidence for democratic theory: The first approach argues that democracy can succeed notwithstanding these apparent deficits of information, either because individuals supplement their low levels of knowledge using various forms of cues or heuristics (Brady and Sniderman 1985; Popkin 1991; Lupia and McCubbins 1998; Druckman 2001; Marietta and Baker 2007), or because some form of collective rationality or aggregate efficiency can emerge despite informational deficiencies at the individual level (Feld and Grofman 1988; Page and Shapiro 1992; Wittman 1995; Landemore 2013). The second school of thought takes the abundant evidence of shortcomings in political knowledge as a more critical concern for the functioning of democracy, and resists the notion that information shortcuts or any “miracle of aggregation” could eliminate the problem of missing—or mistaken—information (Bennett 1996; Kuklinski et al. 2000; Somin 2006; Caplan 2007). Thus, while the first approach essentially concludes that the information costs of mass democracy are not effectively that high, the alternative view holds that these costs are in fact quite substantial, and likely prohibitive in many cases.

The conclusions of the more pessimistic school are bolstered by evidence of “information effects” in survey responses, suggesting that significant deficits in political knowledge have practical consequences for public opinion and voting decisions, and ultimately on public policy outcomes (Delli Karpini and Keeter 1996, 219; Bartels 1996; Gilens 2001; Althaus 2003; Arnold 2012).³³ On the other hand, research in political

³³ These studies generally simulate an objective standard of fully informed opinion—or so-called “enlightened preferences”—by imputing the surveyed opinion of highly informed individuals to demographically similar individuals with less information. Note that the simulation of enlightened preferences may be subject to criticism on methodological grounds, as Althaus himself cautions against overconfidence in its results, stating, “The simulation assumes that the opinions of the relatively more knowledgeable... indicate the ‘correct’ views, against which all other opinions of similar people should be judged. It is easy to see where this assumption might prove untenable” (Althaus 2003, 141). Along these lines, Lau and Redlawsk (1997) evaluate vote choice by a more subjective individual standard, and they find about a 75 percent rate of “correct” voting in presidential elections.

psychology may provide reasons for doubting the pessimistic view. A fundamental challenge comes from the psychological concept of *ambivalence*, which was discussed in Chapter 2. If individuals may sometimes simultaneously hold conflicting opinions, this state of uncertainty could appear as an absence of clear preferences or “true attitudes” on political issues, which would result in survey response patterns that seem to indicate lack of knowledge, but that in fact reflect merely ambivalence (see Zaller and Feldman 1992; Lavine 2001). In contrast to the pejorative overtones of choices labeled “incorrect” or “uninformed,” the concept of ambivalence is more nuanced and less normatively charged, reflecting the realistic challenge of “reconciling strongly held but conflicting principles and considerations simultaneously present in the political culture” (Lavine 2001, 915).³⁴ Similarly, the psychological model of “on-line” information processing (Lodge et al. 1995), in which individuals maintain a running tally of cognitive assessments, suggests that inability to recall factual information in response to survey questions does not necessarily imply the incapacity for informed choice or responsive political judgment.³⁵ These psychological constructs may raise their own normative problems, but they are not problems of low knowledge resulting from high costs of information; they are instead problems that arise in information-rich environments as well.³⁶

³⁴ Notably, even the “voting correctly” approach of Lau and Redlawsk (1997) remains susceptible to the problems raised by the possibility of ambivalence.

³⁵ There are also other methodological objections to the measurement of information effects through analysis of survey responses, which may underestimate the quality of actual knowledge (see e.g. Achen 1975; Mondak and Davis 2001; Prior and Lupia 2008; Levendusky 2011); but see Luskin and Bullock (2011), responding to some of these objections.

³⁶ In fact, in formal analytical terms, increased access to political information will not always yield improved vote choice, as additional information could reduce the perceived benefit differential between ballot options, thereby making choice less efficient (Tollison and Willett 1973, 63); see also Prato and Wolton (2016).

Overall, these arguments about information and its effects can be framed as fundamental debates about electoral competence and the role of voters in a mass democracy, as reflected in these conflicting interpretations of the implications of political knowledge levels for democratic functioning. As with substantive costs, the real and perceived costs of information may exhibit significant variation, but there is a more basic measurement problem caused by an underlying normative uncertainty about what the informational costs of voting actually entail: What kind of information—and how much of it—is necessary in order to cast a “well-informed” vote? Is there an independent standard by which to judge the quality of a voting decision and to assess whether it is sufficiently reasonable or well enough informed? To address these questions, the essential elements of democratic competence—which the political knowledge and information effects literatures often seem to take for granted—must be defined with greater clarity.³⁷ This requires a deeper investigation into underlying interpretations of the meaning of voting in democratic information theory.

4) INFORMATION THEORY FOR REPRESENTATIVE DEMOCRACY

Near the dawn of the modern-day empirical findings of sizable political information deficits among the American public, E. E. Schattschneider stated, “The significance of this widespread ignorance about public affairs depends largely on what we think democracy is” (Schattschneider 1960, 135). Likewise, conceptions of democracy are inextricably tied to characterizations of the information costs of voting, since the amount and type of information needed to make competent voting decisions

³⁷ There are some who oppose use of the normative concept of democratic competence, arguing that it is either too elitist or too vague to be theoretically useful (Smiley 1999; Weissberg 2001; Lupia 2006). Others, however, assert that the concept of competence may be useful for institutional design, particularly if it is defined explicitly (Elkin 1999; Kuklinski and Quirk 2001).

depends on basic interpretations of the meaning and purpose of democracy (Kelly 2012, 61). It is therefore important to begin by observing that in contemporary democratic theory and practice, and particularly in the American democratic tradition, the primary institutional focus is on *representative*, not direct, democratic forms (see e.g. Levinson 2012, 76; Serota and Leib 2013, 1599).³⁸ Representative democracy may in fact be the archetypal institutional response to the perceived problem of mass democratic competence. When James Madison advocated for an American *republic*—by which he specifically meant, “a government in which the scheme of representation takes place,” his famously stated purpose was “to refine and enlarge the public views by passing them through the medium of a chosen body of citizens” (Madison 2001 [1787], 46). Madison thus believed that the body of elected representatives would tend to make decisions “that are more consonant to the public good than if pronounced by the people themselves” (id.). This of course does not mean that elected representatives will always make decisions that are fully consonant with the public good, as Madison readily admitted (47), but the ideal model is one that aims at improving democratic competence through this institutional “scheme.”

Nevertheless, there may be reasons to doubt whether the masses can ever acquire sufficient information to achieve democratic competence even under an ideal representative democracy. There are of course many different ways of understanding the meaning and function of political representation (Pitkin 1967; Mansbridge 2003), and these distinctive understandings may entail different standards of knowledge requirements for democratic competence (Disch 2011). According to Ilya Somin, voters

³⁸ A discussion of the information costs of direct democracy is beyond the scope of this chapter, but it may generally be seen to have higher informational requirements, so that if voters are seen as incompetent for electing representatives, they could *a fortiori* be presumed incompetent for direct democracy (Burnett & McCubbins 2013, 1558).

are generally incompetent for representative democracy even under representational theories with the least demanding informational requirements (Somin 2013, 38). The theory of retrospective voting—in which voters are seen as empowered simply to decide whether to retain or replace incumbents—is the least demanding representational theory in Somin’s view; however, he argues that considerable political knowledge is required to competently judge the performance of elected officials—including, he says, at least a basic understanding of the formation of public policy, and the ability to accurately evaluate particular policy implementations (40-41). Likewise, Somin contends that the second least demanding theory—Burkean trusteeship—requires voters to have basic knowledge of the functions of particular government offices and the qualifications of candidates for those positions (43-44).³⁹ In a similar vein, Russell Hardin discusses the high informational demands of effective representation, stating, “If we wish to assess the morality of elected officials, we must understand their function as our representatives and then infer how they can fulfill this function” (Hardin 2004, 76). For informational skeptics like Somin and Hardin, doubts about democratic competence are not allayed by the Madisonian scheme of representation. Arguably, this is because they subscribe—in the tradition not of Madison, but rather Rousseau—to what William Riker calls the

³⁹ Although Somin’s ordering of representational theories has Burkean trusteeship with greater knowledge requirements than retrospective voting (38), the level of policy understanding he indicates is necessary for competent retrospective voting arguably seems more demanding than the requirements of trusteeship theory, which he indicates is “concerned more with the personal qualities of political leaders than with their policies or issue positions” (44). Furthermore, Somin writes in a footnote that “few modern theorists fully subscribe to the Burkean trusteeship model,” citing Pitkin on the problematic assumption that representatives can determine the “‘true’ interests” of their constituents in an “‘objective’ and unbiased manner.” (213, n. 26) Pitkin indeed criticizes Burke’s model of representation for assuming that “political questions have right answers that can be found” through a process of “rational deliberation,” as Pitkin states that for most modern theorists, “political questions are inevitably controversial ones without a right answer” (Pitkin 1967, 189). However, Somin’s indication that trusteeship theory is concerned with the personal qualities of political leaders seems to challenge that characterization, and moreover, the assumption that right answers to political questions might be found by rational deliberation seems to be one that theorists like Somin would share, as discussed below.

populist interpretation of democratic voting; namely, that the popular will of the people should be embodied in its political representatives (Riker 1982, 11).

a) Riker's Populism and Epistemic Democratic Theory

According to Riker, it is only under the populist interpretation of voting—which subscribes to an ideal of representation in accordance with an identifiable popular will—that there is an objective standard for judging the quality or correctness of electoral outcomes (Riker 1982, 11). In contrast, under what Riker terms the *liberal* interpretation of voting, he states that “it is not assumed that the electorate is right,” nor is there any basic assumption of “popular competence” (10). In place of voting outcomes expressing the popular will, Riker’s liberalism requires only that “the electorate can change officials if many people are dissatisfied or hope for better performance” (11).⁴⁰ For populism to function, there is a need for a reliable mechanism to aggregate individual preferences into an expression of the popular will; however, Riker’s essential assertion is that no voting system is able to perform this aggregation function fairly and accurately, and he thus

⁴⁰ Schattschneider employs an apparently similar distinction, contrasting what he calls the classical ideal of “government by the people” with democracy defined as “a political system in which the people have a choice among alternatives created by competing political organizations and leaders” (Schattschneider 1960, 141). For an updated version of this theoretical dichotomy, see (Beerbohm 2012, 27-28), describing competing conceptions of democracy as “self-rule” versus “answerable rule.” Bruce Cain’s distinction between populist and pluralist democratic design strategies may also be seen as generally tracking this conceptual distinction, particularly with regard to his understanding of the goal of populism as “perfect representation of individual preference” (Cain 2015, 200). Achen and Bartels also distinguish between populist democratic theories and models based on “leadership selection,” but they conclude—along with Somin and Hardin as discussed above—that empirical research casts doubt on the prospects of individual-level competence even just for choosing leaders (Achen and Bartels 2016, 2-4). Instead, Achen and Bartels advocate for democratic theory based in what they consider more “realist” conceptions of group identity (311-313). Riker’s dichotomy might also be seen as corresponding somewhat with the classical liberal versus civic republican paradigm, to the extent that republicanism may be viewed as supporting the existence of a “substantive common interest or good,” while “liberal pluralism” is associated with the denial of any objectively identifiable common interest (Michelman 1989, 445). However, Michelman’s more nuanced framework of conceptions of democracy in constitutional discourse shows that the traditional republican versus liberal dichotomy does not necessarily track other dimensions of normative distinctions (450-452). Riker’s liberalism should therefore not be equated with liberalism more generally, nor his populism with civic republicanism.

argues that populism must be rejected, “simply because we do not and cannot know what the people want” (Riker 1982, 238).⁴¹ The more important point for present purposes, however, is that rejecting populism also has the effect of alleviating concerns about democratic competence that arise from apparent deficits of political information. Riker actually goes as far as arguing that even ostensibly random decision-making by voters “does not really matter for the liberal hope of preventing an official’s abuse of office and authority” (243).⁴² What remains therefore is clearly a very minimal vision of democracy, as Riker readily admits: “The kind of democracy that thus survives is not, however, popular rule, but an intermittent, sometimes random, even perverse, popular veto” (244).

This limited conception of the meaning and purpose of democracy, which clearly echoes the minimalist theory of Joseph Schumpeter (2003 [1942]), has been considered unsatisfactory to many—if not most—democratic theorists. As Coleman and Ferejohn have argued in response to Riker, if conclusions about the meaninglessness of voting outcomes were taken to their logical extreme—if the removal of officials were really random—it would in fact seem to threaten the foundations even of Riker’s minimalist liberal democracy (Coleman and Ferejohn 1986, 22).⁴³ A purely random decision method—such as rule by coin toss—might be a *fair* way of making decisions, but it would not be a *democratic* procedure, which presumably aims at better than random

⁴¹ Riker’s overall argument employs the voting paradox associated with Arrow’s theorem (not to be confused with the paradox of “nonvoting” associated with pivotal theory), along with the existence of other opportunities for manipulating the conditions of social choice, to conclude that “the outcomes of voting are not necessarily fair and true amalgamations of voters’ values,” and that in fact “these outcomes may be meaningless” (Riker 1982, 233).

⁴² “Indeed,” states Riker, “an official who faces an electorate knowing that it sometimes works randomly and may ‘unfairly’ reject him or her has a powerful motive to try even harder to avoid offending voters” (243).

⁴³ More substantively, Coleman & Ferejohn challenge Riker’s conclusion that voting outcomes are meaningless, and they argue that formal problems such as cycles and agenda-based control are in practice less common and pervasive than Riker assumes (Coleman and Ferejohn 1986, 15, 23-24). See also Grofman (1993, 1545-1546).

outcomes (Estlund 2008, 6).⁴⁴ Coleman and Ferejohn thus argue that democratic legitimacy cannot be purely procedural—there is a need for some substantive content or instrumental purposes in order for democratic decision-making to have any real normative meaning (Coleman and Ferejohn 1986, 22).

Accordingly, Coleman and Ferejohn defend populism from Riker’s challenge by proposing the possibility of an “*epistemic*” theory of democracy, in which voting is seen as “consisting in *judgments*—which can be either true or false—rather than in expressions of preferences—which are neither” (Coleman and Ferejohn 1986, 15-16). Joshua Cohen elaborates this epistemic interpretation of voting, stating that it consists of three basic elements: 1) “an *independent standard* of correct decisions”; 2) “a *cognitive* account of voting,” in which individuals vote in accordance with beliefs about the given standard of correctness; and 3) “an account of *decision-making* as a process of the adjustment of beliefs...in light of evidence about the correct answer that is provided by the beliefs of others” (Cohen 1986, 34). Cohen thus concludes, “What the epistemic populist claims is that, when there is a general will, and public deliberation is guided by the principles that define that will, the decisions of majorities about which policies to pursue can provide good evidence about which policies are in fact best” (id.).

Pessimists about the prospects for democratic competence due to informational problems can be seen as generally committed to this epistemic interpretation of voting, which assumes the existence of correct—or at least better and worse—answers to political questions. These theorists therefore tend to reject “normative skepticism” and instead presume the existence of “independent standards against which we must evaluate

⁴⁴ Note that pessimists about democratic competence worry that voting decisions may be *worse* than random, since they may be biased toward irrational and clearly incorrect views (see Caplan 2007, 2).

the correctness of our judgments” (Kelly 2012, 36).⁴⁵ Moreover, epistemic assumptions may extend to democratic optimists as well. Hélène Landemore, whose work is generally more confident about the prospects for democratic competence, retains an epistemic assumption affirming that “at least for some political questions there are right or correct answers” (Landemore 2013, 208).⁴⁶ The roots of this epistemic assumption can likewise be seen in more optimistic analyses of democratic competence appealing to the Condorcet jury theorem, which requires as a basic premise the existence of an objectively correct answer to whatever question is put to a vote (Grofman and Feld 1988, 569).⁴⁷

This confidence of epistemic approaches to democracy in the existence of more or less correct answers to political questions—of essentially true or false political ideas—leads to institutional approaches that emphasize informational issues, which fall generally under the umbrella of deliberative democratic theory.⁴⁸ James Fishkin’s work typifies this approach, distinguishing between institutions designed to express “raw” public opinion formed under “debilitated conditions,” and institutions that facilitate a more “refined” expression of “deliberative public opinion” (Fishkin 2009, 13-14). Similarly, Cohen’s ideal deliberative procedure distinguishes between the institutional implications of voting

⁴⁵ In fairness, Kelly indicates only that independent standards for judging the correctness of decisions must exist “at least some of the time” (Kelly 2012, 36). Similarly, Coleman and Ferejohn state, “The epistemic populist begins by distinguishing between those electoral issues in which there exists a general will and those in which there is no reason to believe that there is a general will or disposition” (Coleman and Ferejohn 1986, 16).

⁴⁶ Landemore’s approach—which she terms “political cognitivism”—is particularly flexible in allowing for weaker and stronger epistemic approaches (213), and even for the possibility of an epistemic theory in which the standard of correctness is “socially and culturally determined” (217).

⁴⁷ The Condorcet jury theorem ensures that a majority voting decision of a large group will almost always reflect the “correct” answer to a binary question, assuming that voters have at least a 50 percent chance of identifying the correct answer, and each voter decides independently—and votes sincerely (Grofman and Feld 1988, 569-570). See also Landemore (2013, 71).

⁴⁸ The epistemic deliberative democracy discussed here may be distinguished from what Kelly calls “deep deliberative democracy,” a purely procedural theory holding that the process of deliberation is intrinsically valuable, independent of its effects on outcomes (Kelly 2012, 48). Kelly concludes that deep deliberative theory is fundamentally untenable since it deprives democracy of any substantive content (80).

under conditions of a commitment to providing “reasons persuasive to all,” and voting viewed as the aggregation “of non-deliberative preferences” (Cohen 1989, 23). Landemore’s deliberative theory, perhaps somewhat more flexibly, focuses on the epistemic appeal of inclusiveness and cognitive diversity, arguing that “deliberation among inclusive groups is likely to produce better results” (Landemore 2013, 90).⁴⁹

A potential problem with epistemic approaches in deliberative democratic theory, however, is that they generally fail to provide much support for broadly participatory institutions. This is perhaps most explicit in Fishkin’s “trilemma of democratic reform,” which describes three primary values that modern democratic institutions aim to express: 1) political equality, 2) deliberation, and 3) mass participation (Fishkin 2009, 32).⁵⁰ The “trilemma” arises because according to Fishkin it is impossible to simultaneously satisfy all three democratic values.⁵¹ The primary emphasis is on the apparent conflict between participatory and deliberative values—and more specifically, on the defects of what Fishkin terms “raw” public opinion under conditions of mass participation that lack adequate procedures for deliberation (47-52). While acknowledging the historical trajectory of democratic institutional development in the direction of expanding and equalizing the suffrage, Fishkin nevertheless laments how “opening up political processes

⁴⁹ Kelly is apparently somewhat more skeptical about the epistemic properties of deliberation, indicating that epistemic theories of deliberative democracy may be subject to challenges based on “framing effects and other cognitive pathologies” (Kelly 2012, 89). Much of the criticism of deliberative theory in fact emerges from an epistemic perspective, offering both empirical and theoretical arguments that deliberation fails to deliver on its promises of finding right answers (Thompson 2008, 498-499; Pennington 2010; Somin 2010).

⁵⁰ Fishkin later adds a fourth value, non-tyranny—which is concerned with limitations on majority rule and is said to apply not to the democratic process itself but to the outcome of that process (60).

⁵¹ See also Ortiz (2004, 211), indicating that conflict between the value of “thoughtful” choice and the values of broad and equal participation is the “paradox of mass democracy.”

to facilitate mass participation has had the unexpected effect of lessening the realization of...deliberation” (48).⁵²

It is easy to see why epistemic theorists are tentative about endorsing mass participation in elections, as there is indeed a certain contradiction in insisting that democracy should have strong epistemic properties, while at the same time endorsing participation by what appear to be severely uninformed and perhaps even irrational citizens. An extreme demonstration of this tension is evident in the work of Jason Brennan, who argues earnestly in favor of replacing universal suffrage with “a moderate epistocracy, in which suffrage is restricted to citizens of sufficient political competence” (Brennan 2011b, 700). Brennan’s proposal for restricted suffrage presumably falls beyond the pale of contemporary democratic norms, but in fact it seems to follow logically from the core assumption in epistemic theory of an independent standard of correctness. As Coleman and Ferejohn suggest in their account of epistemic theory, “The desirability of a voting rule will...depend on its reliability—the extent to which the collective judgments it generates converge with what is in fact the correct judgment” (Coleman and Ferejohn 1986, 16-17).⁵³ A certain ambivalence about mass participation is likewise detectable even in less extreme proponents of epistemic theory. David Estlund, for example, indicates that rule by the knowledgeable few could in principle confer more normative legitimacy than mass electoral participation, but he indicates that such an epistocracy should be rejected for procedural reasons arising from the inability to agree on “a justification that could be accepted by all qualified points of view” (Estlund 2008,

⁵² This is not to say that Fishkin advocates a return to reduced or restricted suffrage; rather, he aims to fill the epistemic gap in democratic institutions by incorporating more opportunities for deliberation (25-31). See also Ackerman and Fishkin (2004), advocating for a national holiday to facilitate deliberation prior to elections.

⁵³ Coleman & Ferejohn admit there are conceptual difficulties in identifying the reliability of any voting rule, but they argue that voting can still retain epistemic properties (17).

33). Landemore, on the other hand, provides substantive reasons against epistocracy (Landemore 2013, 52), but in order to ensure cognitively diverse deliberation she advocates a system of sortition in place of mass electoral participation, concluding that “random selection is preferable to elections as a selection mechanism for representatives” (117).

There is thus a real conflict between epistemically-based conceptions of deliberative democracy and contemporary notions of mass electoral participation. Without seriously entertaining arguments for suffrage restrictions, epistemic democratic theory could nevertheless make a reasonable case for higher substantive voting costs, and it might likewise offer general normative legitimation of lower turnout elections (see Rosema 2007).⁵⁴ The question then for participatory theorists is whether there can be a coherent alternative to epistemic theory: Is there any interpretation of voting capable of supporting the ideal of mass electoral participation without sacrificing democratic meaning? Epistemic theorists have proceeded as if it were self-evident that any non-epistemic interpretation of voting would be overly minimalist and therefore insupportable. Might there, however, be a meaningful theory of democracy that is able to avoid strong epistemic interpretations of voting? Is it possible to justify the notion that there are no right or wrong answers to voting decisions without drifting into pure proceduralism? Can institutions of broad electoral participation be embraced without completely sacrificing the democratic value of deliberation? In other words, might there be a solution to Fishkin’s trilemma?

⁵⁴ According to Rosema, low turnout may be a “blessing in disguise,” since those who do participate are likely to be more politically sophisticated and make “better” choices (612).

b) A Non-Minimalist Alternative to Epistemic Theory

Fishkin begins by asserting that there is no one unified conception of democratic theory, rather there are several competing theoretical approaches to understanding democracy. He thus divides prevailing theories into four categories of ideal types, labeled: 1) competitive democracy, 2) elite deliberation, 3) participatory democracy, and 4) deliberative democracy. According to Fishkin, the trilemma arises because none of these theories can simultaneously satisfy all the democratic values of participation, equality, deliberation, and non-tyranny (Fishkin 2009, 65-66).⁵⁵ If, however, there *were* a way to incorporate all of these values in democratic institutional design, this would not only resolve the purported trilemma, but it could also form the basis for a more comprehensive unified theory that effectively combines the four prevailing approaches. In fact, Fishkin's own analysis sets out a framework for constructing a more expansive theory along these lines. In an appendix entitled, "Why We Need only Four Democratic Theories," he argues that any attempt to satisfy all the democratic values is a "utopian" pursuit destined to fail, because it ignores the "difficult trade-offs" posed by the trilemma (198). However, the competing ideal theories that Fishkin outlines can in principle be seen as broadly consistent, and all four democratic values can arguably be combined into a coherently unified theory that does not warrant the pejorative designation of minimalism.

Fishkin's review of ideal theoretical types begins with competitive democracy, which he identifies as originating in Schumpeterian minimalism (66).⁵⁶ The basis of competitive theory is simply that democratic elections should provide opportunities for

⁵⁵ As indicated above, Fishkin adds a fourth democratic value of non-tyranny subsequent to his formulation of the "trilemma" (see *supra* n. 50).

⁵⁶ Fishkin also cites more recent examples of competitive theory in the work of Richard Posner and Ian Shapiro (211, n. 1).

peaceful alternation in government, and that there should be some basic constitutional restraints on government authority. Echoing Riker's rejection of populism, Fishkin states that under competitive theory, "to expect the will of the people to mean much, if anything at all, is a delusion" (67). According to Fishkin, the main democratic value that competitive theory satisfies is non-tyranny, but he states that the ideal type of this theory is best understood as integrating basic claims to equality as well. The first question in trying to outline a unified theory is thus whether competitive theory can also be interpreted in a way that integrates the value of *participation*, notwithstanding the fact that competitive theorists have been generally skeptical regarding mass participation, as Fishkin indicates (69).

Fishkin himself answers this question affirmatively, stating that a joint commitment to participation, equality, and non-tyranny "is best seen as a variant of competitive democracy that adds a concern for mass participation," which he concedes is "a reasonable alternative for anyone concerned with competitive elections" (200). In fact, Riker explains his theory of liberal democracy as based upon three principles: participation, equality, and liberty—which he states cohere together through a focus on voting as "the central act of democracy" (Riker 1982, 5).⁵⁷ Indeed, according to Riker, "The crucial attribute of democracy is popular participation in government" (id.). Under Riker's liberalism, whether a democratic outcome is "correct"—not epistemically, but in a sense of normative legitimacy—could thus crucially depend on high levels of participation. Under populism, as reflected in the epistemic interpretation of voting, low participation might be seen to engender a legitimate outcome if it represents an informed

⁵⁷ Riker's concept of liberty, which he associates with individual freedom and autonomy (Riker 1982, 6), does not exactly track Fishkin's value of non-tyranny, although there is clearly some resemblance. Riker states that constitutional restraints against tyranny are compatible with his theory of liberalism, and in practice probably necessary to it, although not strictly definitional (248).

decision that is more likely to be correct than it would have been had more citizens participated. However, when conceiving of democracy as a competition for mass approval, or avoidance of a popular veto, outcomes produced under conditions of low participation could be seen as lacking in normative legitimacy. This would of course be particularly true if increased participation might have altered the result, but even if outcomes are not dependent on turnout levels, competitive theory might still be interpreted to require high turnout to the extent that participation is seen as *constitutive* of democratic legitimacy, as opposed to merely reflecting an instrumental constraint (see Michelman 1989, 451).⁵⁸

What then remains in order to construct a more comprehensive unified theory of democracy on Fishkin's terms is only to incorporate the value of deliberation. Here it is important to note how Fishkin divides the ideal theoretical types emphasizing deliberation into two separate categories of "elite deliberation" and "deliberative democracy." According to Fishkin, elite deliberation is essentially just representative democratic theory in the Madisonian tradition, while the category of true deliberative democracy is reserved for deliberation "by the people themselves" in what appear to be more direct democratic forms (Fishkin 2009, 70-73). However, representative democracy with the value of deliberation satisfied mainly at the elite level is fully consistent with competitive theory, and it is also fully consistent with mass participation. Fishkin is critical of Madisonian theory as lacking in the value of political equality, arguing that it institutionalizes deliberation "*for* the people," but not deliberation "*by* the people," since it "does not offer each voter an equal chance of being decisive on substantive decisions" (73). However, the election of representatives surely does implicate important issues of

⁵⁸ Michelman states that the constitutive—as opposed to instrumental—value of participation has generally been associated with deliberative ideals in American constitutional discourse, but he indicates that this connection is not conceptually required (Michelman 1989, 452).

participatory equality, and it thus seems wrong to criticize elite deliberation on this basis, unless one means to reject representative democratic forms in their entirety. Furthermore, if deliberation is valued for its epistemic properties, shifting this function to elected representatives should seem attractive. Of course, epistemic problems may arise at the elite level as well, but representative assemblies may—at least in principle—be able to avoid these problems by serving as what Fishkin calls “deliberative microcosms” for making informed decisions about public policy.⁵⁹ In other words, Fishkin has not proved why deliberation “by” the people is an absolute necessity. Deliberation “for” the people does not exclude the possibility of “government by the people,” again, unless one means to question the foundations of representative democratic theory.⁶⁰

Incorporating the value of deliberation at the elite level thus allows for a coherent unified theory that comprehensively embraces all the democratic values identified by Fishkin. Nevertheless, the value of deliberation under this theory need not be isolated exclusively to the realm of elites. The existence of opportunities for deliberation by citizens at the mass level is certainly not inconsistent with a competitive/participatory approach to democratic theory, even when rejecting the epistemic assumption that voting decisions should be evaluated by an independent standard of correctness. The deliberative theory of Bernard Manin illustrates this well: According to Manin, the competing norms involved in political debate are not subject to an independent standard of correctness by which they can be judged either true or false; however, politics is “not reduced to pure arbitrariness because a norm can be more or less *justified*” (Manin 1987, 354). It is this

⁵⁹ This obviously echoes the Madisonian ideal of representation to “refine and enlarge the public view.” It also seems closer to the Burkean understanding of trustee representation, which as noted previously, Pitkin identifies with the epistemic assumption that “political questions have right answers” (see *supra* n. 39).

⁶⁰ However, it may be noted that Schattschneider indicates that a literal interpretation of the ideal of “government by the people” represents a mistake in democratic theory (Schattschneider 1960, 131, 136).

process of argumentative justification taking place in the public sphere that forms the basis for Manin's version of deliberative democracy.⁶¹ Manin stresses that this concept of deliberative legitimacy is consistent with the Schumpeterian understanding of democracy as a competition for political power, and with voting understood as a necessary aggregative mechanism to conclude the process of public deliberation (Manin 1987, 359-359).⁶² Furthermore, Manin's also suggests the need for high levels of participation in order to legitimate democratic decision-making, stating as follows: "The deliberative principle is both individualistic and democratic. It implies that *all* participate in the deliberation, and in this sense the decision made can reasonably be considered as emanating from the people" (352).⁶³ In Manin's view, it is essentially the participation of the masses—not the correctness of its decisions—that confers normative democratic legitimacy.

This discussion still begs the question of whether the masses can indeed be viewed as competent to engage in meaningful deliberation or voting in the context of representative democratic institutions. It remains to be seen whether information costs under the theory outlined here are low enough that most—if not all—citizens should be willing and able to pay them. In order to respond to skeptics about democratic

⁶¹ Note that Manin's conception of political deliberation, which he contrasts with Rousseau's view, opens the way for rhetorical forms of justification that may include value-based arguments about character and appeals to emotion, in addition to more rational modes of argumentation (Manin 1987, 346). In a similar vein, Yack (2006, 418) characterizes Aristotelian deliberation as relying on "appeals to character and emotion, as well as the giving of reasons." See also Chambers (2009) discussing the role of "deliberative rhetoric" in democratic politics.

⁶² Similarly, Richard Pildes states that "deliberation and competitive theories...are not logically incompatible" (Pildes 2004a, 691). Dennis Thompson likewise indicates that the deliberative value of informed decision-making is "no less central to conceptions that are often contrasted with deliberative theories, such as competitive theories" (Thompson 2013, 372). Thompson calls generally for a more "restrained" approach to deliberative theory in the context of election law (378).

⁶³ Manin actually indicates that what is required is not actual participation by all, but rather only "the right of all to participate in deliberation" (352). However, he does not clarify why the mere right to participate, even if unexercised by a substantial proportion of the citizenry, should be sufficient to ensure that a decision is legitimate. This issue is explored in detail in Chapter 4 on the *D* term of the calculus.

competence and to more fully justify participatory democratic institutions, greater specificity is needed regarding the minimum informational requirements of voting under this unified liberal democratic theory.

c) Epistemic Theory in its Right Place

Even if the basic assumption of the epistemic interpretation of voting—the existence of independent standards of correctness—is rejected, electoral decisions should still be expected to retain some epistemic qualities. Contrary to Riker, it seems clear that completely uninformed or random voting cannot be viewed as meaningful under any democratic theory. Accordingly, there should presumably be some minimum standard of cognitive capacity required to vote, which would justify, for example, the exclusion of children and adults judged lacking in basic mental abilities.⁶⁴

Furthermore, even competitive theorists generally accept the fundamental value of informed over uninformed decision-making (see Thompson 2013, 372), notwithstanding disagreement about what it means to be informed enough to make a competent voting decision. At the very least, voters should be making decisions based on what they *think* or *know* to be true. This might be described as a weaker, more proceduralist, epistemology of voting, which echoes Robert Talisse’s conception of “folk epistemology” (Talisse 2010). Talisse’s approach entails a minimalist conception of belief that demands only that

⁶⁴ This is a very low standard in epistemic terms. Prevailing legal rules generally state that persons may be judged incompetent to vote only if they “lack the capacity to understand the nature and effect of voting such that they cannot make an individual choice.” *Doe v. Rowe*, 156 F. Supp. 2d 35, 51 (D. Me 2001). Based on this standard, psychiatrists have developed a Competency Assessment Tool for Voting (CAT-V), which tests for basic knowledge of how elections work, and for the ability to formulate a preference between candidates based on stated policy positions (Appelbaum, et al. 2005). Note that although this standard of mental competence can justify the exclusion of young children up to an indeterminate age, the exclusion from the franchise of all minors under the age of eighteen, as well as the exclusion of non-citizens, and the disenfranchisement of those convicted of certain crimes, is not justifiable in epistemic terms.

“[w]hen we believe something, we believe that it is true, as established by what we *take* to be good evidence and sound reasoning” (284). This subjective epistemic standard sets a much lower bar for competent voting, with essentially no room for incorrectly held beliefs, for as Talisse points out, “thinking that a belief is false is inconsistent with maintaining that belief” (id.). This approach can therefore form the basis for a theory of democratic legitimacy that is “consistent with decidedly negative assessments of the deliberative capacities of ordinary citizens” (291). After thus discarding the stronger and more substantive epistemic premise regarding the existence of objectively correct and incorrect voting decisions, the boundaries of minimal competence may be extended much further, obviating many of the concerns of information-based skeptics.

Applying Talisse’s folk epistemology to an interpretation of voting under the unified theory of liberal democracy, voting should be viewed as an exercise of popular control over the substance of public policy, with the high informational demands that would be required by such control. Instead, the purpose of voting is limited to the practical problem of selection and rejection of political representatives. This approach thus builds upon Riker’s liberalism, but it seeks to extend and ground his theory in response to its epistemic critics. What is missing from Riker’s theory is a plausible conception of minimal epistemic standards for making decisions about whether to retain or replace representatives. An elaboration of the basis for such a conception is provided by some of those who have responded to democratic competence skeptics.

David Ciepley, for example, appeals to Max Weber’s understanding of democracy, which holds that “the general problem is not one of securing popular control, but of securing responsible and effective leadership” (Ciepley 1998, 192). Summarizing the knowledge requirements of this Weberian approach, Ciepley states that “what is most crucial is not that the electorate be a good judge of policy, but a good judge of political

character” (222). Ciepley outlines the basic qualities of political character in Weber’s view (215-220), but arguably these types of judgments must be allowed as idiosyncratic and perhaps somewhat opaque even to those making them. What are the essential requirements and qualifications for identifying a good political representative? In the emphatic words of Schattschneider, who would presumably agree with the Weberian approach, “This is a problem of *leadership, organization, alternatives and systems of responsibility and confidence*” (Schattschneider 1960, 138). This approach no doubt raises complex and challenging issues, but what should be clear is that judgments regarding political character and leadership in general are subjective matters that cannot be identified as objectively correct or incorrect.

Considerations of leadership and fitness for office are thus easily detached from strong epistemic conceptions of correctness, and such judgments do not necessarily entail high information costs, since decisions on these matters can often be made on a heuristic basis with relatively little information. Justificatory arguments within a context of conflicting norms and values—fitting Manin’s conception of a deliberative process that legitimates democratic decisions—are commonly made regarding these considerations. With control over policy thus left to government officials, the model of representation that emerges is much closer to Burkean trusteeship than the more populist delegate model in which representatives are expected to reflect the (majority) policy preferences of their constituents. Voters surely do need some information about candidates in order to vote competently under these weaker epistemic standards, but they might not need a great deal, and they almost certainly do not need as much as some of the competence skeptics have assumed. For example, voters may not need to understand the specific functions and responsibilities of various elected officials within the policy process, as Somin suggests is required by even the least demanding theories of representation (Somin 2013, 40-44). If

one trusts in the essential character and leadership capabilities of a candidate (or perhaps at least mistrusts that candidate less than the opposition), there is arguably much less need to understand the minutiae of that candidate's official activities and responsibilities if elected.

Moreover, it is not necessary to completely exclude substantive considerations of policy and issue voting from the weaker epistemology of voting under this representational theory. Policy positions themselves can be seen as projecting particular images of political character and styles of leadership, and they can thus serve—in a manner that does not demand high levels of political knowledge—as additional sources of information about electoral candidates. Furthermore, in the words of Morgan Marietta, “A policy proposal also reveals a value priority” (Marietta 2010, 317). Identifying the “value meaning” of proposed policies does not entail high information costs in terms of policy knowledge, for as Marietta states, “It is not incumbent upon citizens to translate their values into the appropriate policies if they are to be represented; they must only be able to translate proposed or enacted policies into the values they represent” (323). In this manner, beyond aiding in overall assessments regarding character and leadership, the positions of candidates and parties on specific policy issues serve as heuristics for identifying distinct sets of values. The deficiencies in political and policy knowledge cited by competence skeptics do not preclude informed voting for representatives under this system of “value representation,” which according to Marietta, “constitutes an answer to concerns about citizen competence, both empirically and normatively” (325). Absent an understanding of the details of how the political system functions, or the complexities of evidence for and against specific policy proposals, voters may nonetheless be competent to select their representatives based on sincerely held beliefs about the congruence (or lack thereof) of their own values with the values of candidates.

They may then trust their elected officials to formulate and implement public policies in a way that generally reflects these values—or they can seek to replace them at the next election.⁶⁵

Some information is therefore necessary for ensuring competent voting decisions, but it is the type of information that should be easily accessible to the mass of citizens, at least in most major elections. This does not mean that processing available information is necessarily easy, or that overall information costs will always be low. However, the location of the most significant costs in a voting decision could shift from problems of political knowledge to problems of political *attitude*. As discussed earlier, some of what appears as lack of political knowledge could actually reflect psychologically ambivalent attitudes of individuals who have conflicting preferences that they have difficulty resolving. Furthermore, as discussed in Chapter 2, political decisions can often involve complex ethical issues that generate conflict between competing values, so an attitude of ambivalence should not imply incompetence, especially from the perspective that there are no fundamentally right or wrong answers. Indeed, according to Manin, “It is unrealistic, and, more importantly, unjustified, to assume that individuals faced with the necessity of having to make a political decision already know exactly what they want” (Manin 1987, 363-364). Rather, through a potentially taxing process of not just public but also private deliberation,⁶⁶ someone with an ambivalent attitude might eventually reach a decision. There is thus no good reason to assume that ambivalent individuals are

⁶⁵ This is obviously an ideal theory to which there may be many objections, not the least of which are issues connected with representation of minorities and other problems of constituency definition, as well as issues of political responsiveness. However, these are more general problems in representational theory, and they pose serious difficulties for strong epistemic approaches as well. Moreover, the direction of democratic reform suggested by the approach advanced here will differ in many ways from the direction of reform under stronger epistemic approaches, as discussed in the following section.

⁶⁶ See Goodin (2000) for a discussion of the importance of an “internal-reflective” form of deliberation to enhance democratic functioning and legitimacy, as opposed the more common “external collective” deliberative approach (Goodin 2000).

incompetent to vote—in fact, one might argue that ambivalence is associated with increased competence to the extent that it might demonstrate less ideological rigidity and more openness to deliberation.⁶⁷ Manin thus states that an “attitude of constant questioning is surely the warranted one” from a perspective of deliberative legitimacy; yet he emphasizes that in the end, “decisions must be made and conflicts resolved” (Manin 1987, 362). The fact is that political decisions can be very difficult and complicated, and often there will be no easy answers.

In sum, the weaker epistemic requirements for voting that survive under this more expansive information theory for representative democracy are relatively minimal. This does not mean, however, that this theory should be described as minimalist, given how it embodies a jointly competitive, participatory, and deliberative vision of liberal representative democracy. Moreover, the unified theory advanced here allows for stronger epistemic assumptions regarding the (elite) deliberation of representative bodies, which is where the process of informed decision-making may appropriately be held to higher standards, and where detailed understanding of specific public policies is rightly demanded. Epistemic assumptions may also apply to constitutional level decision-making that sets limits on political outcomes based on substantive standards of justice or other

⁶⁷ Note that ambivalence also raises a potentially serious problem with regard to testing for minimal voting competence, and possibly with the underlying legal standard, at least to the extent it is interpreted to require a clear expression of choice. As indicated, the prevailing standard is that individuals may be judged incompetent only if they “lack the capacity to understand the nature and effect of voting such that they cannot make an individual choice” (see *supra* n. 64). The CAT-V tests the ability to “make an individual choice” by providing a hypothetical of two candidates with opposing positions on health insurance and government spending. Subjects who express a clear preference between candidates receive full credit, while subjects who express a choice that is “ambiguous or vacillating” receive only half credit, and subjects who state they are unable to make up their mind receive no credit (Appelbaum, et al. 2005, 2099). In addition to the fact that there could be areas other than health care policy and government spending in which subjects could have clearer preferences, the deeper problem is the possibility that ambivalent attitudes will be interpreted as evidence of incompetence. A better test might perhaps try to determine whether an apparent inability to choose is truly a product of failure to understand “the nature and effect of voting,” as the legal standard would seem to require, and not simply a failure to formulate a clear preference in response to a given hypothetical.

normative ideals that are presumed objectively true or correct. In both these areas there is arguably room for reform aimed at improving the epistemic quality of decision-making.⁶⁸ However, the place where strong epistemic assumptions should not be welcome, and where the correctness of individual decisions should not be open to question, is in the rules and procedures for voting, as discussed in the following section.

5) IMPLICATIONS FOR ELECTION LAW AND POLICY

As emphasized in the introductory section, and in the introduction to the dissertation, democratic theory is not just theoretical; it has important implications for the law of democracy and for policy choices that establish the rules and procedures for the administration of elections. This section discusses implications of the unified theory advanced above with regard to three areas of democratic electoral institutions: a) high-level constitutional design, b) Supreme Court election law doctrine, and c) electoral policy reform in general.

a) Constitutional Design Implications

To begin, the distinction between epistemic-populist theory and the unified theory of liberal democracy advanced here has important implications for constitutional design at the highest levels. A principal implication has already been alluded to earlier in discussing the information requirements of representative democracy, as follows: In seeking to ensure that the popular will is embodied in government decisions, the

⁶⁸ For example, proposals for campaign finance reform and other procedural regulations to limit the influence of moneyed interests on the political process can be viewed as principally aimed at improving the epistemic qualities of the deliberation of representatives. In constitutional decision-making, the focus is on disputes over the substance of epistemic standards of justice or moral truth that should be removed from democratic electoral control, although there of course deep disagreements about these matters. See also Invernizzi-Accetti and Wolkenstein (2017) on possibilities for deliberative reform within political parties.

epistemic-populist interpretation of voting—and deliberative democratic theory more generally—makes demands that are more closely associated with direct than representative democracy. Such epistemic-populist demands might be also consistent with representative institutions under a stronger, delegate model of representation, but the overall affinity for direct democratic forms can be seen clearly in Fishkin’s distinction between elite deliberation and his conception of true deliberative democracy with decision-making “by the people” (Fishkin 2009, 73). The unified liberal theory, on the other hand, is firmly grounded in representative institutions, and though it might not necessarily exclude some features of direct democracy, these could actually remain more open to doubts about mass competence.

Moreover, the theory advanced here is not only grounded in representative institutions, but it also clearly entails a specifically *electoral* vision of democracy, since it values and relies on mass participation to confer normative legitimacy. This precludes attempts to fashion epistemically ideal deliberative conditions through random selection of representatives—or sortition—in which a representative sample of citizens is selected by lottery to serve as legislators. The proposal to eliminate the election of political representatives, which has been considered specifically as a response to Fishkin’s trilemma (Levinson 2012, 129-130), is motivated largely by epistemic anxieties about the competence of the masses to elect the best representatives (see e.g. Landemore 2013, 117). Elections are necessary, however, under the theory advanced here, in order to satisfy the value of participation that confers normative legitimacy on the selection of representatives, which sortition fails to provide.⁶⁹

⁶⁹ From the perspective of improving the outcomes of representative assemblies, where the theory advanced here does allow for strong epistemic assumptions, a system of sortition could arguably be justified as a reform that works to “ensure that bad reasons are unable to affect a decision” (Stone 2009, 375). However, as Stone explains, sortition also ensures that potentially *good* reasons cannot affect a decision (382), which becomes problematic assuming the existence of political expertise, which a randomly

The inclination toward sortition is an example of the desire among deliberative theorists to manufacture democratic “microcosms” through systems of random selection, which Simone Chambers describes as an overall approach in which “the mass public is abandoned in favor of mini-publics” (Chambers 2009, 324). This is deeply problematic, according to Chambers, for the belief that such randomly selected mini-publics provide the only opportunities for “genuine” deliberation implies a rejection of the “broader democratic public sphere as a place to pursue reasonable politics” (330-331). In this sense, deliberative theory—with its epistemic-populist interpretation—can be seen as a theory that “moves the heart of democracy away from the vote” (Chambers 2003, 311). In contrast, the unified liberal theory, which views elections primarily as competitive mechanisms for more or less reasonable decision-making about political power and leadership, allows for a stronger normative embrace of broad electoral participation, and thus brings the “heart” of democracy back to the vote, where it arguably belongs.

Furthermore, this theoretical approach also tends to weaken arguments on the merits of “foot voting” over “ballot box voting” (Somin 2013, 114), which likewise seems to discount the foundational value of electoral participation. Somin’s argument on this point in fact relies heavily on epistemic conceptions of mass ignorance and incompetence, and on (see 121-126).⁷⁰ Responding to political conditions by moving to another jurisdiction—if feasible—certainly has its place in an liberal democratic society,

selected citizen is likely to lack. This raises complex issues beyond the current scope, but it seems safe to conclude that deliberative deficiencies in current representative institutions might be addressed by other reforms (see *supra* n. 68), short of disbanding them and moving to a system of sortition. See also Chapter 4 (n. 80 and accompanying text) for a discussion of how sortition fails to account for voting as an expression of popular sovereignty.

⁷⁰ Somin bases his argument on the purported disincentive for information acquisition associated with the pivotal voting problem and the theory of rational ignorance (121). Somin’s further arguments for a more limited national government with increased decentralization of power (139-143), as well as his arguments in favor of strong judicial review (155-164), are beyond the scope of this chapter, but they also rely heavily on questionable epistemic assumptions of mass ignorance and incompetence.

but foot and ballot box voting should not be viewed as “realistic alternatives” to one another, as Somin frames them (120). Opportunities for voting with one’s feet might indeed be a valuable complement to electoral democracy, but the primacy of electoral participation should not be minimized based on dubious assumptions of mass democratic incompetence.

b) Implications for Election Law Doctrine

The unified theory’s emphasis on the essential value of mass electoral participation, with its rejection of strongly epistemic interpretations of voting, has important implications for election law issues relating to the substantive costs of voting. As indicated in this chapter’s introduction, most normative theories in election law scholarship are motivated by structural approaches aimed at second-generation voting rights issues, which generally fail to provide strong foundations for the protection of an individual-level participatory right in cases involving claims of vote denial.⁷¹ Some election law scholars have expressed skepticism about enforcement of the right to vote using traditional individual rights analysis, and have argued explicitly against the notion that voting costs should be reduced in the name of participatory interests backed by individual-level claims (Elmendorf 2008; Flanders 2013).⁷² What is largely missing is a

⁷¹ In fact, the fundamental value of participation may be seen as contested in American constitutional jurisprudence. Tushnet, for example, has argued against the claim that “participation is the basic value embodied in the Constitution,” and more generally against “enshrining participation in a constitutional theory” (Tushnet 1980, 1046, 1048). Michelman has observed that while “constitutive valuations of political participation rights” are present in the Supreme Court’s election law jurisprudence, such values are “never unanimously and always obliquely” suggested (Michelman 1989, 459).

⁷² According to Elmendorf, courts should adopt “an expressly structural understanding of the right to vote, while scaling back the individual right to vote free from burdens that are not shared by others” (Elmendorf 2008, 644). Flanders states, “Someone who is subject to inconvenience or delay is not being denied his right to vote; he still has the ability to participate. So there is no violation of the fundamental value of participation” (Flanders 2013, 65). But see Douglas (2013, 83), stating, “The broader concept of voting and participation as a foundational right places an affirmative duty on governments to create an easy voting process and avoid unreasonable obstacles, even if the barriers impact everyone the same.” Douglas

coherent normative vision capable of supporting highly participatory electoral institutions with low substantive costs enforced through an individual rights-based approach to claims of vote denial.⁷³ Abandoning epistemic conceptions of voting in election law allows for such a participatory democratic vision.

The unanimous decision of the Supreme Court in *Lassiter v. Northampton Election Board*,⁷⁴ which affirmed the constitutionality of literacy tests based on the state's interest in promoting "intelligent use of the ballot," provides a classic example of the operation of epistemic theory in the rules for voting. While the Court has never explicitly overruled this case, Hasen expresses doubts about whether the constitutional ruling of *Lassiter* remains good law⁷⁵—apart from the prohibition of such tests under the Voting Rights Act of 1965 and subsequent amendments;⁷⁶ however, Hasen admits that a literacy test "is not wholly irrational if one views voting as a means for choosing the best candidates" (Hasen 2003, 83). Hasen himself indicates that such assessments of voting

indicates that voting rights should be seen as having both individual-level and structural components (84, n. 11).

⁷³ As indicated, Joseph Fishkin's (2011) work is a notable exception on this point (see *supra* n. 9). Note that none of the above is meant as an argument against structural theories of voting rights for cases involving vote dilution and gerrymandering, but as Fishkin indicates, cases of vote denial require the development of a theory of "how disenfranchisement harms individuals" (Fishkin 2011, 1332); see also Ellis (2014, 550), stating that current election law jurisprudence "fails to fully recognize a complete notion of harm toward the voter."

⁷⁴ 360 U.S. 45 (1959).

⁷⁵ Hasen indicates that the holding of *Lassiter* may have been implicitly overruled by *Kramer v. Union Free School District No. 15* (395 U.S. 621 (1969)), but he also suggests that the majority in *Kramer* may have intentionally avoided overruling *Lassiter* (Hasen 2003, 26, 64). Michelman also raises the question of whether literacy tests remain constitutionally permissible after the Court's invalidation of state poll taxes in *Harper v. Virginia Board of Elections* (383 U.S. 663 (1966)), and he associates the potential acceptability of literacy tests with a "deliberative-politics premise" that is "republicanly grounded" (Michelman 1989, 480-481).

⁷⁶ The original version of the Voting Rights Act of 1965 prohibited the use of any "test or device" in covered jurisdictions, and effectively precluded the use of English literacy tests nationwide with respect to individuals who had completed the sixth grade (Voting Rights Act (VRA) of 1965, §§4(a), (e)). In 1970 the prohibition on all tests or devices was made universally applicable for a period of five years (VRA Amendments of 1970, §201), and in 1975 the Act was amended to make permanent the nationwide prohibition on tests or devices (VRA Amendments of 1975, §102). The VRA is currently codified at 52 U.S.C. §10101 *et seq.*

competence are objectionable from the perspective that “politics is about the division of power among political equals; it is not a ‘test’ to find the ‘best’ candidate” (id.).⁷⁷ However, the meanings and implications of political equality are of course highly contested, and Hasen does not directly address the epistemic-populist arguments in favor of higher costs intended to ensure more competent voting. The unified liberal theory advanced here provides a much stronger foundation for overruling *Lassiter*, by explicitly rejecting the epistemic-populist conception of objective standards for voting decisions.

The status of the holding in *Lassiter* is probably a mostly hypothetical point, for it appears unlikely that competency exams will be reinstated in the U.S., notwithstanding calls from some quarters for instituting such qualifications to ensure a more informed electorate (Brennan 2011b; Harsanyi 2016).⁷⁸ However, the normative approach advocated here would not only exclude such seemingly reactionary reform proposals based in epistemic assumptions; it would also preclude arguments that higher substantive costs should be allowed for the purposes of improving the quality of democratic outcomes. More generally, this approach provides guidance with regard to the standard of review for vote denial cases and the constitutionality of various aspects of the “nuts and bolts” of election administration. A focus on low-cost access, enforced under traditional individual rights analysis, entails a perspective that requires the government to bear most of the costs of administering elections, and not to shift these costs unnecessarily to individual citizens in way that burdens their participation. This suggests a stricter

⁷⁷ Hasen elsewhere associates this distinction with liberal versus conservative perspectives on the franchise (see *supra* n. 12). However, it should be clear from the discussion of how deliberative theory is associated with epistemic-populist ideas that it is not just political conservatives who express concerns about the quality of voting decisions and the problems of political information deficiencies.

⁷⁸ David Harsanyi argues that voters should be required to pass the U.S. naturalization exam. Somin states that he is sympathetic in principle to these types of proposals to ensure intelligent voting, but he withholds his support due to practical concerns of bias in the implementation of any competency exam (Somin 2016; see also Somin 2013, 181-183).

standard of review for election administration than has been applied in the Supreme Court’s jurisprudence to date, which has generally allowed “reasonable nondiscriminatory restrictions” on voting if the state interest is judged on balance to be “sufficiently weighty.”⁷⁹

As scholars have pointed out, this balancing approach does not compel the type of strict scrutiny analysis conventionally applied to claimed infringements of fundamental rights, but rather appears to reflect a somewhat lower standard of review (Elmendorf 2007, 394; Douglas 2008, 151-157). By contrast, the normative approach to voting costs advocated here supports arguments for application of strict scrutiny to any administrative procedure that directly burdens the individual right to vote in a manner not narrowly tailored to meet a compelling state interest (Douglas 2008, 175-177). Importantly, this standard entails an emphasis on requiring the government to show that its voting regulations represent the least restrictive means of satisfying its compelling interests, and it would allow voters challenging these regulations to suggest alternative procedures for meeting those interests (186-195). Furthermore, this approach also supports arguments that a state or local government’s proffered interests in voting regulations should not be accorded much deference by courts (Douglas 2015; Schleicher 2016; Tolson 2015).

This of course does not mean that governments can never demonstrate that their voting regulations are necessitated by genuine concerns for administrative efficiency and/or electoral integrity. However, strict voter identifications laws, for example, are not likely to be justified under this standard if there are examples of other states that are able

⁷⁹ *Crawford v. Marion County Election Bd.* 553 U.S. 181, 190 (2008), citing standards articulated in *Burdick v. Takushi* 504 U.S. 428 (1992) and *Norman v. Reed* 502 U.S. 279 (1992), and the balancing approach set forth in *Anderson v. Celebrezze* 460 U.S. 780 (1983).

to meet those compelling interests using less stringent identification procedures.⁸⁰ Furthermore, the common practice in most states of closing the registration rolls prior to Election Day might not pass constitutional muster under a strict scrutiny test. Requiring prior registration undeniably represents a burdensome substantive cost—as is clear from empirical research demonstrating the turnout effects of EDR and SDR—and given that many states have successfully implemented these procedures, the added cost of requiring separate registration prior to voting would likely fail to meet the least restrictive means prong of the strict scrutiny test.⁸¹ At the very least, partisan manipulation of electoral rules will obviously never provide a compelling interest, and thus a clear showing of partisan intent should be sufficient to strike down any burdensome administrative practice (Foley 2013).

c) Implications for Electoral Policy Reform

In terms of electoral policy more generally, the work of scholars with a broadly participatory agenda receives much needed support from the rejection of epistemic-populist interpretations of voting. For example, Spencer Overton has argued for an “inclusionary vision of democracy,” which “values widespread participation and looks to remove criteria or conditions that act as barriers to such participation” (Overton 2001,

⁸⁰ See the dissenting opinion by Justice Breyer in *Crawford*, arguing to invalidate Indiana’s voter ID law based on evidence that other states had implemented less restrictive procedures (553 U.S. 181, 239-240 (2008)); also see Douglas (2008, 194).

⁸¹ The prevailing Supreme Court decisions on registration requirements are apparently still *Marsten v. Lewis* 410 U.S. 679 (1972), and *Burns v. Fortson* 410 U.S. 686 (1973), both of which approved a 50-day registration cutoff in the interests of administrative efficiency and fraud prevention. Given the considerable advancements in information technology since the early 1970s, combined with the successful implementation of EDR and SDR in several states, it would seem unreasonable to assert that any prior registration requirement would still be justifiable today, unless a state can show otherwise. The VRA provides for a maximum 30-day cutoff for registration in presidential elections (VRA Amendments of 1970, §202(d)). See also James (1987, 1617), arguing that any requirement of advance registration “is a *per se* restriction of the right to vote.”

474). He contrasts this approach with a “merit-based vision,” which he argues is problematic from a structural—rather than individual rights—perspective (480), but Overton seems never directly to confront the underlying epistemic assumptions of this “merit-based” approach to voting in democratic theory. Similarly, Tova Wang advocates for a “voter inclusion principle” in election law and policy on the basis that it “strengthens the very concept of democracy, both as a collection of institutions and for the individual voter” (Wang 2012, 10), yet again, she does not seem to elaborate any theoretical basis for favoring this participatory principle over strong epistemic conceptions. The unified theory advanced here can thus help to shore up the normative foundations for these types of policy arguments for participatory-based reforms that aim generally to ease access by reducing the substantive costs of voting.

More broadly, a stricter standard of judicial review for substantive cost allocations would likely lead to greater uniformity in election administration among states, perhaps paving the way toward new federal legislation of minimum standards for voting access, which might include nationally applicable identification and registration requirements (Hasen 2005, 969; Tokaji 2014, 100-104).⁸² In fact, federal legislation setting minimum

⁸² Hasen advocates for a federal system of government initiated universal registration, including provision of federal voter identification cards, while Tokaji advocates government initiated registration at federal and state levels, with federal mandates for online and same-day registration as well as uniform identification requirements. See also Hasen (2012, xii, 198), and Cain (2015, 198-200), arguing generally for national standards to provide more uniformity in election administration. Federal authority under the Constitution might actually be somewhat unclear in this area, given unresolved interpretative questions about whether administering registration and identification requirements should be viewed as part of regulating the “manner” of voting, and thus within the authority of Congress under the Elections Clause of Article I, Section 4, or rather a part of voter “qualifications,” which are subject to state control under Article I, Section 2 (and under the 17th Amendment). As Derek Muller explains in his analysis of *Arizona v. Inter Tribal Council*, the Court in that case confirmed that regulations related to voter registration are generally within the scope of “Times, Places, and Manner” in the Elections Clause, but the opinion left open the question of whether aspects of the registration process, such as requiring proof of citizenship, as well as identification requirements, could be seen as implicating the authority of the states to enforce voter qualifications (Muller 2014, 316-317, 319-320). See also HLR (2013, 203-207), discussing the Court’s failure in *Arizona v. Inter Tribal* to clarify the distinction between federal power under the Elections Clause and state authority to regulate voter qualifications. Note that even if an administrative procedure is

national standards for election administration has been suggested as a replacement for the anti-discrimination approach of the Voting Rights Act (Pildes 2006b, 756), and support for this new approach may be gaining force after the Supreme Court’s invalidation of Section 4 preclearance procedures in *Shelby County v. Holder*⁸³ (see Issacharoff 2013).⁸⁴ With regard to the various forms of convenience voting, including early and absentee options, the evidence on participatory effects is still preliminary and mixed, so continued experimentation at the state level may be justified notwithstanding a presumption in favor of expanding opportunities for low-cost access. Further state-level experimentation with government-initiated systems of “universal” or “automatic” registration may also be justified before attempting to implement this type of reform at the federal level (see Tokaji 2008, 502-504).⁸⁵ But the testing in the “laboratories of democracy” must at some point stop and take account of its experimental results (see Tokaji 2009a, 267), and the findings seem fairly clear at least with regard to EDR and SDR: Eliminating registration as a separate cost can improve participation without compromising efficiency or integrity.

The normative approach advanced here also has implications for electoral policy in second-order state and local elections, which are subject to more significant participatory problems, as discussed previously. The issues surrounding the timing of state and local elections are complex, but the mandate for low-cost participation should

considered a voter qualification, strict scrutiny could nevertheless trigger invalidation of state regulations on other constitutional grounds (see Tolson 2015, 206-212).

⁸³ 133 S. Ct. 2612 (2013).

⁸⁴ Issacharoff admits that federal authority under the Elections Clause is “untested,” but he indicates that there is “room for expansion of congressional intervention” in moving beyond the discrimination model of voting rights enforcement (Issacharoff 2013, 113). But see Bagenstos (2014, 2870-2875), arguing that “universalist” approaches to voting rights may fail to offer sufficient protection against racial discrimination.

⁸⁵ As Tokaji explains, a policy of “universal” registration involves a proactive undertaking of government responsibility for registering voters, while “automatic” registration involves citizens being registered—unless they affirmatively opt out—when they interact with a government agency (Tokaji 2008, 499, 503). As of this writing, automatic registration has been implemented in Oregon, and six other states and DC have authorized such policies (NCSL 2017). See also Kennedy et al. (2016).

generally argue in favor of concurrent scheduling with first-order races. Admittedly, in these elections there may be information deficits of the kind that could present real difficulties even under the weaker epistemic standards of the unified liberal theory, which as discussed, still requires some rudimentary information about the options on the ballot or reliable heuristics to substitute for such knowledge.⁸⁶ Particularly in local races with relatively little media publicity, and where party cues are generally absent, informational challenges may preclude the ability of citizens to make even basic judgments of character and leadership or to identify value-congruent candidates. However, in place of being satisfied with low and biased turnout, or relying on solutions like Somin’s that emphasize exit over voice, reform efforts could instead focus on policies designed to facilitate more informed voting in these elections. Elmendorf and Schleicher discuss a range of potential reforms along these lines, including the development of state and local party brands to provide partisan cues that do not simply mirror the positions of national parties, or employing substitutes for such cues, such as official endorsements or ballot notations to provide information outside the context of party affiliation (Elmendorf and Schleicher 2013, 409-419).⁸⁷

In sum, the interpretation of the information costs of voting under the unified theory of liberal representative democracy advanced here—with its rejection of strong epistemic standards in election law and policy—lends support to participatory-based reforms that aim to minimize substantive voting costs, and prohibits any efforts to improve the ostensive quality of electoral decisions by increasing these costs. Even

⁸⁶ See also the discussion of second-order elections and ways of addressing their informational problems in Section 4 of Chapter 2.

⁸⁷ Elmendorf and Schleicher’s approach reflects a more minimalist interpretation of electoral competence generally consistent with the approach of this chapter. They accordingly conclude, “The central function of election law is to help citizens aggregate what little information they have into collectively sensible judgments about whether the people running the government should continue at the helm” (431).

further, the emphasis on cost minimization suggests the policy option of reducing effective costs by introducing an incentive for voting, either in the form of a fine for unexcused abstention—as imposed by compulsory voting laws in some democracies, such as Australia—or with some form of compensation for turnout, which would have the same cost-offsetting effect.⁸⁸ Without delving here into the debate on this topic, the point of emphasis for now is that a primary argument against incentives to encourage voting involves concerns for the “quality” of increased turnout under these participatory policies (see Rose-Ackerman 1985, 966-967; Somin 2015; Will 2014).⁸⁹ The unified theory advanced here rejects that epistemically-based argument, and responds to the information-based criticism of compulsory voting with a coherent account of low information costs under representative institutions, thus defining a broader standard of voter competence that is more consistent with policies aiming better to realize a mass participatory vision of democracy.

Admittedly, the introduction of monetary incentives for voting seems like a fairly radical reform proposal, and presumably is not something that politicians—or even scholars—are likely to agree upon at any time in the near future.⁹⁰ There indeed seems to be very little room for reaching any consensus on electoral reform these days.⁹¹ In the

⁸⁸ In formal terms, both these approaches to cost reduction can be modeled by the D term of the voting calculus, and they are discussed in more detail in Chapter 4, along with the complex normative issues surrounding compulsory voting laws and other incentives for turnout.

⁸⁹ In arguing against a policy of compulsory voting enforced by fines for abstention, Rose-Ackerman asserts that when exercising the right to vote is “slightly costly,” voters are more likely to be well informed and make better choices. Somin similarly states that “mandatory voting would exacerbate the already severe problem of voter ignorance,” and Will writes, “If money is necessary to lure certain voters to the polls, those voters will lower the quality of the turnout.” Note that in response to Rose-Ackerman, Karlan indicates that concern for voters making “bad” choices raises “an epistemological difficulty” (Karlan 1994, 1474, n. 60).

⁹⁰ But see the discussion in Chapter 4, Section 5 regarding some practical possibilities for offsetting the costs of voting through implementation of a constitutional duty to vote.

⁹¹ For example, the bipartisan Presidential Commission on Election Administration, which was established by President Obama following the 2012 elections, was able to reach agreement only on some minor reforms aimed at reducing substantive costs, including online registration and early voting, and a standard

short term at least, the prospects for “getting from here to there in election reform” (Gerken 2009, 6) seem highly uncertain. In the longer term, a fuller resolution of the voting wars may only be obtainable through judicial intervention that sets minimum standards of access through stricter enforcement of voting rights, and/or federal mandates for increased uniformity in election administration. In the meantime, principled discussion of voting regulations and their substantive costs should directly address the underlying theoretical assumptions of opposing sides in matters of election law and policy. If a way forward out of the voting wars is to be found, it will be by way of a more stable and secure bridge between the theories and practices of elections.

6) CONCLUSION

Beginning with the *C* term of the voting calculus, this chapter has examined the two basic types of voting costs: substantive costs arising from the practical burdens associated with casting a ballot, and information costs associated with deciding how to vote. The primary aim of the discussion has been to demonstrate that these two types of costs are related in a manner that depends on fundamental assumptions about the role of voting in a modern democracy. A comprehensively unified theory of liberal democracy has been outlined to demonstrate that strong epistemic assumptions—in the form of objective standards for judging the correctness of voting decisions—are not necessary for a coherent model of mass democracy that incorporates all the essential democratic values and supports highly participatory electoral institutions.

recommendation that wait times not exceed 30 minutes. The Commission apparently did not even address the topics of prior registration or the substance of voter identification requirements, which continue to elicit strong partisan disagreement (Bauer and Ginsberg 2014).

Schattschneider has written of a need “to reexamine the chasm between theory and practice,” stating that “it is at least as likely that the ideal is wrong as it is that the reality is bad” (Schattschneider 1960, 131). This chapter represents an attempt to bridge that chasm by describing an approach to information in democratic theory that allows more space for competing versions of “truth” in politics. Without addressing the deeper philosophical issues raised by this approach, this perspective seems particularly desirable for American politics today, given the apparent entrenchment of ideological intolerance in the currently highly polarized environment. Indeed, when individuals or groups believe they hold a conceptual monopoly on the truth, backed by the strong epistemic assumption of objectively right and wrong answers to political questions, it may actually threaten democratic stability. At its core, democratic politics requires a minimum degree of open-mindedness and willingness to compromise, including “at least some tolerance of differing truths” (Crick 1993, 18). This is the normative approach that should be reflected in the rules and procedures for elections, so that those who find themselves on the losing side do not come to believe that “evil has triumphed over good” (Holcombe 2013, 24),⁹² but rather that they were simply outvoted and must work to realize their version of truth in future democratic decisions.

⁹² The larger quote from Holcombe—in which he is criticizing Jason Brennan’s view on objective standards of common good in electoral outcomes—is worth highlighting: “Brennan is telling voters that when they end up on the losing end of an election, evil has triumphed over good; the common good has been defeated. This is much different from concluding that most people wanted this while I wanted that, and so I was outvoted.”