

DEMOCRATIC LAWMAKING AND POLITICAL REPRESENTATION¹

Andrew Rehfeld

Associate Professor, Political Science

Washington University in St. Louis

rehfeld@wustl.edu

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Comments welcomed and appreciated

Abstract

In this paper I claim that there is no particular ethics of political representation, that is, no particular ethics of what representatives should do on account of their being representatives. I argue that the purported ethical obligation of representatives, captured in the “trustee/delegate” distinction, obscures 3 subsidiary distinctions of *aims*, *sources of judgment*, and *motivation* critical to answering the question, “how should representatives vote on legislation?” When we put the problem in these terms, the central substantive question of what representatives should do reduces to the familiar conflict between democratic authority and substantive justice; that is, the conflict between doing what in some sense ought to be done in cases where those to whom it is done do not approve. But in the end, this turns into a problem for the exercise of power in general, whether using political representation or not. Treating the “trustee/delegate problem” as unique or even particular to political representation is thus a serious conceptual error.

“[T]he reader who is looking for theory that has some meaty and straightforward practical significance, who is ill-disposed to conceptual elaboration for its own sake, is bound to be extremely disappointed by what follows and would be well advised to stop here.”²

1. Statement of the Problem

Any comprehensive account of democracy will specify how closely the laws³ of a nation should correspond to the preferences of the citizens governed by them. No one expects there to be an exact correspondence between the two, and deviations may be justified for familiar reasons: citizens often have no formed views on what the law should be; their preferences may be incoherent at the individual or collective levels; their preferences may not conform to their true interests; or these preferences may be trumped by more important principles of justice (including but not limited to the protection of minority rights). So long as these deviations do not become the norm (in which citizen preferences are routinely ignored) they fit well within broad conceptions of democracy.⁴ But the hallmark of democracy is the presumption of a close, even intimate, correspondence between the laws of a nation and the preferences of citizens who are ruled by them. This is reflected in the fact that we must always justify and explain cases in which law deviates from citizen preferences; no such need arises in cases when law conforms to the preferences and wills of those it governs.

Let us call the specification of the proper relationship between citizen preferences and the laws that govern them the “central normative problem” of democracy. Representative government complicates this central normative problem because it introduces political representatives as agents who mediate the will of its citizens. Thus in representative government, another normative problem is thought to emerge in specifying the proper correspondence between citizen preferences and the votes and actions of their

representatives.⁵ The classic statement of this problem has been referred to in various forms. In some cases it is the dichotomy between independent and mandate theories of representation reflecting whether the representative is independent of her constituents or is mandated by them. More commonly it is framed as the “trustee/delegate” distinction in which representatives are said to be pulled between voting as they think is best versus following the instructions of their electoral constituents.⁶ More than this, the “trustee/delegate” problem purportedly emerges as a particular normative problem of political representation itself.

In this article I argue that the trustee/delegate distinction obscures 3 subsidiary distinctions of *aims*, *sources of judgment*, and *motivation* critical to answering the question, “how should representatives vote on legislation?” I argue that when the problem is put in these terms, the central substantive question of what representatives should do reduces to the familiar conflict between democratic authority and substantive justice; that is, the conflict between doing what in some sense ought to be done in cases where those to whom it is done do not approve. But in the end, this turns into a problem for the exercise of power in general, whether using political representation or not.⁷ Treating the “trustee/delegate problem” as unique or even particular to political representation is thus a serious conceptual error.

If this account is right, political representation adds nothing of interest to the central normative problem of democratic government. The fact that we tend to think it does is attributable to the collapsing of the three distinct problems just enumerated into the imprecise binary distinction of “trustees” and “delegates”: towards whose *good* legislation should *aim*; upon whose *judgment* about that good we should rely; and by what *motivations* those writing law should act. Trustees are often (though not always) described as (i) looking out for the national good; (ii) based on their own judgment about that good; and (iii) motivated by their civic virtue. Delegates are often (though not always) described as (i) looking out for their

constituents' interests; (ii) as defined and dictated by their constituents; (iii) often motivated by their desire for reelection. Each of these three parts, however, is an independent, and independently important problem to consider: (i) whose *good* should a democratic lawmaker pursue; (ii) upon whose *judgment* should she rely; and (iii) by what *motivations* should she act?⁸ Indeed, if each of these separate questions points at two directions (the whole versus particular; the judgment of the lawmaker versus the judgment of other citizens; behavior motivated “internally” or “induced”⁹) and any combination of these three is possible, then there are 8 possible ideal types (2 x 2 x 2) rather than the binary one captured by the terms “trustee” and “delegate.”

Although these problems are regularly treated as special to political representation, once unpacked into these three subordinate distinctions, we can see that they apply to the process of lawmaking more generally.¹⁰ So long as the individual(s) making law aim(s) at law that reflects substantive normative principles (of the good, right or just) *and* that corresponds to the preferences of those whom it governs, the problems submerged by the trustee/delegate dichotomy arise.¹¹ This tension, then, applies with no more or less force in a direct democratic assembly in which all citizens participate¹² or in a non-democratic monarchy in which a single individual has the power to make law and wishes to make law that conforms to the preferences of those governed.

The view that there is a distinct *ethics of political representation* derives from a normative casting of political representation in which lawmakers are said to take on unique obligations by virtue of their being representatives.¹³ Instead, the ethics of political representation emerge only from the ordinary obligations one takes on in accepting a job. Put more starkly, there are no particular normative obligations one takes on by virtue of *being* a *political representative* apart from those that one takes on by accepting the role of lawmaker; political representation adds *nothing* of interest to the normative problem at hand. The

casting of the “trustee/delegate” problem as particular to political representation constitutes a substantive conceptual error that fails to distinguish the tension between citizen preferences and normative ideals, on one hand, from professional obligations that *any* legislator (whether monarch, representative, or citizen in a direct democracy) takes on when she takes on the role of making law.

The argument of this paper illustrates the importance of conceptual analysis to normative and empirical political science. The treatment of political representation in these contexts has suffered from a lack of clarity. Political representation is sometimes claimed to be shifting, nuanced, and contingent, and this is no more so than in Hanna Pitkin’s seminal statement.¹⁴ The claim that political representation is complex is possible only when the concept is cast in an overly broad fashion. Thus can seeming complexity and nuance be the results merely of imprecision, in which scholars talk past each other using the same terms, but with very different emphases.¹⁵ This should not lead us to mistake the complexity for the thing itself, or rather, should not lead us to mistake the whole for its simpler parts. The argument is thus in service to advancing social science concepts that are better because they correspond more accurately to the social phenomena they purport to describe and are thus more useful to normative and empirical analysis.¹⁶

The argument continues over three sections. In Section 2, I frame the problem as it has been historically formulated in terms of trustees and delegates, taking up Jane Mansbridge’s recent and prominent reconceptualization of it.¹⁷ In section 3, I illustrate the three conceptual categories that these treatments collapse. In Section 4 I use these conceptual distinctions to argue that *anyone* who makes law (i.e., anyone who has the power to make law and the desire to render that law democratic) faces the tradeoff between aiming at substantive principles of justice versus enacting the will of those who will be governed.¹⁸

The problem is attributed to political representation only when representatives take on the role of lawmaker, and not because they are political representatives *per se*.

2. Delegate, Trustees, and Contemporary Political Science

The questions of this paper have a long historical trajectory and they are often referred to as the trustee/delegate or mandate/independence views of political representation.¹⁹ In this section I briefly summarize this historical problem (2.1), demonstrate how it has been used in contemporary normative and empirical literature (2.2), and reject much of Mansbridge's reconceptualization of these sets of problems (3.3).

2.1 *Tracing the core distinction: Trustees vs. Delegates*

The trustee position, often attributed to Edmund Burke, specifies that national legislation ought (i) to aim at the national good, and (ii) that the representative, in deliberation with other legislators, should be the ultimate judge of what constitutes that national good. Burke clearly identifies these two features as separate features of the whole. Defending the national good as *the proper aim of legislation*, he writes, "If the local constituent should have an interest, or should form an hasty opinion, evidently opposite to the real good of the rest of the community, the member for that place [i.e., the representative] ought to be as far, as any other, from any endeavour to give it effect." Separately Burke defended the view that representatives rather than constituents ought to be the *source of judgment* about what constitutes the national good. "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."²⁰ In this way Burke takes a position on two different sets of issues: that (i) representatives (rather than their constituents) should be the judge of (ii) the good of all (rather than their constituents' narrow interests).²¹

By contrast, delegate views of representation, like those Burke was countering,²² press for a close correspondence between the views of an electoral constituency and the votes of representatives. The view was perhaps best captured by the opponents of the American Constitution in the 1780's, the so called, "Anti-Federalists." Like "trusteeship," so called "delegate" views of representation collapse one view of "aims" and one view of "sources of judgment" into a complex whole. In delegated representation, the (i) *proper aim of legislation* is judged by whether that legislation is good for a particular electoral constituency (i.e., small community); and (ii) citizens should be the *source of judgment* about what constitutes that good. Thus delegate representatives emerge seeking to secure their constituents' interests as their constituents so define them. The opposition of the Anti-Federalists to the US Constitution was premised in part on the inability of the proposed US government to allow for this kind of political representation.²³

The trustee and delegate models have also been closely aligned with accounts of motivation. As a broad generalization, the Burkean model of trusteeship depends is built upon trust and virtue, and those who endorse this model often endorse other mechanisms to ensure the trustworthiness of the representative himself. So, for example, property requirements at the founding were premised on securing representatives who were motivated by virtue, public service and selflessness. By contrast, and again broadly generalizing, delegate accounts are more frequently aligned with a view that representatives will be motivated by their desire for reelection or their desire to avoid legal penalties. The simple delegate framework depends on representatives wanting to be reelected (and thus following the instructions of their constituents). The more complicated proposals for delegacy attached additional legal penalties for representatives who deviated from their instructions. This is a different motivational stance than the Burkean delegate who viewed such motivations for reelection as evidence of corrupt virtue, a view shared by James Madison as well.

In broad summary, then, the representative as delegate is one who i) aims at the good of her constituents, ii) as judged by her constituents, iii) and motivated by self interest (reelection, avoidance of legal penalties). The representative as trustee, again in broad summary, is one who i) aims at the good of the nation as a whole; ii) as judged by the representative, iii) motivated by his civic virtue. In practice, there will be a good deal of variance in any of these three features, a point we return to in section 3 below.

2.2 The dependency and presumption of empirical and normative research.

It is curious that in the empirical and normative literature, scholars have endorsed different views as what the proper role of the representative ought to be. Within the academic literature today there appear to be three separate positions that cover a range of possibilities. Empirical scholars appear to endorse the view that democratic representatives should pursue constituent interests, as judged by the constituents, and motivated by the representative's desire for reelection. Normative scholars appear on the other side of the spectrum endorsing either mixed strategies or something rather close to Burke's trusteeship. I will take these three in turn.

The reigning view within empirical political science presumes the delegate, instructed model of representation. I say, "presumes." because the norms that underlie most empirical research on the subject are not defended even as they are asserted. Most empirical studies equate "better" representation (or merely "good" representation) with how closely a representative's voting record corresponds to what their constituents want her to do.²⁴ If the practice of representative instructions failed over two centuries ago it has reemerged in gentler form through the use of electoral incentives. In particular, the drawing of electoral districts to concentrate like-minded voters is intended to make electoral success difficult unless a representative does what his constituency wants on key issues. In a recent

formulation²⁵ Brunell goes so far as to endorse districts with 80% of one party because this arrangement would make voters happier.²⁶

Similar views appear in the literature supporting electoral reform on the basis that such reforms will bring about a closer fit between the views of electoral constituents and representatives in office. These systems are most often justified by their ability to achieve more “voice” in the legislature. But by creating homogenous constituencies, they simultaneously restrict the real independence a representative has in the legislature when she considers how to vote on proposed legislation. A member of a party in many proportional systems will find it harder to change her mind about many policies, even if she is compelled by a better argument, since were she to vote against her party’s position she would likely be disposed by her party leadership, if not the voters, at the next election. Indeed, proportional representation in which party platforms are well articulated and differentiated before an election are a close contemporary approximation of electoral instructions because such representatives have reduced degrees of freedom once they arrive in office.²⁷ Homogenous constituencies, constituencies in which electoral constituents all share some ideological similarity, create more voice for their position in the legislature, but at the cost of having fewer other representatives who can actually respond and change *their minds* to support the position taken.²⁸ This is why an important institutional task would be to create “voice without earplugs”, that is, to create the proper incentives by which representatives are encouraged both to articulate various points of view and somehow remain open to revision about the views expressed.²⁹ It may be that empirical scholars favor delegate views of representation because they are easier to measure: one need only compare roll call votes of representatives with public opinion surveys to evaluate whether “good” representation is achieved. But such a view ignores the other more complicated question of what the ends of lawmaking should be, how to measure good deliberation, and other questions that make the

trusteeship view of political representation a more plausible alternative, or at least not one to be summarily dismissed.

If there is any consensus in the normative literature on democratic theory it is reflected by Hanna Pitkin's view that no single hard and fast rule should govern a representative in all cases. A democratic representative need not *always* be in agreement with her constituents, but "he must not normally come into conflict with their will when they have an express will..." The conflict, in Pitkin's mind, is hard to resolve and instead of resolution we should look for accountability. "[W]hen a representative finds himself in conflict with his constituents' wishes, this fact must give him pause. It calls for a consideration of the reasons for the discrepancy; it may call for a reconsideration of his own views. It is not sufficient for him to choose; it is necessary that the choice be justifiable."³⁰

In real world politics our evaluation of the appropriateness of a lawmaker so deviating from popular sentiment appears anecdotally to be based not on a principled position about following Justice or Democratic will; rather it appears to be based solely on whether we agree with the substantive issue at hand. Thus do liberals tend to praise as a "profile in courage" Marjorie Magolis-Mezvinsky's 1993 decision to cast the decisive vote in favor of President Bill Clinton's first budget despite its predictable electoral consequences for her as a representative of a conservative constituency, but ridicule President George W. Bush a decade later when he dismisses protesters as irrelevant to his own thinking about "just" policy in Iraq. Conceptually each acted in pursuit of what they believed justice demanded, overriding the judgment on that issue of those whom they represented.³¹

Deliberative democrats have been more receptive to representative independence for precisely the reason just hinted out. Proper deliberative conditions require that representatives be able to revise their views and change their mind when confronted by better arguments.³² And this deliberative commitment requires greater independence of judgment

than empirical political scientists tend to presume in their measurements. Even given its variation, deliberative democrats are still *democrats* and thus add all sorts of democratic checks on the required deliberative independence of the representative. Thus are conditions of publicity, accountability and transparency such critical checks on representative independence.³³ In these views, democratic control unfolds in a process and relationship between the representative and voters not merely at the time of voting and reelection, but critically during the actual term of office. Still, the preference among deliberation theorists for proportional systems to promote voice within the legislature means that representatives will face greater constraints on independent actions. Either they have to work even harder to convince their constituents of the rightness of their position when it deviates from their constituents' view, or face likely defeat at the next election.

2.3 Mansbridge's rethinking representation.

If empirical and normative scholars effectively endorse different views of the proper role of representatives, Jane Mansbridge proposed altogether eliminating the language of trustees and delegates, recasting the set of issues in terms of four new ways to “rethink representation.”³⁴ Mansbridge proposes to replace the traditional “trustee/delegate” distinction with four ideal types of political representation—“promissory,” “anticipatory,” “gyroscopic,” and “surrogate”—described as “legitimate forms of representation” even, she argues, if none of last three “meets the criteria for democratic accountability...” These ideal types are meant to be just that, descriptions of conceptual points that are not necessarily realized in any pure form. In practice, representatives act in a way that mixes these forms.

Why propose different distinctions for the existing ones? First, Mansbridge claims that we might find it off-putting to use the terms “trustee” and “delegate” at all since they may take us back to 18th century political culture and its presumably unjustified elitism in

which “trustee” denotes an elite, superior individual.³⁵ As a practical matter, though, the fact that the traditional distinction harkens back to an antiquated era is only a problem for those who are familiar with 18th century political language and for whom such language generates such associations. Today there are trustees all around us, appointed to solve all manner of motivational or epistemic problems—like my stockbroker, personal trainer or contractor. Notice that these examples are ones in which middle and upper class employ members of an equal or “lower” social class as their trustee demonstrating that trusteeship does not entail a corresponding sense of moral or class superiority *of the trustee* over the principal but coexists with all kinds of class and expertise relationships.³⁶

Second, and more important for Mansbridge, rethinking the terms of representation in her four categories is supposed to provide a better conceptual map by making possible the identification of “the underlying power relation in each form, the role of deliberation in each, and the normative criteria appropriate to each.”³⁷³⁸ But the conceptual claims that Mansbridge makes are much less helpful to empirical and normative analysis than they ought to be because they collapse subsidiary distinctions that are more usefully treated independent of one another. As the passage just quoted indicated, each of the four kinds of representation she proposes collapses at least three different things—power relations, modes of deliberation and normative criteria. Since power relations need not be dichotomous, and since there are many, many forms of deliberation and probably even more normative criteria by which to judge actions, it would appear that relying on these three conceptual descriptors we would arrive at an infinite number of ways to “rethink representation.” In short it would be far more useful to isolate each of these sub-parts independently of, or in conjunction with, the other subparts to see how they do co-vary and to judge how they ought to co-vary.

As troubling, these four conceptualizations are very close reformulations of already existing complex ideas in the history of political representation. Indeed, with one important

exception we have very good terms already in place to describe many of the core ideas collapsed in each. This exception is the terms “gyroscopic” and “induced” to map out the motivations of representatives. While motivations were part of 19th century conceptions of “political virtue,” that term has its own problems and today is not very useful for normative and empirical analysis (a point upon which I expand below). To see this, we can consider each of her four types in turn.

“Promissory representation” as described by Mansbridge is the traditional delegate model in which the representative “promises” to do what he is authorized to do, and his failure to redeem these instructions (the promissory note) will result in his being turned out of office. “In promissory representation, the power relation from voter to representative, principal to agent, runs forward in linear fashion. By exacting a promise, the voter at Time 1 (the election) exercises power, or tries to exercise power, over the representative at Time 2.” In sum, “Promissory representation thus focuses on the normative duty to keep promises made in the authorizing election (Time 1), uses a conception of the voter’s power over the representative that assumes forward looking intentionality, embodies a relatively unmediated version of the constituent’s will, and results in accountability through sanction.”³⁹

As we saw above, delegated representation was precisely the same idea, indeed there is only one significant difference between the traditional delegate model and Mansbridge’s “Promissory” model and the difference is not even conceptual as it is historical, realized in practice. Historically, instructions for “delegated” or “promissory” representatives originated with the electoral constituents rather than from the candidate herself; good candidates would follow instructions, bad ones would not. In contemporary politics this relationship is now inverted. Today the terms of the agreement are more likely to originate from the candidate who makes campaign promises that may tap into voter sentiment but do not necessarily emerge from the voters themselves. While the origins of the plan of action is an interesting

and conceptually important difference between the practice of promissory representation today as compared to delegated representation two centuries ago, the actual activity of the representative—to be beholden to a specific set of known terms that serve as the condition of service and face sanctions for failing to comply—is no different. In both cases they are to follow a precommitted strategy and their failure to follow that precommitment is seen as good reason to terminate their future service. Importantly, this is why elections in which candidates run extremely detailed party platforms approach the delegated, instructed model of representation. It is the precommitment under threat of sanction that characterizes promissory representation no more or less than delegated models do.

We move next to “Anticipatory representation” described as a way to model the empirical fact that representatives often act with an eye to what voters *will* think at the next election. “Representatives focus on what they think their constituents will approve at the next election, not on what they promised to do at the last election.” Because future events cannot cause past events it is “the *beliefs* of the representative at Time 2 about the future preferences of the voter at Time 3, not the actual preferences of the voter at Time 3, are the cause of the representative’s actions at Time 2.”⁴⁰

Anticipatory representation nicely emphasizes the temporal dimension of a representative’s activity. But it does that only if we think that the representative ought to do what the voter wants, and it thus forms a subset of the more basic question concerning the source of a representative’s judgment. Anticipatory representation thus combines two separate conceptual features concerning motivations and sources of judgment. First, it presumes that a representative will be motivated by a desire to be reelected *and* that she will use her constituents (at Time 3) to be the source of judgment about what to do now. For the only way to arrive at Mansbridge’s deliberative concerns—that representatives today will try to manipulate voters so that at T3 they will see why she did the right thing—is because the

representative wants to be reelected. So the representative is anticipating future voter judgment for two reasons—first to rely on them as a *source of judgment* about what to do, and second because she is motivated by the threat of sanction. But this collapses too many moving parts. We would like instead to make normative judgments about each of these separable things—should a representative use her constituents’ future preferences as her source of judgment to decide what to do today and should she explain, defend, or otherwise try to convince her constituents of the reasons she acted because he wants to be reelected? Anticipatory representation as Mansbridge has proposed it collapses each of these features.

Mansbridge’s third category, “surrogate representation,” is meant to describe cases in which we see someone “representing” constituents who do not have a formal, electoral relationship to the representative, “when legislators represent constituents outside their own districts.”⁴¹ Yet despite her protestations, “surrogacy” is what has been historically called “virtual representation” in new clothes. Virtual representation received its most famous articulation as the theory by which some members of British parliament claimed that the American colonies were represented in the House of Commons despite any formal electoral connection between the representatives and the American colonists. Edmund Burke upheld the normative virtues of using virtual representation for democratic purposes, but denied that the American colonies were, in fact, virtually represented.⁴²

Mansbridge differentiates “surrogate” representation from Burke’s “virtual representation” but only by mistaking what Burke believed about *representation* for his views about the “virtualness” of any particular case of it. Mansbridge writes, “Edmund Burke had a version [of surrogate representation] he called “virtual” representation, but Burke’s concept focused on morally right answers, wisdom rather than will, relatively fixed and objective interests, and the good of the whole, which is only one of many possible goals for surrogate representation.”⁴³ Mansbridge of course got Burke’s view of *representation*

right. But what we want to know is what “virtual” adds or subtracts from this definition. Here, for Burke (and the many others who use the term) the critical point of “virtual” was precisely, only, and no more than Mansbridge’s own definition of the surrogate: “representation by a representative with whom one has no electoral relationship.”⁴⁴ The *reason* members of Parliament did not represent the Americans—virtually or otherwise—was because there was *no one*, elected or otherwise, who was there to speak for them. And this was true not only for Burke but for those who cared about constituent interest representation. Indeed, the absence of anyone looking out for American interests, and articulating their concerns was the reason that Burke thought they did not have virtual representation. It also gives lie to the view that he eschewed interest representation of any kind. The Americans were not virtually represented because, in Mansbridge’s language, they lacked an elected representative from some other district who might act as a surrogate for them. As with virtual representation, “...there is no relation of accountability between the representative and the surrogate constituent. Nor is there a power relation between surrogate constituent and representative.”⁴⁵

Finally, we arrive at “gyroscopic” representation, and here Mansbridge introduces an important new addition to our conceptualizations. Like the other terms that Mansbridge has proposed, gyroscopic representation has a long history within the study of representation in this case in terms of virtue. But unlike the other terms, “gyroscopic” offers a new and elegant way to frame this distinction. The benefit of Mansbridge’s formulation is that it can isolate the source of motivation from its content. In “...*gyroscopic representation*, the representative looks within, as a basis for action, to conceptions of interest, “common sense,” and principles derived in part from the representative’s own background.”⁴⁶ As Mansbridge has framed this distinction, however, it is overly broad, again collapsing a number of different conceptual criteria. The most useful part of this is the internality of the motivation

for action. But along with that, Mansbridge adds a list of *ends* and *sources of judgment*. By her treatment, the gyroscopic representative is not only motivated from internal sensibilities (rather than external sanction) but looks to herself as her own source of judgment, and basis for determining the proper ends of legislations.

Mansbridge is not entirely clear about what work “motivations” are doing. On the one hand, we can send the gyroscopic representative off knowing that she is heading in the same direction as we are. But is this because constituents feel comfortable that their representatives are motivated by the right sorts of motivations, or because their constituents believe their representatives will pursue policies that correspond to their (the voters’) own views? This is a critical distinction because if it is the latter—the correspondence between the substance or ends of law and voters’ views about what the law should be—then the elegance of “gyroscopic” is lost. Instead, by separating out motivations clearly from the ends of the law that the representative is pursuing we can see why gyroscopic representation is such a useful formulation: voters care about the outcome of the law and may have reason to support representatives who have a stronger internal compass towards those ends, than others who might more easily be swayed by the potential electoral effects of their positions. What makes a gyroscopic representative different from an induced one does not thus rely on the substantive position either takes *ex ante*. Rather, gyroscopic representatives are desirable (to some) because, internally motivated, they will stick to their guns even if it will cost them their jobs.

Conceptually, gyroscopic representation is not entirely unprecedented, hearkening back to the 18th century concern about “virtue.” Like gyroscopic representation, “virtuous” representatives were supposed to act by a “proper” motivation stemming not from external rewards or punishments but from an internal, properly attuned sense of right and wrong. But virtue for the 18th century was a gross concept spanning two dimensions. Not only did it

signify that a person was internally motivated (rather than externally induced), a representative who had “political virtue” was one who had the purported right substantive view on issues and personal conduct. Thus the virtuous person not only had to do the right thing but had to do the right thing for the right reasons (i.e., motivated by the right sorts of considerations). This is why James Madison could argue that institutions might be structured to encourage people to act *as if* they were virtuous, that is, so that their external behavior would be similar enough to those who were in fact virtuous whether or not their internal motivations were good, right or just. The fact that two representatives voted the same (right) way was not enough to know that they were virtuous; but it was enough in his mind for a reasonably just system. This is why Mansbridge’s formulation is so helpful in this regard: “gyroscopic” and “induced” in sparer formulations than she had cast them, allow us to focus on the motivations of the actors independent of the substantive value of the ends they advocate.

3. Separating the Three Distinctions and Keeping them Separate⁴⁷

We return then to the core problem. The trustee/delegate distinction, as well as most of Mansbridge’s recent attempts to reconceptualize this distinction, hides greater underlying complexity at the cost of obfuscating important distinction that allow us to empirically analyze and normatively assess political representation. As we saw above, normative and empirical treatments of political representation have tended to one side or another of the debate. But underlying all of this is concern that the terms used are not the ones that get to the core distinctions we should care about. In this section I argue that the traditional “trustee/delegate” distinction masks three independent features of the problem, features that can be unmasked by considering what an ethics of democratic lawmaking ought to provide.

The questions of delegates and trustees are ultimately questions about how representatives ought to act. The justification or defense of any institutional arrangement presumes that it promotes a normatively defensible end. For example, one cannot *justify* the creation of institutions that support bike riding or environmental conservation unless bike riding and conservation are themselves normatively endorsable, or as means to a normatively endorsable end.⁴⁸ Since a primary purpose of electoral institutions is to guide the behavior of political representatives or the outcome of politics more generally, we thus first need to figure out what representatives ought to do.

A complete answer to the question “what should representatives do” would form a complete ethic of political representation in democratic contexts. An ethic of this sort, designed on role morality, would explain what obligations a political representative takes on by virtue of being a political representative in a democratic context.⁴⁹ Schematically, a complete ethic of political representation would provide guidance for political representatives according to the three areas of activity that are particular to the role of democratic political representative: as voters on legislation; as public deliberators; and on constituent service.⁵⁰ Seen in the context of an ethics of democratic political representation, the questions of trusteeship and delegacy cover primarily principles intended to guide a representative’s activity when voting on legislation.⁵¹ What we need is instruction for what the representative as *democratic lawmaker* should do when voting on laws.⁵²

Putting aside, for the moment, the traditional categories of delegate and trustee, independent and mandate, what should any democratic lawmaker consider? Rather than take a stand on any substantive claims, I want to note that we can divide the substantive space into the three categories that we saw explicated in the traditional trustee and delegate views of representation: that of *aims*, *sources of judgment*, and *motivations*.⁵³ These distinctions usefully structure the substantive concerns that we have. And while these three categories are

covered in particular ways by the trustee/delegate distinction, I want to show how they are the three key categories that we should use when considering what any democratic lawmaker must do. Later, I return to consider how the trustee/delegate distinction then maps back onto these three categories.

First, as a conceptual matter we should be concerned that *any* lawmaker pass good or just laws and this requires an assessment of “good for whom” or “just for whom.” A specification of aims thus requires specifying a particular group for whom the law is good or just, be that the whole or a part thereof. Perhaps legislation should strengthen the nation’s defense, or provide jobs for a particular district. An ethic of lawmaking will have to specify the proper aim or ends of the legislation in terms of the whole or part thereof. This distinction is useful because it keeps our attention focused on whether the law is aimed at serving the good of all or a partial good within the whole, quite apart from what the substance of the law should or should not be.

Second, once we determine the ends towards which a law ought to aim the democratic lawmaker must make an epistemic determination about means and ends, judging whether a proposed bill is in fact likely to achieve its particular goals: will it in fact be good for the whole or the part? Substantively we would have to specify which set of methods are appropriate given the case. But conceptually there is a range of possibilities bounded by two extremes: she could either rely on her own judgment (to determine what the law ought to be) or rely on the judgment of someone else. This distinction is useful because it draws our attention to the ultimate source of judgment about the law, quite apart from the ends toward which the law should aim.

Finally, we might be concerned that the lawmaker be motivated by the right sorts of motivations, particularly if we don’t have the time to monitor her every vote. Again, as a substantive matter we would be want to specify what those motivations ought to be: maybe

she should be motivated by Christian ethics, virtue theory, or simply her own ambition to power. As a conceptual matter, though, we can follow Mansbridge here and distinguish between internal and external motivations.⁵⁴ In Mansbridge's terms, we might want a lawmaker to rely on her own convictions that provide an internal gyroscope to keep her on course ignoring for the most part the external consequences of her convictions. Alternatively we might want lawmakers to be induced by the external rewards or penalties of acting in a certain way, say, with an eye to reelection. In this case the distinction is useful because it captures the degree to which we can predict a lawmaker's future behavior: presumably a internally motivated lawmaker will be a more predictable actor than one who changes her views based on shifts in public opinion or other external factors.

Each of these distinctions denotes a range of options. Lawmakers are likely to care (and ought to care) about the justice of a law for both the whole and the parts thereof; in some cases more the one than the other. They are likely to rely (and ought to rely) sometimes on their own judgment as to whether the law achieves its stated goals and sometimes on the judgment of others. Finally, they are likely to be motivated (and ought to be motivated) sometimes by their own internal convictions and sometimes induced by external sanctions and rewards.

Once we specify the substance of these three categories—*aims*, *sources of judgment*, and *motivations*—we can see how they relate to some other familiar political distinctions. The pluralist/republican distinction for example, highlights the debate about *the proper aims of legislation*. Pluralists like Robert Dahl and David Truman took the view that representatives should promote the interests of their constituents directly.⁵⁵⁵⁶ Republicans, including Sunstein and Pettit, argue that representatives should aim more directly at the good of all.⁵⁷ The independence/mandate distinction highlights the conflict between the proper *sources of judgment* a representative ought to follow. As discussed above, independent

models of representation view representatives themselves as the proper source of judgment. By contrast the mandated models rely on constituents as the source of judgment for law. The Gyroscopic representative is motivated by her own internal compass, her own moral sensibilities. By contrast the “induced” representative acts by reference to the prospect of future rewards and benefits. (In each case we refer to these three as “distinctions” rather than dichotomies because seldom is a representative said to be a “pure” form of any one of these.⁵⁸)

Because each distinction denotes a range, we can give familiar names to the end points on this range, summarized in table one below. For the *aims of legislation*, we can call “Republicans” those who aim at the good of all and “Pluralists” those who aim at the particular good of some sub-group. For the *sources of judgment* we can call those who rely on their own judgment “independent”, and those who rely on some other person or group’s judgment “mandated”. And for *motivations* we can follow Mansbridge’s terminology and call “gyroscopic” those lawmakers who are internally motivated and call “induced” those lawmakers who are motivated by threat of external sanctions.

-- Table 1 Here SEE END OF THE PAPER FOR ALL TABLES--

We can now see why the traditional “Trustee/Delegate” distinction as well as other “gross concepts” are unhelpful. The representative as trustee is an amalgam of a representative who a) is a Republican (i.e., aims at the good of all) b) independent (i.e., follows her own *judgment* about whether a proposed law achieves this aim) and c) is gyroscopically motivated (i.e., is motivated internally and less prone to external sanctioning). By contrast the representative as delegate is an amalgam of a representative on the other side of each of these three distinctions: a representative who a) is a Pluralist (i.e., seeks to promote his own constituents’ interests); b) mandated (i.e., relies on his constituents’

judgment about whether a proposed law achieves this aim), and c) is induced to act (i.e., is motivated by external inducements, especially prospects of future electoral success).

What then does the three fold distinction buy us if the traditional “Trustee/Delegate” view is captured by it? Why *not* use the term “delegate” for the “induced, mandated, pluralist” in the terms above? Why not, that is, use “delegate” to refer to representatives who look out for their constituents’ interests, as their constituents see them, motivated by a desire for reelection? Similarly, why *not* use the term “trustee” for the “gyroscopic, independent, republican” in the terms above? Why not, that is, use “trustee” to refer to representatives who look out for the common good, as they see it, motivated by internal sensibilities?

The more significant problem with relying on the traditional language is that it masks these underlying distinctions. Each of these three categories (aims; judgment and motivations) is independent of the other, but the language of trustee/delegate collapses them. As historically defined the trustee/delegate distinction identifies only two out of 8 possible permutations of the answers to the three questions posed. In doing so, it reduces our ability to analyze and assess more complex combinations of what representatives might do. It is an example of using concepts to muddy our understanding of the social world rather than clarifying it.

To demonstrate this we can simply articulate how different combinations of each of the dichotomies might manifest themselves. (Table 2 presents a summary of these eight possible positions.)

-- *Table 2 Here SEE END OF PAPER FOR THE CHART--*

Reading across table two, the top row includes all representatives who seek to pursue the public good, instead of acting to pursue their constituents’ particular welfare. In the first cell A we find the typical “trustee” representative. In B we have a representative who, like the traditional trustee, is motivated internally to seek the good of all, but now uses his

constituents' view of the public good to decide what that good actually is. In C we again have a representative pursuing the general welfare, and who uses his judgment to decide what that good is, but motivated by his desire to get reelected rather than republican virtue. (I have labeled this "Madisonian" since I believe this is precisely the kind of representation that Madison was defending when writing *The Federalist*.) But in D we are now very far from the traditional trustee: here is a representative who aims at the public good, but looks to his constituents to define what the good is, and does so only because he wants to get reelected.

Moving to the second row, towards the traditional "delegate" model, we can see the four kinds of pluralist representatives. In cell E we have the pluralist who aims at the good of her particular constituency, but uses her own judgment to determine what that good is, and is motivated to do this only internally. In cell F we move closer to the traditional "delegate" combination with a representative aiming at the good of her constituents, following her constituents' judgment about what that good consists of, but still internally motivated (rather than externally induced). In cell G we now have the induced pluralist seeking the good of her constituents for the sake of reelection, but still relying on her own judgment as to what the good of her constituents actually is. Finally in cell H we have the traditional delegate model: the representative pursuing the good of her constituents as her constituents see it, motivated simply by the desire for reelection.

Now in any of the 8 cells of the table we have a complex character that specifies how representatives in fact behave, or ought to behave. And this may explain why in analyses of the political world we tend towards complex characterizations—political behavior is usually complex. Indeed, once framed this way we can see other subsidiary and familiar distinctions that we also should think hard about. First among these other issues is the temporal reference point for the *aims* of law, and the *sources of judgment*. Should we care about the constituents' good *today*, at *election time*, or in the *longer term*? Should we use their

judgment today about the aims of law, or reference what we believe their judgment will be in the future? (These were collapsed in some of Mansbridges' reconceptualizations.) We can ask similar questions about constituent conditions: should we rely on constituent judgment as it is, or as it would be from an ideal, educated and deliberative position. The point here is not to work through all these distinctions in a hundred- or thousand-celled table. Three is enough to provide a useful conceptual space upon which these other distinctions can unfold. More generally, focusing on the more fundamental categories of *aims*, *sources of judgment*, and *motivations*, provides a rubric by which to assess the rest.

4. Democracy and Justice

So far I have asserted that the question, "what should a representative do" requires a three part answer specifying i) the proper aims or ends of legislation; ii) the source of judgment upon which a representative should rely; and iii) a determination of the proper sort of motivation when acting. Further, I have argued that many past treatments and recent reformulations have not attended to the distinct set of issues that each of these three parts entails, treating complex collections of these three (as other features of political representation) as an answer to the question above.

As I just said, I have merely asserted the tripartite division of *aims*, *sources of judgment*, and *motivations*; I have not yet defended why these three questions are or ought to be the central ones with which we should be concerned. Nor have I justified my initial claim that the three distinctions of "aims," "source of judgment," and "motivations" attend to "democratic lawmaking" rather than "political representation." In this section I will offer a sketch of the normative derivation of these categories, and in doing so demonstrate that they emerge from the activity of democratic lawmaking rather than from anything having to do with political representation *per se*.

Here, we begin by noticing that democratic lawmaking⁵⁹ entails two different sorts of obligations, one attending to obligations in the making of law generally, and the other obligations related to democracy. This applies to *anyone* who seeks to make “democratic law” defined here as law that aims both to be democratic (i.e., to satisfy the preferences of those it governs) and just (i.e., adhering to substantive principles of justice). As I said earlier, “democratic lawmaking” is a necessary but insufficient condition of a democratic regime. Thus a Monarch, an aristocracy or a fully participatory body may all engage in “democratic lawmaking” as an activity without necessarily being a democracy. While these claims require far more explanation and defense than what I will propose here, we can still proceed contingently on the bases of some general presumptions.⁶⁰

4.1 Proper *aims* of lawmaking

It is perhaps a commonplace to say that lawmakers should pass just laws. Much harder is to say what just laws are.⁶¹ But even the notion that lawmakers should pursue justice is itself a contestable claim. More generally we can simply say that lawmakers ought to have some view about what the law ought to be, whether that is a view as to what justice, goodness or stability require. The point is only conceptual—the lawmaker ought to have some view of what law should be when making it; and the law ought to correspond to these ends—be they stability, goodness, justice, or some other approvable aim.

As a conceptual matter, any ends towards which law should aim will presume a scope limited to the people who are citizens of the nation for whom the laws are made. Consider Rawls’ own *Theory of Justice* as a theory binding on a territorially restricted community—they are to conform to a view of justice as fairness *towards themselves* rather than passing laws that help promote fairness elsewhere, no matter how laudatory such actions might be.⁶² Indeed, it explains Rawls’ own motivations in writing *The Law of Peoples*, to explain the

relationship of the pursuit of justice for a particular community with the conflicts with and responsibilities to others.⁶³ But even there, Rawls does not back away from the view of what should bind legislators. Although it may not be right to knowingly kill civilians, many Just War theories similarly allow such behavior in the name of national security, particularly when one's existence as a nation is on the line.⁶⁴ I am merely describing a position here, and I am certainly not defending it given the problems they pose for normative theory more generally. We will leave it as a matter of debate whether justice ultimately requires lawmakers to favor the general good of *all* (i.e., all of humanity) in acting, or merely the general good of all citizens within their nation. The less controversial position is that lawmakers ought to give special concern to the effects of the law on members of the community whom it governs.

While the maximal scope of justice in law is usually presumed to be limited to the nation's borders, its minimal scope is less controversially contained within the whole. Put simply, when lawmakers pursue justice, the common good, or even mere stability, it is the justice (goodness or stability) *of the whole* that they must pursue and not any one of its parts in preference to another. Again, this is merely a conceptual point and does not commit us to any institutional view of how individual lawmakers should act. For it may be that the best way to secure justice for all in lawmaking is to maintain representatives who advocate for their particular constituents, and a corresponding system of interest groups that promote the narrow interests of their members. By this view the collective good is most apt to emerge from tradeoffs between advocates for the parts. For now, all we need see is that lawmakers have an obligation to pursue proper ends, whatever they may be, for all in the nation they govern, leaving for others to specify what this means in both substance and practice.

Now we can see why aiming at a sub-group interest or that of the whole attends to *lawmaking* and not to political representation per se. Anyone who makes law will have to

take up the problem of proper aims. If I am a citizen of a direct democratic assembly I must ask myself whether to pursue the interests of some subgroups to the exclusion of others, or whether a proposal should aim directly at the general welfare of all. That is precisely the judgment I must make. Indeed, my interests are the most salient subgroup interests that I as a member of a directly democratic body will consider. In that context the question is, do I support legislation that advances my own interests or the interests of the whole? And here the very same questions concerning the *aims* of legislation emerge. As a democratic lawmaker I should sometimes vote based on what will benefit me; and sometimes I should vote based on what will benefit the whole. Being a political representative adds nothing to this particular problem.

Now we might think that as a political representative I have a special obligation to my constituents. There is admittedly a special relationship that accrues to representatives vis-à-vis their constituents that is not apparent in the case of direct or monarchical forms. The representative presumably has some obligation to those who voted for him to pursue what he said he was going to do. Fair enough, but *this obligation* is a separate question that is but a shell of the debate we have been discussing. Put differently, we have been asking what the proper terms of this agreement should be. Should a representative promise to be independent or mandated, a pluralist or republican, and should she promise to be motivated by internal or external motivations? Representatives may take on special obligations based on what they promise, but that fact is almost trivial and uninteresting compared to the more robust and typical claim that representation somehow entails normative obligations on account of being representation.

4.2 Democracy and Sources of Judgment

In addition to an obligation to pursue the proper ends, we said that *democratic* lawmakers must make proper law in a manner that is *democratic*. By this I mean that the law as passed must, *in some way*, conform to the collective will of the people it binds. This is not meant to be a description of what “democracy” is as a system of government or regime. Rather, it is a far more modest view, a seemingly trivial one that for laws to be democratic they must at least conform to widely held consensus positions within the nation. Those laws that regularly conflict with such positions are anti-democratic, whatever else they may be.⁶⁵

In practice this means that in addition to seeking justice, *democratic lawmakers* take on a second obligation to pass laws in a manner that does not violate the will of the people, and this means doing what at least a majority of the people want done most of the time. What this precisely entails is of course open to enormous debate and will give rise to paradoxes and perplexing cases, only some of which, have been treated.⁶⁶ But we should emphasize the point that *democratic lawmaking* is not the same as other forms of democratic activity. In particular, *democratic control of lawmakers* may be a reasonable proxy for *democratic lawmaking* but it is not the same. Indeed, one can have a legislature whose membership is completely controlled by regular and robust elections and yet the law not be reasonably democratic law.⁶⁷

The reason that such robust institutions of election are not equivalent to democratic law making can be illustrated by example. Imagine a situation in which democratic control of the lawmakers is robust and fully realized, and yet the law is not democratic law. Imagine a series of candidates is elected and, failing to be motivated by reelection, systematically fails to enact legislation unanimously supported by voters, say, a very high income tax. We all elect representatives, whether using single member districts or parties, who vow to pass the high income tax but when they arrive in the legislature something happens and their views about the substance of the law changes—they no longer think a high tax is a good thing for

the nation—and they fail to pass it. At the next election they are all promptly turned out of office.

So far so good: democratic control of lawmakers has kept representatives out of office when they veer too far from the will of all. But now, after the second election, we observe that the same thing happens to the new crop of representatives: having pledged to pass the very high tax they all vote against it. This second cohort is subsequently turned out again as are a third and fourth crop of representatives. After 30 years, the entire nation (minus a few thousand current and former representatives) still wants a high tax, yet their will is still not translated into law. The extreme split between the virtual unanimity of the people's opinion about the law and the legislation passed means that these other democratic institutions have failed to secure democratic law. What fails in this case is democratic lawmaking, not other features of democratic regimes like “democratic control of lawmakers.” This is why we stipulate that democratically making law must entail some correspondence between the law that is actually made and the will of the people when there is a clear and unanimous will, quite apart from any other institutions of democracy.

A claim that law must conform to the will of the people is incomplete in a number of ways, most obviously and frequently observed that in most cases the “will of the people” is incoherent or underspecified. But this thought experiment is meant to demonstrate the conceptual point that democratic law making happens to the extent the substance of a *law* corresponds to the will of the people. Democratic institutions are designed to transmit the will of the people in some, often mediated, way to the substance of law.⁶⁸ When they consistently fail to do that in cases where there is a coherent and well formed will, the law should not be considered “democratic” no matter how democratic the institutions that created the law are themselves.

There is, however, one way we can further specify what we mean by “the will of the people.” Consider that when we say “the will of the people” we mean something more specific, namely “the will of the people *regarding what the law ought to be.*” This is perhaps obvious if implied: to be “democratic” a proposed law on some topic X (say property taxes) need not conform to the will of the people regarding their view of Y (e.g. what to eat for dinner). But if lawmaking ought to be concerned with proper ends (as we said above) and democratic law is law that refers to what the people think the law should be, then in this case democratic law must be law that conforms to *what the people think the proper law ought to be.* In other words, a commitment to democratic lawmaking is a commitment to relying on the people as the *source of judgment concerning the substance or ends of law.*⁶⁹ (These are all broad conceptual points, and so much work is still left to be done. For example I have said nothing about what will count as “relying on the will of the people” nor even how to deal with divided peoples who disagree about the justice of a case. But we can note that this formulation does not foreclose the most important substantive debates on these issues.)

Again we ask, “what does the concept of representation add to this framing?” And we should see that again, representation does not add much. Taking the view of a citizen in a direct democratic assembly we can see that she must ask herself the exact same questions that were supposed to be the central problematic of political representation: should *she* be the source of judgment about the law, or should she rely on the judgment of others to decide the question? She might want to refer to a poll about the substance of a position to see if there is a coherent will of all and then base her decision upon that. (In English Parliament prior to the mid 18th century, such a practice was employed. First, a secret vote was held to see what substantive views representatives had on proposed legislation. A second, public vote, was then held in which unanimous support was given to whatever side had won the first private vote.⁷⁰) Similarly a monarch must grapple with the same set of questions. Should he be the

source of judgment about the laws, or poll the people and follow their view? In either case, a political representative asks the same set of questions. Representation as such adds little of interest to the nature of the core problem.

4.3 Motivations.

What should we say about the proper motivations for democratic lawmakers? As I said at the start of this paper⁷¹, I think motivations are entirely irrelevant to an ethic of lawmaking (let alone political representation). Instead we should only care about the outcomes of politics and design institutions that provide incentives to people to pursue these outcomes. We should not foreclose people from acting virtuously (and now I mean it in the 18th century sense of being properly motivated *and* pursuing the right sorts of ends). But we should also create incentives for them to act as if they were even if they are not. In other words, institutions should be designed only by reference to the consequences they promote, not based on the hoped for motivations of actors ruled by them.⁷²

Modeling motivations along the lines of “gyroscopic” and “induced” may be useful, however, in predicting future behavior. One thing we can be sure of is that pure gyroscopic actors will be unmotivated by any institutional incentives. As a democratic, this makes me wary of *any* gyroscopic political actor. Gyroscopic actors know no bounds in office, and are present everywhere on the ideological divide: for every Bush there is a Roosevelt, for every Mezvinsky there is a Lieberman. Relying only on the ability to change course at the next election, leaves too many degrees of freedom to be endorsable to democrats.

Mansbridge understands the predictive capacity of gyroscopic representatives, but seems not to see the problems involved: a gyroscopic representative can be *counted on* to go in a specific direction without oversight; to move *without fail* in a certain direction. That is fine so long as they are moving in a direction generally approvable by all, and (hopefully) in

the pursuit of the proper sorts of aims. But we can also find them apt to do profoundly destructive things when issues unknown to us arise, issues which we had no idea how their gyroscope would direct them, after they have been voted into office. The aftermath of September 11th is the prime example. Few could have predicted that George W. Bush who eschewed nation building and did not know the names of some prominent world leaders during the 2000 Presidential election would lead the United States where he has lead it. We should be very wary of gyroscopic representatives (or political actors more generally). With only their own gyroscopes to guide them, democracy stands in the balance.

In the end, though, the motivational questions are again hardly unique to political representation. They arise for all lawmakers and political actors more generally. Citizens in direct democracies might be motivated by their own internal commitments to principles of justice, or they might be motivated to act based on side payments or social benefits they might receive. Similarly, Monarchs may be gyroscopically motivated by their own sense of justice no matter if it causes them personal harm. Or they may be “induced” to pass law that bolsters their own reputations or hold on power. The only difference in these three cases is the kinds of things that will provide the inducements: democratic citizens may be induced by very personal benefits of a law; representatives may be induced by the prospects of reelection; and monarchs may be induced by reputational or power holding considerations. Those particulars, while important, do not change the underlying conceptual point that the gyroscopic and induced motivational concepts apply no more or less to any kind of democratic lawmaking.⁷³ Political representation changes the contours of the problem but adds nothing of interest to the problem itself.

Conclusion

Democratic lawmakers have two obligations by virtue of their role as democratic lawmakers. First, as democratic *lawmakers* they are obligated to pursue *proper substantive ends of legislation*, whatever they turn out to be. Second, as *democratic* lawmakers they are obligated to follow the will of the people *as their source of judgment* for determining what the proper ends of a law should be. Where these two obligations overlap, where the entire population makes judgments that correspond to what is in fact just then the obligation to enact the proper ends of law will be extensionally equivalent to an obligation to democratic lawmaking. Indeed, this is what I take Rousseau's view of the General Will to be: a situation in which the people overwhelmingly support legislation that in fact conforms to substantive principles of justice.⁷⁴ But in practice, we note the very familiar fact that these two obligations can and often do conflict whenever our view of what the law should be is at odds with other people's judgment.

Put differently there are two central pulls for democratic lawmakers whether they happen to represent others, are individual members of a participatory democracy, or monarchs wishing to make democratic law. First, they must decide on what the content of the law should be along with the choice of what the proper referent group is (the nation as a whole or some subset of the whole). Second, they either rely on themselves or others to be the source of judgment about what the substance of law. Notice again that these are two very different issues, one concerning a substantive view about the content of law, the other concerning a question of whose judgment one must follow. Political representatives may have a special relationship to those they have contracted with during an election owing to a contract they negotiate. But representation conceptually adds little of normative interest to the central normative problem of democracy that arises anytime democratic lawmaking is attempted.

* * * * *

In this paper I have thus advanced two central claims. First, I have argued that the traditional distinction between “trustees” and “delegates” obscures a more complex conceptual landscape that includes i) the aims of legislation; ii) the proper source of judgment lawmakers should rely on when voting on law, and iii) the motivations they use to act. Second, I argued that once we unpack the traditional dichotomy between trustees and delegates into its tripartite foundation we can see that the tensions involved in them are not particular to political representation at all. Rather they emerge from obligations that accrue to democratic lawmakers more generally.

Table 1: Categories, names and descriptions of three distinctions.

CATEGORY	NAME	DESCRIPTION
AIM OF LEGISLATION	Republican	Representatives aim at law that promotes the national good.
	Pluralist	Representatives aim at law that promotes the good of their electoral constituents
SOURCE OF JUDGMENT	Independent	Representatives rely on their own judgment to determine law.
	Mandated	Representatives rely on their constituents' judgment to determine law.
MOTIVATIONS	Gyroscopic	Representatives who are guided by their own internal motivations
	Induced	Representatives who are induced by external sanctions.

Table 2: Schematic conceptual space of 3 distinctions

	<u>MOTIVATIONS</u> GYROSCOPIC REPRESENTATIVES		<u>MOTIVATIONS</u> INDUCED REPRESENTATIVES	
	<u>SOURCE OF JUDGMENT</u> INDEPENDENT	<u>SOURCE OF JUDGMENT</u> MANDATED	<u>SOURCE OF JUDGMENT</u> INDEPENDENT	<u>SOURCE OF JUDGMENT</u> MANDATED
<u>AIMS</u> REPUBLICAN REPRESENTATIVES	A. (Trusteeship) Representatives who seek the national good by relying on their own judgment because they believe that is the right thing to do.	B. Representatives who seek the national good by relying on their constituents' judgment because they believe that is the right thing to do.	C. (Madisonian) Representatives who seek the national good by relying on their own judgment because they believe that is the best way to win reelection.	D. Representatives who seek the national good by relying on their constituents' judgment because they believe that is the best way to win reelection.
<u>AIMS</u> PLURALIST REPRESENTATIVES	E. Representatives who seek their constituents' good by relying on their own judgment because they believe that is the right thing to do.	F. Representatives who seek their constituents' good by relying on their constituents' judgment because they believe that is the right thing to do.	G. Representatives who seek their constituents' good by relying on their own judgment, because they believe that is the best way to win reelection.	H. (Delegate) Representatives who seek their constituents' good by relying on their constituents' judgment because they believe that is the best way to win reelection.

¹ Earlier versions of this paper were presented at the 2006 Annual meeting of the American Political Science Association in Philadelphia, PA, and the Political Theory Workshop at Washington University in St. Louis. I thank Jane Mansbridge and Kit Wellman for their responses, and to Randy Calvert, Lisa Disch, Clarissa Hayward, Zach Hoskins, Frank Lovett, Ian MacMullen, and Mark Piper for their comments.

² Greenawalt, Kent. 1987. "The Rule of Recognition and the Constitution." *Michigan Law Review*, 85 (February): 621-71.

³ In the following, by "laws" I mean as ordinary legislation. In the US, for example, I mean the output of the two houses of Congress plus the president's signature if necessary. A comprehensive account of democracy would also have to take up the relationship between the preferences of current citizens to the Constitutional provisions and non-legislative regulations and policies that have the force of law within their society. I acknowledge that these other legal provisions add more complexity to the account, but the complexity is unnecessary to engage given our present concerns on what representatives in a legislature should do when voting on a proposed law.

⁴ Minority rights, freedoms of speech, etc, are all examples of limits on democratic will often justified as enhancements to democracy.

⁵ There are of course other normative problems surrounding representative government, not the least of which has to do with institutional questions of which groups should be represented, how different electoral systems translate preferences into outcomes, and how to provide incentives to representatives to get them to do whatever it is they are supposed to do. As important as each of these topics is, they all depend on a prior specification of what the relationship ought to be in terms of this central normative problem. For example, if we think that representatives ought always and only to pursue substantive issues of justice no matter what the

preferences of their constituents are we will presumably care much less whether minority or other specific groups receive their own representation. (For one example of this see Rehfeld, Andrew. 2005. *The Concept of Constituency: Political Representation, Democratic Legitimacy and Institutional Design*. New York: Cambridge University Press.) Arguments for African American constituencies and those supporting proportional representation presume that representatives should not deviate so much from their constituents' preferences in favor of measures their constituents do not support. See Guinier, Lani. 1994. *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*. New York: Free Press. and Amy, Douglass. 1993. *Real Voices New Choices*. New York: Columbia University Press. for examples of this position.

⁶ Pitkin, Hanna Fenichel. 1967. *The Concept of Representation*. Berkeley: University of California Press.

⁷ In this way the problems of this paper contribute to a broader argument that the concept of political representation has no normative content, but derives normative substance only by the function to which it is put. For a defense of *that* broader position, see Rehfeld, Andrew. Forthcoming. *A General Theory of Political Representation*. Cambridge University Press. .

⁸ I think questions of "proper" motivation are wholly irrelevant to the normative political ethics for reasons similar to those articulated by Bob Goodin. Goodin, Robert. 1995. "Utilitarianism as a Public Philosophy." In *Utilitarianism as a Public Philosophy*, 3-27. New York, NY: Cambridge University Press. But motivations are important to know for reasons of prediction and thus critical to institutional design a point well treated in the history of political through whether in Machiavelli in more matured form in Rousseau and Madison. Mansbridge's own interest in motivations is similarly for predictive purposes, namely so that voters will be able to predict how likely their representatives are to act towards a certain goal. Mansbridge, Jane. 2003. "Rethinking Representation." *American Political Science Review*, 97, no. 4: 515-28.

⁹ These terms are from Mansbridge, Jane. 2003. "Rethinking Representation." *American Political Science Review*, 97, no. 4: 515-28. I take up her argument at length later in this article.

¹⁰ This thus illustrates Ian Shapiro's point about the problems of using Gross Concepts in political theory. Shapiro, Ian. 2005. "Gross Concepts in Political Argument." In *The Flight from Reality in the Human Sciences*, 152-77. Princeton: Princeton University Press.

¹¹ I think any legitimate law will, as a condition of its legitimacy, need to reflect both a minimum of justice *and* correspond to the wills of those it governs and in section 4 I will refer to this as "democratic lawmaking". But this view takes us into longstanding controversies of the relationship between law and norms (see Locke, Kelsen, Hart, Dworken and Waldron) and more generally between justice and democracy, (see Rawls and J. Cohen in particular). Here, we can get at the central problems by framing them in terms of conditional intention: whether or not justice requires that law be substantively just or reflecting the will of those governed, and whether law, to be law, must encompass justice, anyone who wishes to make reasonably decent law that is approved by the people it is governed will face the tradeoffs that I am describing.

¹² Indeed, Rousseau's General Will is, as I understand it, simply a combination of laws that are normatively good, right or just, *and* conforming to the wills of those governed by them. For a particularly good discussion of this see Lovett, Francis. 2004. "Can Justice Be Based on Consent." *Journal of Political Philosophy*, 12, no. 1, March: 79-101.

¹³ For recent discussion of the ethics of representation see Thompson, Dennis. 2005. *Restoring Responsibility: Ethics in Government, Business, and Health Care*. New York: Cambridge University Press. Dovi, Suzanne. 2006. *The Good Representative*. New York: Blackwell. and Applbaum, Arthur Isak. 1999. *Ethics for Adversaries: The Morality of Roles in Public and Professional Life*. Princeton: Princeton University Press.

¹⁴ Pitkin, Hanna Fenichel. 1967. *The Concept of Representation*. Berkeley: University of California Press.

¹⁵ For a similar point see Shapiro, Ian. 2005. "Gross Concepts in Political Argument." In *The Flight from Reality in the Human Sciences*, 152-77. Princeton: Princeton University Press.

¹⁶ The motivations thus instantiate Goertz, Gary. 2006. *Social Science Concepts: A User's Guide*. Princeton: Princeton University Press.

¹⁷ Mansbridge, Jane. 2003. "Rethinking Representation." *American Political Science Review*, 97, no. 4: 515-28.

¹⁸ I do not mean to assert that following the will of the people is not somehow subsumed in a complete principle of justice (though it need not be). Instead, I am artificially separating one principle "do what the people want" from other "principles of substantive justice" in order to draw the distinction. More formally, then, the conflict emerges when one particular plausible principle of justice ("respect the people's views") conflicts with other principles of justice that might counter what the view's of the people are.

¹⁹ See Burke, Edmund. 1774. "Speech to the Electors of Bristol." In *Works*, 446-48. New York: Harpers. and Parsons, Theophilus. 1983 [1778]. "The Essex Result." In *American Political Writing During the Founding Era*, edited by Charles S. Hyneman and Donald S. Lutz, 481-522. Indianapolis, IN: Liberty Press. for historical examples of each position. For a general overview of the history, see Pitkin, Hanna Fenichel. 1967. *The Concept of Representation*. Berkeley: University of California Press.

²⁰ Burke, Edmund. 1774. "Speech to the Electors of Bristol." In *Works*, 446-48. New York: Harpers.

²¹ This is a distillation of Burke that is widely attributed to him. These two positions represent ultimate judgments for him. In the same speech to his electors, Burke clearly indicates that the representative has a particular obligation to the interests of his constituents, and to receive their view. Burke was not thus in favor of disembodied representation, even if ultimately he

thought the representative need to rely on his own judgment about what was in the ultimate good of all.

²² Burke's speech was made to counter a proposal that representatives be legally bound to the wishes of their constituents as expressed through legally binding instructions.

²³ *The Anti-Federalists*. 1966. Edited by Cecilia Kenyon. New York, NY: Bobbs-Merrill
Rakove, Jack. 1996. *Original Meanings: Politics and Ideas in the Making of the Constitution*.
New York: Alfred A. Knopf. Pitkin, Hanna Fenichel. 1967. *The Concept of Representation*.
Berkeley: University of California Press. Rehfeld, Andrew. 2005. *The Concept of Constituency: Political Representation, Democratic Legitimacy and Institutional Design*. New York: Cambridge University Press.

²⁴ This is closely related to the emphasis on "electoral responsiveness," the degree to which votes about parties or candidates translate into the composition of legislatures. See, for one example, Gelman, Andrew, and Gary King. 1994. "Enhancing Democracy Through Legislative Redistricting." *American Political Science Review*, 88, no. 3, September: 541-59. Michael Minta has suggested to me that the reason scholars of electoral politics value the correspondence between constituent desires and representatives voting record is that each is readily quantifiable. I have no reason to doubt that assessment.

²⁵ Brunell, Thomas L. 2006. "Rethinking Redistricting: How Drawing Uncompetitive Districts Eliminates Gerrymanders, Enhances Representation, and Improves Attitudes Toward Congress." *PS: Political Science & Politics*, 39, no. 01, January: 77-85.

²⁶ Why making voters happy is the correct aim of representative institutional design is left undeveloped in Brunell's treatment. Were we to take seriously the goal of making voters happy as described by Brunell we would surely do better by putting Prozac into the water supply than meddling with electoral reform.

²⁷ An important exception to this would be the kind of proportional system endorsed by Thomas Christiano where parties articulate general principles of justice, and then are afforded a great deal of independence once in office to deliberate and figure out which sorts of policies conform to them. Christiano, Thomas. 1996. *Rule of the Many*. Westview Press. Unfortunately, the incentives of winning office make it more likely that parties will take ever more specific positions on issues of the day prior to their arrival and deliberation in the legislature. Indeed, in practice and unless one restricts freedoms of speech, parties are more easily and readily described by their positions on issues rather than the normative underpinnings of their views.

²⁸ Lublin, David. 1997. *The Paradox of Representation*. Princeton, NJ: Princeton University Press.

²⁹ I speak at greater length about this problem in Rehfeld, Andrew. 2005. *The Concept of Constituency: Political Representation, Democratic Legitimacy and Institutional Design*. New York: Cambridge University Press. The best option may be to have very diverse constituencies but secure the voice of different groups through the use of legislative quotas and qualifications for office. For an extended treatment of the normative implications of quotas for political equality and democracy, see Rehfeld, Andrew. 2006. "Quotas and Qualifications: On Political Equality and the Democratic Costs of Reserved Seats," *Political Science*, Washington University in St. Louis.

³⁰ Pitkin, Hanna Fenichel. 1967. *The Concept of Representation*, Pp. 163-64. Berkeley: University of California Press.

³¹ There are critical differences between the two cases that are certainly relevant to our final evaluation of each case. Mezvinsky for example, appears to have struggled with the conflict between democratic obligations and doing what she thought was right; Bush exhibited none of that struggle whether or not he thought about it internally. But despite his dismissal of protests, Bush was on stronger *democratic* grounds in that far more Americans supported his War in Iraq

than did Mezvinsky's constituents support her vote to raise taxes. I leave aside the critically important question of manipulations of opinion that lead to this support, considerations that would have to be taken into account in any judgment of the matter.

³² Gutmann, Amy, and Dennis Thompson. 1996. *Democracy and Disagreement*. Cambridge, MA: Belknap Press. Sunstein, Cass. 1993. *The Partial Constitution*. Cambridge: Harvard University Press. Pettit, Philip. 1997. *Republicanism: A Theory of Freedom and Government*. Oxford: Clarendon Press. Elkin, Stephen. 2006. *Reconstructing the Commercial Republic*. Chicago: University of Chicago Press. to name but a few.

³³ Gutmann and Thompson have the most developed account, but the role of accountability, publicity and transparency are critical components of all prominent accounts of deliberative democracy.

³⁴ Mansbridge, Jane. 2003. "Rethinking Representation." *American Political Science Review*, 97, no. 4: 515-28.

³⁵ Mansbridge, Jane. 2003. "Rethinking Representation." *American Political Science Review*, 97, no. 4: 515-28.

³⁶ See Beerbohm, Eric. 2006. "The Ethics of Democratic Lawmaking." Paper presented at the Representation Reconsidered, University of British Columbia. for a framing of this in terms of expertise.

³⁷ The strongest version of Mansbridge's argument sticks to the position quoted here at the outset of her argument, that uses separate normative criteria to evaluate any case of these forms, rather than treating these forms as normative standards themselves. So, for example, a representative is an anticipatory representation just so long as he acts in a way designed to anticipate retrospective judgment of his actions today by voters in a future election. Whether that's a good thing, a legitimate action, or whether he acts correctly will be part of our normative judgments about the case, but does not affect the fact that so acting he is an anticipatory

representative. Mansbridge is not always consistent on this point, but I believe her analysis can be charitably read this way. For more on this see Rehfeld, Andrew. Forthcoming. *A General Theory of Political Representation*. Cambridge University Press.

³⁸ Mansbridge, Jane. 2003. "Rethinking Representation." *American Political Science Review*, 97, no. 4: 515, 515-28.

³⁹ Mansbridge, Jane. 2003. "Rethinking Representation." *American Political Science Review*, 97, no. 4: p. 516, 515-28.

⁴⁰ Mansbridge, Jane. 2003. "Rethinking Representation." *American Political Science Review*, 97, no. 4: 515, 515-28.

⁴¹ Mansbridge, Jane. 2003. "Rethinking Representation." *American Political Science Review*, 97, no. 4: 515, 515-28.

⁴² Burke's argument is a perfect example of why institutions need both normative and empirical justification. In this case, Burke was endorsing the normative value of virtual representation but denying the empirical efficacy of virtual representation in the case of the Americans.

⁴³ Mansbridge, Jane. 2003. "Rethinking Representation." *American Political Science Review*, 97, no. 4: 522, 515-28.

⁴⁴ Mansbridge, Jane. 2003. "Rethinking Representation." *American Political Science Review*, 97, no. 4: 522, 515-28.

⁴⁵ Mansbridge, Jane. 2003. "Rethinking Representation." *American Political Science Review*, 97, no. 4: 523, 515-28.

⁴⁶ Mansbridge, Jane. 2003. "Rethinking Representation." *American Political Science Review*, 97, no. 4: 515, 515-28.

⁴⁷ This sections expands considerably on a brief formulation in Rehfeld, Andrew. 2005. *The Concept of Constituency: Political Representation, Democratic Legitimacy and Institutional Design*, 201-04. New York: Cambridge University Press.

⁴⁸ This disjunction is meant to cover consequential and non-consequential arguments. Even if a rule is a means to a normatively endorsable end, it may not be justifiable if it is itself normatively prohibited. Thus for Kant the rule “Lie” should not be followed even if it would save a life (a normatively endorsable end). For more on the relationship between norms and institutional design, see Rehfeld, Andrew. 2005. *The Concept of Constituency: Political Representation, Democratic Legitimacy and Institutional Design*. New York: Cambridge University Press..

⁴⁹ For role morality approaches see, Applbaum, Arthur Isak. 1999. *Ethics for Adversaries: The Morality of Roles in Public and Professional Life*. Princeton: Princeton University Press. Beerbohm, Eric. 2006. "The Ethics of Democratic Lawmaking." Paper presented at the Representation Reconsidered, University of British Columbia. Sabl, Andrew. 2002. *Ruling Passions: Political Offices and Democratic Ethics*. Princeton, NJ: Princeton University Press. For an alternative view, reliant on virtue ethics, see Dovi, Suzanne. 2006. *The Good Representative*. New York: Blackwell.

⁵⁰ For a similar list of activities see Eulau, Heinz, and Paul D. Karps. 1977. "The Puzzle of Representation: Specifying Components of Responsiveness." *Legislative Studies Quarterly*, 2, no. 3, August: 233-54.

⁵¹ It may also offer some guidance on how to deliberate. But it is primarily an answer to the question of how representatives should vote on legislation. For two recent comprehensive treatments see Beerbohm, Eric. 2006. "The Ethics of Democratic Lawmaking." Paper presented at the Representation Reconsidered, University of British Columbia. and Dovi, Suzanne. 2006. *The Good Representative*. New York: Blackwell.

⁵² The formulation of this in terms of the role of “democratic lawmaker” is adapted from Beerbohm, Eric. 2006. "The Ethics of Democratic Lawmaking." Paper presented at the Representation Reconsidered, University of British Columbia.

⁵³ All three of the considerations in this paragraph are drawn from sources in the history of political thought. The first two come more proximately from a simplified account of Beerbohm, Eric. 2006. "The Ethics of Democratic Lawmaking." Paper presented at the Representation Reconsidered, University of British Columbia. See that work for a far more nuanced and complete version of political representatives as democratic lawmakers. The third question maps closely onto questions of virtue from the 18th century that I will mention below. See Mansbridge, Jane. 2003. "Rethinking Representation." *American Political Science Review*, 97, no. 4: 515-28. for a more contemporary version of these arguments.

⁵⁴ Mansbridge, Jane. 2003. "Rethinking Representation." *American Political Science Review*, 97, no. 4: 515-28.

⁵⁵ Dahl, Robert A. 1956. *A Preface to Democratic Theory*. Chicago: The University of Chicago Press.

⁵⁶ Truman, David. 1953. *The Governmental Process: Political Interests and Public Opinion*. New York: Alfred A. Knopf.

⁵⁷This is a proximate judgment, as a justification for the system as a whole, pluralism and republicanism are both justified only by reference to the greater good. The partial advocacy that is the hallmark of Pluralism is justifiable only by the argument familiar from defenses of capitalist enterprise that we all do better when each pursues his own partial good. The dichotomy thus focuses not on a comprehensive justification for either position, but rather from the substantive view of which one is more likely to succeed in attaining it. Rehfeld, Andrew. 2005. *The Concept of Constituency: Political Representation, Democratic Legitimacy and Institutional Design*, Chapter 8. New York: Cambridge University Press.

⁵⁸ This is a familiar point. See, for example, Pitkin, Hanna Fenichel. 1967. *The Concept of Representation*. Berkeley: University of California Press. and Mansbridge, Jane. 2003.

"Rethinking Representation." *American Political Science Review*, 97, no. 4: 515-28. On the usefulness of treating this as a "distinction" versus "dichotomy" see Putnam, Hillary. 2002. *The Collapse of the Fact/Value Dichotomy*. USA: Harvard University Press.

⁵⁹ I have taken this term from Eric Beerbohm's extremely useful discussion of these matters., although I use it in a slightly broader way. Beerbohm, Eric. 2006. "The Ethics of Democratic Lawmaking." Paper presented at the Representation Reconsidered, University of British Columbia.

⁶⁰ For helpful recent treatments of these topics see Dovi, Suzanne. 2006. *The Good Representative*. New York: Blackwell. Beerbohm, Eric. 2006. "The Ethics of Democratic Lawmaking." Paper presented at the Representation Reconsidered, University of British Columbia. Sabl, Andrew. 2002. *Ruling Passions: Political Offices and Democratic Ethics*. Princeton, NJ: Princeton University Press. Thompson, Dennis. 2005. *Restoring Responsibility: Ethics in Government, Business, and Health Care*. New York: Cambridge University Press. Applbaum, Arthur Isak. 1999. *Ethics for Adversaries: The Morality of Roles in Public and Professional Life*. Princeton: Princeton University Press. For classic statements about law and justice see Raz, Joseph. 1979. *The Authority of Law: Essays on Law and Morality*. New York: Oxford University Press. Dworkin, Ronald. 1977. *Taking Rights Seriously*. Cambridge, MA: Harvard University Press. Hart, H. L. A. 1961. *The Concept of Law*. London: Oxford University Press. The relationship between the substance of law and the consent of those governed begins with Hobbes, Thomas. 1994. *Leviathan*. Indianapolis: Hackett. and Locke, John. 1988 (1690). *Second Treatise of Government*. In *Two Treatises of Government*. Edited by Peter Laslett. Cambridge Texts in the History of Political Thought. Cambridge: Cambridge University Press. I take Locke's statement in the *Second Treatise on Government* to be the first thoroughgoing

attempt to reconcile democratic lawmaking with principles of justice. Many, many other accounts have, of course been offered, from Rousseau's *Social Contract* through Rawls' *Political Liberalism*. The point here is not to offer a definitive view of these matters, but rather to frame the questions of norms of political representation against this more familiar substantive debate.

⁶¹ For a more complete view of justice and democratic lawmaking see Beerbohm, Eric. 2006. "The Ethics of Democratic Lawmaking." Paper presented at the Representation Reconsidered, University of British Columbia.

⁶² Rawls, John. 1971. *A Theory of Justice*. United States of America: Harvard University Press.

⁶³ Rawls, John. 1999. *The Law of Peoples*. USA: Harvard University Press.

⁶⁴ For the classic statement see Walzer, Michael. 1977. *Just and Unjust Wars*. New York: Basic.

⁶⁵ The hard cases familiar from democratic theory are the conditions under which we can say that a consensus on a policy has rightly emerged and should thus be respected; e.g., when a citizenry has adequate education and resources to attend to determining their own good, and justice more generally. But to the extent a polity is persistently governed by laws of which it does not approve, the polity is that much more anti-democratic.

⁶⁶ Christiano's *Rule of the Many* is a particularly good treatment of some of these problems. On some problems of time and democratic theory see Thompson, Dennis. 2005. *Restoring Responsibility: Ethics in Government, Business, and Health Care*, "Election Time". New York: Cambridge University Press. But some have not been considered as far as I know. Imagine, for example, a polity in which citizens vote directly on a particular law, say a zoning ordinance, every 2 years. On Election Day they unanimously agree that the law is good and vote to endorse it. But for the remainder of the 2 years they all believe it is a terrible law and should be changed. Then the next Election Day they change their minds and vote to keep it. Presuming

that their reliable change of heart is not a manipulation of their views, is such a law democratic? In one sense it certainly is: they endorsed it freely and fairly, and part of what they endorsed is to be bound by their decision on that day rather than their decision on some other day. Yet if we reference the people's views over time, it clearly is not democratic: on 729 days out of every 730 the people explicitly think this is a bad law. It is not clear to me why we should reference Election Day views to determine whether the law is *democratic*; we do so for other very different reasons of stability and coordination. This is obviously only suggestive, but I think that democratic law must reference a continuous state using elections only as proxies for the longer term sentiments of citizens.

⁶⁷ This may well describe the current political situation in the United States, in which robust majorities of American citizens hold different substantive views of what to do about a range of issues than what is reflected in the law that governs them.

⁶⁸ Schwartz, Nancy L. 1988. *The Blue Guitar: Political Representation and Community*. Chicago: The University of Chicago Press. Williams, Melissa S. 1998. *Voice, Trust, and Memory*. Princeton: Princeton University Press.

⁶⁹ Conforming to popular will has a separate virtue of *authorizing* the law by virtue of citizen consent. The distinction between the two is not dissimilar from Kant's distinction between sovereignty and forms of government. Kant, Immanuel. 1992. "To Perpetual Peace: A Philosophical Sketch," trans. Ted Humphrey. In *Perpetual Peace and Other Essays*, 113-14. Indianapolis, IN: Hackett. So the question for us is whether there is distinction between "source of judgment" and "authority", and, if there is such a distinction, whether in fact "source of judgment" has anything to do with democracy. That is, it may only be the people's authority over the law, their right to decide, that makes it democratic. Here, I want to say, no, not only their right to decide. Rather, it is their decision *about the content of some law*. That's where the source of judgment is democratic.

⁷⁰ The practice was eliminated because of increasingly competitive elections in which incumbents could not credibly defend their opposition to passed legislation against the public attacks of challengers. Pole, J. R. 1983. *The Gift of Government: The Richard Russell Lectures, Number One*. Athens, GA: The University of Georgia Press.

⁷¹ See note 5 above.

⁷² I acknowledge the can of worms this opens up and do not propose to defend it in any way here. For similar views see Pettit, Philip. 1997. *Republicanism: A Theory of Freedom and Government*. Oxford: Clarendon Press. and Goodin, Robert. 1995. "Utilitarianism as a Public Philosophy." In *Utilitarianism as a Public Philosophy*, 3-27. New York, NY: Cambridge University Press.

⁷³ Indeed, the motivational states apply to any kind of "lawmaking" at all, democratic or otherwise.

⁷⁴ For an elegant statement of such a view see Lovett, Francis. 2004. "Can Justice Be Based on Consent." *Journal of Political Philosophy*, 12, no. 1, March: 79-101.