

Preferences, Priorities, and Plebiscites

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Plebiscites have long and repeatedly been criticized as suffering a host of flaws relative to representative democracy: voters' lack of information;¹ low and uneven voter turnout;² voters' failure to "deliberate;"³ the excessive influence of money⁴ and of interest groups;⁵ and voters'

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1. See, e.g., DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 122–44 (1984) [hereinafter *DIRECT LEGISLATION*]; Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 91–92 (1995); David B. Magleby, *Let the Voters Decide?: An Assessment of the Initiative and Referendum Process*, 66 COLO. L. REV. 13, 38–39 (1995) [hereinafter *Let the Voters Decide*]; Catherine A. Rogers & David L. Faigman, "And to the Republic for Which It Stands": *Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057, 1064–66 (1996).

2. See, e.g., THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 66–70 (1989); *DIRECT LEGISLATION*, *supra* note 1, at 77–99; *Let the Voters Decide*, *supra* note 1, at 31–34.

3. See, e.g., Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 18–19 (1978); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1526–27, 1555–56 (1990); Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1414–15 (1978).

4. See, e.g., DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000); Collins & Oesterle, *supra* note 1, at 74; Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845 (1999); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 511–13 (1982); John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can*

anonymity, which is said to result in greater enthusiasm for legislation hostile to numerical minorities of various sorts.⁶ Defenders of direct democracy, including myself, have typically replied by contending both that plebiscites are not in fact as flawed as their critics claim and that, when viewed equally unromantically, representative democracy suffers defects comparable in kind and degree.⁷ Defenders of direct democracy have also reminded the critics that the issue is not whether plebiscites are superior to (and should therefore perhaps replace) representative democracy but only whether direct democracy is a beneficial *supplement* to representative lawmaking processes.⁸

Recently, Professor Sherman Clark contributed to this longstanding debate a novel and counter-intuitive “populist” critique of plebiscites, with the core claim that plebiscites “cannot be trusted to reflect the voice of the people accurately or meaningfully.”⁹ At the center of the problem he believes are two concerns: that previous discussions of plebiscites have been based on a too narrow “understanding of what it means to hear the voice of the people,” and that “single-issue direct democracy lacks a mechanism for reflecting voter priorities among issues.”¹⁰

In this Essay, I examine both claims. Part I considers, but ultimately finds unpersuasive, Clark’s contention that the opportunity to express

Corruption, Undue Influence, and Declining Voter Confidence be Found?, 39 U. MIAMI L. REV. 377, 391–400 (1985).

5. See, e.g., Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 18–19 (1997); Randy M. Mastro et al., *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It*, 32 FED. COMM. L.J. 315, 317–19 (1980); Shockely, *supra* note 4, at 381–90; Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 420–35 (2003).

6. See, e.g., Bell, *supra* note 3, at 13–17; Eule, *supra* note 3, at 1551–55; Priscilla F. Gunn, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 URB. L. ANN. 135 (1981).

7. See, e.g., CRONIN, *supra* note 2; ELISABETH R. GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* (1999); Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991); Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988).

8. See, e.g., CRONIN, *supra* note 2, at 59; Baker, *supra* note 7, at 774–76; Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1350 (1985) (book review) (“Indeed, to proceed by contrasting direct and representative democracy may miss the point. We do not have to choose between the initiative and the legislature: in twenty-three states we have both. In these states the legislature and the initiative not only coexist but interact in a system of lawmaking.”).

9. Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 434 (1998).

10. *Id.* at 436.

priorities within the lawmaking process itself is essential to the legitimacy of that process. Part II critiques Clark's claim that the results of representative lawmaking processes more "fully,"¹¹ "clearly,"¹² and "completely"¹³ reflect the "voice of the people" than the results of direct lawmaking processes.¹⁴ This Part also questions the basis for, and the implications for his larger thesis of, Clark's identification of certain circumstances under which he believes direct democracy may be preferable to representative lawmaking. Part III examines Clark's claim that the mere availability of direct democracy distorts the "voice of the people" as expressed through candidate elections and representative lawmaking, and ultimately disagrees with Clark's conclusion that representative lawmaking must "be exclusive."¹⁵

I. DEFINING "THE VOICE OF THE PEOPLE"

Clark contends that the "understanding of popular sovereignty that fuels allegiance to direct democracy is rooted in the problem of political legitimacy," and that the legitimacy problem "is one of justifying coercion, given that no person has 'natural' authority over another."¹⁶ Thus, he continues, "a regime is legitimate if people are made to follow only those rules to which they have consented."¹⁷ In a regime under which unanimity of consent is unlikely to be achieved, "a second-best solution is to allow each person to participate fully and equally in the processes by which the rules are made."¹⁸

From this largely uncontroversial starting point, Clark goes on to contend that each citizen must therefore have "an equal opportunity to influence political decisions," and that "this end mandates that each citizen possess not only a right to an equal allocation of political power, but also an opportunity to allocate that allotment as he or she sees fit."¹⁹

11. *Id.* at 437, 448–50, 463, 482.

12. *Id.* at 436, 448, 450, 478.

13. *Id.* at 436.

14. *See id.* at 448 ("I hope to sever the connection between single-issue majority preference and popular voice and argue that direct democracy, while perhaps measuring the former, does not give us a full and meaningful way of making sense of the latter.")

15. *Id.* at 466.

16. *Id.* at 441.

17. *Id.* at 442.

18. *Id.*

19. *Id.* at 455.

Taking the above portion of Clark's analysis on its own terms, one might first wonder why he finds direct democracy problematic. After all, it affords each citizen in the relevant jurisdiction one vote and therefore a seemingly "equal opportunity to influence" the political decision in question. In addition, the initiative process affords even a small minority of voters the opportunity to place an issue on the ballot if certain clear requirements are met.²⁰ The representative lawmaking process offers numerical minorities no comparably straightforward access to the legislative agenda nor, therefore, a comparable opportunity thereby to influence the lawmaking process.

On a different level, representative and direct democracy are both importantly flawed in the area of providing each voter an "equal opportunity to influence" political decisions. In direct democracy, "citizens with particularly intense concerns and priorities will find no market for their votes"²¹ and may therefore have no *meaningful* opportunity to influence the lawmaking process when they are in the minority; "one person, one vote" reduces to a mere formality.²² A representative lawmaking process, however, will also inevitably deny certain voters a meaningful opportunity to influence the process; the difference is the group of voters that is adversely affected in each process.

The geographical allocation of representation means that a numerical minority within a particular representative's jurisdiction may have no meaningful opportunity on certain issues to influence the decisionmaking on those issues by their representative or by the legislature as a whole. Indeed, legislation that is enacted by a simple majority of representatives in a bicameral legislature may be favored by as few as thirty-nine percent of all voters, even assuming that a majority of constituents of each of the representatives voting in favor of the legislation shared that preference.²³ Even if one agrees with Clark that "majority will" may not

20. Under the Arizona Constitution, to take just one example, a petition signed by ten percent of the "qualified electors" is sufficient to place a statutory initiative on the ballot, assuming various other technical requirements are met. *See* ARIZ. CONST. art. 4, pt. 1, § 1(2). For comprehensive and continuously updated information regarding the signature and other legal requirements for placing a statutory initiative on the ballot in the twenty-four states that provide for such a process, see <http://www.iandrinstitute.org>, the web site of the Initiative and Referendum Institute.

21. Clark, *supra* note 9, at 475.

22. *Id.* Clark contends that this fact renders direct democracy "akin to the worst possible districting scheme." *Id.*

23. This assumes that each voter gets to elect a representative in both chambers, that representatives are elected on a geographical basis, and that the jurisdictions from which the members of the two chambers are elected are the most diverse possible. *See* Baker, *supra* note 7, at 717 & n.25.

Clark acknowledges that "[r]epresentation produces results at odds with those favored

be “worth conveying,”²⁴ one begins to wonder whose preferences and/or priorities *are* conveyed by the representative lawmaking process and why Clark believes the “will” of those voters to be worthy of seemingly special respect.

Notwithstanding the above, Clark’s view is that representative lawmaking “allows for a fuller expression of ongoing consent” because “it allows citizens to express their *priorities* in a way not possible through direct democracy.”²⁵ On this account, the opportunity for “equal” participation (at least in some forms) is not enough to render a lawmaking process legitimate. Rather, the opportunity for “full” participation—defined as the opportunity to express “priorities as well as preferences”²⁶—is also necessary. “[T]he goal,” Clark contends, “should be to allow each person, who knows that his or her perfect world will not be enacted . . . to speak most clearly *about the world as a whole* by telling us what he or she most wants to win and what he or she is most willing to lose.”²⁷ He concludes that, “[b]y counting heads in the form of a single-issue majority vote, we may learn what the most people want, but we do not learn what the people want most.”²⁸

Clark’s account leaves several important questions unanswered. Most obviously, why is the opportunity for “equal” participation—in the form of “one person, one vote,” whether for a ballot proposition or a candidate—not enough to render a lawmaking process legitimate? Why is the opportunity for “full” participation also required? Answers to these questions are essential given the great weight that Clark ultimately places on the notion of “full” participation. “[T]he goal,” he repeatedly affirms, “is to hear the voice of the people as well and as *fully* as

by majorities on specific issues because voters are forced to funnel their input through the medium of their legislative representatives.” Clark, *supra* note 9, at 475 n.110. He goes on to explain his seeming lack of concern with this fact as follows:

Granted, representation does stand between the *majority* and the legislation the *majority* wants, at least under some circumstances. And yes, this is what gives representative democracy its “advantage.” But this need not mean that representation stands “between the *people* and the legislation the *people* want.”

Id. (quoting Stephen L. Carter, *Foreword* to LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY*, at xvii (1994) (alteration in original)).

24. Clark, *supra* note 9, at 447.

25. *Id.* at 450 (emphasis added).

26. *Id.* at 482.

27. *Id.* at 448 (emphasis added).

28. *Id.* at 482.

possible.”²⁹ And he contrasts this goal with direct democracy’s measuring of “issue-by-issue majority preference.”³⁰

There are other difficulties with this portion of Clark’s argument. To begin, Clark never persuasively explains why, under his account, the opportunity to express *priorities* is essential to the legitimacy of a lawmaking process. If the core concern is to obtain the consent of the governed, affording a voter an equal opportunity to express her preference on a single issue is not obviously more problematic than affording a voter an equal opportunity to express her priorities among two or more issues.³¹ Furthermore, in order to be persuasive, any account Clark might provide as to why the opportunity to express priorities is critical would need to address two further issues that his discussion does not include. He must explain why the process of obtaining a constitutional amendment in forty-nine states is (presumably) legitimate despite the fact that the process in each of those states ultimately simply “count[s] heads in the form of a single-issue majority vote.”³² In addition, he must

29. *Id.* at 448 (emphasis added); *see also id.* at 443 (asserting that “the processes used to hear [the voice of the people] should allow each citizen as full and equal an opportunity to be heard as is possible”); *id.* at 482 (“Before any outcome can claim popular consent, the processes used to reach that outcome must be evaluated. Did those processes allow for the fullest possible popular input?”).

30. *Id.* at 448.

31. The closest Clark comes to an explanation is the following:

A commitment to equality mandates that each citizen’s capacity for decisionmaking be respected equally—that each citizen’s judgments be granted equal respect in our political processes. Among the judgments that *presumably* ought to be granted this respect are judgments on the relative importance of issues—decisions as to which judgments each citizen feels most strongly should be backed with the coercive force of the state. If political legitimacy depends on giving the people as full and fair an opportunity as possible to tell us what they want, there seems no warrant for denying them a chance to tell us what they want most.

Id. at 456 (emphasis added).

The above elaboration does not, to my mind, answer the question posed in the text: Why is the commitment to equality not met by affording equal respect to citizens’ expressions of preference on a single issue? Why does equal respect further mandate that citizens have the opportunity to make certain types of political judgments?

32. *Id.* at 482. In the alternative, Clark could take on the more daunting task of explaining why those forty-nine states’ constitutions are not, in fact, legitimate under his account.

As of 2002, every state’s constitution except Delaware’s required that a proposed amendment to the state constitution be ratified by a popular vote and be approved by at least a simple majority of those voting on the amendment. *See* THE COUNCIL OF STATE GOV’TS, 34 THE BOOK OF THE STATES 16–17 tbl.1.2 (2002 ed.) [hereinafter BOOK OF THE STATES 2002]. A handful of states require approval by more than a simple majority of voters or impose additional restrictions on the ratification process. *Id.*

explain why a lawmaking process providing for single-issue majority votes is (apparently, under his account) not legitimate even if it was adopted by voters as an expression of their sincere *priority* that they sometimes have the opportunity to express their *preferences* in the form of single-issue direct democracy.³³

On this last point, Clark's explanatory task is made significantly more difficult by the fact that lawmaking by initiative is currently available in only twenty-four of the fifty states.³⁴ This means that any voter for whom it is a priority to live in a state in which lawmaking by initiative is not (or is) available, has ample opportunity to *express that priority* by his choice of where to live.³⁵ The fact that each state's residents have the continued option to "vote with their feet" if they find the lawmaking process of a particular state sufficiently attractive or problematic arguably lends extra legitimacy to *each* state's chosen combination of lawmaking processes, whether or not those processes include lawmaking by initiative.

Even if Clark could provide a persuasive account of why the opportunity to express priorities within the lawmaking process itself is essential to the legitimacy of that process, other difficulties remain with his conception of "the voice of the people" as being more accurately and legitimately expressed through representative than direct lawmaking. First, with regard to the expression of priorities, Clark's general depiction of direct lawmaking is unduly pessimistic, and his portrayal of representative lawmaking unduly optimistic. As Clark ultimately acknowledges, even the initiative process, the most seemingly preference-oriented form of

33. That is, Clark must first explain whether, under his account, existing direct democratic processes for amending state constitutions are legitimate. If he concedes that they are, he must then explain both (a) why a broader plebiscitary lawmaking process adopted through that amendment process is not legitimate, and (b) why other amendments adopted through that same process *are* legitimate.

34. As of 2002, twenty-four states had a statewide initiative process. BOOK OF THE STATES 2002, *supra* note 32, at 239–46. Only eighteen states' constitutions provide for amending the state constitution through an initiative process. *Id.* at 18 tbl.1.3.

35. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); see also Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911, 1947–51 (1995) ("In the usual course of affairs, each of the fifty states chooses the package of taxes and services, including state constitutional rights and other laws, that it will offer its residents and potential residents. In this way, the states compete for both individual and corporate residents and their tax dollars." (footnotes omitted)).

direct democracy,³⁶ does give voters the opportunity to express priorities, albeit in a more limited fashion than most representative lawmaking processes.³⁷ Mechanisms such as voter turnout,³⁸ the difficulty of qualifying proposed initiatives for the ballot,³⁹ and the opportunity voters have to “demonstrate the intensity of their preferences through their willingness to expend time, energy, and money campaigning for or against a given proposition”⁴⁰ all “suggest that a ballot proposition is unlikely to pass unless it is backed by a highly motivated constituency.”⁴¹

Similarly, the expression of priorities through representative lawmaking is not as inevitable or accurate as Clark seems to suggest, and the implication for Clark’s account is that representative lawmaking may suffer a deficit of legitimacy no less than the deficit he claims direct democracy exhibits. Clark accurately observes that the primary mechanism by which legislatures express priorities (their own, and presumably also those of their constituents) is vote trading or “logrolling.”⁴² The mere availability of logrolling, however, does not mean that at any given time the laws that have and have not been enacted reflect “what the people want most.”⁴³

As Clark acknowledges, “the optimal level of aggregation is total, and all issues should be considered in conjunction with one another.”⁴⁴ But

36. As Clark observes, “the referendum is, on my account, potentially less troubling than the initiative. When a measure has been referred to a popular vote by the legislature, at least the referral itself has been subject to the priority-measuring representative process.” Clark, *supra* note 9, at 472.

37. *Id.* at 469–70.

38. *Id.*; see also Gillette, *supra* note 7, at 968–69.

39. Clark, *supra* note 9, at 470 (“perhaps only intensely concerned groups will expend the effort to gather the necessary signatures” to qualify a proposed initiative for the ballot); see also *id.* (“[V]oters appear to display an across-the-board resistance to ballot issues. A substantial majority of initiative provisions are in fact defeated, suggesting that voters’ prevailing attitude is ‘When in doubt, vote no.’” (quoting Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1357 (1985) (book review)) (footnote omitted)).

40. Clark, *supra* note 9, at 470.

41. *Id.*

42. *Id.* at 456:

Legislatures serve as fora through which citizens are enabled, and in fact required, to express their priorities as well as their preferences. Because legislative decisionmaking, unlike plebiscite voting, is conducted by small groups of representatives who are able to monitor one another’s voting behavior, representatives can deal for votes. They are able to trade off outcomes less vital to their constituents in return for votes on issues of greater concern. The familiar term for such a tradeoff is “logrolling.”

43. *Id.* at 482.

44. *Id.* at 466.

no lawmaking body at any particular point in time can possibly prioritize among the truly complete universe of possible issues and preferences. The representative lawmaking process and the logrolling process are both “rolling” processes, within and across a particular legislative session. Thus, at any given point in time the resulting *aggregate* expression of priorities is inevitably incomplete and its accuracy therefore highly suspect and perhaps unknowable. The state of the world after a given legislative enactment simply will *never* be “the world as a whole”⁴⁵ that “the people want most.”⁴⁶ Only an enormous “omnibus” bill covering the entire universe of possible laws has even the logical potential to yield such an expression of priorities. Indeed, a particular legislative enactment does not yield the state of affairs that “the people want most” even at that particular point in time. At any given point in time, some group of voters is eagerly anticipating the passage of legislation that will produce a state of affairs that it prefers in some respect to the status quo. And the passage of that legislation in the future suggests that a significant number of voters⁴⁷ was dissatisfied in some respect with the “world as a whole” represented by the status quo.

In sum, a representative and an initiative lawmaking process will each convey *different* information about what “world as a whole” is desired most by “the people” (defined in different ways). Neither process, however, has the capacity to convey information about the priorities of “the people” (*however* defined) regarding the “world as a whole” that is *more accurate* than the information conveyed by the other. All of the information conveyed by each process will be (differently) incomplete, and therefore will necessarily be an inaccurate representation of the *priorities* of “the people” regarding the “world as a whole.” Indeed, in the absence of an “omnibus” bill covering the entire universe of possible laws, the very notion of expressing “priorities” is inherently limited in its meaning and import.

II. LOGROLLING AND VOTER PRIORITIES

Let us now put to one side Clark’s “legitimacy” argument discussed above and focus on his central concern that single-issue direct

45. *Id.* at 448.

46. *Id.* at 482.

47. As was discussed above, this “significant number” may be as little as 39% of the voters. *See supra* note 23 and accompanying text.

democracy, unlike representative democracy, “lacks a mechanism for reflecting voter priorities among issues.”⁴⁸ Clark observes that “this difficulty may best be evaluated as a variation of the long-recognized, but perhaps underappreciated, intensity problem: in a plebiscite the majority rules, regardless of how much or how little those on either side have at stake.”⁴⁹ As was discussed in Part I above, however, the plebiscite does have ways of measuring voters’ intensity of preference on the single issue in question,⁵⁰ although it offers no good analogue to the vote trading possible in many legislative bodies.⁵¹ In addition, it should be

48. Clark, *supra* note 9, at 436.

49. *Id.*

50. See *supra* notes 36–41 and accompanying text.

51. At least formally, not all states view legislative vote trading as an unadulterated good. In Texas, for example, legislative vote trading arguably violates constitutional and statutory prohibitions on bribery, and may result in a forfeiture of public office. TEX. CONST. art. XVI, § 41 states, in relevant part:

Any person who shall, directly or indirectly, offer, give, or promise, any . . . thing of value . . . or personal advantage, to any . . . member of the Legislature to influence him in the performance of any of his public or official duties, shall be guilty of bribery And any member of the Legislature . . . who shall . . . receive, or consent to receive, directly or indirectly, for himself, or for another, from any . . . person, any . . . thing of value . . . or of personal advantage or promise thereof, for his vote . . . or for withholding the same, or with any understanding, expressed or implied, that his vote . . . shall be in any way influenced thereby, . . . shall be held guilty of bribery, within the meaning of the Constitution, and shall incur the disabilities provided for said offenses, with a forfeiture of the office they may hold, and such other additional punishment as is or shall be provided by law.

See also TEX. PENAL CODE ANN. § 36.02 (Vernon 2003) (“A person commits [bribery] if he intentionally or knowingly offers . . . or . . . accepts . . . from another . . . any benefit as consideration for the recipient’s . . . vote, or other exercise of discretion as a public servant . . .”). An offense under § 36.02 is a second degree felony.

Notwithstanding the above prohibitions, however, there is no evidence that less vote trading takes place in the Texas legislature than in the legislatures of states without such seemingly applicable prohibitions. The prohibitions are occasionally invoked by legislators themselves, however, when it’s politically advantageous to do so. Consider the following newspaper report of an incident during the 2003 legislative session:

House Democrats on Thursday accused Republican leaders of offering millions of dollars in state spending in their districts for votes favoring limits on lawsuits in Texas.

The horse-trading tactics are part of a legislative battle over limiting lawsuits that has split the House, largely along partisan lines. Proposed budget trades could be particularly persuasive at a time the state is facing a \$9.9 billion revenue shortfall and lawmakers are considering major budget cuts.

While legislative deal-making is not unusual, these proposed trades led House Speaker Tom Craddick to say they were “serious allegations,” and Travis County District Attorney Ronnie Earle said he was “gathering information” on the incidents.

kept in mind that, notwithstanding an interrelationship, priorities and intensities of preference are distinct concepts.⁵² For example, two individuals might prioritize *A*, *B*, *C*, and *D* the same, but that ordering might reflect very different intensities of preference. That is, Bob might intensely prefer that *A* be enacted and be relatively indifferent among *B*, *C*, and *D*, while Sue might be nearly indifferent between *A* and *B*, but strongly prefer *B* to *C* and *C* to *D*.

Clark's central concern with direct democracy is perhaps best captured by the following one of his examples. Imagine that ballot propositions *X*, *Y*, and *Z* are each preferred by 60% of voters (as contrasted with the 40% of voters who prefer not-*X*, not-*Y*, and not-*Z*, respectively). If voted on independently, outcomes *X*, *Y*, and *Z* would each receive a majority of votes. "This tells us," Clark observes,

that if we asked each voter to describe his or her ideal world, a majority of those descriptions would include *X*. It tells us as well that a perhaps differently constituted majority of those descriptions would include *Y*, and that the same would be true of *Z*. This does *not* mean, however, that the overall outcome *XYZ* is most preferred by the people as a whole, or that *XYZ* would necessarily command a majority.⁵³

Clark's example seems uncontroversial. It might indeed be the case that a series of plebiscites would yield an overall outcome that is not preferred by the people as a whole. It might also be the case that a series of plebiscites would yield an overall outcome that is different from the result of a legislative session involving the same issues. But is there any reason to believe that the results of a representative lawmaking process would be a more "accurate" reflection of the preferences of "the people"?

Clark contends that the representative lawmaking process is indeed

Offering something of value in exchange for a legislative vote can be a bribe under Texas law.

R. G. Ratcliffe, *78th Texas Legislature/Funds-for-votes tactic alleged in House fight GOP's aggressive push for tort limits criticized*, HOUS. CHRON., Mar. 28, 2003, available at 2003 WL 3247778; see also Gary Scharer, *Legislator denies offering funds*, EL PASO TIMES, Mar. 28, 2003, available at 2003 WL 6731140.

52. Clark seems to acknowledge the existence, if not also the import for his own argument, of this distinction when he observes in the initiative context that "phenomena such as voter turnout, varying levels of activism, and varying levels of spending may reflect absolute intensity as to any given issue without reflecting priorities among issues." Clark, *supra* note 9, at 470.

53. *Id.* at 449.

superior on this score.⁵⁴ it “allow[s] us to hear most clearly and completely what the people have to say,”⁵⁵ and it is a more “accurate” reflection of the voice of “the people.”⁵⁶ The entire basis for Clark’s claim appears to be the logrolling opportunities afforded by the legislative process. The problem, however, is that legislative outcomes are significantly impacted by a host of procedural variables of which the opportunity to trade votes is only one.⁵⁷ For example, the ultimate legislative outcome when our hypothetical three issues (X, Y, and Z) are involved will be determined in part by such non-substantive variables as the order in which the issues are taken up for consideration, whether all three issues are expected to be (and ultimately are) taken up in the same legislative session, whether the membership of the legislature will be changing at the end of the legislative session, and whether legislators with particularly intense preferences on one or more of the issues have sufficient political capital at the relevant point(s) in time to logroll effectively if needed.

The existence and importance of these non-substantive variables in determining outcomes in a representative lawmaking process is not inherently problematic, but it does cast serious doubt on Clark’s claim

54. Clark states:

My avowedly presentist claim is this: representation checks majority power without limiting popular voice. *It does so by allowing for an expression of popular voice that is superior to majority preference.* This voice is superior because it includes information about citizen priorities and because it permits citizens to express their opinions as well as their interests. Popular input is refined not by limiting what the people can express, but by allowing them to express themselves more clearly.

Id. at 478 (emphasis added).

55. *Id.* at 436; *see also id.* at 478 (contending that representative lawmaking allows the people “to express themselves more clearly”); *id.* at 448 (contending that a lawmaking process that allows each person to “tell[] us what he or she most wants to win and what he or she is most willing to lose” enables people “to speak most clearly about the world as a whole,” and implicitly suggesting that representative lawmaking is such a process).

56. *See, e.g., id.* at 472 (implicitly contrasting direct democracy with a representative lawmaking process that provides “full and accurate popular input”); *see also id.* at 449 (implicitly contending that representative lawmaking “produc[es] a fuller and more nuanced sense of what the people have to say”).

57. Indeed, “if a Condorcet choice does not exist, the outcome of an election involving more than two alternatives will be a function of such ‘procedural’ variables as the order in which various alternatives are formally considered.” *See Baker, supra* note 7, at 727. This is the “voting paradox,” frequently referred to as the Arrow “impossibility theorem.” *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2nd ed. 1951); *see also* sources cited in Baker, *supra* note 7, at 727 n.65. For elaboration on when a Condorcet choice exists, *see id.* at 726.

that the results of the representative lawmaking process more “fully,”⁵⁸ “clearly,”⁵⁹ and “completely”⁶⁰ reflect the “voice of the people” than the results of direct lawmaking processes.⁶¹ The results of the two lawmaking processes with regard to our hypothetical issues *X*, *Y*, and *Z* may well be different, but Clark has given us no reason to believe that the results of the legislative process will be *superior* on any dimension relevant to his account.

Consider a related, but even more troublesome, hypothetical that Clark does not discuss. Imagine a state with nine jurisdictions. Imagine further that interest groups in five of the nine jurisdictions each seek and obtain a proposition on a state-wide ballot that would provide the relevant jurisdiction a special subsidy (“pork”) of some sort from the state coffers. When put to the voters as a series of five independent ballot measures, there is little doubt that none of the five measures will obtain the support of a majority of the state’s voters. Although voters in each of the special subsidy jurisdictions will presumably enthusiastically support the ballot proposition that specifically benefits them, one would expect the voters in each of the other eight jurisdictions rationally to oppose a special subsidy that imposes costs on them with no countervailing benefit.

Now imagine similar legislation in the state legislature. The ability to trade votes will enable the representatives from the five special subsidy jurisdictions readily to join forces and package their individual subsidies into a single bill.⁶² Those representatives, of course, will vote in favor of the bill, thereby ensuring its passage notwithstanding the predictable opposition of representatives from the four jurisdictions on which the legislation imposes costs without any countervailing benefit.

What are we to make of the fact that legislation that one would expect never to be enacted via direct democracy would probably always be

58. See *supra* note 11.

59. See *supra* note 12.

60. See *supra* note 13.

61. See Clark, *supra* note 9, at 448 (“I hope to sever the connection between single-issue majority preference and popular voice and argue that direct democracy, while perhaps measuring the former, does not give us a full and meaningful way of making sense of the latter.”).

62. For purposes of my hypothetical, it is not at all necessary that the legislation take the form of a single bill. A series of bills on which the relevant jurisdictions’ representatives have traded votes among themselves to secure sufficient support is equally possible and would have the same result.

enacted in a representative lawmaking process? Is the answer really that such special subsidy legislation is “what the people want most” and that representative lawmaking therefore more accurately reflects the “voice of the people”?⁶³ If that is Clark’s claim, he needs to provide a persuasive explanation for why that would be true even if it can be shown (logically, if not necessarily empirically) that aggregate social welfare would be reduced by the adoption of such legislation, and/or that voters would overwhelmingly prefer legislation that prohibited *all* pork (thereby significantly reducing both taxes and government spending) to legislation that provided *every* jurisdiction pork.

If Clark’s response is that such “pork” legislation is an example of a situation “in which direct democratic lawmaking, despite its inability to account for voter priorities, might be desirable,”⁶⁴ then he must instead provide a workable account of how one is to identify such situations. It is not clear from his existing discussion, however, that Clark would consider my hypothetical enactment to be such a situation.

Clark lists three types of situations in which he believes direct democracy might be preferable to (or, at least, no less desirable than) representative lawmaking in light of the fact that the “plebiscite has the potential, perhaps, to do one thing well—to identify majority preference on isolated issues.”⁶⁵ The first situation is when “the agency costs of representation may be particularly large, as in cases when representatives might risk defying constituent priorities.”⁶⁶ It is not clear that Clark would consider my hypothetical special-subsidy legislation such a situation. He seems to have in mind instances in which representatives might be expected not to vote consistently with the preferences of their constituents because the “legislators’ self-interest conflicts with constituent priorities.”⁶⁷ His examples are term limits and campaign finance reform.⁶⁸ My hypothetical legislation, in contrast, does not involve this sort of conflict between the self-interest of representatives and that of their constituents; the representatives from the benefited jurisdictions are expected to vote just as their constituents would. Thus, my hypothetical legislation would not seem to be included in Clark’s first category.

The second category of situations for which Clark suggests direct democratic lawmaking might be desirable is that involving “issues for

63. Clark, *supra* note 9, at 482.

64. *Id.* at 471.

65. *Id.*

66. *Id.*

67. *Id.* at 471–72 & n.106.

68. *Id.*

which the measurement of priorities appears inessential.”⁶⁹ “The key here,” he says, “would be to identify issues that do not seem to be of particular interest to any identifiable minority of citizens.”⁷⁰ My hypothetical subsidy legislation, however, is presumably of significant interest both to each benefited jurisdiction and to each jurisdiction on which the legislation imposes only costs. Each of these jurisdictions’ citizens is an “identifiable minority,” thus Clark would not seem to include my hypothetical legislation in his second category.

Clark’s final category is “issues for which receiving *direct* popular input is considered more important than achieving full and accurate popular input.”⁷¹ His examples are traditional “civic republican” concerns such as “popular education,”⁷² “popular participation for its own sake,”⁷³ and “giving people the (mistaken) feeling that they have had greater input into the political process.”⁷⁴ Although he gives no specific examples, Clark gives no indication that my hypothetical subsidy legislation is what he has in mind here.

To be fair, Clark states that “[t]here are *at least*”⁷⁵ the three sorts of situations discussed above in which direct democratic lawmaking might be desirable under his account. Perhaps Clark would be willing to add a fourth category that would include my hypothetical legislation. If so, that decision may have substantial import for his larger theory.

The problem posed by my hypothetical legislation is not one of agency costs (Clark’s first category) but one of externalities. The essence of the special subsidy legislation is that it benefits the citizens in certain jurisdictions at the expense of those in others. In my example, the benefited jurisdictions have each presumably contributed approximately one-ninth of the relevant funds to the state coffers, but will each be receiving approximately one-fifth of the total subsidy.⁷⁶ The four non-

69. *Id.* at 472.

70. *Id.*

71. *Id.* (emphasis in original). *See also id.* at n.106 (“[T]here might be issues for which the educational or citizenship-building benefits of a plebiscite would outweigh concern over the loss of input regarding voter priorities.”).

72. *Id.* at 472.

73. *Id.*

74. *Id.*

75. *Id.* at 471 (emphasis added).

76. In the case of a ballot measure involving a subsidy to only one of the nine jurisdictions, the benefited jurisdiction will have presumably contributed approximately one-ninth of the relevant funds in the state coffers, but will be receiving the entire subsidy.

benefited jurisdictions, in contrast, will each presumably also have contributed approximately one-ninth of the relevant funds to the state coffers, but will each receive no portion of the subsidy.

A ballot measure involving a subsidy to only one of the nine jurisdictions can be expected to fail because the legislation is a net loss for eight jurisdictions and a net gain for only one. In contrast, legislation involving a subsidy to five of the nine jurisdictions can be expected to pass because it represents a net gain for a majority of jurisdictions and a net loss for only a minority. In both cases, the subsidy legislation benefits certain jurisdictions at the expense of others. The difference is that if each jurisdiction's subsidy is considered alone, the benefited jurisdiction is greatly outnumbered by the jurisdictions for which the legislation is a net loss. The ability to trade votes, however, enables a coalition of benefited jurisdictions to form such that they outnumber the jurisdictions on which the legislation imposes only costs.

If Clark would include my hypothetical legislation as a fourth type of situation in which plebiscitary lawmaking might be preferable to representative lawmaking, despite the former's claimed inability to account for voter priorities, the implications for his larger thesis should not be underestimated. If he defines the fourth category to include all legislation that imposes uninternalized externalities anywhere within the relevant state,⁷⁷ nearly all legislation will be included. In a world of interest groups, nearly all legislation—whether it involves spending, regulation, or “the public interest”—imposes such uninternalized externalities by providing concentrated benefits for a few, while simultaneously imposing diffuse costs on the many. If Clark were to deem all such legislation appropriate for consideration in a direct democratic lawmaking process, there will be little left to his larger thesis. If Clark instead were to define the fourth category in some other way, such that my hypothetical legislation is included but not all legislation that imposes uninternalized externalities within the state is, he will need to take on the difficult task of providing a principled—and workable—basis for distinguishing among legislation that imposes uninternalized externalities within the state.

I do not mean my discussion above to suggest that I have dismissed or ignored the fact that Clark's consideration of direct democracy is explicitly not utilitarian.⁷⁸ I acknowledge Clark's claim that “we ought

77. By limiting the concern to legislation that imposes uninternalized externalities “anywhere within the relevant state,” I am excluding legislation that might impose such externalities on neighboring states, non-residents, or future immigrants (to give just a few examples).

78. Clark observes early on that “[u]nlike prior accounts of the intensity

to account for intensity information not because satisfying an intense preference produces more utility than does satisfying a mild preference (although it may well do that), but because intensity information is unarguably one of the things people want to express.⁷⁹ At the same time, a utilitarian analysis is undeniably useful in understanding both why my hypothetical special-subsidy legislation is likely to meet a different fate in direct and representative lawmaking processes, and why one might prefer the outcome likely in the direct lawmaking process. Clark need not incorporate this utilitarian analysis within his own thesis, but he will need to provide a persuasive rebuttal to utilitarian concerns such as these if he concludes that my hypothetical special-subsidy legislation is not an instance in which lawmaking via direct democracy might be desirable.

It is to Clark's credit that he acknowledges that there may be situations in which the opportunity to express priorities that is provided in a representative lawmaking process should take a backseat to other concerns that make direct democratic lawmaking more desirable.⁸⁰ That acknowledgment has at least two important implications for his larger thesis, however, which he unfortunately does not similarly acknowledge. First, Clark never provides a coherent account of how he arrived at the (presumably exceptional) situations he identifies. Given Clark's explicit concern *not* to provide a utilitarian analysis, one presumes that these situations were *not* identified through some sort of cost-benefit analysis, but Clark provides no explanation. Second, insofar as Clark's explicit "goal" for a lawmaking process is that it allow each person "to speak most clearly about the world as a whole by telling us what he or she

problem, . . . the argument offered here is not utilitarian." Clark, *supra* note 9, at 436–37. Thus, his "claim is not that we should take intensity into account in order to maximize overall welfare." *Id.* at 437. Clark further notes that:

Although it is not surprising that normative public choice theory, given its roots in welfare economics, tends to assume a cost-benefit criterion for evaluating decisionmaking processes, the utilitarian framework may not be the best way to think about the implications of the intensity problem for direct democracy. The populist case for direct democracy seems to be less about maximizing utility than about maximizing input.

Id. at 453 (footnote omitted); see also *id.* at 460 (observing that the paradox of logrolling "poses no difficulty for those [such as himself] whose goal is not to maximize utility, but rather to ensure that each citizen has an equal voice in government").

79. *Id.* at 453.

80. *Id.* at 471–72.

most wants to win and what he or she is most willing to lose,”⁸¹ Clark should explain why the three exceptions he identifies are consistent with that goal and why other plausible exceptions, such as my hypothetical legislation, are not.

This omission in Clark’s discussion focuses one’s attention on the question of what his thesis actually is. At some points in the Essay, Clark’s thesis takes a strong form, at other times a significantly weaker form. Clark’s weaker thesis is an essentially cautionary tale: “direct democracy’s ability to record unmediated majority preference should not entitle it to any special place in the hearts and minds of those concerned with hearing the voice of the people.”⁸² We should not assume that the plebiscite is “more responsive to the people” solely because of its “direct access to majority preference.”⁸³ Thus, “the mere direct democratic origin of a particular outcome [should not] serve as an implicit ace in the hole, even for those with the most unmitigated populist priorities.”⁸⁴ Rather, “[p]olitical outcomes, whether generated by plebiscite or through representation, should be evaluated on their merits, rather than on the basis of their presumed fidelity to some vision of popular will.”⁸⁵ On this reading, Clark does not advocate the elimination of direct democracy, nor even suggest that representative lawmaking is generally preferable to plebiscites. His central concern is simply to call into question “the assumption that plebiscitary outcomes are somehow more legitimate than representative outcomes.”⁸⁶

At other points in his Essay, however, Clark seems to be arguing that representative lawmaking is importantly superior to direct democracy, and that the latter therefore should be used only in extraordinary circumstances, if at all. I take up Clark’s stronger thesis in the next Section.

III. REPRESENTATIVE ELECTIONS AND THE VOICE OF THE PEOPLE

In its strongest form, Clark’s thesis begins with the observation that representation “allow[s] for an expression of popular voice that is superior to majority preference.”⁸⁷ The voice is superior, he contends, “because it includes information about citizen priorities and because it

81. *Id.* at 448.

82. *Id.* at 470–71.

83. *Id.* at 437.

84. *Id.* at 471.

85. *Id.* at 473.

86. *Id.*

87. *Id.* at 478.

permits citizens to express their opinions as well as their interests."⁸⁸ Clark goes on to contend that representative lawmaking must "be exclusive."⁸⁹ "[G]iving people additional opportunities to speak directly to specific issues in the form of the plebiscite render[s] the people less articulate,"⁹⁰ he contends. He argues that the mere availability of direct democracy "obscures voter priorities even as to those issues on which no initiative or referendum is ever conducted"⁹¹ because direct democracy is a "majority veto" that provides "an opportunity for renege[ing] on deals or . . . inhibiting the making of those deals"⁹² in the legislature.

Although the election of a representative is seemingly the direct expression of a single-issue majority preference that Clark finds so problematic, he argues that such elections are really "the ultimate multi-issue referenda" and therefore importantly distinguishable.⁹³

Issues are framed, balanced, and traded off in the form of candidates, who attempt to put together a bundle of positions and commitments capable of attracting more votes than any other bundle. This bundling of issues is the crucial device that allows (indeed requires) voters to weigh the relative intensity of their concerns.⁹⁴

When plebiscites are available, they "allow[] the people the final decision, amounting to a veto power, over enactments of representative bodies."⁹⁵ In this context, the plebiscite is doubly problematic for Clark. It is not just that the plebiscite precludes an adequate expression of voter priorities.⁹⁶ The more significant problem is that "direct democratic processes represent attempts by those who believe they have a numerical majority on a particular issue to get what they cannot get from the legislature," notwithstanding the fact that "those in favor of a given outcome could have secured that outcome by making it a priority in electing representatives."⁹⁷ Clark contends both that the plebiscite proponents were not willing to make the issue in question a priority in electing representatives and that "some minority of voters more intensely concerned with that issue *were* willing to make that issue a priority"

88. *Id.*

89. *Id.* at 466.

90. *Id.*

91. *Id.* at 480.

92. *Id.*

93. *Id.* at 463.

94. *Id.* at 463–64.

95. *Id.* at 478–79.

96. *See supra* notes 25–28 and accompanying text.

97. *Id.* at 479.

during the election of representatives.⁹⁸

Clark's view, in sum, is that the plebiscite importantly distorts the expression of voter priorities by negating the "deals" (i.e., priorities) that are represented by the election of particular representatives. Thus, whenever the plebiscite is available, it represents a potential majority veto whose mere availability may inhibit or obscure the important expression of voter priorities both within the legislative process (via logrolling) and in the election of representatives.⁹⁹

Clark is undoubtedly correct both that the plebiscite is a "majority veto" on outcomes of the legislative process and that its availability may affect the expression of voter priorities both within the legislative process and in the election of representatives. I disagree with Clark, however, about whether the ultimate result is a less accurate expression of voter priorities. It seems to me no less plausible that the plebiscite (and the effects of its mere availability) renders the ultimate expression of voter priorities *more* accurate.

To begin, as even Clark acknowledges, "most of the issues a representative will vote on during a given legislative session will not have been a particular focus of his or her election campaign."¹⁰⁰ In some instances, the issues simply did not exist at the time of the election, e.g., homeland security, the detention of suspected terrorists, or the proper response to the SARS outbreak. In addition, however, candidates in a competitive two-party system are not likely to diverge much on their views of the vast majority of issues that *are* discussed during an election. As the economist Harold Hotelling taught us decades ago, "competing sellers tend to become too much alike,"¹⁰¹ and this tendency is "strikingly exemplified"¹⁰² in politics:

98. *Id.*

99. *Id.* at 480.

100. *Id.* at 476.

101. Harold Hotelling, *Stability in Competition*, 39 *ECON. J.* 41, 53–54 (1929). Hotelling explains that:

When a new merchant or manufacturer sets up shop he must not produce something exactly like what is already on the market or he will risk a price war. . . . But there is an incentive to make the new product very much like the old, applying some slight change which will seem an improvement to as many buyers as possible without ever going far in this direction [T]he tendency [is] to make only slight deviations in order to have for the new commodity as many buyers of the old as possible, to get, so to speak, *between* one's competitors and a mass of customers.

Id. at 54.

102. *Id.*

The competition for votes between the Republican and Democratic parties does not lead to a clear drawing of issues, an adoption of two strongly contrasted positions between which the voter may choose. Instead, each party strives to make its platform as much like the other's as possible. Any radical departure would lose many votes, even though it might lead to stronger commendation of the party by some who would vote for it anyhow. Each candidate "pussyfoots," replies ambiguously to questions, refuses to take a definite stand in any controversy for fear of losing votes. Real differences, if they ever exist, fade gradually with time though the issues may be as important as ever.¹⁰³

Hotelling's intellectual heirs built upon these insights in crafting the "median voter" thesis, which contends that the major political parties (and their candidates) in a two-party system will both compete for voters in the middle of the distribution of voter preferences.¹⁰⁴ In the course of this competition, the parties will each move toward the middle of the preference distribution, converging on the same location until the vast majority of voters, on the vast majority of issues, are largely indifferent between the two parties.

Of course, there still will be differences between the parties and their candidates, with one party being more generally attractive to individuals to the "right" of center and the other being more generally attractive to individuals on the "left."¹⁰⁵ But the core prediction of Hotelling and his intellectual heirs stands uncontroverted by observed reality or subsequent theoretical critique:¹⁰⁶ there will be more similarities than differences

103. *Id.* at 54–55. Hotelling continues:

The Democratic party, once opposed to protective tariffs, moves gradually to a position almost, but not quite, identical with that of the Republicans. It need have no fear of fanatical free-traders, since they will still prefer it to the Republican party, and its advocacy of a continued high tariff will bring it the money and votes of some intermediate groups.

Id. at 55.

104. In 1957, Anthony Downs presented the pioneering application and elaboration of Hotelling's insights for political parties. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 114–41 (1957). Building upon Hotelling's model, Downs "confirm[ed] Hotelling's conclusion that the parties in a two-party system converge ideologically upon the center, and [Arthur] Smithies' addendum that fear of losing extremist voters keeps them from becoming identical." *Id.* at 140. For further discussion of Down's extensions of the Hotelling-Smithies model, see Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 *VILL. L. REV.* 951, 969–70 & n.87 (2001).

105. For an early, formal explanation for this phenomenon, see Arthur Smithies, *Optimum Location in Spatial Competition*, 49 *J. POL. ECON.* 423 (1941).

106. Since 1957, there has been much empirical and theoretical work "extending and complicating the Downsian spatial model in ways that permit opposing candidates to

between the two parties' candidates, and the differences will often not be great.

All of this suggests that candidate elections are inevitably highly incomplete, and therefore highly inaccurate, reflections of voter priorities on an enormous number of issues. Contrary to Clark's claim, it will very often be the case that in choosing between candidates voters had no opportunity to express even a preference, let alone a meaningful sense of priorities, on a large number of issues. And, according to Hotelling and his heirs, many of these issues will be precisely the ones on which a minority (i.e., the "non-median voter") has an intensely felt preference.¹⁰⁷ Viewed in this context, the plebiscite is vastly more attractive (or at least much less unattractive) than Clark contends: insofar as candidate elections are *not* an accurate expression of voters' priorities or even preferences, then any additional "distortion" provided by a plebiscite is of no particular import.

It is also possible, however, that the plebiscite actually *improves* the accuracy of the information about voter priorities conveyed by candidate elections. There are at least two respects in which this may be true. First, the initiative process affords a minority the opportunity to get an issue on the ballot that the legislature may be unwilling, or have insufficient time, to take up.¹⁰⁸ Although the outcome of the plebiscite may be an imperfect expression of the voters' intensities of preference, Clark has not made a persuasive case that it is ultimately any less imperfect than the information about voter preferences and priorities conveyed by either the representative lawmaking process or the election

take distinct positions away from the center of gravity of the voter distribution." Morris P. Fiorina, *Whatever Happened to the Median Voter?* 2 (Oct. 2, 1999) (unpublished paper prepared for the MIT Conference on Parties and Congress, Cambridge, MA) (on file with author); *see also* Baker, *supra* note 104, at 970 n.89.

It is noteworthy, however, that even critics of the Downsian model concede that in the middle decades of the twentieth century "[o]n most issues, most of the time, the two major party candidates would take middle-of-the-road positions," and that even today "[c]learly, centripetal forces continue to operate in American politics, especially at the presidential level." Fiorina, *supra*, at 2, 4. Moreover, empirical studies of congressional voting finding that party affiliation does sometimes matter do not necessarily suggest that one must be skeptical of models predicting convergence of parties' platforms. *See* Baker, *supra* note 104, at 970 n.89.

107. *See supra* notes 104–06 and accompanying text; DOWNS, *supra* note 104, at 118 (Given a normal distribution of voters' preferences, the parties "will converge rapidly upon the center. The possible loss of extremists will not deter their movement toward each other because there are so few voters to be lost at the margins compared with the number to be gained in the middle.").

108. *See supra* text accompanying note 20.

of representatives.¹⁰⁹

Second, candidate elections afford voters only the crudest opportunity to express their preferences, and provide them no meaningful opportunity to express the intensity of those preferences or their priorities among various preferences. Consider two people who each vote for the same candidate in a two-candidate election. Imagine further that one of the people voted for the candidate while being indifferent to the candidate's position on abortion and that the other person voted for the candidate because of the candidate's position on abortion. The outcome of the candidate election itself provides no particularly meaningful information about the two voters' intensity of preference on the abortion issue. A subsequent plebiscite on abortion, however, would fill that gap by giving both voters a better opportunity than that afforded by the candidate election to express the intensity of their preferences on the abortion issue.

IV. CONCLUSION

I agree with Clark that "direct democracy's ability to record unmediated majority preference should not entitle it to any special place in the hearts and minds of those concerned with hearing the voice of the people."¹¹⁰ At the same time, however, direct democracy's differences should not relegate it to a lesser place relative to representative democracy.

Clark's important contribution is to have focused our attention on one of the potentially most significant, but least discussed, differences between representative and direct democracy: the ability to express voters' priorities. A close examination of Clark's analysis, however, does not persuade one to join him in concluding either that the expression of voters' priorities is a more legitimate expression of "the voice of the people" than the expression of voters' single-issue majority preferences, or that representative democracy is generally superior to direct democracy in expressing that voice. One is persuaded instead that representative and direct lawmaking reflect the voice of the people in ways that are differently incomplete, differently inaccurate, and have different claims to legitimacy.

In the end, nonetheless, it is easy to conclude with Clark that

109. See *supra* text accompanying note 107.

110. Clark, *supra* note 9, at 470-71.

“[p]olitical outcomes, whether generated by plebiscite or through representation, should be evaluated on their merits, rather than on the basis of their presumed fidelity to some vision of popular will.”¹¹¹

111. *Id.* at 473.