1998

A Populist Critique of Direct Democracy

Sherman J. Clark
University of Michigan Law School, sjclark@umich.edu

COMMENTARIES

A POPULIST CRITIQUE OF DIRECT DEMOCRACY

*Sherman J. Clark**

It is often assumed that direct democratic processes — referenda and initiatives — offer the people a chance to speak more clearly than is possible through representative processes. Courts, commentators, and political leaders have defended or described direct democratic outcomes as the voice of the "people themselves." Because plebiscites allow the people to speak directly, without the potential distortion inherent in representation, they seem ideally responsive to popular will. Indeed, even critics of direct democracy appear to grant as much. Critics are quick to point out, of course, that actual plebiscites often fall far short of the ideal. Uneven voter turnout, poorly drafted ballot issues, the influence of special interests, and similar factors are said to obscure popular input. Alternatively, it is frequently argued that values such as fairness, deliberation, and the protection of individual rights require that popular will be checked and balanced through representative processes, or limited through judicial review. What goes unchallenged, however, is the underlying assumption, which remains as pervasive as it is intuitively appealing: if you really want to know what the people want, take a vote. In this Commentary, Professor Clark challenges this assumption and argues that initiatives and referenda, regardless of how well and fairly they are conducted, cannot be trusted to reflect the voice of the people accurately or meaningfully. Professor Clark argues that direct democratic processes distort popular input by precluding the expression of priorities among issues. By presenting voters with one issue at a time, plebiscites offer no opportunity for voters to focus their political power on the issues of greatest concern to them. Referenda and initiatives, by giving people the chance to vote yea or nay as to this or that particular outcome, make people feel as though they have more input. In fact, however, such processes actually limit people's ability to make effective use of their political power to influence the overall array of outcomes. By contrast, representation, which feels like a limitation of input, actually facilitates the effective use of political power by permitting voters to express both single-issue preferences and inter-issue priorities. Electoral and legislative logrolling — often seen as distorting or obscuring popular voice — in fact facilitates meaningful popular input by allowing voters to allocate their political power to the issues about which they feel most strongly. Representation permits, indeed requires, that voters speak not only to the question of what they want, but also to the question of what they want most.

INTRODUCTION

After the passage of Proposition 209,[1] California's anti-affirmative action measure, California Governor Pete Wilson held a televised press

---

* Assistant Professor, University of Michigan Law School. Thanks to Akhil Amar, David Butz, Don Herzog, Rick Hills, Jeffrey Lehman, Sanford Levinson, Frank Michelman, Jocelyn Normand, Terry Sandalow, Jane Schacter, Rick Pildes, Matthew Zinn, and participants in the Michigan Legal Theory Workshop.

[1] Proposition 209, formally known as the California Civil Rights Initiative, was approved by a majority of voters on November 5, 1996. It amended the California Constitution to provide: "The state shall not discriminate against, or grant preferential treatment to, any individual or

conference to respond to protesters. Rather than address the merits of Proposition 209, Governor Wilson elected to rely on a rhetorical device common to the discourse of referenda and initiatives, saying simply, "The People of California have spoken."[2] Governor Wilson's sentiments echoed those expressed by Justice Scalia in a similar context. Dissenting in *Romer v. Evans*,[3] Justice Scalia emphasized that Amendment 2 to the Colorado Constitution had been "put directly, to all the citizens of the State," and had therefore been approved by the "most democratic of procedures."[4] Or consider this, from a recent essay in *The Economist*: "If democracy means rule by the people, democracy by referendum is a great deal closer to the original idea than the every-few-years voting which is all that most countries have."[5]

These endorsements of direct democracy make explicit an assumption that underlies much of our political, legal, and popular discourse on referenda and initiatives. The assumption is this: whatever one thinks about the propriety or wisdom of plebiscites, they at least do one thing — they let the people speak. In the words of the Supreme Court, direct democracy is designed to "give citizens a voice on questions of public policy."[6] This characterization goes largely unchallenged because it is assumed that, absent unanimity, the majority must be understood as speaking for the people as a whole.[7] This assumption leads advocates of direct democracy to emphasize unmediated access to majority preference. Direct democracy, it is argued, allows access to majority preference without the interference and potential distortion of representative institutions. The more direct the process, it

---

group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art. I, § 31(a).

[2] *CNN Inside Politics* (CNN television broadcast, Aug. 28, 1997), *available in* LEXIS, News Library, Script File, Transcript #97082800V15. Governor Wilson's press conference was occasioned by a march conducted by civil rights leaders to protest, or rather mourn, the passage of Proposition 209. *See id.*

[3] 517 U.S. 620 (1996) (holding unconstitutional Amendment 2 to the Colorado Constitution, which prohibited the state from enacting or enforcing any measures designed to protect homosexuals as a minority class).

[4] *Id.* at 647 (Scalia, J., dissenting). Justice Scalia was in turn speaking in the tradition of Justice Black, who opined that "provisions for referendums demonstrate devotion to democracy," James v. Valtierra, 402 U.S. 137, 141 (1971), and of Justice Harlan, who similarly described a referendum outcome as the voice of "the electorate itself" and a "decision of the people," Rietman v. Mulkey, 387 U.S. 369, 396 (1967) (Harlan, J., dissenting).

[5] *Full Democracy*, ECONOMIST, Dec. 21, 1996, at 3, 3 (survey insert).

[6] City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 673 (1976) (quoting *Valtierra*, 402 U.S. at 141).

[7] What has been noted regarding Chief Justice Rehnquist might fairly be said to characterize our political and legal discourse regarding direct democracy generally: "He consistently equates 'majority rule' with the 'will of the people' and does not stop to consider the possibility that the relationship between the two may be problematic." Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 637 (1994).

is assumed, the clearer the voice of the people. This assumption is at the heart of the populist case for direct democracy.[8]

Unmediated access, however, does not always enhance clarity. There are mediating devices and there are mediating devices. They can in some cases obscure, but they can also improve comprehension. Prescription eyeglasses are mediating devices, but they make clear what would otherwise be obscured. The translators employed by diplomats are mediating devices, but they allow communication between people who could otherwise only guess at one another's meaning. Granted, no translator is perfect, but few would on that basis forego their assistance in favor of a "direct" but incomprehensible conversation.

In this Commentary, I offer an alternative understanding of what it means to hear the voice of the people. Part I suggests that instead of asking which processes allow us to hear most directly what the people have to say, we should ask which processes allow us to hear most clearly and completely what the people have to say. I thus offer a vision of democracy that remains a populist vision, rooted in the ongoing consent of the governed, but that emphasizes the clarity and completeness with which consent is obtained, rather than the directness.

In Part II, I argue that plebiscites, while making people feel that they have more voice in government, may actually prevent the people from expressing themselves clearly.[9] Specifically, I argue that single-issue direct democracy lacks a mechanism for reflecting voter priorities among issues. I suggest 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.[10] Unlike prior ac-

---

[8] The term "populist" here does not refer specifically to the turn-of-the-century Populist political movement, but rather to "a persistent yet mutable style of political rhetoric with roots deep in the nineteenth century," which consciously constructs itself in opposition to political elites and emphasizes putting political power into the hands of the people as a whole. MICHAEL KAZIN, THE POPULIST PERSUASION 5 (1995).

[9] I do not maintain that there is some static and unambiguous "popular will" out there waiting to be measured. Popular preferences are shaped through, as well as measured by, political processes. One might even go so far as to suggest that there is nothing fairly describable as the will of the people independent of the processes through which it is constructed. I do not go so far. Given that my attempt is to mount a populist critique rather than a critique of populism, I rely on a concept of popular will that is not constructed solely through the political process. In an effort, therefore, to recognize the fluid and process-dependent nature of popular preferences and priorities, without falling into a rhetorically suicidal postmodern rejection of "popular will" as an empty concept, I avoid the phrase "popular will" whenever possible in favor of the auditory metaphor of "popular voice." To take seriously the claims of those who profess a desire to give the people a voice, I must at least grant that the people have something to say.

[10] *See, e.g.*, Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 25 (1978) ("[I]n a particular referendum on a particular issue, a matter extremely harmful to minority interests but only moderately beneficial to non-minority interests may be passed; the ballot does not easily register intensity of interest as the legislative process does.").

counts of the intensity problem, however, the argument offered here is not utilitarian. The claim is not that we should take intensity into account in order to maximize overall welfare, let alone that we should do so by allocating more political power to those who have more at stake. No one can or should have more input than anyone else. What we can and should do, however, is allow citizens to weigh and express the relative intensity of their own concerns in deciding how to make use of their political power. We should allow for the expression of priorities as well as preferences.

In Part III, I argue that representative government allows, and in fact requires, voters to express priorities by focusing their limited political power where it matters to them most. They do so by trading off less important issues, through candidate elections and legislative logrolling, in order to secure results on the issues they consider most important. I suggest that these familiar processes of Madisonian coalition-building and pluralist vote-trading might profitably be understood not as devices which protect minorities *from* the people as a whole, but rather as the means through which the people make themselves heard.

I do not claim that representation is perfect, on populist terms or any other. Nor do I assert categorically that representation in every case conveys the voice of the people more fully than do plebiscites. My aim is rather to call into question the opposite categorical claim so often made or implied on behalf of direct democratic processes. The underlying assumption, which I attempt to show is as pervasive as it is superficially appealing, is that the voice of the majority must be understood as the voice of the whole. Thus, a plebiscite, whatever its flaws in practice, is assumed to be superior in principle, at least on purely populist terms. By virtue of its direct access to majority preference, the plebiscite seems, at bottom, if we could get it right, more responsive to the people. It is this assumption that I challenge. My goal, therefore, is not so much to enter the debate over any particular direct democratic outcome, but rather to make way for those debates by questioning the conversation-ending claim that "the people have spoken." I suggest that this ace in the hole — played with such effect by Governor Wilson and others — comes from a stacked deck.

I. The Voice Of The People

A. Confronting the Populist Case for the Plebiscite

The populist case for direct democracy is straightforward and appealing: direct democratic processes are at some level more democratic, more legitimate, than representative institutions, because they are more directly responsive to the people. In one formulation:

> It is natural to assume that direct is better, more nearly perfect, than indirect — that the ideal of consent of the governed is better achieved by con-

> senting to the laws themselves, rather than to representative lawmakers. This argument from the logic of democracy surely has much to do with the initiative's popularity.[11]

If we want to know what the people want, a natural intuition is that we should take a vote.

This "argument from the logic of democracy" makes two claims, or rather one claim and one assumption. The claim is that popular responsiveness is an appropriate democratic criterion. The assumption is that direct democracy satisfies that criterion better than does representation. Thus framed, there are three basic sorts of arguments one might make in response to the populist case. Two are familiar and well-represented in the literature.

First, one could challenge the equation of popular responsiveness with democratic legitimacy. Asking whether one process is "more democratic" than another is at bottom a question about the nature of democracy. In this context, democracy, at least American democracy, does and ought to mean more than identifying and effectuating popular preferences. An essential function of our constitutional regime is to control and place limits on raw popular power. Alongside explicitly populist criteria, values such as individual rights, fairness, and wise decisionmaking ought to inform our understanding of democracy, and thus our choices between processes. Claims of this sort, when addressed to the question of direct democracy, often take the form of calls for strict judicial review of direct democratic outcomes.[12] The paradigmatic example of this sort of argument is the claim that a particular plebiscitary process or outcome is unconstitutional.[13]

---

[11] Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 55 (1995).

[12] *See, e.g.*, Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1521–22 (1990); Julian N. Eule, *Representative Government: The People's Choice*, 67 CHI.-KENT L. REV. 777, 789 (1991). Frank Michelman, addressing a conference dedicated to the late Julian Eule, defended and augmented Eule's call for increased judicial scrutiny of direct democracy by arguing that democracy ought to mean more than majority rule. Michelman argues that because majority rule is appealing primarily on fairness grounds, majority rule ought to give way in cases where other decisionmaking processes better serve "both to sustain a democratic form of social life and to supply everyone concerned with reason to regard himself or herself as no less an author than anyone else of the fundamental laws of the country." Frank I. Michelman, *"Protecting the People from Themselves," or How Direct Can Democracy Be?*, 45 UCLA L. REV. 1717, 1733 (1998). *But see* Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 531 (1994) (arguing against judicial review of plebiscites); Mark Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Legislation*, 1996 ANN. SURV. AM. L. 373, 376–78 (advocating against differential judicial review of plebiscites). See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY 665–712 (1998) for a general overview of the discourse of direct democracy.

[13] One not widely accepted but persistent argument goes even further, maintaining that direct democratic processes in general are unconstitutional under the Guaranty Clause. *See* Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 19–21 (1993); Catherine A. Rogers & David L. Faigman, *"And to the Republic for Which It Stands": Guaranteeing a Republican Form of Government*, 23

An effort to meet the populist case for direct democracy on its own terms, however, cannot rely on arguments of this sort. While few would dispute the claim that there are substantive values that ought to be placed alongside or even above popular responsiveness, critiques highlighting such values will not resonate with those who emphasize the need to put government back into the hands of the people. In fact, such critiques put the critic in opposition to the people — in the posture of elitist guardian telling the people they cannot or should not get what they want.

A second, equally familiar response points to the messy, real-world practice of direct democracy. For example, the absence of deliberation, low and uneven voter turnout,[14] voter ignorance,[15] the influence of money,[16] and special-interest capture[17] all undermine the responsiveness of direct democracy. Moreover, insofar as it is often difficult to ascertain precisely what voters thought they were enacting in a given

---

HASTINGS CONST. L.Q. 1057, 1058–59 (1996); Douglas H. Hsaio, Note, *Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic*, 41 DUKE L.J. 1267, 1296–1303 (1992). The Court has expressly refused to consider this question. *See* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912).

[14] *See, e.g.*, David Magleby, *Let the Voters Decide?: An Assessment of the Initiative and Referendum Process*, 66 COLO. L. REV. 13, 31–34 (1995) [hereinafter Magleby, *Let the Voters Decide?*]; *see also* DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 77–99 (1984) [hereinafter MAGLEBY, DIRECT LEGISLATION] (describing empirical evidence on ballot-issue voting patterns).

[15] *See* Collins & Oesterle, *supra* note 11, at 91–92; Magleby, *Let the Voters Decide?*, *supra* note 14, at 38–39; *see also* Robert C. Benedict & Lauren H. Holland, Initiatives and Referenda in the Western United States, 1976–1980: Some Implications for a National Initiative? 40 (unpublished paper presented at the American Political Science Association annual meeting, Washington, D.C., Aug. 1980) (describing a 1976 mail survey in which a majority of voters surveyed agreed with the proposition that "[t]he initiative and referendum measures on the ballot are usually so complicated that one can't understand what is going on"), *cited in* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 74 (1989). Cronin, despite acknowledging this and other evidence of voter confusion, maintains that properly drafted plebiscites need not give rise to voter confusion or misunderstanding. *See* CRONIN, *supra*, at 70–73.

[16] *See, e.g.*, Collins & Oesterle, *supra* note 11, at 74; 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 Corruption, Undue Influence, and Declining Voter Confidence be Found?*, 39 U. MIAMI L. REV. 377, 391–400 (1985).

[17] *See, e.g.*, Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 18–19 (1997) (disputing the claim that direct democracy is freer from special interest domination than is lawmaking by legislatures); Randy M. Mastro, Deborah C. Costlow & Heidi P. Sanchez, *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); Shockley, *supra* note 16, at 381–90. *But see* DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 37 (1989) (arguing that direct democratic processes are not subject to special-interest capture because proponents of measures are equally divided between the left and the right).

plebiscite, the interpretation of direct democratic outcome places substantial strain on traditional canons of statutory interpretation.[18] This approach might be coupled with the line of argument that emphasizes the difference between transient popular preference and the considered will of the people. In this light, an initiative or referendum outcome might not reveal what a deliberate, thoughtful majority of the whole voting population would want if they had a full understanding of the issue at hand. Popular responsiveness might be valuable, this argument would acknowledge, but direct democracy, *as practiced*, does not accomplish that end.

As evidenced by the extent to which direct democracy is flourishing, however, critiques rooted in these concerns have gone largely unheeded. They have gone unheeded, I suggest, because they do not get to the heart of the matter. Supporters of the referendum and the initiative acknowledge that such processes are imperfect and need to be improved. The same is true of legislatures. Whatever processes we adopt will be imperfect and will need monitoring to ensure that they meet the ends for which they are designed. If one of those ends is popular responsiveness, the essential question is this: which processes have the *potential* to let us hear the voice of the people? What the extant critiques leave untouched is the assumption that direct democracy has this potential — that a well-conducted popular vote would tell us, as well as we can ever hope to learn, what the people want.

I question this assumption, and thus mount a third and different sort of critique. I attempt to meet the populist case on its own terms. I grant the significance of popular responsiveness, and therefore do not set up substantive values against the voice of the people. Moreover, I set aside arguments rooted in the failings of actual referenda. My argument holds even if referenda could be conducted perfectly — even if plebiscites were capable of telling us what a fully informed majority of the population would prefer on any given issue. Instead, I challenge the assumption underlying the populist case. I question the claim that the majority should be understood as speaking for the whole. My goal is to sever single-issue majority preference from popular voice. Moreover, I aim to do so in a way that embraces, rather than rejects or qualifies, the concerns and priorities underlying the enduring and pervasive populist affection for the plebiscite.

B. Why Should the People Be Heard?

Consider the two-part populist case for direct democracy: first, we ought to care about what the people want; second, direct majority votes tell us, better than do representative processes, what the people

[18] *See* Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 505; Jane Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 109–10 (1995).

want. For purposes of this argument, the first part of this assumption is not contested. I thus grant what might be termed the basic premise of popular sovereignty. At some level at least, we ought to care what the people have to say. Popular input ought to matter. However, if the premise of popular sovereignty is to serve as a starting point for argument, it becomes critical to examine the bases for the premise. Why popular sovereignty? Why listen to the people?

The understanding of popular sovereignty that fuels allegiance to direct democracy is rooted in the problem of political legitimacy. The legitimacy problem itself emerges as a consequence of deeper, underlying commitments to liberty and equality. The problem is one of justifying coercion, given that no person has "natural" authority over another. The content of this presumption of equality is famously elusive. But however it is specified — equal in the eyes of God; equal by nature (or in the "state of nature"); or equal in the presumed capacity for moral choice — the problem of legitimacy remains. If each individual is of equal intrinsic worth — equally worthy of respect — by what right does any person or group of people (the state) exercise coercive authority over any other? This is arguably the central question of liberal political theory,[19] but it is not an abstract or purely theoretical concern. Each time a cab driver, bartender, or teenager protests that "no one should be able to tell me how to live my life," he or she has expressed a concern about the legitimacy of power. The collective manifestation of this concern will be equally familiar to even the most

---

[19] Indeed, an attempt to give content to the ideal of human equality reveals an even closer conceptual connection between the problem of equality and the problem of legitimacy. Here is Locke:

> [The State of Nature is a] *State* also *of Equality*, wherein all the Power and Jurisdiction is reciprocal, no one having more than another: there being nothing more evident, than that Creatures of the same species and rank promiscuously born to all the same advantages of Nature, and the use of the same facilities, should also be equal one amongst another without Subordination or Subjection ....

JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690). On this account, equality fundamentally serves to call into question the legitimacy of authority. Locke elaborates:

> Though I have said above ... *[t]hat all Men by Nature are equal*, I cannot be supposed to understand all sorts of *Equality: Age* or *Virtue* may give Men a just Precedency: *Excellency of Parts and Merit* may place others above the Common Level: *Birth* may subject some, and *Alliance* or *Benefits* others, to pay an Observance to those to whom Nature, Gratitude or other Respects may have made it due; and yet all this consists with the *Equality*, which all Men are in, in respect of Jurisdiction or Dominion one over another, which was the *Equality* I there spoke of, as proper to the Business in hand, being that *equal Right* that every Man hath, *to his Natural Freedom*, without being subjected to the Will or Authority of any other Man.

Id. at 322. Equality, here stripped of any affiliation to sameness or even similarity, becomes a way of talking about liberty, and in this sense essentially a framework for the problem of political legitimacy. My goal, however, is not to search liberal theory for a "correct" reading of the principle of popular sovereignty. Locke's is merely one formulation, albeit a particularly cogent and influential one, of the way in which a dual commitment to equality and autonomy gives rise to questions of legitimacy.

casual student of American history: "Why should we (taxpayers, voters, the people) be governed by them (bureaucrats, politicians, elites)?"[20]

Theories of popular sovereignty attempt to respond to this concern by describing political and legal obligations as fundamentally self-imposed. Although they can be formulated in various ways, the basic moves leading from the presumption of equality to the justification of political authority through popular sovereignty are familiar. The equal and autonomous individual is not coerced to the extent that he or she is obeying only himself or herself. In other words, the people can fairly be made to follow their own rules. Thus, a regime is legitimate if people are made to follow only those rules to which they have consented.

Given this basis for popular sovereignty, the concept is an inherently imperfect solution to the legitimacy problem. Absent unanimity, some people are made to follow rules to which they did not agree; not everyone has literally consented. From the individual perspective, a second-best solution is to allow each person to participate fully and equally in the processes by which the rules are made. The collective manifestation of this second-best solution is popular sovereignty — the requirement that the regime reflect the consent of the people as a whole. On this understanding, voting systems, however necessary, are means rather than ends. They are the means through which we seek to allow people to participate, as fully and equally as possible, in crafting and approving the rules and institutions under which they live.[21]

Alternative readings of popular sovereignty are of course possible. For example, one might distinguish popular sovereignty from popular responsiveness by arguing that authority need only be *derived* from, and thus justified by, the consent of the governed, as opposed to by God or by nature, for instance.[22] On this reading, no ongoing assertion of consent is necessary. It appears, however, that the populist case

---

[20] As Michael Kazin has detailed in his study of populist political rhetoric, various formulations of this concern have long been a central theme in American political discourse. *See* KAZIN, *supra* note 8, at 1–7; *see also* ROBERT H. WIEBE, SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY (1995) (exploring the historical development of American democratic theory).

[21] An alternative solution to the legitimacy problem relies on implied consent. The basic steps, again, are familiar. Since everyone cannot actually consent, a regime is legitimate if the people *would* consent to it, were they properly educated, enlightened, or public-spirited. Severed from any connection to actual self-government, such implied consent theories become ways of talking about fairness, justice, efficiency, or any other substantive values that one argues people would or should accept. Implied consent thus functions like Kant's categorical imperative or Rawls's veil of ignorance — as a framework for normative or ethical argument. In contrast, this Commentary suggests that the justifications offered by advocates of direct democracy are rooted in a commitment to the actual, if inevitably imperfect, consent of the governed.

[22] In one familiar formulation, governments "deriv[e] their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

for direct democracy is rooted in a concern for active, ongoing consent. Similarly, one might attempt to articulate a more emphatically collectivist understanding of popular sovereignty. In this formulation, the idea of popular sovereignty emerges not so much from a concern over individual autonomy, but rather as a response to alternative claims of authority over the people as a whole.[23] In the end, however, it is not clear what follows from the collectivist formulation. Whether the voice of the people is understood as collective expression or aggregated preferences, the processes used to hear that voice should allow each citizen as full and equal an opportunity to be heard as is possible.

My aim here is not to prove, in any deontological sense, the necessity for full and equal popular input. Nor do I maintain that a theory of popular sovereignty, however formulated, is the best or only way of responding to the legitimacy problem. The justification of political authority is of course a central theme of political and legal theory. I make no attempt here to canvass, let alone adjudicate among, the myriad justificatory accounts, consent-based or otherwise. My claim is much more modest, and can be divided into two parts. First, it is normatively appealing to conceive of political processes as striving, at least in part, to provide each citizen with a full and equal chance to form or consent to the rules and institutions under which he or she is required to live. Second, and more to the point, the populist case for direct democracy, to which I am attempting a response, appears to be rooted in this very concern — in the desire to give the people the clearest possible voice.

C. How Should the People Be Heard?

To the extent that legitimacy hinges on ongoing popular consent, two potentially inconsistent goals emerge. First, and most obviously, each person's voice must be given equal weight. Second, each person's voice should be heard as fully and accurately as possible. It should be evident that the first of these aims is necessary but not sufficient — equal treatment alone does not answer the autonomy concerns underlying the legitimacy problem. The most total despotism, for example, could give each person's voice equal weight by giving no one any voice at all. Accordingly, voting systems cannot be satisfactorily evaluated without reference to the second goal inherent in a commitment to hearing the voice of the people. How well and fully is each person heard?

---

[23] As historian Edmund Morgan has argued, the idea of a "people" from whom all power flows, and in whom ultimate authority remains, emerged as a response not to challenges against political authority generally, but to specific and long-standing claims of royal authority. *See* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 55–57 (1988).

Purely quantitative criteria cannot answer this question. For example, it might be suggested that frequency of input is the decisive factor. Perhaps the more often citizens get to express their preferences, the more fully their voices will be heard. Or perhaps the decisive factor should not be frequency, but rather the number and significance of the issues on which citizens can express their preferences. On this criterion, the more key issues about which citizens are able to express an opinion, the more complete the popular input, with the ideal being citizen input on every issue. It is possible, however, to give every citizen input on every issue without well or fully hearing any of them. Imagine, for example, a system in which each citizen records his or her opinion in plain English and gives it to an official who speaks only Greek — the official's job being to make his or her best guess at what the people have said. Input, even universal input, is not meaningful without some assurance that it will be translated as fully and accurately as possible. Some qualitative criteria are needed.

One criterion has emerged as central — directness. If the desire is to hear the people as clearly as possible, it is intuitively appealing to assume that the more direct the input, the better. If the danger is that the voice of the people will be garbled or mistranslated, perhaps the best solution is to eliminate the mediating devices that give rise to these concerns. In this light, representative democracy has come to be seen as a second-rate form of popular sovereignty.[24] Direct democracy, in contrast, appears to give us the pure and unadulterated voice of the people themselves.

Perhaps the clearest articulation of this understanding was offered by the Supreme Court in *City of Eastlake v. Forest City Enterprises*.[25] In an opinion by Chief Justice Burger, the Court upheld the constitutionality of a city charter provision, enacted by popular vote, that required that any land use changes passed by the city council be approved by referendum. The provision had been challenged as a standardless delegation in violation of the Due Process Clause. The Court, however, held the following:

> A referendum cannot . . . be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.[26]

---

[24] *See* CRONIN, *supra* note 15, at 17 ("In effect, Madison embraced a watered-down version of 'consent of the governed.'"). One familiar defense of the legitimacy of representation in fact fuels the perception that representative democracy is second-best, by arguing that it is legitimate to require people to follow not only rules to which they have consented, but also rules made through processes to which they have consented. I do not rely on this argument.

[25] 426 U.S. 668 (1976).

[26] *Id.* at 672 (citation omitted) (citing Hunter v. Erickson, 392 U.S. 385, 392 (1969)).

Up to this point, the opinion may be read as merely recognizing the premise of popular sovereignty at the heart of "our constitutional assumptions." Because "all power derives from the people," the will of the people is prior to and superior to that of the legislature. Almost without pause, however, the Court went on to endorse the accompanying assumption that referendum results are the voice of the people:

> The referendum is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to "give citizens a voice on questions of public policy."[27]

The assumption that referendum results constitute the voice of the people, although not logically required by the holding, cannot be dismissed as mere dicta, given that this assumption served as the basis on which the Court distinguished prior cases involving standardless delegations. For example, the Court described cases involving delegation to administrative agencies as follows:

> [T]hese cases involved a delegation of power by the legislature to regulatory bodies, which are not directly responsible to the people; this doctrine [of standardless delegation] is inapplicable where, as here, rather than dealing with a delegation of power, we deal with a power reserved by the people to themselves.[28]

The Court similarly distinguished *Eubank v. Richmond*[29] and *Washington ex rel. Seattle Title Trust Co. v. Roberge*,[30] which had invalidated the delegation of zoning authority to specified segments of a given population:

> The thread common to both decisions is the delegation of legislative power, originally given by the people to a legislative body, and in turn delegated by the legislature to a *narrow segment* of the community, not to the people at large.[31]

By describing a referendum result as approval by "the people at large," rather than by a "narrow segment of the community," the Court equated majority preference with popular voice.

Significantly, this same understanding is evident in cases *disapproving* particular direct democratic outcomes. In *Hunter v. Erickson*,[32] for example, the citizens of Akron, Ohio, had amended their city charter through a majority vote in a referendum to provide that no fair housing laws could be effective until approved by a majority vote in a subsequent referendum. The Court held that the provision violated the Equal Protection Clause because it disadvantaged a "particular

---

27 *Id.* at 673 (quoting James v. Valtierra, 402 U.S. 137, 141 (1971)).

28 *Id.* at 675.

29 226 U.S. 137 (1912).

30 278 U.S. 116 (1928).

31 *City of Eastlake*, 426 U.S. at 677.

32 393 U.S. 385 (1969).

group by making it more difficult to enact legislation in its behalf."[33] In its opinion, the Court took pains to stress that "[t]he sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed."[34] By assuming that reversing a referendum result amounted to putting a "limitation" on "the sovereignty of the people," the Court made clear that it saw direct democratic outcomes as expressions of that sovereignty.[35]

As might be expected, cases in which direct democratic outcomes are *upheld* give rise to even more energetic endorsements of the assumption that those outcomes express the will of the people. Consider the language employed by the Ninth Circuit in vacating a temporary restraining order that would have delayed the enforcement of California's Proposition 209. Before addressing, and rejecting, the district court's finding that the plaintiffs had demonstrated a likelihood of success on the merits, the court commented on what it saw as the extreme consequences of the district court's ruling. According to the Ninth Circuit, "[t]he decision operates to thwart the will of the people in the most literal sense."[36] There is no missing the premise here, or its significance in the eyes of the court.[37] The decision of the majority is taken to be the unambiguous "will of the people."[38]

The equation of more direct with more responsive is not only pervasive, but at first blush quite appealing. As Julian Eule, who was hardly an advocate of direct democracy, acknowledged, "Regardless of the many ways in which plebiscites garble the message of majority

---

[33] *Id.* at 393.

[34] *Id.* at 392.

[35] *See also* Evans v. Romer, 854 P.2d 1270, 1286 (Colo. 1993) ("That Amendment 2 was passed *by a majority of voters* through the initiative process *as an expression of popular will* mandates great deference." (emphasis added)), *aff'd*, 517 U.S. 620 (1996).

[36] Coalition for Econ. Equity v. Wilson, 110 F.3d 1431, 1437 (9th Cir.), *cert. denied*, 118 S. Ct. 396 (1997).

[37] As a formal matter, the Supreme Court has held that the direct democratic origin of a challenged measure is irrelevant for purposes of constitutional review. *See* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 737 (1964) ("We hold that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance . . . ."). While this remains the Court's official position, holdings such as the one in *City of Eastlake* suggest that assumptions about the responsiveness of direct democracy are operating as a weighty thumb on the scales. Also note the implicit assumption in *Lucas* itself that approval by majority vote can be equated with approval by "the electorate" as a whole.

[38] State courts have been no less willing to endorse this assumption. Consider the cross-section of state court decisions collected by Jane Schacter. *See* Schacter, *supra* note 18. Schacter reviewed fifty-three cases applying statutes passed through initiatives, examining the methods of statutory interpretation that courts employed. *See id.* at 110. In none of those cases did any court question the equation of majority preference and popular preference. *See id.* at 117–19. Schacter's finding is particularly striking because it appears that many of those courts were intimately and painfully aware of the difficulty of determining what the voters actually thought they were enacting. *See id.* at 111. What remains unquestioned, however, is the assumption that if it is clear what precisely a majority preferred, we can and must take it as given that the majority has spoken for the people as a whole. *See id.* at 110–11.

will, it would be difficult to argue convincingly that legislatures convey it more clearly."[39] Granted, it would be difficult to argue that legislatures measure *majority* will more accurately than do direct democratic processes, but why is that relevant? What makes Eule's concession significant is the unspoken equation of majority preference with popular preference. What goes unchallenged is the assumption that "majority will" is worth conveying.[40]

Eule is in good company, given the extent to which popular sovereignty and majority rule have been linked in our legal and political discourse. The roster of those who have endorsed this linkage reads like a *Who's Who* of Western political thought. Here is de Tocqueville: "The absolute sovereignty of the will of the majority is the essence of democratic government . . . ."[41] Lincoln's endorsement was particularly energetic:

> A majority . . . is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or to despotism. Unanimity is impossible. The rule of a minority, as a permanent arrangement, is wholly inadmissable; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.[42]

One could extend this list almost endlessly, including similar statements from such notables as Hobbes, Locke, and Jefferson.[43] As Robert Dahl observed, "Running through the whole history of democratic theories is the identification of 'democracy' with political equality, popular sovereignty, and rule by majorities."[44] Kenneth May added

---

39 Eule, *Judicial Review of Direct Democracy*, *supra* note 12, at 1521.

40 Eule went on to argue that courts should give less deference to direct democratic outcomes than to legislative enactments. *See id.* at 1525–32. Because the ordinary legislative and executive constraints on majority will are absent from plebiscitary devices, the courts must guard "against the evils incident to transient, impassioned majorities that the Constitution seeks to dissipate." *Id.* at 1525. The equation of majority preference with popular voice forced Eule to envision the courts in opposition to the people.

41 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 246 (J.P. Mayer ed. & George Lawrence trans., Harper Collins 1988) (1850).

42 Abraham Lincoln, First Inaugural Address, *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 5, 9 (James D. Richardson ed., 1897).

43 *See, e.g.*, THOMAS HOBBES, LEVIATHAN 114 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) ("For if the lesser number pronounce (for example) in the Affirmative, and the greater in the Negative, there will be Negatives more than enough to destroy the Affirmatives; and thereby the excesse of Negatives, standing uncontradicted, are the onely voyce the Representative hath."); LOCKE, *supra* note 19, at 350 ("[I]t is necessary the Body [the community] should move that way whither the greater force carries it, which is the *consent of the majority*: or else it is impossible it should act or continue one Body, *one Community* . . . ."); Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* 1 GREAT ISSUES IN AMERICAN HISTORY: A DOCUMENTARY RECORD, 1765–1865, at 186, 189 (Richard Hofstadter ed., 1958) ("[A]bsolute acquiescence in the decisions of the majority [is] the vital principle of republics, from which [there] is no appeal but to force . . . .").

44 ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 34 (1956), *quoted in* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 702 (1995). Croley elaborates: "Majoritarianism is virtually implicit in democratic theory . . . . Once citizens of the polity are political equals — that is, once they have an equal voice in

the weight of modern decision theory to the apparent consensus, by demonstrating mathematically that majority rule is the only decision principle capable of meeting basic conditions of fairness and rationality without privileging the status quo.[45]

D. Framing a Populist Critique

The difficulty with traditional analysis is that we lose track of what we are trying to hear. If our goal were to measure issue-by-issue majority preference, more direct would indeed be more responsive, and the mediating devices of representative government would indeed be agency costs, noise, or interference. Recall, however, that in populist terms the goal is to hear the voice of the people as well and as fully as possible. Political processes respond to the legitimacy problem by ensuring that voters have as full an opportunity as possible to influence the rules (plural) under which they must live. For those whose aim is to give the people a voice in government, therefore, the goal of political processes should *not* be to permit each voter to describe, one issue at a time, his or her perfect world, as if describing what he or she would do if elected Czar. Rather, the goal should be to allow each person, who knows that his or her perfect world will not be enacted — who knows that he or she will win some and lose some — 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.

In this way 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. It might appear, therefore, that I must disregard or reject the array of historical support and mathematical demonstration that has been offered on behalf of that connection. In fact, I need not.

In essence, all of the protestations and proofs cited above reduce to a single claim: rule by the majority is superior to rule by a minority. I

---

decisionmaking processes — it follows that policy alternatives attracting the most voices will prevail." Croley, *supra*, at 702. *But see* David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 13 (1990) ("Popular sovereignty is not necessarily *majority* will. Law can come from the people . . . without coming from political majorities. Although popular sovereignty *can* be understood as fifty percent plus one, it can also be understood as a plurality, a supermajority, or even the will of an appointed oligarchy of lawmakers.").

[45] *See* Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680, 683 (1952). Public choice pioneer Kenneth Arrow further showed, however, that *no* decision process, including majority rule, can meet a set of five slightly more stringent conditions, each of which seems intuitively necessary and reasonable. Most notably, Arrow showed that no rule can prevent intransitivity (the phenomenon through which outcomes depend on the order in which issues are voted upon), and the consequent possibility of cycling or manipulation or both, without violating one or more seemingly basic requirements of fairness or rationality. *See* KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 120 (1963).

am fully prepared to acknowledge this claim. All else being equal, a decision by 50% plus one is better than a decision by 50% minus one. We might call this the majoritarian principle. As far as it goes, it is correct. One way of framing my thesis, therefore, would be to claim that all else is *not* equal — that other sorts of information should tip the balance. This formulation, however, unnecessarily implies that my argument requires a rejection of the majoritarian principle. It does not. Specifically, the principle as phrased presumes a world of isolated issues and yes or no preferences. Nothing about the superiority of majority rule to minority rule, however, rules out a more sophisticated set of interconnected applications of the majoritarian principle, aimed at producing a fuller and more nuanced sense of what the people have to say.

I do not reject the majoritarian principle itself. What I reject is the piecemeal application of that principle to one issue at a time. The majoritarian principle holds that if all we are capable of knowing is that 60% of the people prefer *X* (as opposed to 40% who prefer not-*X*), then *X* should prevail. But that is not all we are capable of knowing. In particular, we know that the choice between *X* and not-*X* is not the only issue that the people will confront. They will also decide, through some forum or another, the choice between *Y* and not-*Y*, and *Z* and not-*Z*.[46] Assume that *Y* and *Z* would each prevail in a series of referenda. Outcomes *X*, *Y*, and *Z* would each, if voted on independently, command a majority. This tells us 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.

Unless the majorities on issues *X*, *Y*, and *Z* are largely congruent, a series of referenda on those issues would not necessarily give a majority of voters everything they want. This is the fundamental Madisonian insight. A citizen in the majority on issue *X* may be in the minority on issues *Y* and *Z*.[47] Few voters will find themselves in the

[46] For purposes of illustration, I assume that outcomes *X*, *Y*, and *Z* are unconnected. By making this assumption, I mean to forgo arguing the easy case in which multiple issues are logically dependent on each other or conceptually interconnected, as, for example, if outcomes *X*, *Y*, and *Z* represented competing claims on limited resources. In the latter situation, one could argue that a voter cannot coherently express a preference on one issue in isolation from the others. Instead, I am intentionally confronting the hard case — the supposed best case for direct democracy — in which each issue is conceptually and logically independent of the others.

[47] In some circumstances, of course, the majorities will be congruent — the same people will favor *X*, *Y*, and *Z*. In such a case, *XYZ* will be the outcome no matter what voting system is employed, regardless of how intensely concerned the minority might be about any or all of the issues. Because no populist analysis is capable of ameliorating this difficulty — the problem of the "discrete and insular minority," United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) —

majority on every issue, and thus few will see their ideal world enacted in all of its particulars. Moreover, it seems fair to assume that people will not attach equal significance to each feature of their ideal, but unobtainable, world. In this light, giving people an opportunity to describe their ideal world through a series of plebiscites may be a false blessing. Instead, what is needed is a method of allowing people to tell us, given that they will not get everything they want, which outcomes they want most.

I argue below that representation may be understood as a method of accomplishing this end without violating the majoritarian principle itself. It is a mediating device that can illuminate as well as obscure. In particular, it allows citizens to express their priorities in a way not possible through direct democracy. To put my argument back into the context of legitimacy theory generally, my claim is that the Lockean two-step (asserting that consent to the processes through which laws are made equals consent to those laws) is unnecessary. If, as I argue below, representation allows for a fuller expression of ongoing consent, it appears that this Madisonian "version of the consent of the governed" may not be "watered down"[48] at all. In the end, however, nice theoretical distinctions are unlikely to alter the debate over direct democracy unless they can be couched in terms that resonate with those whose priority is not fidelity to some particular interpretation of eighteenth-century liberal theory, but rather giving the people of today a voice in governing themselves. Accordingly, my argument up to this point is perhaps best stated as a straightforward normative corollary to the most uncontroversial of populist principles. If we want to listen to the people, we ought to try and let them speak as clearly as possible.

II. THE PRIORITY PROBLEM

A. The Intensity Problem Revisited

By equating the preference of the majority with the will of the people, we fail to take into account that, for any particular issue, some individuals will care more — have more at stake — than will others. More to the point, single-issue votes cannot take into account that, for each person, some issues will be more important than will others. The paradigmatic case of the intensity problem is that of a relatively apathetic majority prevailing over a significant minority with a great

---

we recognize the necessity of particular substantive judicial protections in such circumstances. In section III.C below, I directly address the intersection between the problem of the discrete and insular minority and my critique of direct democracy. In brief, direct democracy does not solve this problem, but rather exacerbates it, by ensuring that minorities will be unable to allocate their limited political power toward securing favorable outcomes on those issues that concern them most.

[48] CRONIN, *supra* note 15, at 17.

stake in the issue at hand.[49] A classic example might involve a local referendum over a modest property tax increase earmarked for school funding in a town with badly deteriorating schools. A numerical majority of voters without children in public school might vote the measure down out of an unwillingness to pay any additional taxes, despite intense concern over the quality of schools on the part of parents of school-age children.[50] Equally plausible, of course, is the sort of scenario envisioned by Madison, in which a local majority with children in school could force a substantial tax increase on a property-owning minority.

The intensity problem exists no matter how well a given plebiscite is conducted. Again, my aim here is to set aside arguments pointing to the particular failings of any given initiative or referenda. I focus on the intensity problem because it is a difficulty inherent in single-issue majority votes. For purposes of this argument, therefore, I assume the best possible account of direct democracy. Even if we could ensure full voter turnout, and further ensure that all voters fully understand the issue being voted on — and even if we could eliminate the possibility of agenda manipulation and the influence of money — single-issue votes would still be vulnerable to the intensity problem.

Let me put my claim as starkly as possible: even if a majority of citizens, all of whom are fully informed, vote "yes" in a single-issue referendum on Proposition *A*, it is not safe to assume that the world most preferred by the citizens is one in which Proposition *A* is enacted.

Instead, Proposition *A* should be understood as just one aspect of a world in which Propositions *B*, *C*, and *D* must also be decided. In a diverse and heterogeneous society, few voters will be able to get everything they want — few will be able to secure favored outcomes on each and every issue. Add to this that not all issues will be equally important to all citizens, and the intensity problem comes into play. A majority of citizens, though in favor of Proposition *A* in the abstract, might actually prefer a world in which Proposition *A* is defeated, if sacrificing that outcome would allow them to secure preferred outcomes on other issues about which they are more intensely concerned. In populist terms, a referendum can obscure the voice of the people by precluding them from trading outcome *A* in return for higher priority outcomes. Although direct democracy seems to give the people more input by allowing them to speak directly to this issue or that, it may in fact inhibit the people's ability to speak about the world as a whole.

The problem of the varying intensity of preferences has been recognized in a number of quarters, and was for a time a minor focus of

---

[49] *See* Dennis C. Mueller, Robert D. Tollison & Thomas D. Willett, *Solving the Intensity Problem in Representative Democracy*, *in* ECONOMICS OF PUBLIC CHOICE 54, 58 (Robert D. Leiter & Gerald Sirkin eds., 1975).

[50] *See id.*

the political science literature.[51] Robert Dahl recognized and described the problem as early as 1956, only to conclude that, in all probability, "no solution to the intensity problem through constitutional or procedural rules is attainable."[52] A decade later, Willmoore Kendall and George W. Carey highlighted the normative implications of the problem for democratic theory and similarly concluded that "[p]opulistic democracy (or, if you like, the theorists of populistic democracy) cannot take intensity into account."[53]

The public choice justification for considering intensity of preferences is fundamentally utilitarian. If the aggregation of preferences is intended to give as many people as much as possible of what they want (maximizing utility along some scale), should not our aggregation mechanism take into account how *much* people prefer a given outcome (how much utility they hope to gain), as well as how *many* people prefer that outcome? The difficulty with the utilitarian argument for caring about the intensity of preferences is that it inevitably founders on the problem of interpersonal utility comparisons.[54] While we might imagine taking into account that one person cares more about X than does her neighbor, how could we hope to quantify that difference? And how could we even begin to talk about whether she likes X more than her neighbor likes Y?[55] As much as we might like to account for preference intensities in our effort to make society better off, modeling a collective choice mechanism to accomplish this end would require not only that we compare utilities among individuals,[56] but also that we make some questionable assumptions about the commensurability

---

[51] *See, e.g.*, Anthony Downs, *In Defense of Majority Voting*, 69 J. POL. ECON. 192, 192 (1961) ("[T]he equal weighting of all votes can lead to undesirable results when voters do not have equally intense preferences. If a minority passionately desires some act which the majority just barely opposes, there is no way for the minority to express its great intensity in a simple once-for-all vote . . . .").

[52] DAHL, *supra* note 44, at 119.

[53] Willmoore Kendall & George W Carey, *The "Intensity" Problem and Democratic Theory*, 62 AM. POL. SCI. REV. 5, 10 (1968).

[54] *See, e.g.*, AMARTYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 4 (1970) (acknowledging that "it is arguable that social choice should depend not merely on individual orderings [of preferences], but on their intensities of preference," but recognizing that "[t]his argument is somewhat misleading [because] we are not merely specifying preference intensities of the individuals, we are making interpersonal comparisons between these").

[55] In the realm of political theory, John Rawls noted the inability of utilitarian conceptions of justice to provide a satisfactory basis for interpersonal utility comparisons. *See* JOHN RAWLS, A THEORY OF JUSTICE 90–91, 322–24 (1971). This observation, however, was secondary to Rawls's more fundamental critique of utilitarianism. *See id.* at 91 ("The controversy about interpersonal comparisons tends to obscure the real question, namely, whether the total (or average) happiness is to be maximized in the first place.").

[56] *See* Yew-Kwang Ng, *Beyond Pareto Optimality: The Necessity of Interpersonal Cardinal Utilities in Distributional Judgements and Social Choice*, 42 ZEITSCHRIFT FÜR NATIONALÖKONOMIE [JOURNAL OF ECONOMICS] 207, 207 (1982).

of human needs and desires.[57] Faced with these problems, recent public choice theorists, at least those operating from a fundamentally utilitarian outlook, have largely been content to leave the intensity problem alone.

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.[58] The populist case for direct democracy seems to be less about maximizing utility than about maximizing input. Thus, we ought 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.

This distinction is central to my legitimacy-based, nonutilitarian account of the intensity problem. I am not talking about outcomes, as such, but rather about the full and equal input that is presumed to legitimate those outcomes. The goal is to approximate universal consent, without violating the principle of equality that gives rise to the need to secure that consent. The method is to hear as much as possible of what the people have to say, while giving each individual an equal voice and ensuring that each individual's voice is equally heard. From this perspective, the paradigmatic case described above — an outcome extremely harmful to a minority but only modestly beneficial to the majority — is not itself the problem. Rather, it is evidence of the problem. It suggests that the process employed may not have allowed for a full and fair expression of popular voice.

In this light, I prefer the term "priority problem" to the more familiar term "intensity problem." This highlights the distinction between the utilitarian concept of intensity, understood as how much, in some absolute sense, an individual has at stake, and the legitimacy-based need to allow each individual to weigh the relative intensity of his or her own concerns. Not only would accounting for absolute in-

---

[57] *See* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2159–61 (1990).

[58] On this point, Glen O. Allen stated:

> [W]e must remember that the utilitarian conception of democracy is not the only conception, and the utilitarian justification not the only justification. There is, in addition, the contractarian conception of democracy, in which the legitimate authority of government rests upon the consent of the governed. Hence, in this conception, votes, preference rankings, or any other desiderative data to be aggregated in social decisions are not presumed to be measurements of psychological magnitudes involving the interpersonal comparison of values. On the contrary, they need be considered as no more than units or counters of political power.

Glen O. Allen, *Beyond the Voter's Paradox*, 88 ETHICS 50, 51 (1977).

tensity require the interpersonal comparison of utilities, it would also violate the very principle of equal input that lies at the heart of our commitment to popular sovereignty. In order to account for absolute intensity, we would need to allot more power — extra votes — to those who have more at stake. This we should not do. It is possible to account for citizen priorities, however, without giving different weight to each individual citizen's set of concerns. I argue below that well-recognized processes of legislative and electoral logrolling can be described as mechanisms for accomplishing this end.

B. Should Priorities Be Disregarded?

I have maintained that voters should be able to express themselves as clearly as possible and thus should be permitted to express the relative intensity of their concerns. Consider, however, an argument that the expression of priorities should be precluded. Perhaps the relative intensity of preferences should *not* be accounted for in our political processes, even to the extent that we are able to do so without violating principles of equality or making subjective utility comparisons. I have argued that a commitment to equality demands respect for individual autonomy and thus gives rise to the premise of popular sovereignty. It is possible, however, to sever the idea of equality from that of autonomy and develop an argument for majority decisionmaking that is focused less on the equal allocation of power and authority than on the equal granting of respect — less on will than on judgment.

At least some public decisions might fairly be described as expressions not of preference but of judgment. For example, when the people of Colorado voted on Amendment 2, were they expressing a preference or were they making a judgment about the moral status of homosexuality? The process may be described either way, or in both ways. The extent to which political decisions ought to be viewed as group judgments, rather than as aggregated preferences, is at the heart of the pluralist-versus-republican debate in American politics. In making political decisions, are we as a people merely attempting to balance and aggregate competing interests? Or are we trying to find the morally correct answers to the questions confronting us? Do not at least some issues fall into the latter category? As to those issues, if all people are presumed to be equal in their capacity for moral judgment, should we not weigh each person's judgment equally? Absent unanimity, is not the judgment of the majority a better guide than that of the minority?

There are at least two ways in which a view of voting as moral judgment might be employed in defense of direct democracy. The first would be to reject the notion that political decisions should be judged by the extent to which they reflect popular preferences. One might claim that direct democracy is desirable because it taps the judgment of a large subset of the community and thus produces wiser and better

results than a process reflecting the opinions of any smaller subset, such as a legislature. I attempt no response to this argument. It is not at all clear that the outcomes produced by direct democracy are in general more wise or more fair than those produced by representative processes. Nonetheless, a shift in focus in the debate along these lines should be welcomed. To the extent that advocates of direct democratic processes give up the claim that such processes reflect the will of the people, and begin to defend direct democracy on the grounds of the wisdom or fairness of the outcomes it produces, this Commentary will have achieved its purpose.

However, the description of some political decisions as group judgments, rather than as collective preferences, suggests another, more interesting argument — one that goes directly to the question of whether intensity ought to be taken into account. I have described voting procedures as ways of implementing the principle of popular sovereignty that provide a partial resolution to the problem of legitimacy. Analytically, the presumption of equal capacity for moral decisionmaking leads to the presumption of equal autonomy. The presumption of equal autonomy gives rise to the need to justify coercion, a justification that we achieve, albeit imperfectly, by seeking to make each person as much as possible the author of the rules he or she must obey. Our processes thus seek to provide each citizen with an equal opportunity to influence political decisions. I have argued 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. The focus throughout this account of the mandates of popular sovereignty is on power and authority, and on their legitimate allocation.

It is possible, however, to short-circuit this analysis. By emphasizing the equal capacity for decisionmaking itself, rather than the autonomy that flows from that capacity, we can generate a different imperative. We can go directly from the equal capacity for moral judgment to a right to have one's judgments accorded equal respect. In this light, perhaps we should not care about the intensity of preferences, because we should not care about preferences at all, but rather about judgments. We should care not about what the people want, but about what the people judge to be good. Although judgments might be held and expressed with various levels of conviction or certainty, it seems odd to speak of them as being more or less intense. Moreover, even if it makes sense at some level to speak of the intensity of judgments — perhaps by equating intensity with degree of conviction — it is not at all clear that such intensity ought to be respected in our decisionmaking processes. It might be argued that we should not want to know what each equal and autonomous citizen desires, let alone how much each desires it, but rather what each citizen, presumed to be

equal to all others in the capacity for moral decisionmaking, thinks is best.

The primary difficulty with this attempt to recognize equal decisionmaking capacity separately from the correlative concern of autonomy is that it misses what makes political decisions problematic. The difficulty comes not in allowing each person to express his or her judgments, or even in giving those judgments equal respect, but in deciding whose judgments will be backed by the coercive force of the state. Political processes are the way in which we decide which citizens' views become law. We ask each citizen: Given your views — your judgments — what laws do you want? Political decisions constitute not merely judgments, but most essentially the enforcement of those judgments on others. Because politics is the forum through which some people's opinions become other people's laws, political decisions are inescapably exercises not only of judgment, but also of will.

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.

III. Accounting For Priorities

A. Legislative Logrolling

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 trade-off is "logrolling."

Economists and public choice theorists have long recognized that logrolling might serve to protect minority groups, increase overall welfare, or both, by allowing for some weighing of intensity.[59] The basic

---

[59] *See* William J. Baumol, Welfare Economics and the Theory of the State 45 (2d ed. 1965) (asserting that logrolling protects minority interests and can increase social welfare by allowing an individual who ardently desires a measure to secure its implementation by trading votes on other issues for support of that measure); James M. Buchanan & Gordon Tullock,

premise here is straightforward and, I hope, unremarkable. As David Magleby observed in the conclusion to his 1984 study of direct democracy:

> In direct legislation all votes are counted equally, but not all voters feel equally positive or negative about the proposition. . . . In the legislative process, elected representatives can calculate the varying degrees of intensity and include them in their legislative decisions.[60]

Legal scholars have also noted the way in which legislative processes allow minorities to engage in coalition building through logrolling and thus secure outcomes on particular high-priority issues.[61] So far, however, this observation has not been made the central focus of a critique of direct democracy. The closest approach to date appears to be that of Derrick Bell, who identifies the failure to account for intensity of interests as one of the reasons direct democracy operates to disadvantage racial minorities.[62] Unfortunately, his observation is rendered substantially less potent than it might be because he implicitly acknowledges that intensity measurement is a corrective to, rather than a faithful expression of, the voice of the people.

Bell criticizes direct democracy on the following grounds:

> [B]ecause it enables the voters' racial beliefs to be recorded and tabulated in their pure form, the referendum has been a most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day.[63]

THE CALCULUS OF CONSENT 132–33 (1962) (observing that logrolling almost necessarily leads to Pareto superior outcomes when voters possess preferences of varying intensities); Gordon Tullock, *Problems of Majority Voting*, 67 J. POL. ECON. 571, 572 (1959) ("Permitting the citizens who feel very strongly about an issue to compensate those whose opinion is only feebly held can result in a great increase of the well-being of both groups, and prohibiting such transactions is to prohibit a movement toward the optimum surface.").

[60] MAGLEBY, DIRECT LEGISLATION, *supra* note 14, at 184–85. Magleby, who emphasized policy, rather than democratic theory, did not develop this pregnant insight further.

[61] For example, Richard Collins and Dale Oesterle explain:

> [L]egislatures reflect not only the number of a measure's proponents, but also the intensity of their preferences. In this way, minority interests are able to get their most strongly desired legislation passed, even when that legislation would not achieve majority support in a referendum. More important still, minorities can persuade legislatures to amend the parts of majoritarian bills they find most objectionable, even if a referendum would give majority backing to those parts.

Collins & Oesterle, *supra* note 11, at 59–60; *see also* Charlow, *supra* note 12, at 605 ("Owing to a great number of factors, principle [sic] among them vote trading and the varying intensity of concern on different issues, laws may be enacted by legislatures even though they do not truly enjoy the support of a majority of either legislators or the public.").

[62] *See* Bell, *supra* note 10, at 25.

[63] *Id.* at 14–15.

On this reading, direct democracy produces racist outcomes because the people are racist. Because we need to protect minorities from that racism, we need to check or obscure popular preferences through devices such as logrolling, as well as through other devices such as judicial review. By conceding that direct democracy measures voters' beliefs in their "pure form," Bell invites an understanding of logrolling as a dilution or obscuring of those beliefs and reinforces the understanding of representation as "watered down" popular sovereignty. I suggest that it is precisely this reading of representation that has rendered critiques of direct democracy largely ineffectual.[64]

Bell focuses on outcomes. He emphasizes that direct democracy can produce results "extremely harmful to minority interests but only moderately beneficial to non-minority interests."[65] He therefore invites a utilitarian reading of the intensity problem under which logrolling appears to be merely one of many partial responses to a difficulty inherent in democratic processes generally.

Bell's analysis is vulnerable to an outcome-driven critique like that of Lynn Baker. Baker focuses on the question whether plebiscites are "more likely than representative processes to produce laws that disadvantage racial minorities."[66] She concludes that making this comparison "is a difficult empirical question," and she consequently takes issue with those who too readily conclude that minorities should prefer representative lawmaking to direct democracy.[67] Baker emphasizes a critique of representation as practiced. She argues that many of the often-cited differences between representation and direct democracy, such as the opportunities offered by the former for deliberation and logrolling, do not allow us to conclude a priori that plebiscites are systematically more likely to produce outcomes that disadvantage minorities.[68]

Regarding logrolling in particular, Baker initially points out that logrolling is not a perfect intensity-measurement device. It can guarantee neither that each individual legislative outcome will reflect the highest aggregate preference nor that the net result of such individual legislative outcomes will be socially optimal. Baker makes her point with the assistance of the following table:

---

64 As I suggest below, a similar difficulty haunts the arguments of voting rights theorists, whose substantive concerns mirror those expressed by Bell. *See infra* pages 473–75.

65 Bell, *supra* note 10, at 25.

66 Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 709 (1991).

67 *Id.* at 710.

68 *See id.* at 775.

TABLE 1[69]

	Rep. A	*Rep. B*	*Rep. C*	*Agg. util.*
Issue 1	+3 utiles	-1 utile	-4 utiles	-2
Issue 2	-1 utile	+3 utiles	-8 utiles	-6

Baker points out that in the situation summarized in Table 1, Representatives *A* and *B* would trade votes and thereby pass both issues, despite a loss in aggregate social utility.[70] As Baker notes, this is the classic "paradox of logrolling," which public choice theorists have long debated.[71] Through a series of apparently utility-maximizing decisions, representatives can logroll and vote-trade their way to a lower net utility.

---

[69] *Id.* at 723 tbl.1.

[70] *See id* at 723. The quantities in Baker's table are values of absolute utility, with the plus or minus signs indicating whether a particular outcome is desirable or undesirable to each representative. Thus, Representative *C* would lose 4 utiles through the passage of Issue 1 and would lose 8 utiles through the passage of Issue 2. Implicit in this hypothetical is the further assumption that the utility measures are symmetrical — Representative *C* would gain 4 utiles through the defeat of Issue 1 and would gain 8 utiles through the defeat of Issue 2. Within this framework, the optimal outcome suggested by the column labeled "Aggregate Utility" would be the defeat of both issues, for a net gain of 8 utiles.

[71] *See id.* (citing DENNIS C. MUELLER, PUBLIC CHOICE 49–58 (1979)); *see also* DENNIS C. MUELLER, PUBLIC CHOICE II, at 82–87, 91–95, 183–84 (1989) (discussing and evaluating arguments on both sides of the debate over the paradox of logrolling); ROBERT SUGDEN, THE POLITICAL ECONOMY OF PUBLIC CHOICE: AN INTRODUCTION TO WELFARE ECONOMICS 185 (1981) (concluding that the advantages or disadvantages of logrolling as compared to single-issue voting are indeterminate); Peter Bernholz, *Logrolling and the Paradox of Voting: Are They Really Logically Equivalent? A Comment*, 69 AM. POL. SCI. REV. 961, 961–62 (1975) (showing that logrolling does not necessarily produce the paradox of voting); David H. Koehler, *Vote Trading and the Voting Paradox: A Proof of Logical Equivalence*, 69 AM. POL. SCI. REV. 954, 954 (1975) (asserting that preference patterns needed for vote trading necessarily produce the voting paradox); David H. Koehler, *Vote Trading and the Voting Paradox: Rejoinder*, 69 AM. POL. SCI. REV. 967, 967 (1975) (contesting Bernholz's challenge on the basis of assumptions stipulated in the original model); Joe Oppenheimer, *Some Political Implications of "Vote Trading and the Voting Paradox: A Proof of Logical Equivalence": A Comment*, 69 AM. POL. SCI. REV. 963, 963 (1975) (arguing that the connection between logrolling and the voting paradox has substantial political significance); William H. Riker & Steven J. Brams, *The Paradox of Vote Trading*, 67 AM. POL. SCI. REV. 1235, 1236 (1973) (showing that logrolling may produce a voting paradox by generating external costs to nontraders that outweigh the gains to traders); Thomas Schwartz, *Vote Trading and Pareto Efficiency*, 24 PUB. CHOICE 101, 109 (1975) (arguing that Pareto inefficient outcomes in certain examples of the voting paradox are not really results of vote trading).

While this phenomenon presents a thorny problem for welfare economists and public choice theorists concerned with maximizing aggregate utility, it poses no difficulty for those whose goal is not to maximize utility, but rather to ensure that each citizen has an equal voice in government. From this perspective, the "difficulty" presented by Baker's example is a product of the very feature of representation that ought most to be valued — the obligation that it places on each citizen to demonstrate the intensity of his or her preferences.

Baker invites us to see Representative *C* in her hypothetical as the intensely concerned minority. Consistent with the utilitarian assumptions inherent in her public choice perspective, Baker has made no effort to allocate equal amounts of potential utility to each representative and has crafted a scenario in which *C* has twelve utiles at stake, compared to just four each on the part of *A* and *B*. When we refocus our attention, however, from utility maximization to democratic legitimacy, and to the concomitant requirement that no citizen have more input than any other, we see the need to equalize the allocation. We achieve an equal allocation by representing each individual's preferences not in terms of absolute utility, but rather in terms of the portion of each representative's political power that he or she is willing to devote to each issue. The situation now looks like this (Baker's absolute utility figures are included in parentheses):

TABLE 2

	Rep. A	*Rep. B*	*Rep. C*
Issue 1	+3/4 (+3)	-1/4 (-1)	-1/3 (-4)
Issue 2	-1/4 (-1)	+3/4 (+3)	-2/3 (-8)

Here, Representative *C* does not represent an intensely concerned minority in the sense we care about. Rather, it is *A* and *B* who are willing to devote a larger proportion of their political power to specific high-priority issues. Each is willing to devote three-fourths of his or her power to the favored issue, as compared to the two-thirds that *C* is willing to devote to defeating Issue 2. In a single-issue vote on Issue 1, Representative *A* (the intensely interested minority as to that issue) would lose. The single-issue format would present no opportunity for *A* to prove how much that outcome matters to him or her. Alternatively stated, the single-issue vote on Issue 1 would not require *B* and *C* to prove how much they really wanted to defeat the measure.

Baker's two-issue universe contains a wrinkle that is not immediately obvious, and that illustrates the risk one takes when using highly simplified hypotheticals to analyze voting systems. Baker assumes that Representatives *A* and *B* would trade votes if permitted, thus passing both issues and leaving *C* out in the cold. It is not at all clear that such a trade would occur. In fact, it seems more likely that *C*

would make a deal with *A*.[72] Nonetheless, the example still supports Baker's claim that logrolling may reduce aggregate utility.[73]

At first glance, however, the likelihood of a deal between *A* and *C* does seem to call into question my claim that logrolling can account for priorities. Representative *B*, despite being willing to allocate three-fourths of his or her political clout to the passage of Issue 2, may well be unable to achieve its passage. At the same time, Representative *C*, who is willing to allocate just two-thirds of his or her power to defeating that issue, will be likely to prevail. This possibility, however, casts no doubt on my claim. Representative *B*'s difficulty is an artifact of a hypothetical containing only two issues. Representative *B* will be shut out in his or her effort to secure passage of Issue 2 because he or she has literally nothing to offer to *A* other than a "Yes" vote on Issue 1. Unfortunately for *B*, *A* can get the "Yes" vote on Issue 1 from *C* for nothing, and thus has no need to deal with *B*. What this example shows is that a two-issue scenario, while offering more scope for vote-trading than would two isolated single-issue referenda, still sharply restricts the representatives' capacity to deal.

To think meaningfully about the way in which representative processes account for priorities, it is necessary to imagine a world in which Issues 3, 4, and 5 must also be decided. In this more realistic, multi-issue scenario, *B* might be able to offer votes on other issues and thereby outbid *C* for *A*'s vote on the critical Issue 2. Alternatively, *C* might think it wise to concentrate his or her voting power in an effort to defeat Issue 2.

My aim is not to quibble with Baker's hypothetical, or with her claim that logrolling may reduce aggregate utility. I grant as much. For purposes of argument, therefore, assume that Baker is correct in her conclusion that *A* and *B* will trade votes (perhaps in a deal including votes on other issues), pass both issues, and leave *C* out in the cold. Given a sufficient number of issues — a healthy market, if you will — whoever is willing to pay the most for a vote has a good chance of getting it. If, in the end, *B* is willing to allot more of his or her limited and equal share of voting power to passing any given issue than *C* is willing to allot to defeat that issue, the measure in question may well be passed, no matter how much more intense *C*'s preference, need, or expected utility may be. This is as it should be.

---

[72] Representative *C* can offer to vote with *A* on *both* issues. In effect, *C* could say to *A*, "I will vote with you, and against my own inclination, in favor of Issue 1, if you agree to vote in accordance with your own inclination against Issue 2 rather than trading with *B* and voting for Issue 2 in return for his or her vote on Issue 1." By cutting a deal with *C*, *A* could get favorable results on both issues. The likely outcome appears to be not the passage of both issues, as Baker suggests, but the passage of Issue 1 and the rejection of Issue 2.

[73] The passage of Issue 1 and rejection of Issue 2 (resulting from a deal between *A* and *C* of the sort described) would produce less total utility (4 utiles in aggregate) than would the rejection of both issues (8 utiles in aggregate).

We are perhaps troubled by *C*'s potential inability to defeat either issue, despite the high raw intensity of his or her opposition, because we imagine *C* as a sympathetic figure. We might envision *C* as representing a racial minority group, for example, intensely opposing both a cut in school funding and a toxic waste dump located near their community. Baker gives us a hypothetical in which this group has a numerical majority on both issues, and would win on both but for the insidious and utility-reducing practice of logrolling.

Equally plausible, however, is the scenario wherein *C* represents a rich white community energetically seeking both to avoid a tax increase for schools (they send their kids to private schools) and to locate a toxic waste dump in someone else's backyard. In this scenario, we do not believe that the raw intensity of *C*'s desire to succeed on both issues should cause us to give *C* more than his or her one-third of the total political power. Instead, *C* should be required to come to the table and deal. We might imagine *B* as representing a sympathetic racial minority group in this alternative scenario. Logrolling might allow them at least to get the school funding the community needs. A single-issue vote would preclude any such expression of priorities.

Legislative logrolling is, in this sense, outcome-neutral. The intensely concerned minority could be a minority of virulent racists, rather than an oppressed racial group seeking protection or advancement. This possibility supports Baker's claim that logrolling is not guaranteed to produce results more favorable to racial minorities. It does not, however, cast any doubt on the thesis that logrolling accounts for voter priorities. The same applies to Baker's accurate observations, first, that "logrolling can alter the results of a vote only if the minority feels more intensely about an issue than the majority,"[74] and second, that a minority "will be able to use logrolling to achieve a favorable result 'only when the intensity of preferences of the minority group is *sufficiently greater* than that of the majority to make the minority willing to sacrifice *enough votes* on other issues to detach marginal voters from the majority.'"[75] Yes, and yes.

I should emphasize this point. Even if a minority has an intense preference, that minority will not be able to prevail unless the majority's preference on the issue is less intense. If the majority is as willing as the minority to make a given issue a priority, the majority will win. So too would the majority carry a plebiscite. Put differently, logrolling cannot account for absolute intensity, only differences in relative intensity. Logrolling simply offers a chance for minorities to prevail on issues that they care about *more* intensely than do those in the majority. In populist terms, this is as it should be. Of course, there are certain

---

[74] Baker, *supra* note 66, at 728.

[75] *Id.* (quoting BUCHANAN & TULLOCK, *supra* note 59, at 220–22 (emphasis added by Baker)).

minority interests worthy of protection regardless of the intensity of majority opposition. We call them rights. My aim here, however, is to eschew rights-based arguments in favor of an expressly populist critique couched in terms of hearing the voice of the people as fully as possible. I readily acknowledge that logrolling cannot guarantee specific outcomes. More to the point, logrolling cannot give any individual more than an equal and limited share of political power. All it does is what it should do: it allows individuals to decide how to allocate that power.

B. Elections as Multi-Issue Referenda

Although legislative logrolling may in fact reflect the relative intensity of preferences, is it not the *legislators'* preferences that are being reflected, rather than the people's? Voters are routinely presented with very few (usually two) viable candidates for a given representative office. Moreover, an individual voter is rarely presented with his or her ideal candidate — one who reflects his or her preferences across the entire range of contested issues. Instead, voters are often forced to choose what they perceive as the lesser of two evils. Indeed, this reality may help explain why many voters embrace various forms of direct democracy. If our only direct access to the preferences of the individual citizen is through his or her choice between two candidates, neither of whom precisely reflects that individual's array of needs and desires, how can we claim to be accurately hearing the voice of the whole?[76]

Although we must acknowledge the frustration experienced by the individual voter when confronted with a choice between two imperfect candidates, we need not assume that the collective voice is being distorted. In fact, the individual voter's frustration may be the best and surest signal that relative priorities are in fact being reflected. A mediating device may feel distorting, just as the use of translators in negotiations is inevitably awkward and frustrating, even as it facilitates communication that might otherwise be impossible.

Group decisionmaking, even when reduced to a process of preference aggregation, is not merely an exercise in communicating and adding together individual desires. Rather, it is a process of balancing, blending, and reconciling sometimes conflicting desires into some sort of minimally coherent whole. On this understanding, elections are the ultimate multi-issue referenda. Issues are framed, balanced, and

---

[76] *See, e.g.*, Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1082 (1988) ("[V]oters are never presented with a clear choice on any single issue; rather, the People must choose among complicated 'tied goods' called 'candidates' — each an intricate bundle of issue positions (of varying degrees of clarity), commitments, character, party affiliation, demographic features, past records, and visions of the future."); James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 221 (1990) ("[T]he people frequently are reduced to a collective vocabulary that is almost infantile in its simplicity.").

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.

In a representative election, people are forced to compromise, to evaluate the seriousness of their various concerns. To prevail on an issue about which one feels deeply, one might compromise on positions to which one is less attached. A deeply committed minority might prevail on any given issue, but only if it is willing to demonstrate the depth of its concern by allowing its candidate to win the remaining necessary votes through his or her choice of positions on other issues.[77] Just as in any fair voting system, each individual has an equal allotment of political power. Just as in any fair voting system, each individual's allotment is necessarily limited. Unlike a series of popular votes, however, which would require each person to expend an equal quantum of that power on each issue, the bundling of issues in the form of candidates allows citizens to employ a greater portion of their political power on issues about which they feel more deeply. Representative elections thus do more than count heads. They also allow for the expression of priorities and thereby treat people equally without reducing them to aggregations of single-issue votes.

It might seem like a stretch to suggest that the full range of trades on the potentially infinite number of contestable political issues can be embodied in a mere two candidates — or, to be precise, in one candidate, the election winner. There is so much we cannot know about voter preferences when all we have is a majority vote in favor of a given candidate. As James Gardner has queried:

> Why did [the voters] vote the way they did? Did they approve of all the many planks in the platform of a successful candidate? Was it the candidate's positions or character that they found most appealing? Attempts to answer questions like these have spawned whole branches of political science devoted to studying the electorate, not to mention a vigorous and profitable political polling industry.[78]

How can any candidate meaningfully embody or reconcile the myriad, potentially conflicting concerns and preferences of thousands or even millions of voters?

At one level, this objection is a red herring. All of the concerns and preferences will be reconciled, whether we like it or not, into one and only one state of the world. Some set of outcomes — some single end

---

[77] *See* MUELLER, PUBLIC CHOICE II, *supra* note 71, at 183 ("[A] minority, which supports a candidate for the position he takes on a couple of key issues, regardless of his position on others, [can] essentially trad[e] away its votes on the other issues to those minorities feeling strongly about these other issues.").

[78] Gardner, *supra* note 76, at 222.

state — will obtain. Additionally, in a large and heterogeneous society, chances are that few people will approve of everything about it. We do not know that a majority approved of "all the many planks in the platform." In fact, we should hope that they did not, because majority inability to elect an ideal candidate may be the best evidence that the majority has been forced to account for intense minority input. Given a diverse electorate, everyone cannot get everything he or she wants. Literal, universal consent is unobtainable. What we can do, however, is give people the opportunity to make known what they want most. Political candidates, aided by the "vigorous and profitable political polling industry," can be understood as the devices through which we seek to ensure that the inevitable, and inevitably dissatisfying, balancing and reconciling of competing desires will be accomplished with an awareness of citizen priorities as well as preferences.[79]

Nor does this description depend upon identifying specific "bundles" of issues that ought to be considered in conjunction with one another. The connection among issues is not substantive but procedural, even strategic. Certainly there will be issues that should be evaluated in light of other logically or conceptually related matters. For example, a voter's preference regarding a tax increase might well depend upon his or her understanding of how the revenue will be used. On the other hand, some issues might, as a substantive matter, appropriately be considered in isolation. Perhaps, for example, one's opinion on gay rights or affirmative action will or should be reached without reference to other contested issues. My account does not require that we identify specific sets of issues that ought to be lumped together, or that we identify some optimal level of aggregation.

Instead, candidates will generally search for the set of positions, related or unrelated, that will garner the most votes. Granted, some citizens will vote for a candidate who supports measure *A* only if that candidate also supports measures *B* and *C*. If enough citizens feel that way, a candidate might be foolish to support issue *A* while opposing *B*

---

[79] As Robin Charlow has observed, regarding legislative outcomes not supported by a majority:

> [E]ven this phenomenon does not necessarily mean that the system is at odds with public majority will.... [T]he will of the public majority, like that of its representatives, would be to engage in vote trading ... because the issue is not personally of great moment or because a vote might buy support for some other measure about which one feels very strongly. In other words, the public majority might in fact desire to vote in the same seemingly counterintuitive way as its representatives vote.

Charlow, *supra* note 12, at 605–06. Charlow identifies what might be termed an implied majority will, analogous to the implied consent often thought to legitimate authority. The majority, we can infer, would have voted as their representatives did if they had understood the need to trade off votes to secure favorable outcomes on high-priority issues, and if they had possessed sufficient information and sufficiently practicable means to engage in those trades. This argument attempts to legitimate legislative decisions by describing them in terms of majority preference. The better approach may be to recognize that citizens *do* have the means to figure out which issues to trade and to execute those trades. This means is representation.

and *C*. All this goes into the mix. In a sense, therefore, the optimal level of aggregation is total, and all issues should be considered in conjunction with one another. As I have acknowledged above, some issues might be considered the subject of judgment rather than preference — appropriately evaluated on their merits without regard to the political necessities of logrolling and vote trading. Nonetheless, when it comes time to convert judgment into law, citizens need to acknowledge that no one will see all of his or her judgments enacted. So they must prioritize, come to the table, and deal. They are required by the representative process to decide which of their judgments, concerns, and values — however reached — they most want to see backed by the force of the state.

Might many of these competing concerns and values be seen as incommensurable — the balancing and trading of apples and oranges? Absolutely. But balanced and traded they will be, one way or another. The question is whether they will be balanced with or without attention to voter priorities. Does representation perform this balancing perfectly? Absolutely not. Improper influences, imperfect information, prejudice, malapportioned legislatures, and similar difficulties muddy the waters. I do not claim that representative government is free from agency costs, but rather that the understandable frustration felt by voters forced to funnel their input through candidates is not such a cost. What looks like a limitation is in fact an augmentation.

This conclusion may seem counterintuitive, or even perverse. How can limiting popular political participation to occasional votes in admittedly imperfect candidate elections express popular preferences more accurately? Put differently, why must representation be exclusive?[80] How can giving people *additional* opportunities to speak directly to specific issues in the form of the plebiscite render the people *less* articulate?

The answer is that each citizen's relative share of political power is necessarily limited. If there are x citizens, no one can legitimately exercise more than $1/x$ of the total power. The only question is how they should be permitted to exercise that power. We can let a citizen check more boxes when he or she casts a ballot, but the ballot as a whole will still count for no more than $1/x$. Representation lets each individual allocate that power where it matters most. Putting an issue to a direct vote, by contrast, does two things. First, it prevents voters who care deeply about that particular issue from demonstrating the intensity of their concern. Second, it prevents voters who do *not* care deeply about

---

[80] *See* 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.").

that particular issue from using it as vehicle for expressing the intensity of their concern about issues that matter more to them. By increasing each individual's ability to tell us what his or her *ideal* world would look like, we may actually decrease his or her ability to tell us which of several achievable worlds he or she would prefer. By giving the people an "opportunity" to consider issues in isolation, we may deny them the ability to tell us what they most want overall.

C. *Direct Democracy and Intensity*

I have argued that representative government, through a combination of legislative and electoral logrolling, allows, and in fact requires, voters to take into account the relative intensity of their various preferences in deciding how to make use of their allotment of political power. Direct democratic processes, by contrast, effectively preclude logrolling by presenting voters with a single issue in isolation. The thousands or even millions of voters in a plebiscite could never coordinate and enforce the kinds of trade-offs embodied in candidates and effected through the legislature.

Nor is this an accidental feature of the plebiscite. The majority of states with provisions for direct democracy explicitly require that a given initiative or referendum encompass just one issue or subject.[81] These single-issue requirements are intended not only to clarify issues and reduce voter confusion, but as well to preclude vote trading.[82] Setting aside for a moment the question whether single-issue requirements are a good thing, these requirements have proven extremely difficult to enforce meaningfully or consistently.

The experience of California is illustrative.[83] Since 1948, the California Constitution has provided that "an initiative measure embracing more than one subject may not be submitted to the electors or have any effect."[84] This rule arose in response to a number of broad initiative provisions, known pejoratively as "ham and eggs"[85] initiatives, which appeared on the ballot in California in the 1930s and 1940s.[86] The California courts, however, have come to appreciate the difficulty

---

81 Philip Dubois and Floyd Feeney provide a catalogue of state initiative provisions and applicable single-subject requirements. *See* PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 127–29 (1998).

82 *See, e.g.*, Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1291–92 (Cal. 1978) (upholding the Jarvis-Gann initiative, California Proposition 13, against a claim that it violated the single-subject rule, and observing that "no apparent 'logrolling' is involved in this case").

83 *See* DUBOIS & FEENEY, *supra* note 81, at 129–36 (providing a lucid history of California's single-issue requirement and its enforcement).

84 CAL. CONST. art. II, § 8(d).

85 Daniel Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 949 (1983).

86 *See id.* at 949–53.

inherent in giving meaning to and enforcing the single-issue requirement.

First consider Proposition 13, the Jarvis-Gann property tax rollback initiative, which signaled the beginning of the modern era of widespread popular lawmaking in California and across the nation. According to the California Supreme Court, Proposition 13 included four primary elements: (1) a limitation on property tax rates; (2) a limitation on property assessments; (3) restrictions on methods of changing state taxes; and (4) restrictions on methods of changing local taxes.[87] The Court sensibly upheld this initiative against a contention that it violated the single-issue requirement, holding that each of the provisions was "reasonably interdependent," "functionally related," and "reasonably germane" to the purpose of the initiative.[88] In the eyes of the court, "[e]ach of the four basic elements . . . was designed to interlock with the others to assure an effective tax relief program."[89]

So far so good. A four-pronged eating utensil is still just one fork. But then came *Fair Political Practices Commission v. Superior Court*,[90] in which the California Supreme Court upheld the Political Reform Act of 1974.[91] The Political Reform Act, as described by the court in a subsequent case, contained no less than eight "complex features" aimed at cleaning up California politics: (1) the establishment of a fair political practices committee; (2) the creation of disclosure requirements for campaign contributors; (3) limitations on campaign spending; (4) regulation of lobbyists; (5) conflict of interest regulations; (6) rules regarding voter information pamphlets; (7) rules regarding the position of candidates on ballots; and (8) associated auditing and penalty procedures.[92] Noting that complex problems require complex solutions, the *Fair Political Practices* court observed that "[u]nless we are to repudiate or cripple use of the initiative, risk of confusion must be borne,"[93] and upheld the initiative under the "reasonably germane" standard applied to Proposition 13 a year earlier.[94] In addition, the court recognized "the possibility that some voters might vote for the measure . . . while objecting to some parts," but observed that "[s]uch risk" was unavoidable and did not "warrant rejection of the reasonably germane test."[95]

Any doubt that the single-issue cat was out of the bag was eliminated by the failed challenge to Proposition 8, the Victim's Bill of

---

87 *See Amador Valley*, 583 P.2d at 1284.

88 *Id.* at 1290–91 (citing Perry v. Jordan, 207 P.2d 47 (Cal. 1949)).

89 *Id.* at 1291.

90 599 P.2d 46 (Cal. 1979).

91 *See id.* at 51.

92 Brosnahan v. Brown, 651 P.2d 274, 279 (Cal. 1982).

93 *Fair Political Practices*, 599 P.2d at 42.

94 *See id.* at 41.

95 *Id.*

Rights. According to the court, that initiative covered eleven diverse topics, including restitution, safe schools, evidence, bail, prior convictions, diminished capacity, habitual criminals, victim's statements, plea bargaining, sentencing, and mentally disordered sex offenders.[96] In a 4–3 decision, the court restated the "reasonably germane" standard and upheld the initiative.[97] The court expressly rejected the argument that provisions of an initiative must be "interdependent and interlocking," as might be suggested by a narrow reading of earlier cases.[98]

My purpose here is not to quibble with the way in which the California courts have drawn the single-issue line. Rather, I focus on the difficulties inherent in enforcing the single-issue requirement in order to reemphasize my response to the question whether an account of representative democracy that hinges on the bundling of issues requires a theory of how those issues ought to be bundled. Do I need to describe the appropriate boundaries of issue trading? In other words, do I need to offer a theory for identifying the issues that are ideally or in reality "paired" with each other? No. On my account, no such boundaries need be described and no such theory generated. As described above, representative elections result in aggregation or bundling across the entire range of issues or potential issues. Each voter casts his or her vote (that is, allocates his or her equal but limited allotment of political power) according to whatever issue or set of issues he or she considers most important.[99] As California's experience shows, it is direct democracy, not representation, that forces us to attempt to define, ex ante, appropriate bundles of issues. The nature of the plebiscite is that it attempts to isolate one issue — or one set of "functionally related" issues — and to identify majority preference on that issue or set of issues as clearly and directly as possible. To the extent that a given direct democratic process successfully identifies majority preference on a specific issue, however, the process is equally successful in submerging the expression of priorities among issues.

One might argue in response that direct democratic processes account for intensity in other ways. Ironically, these arguments rely on a claim that, as practiced, direct democracy does *not* in fact record majority preference. Clayton Gillette, for example, has argued that direct democratic processes provide an "effective mechanism for reflecting

---

[96] *See Brosnahan*, 651 P.2d at 277–79.

[97] *See id.* at 284.

[98] *Id.* at 281 (internal quotation marks omitted) (citing Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1290 (Cal. 1978)).

[99] Again, the individual voter may feel that a frustratingly limited choice of bundles is imposed upon him or her by the available candidates. In fact, the limited selection of bundles is imposed upon the individual *through* the candidates by the electorate as a whole, whose voice we are presumably trying to hear, and whose collection of weighted preferences and priorities the candidates seek to identify and embody.

relative intensity of preference."[100] That mechanism is voter turnout: "[T]hose who have little interest in the outcome will simply not vote at all."[101] A similar argument might rely on the difficulty of qualifying proposed initiatives for the ballot: perhaps only intensely concerned groups will expend the effort to gather the necessary signatures. Moreover, voters 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."[102] Finally, voters can demonstrate the intensity of their preferences through their willingness to expend time, energy, and money campaigning for or against a given proposition. These phenomena suggest that a ballot provision is unlikely to pass unless it is backed by a highly motivated constituency.

One potential response to these arguments for direct democracy would be to quibble with the effectiveness of these ad hoc methods of accounting for the intensity of preferences. In response to the voter turnout argument, for example, one might point out that voters without intense preferences may in fact cast plebiscite votes, particularly in general election years. Once a voter comes to the ballot box to cast a vote on a candidate election or issue about which she does feel strongly, "the marginal cost to that voter of expressing a preference even on issues about which she cares little is negligible."[103] In addition, voter turnout may reflect factors other than intensity, such as socioeconomic level.[104] Similarly, a voter's willingness to spend time, energy, and money qualifying or campaigning for a given proposition may not correspond directly with preference intensity, but may as well vary according to factors such as available free time, access to information, and wealth. Moreover, 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.

In the end, however, I am willing to grant that direct democracy, as practiced, may account for voter priorities to some extent.[105] I do so at no cost to my central thesis. My claim here is that majority preference should not be equated with popular voice. I argue 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

---

[100] Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 968 (1988).

[101] *Id.* at 969.

[102] Briffault, *supra* note 80, at 1357.

[103] Baker, *supra* note 66, at 724.

[104] *See* MAGLEBY, DIRECT LEGISLATION, *supra* note 14, at 79–80. *But see* Briffault, *supra* note 80, at 1358.

[105] For example, no citizen has unlimited time or resources, so a decision to allocate time and money to a given issue does reveal something about what a voter wants most.

with hearing the voice of the people. Once it is granted that a plebiscite's mere directness does not entitle it to any particular populist laurels, the mere direct democratic origin of a particular outcome will cease to serve as an implicit ace in the hole, even for those with the most unmitigated populist priorities.

In fact, it is illuminating to consider the ways in which direct democracy might be reformed to make it more capable of accounting for voter priorities. For example, one might imagine a process of cumulative plebiscitary voting. Each voter would be allotted a number of votes equal to the number of initiatives to be voted on over some period of time. He or she would vote on each issue, or concentrate the votes on one or more high-priority issues. Alternatively, one might construct multi-issue ballots, whereby a voter could choose between realistically achievable overall outcomes. I do not take a position on the merits of these sorts of proposals, but it is instructive that they might be understood as methods of *improving* direct democracy. Note that either of these reforms would move the process away from the direct identification of single-issue majority preference, which has been seen as the very source of the plebiscite's inherent superiority. These reforms might in fact improve the ability of plebiscites to hear the voice of the people. How? By making plebiscites look more like representation.

I have chosen not to explore in any detail the ways in which direct democracy might be reformed so as to be more responsive to priorities. An attempt to analyze those possibilities here would shift the focus of my argument away from my central point regarding the fundamental democratic character, or lack thereof, of the plebiscite. Moreover, I do not think that direct democracy ought to be reformed so as to reflect voter priorities. The plebiscite has the potential, perhaps, to do one thing well — to identify majority preference on isolated issues. Perhaps direct democracy could be made increasingly to resemble representation, and thus better account for priorities. But so too could a motorcycle be used to transport a family of four on a rainy day if equipped with a sidecar on each side and some sort of makeshift windshield and roof. It would, however, do a poor job, and in the process would lose the attributes that make motorcycles desirable in the first place. If you want to transport a family of four, use a car. If you want to account for priorities, do not attempt to transform direct democracy into a makeshift imitation of the representative process.

Instead, let direct democracy do what it has the potential to do well. There are at least three sorts of situations in which direct democratic lawmaking, despite its inability to account for voter priorities, might be desirable. First, under certain circumstances, the agency costs of representation may be particularly large, as in cases when representatives might risk defying constituent priorities. The paradig-

matic case here would be a term limits measure, where representatives literally have nothing to lose by refusing to support such legislation.

Second, there may be issues for which the measurement of priorities appears inessential. If, for example, we could identify issues for which everyone's preferences, whether pro or con, were equally intense or equally lukewarm, nothing would be lost by employing a plebiscite to decide those issues. The key here would be to identify issues that do not seem to be of particular interest to any identifiable minority of citizens. It is worth noting, however, that many of the most widely publicized and contentious plebiscitary measures have been those that manifestly are of particular concern to an identifiable minority — for example, referenda on affirmative action, gay rights, bilingual education, and welfare benefits for immigrants.

Third, and finally, there may be issues for which receiving *direct* popular input is considered more important than achieving full and accurate popular input. On occasion we may care about popular participation for its own sake, or about public education, or about giving people the (mistaken) feeling that they have had greater input into the political process. Moreover, although it is difficult for me to concede, we may want to use the plebiscite to secure public acceptance of specific outcomes. Although I have argued throughout this Commentary that direct democratic outcomes should *not* be accorded any special status as more democratically legitimate or authoritative than representative outcomes, it would be wishful thinking for me to deny that many people, including political leaders, judges, and commentators, continue to accord plebiscitary results such higher status. As long as this mistaken idea persists, it may be possible to achieve greater public acceptance of difficult or problematic political decisions if those decisions have received the presumed anointing of the direct popular vote.

Before leaving the subject of direct democracy and intensity, I should note that 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. In fact, if *City of Eastlake* were to be reversed, and referenda evaluated in the same manner as are delegations to administrative agencies or regulatory bodies, the referendum might survive my critique unscathed. Just as we might properly choose to delegate some decisions to administrative agencies or regulatory bodies to gain the benefits of experience and expertise, we might similarly decide to allow some decisions to be made by popular vote.[106] We should do so, however, not because we are un-

[106] For example, the agency costs attached to representative government are particularly severe in certain circumstances, such as when legislators' self-interest conflicts with constituent priorities. Thus, we might prefer that campaign finance reform, term limits, and similar issues be decided by popular vote. Alternatively, there might be issues for which the educational or citizen-

der the illusion that plebiscitary outcomes somehow give us the true voice of the people, but because we have particular reasons to prefer that decisionmaking process. What I object to is not plebiscites per se, but rather the assumption that plebiscitary outcomes are somehow more legitimate than representative outcomes.

D. Evaluating Representative Systems

Given that my critique of direct democracy hinges on a particular account of representation, it seems fair to ask whether the account offers any grounding for an evaluation of, or comparison among, representative systems themselves. For example, it might be possible to mine the empirical political science literature with an eye to determining what sorts of structures encourage or permit representatives to be responsive to the priorities, as well as to the isolated preferences, of their constituents. Because a voter's priorities among issues will themselves be a function of the electoral and legislative marketplace, it would be difficult to determine in any absolute sense how well a given procedure succeeds in permitting the fullest possible expression of those priorities. Research, therefore, would focus on agency costs suggestive of market failure, rather than on a correspondence between single-issue preferences and ultimate outcomes. While I encourage such research, no such effort is made here. In fact, the difficulty inherent in determining the extent to which any given process has or has not accounted for priorities among issues lends credibility to my basic claim. Political 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.

That said, I am willing to suggest one way in which my critique might inform debate over what sorts of legislative structures might be most fair or appropriate. A populist view of representation might provide the basis for an equally populist — as opposed to constitutional, legal, or fairness-based — critique of multimember districts and at-large elections.

One potential source of distortion in the communication of voter priorities through candidate elections is an insufficiently diverse electoral district. For minority intensity to be taken into account, there must be some exploitable difference of opinion among the majority on some issue about which the minority is less deeply concerned. For an intense minority to sell its votes, there must be buyers. This problem is the flip side of the problem of the discrete and insular minority. Call it the problem of the monolithic majority. If even a bare majority agrees on every political issue, the members of that majority have no

---

ship-building benefits of a plebiscite would outweigh concern over the loss of input regarding voter priorities.

need to trade for votes. Such a realistic appraisal of the situation of minority voters suggests that many normative arguments about voting rights might profitably be couched in more explicitly populist terms.

Voting rights theorists have argued that certain sorts of political districts and election schemes prevent minority groups from exercising their fair share of political power.[107] At-large elections and multimember districts sometimes preclude black voters from electing any representatives, even where they constitute a substantial minority of the population. Voting rights advocates often couch their arguments in terms of legality or fairness, arguing that the Due Process Clause or the Voting Rights Act precludes vote dilution of this sort. Alternatively, they argue that it is unfair for certain groups to be denied an opportunity to elect representatives of their choice. According to Lani Guinier, fairness requires enabling substantial minorities to elect at least one representative of their choosing.[108] Remedies such as nondilutive redistricting or cumulative voting are thus endorsed on the grounds that they are either required by the Voting Rights Act or mandated by principles of fair play.

Unfortunately, arguments of this sort are too easily criticized as antipopulist. Legal requirements and principles of fairness can be (mis)understood as limits that voting rights advocates want to impose on the pure and unadulterated will of the people. Consider, for example, the extent to which those opposed to Lani Guinier's appointment as Assistant Attorney General for Civil Rights were able to characterize her arguments as "radical" or "undemocratic."[109] Voting rights arguments that seem to discount the voice of the people may fail to resonate with those whose vision of democracy is rooted in strongly antielitist, populist understandings.[110]

---

[107] *See* MINORITY VOTE DILUTION (Chandler Davidson ed., 1984); QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990 (Chandler Davidson & Bernard Grofman eds., 1994); ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987).

[108] *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 2–4 (1994).

[109] *See* Stephen L. Carter, *Foreword* to GUINIER, *supra* note 108, at ix–x. I do not claim that these are accurate characterizations of Guinier's varied and nuanced arguments. On the contrary, I am interested in why arguments like Guinier's are easily mischaracterized as antipopulist. That said, my critique would not provide an alternative grounding for more radical arguments seeking direct racial quotas or minority legislative vetoes.

[110] For example, consider Stephen L. Carter's attempt to argue that Lani Guinier's work is not nearly so radical as it was portrayed. *See id.* at xiii. Carter points out that limits to majority power have long been a central and uncontroversial feature of American government. *See id.* at xvi. He is, of course, correct on this point, but the way in which he argues for this feature of American government is revealing:

> Why place these limitations on what the majority can do? The reason can only be that majorities are not fully trusted, or, rather, that the larger, more thoughtful, and harder-to-assemble majority that is needed to construct a constitutional clause is more to be trusted than the smaller, more passionate, easier-to-arouse majority that quickly assembles around almost any issue.

Consider, however, the implications of viewing priorities among issues as a fundamental aspect of what all citizens, minority *and* majority, would like to express. Certain forms of redistricting might thus be defended not as giving minorities a turn, but as giving all voters a better and clearer voice, by ensuring an energetic market for the electoral logrolling which accounts for voter priorities. Cumulative voting can similarly be understood as a device for ensuring that the representative process is capable of hearing the full range of citizens' needs and desires — priorities as well as preferences. I do not presume to instruct voting rights advocates on how they should make their case. I merely suggest that by framing arguments in expressly populist terms, it might be possible to reach those who continue to view voting rights as being more about advancing certain groups than about responding to the voice of the people as a whole.[111]

For my immediate purposes, it is sufficient to note that direct democracy is, on the reading I suggest, akin to the worst possible districting scheme. It is the one system that guarantees that citizens with particularly intense concerns and priorities will find no market for their votes.

E. Linking Pluralism and Republicanism

It may appear that I have given short shrift to one potential objection to my account. In arguing that representation accounts for voter priorities among various and disparate issues, I have claimed that the

---

Id. By claiming that the reason for limiting majority power "can only be" a mistrust of majorities, Carter dismisses or ignores the possibility of a populist critique of majority rule. Carter also notes:

> [T]he great majority of the people never has the opportunity to vote directly on the great majority of the issues. The divisive issues — abortion, school prayer, taxes — are never on the ballot. (Some states do allow initiative and referendum [sic], but with substantial procedural difficulties.) Instead, we all vote for representatives who will then cast votes in our name. Not only does this system dilute direct democracy — sometimes the system openly frustrates it.

Id. True. Representation produces results at odds with those favored by majorities on specific issues because voters are forced to funnel their input through the medium of their legislative representatives. But then Carter gives away the farm. After observing that liberals and conservatives alike often point to the legislature's refusal to enact their position, even though a majority of citizens supports it, as proof that representation is muting the voice of the people, he asserts: "And in both cases, advocates are correct that only the vicissitudes of the legislative process stand between the people and the legislation the people want. What the advocates doubtless know but are reluctant to acknowledge is that those vicissitudes are precisely what give representative democracies their advantages." *Id.* at xvii. Not necessarily. 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." In a foreword ostensibly designed to make Guinier's critique palatable to a general audience, Carter embraces the very assumption that has made such critiques so unpalatable up to now — the assumption that limitations on majority preference amount to constraints on the people themselves.

111 *See, e.g.*, Larry Alexander, *Still Lost in the Political Thicket (Or Why I Don't Understand the Concept of Vote Dilution)*, 50 VAND. L. REV. 327 (1997).

arguably incommensurable nature of many of these issues casts no doubt on my description. I argue that troubling trade-offs are an inevitable consequence of a heterogeneous society, and should at least be effected with an eye to voters' priorities among issues. At a deeper level, however, a critic of my argument might point out that elections tend to turn on a relatively small number of particularly salient issues. It seems safe to say, moreover, that 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. In part, this is because there are many issues voters do not care much about. Potentially more troubling, however, is the near-certainty that there are many issues voters do not understand well, or perhaps do not even realize are being decided. How can I claim that candidates embody popular preferences, let alone priorities, on issues voters do not understand or have not even considered?

I will respond to this difficulty by considering a different sort of objection, this one normative rather than descriptive. The objection is this: does my essentially pluralist account imply that principled legislators — legislators who seek some vision of the common good rather than (exclusively) reelection — ought to be eschewed as imposing agency costs? If candidates are supposed to act as fluid and responsive multi-issue referenda ballots, do not independent judgment, ideals, and principles limit their functioning as such? Yet, legislatures are also supposed to be fora for principled, republican deliberation. One need not take a strong Burkean view of representation in order to ask how a representative body can be both a forum for principled deliberation *and* a means of transmitting the voice of the people as clearly as possible. It would be unfortunate if my critique were to hinge on the normatively unappealing and descriptively questionable claim that principled legislators impose agency costs, but are perhaps too rare to worry about.

The answer, I think, is that independent judgment, ideals, and principles are some of the things people might want. Deliberation is not an agency cost if the agent has been hired to deliberate. Voters may not have particularly intense substantive preferences on most issues. More to the point, they may not understand some issues, and they may not be aware of others. This does not mean, however, that voters do not care how those issues are decided. In fact, it might be the case that *how* issues are decided is precisely what voters care about most. By voting on the basis of party affiliation or candidate character, voters allocate some portion of their political power not to secure a given outcome on Issue *A* or Issue *B*, but rather to influence how and by whom Issues *C* through *Z* will be decided. It would be perfectly rational for a voter to decide that there are very few particular issues that are as important to him or her as these sorts of process-based concerns. As two economists have phrased the point, following John

Stuart Mill, "rational citizens will want to have their opinions and *not* their preferences represented."[112] The term "opinions" in this formulation refers to a broad set of views about the way in which issues are decided — about the priorities employed in the decisionmaking process.

It is misleading, therefore, to conceive of candidates as attempting to embody voter preferences and priorities on hundreds of discrete substantive issues. Instead, the balancing takes place between some smaller subset of substantive issues and some difficult-to-define set of process-based concerns suggested by things like character, ideology, and party affiliation. Stated differently, there is nothing inherently contradictory about a pluralistically expressed popular desire for representative republicanism. Moreover, single-issue votes are inherently incapable of accounting for these latter sorts of concerns. My critique, therefore, requires neither that I dismiss the role of representation as a locus for principled deliberation, nor that I assume candidates are capable of precisely embodying popular preferences on an unlimited number of substantive issues. To some extent, at least, these two difficulties answer each other. Representation allows and requires voters to express their priorities, both substantive and process-based, by deciding which concerns to use as bases for voting.

My critique thus offers a potential, if partial, rapprochement between pluralist and republican accounts of representation. Does representation identify and effectuate popular will by balancing competing interests, or does it modify and improve popular input through deliberation? On my account, it does both. Representation can refine without diluting.

The term "refine" in this context comes from Hume,[113] whose influence on Madison's contributions to our own representative system has been well documented.[114] Without attempting to foist my reading of

---

[112] Albert Breton & Gianluigi Galeotti, *Is Proportional Representation Always the Best Electoral Rule?*, 40 PUBLIC FINANCE [FINANCES PUBLIQUES] 1, 5. Breton and Galeotti elaborate:

> The basis of that view of rationality . . . is that citizens know that political choices are collective choices and that these necessarily involve compromises, give and take, and adjustments to the views of others. Opinions, which are essentially in the nature of orientations, attitudes, broad outlooks, and dispositions[,] are a better guide in the debates and discussions leading to political decisions than are preferences, because they are more flexible and more malleable and because they provide a quick reference point for the assessment of behaviours and outcomes.

Id.

[113] *See* DAVID HUME, ESSAYS: MORAL, POLITICAL, AND LITERARY 492, *in* 3 DAVID HUME, THE PHILOSOPHICAL WORKS (Thomas Hill Green & Thomas Hodge Grose eds., 1882 (photo. reprint Scientia Verlag Aalen 1964)) (1777) ("In a large government, which is modelled with masterly skill, there is compass and room enough to refine the democracy . . . .").

[114] *See* DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 101–02 (1984); RALPH KETCHAM, JAMES MADISON 187 (1990); DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 42–43, 48–50 (1989); WILLIAM LEE MILLER,

representation on Madison, it is worth noting that an emphasis on priorities among issues does offer one way of reducing the tension between the republican and pluralist visions that struggle for prominence in *The Federalist No. 10*. Robert Dahl, for example, observes accurately that Madison neither defines the "tyranny" against which representation is to protect, nor explains how process-based protections will be capable of differentiating the tyranny they aim to check from the republican genius they aim to effectuate.[115] How can substantively neutral processes distinguish illegitimate majority tyranny from legitimate expressions of popular will?

Majority tyranny may in fact be impossible to distinguish from majority will, but that will only bother us to the extent that we continue to equate majority will with the will of the whole. Once we recognize that the voice of the people can and should be understood as something other than the single-issue preference of a majority, a process-based distinction between majority tyranny and popular voice becomes possible. Dahl's premature concession that the intensity problem is insoluble prevents him from recognizing that Madison had solved it, and, in doing so, had described a way of checking majority tyranny without imposing substantive limits on popular will.

My aim here is not to offer an interpretation of *The Federalist No. 10*. I refer to Madison's defense of representation only because debate over the interpretation of that defense has been a central locus for ongoing consideration of the republican-pluralist dichotomy in American political thought. 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.

IV. REEVALUATING THE MAJORITY VETO

As described by the Supreme Court, "[t]he referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative

---

THE BUSINESS OF MAY NEXT: JAMES MADISON AND THE FOUNDING 55–60 (1992); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 504 (1969).

[115] *See* DAHL, *supra* note 44, at 4–33.

bodies."[116] This formulation, however, assumes precisely what I have set out to question, that a majority vote on a given issue can be unproblematically characterized as a decision of the people as a whole. It is more accurate to say 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. This much is uncontroversial, and not intuitively problematic. When one considers, however, *why* they are unable to get what they want from the legislature, attempts by majorities to secure those outcomes directly may appear more troubling.

Consider this account of the majority veto: having a majority, those in favor of a given outcome could have secured that outcome by making it a priority in electing representatives. If they failed to do so, it is because they were *not* willing to make that outcome a priority. They were unwilling to allocate their political power to that end. Moreover, it can be assumed that some minority of voters more intensely concerned with that issue *were* willing to make that issue a priority. They did allocate a measure of their limited allotment of political power to that end. They traded off other issues in an effort to secure a favorable outcome on the issue or issues they cared about more. In effect, they made a deal, or rather an infinitely complex and interconnected set of deals, whereby they gave up much of what they would have liked in return for some of what they really wanted. Now the majority reverses that outcome through a plebiscite.

On this account, two potential scenarios emerge, neither of which is appealing. Assume first that voters in elections, and legislators when they logroll, do not take into account the possibility of a majority veto of legislative outcomes. This assumption is admittedly unrealistic, but it is worth exploring for the light it sheds on the more realistic scenario in which the possibility of a majority veto is an ever-present and well-known fact of political life. Consider, therefore, the possibility that at least some of those involved in the logrolling process, electoral and legislative, may have understood themselves to be making enforceable agreements. A majority reversal then looks like a straightforward betrayal. Because these myriad trade-offs were brokered by and conducted through the medium of legislative candidates, they are impossible to trace. No one voter can say to any other, "Hold on, you traded off outcome X to me in return for outcomes A, B, C, and D, and now you are going back on the deal." Those in the majority take advantage of this enforcement problem. They renege, and no one seems to have standing to object.

One might respond, however, that most, if not all, of those involved in the process, voters and legislators alike, fully recognize the possibil-

---

[116] City of Eastlake v. Forest City Enters., 426 U.S. 668, 673 (1976).

ity of direct democratic reversal of legislative outcomes. Voters should therefore be understood to have accounted for that possibility in evaluating various potential deals and trade-offs.[117] Not to put too fine a point on it, a minority that trades away political power to secure a given result is foolish. Those in the minority, however intense their preferences, should know better. At least, they should know to adjust the "price" of their votes accordingly. On this account, no minority has been cheated, because the deals themselves should not be understood as enforceable. No one has reneged, because nothing has been promised.

So much the worse. To the extent that priority-reflecting logrolling does not occur, or is inhibited by the possibility of the majority veto, the mere existence of the plebiscite has precluded or inhibited the expression of priorities across an entire range of issues. In this way direct democracy obscures voter priorities even as to those issues on which no initiative or referendum is ever conducted. Put differently, the going price for a minority vote approaches zero to the extent that majorities recognize that, in the end, they have no need to deal at all. Either way — by providing an opportunity for reneging on deals or by inhibiting the making of those deals — direct democracy vests in the majority the ability to speak on behalf of the whole. Citizens may try to express their priorities through trade-offs in candidate elections and legislative logrolling, whether or not those trades are enforceable. They do so in vain, however, to the extent that the results of those representative processes are subject to a majority veto.

At least one Supreme Court Justice appears to have recognized this phenomenon. Justice Scalia, dissenting in *Romer v. Evans*,[118] described Colorado Amendment 2 as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the effort of a politically powerful minority to revise those mores through the use of the laws."[119] Stated in that fashion, nothing could appear more legitimate. But in what way are advocates of gay and lesbian rights a "politically powerful minority" in Colorado? And how did they gain that power? Why was the majority unable to achieve its goals through the legislature? Justice Scalia himself provides an explanation:

> The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, *and, of course, care about homosexual-rights issues much more ardently than the public at large*, they

---

[117] *See* Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99, 101 (1996) (examining how potential initiatives affect legislative behavior).

[118] 517 U.S. 620 (1996).

[119] *Id.* at 636 (Scalia, J., dissenting).

> possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.[120]

On Justice Scalia's reading, at least, one explanation for the legislature's failure to pass the equivalent of Amendment 2 is that it was responding to priorities as well as preferences. Coloradans supporting gay rights, though apparently in the minority, had secured some measure of recognition for gay rights by "devot[ing their] political power" to the issue they cared about "much more ardently than the public at large."[121]

A similar, if somewhat speculative, story might be told about California Proposition 209. Affirmative action is unquestionably an issue which has aroused intense minority concern. Without attempting to quantify the point, it seems at least likely that representatives from minority districts knew that trading off affirmative action in the legislature would have been political suicide. While it is certainly true that many opponents of affirmative action expressed intense concern over the issue, many of those who voted for Proposition 209 may have been equally interested in other issues, such as immigration, taxes, or other issues of more local concern. Those voters, at least in the perception of their representatives, were apparently unwilling to make the elimination of affirmative action a sufficiently high priority. Those representatives appear to have recognized that getting a majority of the legislature to support the equivalent of Proposition 209 would have required trade-offs unacceptable to their constituents.

I readily acknowledge that neither Justice Scalia's account of Colorado Amendment 2 nor my tentative description of California Proposition 209 is capable of being proven empirically. As for Colorado Amendment 2, for example, Justice Scalia may have been mistaken. Perhaps opponents of Amendment 2 did not in fact care about gay rights issues more ardently than the public at large. More to the point, perhaps there are other reasons that proponents of Amendment 2 sought their ends directly rather than through the legislature. Primarily, a constitutional amendment is more difficult to repeal than a statute passed through the legislature. In addition, considerations such as Colorado's strong tradition of home rule may have made legislative action unlikely, or even impossible, in this situation. In other words, Coloradans accustomed to local government autonomy may not have been willing to brook legislative interference with local decisions. Similar objections might be raised regarding my post hoc speculation regarding California Proposition 209. The failure of California's legislature to eliminate affirmative action may have been in part a conse-

120 *Id.* at 645–46 (emphasis added) (citations omitted).

121 *Id.*

quence of representative agency costs, rather than an accurate reflection of citizen priorities. For example, representatives of those opposing affirmative action may have underestimated the intensity of that opposition. Perhaps large numbers of voters would in fact have been willing to make that end a priority by allowing their representatives to make whatever trade-offs were necessary to pass the equivalent of Proposition 209.

I cannot state categorically that any given representative process transmits the voice of the people more fully than would a plebiscite or series of plebiscites. But that is not my aim. My purpose is merely to argue that no such categorical claim can or should be made for any given direct democratic outcome. 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? In particular, did they allow for the expression of priorities as well as preferences? Given that no process is perfect, and given further that different processes are imperfect in different ways, it will rarely be possible to answer this question with great confidence. As a result, judicial and popular debate over particular direct democratic outcomes should focus on their constitutionality, propriety, and wisdom, rather than on their purported status as reflections of popular voice. My concern is that these debates have been shortchanged, and in some cases foreclosed, by the claim that direct democratic processes "allow[] the people the final decision,"[122] so that rejecting plebiscitary outcomes necessarily "operates to thwart the will of the people in the most literal sense."[123] That claim in turn depends on the underlying assumption that the voice of the majority on any given issue must be understood as the voice of the whole. That assumption, I have argued, is simply untenable. By 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.

---

[122] City of Eastlake v. Forest City Enters., 426 U.S. 668, 673 (1976).

[123] Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 699 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997).