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## Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy

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PRO-CONSTITUTIONAL REPRESENTATION: COMPARING  
THE ROLE OBLIGATIONS OF JUDGES AND ELECTED  
REPRESENTATIVES IN CONSTITUTIONAL DEMOCRACY

VICKI C. JACKSON\*

ABSTRACT

*The role of elected representatives in a constitutional democracy deserves more attention than it typically receives in law schools. Just as judges have a set of role obligations, which are widely discussed and debated, so, too, do representatives. Their obligations, however, are far less widely discussed in normative terms. Understandable reasons for this neglect exist, due to institutional differences between legislatures and courts, law schools' long-standing focus on courts, and the intensely competing demands on elected officials; but these factors do not justify the degree of silence on the normative obligations of representatives. This Essay seeks to introduce and defend the normative concept of "pro-constitutional" legislative representatives*

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\* This Essay, which formed the basis for the Cutler Lecture given at William & Mary Law School, March 23, 2015, was originally prepared for the Princeton ConLaw Schmooze, on "Democracy and Accountability," December 7, 2012. With thanks for helpful comments from, or conversations with, Lori Andrews, Bernadette Atuahene, Felice Batlan, David Beatty, William Birdthistle, Dan Farber, John Ferejohn, David Fontana, Andrew Gold, Jonathan Gould, Jamal Greene, Tara Grove, Gabor Halmai, Sarah Harding, Steven Jackson, Tsvi Kahana, Harold Krent, Mattias Kumm, David Law, Edward Lee, Clark Lombardi, Jane Mansbridge, Martha Minow, Anne Joseph O'Connell, Pasquale Pasquino, David Pozen, Intisar Rabb, Todd Rakoff, Judith Resnik, Mark Rosen, César Rosado, Michael Sandel, Fred Schauer, Kim Scheppele, Chris Schmitt, Michael Seidman, Nicholas Stephanopoulos, Joan Steinman, Mark Tushnet, Mila Versteeg, Robin West, and many other participants in workshops at Harvard Law School, William & Mary Law School, Chicago-Kent College of Law, and at the George Washington University Law School Comparative Constitutional Law Roundtable. I was aided by a number of talented law students who provided research assistance, including Aaron Frumkin, Lauren Davis, Ariel Giumarelli, Noah Marks, and Jason Shaffer. None of those mentioned bear any responsibility for errors of thought, accuracy, or otherwise in this Essay, which is my first effort to put something on paper about the subject.

—that is, representatives whose goals are to advance the purposes of constitutional democracy within their own constitutional system.

*In identifying some of the normative obligations of a “pro-constitutional” representative in a democratically elected legislature, this Essay argues that such obligations are not limited to issues of constitutional interpretation, but extend to an active role in promoting a working and democratic constitutional government. If judges’ decisions are generally to be governed by consistently and impartially applied principles, legislators must balance the demands of many competing norms and multiple obligations of accountability. To act representatively, legislators must not only be aware of their constituents’ views, but must also be willing to engage with their constituents on and sometimes even seek to influence the substance of those views. To act legislatively representatives must act collectively, and thus, in a heterogeneous and pluralistic setting, they must sometimes be willing to compromise. Representatives also may have obligations of providing information, of fair treatment of constituents, and, in the U.S. Congress, of giving special attention to areas of constitutional legislative jurisdiction in which only the federal government can effectively respond to developments.*

*This Essay also argues that law schools should give more attention to the normative roles of elected representatives. Focusing on the normative obligations of members of Congress can help illuminate distinctions among differently constituted legislative bodies, as well as degrees of overlap and difference between the role obligations of judges and those of elected officials. Improved normative understandings of legislative members’ roles may also bear on statutory and constitutional interpretation. And a more complex understanding of these normative dimensions may help better prepare those law graduates who are themselves elected as representatives to evaluate and respond to the competing demands of their position. Finally, developing a more realistically complex account of normatively attractive conceptions of representation may contribute to ameliorating some contemporary political pathologies.*

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## INTRODUCTION

The role of the judge in a constitutional democracy has occupied the time and attention of lawyers, judges, and law students for decades—the concept of a representative, much less so. Legal scholarship has constructed judging both as the problem in constitutional cases and as the desideratum of decisionmaking in the heroic conception of the Herculean judge often conveyed by the case method. The countermajoritarian difficulty—perhaps the leading concept in American constitutional theory in the last half-century—assumes that it is the role of the judge that requires an account. And accounts have been offered—of great variety, normative thickness, and contestedness—not only in constitutional law courses but across a wide spectrum of subjects in which the work of judges is evaluated.

The role of elected representatives has garnered far less scholarly and pedagogical attention in contemporary legal education.<sup>1</sup> In part this may be because it appears normatively unproblematic; elected representatives by definition have authority to act in constitutional democracies. But in a time of declining respect for legislatures and widespread perception of a decline in Congress's ability to function as a lawmaker,<sup>2</sup> those concerned with the basic functioning of

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1. William & Mary Law School ran both a “moot court” and a “moot legislature” program in its early years, because its founder, George Wythe, apparently conceived of the school as training lawyers, judges, and legislative lawmakers. See Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 535-36 (1990); Paul Hellyer, *America's Legal History Started in Williamsburg*, 63 VA. LAW. 44, 45 (2014), <http://scholarship.law.wm.edu/libpubs/107> [<https://perma.cc/3SWH-4L3B>]. Its role in preparing future legislators was favorably noted by Thomas Jefferson. See Carrington, *supra*, at 536 (quoting Jefferson, in 1780, as saying: “This single school by throwing from time to time new hands well principled and well informed into the legislature will be of infinite value.”).

2. See, e.g., *Confidence in Institutions*, GALLUP (2015), <http://www.gallup.com/poll/1597/confidence-institutions.aspx> [<https://perma.cc/HS95-TEQ8>] (last visited Mar. 30, 2016) (reflecting that, of any institution named in the survey, the public has the least confidence in Congress—below the military, the Presidency, the Supreme Court, as well as below small business, the police, churches, public schools, banks, organized labor, and even below “big business”). Students of Congress have increasingly raised concerns. See, e.g., THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006). For an argument that the U.S. political system, including Congress, did not perform badly from a comparative perspective in confronting the economic crisis of 2008-2009, see Pietro Nivola, *Overcoming the Great Recession: How Madison's “Horse and Buggy” Managed*, in *WHAT WOULD MADISON DO? THE FATHER OF THE*

American constitutional democracy can no longer afford simply to assume the unproblematical character of the legislator's role.

Judging and representing are two foundations of U.S. (indeed, of any modern) constitutional democracy. Yet legal education neglects the subject of representation, which is a normatively more complex and demanding position in the U.S. federal system than is being a judge; in law schools, however, representation is discussed, typically, in narrow and normatively flat ways. This Essay aims to promote thinking and research in this area. Its claims are these: that the role of representing is neglected in comparison to the enormous literature on the role of judging; that it is worth the effort to try to define the aspirations and responsibilities of a "conscientious" or "pro-constitutional" legislator in the U.S. constitutional democracy; and that the effort is worthy of consideration in law schools, with potentially interesting payoffs in several areas.

In Part I, I elaborate on the relative neglect of the normative dimension of representation in legal education and scholarship. In recent years, some attention has been given to the role of representatives in interpreting constitutional law,<sup>3</sup> and to the importance of representative bodies including members of excluded, disadvantaged social groups.<sup>4</sup> But this growing literature for the most part has not taken on the larger task of offering a more general account of the normative expectations of elected representatives in a constitutional democracy. I note several reasons for this, including real institutional differences among the branches, the judicial focus of legal education, and the genuine challenges of the conflicting accountability demands that representatives may face. But these

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CONSTITUTION MEETS MODERN AMERICAN POLITICS 51-65 (Benjamin Wittes & Pietro Nivola eds., 2015).

3. The seminal article may well be Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

4. See, e.g., Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991); Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83; see also Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005); Richard Pildes, *The Supreme Court 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004) (discussing racial cleavages and other challenges to democracy, including partisan districting, the role of political parties, and campaign financing).

factors do not justify the degree to which the obligations of representatives have been neglected as a normative focus.

It is possible to develop and to teach a more complex normative account of representation, an account rooted in what I would call the idea of a “pro-constitutional representative.” Part II explains this concept, grounding it in several sources: the nature of an elected representative, the nature of a legislator, and the specific contours of the U.S. Constitution with respect to representation and legislative power. It then seeks to define the aspirations and responsibilities of a “pro-constitutional” legislative representative, especially in the national Congress. A pro-constitutional representative is not concerned only with interpreting specific provisions of the Constitution, nor only with ensuring that legislation she promotes would meet constitutional standards. Rather, a pro-constitutional representative is one who more broadly seeks to fulfill the complex and at times conflicting demands of “representing,” in many ways a more demanding task than that of “interpreting” a legal instrument. Representing requires not only “presence” but acting, not only responding but initiating. Part II identifies some components of what such a more complex normative account would address. Although these criteria may not be capable of definitive application in specific instances, they provide useful parameters for evaluating representatives’ conduct as a whole. They include elements on which there is probably widespread agreement—such as providing information to, and receiving information from, constituents—and other elements, including a willingness to compromise, that I expect to be more controversial.

Finally, in Part III, I return to why the subject is fit for law schools and worth the effort to integrate better attention to the normative qualities of good representatives and their relationship(s) to evaluations of different representative bodies. As to scholarship, thinking harder about what makes a good representative in a constitutional democracy sheds interesting light on comparative forms of representation; it may likewise shed light on interpretive theories based on deference to legislatures or on the idea of “representation-reinforcement.” As to teaching, it may better prepare those law students who go on to be representatives themselves to think complexly about their roles. And, finally, it may help raise the level of



expectations of elected representatives in ways that would serve the public good.

#### I. THE RELATIVE NEGLECT OF THE NORMATIVE SIGNIFICANCE OF BEING A REPRESENTATIVE IN A DEMOCRACY

What happens when the Supreme Court decides a controversial issue? In *District of Columbia v. Heller*, for example, the Court, by a five-to-four vote, overruled an earlier decision and held that the Second Amendment guarantees an individual right to possess weapons, especially in the context of weapons in the home suitable for self-defense.<sup>5</sup> There was public commentary and scholarship analyzing the opinions, their implications, the reasoning methods, the interpretive sources, and the consistency with which they were applied.<sup>6</sup>

What happens when Congress has a controversial issue before it? A recent instance involved the question of raising the debt ceiling to avoid default or harm to the nation's credit in 2011.<sup>7</sup> Are there news

5. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

6. See, e.g., Editorial, *Affirming the Rule of Law*, N.Y. POST (June 27, 2008), <http://nypost.com/2008/06/27/affirming-the-rule-of-law/> [<https://perma.cc/PHE2-PDWK>] (praising Justice Scalia's opinion for the majority); Grant Bosse, *Finally We Can Begin Reclaiming our 2nd Amendment Rights*, N.H. UNION LEADER (July 1, 2008), <http://www.freerepublic.com/focus/f-news/2039242/posts> [<https://perma.cc/LS5Y-6DLV>] (praising ruling); Ted Cruz, *Supreme Court Ruling Scored a Bull's-eye*, HOUS. CHRON. (June 29, 2008), <http://www.chron.com/opinion/outlook/article/Supreme-Court-ruling-scored-a-bull-s-eye-1775072.php> [<https://perma.cc/EPN6-XRQT>] (same); Linda Greenhouse, *Justices, Ruling 5-4, Endorse Personal Right to Own Gun*, N.Y. TIMES (June 27, 2008), <http://www.nytimes.com/2008/06/27/washington/27scotus.html> [<https://perma.cc/L8KE-KJZL>] (analyzing both Justice Scalia's opinion for the majority and Justice Stevens's opinion in dissent); Robert Hardaway, *Gun Ruling Overturns 200 Years of Precedent*, HOME NEWS TRIB. (July 7, 2008), 2008 WLNR 26954813; Editorial, *Repeal the 2nd Amendment*, CHI. TRIB. (June 27, 2008), [http://articles.chicagotribune.com/2008-06-27/news/0806260750\\_1\\_2nd-amendment-majority-gun-control](http://articles.chicagotribune.com/2008-06-27/news/0806260750_1_2nd-amendment-majority-gun-control) [<https://perma.cc/5UWS-EE5N>] (criticizing the decision); Editorial, *Two Courts, One 'Sin,'* L.A. TIMES (Oct. 22, 2008), <http://articles.latimes.com/2008/oct/22/opinion/ed-court22> [<https://perma.cc/M2UG-8HQF>] (criticizing Justice Scalia's opinion); see also, e.g., Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POLY REV. 325 (2009) (analyzing the future of originalism through the lens of *Heller*); Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J. (June 27, 2008), <http://www.wsj.com/articles/SB121452412614009067> [<https://perma.cc/RXR7-73BB>] (praising the majority opinion); Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), <http://www.newrepublic.com/article/books/defense-looseness> [<https://perma.cc/C4BQ-3ULN>] (criticizing the majority's "freewheeling discretion strongly flavored with ideology").

7. For descriptions of this crisis, see Neil H. Buchanan & Michael C. Dorf, *How to Choose*

articles analyzing the reasons for different senators or congressmembers' positions? Typically not. Is there scholarly commentary on what different members of the legislature should do? In that crisis, the dominant concern of legal scholarship for at least several months was whether the President could act on his own if Congress did not.<sup>8</sup> Very little scholarship focused on the reasons for, and conduct of, the elected members of the Congress.

There are many reasons for this lopsided analytical focus, as I explore below.

### A. Institutional Differences

For one thing, even when legislation is subject to constitutional challenge, it is typically an executive branch officer who is the named party-respondent, not individual legislators or the legislature as a whole. Action by the President or other executive officials is often subject to judicial review; *inaction* by the legislature is not.<sup>9</sup>

The Supreme Court, moreover, is the head of a large judicial system in which principles of judicial hierarchy and *stare decisis* mean that what the Court says will impact the decisions of many lower state and federal courts. Legislation is different. Congress's relationships with the state legislatures are not as directly hierarchical, and *stare decisis*, as such, does not exist for legislatures. Still, a federal law has powerful preemptive force, which may control the actions of many officials and, often, of private persons as well.

Another possible reason for the lopsided focus is that there are many fewer judges on the Supreme Court than there are members

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*the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1176-78 (2012) [hereinafter Buchanan & Dorf, *Least Unconstitutional Option*]; Neil H. Buchanan & Michael C. Dorf, *Nullifying the Debt Ceiling Threat Once and for All: Why the President Should Embrace the Least Unconstitutional Option*, 112 COLUM. L. REV. SIDEBAR 237, 237 (2012), [http://columbialawreview.org/wp-content/uploads/2012/12/237\\_Buchanan\\_Dorf.pdf](http://columbialawreview.org/wp-content/uploads/2012/12/237_Buchanan_Dorf.pdf) [<https://perma.cc/6NDH-CT7Y>] [hereinafter Buchanan & Dorf, *Nullifying*].

8. See, e.g., Buchanan & Dorf, *Least Unconstitutional Option*, *supra* note 7; Buchanan & Dorf, *Nullifying*, *supra* note 7.

9. In some other constitutional systems, actions for unconstitutional legislative omissions are recognized. See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 831 (3d ed. 2014) (noting Portugal's constitutional provision concerning the Constitutional Court's power to control "unconstitutionality by omission" in failures of legislatures to act).

of Congress. Although there are more than 800 authorized Article III judicial positions in the courts of appeals and district courts,<sup>10</sup> there are only nine members of the Supreme Court—compared to 435 members of the House and 100 in the Senate. Moreover, in any given case in the lower federal courts, ordinarily only a single judge sits in district court cases and only three judges sit on a court of appeals panel.<sup>11</sup> Even when a court of appeals sits en banc, it sits with far fewer judges than the number of legislators.<sup>12</sup>

A third reason for the difference in focus is that we are more sure that we care about reason-giving in courts than about reason-giving in legislatures. It is considered an obligation of appellate courts to give reasons explaining judgments; indeed, the obligation to give reasons is often considered a fundamental “check” on the power of the courts.<sup>13</sup> But as far as legislatures go, judges and jurists disagree about the need for, and significance of, reasons; they also disagree about the role of so-called “legislative history,” in which arguments are often made about the reason for legislation and about legislators’ understandings of what the legislation is designed to accomplish.

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10. See *How the Federal Courts Are Organized*, FED. JUDICIAL CTR., <http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu5a&page=/federal/courts.nsf/page/183> [<https://perma.cc/Q57E-NREX>] (last visited Mar. 30, 2016) (using statistics from 2007); see also RICHARD POSNER, *HOW JUDGES THINK* 60 (2008) (noting that in addition to the 800-plus active federal Article III judges, there are another several hundred senior judges who hear cases, for a total of about 1200 sitting Article III federal judges).

11. See 28 U.S.C. § 46(c) (2012).

12. See, e.g., 9TH CIR. R. 22-4(d) (providing for en banc review by eleven judges, instead of the full twenty-nine in the Ninth Circuit). By statute, the next largest court of appeals is the Fifth Circuit, with seventeen judges. See 28 U.S.C. § 44; see also 5TH CIR. R. 35.6. For the general rule on who can participate in en banc review, which limits participation to members in active service plus any senior judge who sat on the panel decision under review, see 28 U.S.C. § 46(c).

13. See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-72 (1978); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (agreeing “with Lon Fuller that reasoned response to reasoned argument is an essential aspect of [the judicial] process”). See generally Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17 (2001).

*B. Legal Education's Court-Centered Focus*

A fourth explanation that I want to focus on, one perhaps reflecting the continued influence of Langdellian approaches, is that law schools and legal scholars have constructed judging as a focus of normative attention in a way that has not happened for representatives. As noted above in the Introduction, in legal scholarship and law school teaching, multiple perspectives are brought to bear on the role of the judge, the question of what is good judging, and legitimate approaches to judicial interpretation. Judicial independence (vel non) and related institutional structures are likewise the subject of consideration in many courses. But legal education produces much richer understandings of normative demands and competing theories about what being a good judge means than about what being a good elected representative means. Law schools and legal scholarship are filled to overflowing with normative accounts of judging. Whether in the development of the common law, the interpretation of statutes, or the decision of constitutional questions, there are normatively thick, nuanced, competing, and contested accounts of what “good” judging entails. Substantial agreement exists on some core attributes of judging—a set of “thou shalt nots” involving corrupt behavior or the intrusion of certain forms of bias on judicial decisions.<sup>14</sup> But there are also a number of “thou shalt”s for being a good judge—about the idea of impartiality (which mirrors, in a positive way, the prohibition of bias) and about accuracy and competence in identifying, understanding, and applying the law<sup>15</sup> (whether there is clear law that controls or the applicable law is less clear and must be determined from multiple relevant sources).

Much normative contest remains over other aspects of judging. In interpreting statutes, for example, should the judge conceive herself to be the “faithful agent” of the legislatively enacted text?<sup>16</sup> the

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14. *Cf.*, e.g., 28 U.S.C. § 455 (2012) (providing for disqualification of federal judges for personal bias or prejudice, or perceived lack of impartiality, and in several specific circumstances associated with actual or perceived bias).

15. *See*, e.g., MODEL CODE OF JUDICIAL CONDUCT r. 1.1 (AM. BAR ASS'N 2010) (“Compliance with the Law”), r. 2.2 (“Impartiality and Fairness”).

16. *See generally* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (describing the “faithful agent” theory).

underlying legislative intent? the overarching legislative purpose?<sup>17</sup> Should the judge see herself as a “junior partner” of the legislature, sensibly trying to fill in and make more coherent or normatively attractive a legislative scheme, with its inevitable lacunae and potential inconsistencies?<sup>18</sup> Should approaches to statutory interpretation carry over to constitutional interpretation? What is the impact of the difficulty of amendment on constitutional interpretation?<sup>19</sup> Can the text evolve over time as understandings change? Is there a stronger or weaker role for *stare decisis* in federal statutory, common law, or constitutional cases? Is there a “countermajoritarian” difficulty to invoking judicial review in a democracy? If so, what are normatively appropriate responses to that difficulty? original understandings or intent? the “Thayer” rule?<sup>20</sup> John Hart Ely’s representation-reinforcing approach?<sup>21</sup> an evolving meaning approach based on widespread understandings? a moral approach based on application of deep principles embodied by the Constitution?<sup>22</sup> These kinds of questions are posed to law students, again and again, in a variety of classes.

Other aspects of the normative role of judging may vary depending not on the subject matter but on the judge’s position in the court system. For trial courts, for example, what is the best normative balance between allowing lawyers to control the litigation and having the judge herself shape the litigation? This question is highly contested, as are the benefits of “managerial” judging towards informal settlement as compared to public trials and more formal

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17. See William N. Eskridge, Jr. & Philip P. Frickey, Commentary, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2032 (1994) (describing widespread commitments to purposive interpretation in the 1940s).

18. See Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 407-08 (arguing that Congress cannot “resolve matters in legislative text without the aid of courts acting as junior partners”).

19. See Vicki C. Jackson, *Democracy and Judicial Review, Will and Reason, Amendment and Interpretation: A Review of Barry Friedman’s The Will of the People*, 13 U. PA. J. CONST. L. 413, 433-51 (2010) (exploring the interplay between amendment and interpretation).

20. See Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2797-801 (2003) (discussing James Bradley Thayer’s view that courts should only invalidate legislation that is manifestly inconsistent with the Constitution).

21. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing for representation-reinforcement as the basis for judicial intervention).

22. See, e.g., RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

adjudication.<sup>23</sup> On multimember courts, other normative debates exist about the role of principle and compromise. Most agree that overt log-rolling is inconsistent with a judge's job to be a "principled" decisionmaker. But should every disagreement result in a different opinion?<sup>24</sup> Should "undertheorized" decisions that may lack analytical clarity but find agreement be favored over more analytically clear or comprehensive treatments that result in more splintered courts?<sup>25</sup> These questions are also ones that recur across law school curricula.

The work of democracy is typically done through processes that must be authorized by elected representatives. The size and scale of modern states make this a necessity; without representation, inclusion of multiple viewpoints in governance would be close to impossible. Indeed, some political scientists now view representative democracy as a "first-best," not "second-best," form of democratic governance.<sup>26</sup> But in law schools, to the extent that we talk about the work of representatives in our classes on constitutional law, we tend to speak of the legislative body as a whole, offering generalizations about what motivates the body to act; we do not usually focus on the role of a single representative herself. And, with respect to the motivations of legislators or legislatures, we tend to offer thin—and normatively unattractive or naive—accounts.

With respect to judging and courts, law school classrooms are populated across subject areas with highly elaborated and nuanced normative aspirations for the role of constitutional judging, which may well be coupled with a skepticism about whether law, or principles, "really matter" to judicial decisions. In contrast to these richly elaborated, and critiqued, normative theories about what

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23. For description of the trend towards judges as managers of lawsuits and promoters of settlement and critique of the abandonment of adjudication, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

24. For one view, see Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 134 (1990) (arguing that U.S. appellate judges should exercise "greater restraint before writing separately").

25. See Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (arguing for minimalist approaches to judicial decisionmaking).

26. See, e.g., NADIA URBINATI, REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY 223-28 (2006).

good judges do and should do, the approach in too many classrooms and too much writing (my own included, I am sure) about elected representatives has been to veer between two alternatives: a highly formal “black box” of the “representative democratic process,” under which it is simply presumed that legislation carries with it a democratic imprimatur of legitimacy (what Jane Schacter calls the “accountability axiom”),<sup>27</sup> and a corrosive form of (pseudo-?) realism, in which legislators are motivated, cynically, only by the desire to be reelected and enjoy the accouterments of office,<sup>28</sup> with statutes regarded as the unfortunately “sausage-like” product of a cynical and unprincipled legislative process driven by concern for narrow (and campaign-contributing) interest groups.<sup>29</sup> Such attitudes may be expressed about hard-fought legislative compromises that pass by the slimmest of majorities or about legislation that is passed by

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27. See Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 216-17 (2012) (describing a “black box” of deliberative democracy in legislatures); Jane S. Schacter, *Political Accountability, Proxy Accountability, and the Democratic Legitimacy of Legislatures*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 45, 45 (Richard W. Bauman & Tsvi Kahana eds., 2006) [hereinafter Schacter, *Political Accountability*] (describing the “accountability axiom”). Schacter’s work problematizes assumptions about the accountability resulting from democratic elections, both because of deficits in accountability arising from voters’ lack of knowledge and asymmetry in accountability because of disparities in the political process. See *id.* at 46; see also Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737 (2004).

28. See Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 649-50, 674, 708-10 (1998) (“[P]ublic choice theory defines the legislative process as an arena for fundamentally self-serving behavior as legislators trade off votes on specific legislation to advance their prospects for reelection.”). For a similar but less critical description of social choice theory in law, see Jonathan R. Macey, *Public Choice and the Legal Academy*, 86 GEO. L.J. 1075 (1998) (reviewing JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997)). The reductionism of such theories has been subject to critique. See, e.g., Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 217-68 (1988); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990).

29. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION 61-63 (2007) (discussing “rent extraction” as a way of understanding legislative activity but arguing that “it accepts the inaccurate view of legislators as one-dimensional seekers of financial rewards from special interest groups.... [A]lthough reelection and interest group considerations are important to lawmakers, most are also pursuing other objectives, such as affecting policy in ways consistent with their ideological commitments”). As noted in text below, the challenges of aggregating group preferences, as explored by public choice theorists, may also limit the fairness and coherence attainable even by sincerely motivated collective decisionmakers.

substantial majorities, about legislation rushed through a Congress with little deliberation or about legislation that culminates a multi-year process of legislative fact-finding.

In addition to the “legitimate democratic will” version of legislation and the public choice “rational actor” model of representatives who seek to maximize only their own reelection (or other self-interested gain), there is on occasion in law school classrooms a recognition of the various collective choice problems of legislative decision making, which can explain how, even with legislators acting in good faith, legislation may be enacted that does not represent the views or preferences of a majority.<sup>30</sup> Such moves may be invoked, for example, to help explain why courts invalidating laws may not be “countermajoritarian,” or to problematize the concept of a “legislative intent” or “purpose” that can guide statutory interpretation.<sup>31</sup> But these are positive propositions; they do not contribute in any direct way to a normative account of what a good representative in a constitutional democracy should do in light of such collective action (and other) problems.

Pamela Karlan’s 2012 *Foreword* to the *Harvard Law Review* develops the theme that the current majority of the Court shows contempt or “disdain” for the democratic branches.<sup>32</sup> Distrust of the most representative branch is pervasive.<sup>33</sup> When we assume in our teaching that members of the legislature are motivated only by a desire for reelection, do we implicitly convey a degree of normative disdain? One might think that the motivation to be reelected is an essential constitutional mechanism of democratic accountability. Why, then, should such motivations be viewed only as a negative fact about representatives?<sup>34</sup>

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30. See, e.g., Adrian Vermeule, *The Supreme Court 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV L. REV. 4, 11-12 (2009) (explaining Arrow’s theorem).

31. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 337, 349-50 (1998).

32. Pamela S. Karlan, *The Supreme Court 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 2, 13, 50, 51, 53, 68, 71 (2012).

33. See *supra* note 2. The phenomenon of publics having greater trust in their constitutional courts than in their legislatures is not limited to the United States. See Kim Lane Scheppele, *Parliamentary Supplements (Or Why Democracies Need More than Parliaments)*, 89 B.U. L. REV. 795, 796-97 (2009); see also David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 791 n.219 (2009).

34. Gerrymandering, the impact of money on elections, and the need for tremendous



Constitutional law casebooks almost always include *Marbury v. Madison*, framed, at least in part, by a discussion of what the “judiciary” and its judges necessarily do and ought to be doing. Many “Conlaw” books return, repeatedly, to questions of interpretation, which are presumptively about “good” judging as well. But how many Conlaw casebooks introduce students to debates between Burkean (or “republican”) views of the representative as a “trustee,” obligated to exercise independent judgment in voting (considering constituents’ views but not treating them as dispositive), and more pluralist, interest-group accounts in which a good representative ought to act more as a “delegate” and primarily advance the interests or views of her constituency? Even in the Brest-Levinson casebook, known for its innovative approach of including nonjudicial materials of constitutional interpretation, there is little effort to explore the ways in which *being a representative* matters to the nature of the constitutional interpretation offered.<sup>35</sup> And Conlaw

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amounts of fundraising all help account for some of the negative views of federal legislators. I do not disagree with those who view the current financing system and its reliance on large donors as corrosive. For varying accounts, see, for example, LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009); see also Hasen, *supra* note 27, at 221-22 (noting that lobbyists raise campaign contributions as a way to gain access to legislators, with attendant risks of producing “rent-seeking” legislation). Nor do I disagree that the drawing of district lines could be better performed by nonpartisan actors, or that without political competition within electoral districts it is difficult to achieve appropriate levels of accountability. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) [hereinafter Issacharoff, *Gerrymandering*]. Nor do I disagree with those who have argued that existing patterns of representation may reflect racism and other forms of injustice so as to warrant particular attention to the inclusiveness of legislatures vis-à-vis disadvantaged social groups. See IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 121-24, 141-53 (2000); Melissa S. Williams, *The Uneasy Alliance of Group Representation and Deliberative Democracy*, in *CITIZENSHIP IN DIVERSE SOCIETIES* 124, 131-44 (Will Kymlicka & Wayne Norman eds., 2000); *cf.*, *e.g.*, John E. Roemer, *Why Does the Republican Party Win Half the Votes?*, in *POLITICAL REPRESENTATION* 304, 310-12, 316-21 (Ian Shapiro et al. eds., 2009) (exploring, inter alia, “race-based” and “anti-solidarity” effects). Rather, I seek here to argue the benefits of articulating a normatively complex account of the role of legislators that recognizes that they are not supposed to behave like judges, that their obligations under the Constitution differ from those of judges, and that their “representative” character includes a normatively attractive element of responsiveness to electoral constituencies.

35. The Sixth Edition of the Brest-Levinson casebook, PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (6th ed. 2015), includes legislative forms of constitutional interpretation—for example, nullification expressed in state legislatures, *id.* at 102-06, and the views of Representative James Madison in Congress on the

books and courses generally pay little attention to the affirmative duties that legislators may have to act, positively, to give effect to constitutional vision(s) of the legislative role,<sup>36</sup> nor do they typically raise questions of whether there are competing normative theories on the role of representatives (as there are with judges), or whether there are shared elements to those different visions (as with judging).

It is understandable that a constitutional law course would focus most attention on the meaning of the Constitution's provisions in contested cases; casebooks on legislation sometimes note, albeit briefly, questions about representatives roles.<sup>37</sup> But in law school,

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national bank, *id.* at 31-34; constitutional interpretations offered by Presidents—for example, Thomas Jefferson on acquiring Louisiana, *id.* at 152-55, Andrew Jackson on the national bank, *id.* at 77-80, and Abraham Lincoln on secession, *id.* at 309-10 (in contrast to the views of Judah Benjamin, as he left the Senate, *id.* at 308); Cabinet members' constitutional views, as of the Attorney General and the Secretary of the Treasury on the National Bank, *id.* at 34-35, 36-39; constitutional views of political candidates running for office, *id.* at 297-300 (reviewing the Lincoln-Douglas debates); and views of such influential individuals as Frederick Douglass, *id.* at 293-97. But this wonderful book does not include material reflecting on the nature of being a representative, in some contrast with material understandably devoted to the role of *courts* in constitutional review—including, but not limited to, *Marbury*. See *id.* at 121-35.

36. The range of academic literature is broader than what goes on in our classrooms. Some, like Robin West, have argued that legislators do have constitutional duties to fulfill constitutional norms. See, e.g., Robin West, *Tom Paine's Constitution*, 89 VA. L. REV. 1413 (2003). West offers an account of what she sees as constitutional obligations to provide for far greater equality than currently exists. *Id.* The claim I am advancing here is that, whatever the legislator or her constituents believe the constitutional vision is—whether of a night watchman state or of a socially egalitarian society—legislators have obligations derived in part from being elected, and in part from being elected *under the Constitution*, to act in certain ways as constitutionally and democratically elected representatives to advance that normative vision.

37. Although one might expect casebooks on legislation to give attention to the role of legislators, even here relatively little attention is given to the normative obligations of individual representatives. The Hart & Sacks *Legal Process* materials devote attention to the functions carried out in legislatures (for example, legislating, oversight, constituent service, investigation), but not to the normative obligations of individual legislators. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 693-843, 953-1007 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (edited version of the 1958 Tentative Edition). The Eskridge-Frickey-Garrett casebook discusses legislators' obligations to assure themselves of the constitutionality of legislation, under precedents established by courts. See ESKRIDGE, JR., FRICKEY & GARRETT, *supra* note 29, at 431-32. The Manning-Stephenson casebook considers whether legislators are aware of judicial canons of interpretation. See JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 280-82 (2d ed. 2013). William Popkin's book on legislation considers the electoral incentives of legislators, for example, whether voters are more likely

across the curriculum, much more attention is paid to what courts do—how they are constructed and selected, who the judges are, judicial behavior at the trial and appellate levels, and different styles of judicial reasoning—than is paid to comparable questions about legislatures and their members. That is, we build a stronger positive foundation for normative reflection on judging than we do for normative reflection on the nature of being a representative.

It may be that it is not in law schools that the most normative attention should be given to the nature of representation; perhaps the role of representatives and the making of statutes in legislative bodies should be treated as subjects for government departments, and the application and interpretation of laws, once made, for the law schools. But this does not seem in fact to describe the law school curriculum, much of which is devoted to questions of reforming laws, which often (and necessarily) contemplate legislation. What is lacking, however, is a focus on representation, on trying to develop a complex set of normative discourses around representation that might offer a more aspirational counterbalance (reflecting

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to blame than give credit, and the incentives for the risk-averse behavior this creates. *See* WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 146-50 (5th ed. 2009).

Some legislation casebooks do give some attention to normative questions about the roles of individual representatives. OTTO J. HETZEL, MICHAEL E. LIBONATI & ROBERT F. WILLIAMS, LEGISLATIVE LAW AND STATUTORY INTERPRETATION: CASES AND MATERIALS 81-88 (4th ed. 2008), refers to the question whether a representative sees herself as a Burkean “trustee” for the people, acting independently of their views in the long term interest of the whole, or rather sees herself as a “delegate,” advancing the known current interests of the represented. The same source also refers to the types of “representation” made famous by HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 11-12, 38-143 (1967)—formal representation based on authority, descriptive representation, symbolic representation, and substantive representation (“acting for” and in the interests of those represented). *See* HETZEL, LIBONATI & WILLIAMS, *supra*, at 81-86.

Importantly, a relatively new casebook raises questions in its first chapter about how judges, legislators, and administrators think about statutes and, with respect to legislators, makes the important point, central to this Essay, that legislators, unlike judges, “represent the public” and openly seek compromise. *See* WILLIAM N. ESKRIDGE, JR., ABBE GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 11 (2014). Also recognizing the central role of compromise is ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 26-27, 444-47 (3d ed. 2009) (referring to compromise as “the heart of the legislative process,” and briefly discussing representatives’ relationships with those represented, including references to the delegate and trustee theories). (Abner Mikva was himself an elected member of the Illinois legislature and then of Congress, as well as being a federal judge and White House Counsel. *See id.* at xxix.) For discussion of other casebooks, see *supra* note 35, *infra* note 90 and accompanying text.

awareness that legislators' obligations are different from judges') to the more cynical of positive accounts, and thereby better inform law school discussions of the relationships between legislatures, courts, administrative agencies, and other actors in the constitutional system.

### *C. Competing Demands of Accountability*

In thinking about why it is much harder to develop useful normative frameworks for being a "good" elected representative than for being a "good" judge, it is relevant to consider the very wide range of persons (and institutions) to whom representatives may owe accountability and from whom they may face direct demands. Indeed, in the case of elected representatives, just thinking about the range of stakeholders to whom one might have obligations of accountability is enough to make the head spin.<sup>38</sup> Imagine you are a representative: There are, of course, the voters who elected you, the voters who voted against you in your constituency, and nonvoters in your constituency (whose well-being may influence voters), as well as those in your constituency who you hope will vote for you in the future.<sup>39</sup> There are the voters in the broader polity of which all are a part, and those who are not voters at all but who are affected by and/or support (and may seek to influence) what you do.<sup>40</sup> You

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38. Cf. OTTO J. HETZEL, MICHAEL E. LIBONATI & ROBERT F. WILLIAMS, *LEGISLATIVE LAW AND PROCESS* 189-93 (1993) (distinguishing between the representative's "styles of representation"—as "trustee" or as "delegate," and the representative's "focus of representation: whether legislators think primarily in terms of the whole nation, in terms of their constituencies, or some combination of these") (drawing from ROGER H. DAVIDSON & WALTER J. OLESZEK, *CONGRESS AND ITS MEMBERS* 127-38 (3d ed. 1990), and DAVID J. VOGLER, *THE POLITICS OF CONGRESS* (1988)).

39. Cf. ESKRIDGE, FRICKEY & GARRETT, *supra* note 29, at 53 (suggesting, based on R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* (1990), that legislators concerned about reelection "will consider the potential preferences of the inattentive public and the likelihood that voters will focus on these preferences at election time").

40. In addition to the interests of donors who may be outside the district or state, there may be other forms of outside support. See, e.g., Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 549 (2003) (describing how and why the governor of Puerto Rico flew to Illinois to campaign for reelection of a congressional incumbent); see also Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 515 (2003) (describing as "surrogate" representation "when legislators represent constituents outside their own districts").

might also feel obligations to your fellow representatives or to congressional leadership, to say nothing about your party, or your institution as such (the House, the Senate, the Congress as a whole).<sup>41</sup>

Perhaps one of the reasons for the relative flatness of the legal literature about elected representatives is that being a good elected representative may be a harder project to engage in than the normative discourses around good judging reflect. Putting to one side the situation of elected judges, judicial accountability, however hard to define, seems to involve both a more constrained set of issues and a smaller range of stakeholders who can interact directly with judges in their judicial capacity.<sup>42</sup> Yet a better understanding of what,

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41. See Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 809-10, 828-32, 845-49 (2014) (suggesting that problems of governance might be mitigated by stronger political parties that have more ability to make deals and “force compromise” through more effective party leadership); see also DENNIS THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* 100 (1987) (identifying at least eight roles of a representative, taking into account “trustee” and “delegate” perspectives and those of “nation, party, district and district majority”).

42. The role of the judge pre-dates the development of modern democracies; indeed, norms of good judging have developed over the millennia. See generally JUDITH RESNIK & DENNIS E. CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2011). Judges today have obligations to the parties to treat them and their contentions with fairness and impartiality and to treat witnesses and jurors with respect; judges may have obligations to offer reasoned accounts for their decisions. Judges are constrained in ways that differ from legislators: judges have obligations to the existing “law” to “get it right,” which can sometimes be relatively objectively determined; and judges in lower courts have obligations to respect the judicial hierarchy, which one might think of as being “accountable” to the appellate court. Of course, the “public interest” may play a role in the resolution of judicial questions, under the law, and may call on judges to consider a wide range of interests; judges perform indisputably public functions, in which broader publics have a stake. U.S. judges, however, are generally not allowed to have “ex parte” contact with litigants (except with the parties’ consent or as permitted by other specific exceptions), nor may judges interact other than in highly constrained ways (for example, subject to norms of public filing and adversarial testing) with non-parties about pending issues. See, e.g., MODEL CODE OF JUDICIAL CONDUCT r. 2.9 (AM. BAR ASS’N 2010) (“Ex Parte Communications”). Elected officials are not under similar constraints. Judges are exhorted not to allow themselves to be influenced by “public clamor,” *id.* at r. 2.4(A), whereas representatives are expected to consider and at times to be responsive to public views. The norms for good judging differ in other respects from those for good representatives: for example, for judges the principle of impartiality would always be thought of controlling importance; not necessarily so for representatives. See *infra* notes 114-16 and accompanying text; cf. THOMPSON, *supra* note 41, at 101 (arguing that no single principle or choice of roles will prove adequate to define what representatives should do because “there are so many roles from which to choose ... [and] the choice depends on what else is happening in the legislative system” and the actions of other

aspirationally, elected legislative representatives *should* do—with no doubt a range of normatively complicated views—will better enable evaluation of what they *do* do—individually and when they act together to legislate.<sup>43</sup> Yet rather than discuss the difficult choices that often confront representatives, law schools typically approach their roles with normatively flat views, or even with silence.

## II. ELECTED REPRESENTATIVES SHOULD BE UNDERSTOOD TO HAVE PRO-CONSTITUTIONAL OBLIGATIONS TO ACT TO PROMOTE WORKING GOVERNMENT

This silence is concerning. One of the lessons from a comparative study of constitutional systems is the importance of what may be called “pro-constitutional” aspirations, attitudes, and behaviors by democratically elected representatives, as well as other actors throughout the institutions of constitutional democracy and enough portions of civil society and popular culture. I use the term “pro-constitutional,” not so much to refer to any specific obligation of constitutional interpretation that legislators may have, but rather to call attention to their central constitutional role as representatives in a constitutional democracy.

Being an elected representative in a lawmaking body is, normatively, a quite challenging role: Legislators face competing demands, widely recognized, between short-term electoral accountability, which has attractive and important aspects in a constitutional democracy, and advancing the long-term public good (of both particular constituencies and the country as a whole), which also

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legislators).

43. An important question is the difference between discussing obligations of legislators as individuals and obligations of a representative body as a whole. See Vermeule, *supra* note 30, at 26-27. Waldron suggests that an advantage or virtue of representative lawmaking (over direct democracy) is that representatives can engage in what he calls “abstraction”—that is, distancing themselves enough from particular concrete situations to be able to frame laws at the right levels of generality. See Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335, 345-49 (2009) (“[R]epresentatives should present people’s interests, concerns and ideals, universalizably, under certain aspects.”). Quoting Urbinati, Waldron argues that “representation ‘helps to depersonalize claims and opinions’ in a way that makes deliberation easier.” *Id.* at 350 (quoting Nadia Urbinati, *Representation as Advocacy: A Study of Democratic Deliberation*, 28 POL. THEORY 758, 760 (2000)). Can one deduce obligations for individual legislators from this aspect of representative lawmaking? Or is the ability to “abstract” one that can only be evaluated across the entire legislature?

has real normative attraction. As Nadia Urbinati has written: “If representatives are to be judged, there should be a norm of ‘good’ representation.”<sup>44</sup> But the norms for being a good representative are quite different than for being a good judge. For example, unlike judges who, no matter how chosen, are supposed to act impartially in adjudication, legislators are elected as representatives of particular constituencies on whose behalf they are supposed to act, at least sometimes. Elected representatives, unlike judges, should not necessarily aim to be principled and consistent in all their work on legislation, given both the unlikelihood that their constituents are so consistent and the need to work with others to get anything done. Moreover, legislators are not necessarily expected individually to give reasons for most of their actions. Unlike federal life-tenured judges, for whom reason-giving is a central form of public accountability, legislators must regularly stand for election where what the public views as their product can in theory be evaluated. Both the need for “pro-constitutional” understandings of the functions of being a “good” representative and the (potential) complexity of those understandings are underappreciated.

#### A. *Why the Term “Pro-Constitutional”?*

Before trying to say more about the attitudes and qualities of a “pro-constitutional” legislator, a few words on the term “pro-constitutional” may be helpful. Is the idea of a “pro-constitutional” representative any different from the idea of a “good legislator”? What obligations inhere in being a representative in a constitutional democracy? Are there obligations that flow from the U.S. Constitution that affect the role of an individual representative in the U.S. Congress? Why the term “pro-constitutional”?

It is the Constitution that provides for the selection of representatives by popular election. In so doing, the Constitution prescribes that the principal lawmakers of the government are directly chosen in democratic elections.<sup>45</sup> Over time, the U.S. commitment to an inclusive notion of the democratic electorate has expanded in the

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44. URBINATI, *supra* note 26, at 218.

45. See U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII.

Constitution,<sup>46</sup> accentuating the role of elections in legitimizing government lawmaking. The representatives' relationship to those who elect them is at the heart of U.S. constitutional government.<sup>47</sup> Representative legislatures stand for the proposition that the laws under which we are governed must rest on the consent of the governed, given through their election of the lawmakers and the need for those lawmakers to stand regularly for election.<sup>48</sup> In order for that consent to be meaningful, publicity and transparency are both necessary and contemplated by the Constitution, so that the people can know and understand the significance of what their representatives have done.<sup>49</sup>

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46. See U.S. CONST. amends. XV, XVII, XIX, XXIV, XXVI.

47. See, e.g., GORDON S. WOOD, REPRESENTATION IN THE AMERICAN REVOLUTION 70-71 (rev. ed. 2008) ("Representation ... was the key conception in unlocking an understanding of the American political system."); Mark D. Rosen, *The Structural Constitutional Principle of Republican Legitimacy*, 54 WM. & MARY L. REV. 371 (2012) (arguing that the Constitution embodies a structural principle of "Republican Legitimacy," which includes the idea that the selection method for representatives must be legitimate, providing a fair mechanism for expression of the people's choice in competitive elections); Edward Rubin, *Judicial Review and the Right to Resist*, 97 GEO. L.J. 61, 103 (2008) ("[T]he essence of our system is representation; the people elect representatives and the representatives constitute the ruler. This is not an unfortunate compromise with inconveniences of mass society, but an epochal innovation by the Western world in the art of governance."); cf. Jeremy Webber, *Democratic Decision-Making as the First Principle of Contemporary Constitutionalism*, in THE LEAST EXAMINED BRANCH, *supra* note 27, at 411, 411 ("[D]emocratic participation ... is the first principle of contemporary constitutionalism.").

48. It is not the case in all constitutional democracies that the legislature is the principal lawmaking body. Although usually this is so, in the current Fifth French Republic the legislators act in the domain of "lois," but the President has authority to issue "règlements," and the legislature is prohibited from enacting laws in the domain of the President's authority over règlements or regulation. See 1958 CONST. 37 (Fr.) (all matters other than those designated for statute law come within the domain of regulation); ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE 46-47 (1992); see also 1958 CONST. 34 (Fr.) (listing the domains of legislation); *id.* art. 41 (giving Constitutional Council jurisdiction to rule on whether a proposal for a statute is unconstitutional insofar as it is "not a matter for statute" but intrudes on the domain of regulation); *id.* art. 47 (providing for finance bills to come into legal effect through regulation if parliament fails to take a decision within 70 days); *id.* art. 47-1 (same for social security bills after 50 days). The fact that, in the United States, the "legislative" power is vested in a Congress made up of elected representatives, and includes the power to make all laws necessary and proper to carry out its legislative powers and the powers delegated to other organs of the national government, tightly links elected representatives in the legislature to lawmaking.

49. See U.S. CONST. art. I, § 5 (requiring each House to keep and publish a journal of its proceedings), § 6 (providing immunity for any speech or debate in Congress), § 9 (requiring a "regular Statement and Account of the Receipts and Expenditures of all public Money" to be published); *id.* amend. I (prohibiting abridgment of freedom of speech, or of the press, or



Second, and in addition to the idea of being the principal law-makers under the Constitution, the broader idea of being a “representative” is invoked, explicitly by the term used for membership in the House, and implicitly by the term used for membership in the Senate. Although the term “representative” (like the idea of representation) has many forms, it is a role distinct from being a “judge.”<sup>50</sup> Which of its many meanings is most appropriate depends in part on the fact simply of being elected, in part on the fact of being elected to serve in the legislature of a constitutional democracy, and in part on the fact of being elected to serve in the particular legislature constituted by the Constitution and laws of the United States. By virtue of being elected, it can be argued, representatives assume an implicit obligation of faithful service to their constituencies, which at a minimum means they are to act to promote the public good, not private interest.<sup>51</sup> Being a proconstitutional

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of the people’s rights to assemble and petition the government). On the significance of Speech and Debate immunity, see *Powell v. McCormack*, 395 U.S. 486, 503, 505 (1969) (describing the immunity as “insur[ing] that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation,” “to enable and encourage a representative of the public to discharge his public trust” (quoting James Wilson), and “to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions”). On the importance of free access to information to representative government, see generally Bernard Manin et al., *Introduction*, in *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* 1, 23-24 (Adam Przeworski et al. eds., 1999). See also Jonathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 *CORNELL L. REV.* 280, 284, 306-07 (2002) (arguing that “contestability,” that is, competitive elections, and “an unbiased, widely available source of information” that can be integrated into political discourse are necessary to sustain accountable and public-interested government); Jeremy Waldron, *Legislating with Integrity*, 72 *FORDHAM L. REV.* 373, 379 (2003).

50. Being a representative as the principal role of a government actor is different from the adjectivally “representative” characteristics of all government actors. All organs of government can be “representative” of the people or of their country, in some ways; but the job title of representative connotes a different set of responsibilities than the job title of being a judge. In Hanna Pitkin’s terms, all members of the government can be “representative” in a “symbolic” or “descriptive” sense; but it is the elected representatives—in both the legislature, with which I am concerned here, and the executive—who “act for” the people as their direct representatives. See PITKIN, *supra* note 37, at 112-43.

51. See Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077, 1136-68 (2004) (discussing, inter alia, the Framers’ conceptions of public officials’ fiduciary duties); David L. Ponet & Ethan J. Leib, *Fiduciary Law’s Lessons for Deliberative Democracy*, 91 *B.U. L. REV.* 1249, 1255-58 (2011); D. Theodore Rave, *Politicians as Fiduciaries*, 126 *HARV. L. REV.* 671, 706-19 (2013); see also Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 *QUEEN’S L.J.* 259 (2005); Ethan J. Leib, David L. Ponet & Michael Serota, A

representative refers not only to the obligations of representatives to interpret specific provisions of the Constitution as they are relevant to their official duties—though it would include that—but also, and more generally, encompasses obligations of serving as a representative under the Constitution.

At least three animating ideas of the Constitution are relevant: workable government, constitutional loyalty, and representative legitimacy. First, an important goal of the Constitution was to create an effective, working government.<sup>52</sup> The Articles of Confederation were regarded, by those motivated to come to Philadelphia in the summer of 1787, as unworkable: major legislation and spending required a super-majority vote of the states, which was often difficult to obtain;<sup>53</sup> and states failed to meet obligations to fund the national government.<sup>54</sup> The national government lacked power to regulate its citizens directly,<sup>55</sup> to prevent ruinous economic wars between the states,<sup>56</sup> and to protect the interests of the United States in the international sphere.<sup>57</sup> Amendments of the Articles of Confederation were essentially impossible as unanimity was required.<sup>58</sup> The government lacked an executive head, making expeditious and effective action extremely difficult.<sup>59</sup> The national

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*Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 708-09, 725-26 (2013); *infra* notes 62-71, 110 and accompanying text.

52. See THE FEDERALIST NO. 70, at 354 (Alexander Hamilton) (Ian Shapiro ed., 2009) (noting the “necessity of an energetic Executive”).

53. See ARTICLES OF CONFEDERATION of 1781, art. IX, X, XI (requiring vote of nine states for certain actions).

54. For references to the inadequacy of the system of requisitions from the states in providing revenue for the national government, see THE FEDERALIST NO. 15, *supra* note 52, at 74-75, NO. 21, at 102-06, and NO. 30, at 146-50 (Alexander Hamilton).

55. See THE FEDERALIST NO. 15, *supra* note 52, at 74-75 (Alexander Hamilton).

56. See THE FEDERALIST NO. 7, *supra* note 52, at 35-36 (Alexander Hamilton); see also *id.* NO. 11, at 58, and NO. 22, at 108-110 (Alexander Hamilton).

57. See Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 486-89 (1991) (describing the “geostrategic” vision of the founders, especially in Federalist Nos. 4 through 8, to maintain union and diminish the prospects for adverse foreign influences and foreign and internal wars); see also, e.g., THE FEDERALIST NO. 3, *supra* note 52, at 15-18 (John Jay) (on the dangers of foreign wars), NO. 22, at 109-13 (Alexander Hamilton) (on challenges of waging war, making peace and ensuring compliance with treaties under the Articles).

58. ARTICLES OF CONFEDERATION of 1781, art. XIII.

59. See, e.g., GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 466-67, 521-22, 550-51 (1969) (arguing that establishing an effective national executive was a major purpose of the Framers in 1787).

government was a quite limited, and quite checked, one, but it was also widely seen as ineffective.<sup>60</sup> Thus, an important motivating force for adoption of the Constitution was to create an effective, working government; the extent to which it did so has contributed to its endurance over time. Members of a U.S. government thus have some obligation to maintain a working government, consistent with the spirit of the Constitution.<sup>61</sup>

Second, all elected officials and judges in the United States, including members of Congress, are required by the Constitution to take an oath (or to make an affirmation) to support the Constitution.<sup>62</sup> Although many national constitutions require such an oath, not all do. In Canada, for example, the oath that is taken swears allegiance to the *monarch* without reference to the constitution.<sup>63</sup>

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60. For a helpful overview of some of the challenges the country faced under the Articles of Confederation that provided context for the drafting and adoption of the Constitution, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 25-34, 42-56 (1996). For James Madison's concerns, see GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 9-12 (6th ed. 2009) (reprinting portions of Madison's memorandum of April 1787). For a characterization of governance under the Articles of Confederation as one of gridlock, see Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1109. See also, e.g., THE FEDERALIST NO. 23, *supra* note 52, at 115 (Alexander Hamilton) (arguing that the union required an "energetic" constitution).

61. See, e.g., David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 75-76 (2014) (describing the principle of working and effective government); cf. Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 357, 372 (2011) (arguing that "liberal anxiety today should focus not just on whether our system of checks and balances can safely constrain collective political action, but also on whether the system can ensure that collective action *does* happen when it is necessary" and suggesting that the different organs of government in a divided government constitution can take action designed to "prod" others into action that is needed but not being taken, using as an example litigation over climate change); Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148, 148 (2007), <http://www.yalelawjournal.org/forum/political-avoidance-constitutional-theory-and-the-vra> [<https://perma.cc/2ZY8-Y3WM>] (arguing that "in modern political practice, the flight from political responsibility—the problem of political abdication—is at least as serious a threat" as that of expansion of legislative and executive power).

62. U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."); see Rosen, *supra* note 47, at 378 (discussing significance of the oath in committing officials to the principle of "Republican Legitimacy").

63. See MICHEL BÉDARD & JAMES R. ROBERTSON, PARLIAMENTARY INFO. & RESEARCH SERV., BP-241E, OATHS OF ALLEGIANCE AND THE CANADIAN HOUSE OF COMMONS 1-2 (2008), <http://www.parl.gc.ca/Content/LOP/ResearchPublications/bp241-e.htm> [<https://perma.cc/45TV-W3QQ>] (quoting Section 128 of the Canadian Constitution Act, 1867, which provides that

The idea of the Oath or Affirmation Clause of Article VI of the Constitution is one of loyalty to the Constitution as a whole.<sup>64</sup> The idea of loyalty to the Constitution bears some resemblance to doctrines in other countries. In Germany, the Constitutional Court has found an unwritten constitutional doctrine of “bundestreue”—which is sometimes translated as “profederal loyalty.”<sup>65</sup> Although no doctrine of comparable force has been articulated by the courts in the United States, the idea of something like a reciprocal loyalty among parts to the whole has long been articulated in some U.S. federalism cases, as Daniel Halberstam has shown.<sup>66</sup> Moreover, as Justice Robert Jackson memorably suggested, the design and effective workings of the branches of the national government depend on understandings of “interdependence” and “reciprocity.”<sup>67</sup> Unwritten

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every member of the House of Commons and of the provincial legislatures must take the following oath, set forth in Schedule 5: “I, A.B. do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria”). A note to the Schedule also provides for substitution of the name of the King or Queen, as appropriate. *See id.* at 2 (“As can be seen, the oath is one of allegiance to the monarch, not to Canada or the Canadian Constitution.”).

64. *See* Vicki C. Jackson, *Proconstitutional Behavior, Political Actors, Independent Courts: A Comment on Geoffrey Stone’s Paper*, 2 INT’L J. CONST. L. 368, 368, 376 (2004) (“Political actors play a key role in establishing and sustaining constitutionalism by their decisions whether to engage in ... ‘proconstitutional’ behavior;” defining proconstitutional behavior as “behavior that may not be expressed in terms required by the constitution but that has the purpose and effect of facilitating implementation of constitutional values and commitments”). In that comment I called for the development of a constitutional jurisprudence for nonjudicial actors, *see id.* at 379, towards which the instant Essay represents an effort.

65. *See id.* at 378 (“[T]he idea of governmental duties to behave in particular ways, even if not fully judicially enforceable, is no stranger to modern constitutional discourse.”). On Germany and “bundestreue,” *see* DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 61-75 (2d ed. 1997) (using the word “profederal” as translation of “Bundestreue” in an opinion by the federal Constitutional Court, and elsewhere defining Bundestreue as a “principle of federal comity”). *See also* DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 77-80 (1994) (treating Bundestreue as a “constitutional analog of the general civil-law duty of an obligor to act in good faith”).

66. Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 789-90, 801-16 (2004) (arguing that although the U.S. Constitution has not been interpreted by the Court to establish “a general doctrine of fidelity to hold the system of divided power together,” and is said to rely instead on checks and balances, “a constitutionally grounded concern for the common enterprise is more than occasionally discernible” as in the application of “proper purpose[.]” requirements to taxing and spending measures, in intergovernmental immunities, and in dormant Commerce Clause case law).

67. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1953) (Jackson, J., concurring). Invoking both workability and reciprocity in discussing the “actual art of governing under our Constitution,” he explained: “the Constitution diffuses power the better to secure liberty, [but] also contemplates that practice will integrate the dispersed powers into a

implications from a constitution and its structures to impose duties of good faith and fair dealing on parts of the government exist in other constitutional systems as well, including Canada.<sup>68</sup> The standards of being a “pro-constitutional” legislator will not necessarily give rise to justiciable claims, as the obligations are not limited to conforming to specific constitutional requirements or prohibitions but more broadly embrace how the role of representation is to be carried out. Some important textual provisions have been found nonjusticiable,<sup>69</sup> and others, we know, are “underenforced.”<sup>70</sup> But what the Constitution requires to work goes well beyond the group of issues that the courts can adjudicate. The oath may, indeed, be thought of as an additional “soft” enforcement mechanism, on the premise that men and women will generally take seriously the obligations they publicly avow (or take them more seriously than without such a public vow).<sup>71</sup>

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workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” *Id.*

68. Thus, in the *Secession Reference* case, the Supreme Court of Canada drew on unwritten constitutional principles (as it has in a number of other cases) to resolve questions about the legality of a unilateral secession. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 239-40, 247-63 (Can.). After concluding that a unilateral secession would not be constitutional, it also concluded that if, by a clear vote, a clear majority in one province wanted independence, a duty would arise for the rest of Canada to discuss this with the province. *Id.* at 265-68, 273. Implementation of this duty, the court said, would be for the political organs of government to work out; the duty, then, was only in part justiciable. *Id.* at 271-72.

69. *See, e.g.*, *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 137, 150-51 (1912) (rejecting, as nonjusticiable, a challenge under the Guarantee Clause of Article IV to states’ use of referenda for lawmaking); *Luther v. Borden*, 48 U.S. 1, 42 (1849) (holding a challenge to the legitimacy of a particular state government nonjusticiable under the Guarantee Clause); *see also* *United States v. Richardson*, 418 U.S. 166, 179-80 (1974) (finding that taxpayer lacked standing to challenge asserted violation of the Statement and Account clause of Article I, Section 9 and suggesting that the subject matter was committed to Congress to supervise); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (refusing to adjudicate challenge brought by citizens and taxpayers, under the Incompatibility Clause of Article I, section 6, to Members of Congress serving in the Army Reserve Corps); *cf.* Frederick Schauer, *The Supreme Court 2005 Term—Foreword: The Court’s Agenda—and the Nation’s*, 120 HARV. L. REV. 4 (2006) (noting that much of what is of most concern to the public is not before or decided by the courts).

70. On underenforcement of constitutional norms, see LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES* (2004).

71. *Cf.* Sujit Choudhry, *Popular Revolution or Popular Constitutionalism? Reflections on the Constitutional Politics of Quebec Secession*, in *THE LEAST EXAMINED BRANCH*, *supra* note 27, at 480, 488 (explaining that the *Secession Reference* case “held that the rules were both nonjusticiable and legally binding”). A public oath might also be conceived as an explicit

Third, the Constitution plainly makes elected representation a central pillar of the legitimacy of government. As noted earlier, representatives' legitimacy derives importantly from their being publicly elected, which in turn implies a set of relationships and obligations to their constituents. But the idea of being elected to act as representatives in a collegial lawmaking body in a way faithful to the Constitution might also carry with it another implication—that representatives must behave in a way that is faithful to, that recognizes the democratic pedigree of, the other members of the legislative body. Other members are not enemies, but may be part of the opposition, participating jointly with the majority in the governance project; and a healthy opposition is a necessary component of what Rosen calls the “Republican Legitimacy” of the government under the Constitution.<sup>72</sup>

Many aspects of constitutional structure may affect the role obligations of representatives. Two specific aspects of the U.S. Constitution not already mentioned reinforce the idea that representatives have duties beyond loyalty to the Constitution and their constituents. First, the role of representative can be more or less independent from the constituency during the term of office. In some jurisdictions, elected representatives may be given “instructions” by their constituents, which they are obligated to implement, or are subject to recall elections before their term is over. The U.S. Congress is constituted in a way that is more independent. No provision in the Constitution was made either for binding mandates from the people to their representatives, or for the recall of representatives during the constitutionally specified term.<sup>73</sup> These decisions

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invitation to the public and other constitutional actors to evaluate public office-holders' fidelity to the oath.

72. See Rosen, *supra* note 47, at 376-77.

73. See JACK MASKELL, CONG. RESEARCH SERV., RL30016, RECALL OF LEGISLATORS AND THE REMOVAL OF MEMBERS OF CONGRESS FROM OFFICE 6-7 (2008) (noting the deliberate decision by the Framers not to include recall provisions, such as were included in Article V of the Articles of Confederation, and distinguishing earlier practices under which members of the Continental Congress and colonial legislatures were subject to instruction and recall); CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 41 (2001) (noting “the framers’ explicit rejection of the ‘right to instruct’ representatives” and emphasizing the importance of deliberation in public decisionmaking); see also THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 129-30 (1989) (arguing that rejection of the right to recall Senators at the time the Constitution was ratified represented a conscious effort to remedy defects of the Articles of Confederation, both in

reflect an effort to insulate members of Congress from immediate passions and interests and to promote deliberative decisionmaking in a process involving other representatives from other states and localities.<sup>74</sup> There may thus be a basis for thinking that Senators and House members have a duty to consider fairly the positions and arguments of others in Congress. Moreover, independence during the term of elected office implies the at-once national and local character of the role of representative: duties to a constituency but also duties to the national polity, of which the deliberative process in Congress assembled is an expression.

Second, the role of a representative may differ in a parliamentary and presidential system. For example, in a parliamentary system, if the membership loses confidence in the head of government it is entirely appropriate that they so indicate and resort to new elections. But in a presidential system, the president is elected separately from the members of the legislature, and for a fixed term; the president's legitimacy is not derivative of the legislature's but is in practice as directly from the people as that of legislative representatives; and the legislature cannot terminate a president's term by a vote of no-confidence, as in parliamentary systems. The U.S. Supreme Court has emphasized that the President is the only elected official who can claim to speak for the whole people.<sup>75</sup> Members of Congress, then, may have a duty to recognize the President's democratic legitimacy and to work with him or her in making the government function for the President's term of office, in a way

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failing to have sufficiently national views in the legislature and in paying excess attention to "shortsighted" passions of the people in their states). But although the rejection of recall and instruction reflects a desire for national and independent views, the allocation of representation represented a rejection of the idea that "virtual" representation, divorced from particular interests of particular constituencies, was democratically legitimate. *See generally* WOOD, *supra* note 47, at 3-13 (discussing "virtual representation"). History and constitutional structure thus emphasize the complexity of the role of representatives reflected in the U.S. Constitution.

74. It is worth noting that each House is authorized to expel members but only by a two-thirds vote, U.S. CONST. art. I, § 5, also a form of protection for the independence of members within the body.

75. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2088-89 (2015); *United States v. Curtiss-Wright Exp., Corp.*, 299 U.S. 304, 319 (1936) (quoting John Marshall in the U.S. House of Representatives).

that differs from legislatures' relationships to prime ministers in parliamentary systems.<sup>76</sup>

In sum, just as the idea of being a good federal judge draws in part on general concepts of the role of being a judge,<sup>77</sup> in part on the obligations of judging in a constitutional democracy,<sup>78</sup> and in part on the specific structures of the U.S. Constitution,<sup>79</sup> so, too, does the idea of a “pro-constitutional representative” draw on the general role of an elected representative, on the role of legislators in constitutional democracies, and—when discussing federal representatives—on more specific aspects of the U.S. Constitution.<sup>80</sup>

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76. Mitch McConnell, as Senate Minority leader, “summed up his plan to [the] National Journal: ‘The single most important thing we want to achieve is for President Obama to be a one-term president.’” Andy Barr, *The GOP’s No-Compromise Pledge*, POLITICO (Oct. 28, 2010, 8:09 AM), <http://www.politico.com/story/2010/10/the-gops-no-compromise-pledge-044311> [<https://perma.cc/9M93-SGW4>]. While seeking to defeat the sitting President at the next election is perfectly legitimate as a political goal, it is arguably inconsistent with a representative’s duty to work with the elected President on behalf of the people for this to be the opposition’s “most important thing” to achieve. Cf. THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM*, at xix-xx (2012) (describing the Senate’s blocking enactment of a resolution, previously supported by Republican leadership, to create a bipartisan deficit reduction commission: “Never before have cosponsors of a major bill conspired to kill their own idea .... Why did they do so? Because President Barack Obama was for it, and its passage might gain him political credit.”).

77. Most of the ethical rules believed generally to apply to judges, *see, e.g., supra* notes 14-15 and accompanying text, also apply to federal judges—norms of impartiality, of not having a personal financial interest in a matter under decision, and of engaging in principled decisionmaking. *See generally* Judicial Conference, *Code of Conduct for United States Judges*, U.S. CTS. (Mar. 20, 2014), <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> [<https://perma.cc/ECQ6-7C5N>].

78. *See generally* JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION (Robert Badinter & Stephen Breyer eds., 2004) (describing how a democracy shapes the role of the judiciary); President Aharon Barak, *The Supreme Court 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002).

79. These include the case or controversy limitations derived from language of Article III and its provisions for life tenure and the kind of independence these contemplate. *See* U.S. CONST. art. III.

80. Other differences between representation in the U.S. Congress and elsewhere, and differences between serving in the House and the Senate, are discussed further below. *See infra* Part III.A.



*B. Pro-Constitutional Representatives as Actors Motivated by the Public Good and Elected to Serve the Public Good in Ways Connected to Their Constituency*

Why do people run for office in the first place? At least some are motivated altruistically, to serve the public good as they see it.<sup>81</sup> Although the empirical political science literature seems to be dominated by a model that focuses on voters and voting, legislative votes, and what public opinion polls show about voter preferences, more normatively focused political scientists acknowledge that representatives have opportunities to contribute to or reshape public views, as well as to simply express them.<sup>82</sup> Their motivation to reshape public opinion cannot be accounted for merely by desires to be reelected.

Is the model we sometimes promote in law schools, of purely self-interested representatives calculatedly taking positions and producing laws only to assure their own well-being and reelection, an adequately complete description of what representatives actually do and care about across the range of legislative tasks?<sup>83</sup> Does it fully convey their opportunities to shape the sphere of “public affairs,” their capacity to form, as well as to express or act on, the

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81. For discussion of factors associated with interest in running for office, including family background and related attitudes towards being a good citizen, and ideological passions or general interest in politics, and summarizing related literature, see Richard L. Fox & Jennifer L. Lawless, *To Run or Not to Run for Office: Explaining Nascent Political Ambition*, 49 AM. J. POL. SCI. 642, 645-46, 650 tbl.3, 651 fig.2 (2005); cf. Jennifer L. Lawless & Richard L. Fox, *Just Say Run: How to Overcome Cynicism and Inspire Young People to Run for Office*, BROOKINGS (July 7, 2015, 7:00 AM), <http://www.brookings.edu/blogs/fixgov/posts/2015/07/07-just-say-run-young-people-politics-lawless-fox> [<https://perma.cc/8NX4-V8LB>] (noting that although young people are cynical about politics, young people with more exposure to politics are more likely to consider running for office as they “also see some examples of politicians behaving well, elected officials solving problems, and earnest, well-meaning candidates aspiring to improve their communities”).

82. See, e.g., THOMAS H. LITTLE & DAVID B. OGLE, *THE LEGISLATIVE BRANCH OF STATE GOVERNMENT: PEOPLE, PROCESS, AND POLITICS* 150-51 (2006) (noting that candidates may have multiple motivations for running for elected office, including “the desire to influence an area of public policy”); cf. Robin West, *Toward the Study of the Legislated Constitution*, 72 OHIO ST. L.J. 1343, 1364 (2011) (criticizing assumptions in legal scholarship that legislators do not act “from a genuine desire to serve the general welfare”).

83. See, e.g., HART & SACKS, *supra* note 37, at 696-705 (describing the legislature’s work in some detail as extending well beyond taking discrete votes on discrete pieces of legislation).

preferences of their constituents?<sup>84</sup> Does a motivation to be reelected really explain or account for the full range of activities undertaken and the full range of normative goals a good representative might have?

The activities of being a “representative” go well beyond votes in committee or on the floor.<sup>85</sup> Representatives have opportunities to propose legislation, to participate in shaping laws through negotiation, and to build and develop legislative agendas. They can hold hearings to highlight problems and identify possible solutions. They may develop capacities within the institution to provide expertise, or connections to others, that can help a large institution like a modern legislature function. The desire to be reelected is plainly a motivating factor and a constraint—most of the time for most elected representatives—but it is not an adequate account of the aspirations of being a representative. A focus only on voting for legislation and the chances for reelection (and raising the money necessary to fund an election campaign) may obscure the roles of representatives in the attitude formation process.<sup>86</sup>

Political science tends to be dominated by “positive” questions, asking, for example, about what representatives do and what motivates them. Yet some political theory literature in recent years has focused on the nature of representation (in a way that goes beyond a longstanding focus on the nature of democracy and its institutions).<sup>87</sup> Could more use of this literature—debating various forms

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84. On the capacity of individual members of Congress to command attention from, shape, and influence “the public sphere,” see generally DAVID R. MAYHEW, *AMERICA’S CONGRESS: ACTIONS IN THE PUBLIC SPHERE, JAMES MADISON THROUGH NEWT GINGRICH* (2000).

85. For descriptions of the range of activities, including those mentioned later in this paragraph, see ROGER H. DAVIDSON, WALTER J. OLESZEK ET AL., *CONGRESS AND ITS MEMBERS* 5-6, 110-14, 122-28, 163-202, 245-71, 330-38, 354-64 (14th ed. 2014); HART & SACKS, *supra* note 37, at 696-705; DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 81-158 (2d ed. 2004); MAYHEW, *supra* note 84, at 9; R. ERIC PETERSEN, *CONG. RESEARCH SERV., RL33686, ROLES AND DUTIES OF A MEMBER OF CONGRESS: BRIEF OVERVIEW* 5-10 (2012).

86. For additional discussion of the constructed elements of public opinion and group self-understandings, see, for example, Courtney Jung, *Critical Liberalism*, in *POLITICAL REPRESENTATION*, *supra* note 34, at 139, 149-51; Clarissa Rile Hayward, *Making Interest: On Representation and Democratic Legitimacy*, in *POLITICAL REPRESENTATION*, *supra* note 34, at 111, 112 (arguing that representation should be understood to include responsibility in “shaping political interests in democracy-promoting ways”).

87. Some have suggested that the now classic work by Hanna Fenichel Pitkin, *The Concept of Representation*, see PITKIN, *supra* note 37, may have helped suppress other work until very recently. For more recent work of interest, see the exchanges between Mansbridge, *supra*

of “trustee” or “delegate” understandings, various combinations of both,<sup>88</sup> or other normative approaches grounded, for example, in

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note 40; Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214 (2009); and Jane Mansbridge, *Clarifying the Concept of Representation*, 105 AM. POL. SCI. REV. 621 (2011). See generally SUZANNE DOVI, *THE GOOD REPRESENTATIVE* (2007); URBINATI, *supra* note 26; Andrew Rehfeld, *Towards a General Theory of Political Representation*, 68 J. POL. 1 (2006); Michael Saward, *Authorisation and Authenticity: Representation and the Unelected*, 17 J. POL. PHIL. 1 (2009); Michael Saward, *The Representative Claim*, 5 CONTEMP. POL. THEORY 297 (2006). For useful summaries of developments in theories of representation, see Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387, 388-89 (2008); and Suzanne Dovi, *Political Representation*, STAN. ENCYCLOPEDIA PHIL. (Oct. 17, 2011), <http://plato.stanford.edu/entries/political-representation/> [<https://perma.cc/AC5H-TYEU>]. For a possible reason why political theory has neglected a very important element of representation—the duty at times to compromise—see Mark E. Warren & Jane Mansbridge, with André Bächtiger et al., *Deliberative Negotiation, in NEGOTIATING AGREEMENT IN POLITICS* 86, 93 & n.21 (Jane Mansbridge & Cathie Jo Martin et al. eds., Am. Political Sci. Ass’n Task Force on Negotiating Agreement in Politics, 2013), <http://www.apsanet.org/portals/54/Files/Task%20Force%20Reports/Chapter5Mansbridge.pdf> [<https://perma.cc/2QCF-SLYR>] (suggesting that work on “deliberative” democracy by theorists such as Elster, Habermas, Sunstein, and Rawls tended to treat “bargaining” as necessarily distinct from deliberation).

88. For helpful discussion of different conceptions of representing with different conceptions of democracy, see Jonathan R. Macey, *Representative Democracy*, 16 HARV. J.L. & PUB. POLY 49, 49-50 (1993) [hereinafter Macey, *Representative Democracy*] (opposing the “pluralist” vision of representing one’s constituency with the “guardian” vision of promoting the broader interest of all society). A “trustee” or “guardian” may consider what his constituents think but regards himself as obligated to make an independent judgment in the context of multimember deliberations; a “delegate” generally views himself as more bound by the expressed views of his constituents. *Id.*

As Pitkin has importantly suggested, a representative might think of herself in both ways—not only as having obligations to be responsive to constituents but also as having obligations to think and vote independently. See PITKIN, *supra* note 37, at 165-67. Indeed, Pitkin suggests, being a “representative” requires some oscillation between these two modes so as to render those represented “present” in some way, but recognizing that it is the representative, not the represented, who is actually “present” in a deliberative body, where information is exchanged and views may change through collegial discussion. See *id.* at 144, 165-67; see also Iris Marion Young, *Deferring Group Representation*, in NOMOS XXXIX: ETHNICITY AND GROUP RIGHTS 349, 358 (Ian Shapiro & Will Kymlicka eds., 1997) (agreeing with Pitkin that a representative is both trustee and delegate). For these reasons, in part, Macey is incorrect to say that by rejecting “virtual” representation as a theory, the Framers necessarily rejected a view that sometimes representatives should act more independently of their constituencies, see Macey, *Representative Democracy*, *supra*, at 50, a role concept reflected in the rejection of provisions for recall or instruction of members of Congress. *But cf.* Jonathan R. Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673, 1674 (1988) (stating that the Framers’ plan was to “hope for republicanism” but prepare for pluralism).

the collegial nature of the legislative process<sup>89</sup>—be made in law school classrooms? In an important casebook by Issacharoff, Karlan, and Pildes,<sup>90</sup> materials are included on the debate over “trustee” versus “delegate” views on representation, and on the views of Burke, Aristotle, and others—but generally with a focus on the goals of democracy (whether those goals are seen as idealistic and public-spirited, seeking a common good, or rather more centered on regulating a power competition among economic (or other) groups) and with attention not so much on the normatively good legislator but on the normative justification for democracy itself. Of course, the two are closely linked: one cannot have a conception of a good legislator without a normative concept of democracy and of what the legislature as a body should do.<sup>91</sup> But there are benefits to be had from focusing some discussion on what the elected representatives themselves ought to be thinking about, if they are to regard themselves and be regarded by others as good representatives.

Although there are formalist conceptions of being a representative that require nothing more than formal authorization,<sup>92</sup> the job of “representative” is not just to appear, not just to vote, but more generally to *act* as a representative. Unlike judges, who in our society act only when parties call on them to do so by initiating some regularized procedure, it is a mistake to think of representatives as

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89. Cf. THOMPSON, *supra* note 41, at 96-97, 99-102, 105-14, 122 (exploring significance of fact that legislators have little control over who the other legislators are, but can enact legislation only by acting collegially, and arguing that legislators’ ethical obligations may vary depending on where in the legislative process an issue arises).

90. SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 10-13 (4th ed. 2012); see also DANIEL H. LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 11-14 (5th ed. 2012) (excerpting Edmund Burke’s speech, which raises normative questions of the representative’s self-conception). For discussion of other casebooks, see *supra* notes 35, 37.

91. On differences between the qualities of a legislature and the qualities of its members, see Vermeule, *supra* note 30, at 40 (suggesting that, for example, the biases of individual members of a collective body may cancel out, depending on their distribution).

92. As noted earlier, Pitkin offers four distinct views of representation—a “formal” view, in which the mere fact of authorizing is what makes someone a representative; “symbolic” representation, in which a representative “stands for” the represented (measured by how much the representative is accepted by her constituents); a “descriptive” understanding, in which the question is how much does the representative resemble her constituents; and a “substantive” view, in which the representative “act[s] for” her constituents, that is, by advocating for them. PITKIN, *supra* note 37, at 38, 60, 92, 112. This summary of Pitkin also draws on Dovi’s entry in the *Stanford Encyclopedia of Philosophy*. Dovi, *supra* note 87.

merely showing up and voting. Representatives need to act—to make provision for laws that will enable programs to move forward, presumably for the welfare of their people, and to monitor the effectiveness of already-enacted laws.<sup>93</sup>

Cass Sunstein emphasized a related point about constitutions years ago—that they are designed not only to constrain, but also to empower and facilitate governance towards good public ends.<sup>94</sup> Elected representatives help carry out or enable such governance. And the carrying out that is implicit in the holding of a constitutional office is facilitated by a set of “pro-constitutional” representative functions and attitudes that warrant the attention of constitutionalists.

In 1787, after the U.S. Constitution was drafted, several noteworthy things happened. Ratifying conventions were in fact organized and held; attendees debated and reached conclusions by substantively voting on the measures.<sup>95</sup> Once the Constitution was ratified, elections for national office were also actually held. Once representatives were chosen, they trekked—no small thing—to New York to meet in the new Congress. And while there, they legislated into existence a national government.<sup>96</sup> The point at which I am driving is that it took a willingness to commit, to act, on behalf of the people to make the constitutional government come into being and work.

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93. Even if most legislative drafting is done by staff or by outsiders including lobbyists, see, e.g., Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 906, 916, 983-84 (2013); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 583 (2002), it is the elected representatives who bear responsibility for both initiating and ultimately voting on proposed legislation.

94. Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 635 (1991).

95. For a widely praised historical account of the ratification period, see PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION* (2010). For an account of James Madison’s work in the Constitutional Convention, in the Virginia ratifying convention, and as an elected representative to Congress in urging adoption of rights-protecting amendments, see JACK RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA* 366-95 (2010).

96. On the activities of the First Congress, see generally David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161 (1995). I am not suggesting that these actions and the attitudes that underlay them sprang from nowhere; the individual states (and before that, colonies) and the national government organized under the Articles of Confederation provided experience in governing.

The importance of pro-constitutional action is evident in several contexts. U.S. federal elections have always been held on schedule, even during war. When opposition parties won, power has been handed over; even when it was questionable, power has been handed over upon the decision of an apparently authorized institutional decisionmaker.<sup>97</sup> For another example: the U.S. Census, which is in some ways a necessary part of the infrastructure for the democratic, constitutional legitimacy of the House of Representatives, has always been taken every ten years, as called for in the Constitution.<sup>98</sup> My point is not that the political branches always comply with their constitutional duties, as there have been derelictions in the past, and perhaps today; my point here is that it is possible to have a conversation about the obligations of elected representatives under the Constitution that has no connection to what courts will be able to decide. Indeed, it is one of my claims that an under-appreciated responsibility of elected representatives is to continue the never-ending task of participating in making a government that works.<sup>99</sup>

Robin West has vigorously argued that law schools should refocus attention on legislators.<sup>100</sup> I share some of her concern about the “unchecked valorization” of the judge as compared to the legislator.<sup>101</sup> As she notes, casebooks and law school corridors are bedecked

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97. Thus, *Bush v. Gore*, 531 U.S. 98 (2000), was treated as resolving the presidential election by the loser of that decision, Vice President Gore, notwithstanding that the Court was closely divided and that Gore had won the popular vote. See *2000 Presidential Election, Popular Vote Totals*, NAT'L ARCHIVES & RECORDS ADMIN., [http://www.archives.gov/federal-register/electoral-college/2000/popular\\_vote.html](http://www.archives.gov/federal-register/electoral-college/2000/popular_vote.html) [<https://perma.cc/SLE3-VP46>] (last visited Mar. 30, 2016). On the election of 1800, in which for the first time the presidency changed from one political party to another, and on the contested election of 1876, see Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985, 2000-06 (2003).

98. MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 2 (1988); see U.S. CONST. art I, § 2, cl. 3. This is not always true in democracies; compare Tennessee's failure to reapportion itself between 1900 and the time of the decision in *Baker v. Carr*, 369 U.S. 186 (1962). See *id.* at 191.

99. On how the design of the Constitution should be understood to promote not only checks on government but also effective and working government, see Pozen, *supra* note 61, at 75-77; cf. Webber, *supra* note 47, at 411 (“[C]onstitutions are not primarily about limiting government. Their first role is to constitute government: to specify the processes by which public decisions are made.... This is a positive role, a role that *enables* public action, not one that is adequately captured through the concept of limits.”); Sunstein, *supra* note 94, at 635.

100. See ROBIN L. WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* 111-14 (2014); West, *supra* note 36.

101. West, *supra* note 82, at 1363.

with pictures of judges—“Oliver Wendell Holmes, Learned Hand, and Benjamin Cardozo,” but not of great orators or legislators—“from Cicero to Ted Kennedy, from Daniel Webster to Orrin Hatch.”<sup>102</sup> As portrayed in law schools, she argues, judges debate, deliberate and reason, based on “encyclopedic knowledge” and with an eye on the future; the legislator “reacts to constituent desire on the basis of his desire to stay in their good graces.”<sup>103</sup> These ideas of the good judge and the bad legislator are related to the idea that “law,” which comes from courts, is good, and “politics,” which produces statutes, is bad.<sup>104</sup> Just as the Realists and the Critics have opened eyes to the fact that judging is not only about principle, but also about politics, so, she argues, we should look for the “legalist impulse in politics.”<sup>105</sup> “We have not shifted our baseline assumption that politics is lacking in reason. We do not assume [that] legislators ... [may have] a genuine desire to serve the general welfare; that the legislator can be reasonable, and principled, and judicious ....”<sup>106</sup> Although I would not go so far as to say that legislators can be as “principled” as judges—indeed, I do not think that is their job description—I agree with West that our approach in the law schools has failed to recognize the often “genuine desire to serve the general welfare” that motivates people to seek public office in the first place and that continues to animate at least some of what they do in public service. She writes with particular force that because the center of what judges see as their calling is to treat like cases alike, the courts have construed equal protection as a negative constraint requiring legislators to engage in “rational sorting;” in legislative hands, she argues, a “legislated constitution” of obligation to assure equal protection might, and indeed should, look very different.<sup>107</sup> And, in ways consistent with work on the Constitution outside the courts, by Mark Tushnet, Larry Kramer, and others,<sup>108</sup> she urges

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102. *Id.* at 1347.

103. *Id.* at 1362-63.

104. *See id.*

105. *Id.* at 1364. For a thoughtful effort to reveal and understand the “legalism” in congressional lawmaking through the “rules” for legislation in Congress, and their connection to understanding what a piece of legislation means, see Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 *YALE L.J.* 70 (2012).

106. West, *supra* note 82, at 1364.

107. *See id.* at 1359, 1366.

108. *See, e.g.,* LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM*

law schools to ask what a “legislated constitution”—that is, a constitution given meaning through legislative acts (statutes) and interpretations—would look like.<sup>109</sup>

What I would like to add to this is the idea that legislators, like judges, have some core obligations at the heart of their calling as legislative representatives in a constitutional democracy. As noted earlier, these core obligations are quite different from the core obligations of judges in important respects. Moreover, the obligations of representatives are in real tension with each other, embracing as they do both responsiveness to constituents and responsibility for the public welfare of the country as a whole, as well as responsibilities to comply with constitutional constraints and mandates.

Part of the core “mandate” of being a representative in a constitutional democracy is, in some respects, trans-substantive—it is to act on behalf of and as if they are a part of a working, ongoing government that will continue to function beyond their term, on behalf of a society that likewise has existed in the past and will exist in the future. In this respect, then, I want to draw some distinction between the idea that the Constitution contemplates affirmative (albeit nonjusticiable) obligations for those it calls “representatives” or “senators,” and the substantive content of those obligations. That is, one could have a very different conception of what affirmative measures the Constitution requires than those for which Professor West argues, but still agree, in principle, that legislators have affirmative obligations under the Constitution and as elected representatives towards the future—the future of one’s constituency, of one’s institution, of one’s country, and, increasingly, the future of the interconnected world.

So, the idea of “pro-constitutional” behavior includes participating in making and maintaining a government that works under the Constitution.<sup>110</sup> This is an obligation, whether one is in the majority

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AND JUDICIAL REVIEW (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

109. See West, *supra* note 82, at 1365-66.

110. Cf. STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 178-79 (1995) (writing on the “positive constitutionalism” of John Stuart Mill and his conception of “the creative rather than merely protective functions of liberal-democratic institutions”). Holmes argues that Mill envisioned representative government as a process of “public learning” and representative institutions as locations to advance “publicly useful



or minority. It is part of what the Constitution contemplates is entailed in being a “representative” or “senator” who is “elected by the people” to serve in the Congress of the United States. Opposition is essential to democratic government; it is essential that opposition not be equated with “disloyalty.”<sup>111</sup> But the idea of pro-constitutional behavior suggests that opposition must be conducted in ways consistent with the obligation of all constitutional officers to participate in making constitutional government work, rather than to make constitutional government fail.<sup>112</sup>

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knowledge.” *Id.*

111. See Jeremy Waldron, *The Principle of Loyal Opposition* 1-2 (N.Y. Univ. Sch. of Law, Pub. Law Research Paper No. 12-22, May 2012), <http://ssrn.com/abstract=2045647> [<https://perma.cc/W7RP-EFFW>]; see also David Fontana, *Government in Opposition*, 119 *YALE L.J.* 548 (2009) (describing various constitutional mechanisms for sharing power with electoral losers, including minority parties). For this reason, attitudes expressed during the apportionment process on both sides of the political spectrum about injuring the opposing party through gerrymandering are, if understandable, also concerning. See Rosen, *supra* note 47, at 375, 377 (quoting statements by legislators engaged in redistricting).

112. Waldron evidently would not treat the idea of a loyal opposition as imposing any constraints on what the opposition does; indeed, he seems to reject all efforts to fill in the term “loyal to what,” and emphasizes instead the message to those with a majority of the loyalty of the opposition. Waldron, *supra* note 111, at 31-41. Yet, as he describes the idea of the loyal opposition in Britain, it is an opposition, fierce and partisan to be sure, but one that is also “disciplined” by the responsibility to be ready to take over the government and run it. See *id.* at 11-14. Thus, Waldron notes that, apart from critiquing and holding accountable the existing government, the main role of the opposition is “to prepare for government,” and he suggests that “this duty—to provide a government-in-waiting—affects the way in which the duty to criticize is performed.” *Id.* at 13. The need for a “consistent program,” the paper suggests, imposes a certain responsibility. See *id.* at 13-14. Waldron quotes Sir Ivor Jennings on how “[i]rresponsible opposition is not part of democratic government,” and Burke on the benefits of a “regulated rivalry,” arguing that what regulates the competition is not loyalty as such but the prospects of actually having to govern. *Id.* at 14-15.

*C. Defining Pro-Constitutional Attitudes and Responsibilities*<sup>113</sup>

The task of defining “pro-constitutional” behavior for elected representatives is more complex than the analogous task of defining pro-constitutional behavior for judges. The ethics, virtues, and desirable attitudes or habits of mind of an elected representative cannot be expected to overlap entirely with those of a judge; they are different roles, with different tasks. Some lines are drawn with relative clarity about the role of a judge—to be principled, consistent, and impartial. For a representative, it seems much harder—what is the core? Ian Shapiro writes:

If representatives follow Burke’s ... admonition not to sacrifice their judgment to the opinions of their constituents, they are vulnerable to charges of elitism, yet if their actions reflect the vicissitudes of public opinion, then they are “pandering.” In short, representation is an elusive notion in democracies, a seemingly inevitable practice whose legitimacy is inescapably suspect.<sup>114</sup>

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113. A caveat: Much of the recent political science literature focuses on forms of political representation that are not authorized through territorial constituencies’ voting. I am focused here primarily on only one particular form of being a political representative: being an elected member of the legislature from a single constituency in the U.S. separation of powers system. There may be differences in the responsibilities and duties—or in the balance among the obligations—of representatives selected through party lists in a proportional representation system and representatives in single constituency winner-take-all elections. There may also be differences in the balance of obligations for members of legislatures in a parliamentary system and those in a separation of powers system. I will try to address these briefly in Part III. And there may be differences in the obligations of representatives who are not elected (for example, heads of self-designated NGOs that are active in the legislative arena) or who are not selected in a constitutional democracy. These important issues are beyond the scope of this Essay.

114. IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 58 (2003); see Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), in 1 *THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE* 442, 446-48 (Henry G. Bohn ed., 1854). Shapiro praises Joseph Schumpeter’s insight that, in a representative democracy, “power is acquired only through competition and held for a limited duration” and efforts to control power occur through the incentives of competition; when many offices are noncompetitive, however, the theory does not hold. SHAPIRO, *supra*, at 57. This “competitive” model provides a conception of representation that will, at first thought, seem only rarely to support a representative’s exercise of judgment that is independent from what the representative believes her constituents want or will accept. Yet the recognition that a representative may try to lead public opinion gives considerably more substance to the possibility of an “independent” model of representation within a competitive system.

What, if any, norms of impartiality towards all constituents or the whole country, do members have? Would we really want representatives who are as “principled” in their actions in public office as judges? That the Constitution subjects representatives but not judges to frequent elections suggests not.<sup>115</sup> Do we rather want representatives who can work with, and compromise with, other representatives to produce a product (legislation) that can function as law?<sup>116</sup> Accountability, to be sure, is an important part of being a representative—but to whom or what? to the people who voted for the representative or to the whole constituency? to the country as a whole or to her political party? to the legislature of which she serves as a part? or even, to a limited extent, to those beyond the country who are affected by her action or inaction? “Accountability” has something of an “after-the-fact” quality to it. Is there more to being a good representative than being accountable to the right constituencies or stakeholders?

I am not sure there is one single normative conceptualization that will capture the range of ways of being a good representative and the range of considerations that inform judgments of the right course of action for a conscientious representative.<sup>117</sup> There are, of course, the “shalt nots”—thou shalt not take bribes for legislative votes, nor engage in extortionate misuse of the office. There are also the important constitutional “shalt nots”—thou shalt not pass a law abridging the freedom of speech, or establishing religion.<sup>118</sup> Such constitutional commandments certainly embrace a role for representatives themselves to develop an understanding of what those constitutional limits are.

But what are the positive “thou shalts”? What does it mean to give a good account of oneself as a representative in a constitutional

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115. Compare U.S. CONST. art. I, § 2 (elections every two years for members of House of Representatives), with *id.* art. III, § 1 (judges to hold office during good behavior). The oft-made claim that legislation (and legislators) can draw arbitrary lines that courts are forbidden to draw leads to a similar conclusion.

116. See Russel Hardin, *An Exact Epitome of the People*, in *THE LEAST EXAMINED BRANCH*, *supra* note 27, at 33, 37 (“A legislature is a compromise.”).

117. Moreover, as suggested above, the balance of obligations (that is, which obligations weigh more heavily) may be quite different depending on the particular kind of representative system in which one serves: for example, for one elected as a representative from a single-member district in a system like that in the United States and for one elected as a representative on a party “list” in a proportional representation system. See *infra* Part III.A.

118. See U.S. CONST. amend. I.

democracy?<sup>119</sup> in a constitutional democracy built on commitments to divisions of power, checks and balances, federalism, the protection of liberty and of the fundamental equality of all members of the polity?

*1. Acting as Part of Ongoing Government*

As argued in Part II.B above, perhaps one could say that an elected representative has some obligation to make the government in which she serves work for the people—that is, to govern, to act, rather than simply to obstruct. I recognize that a representative may have a conception that obstructing “big government” projects, or some trends, is both the right thing to do and what she was elected to do. But even so, standing for Congress and being elected surely can be understood to carry with it an obligation to participate, affirmatively, in governance, even if only for those most basic functions of a state, and those required, implicitly or explicitly, by the Constitution (for example, to provide for a census every ten years, or to guarantee a republican form of government).<sup>120</sup>

*2. Being Sufficiently “Present” to “Represent”*

Second, we might say that representatives have some obligation to be sufficiently active and present in the legislature so as to achieve some minimum level of in fact “representing”: making their constituencies—with their mixes of views, values, interests, and conflicts—“present” in the larger body so that the larger body’s work has democratic legitimacy vis-à-vis individual constituencies.<sup>121</sup> In these capacities as a representative of a particular constituency and as a member of the larger legislative body, a representative may have obligations both to deliberate with other legislators and to advocate for particular goals or positions.<sup>122</sup> Likewise, being present as

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119. For one kind of answer, see DOVI, *supra* note 87, at 7, 65, 88-92, discussing the idea of “democratic advocacy” as an obligation of the good representative, and discussing the “virtues” of “fair-mindedness” (picked up on below), “critical trust building,” and “good gatekeeping.” Her account has influenced some of what follows.

120. *But cf.* Pildes, *supra* note 61 (noting “avoidance” and abdication of responsibility by elected representatives).

121. See PITKIN, *supra* note 37, at 8-9 (discussing “making present” those represented).

122. See DOVI, *supra* note 87, at 7 (discussing advocacy role); *see also* URBINATI, *supra* note

a representative may imply obligations to check and question initiatives of the executive branch, to monitor and provide oversight of existing programs, and to consider the need for legislative change.<sup>123</sup> Some of these obligations might be captured under the idea of “responsiveness” to constituents. Such responsiveness might be seen as having dual components: developing and advancing policy preferences of constituents while limiting developments that ones’ constituents oppose, and, in the U.S. system, providing constituent service on individual matters, as discussed further below.<sup>124</sup>

### 3. Being “Responsive” and “Accountable”

Third, some core responsibilities of listening to, advocating for, and providing information to voters may derive from being a democratically elected representative who can remain in office only by winning a (presumptively, if not actually) competitive election.<sup>125</sup>

Part of the core of being a representative is to be “accountable” to one’s constituency, which is not necessarily the same as being “responsive” in the sense of advocating for constituents’ immediate preferences. One can debate the balance between the “responsiveness” and the “independence” that is normatively desirable and

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26, at 44-48 (linking advocacy roles of representatives to the possibility of legislation reflecting judgments about what is just). On deliberation as part of a larger body, see MANN & ORNSTEIN, *supra* note 2, at 170-73 (expressing concern about decline in genuine deliberation); *id.* at 125-39 (noting, inter alia, House Democrats’ efforts in the decade before 1994 to “deny the minority Republicans opportunity to participate in any meaningful fashion in the legislative process” and strategies by Republicans under the George W. Bush Presidency to exclude Democrats from congressional processes). Whether one’s ideal is of a competitive democracy based on aggregation of preferences, or of a more deliberative democracy based on reason and democratic values, see DOVI, *supra* note 87, at 18-21, good representatives must be able to talk and exchange information with their opponents. See ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL* 6-7 (2007).

123. For concerns about a decline in oversight by Congress, see MANN & ORNSTEIN, *supra* note 2, at 151-58 (attributing this decline to a decline in institutional identity).

124. For one study suggesting that responsiveness to individual constituent problems has increased (or not decreased) while collective “responsiveness” to public views has declined, see Stephen Ansolabehere et al., *The Vanishing Marginals and Electoral Responsiveness*, 22 BRIT. J. POL. SCI. 21, 27-36 (1992); for further discussion see Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 660 (2002).

125. On the importance of actual competition to democratic legitimacy, see Issacharoff, *Gerrymandering*, *supra* note 34, at 620-30.

politically possible for elected representatives to enjoy. But on any theory of the role of a representative in a democracy, representatives must be accountable to voters in some way. And any form of accountability requires that the voters be able to evaluate their representatives' work—whether representation is seen as a “promissory” grant of authority, in which the voters look back to see if their representative fulfilled promises; a more “anticipatory” model, in which a representative tries to anticipate voters' views at the time of the next election; or a more “gyroscopic” form of representation, in which the constituency trusts the representative to make independent decisions but retains the power to not reelect the representative if her account of her actions as a representative is not satisfying.<sup>126</sup>

Some argue that the “accountability” function is best satisfied by direct communications by the representative—for example, over the Internet or social media—explaining each of her votes or other actions to the voters.<sup>127</sup> But few would argue—on *any* theory of being a democratic representative—that there is no need for any flow of opinion and information to and from voters about the representative's performance.<sup>128</sup>

Information flow, then, about the issues confronting our government and the position of different parties or candidates on those issues is essential. Whether one conceives of elected representatives

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126. These terms are drawn primarily from Mansbridge, *supra* note 40, at 515. Per Mansbridge: “Promissory” theories view the representative as having an obligation to keep promises made to constituents; if the representative fails to do so, the sanction is not being reelected. “Anticipatory” approaches envision the representative as having an obligation to anticipate what her constituents will approve of at the next election. Each of these could be understood as a form of a “mandate” or “delegate” model of representation. *See id.* In “gyroscopic” representation, a theory developed by Mansbridge, representatives reach decisions without much conscious regard for their representatives' views; if the voters select a representative who mirrors them, a gyroscopic representative will reflect their views while exercising independent judgment. *See id.* at 522. Gyroscopic models, combined with a focus on voters' powers of selection, may be seen to produce a non-elitist version of Burke's “trustee” model. *Id.*

127. Steven I. Jackson, *Conversational Representation: Positive Expectations for Representatives* (Aug. 26, 2014) (unpublished manuscript) (on file with author) (discussing “conversational” model of representation).

128. *See* URBINATI, *supra* note 26, at 49-52 (developing the ideas of “representativity” and “reflexive adhesion,” and linking them to Benjamin Constant's theory that political representation has two levels—representation of the people's will as expressed in elections and representation of changes in public opinion between elections).

as subject to voter mandates or after-the-fact voter accountability,<sup>129</sup> or of representative government as serving the public good through interest group pluralism or through more deliberative conceptions of democracy,<sup>130</sup> information flow permitting evaluation of competing options (including, where an incumbent is running for reelection, her performance in office) is critical.<sup>131</sup>

It is not only the obligation of accountability that implies obligations to listen, to respond, and to provide information. Without information flows, a representative cannot—during her term in of-

129. See, e.g., Bernard Manin et al., *Elections and Representation*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION, *supra* note 49, at 29, 29-54.

130. Compare ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (expanded ed. 2006) (illuminating interest-group pluralist accounts of democracy under which representative democracy works through coalitions based on the interests of different groups), and DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS (1951), with AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996), BEYOND SELF-INTEREST (Jane J. Mansbridge ed., 1990) (a collection of essays “reject[ing] the increasingly prevalent notion that human behavior is based on self-interest, narrowly conceived” as citizens, legislators, and other constitutional actors, *id.* at ix), Michael J. Sandel, *The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues*, 66 FORDHAM L. REV. 1 (1997) (defending civic republicanism), and Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) (emphasizing “civic virtue” in participatory self-government). Cf. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269-83 (Harper Colophon 1975) (1942) (envisioning the best form of democracy as one characterized by “a competitive struggle for the people’s vote” to choose competing elite leadership rather than broader forms of participation). Neo-liberal accounts may be treated as theories of democracy, but they can perhaps be better viewed as theories of liberal protection of economic values based on the market.

131. See BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 197-98, 205-06 (1997) (emphasizing the importance of “trial by discussion” where one party tries to change the opinions of another based on impersonal or long-term factors); see also SUNSTEIN, *supra* note 73, at 3-47 (explaining the need for deliberation, both with those who are like-minded (as in “enclave deliberation” by marginalized groups) and with those who are not (because heterogeneity in deliberative groups helps counteract polarization tendencies)); cf. Schacter, *Political Accountability*, *supra* note 27, at 52-53, 70-72 (noting arguments that the collective public’s ability to evaluate candidates may be improved by even a few voters (the “attentive public”) who are well informed, but concluding that this possibility does not redress asymmetries in information that prevent any simple conclusion that electing legislators provides sufficient democratic legitimacy through accountability). Manin notes the significance of shared understandings of facts made possible by “neutral” channels of communication. He contrasts French public opinion at the time of the Dreyfus affair—which, he argues, was divided as to the facts because political parties controlled the media which people read—with Watergate, when there was a shared sense of the facts among people of different parties because, Manin asserts, the principal media of communication were not controlled by political parties. See MANIN, *supra*, at 228-29. If, today, more people receive their information from like-minded channels of communication affiliated, this poses more of a challenge to the kind of exchange on which both interest-based and deliberative/civic virtue-based theories depend. See SUNSTEIN, *supra* note 73, at 35-36.

fice—well fulfill her obligations to advocate for the interests of one’s constituents as they understand them, or to advocate to one’s constituents what the representative believes the best understandings or solutions to problems may be. Thus, understandings of representatives as “acting for” their constituents, in Pitkin’s terms, also require regular and two-way information flows.<sup>132</sup>

#### 4. *Providing Assistance Fairly and Impartially to Constituents*

Fourth, do members of Congress, as representatives, have obligations to provide their constituents with assistance in dealing with other parts of the government, such as executive branch agencies? Should these obligations be conceived as arising out of the representative-constituent relationship, or also (or rather) as reflecting a “checking” function of legislators on whether executive departments are properly carrying out the laws?<sup>133</sup> And if assistance is provided to some constituents, must representatives offer comparable assistance on a nonpartisan basis to others? That is, do members of Congress have obligations of fairness in dealing with their constituents,<sup>134</sup> even those with whom they disagree?<sup>135</sup>

Supreme Court Justices have said that “[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as

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132. On representatives’ obligations between elections, see *supra* notes 121-22. Recognizing the need for information flows does not negate the need to be able, at times, to conduct discussions and negotiations outside the public eye. On the benefits of secrecy for good deliberation and deal-making in the process of governance, see Pildes, *supra* note 41, at 845-49. See also Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 410-12, 413-14 (2000) (noting, in contrasting U.S. and French experience in late eighteenth century in drafting constitutions, benefits of secrecy in drafting constitutions, including enabling both tentative exploration of positions and hard bargaining).

133. Cf. HART & SACKS, *supra* note 37, at 702 (describing members of legislatures as having the “job of serving as intermediary between constituents and the numerous branches of the executive department with which they have to deal” and suggesting that “[i]n an important sense, the Congressman carries the responsibility here to see that the executive action is lawful”). See *supra* note 123 for recent concerns about the oversight function.

134. On the advantage of single-member districts in strengthening the relationship of representative to constituents, see Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205, 229-31; Gerken, *Second-Order Diversity*, *supra* note 4, at 1135.

135. See Warren & Mansbridge, *supra* note 87, at 92-93 (defining fairness as an element of just public deliberation, in terms of including all affected interests in the discussion).



much opportunity to influence that candidate as other voters in the district.”<sup>136</sup> If so, would representatives have obligations of fair dealing with all their constituents? If, as the Court recently recognized, “partisan gerrymanders” are incompatible with democratic principles,<sup>137</sup> would partisan limits on constituent assistance also be incompatible with democratic principles? With the fundamental equality of all members of the polity?

An obligation of fair dealing may arise when constituents come to their district or state representatives with requests for assistance. But such an obligation might also be relevant when thinking about representatives’ duties to communicate, noted above and elaborated on below.

Are there obligations of fairness in providing information to constituents about policy issues in order to influence their judgment, or in seeking to win election or reelection? That an obligation of impartiality may exist for some functions does not necessarily mean it exists for others. It surely is the case that democracy can benefit from passionate, one-sided presentations on various issues; a free press and freedom of speech can help to secure this possibility. Are representatives in some sense more like legal advocates, legitimately arguing for one position?<sup>138</sup> Do they have obligations of accuracy in so doing? Or do representatives have special obligations of fairness in the discussion and presentation of information relevant to the public? Do they have an obligation to avoid providing information so one-sided as to be “propaganda”? Or is such one-sidedness a normatively neutral or good activity given the welter of other sources and potential rivals? However one answers questions about obligations of accuracy and avoidance of dishonest statements, it seems a category mistake to translate duties of impartial-

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136. *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (White, J., plurality opinion). In the next sentence, Justice White seems to equate representing the losers’ interests adequately with anything short of entirely ignoring them: “We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters.” *Id.*

137. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015).

138. *Cf. URBINATI*, *supra* note 26, at 40-48, 58 (arguing that democratic representatives should be understood to have a double identity—one of a passionate partisan or advocate, one more general and deliberative—and that representation requires “proportionality” in representation in the sense of situated citizens’ views being heard and considered).

ity (which may be applicable to functions like constituent assistance) into the campaigning for competitive electoral office.

### 5. *Exercising Opinion Leadership*

Fifth, do representatives sometimes have obligations of opinion leadership?<sup>139</sup> One-way models of transmission of constituents' preferences do not seem accurately to capture what many representatives do. On at least some issues, some representatives might see themselves not merely as faithful reporters, recorders, or transmitters of constituents' views, but as being in a conversation with constituents, in which appropriate and better views are worked out. Representatives' views are informed not only by their constituents but also by what they learn, from other representatives in Congress or from outside experts or lobbyists.

People motivated to run for office are likely to have some issues about which they care deeply and have real knowledge. Should representatives exercise efforts at opinion leadership when, for example, their constituencies' understandings of their own interest are, in their representatives' judgment, formed in too short a time frame? Do representatives have affirmative responsibilities to speak out and provide information that assists in legitimate opinion formation towards the goal of constitutional, effective, and workable government? At least at times, one would expect a good representative to seek to provide information in support of guiding her constituency to a better informed view.

### 6. *Engaging in Compromise*

Sixth, do representatives ever have an obligation to compromise?<sup>140</sup> This may be an especially difficult question for constitutional

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139. Cf. Issacharoff, *Gerrymandering*, *supra* note 34, at 622 (arguing that important measures of political legitimacy from competitive elections result when candidates or parties "are forced to attempt to educate and influence the voting public, and are in a deep sense accountable to changes in the preferences of the electorate").

140. See generally AMY GUTMANN & DENNIS THOMPSON, *THE SPIRIT OF COMPROMISE* (2012). For discussion of compromise in U.S. constitutional law, see Sanford Levinson, *Compromise and Constitutionalism*, 38 PEPP. L. REV. 821, 826-27 (2011) (applying Avishai Margalit's distinction between compromise and "rotten" compromise); Carrie Menkel-Meadow, *The Variable Morality of Constitutional (and Other) Compromises: A Comment on Sanford*

law professors to consider in a discussion of what being a normatively good constitutional legislator entails; the influence of judicial modes of decisionmaking according to principles of consistency may lead us to believe that compromise is always (or usually) a bad thing. Whether judges on multi-member courts should compromise to produce a unified opinion or write separately is a question that continues to provoke disagreement and discussion. But for a multi-member, heterogeneous democratic legislative assembly, the “spirit of compromise” is an essential attribute to get done the public’s work of governing; or, it is essential unless a single mindset has a very dominant majority in the legislature, a situation that can bring with it other problems in a democracy.

As Warren and Mansbridge put it, “the capacity to act is an integral part of the meaning of democracy.”<sup>141</sup> Legislatures that lack the capacity to negotiate and compromise will have a difficult time fulfilling the basic functions of legislatures in a democracy.<sup>142</sup> This may not mean that every legislator must have the spirit of compromise, but enough members must in order to enable the legislature to work.<sup>143</sup> Legislators that lack the ability to engage in good nego-

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*Levinson’s Compromise and Constitutionalism*, 38 PEPP. L. REV. 903, 905 (2011) (arguing that “compromise is sometimes a moral good in itself”); see also Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 955 (2000) (arguing that some constitutional provisions represent “compromises,” and some represent “principles” and should be interpreted accordingly); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1945, 1978-79, 2003-05, 2008-13 (2011) (arguing, in part, that the Constitution is a “bundle of compromises,” whose provisions should be understood through ordinary rules of statutory interpretation). For a more general take on compromise, see ROBERT MNOOKIN, *BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT* 3-4 (2010) (rejecting “categorical answer[s]” to the question posed by the book’s title).

141. Warren & Mansbridge, *supra* note 87, at 86.

142. See Pildes, *supra* note 41, at 845 (“[E]ffective governance inevitably requires negotiation, particularly in our separated-powers system.”).

143. On the “decline of compromise” in the Congress, see Carl Hulse & Jeremy W. Peters, *Struggle over Government Funding Points to the Decline of Compromise*, N.Y. TIMES, Dec. 13, 2014, at A10 (“The near collapse of a critical government-wide funding bill that now faces a Senate test underscored a fundamental problem with Congress—the lost art of compromise.”). Hulse and Peters also report how “[s]easoned lawmakers and congressional aides watched in amazement the near failure of a measure that was endorsed by the majority leadership of both the House and the Senate and President Obama” and indicate that both partisanship and procedural irregularities “have taken a significant toll on the ability of the House and the Senate to get things done.” *Id.*; see also Barr, *supra* note 76 (noting House Speaker Boehner’s declaration of a refusal to compromise). Although a well-functioning legislature can be made up of members who are more and less willing to compromise, when any compromise is viewed

tiation processes will fail to reach compromises that would have substantial public support and advance the common good. Thus, in Warren and Mansbridge's terms, such gridlock reduces the "normative legitimacy" of the legislatures.<sup>144</sup> Of course, political parties with large enough majorities may be able to act effectively with less compromises than those with more narrow majorities; but absent a situation of single-party dominance and high intraparty agreement, compromise will usually be necessary to enable legislatures to act.

An obligation to be willing at times to compromise, moreover, might also draw support from the fact that all members of the legislature have been elected by the people of the overall nation. The political equality of members of the polity and their equivalent stake in the enterprise of ongoing governance may entail obligations of respect for co-legislators, which would in turn support a willingness to engage in genuine deliberation even with those of a different party, and some willingness to consider compromises.<sup>145</sup>

Finally, as an empirical matter, legislatures that gridlock tend to lead to power migration to other institutions and loss of public confidence in the legislature.<sup>146</sup> The spirit of compromise in the legislative branch thus can help promote a healthy institutional balance among the three branches of government.

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negatively even those legislators inclined to compromise will hesitate to do so.

144. Warren & Mansbridge, *supra* note 87, at 89.

145. For a more nuanced argument for compromise from principles of democracy, see Daniel Weinstock, *On the Possibility of Principled Moral Compromise*, 16 CRITICAL REV. INT'L SOC. & POL. PHIL. 537, 549 (2013) (arguing for "striking compromises that integrate the concerns of 'losers' in recognition of the fact that deliberative mechanisms often fail to embody full satisfaction of the principle of democratic respect and inclusion"). Weinstock also argues that some compromises can be regarded as "principled" insofar as they can be justified as best promoting moral principles in real world conditions. *Id.* at 551-54.

146. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) ("[No] decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems... [O]nly Congress itself can prevent power from slipping through its fingers."); Teter, *supra* note 60, at 1152-55 (arguing that gridlock over the debt ceiling in 2011 had a tendency to push the President to take one of several actions, any of which would have involved assertion of an unprecedented executive power).

*7. Acting on Matters that Other Jurisdictions Cannot Handle Effectively*

Seventh, focusing on federal representatives: Do the constitutional grants of power over, for example, federal taxes and budgets, interstate commerce, bankruptcy, copyright and patents, or even elections contemplate a duty to act?<sup>147</sup> or, if not to act, to give responsible attention, such that if things are going wrong, those with the power to do so can seriously consider acting to fulfill the goals of the constitutional grants of power? Recall that I am not talking about justiciable obligations, but rather, an enriched understanding of the constitutional role of legislators. Congress has power to regulate the “manner” of congressional elections,<sup>148</sup> do recent events suggest that representatives have a duty at least to consider further exercising this power (for example, by standardizing voting machines or limiting barriers to voting in federal elections)? When subjects are within the exclusive jurisdiction of the national government, or concern matters that can no longer be dealt with adequately by the separate states, a conscientious national legislator might feel a constitutional obligation to address the problem.

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There may well be other criteria, attitudes, and values relevant to being a “pro-constitutional” representative. But even the ones discussed here must also be evaluated keeping in mind the multiple and competing demands of accountability identified earlier<sup>149</sup>—including, inter alia, to constituents who voted for the representative, constituents who voted against, constituents who did not vote, constituents who will be voting in the next election, supporters who do not live in one’s district or state, the people of the entire country, one’s party, one’s fellow legislative members, and one’s institution (for example, the House of Representatives or the Congress). In the next Section, examples illustrate how identifying criteria for being

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147. See U.S. CONST. art. I, § 8, cls. 1, 3, 4, 8; *id.* art. I, § 4, cl. 1.

148. See *id.* art. I, § 4, cl. 1.

149. See *supra* Part I.C.

a “pro-constitutional” representative may help, if not to resolve hard questions, at least to suggest frameworks for analysis.

*D. Examples Illustrating Application of Criteria for Pro-Constitutional Behavior*

Some examples will illustrate the complexity of applying these criteria, in the context of the multiple demands of accountability to different stakeholders, to evaluate particular actions. Yet, I hope, the discussion will also suggest the benefits of trying to define with more acuity the range of normative considerations—including, but not limited to, the desire to be reelected—that representatives should consider.

*1. Refusals to Confirm*

Consider some recent episodes of constitutional conflict between Congress and the President. The first involves the Senate’s refusal to confirm nominees for authorized agencies, for example, Richard Cordray for the Consumer Financial Protection Bureau (CFPB).<sup>150</sup> The refusal is not, let us assume, based on objections to Cordray’s qualifications, but rather, on objections of some Senators to the design of the statute enacted by a prior Congress.<sup>151</sup>

To begin with, it is clear that senators have constitutional authority to refuse to confirm. There is no justiciable obligation even

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150. For useful accounts of this episode, see John C. Roberts, *The Struggle over Executive Appointments*, 2014 UTAH L. REV. 725, 737-38; Teter, *supra* note 60, at 1150-51; Jeff VanDam, Comment, *The Kill Switch: The New Battle over Presidential Recess Appointments*, 107 NW. U. L. REV. 361, 362-65 (2012); Alexander M. Wolf, Note, *Taking Back What’s Theirs: The Recess Appointments Clause, Pro Forma Sessions, and a Political Tug-of-War*, 81 FORDHAM L. REV. 2055, 2057-59, 2060-61 (2013); see also *Developments in the Law: Presidential Authority*, 125 HARV. L. REV. 2057, 2135-38, 2153 (2012) [hereinafter *Developments*].

151. See John H. Cushman, Jr., *Senate Stops Consumer Nominee*, N.Y. TIMES (Dec. 8, 2011), <http://www.nytimes.com/2011/12/09/business/senate-blocks-obama-choice-for-consumer-panel.html> [<https://perma.cc/Y24N-BEDJ>] (quoting Senator Hatch, a Republican, saying, “This is not about the nominee, who appears to be a decent person and may very well be qualified.”). See generally MANN & ORNSTEIN, *supra* note 76, at 98-100 (noting a new trend of “blocking nominations, even while acknowledging the competence and integrity of the nominees, to prevent the legitimate implementation of laws on the books” and discussing nominations for the Centers for Medicare and Medicaid Services and the Federal Reserve Board, as well as for the CFPB) (emphasis omitted).

to vote on proposed nominees. And, it might be argued that, given the power, senators can legitimately use it to try to elicit concessions from other actors to amend the underlying statute.

Yet it might be argued that there is (or there was and should now be) a constitutional convention that generally favors up or down votes on the merits of presidential nominees.<sup>152</sup> That is, to the extent that there was a positive practice of up or down votes, that practice may have normative (not merely positive) weight for legislative interpretation of how to implement constitutional powers. It might be thought that voting—affirmatively manifesting whether the Senate consents—is a part of the active responsibility of members of the Senate to make a government that works. But is there a further obligation to vote in favor of the President's nominee, if members have no objections to the character, temperament, or competence of the nominee for the position?

If the only responsibility of an elected representative were to act so as to facilitate government, the answer would arguably be yes. Government cannot function well, and the rule of law aspects of government are confounded, if the legislature creates bodies which then cannot act because they do not have appropriate heads or staffing. Likewise, from the point of view of accountability to the institution of Congress itself: if a prior Congress has enacted a statutory scheme, it might be argued that both the responsibility to promote a working government and a sense of responsible continuity with past Congresses would favor a yes vote for a well-qualified nominee, even if the nominee is to head an agency of which the Senator disapproves.<sup>153</sup>

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152. See MANN & ORNSTEIN, *supra* note 76, at 76 (describing earlier convention that all nominees recommended out of Committee received a floor vote); see also *Developments*, *supra* note 150, at 2154 (outlining a possible argument that the Senate's "failing to give ... nominees an up-or-down vote" would "violat[e] the spirit of the Constitution"). The Senate vote on Cordray was 53-45 in favor of cloture (that is, ending debate to permit a vote on the merits), see Cushman, *supra* note 151, but this was not enough under the then-existing rules of the Senate (which required a three-fifths majority to end debate) to bring the merits of the nomination up for a simple-majority vote. Although unwritten conventions that are not enforceable by courts are more widely associated with British constitutionalism, a number of writers have argued that they can be identified and contribute importantly to constitutional government in the United States. See, e.g., Pozen, *supra* note 61, at 38-39.

153. Cf. Andrei Marmor, *Should We Value Legislative Integrity?*, in THE LEAST EXAMINED BRANCH, *supra* note 27, at 125, 137-38 (arguing that respect for legal continuity and pluralism disfavor attempts to "wipe the previous legislative slate clean").

But we must complicate things further. Imagine the representative not only believes the agency is a bad idea (either because of views on the specific issue or because government has generally grown too large), but also believes (correctly let us assume) that the majority of her home state constituents also believe the agency is a bad idea. The Senator cares about their views not only because she is their representative, but also because she hopes, in the next election, to be returned to office. This electoral connection is one that, by constitutional design, can be understood to incline elected representatives to place considerable weight, at least much of the time, on what their constituents would favor.

But the electoral connection does not, of course, address whether the representative should simply accept her constituents' views as a given or seek to influence or change them. What if the Senator believes the agency is a bad idea, but also believes it is a bad idea to legislate a new agency into existence and not fill its positions—that it would be better to try to repeal the legislation than to obstruct its fulfillment while it remains law on the books? What if the Senator, considering her obligations to the people in her home state, or to the people as a whole, recognizes the normative force of a prior decision to establish this agency as that which is desired by a majority? Should the Senator consider activating an opinion-influencing role to try to persuade her constituents of the need to accommodate the act of a prior majority to legislate the agency (by allowing the agency to have a head and to function as intended) while working to repeal or modify the legislation?

These questions implicate the multiple constituencies that one could imagine accountability towards, and the possible existence of duties affirmatively to act as a representative (including, in the different case of so-called secret “holds,” the possible application of the duty to provide information to constituents).<sup>154</sup> They do not answer the question of what the legislator should do, but they sketch some of the normative questions a good legislator might consider in arriving at an answer.

Imagine that you are a Senator opposed to the current statute for the agency, and you believe your constituents are likewise opposed,

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154. On the controversial practice of secret “holds,” see MANN & ORNSTEIN, *supra* note 76, at 84-91.



and for good reasons. On the question of whether there is an obligation to compromise: that question cannot be fully analyzed without also considering whether it is a legitimate form of activity to threaten to withhold confirmation of worthy heads of federal agencies unless changes in the statute are made. These activities—amending the statute and confirming its head—are not unrelated. Respect for past Congresses and for continuity of governance, along with the norm of enabling government to work, would favor having an agency with a head. But the norm of compromise may work in both directions: The obligations owed to your constituents may provide legitimate support to a refusal to confirm in order to elicit compromise from others on the future of the agency.

More blanket refusals to confirm, or patterns of using confirmation as a bargaining chip on behalf of a minority view against decisions taken by a legitimate prior majority, raise, I think, somewhat distinct questions. At some point, acts that, taken alone, may seem well within the range of legitimate reconciliation of the various duties and responsibilities of representatives, cumulatively may become a kind of obstructive denial of the legitimacy of the general norm of lawmaking and law execution by elected majorities that runs afoul of the duty to act so as to enable government to proceed. Moreover, repeated such efforts have the potential to become a way of delegitimizing the results of elections themselves—with consequences too vividly illustrated in too many other countries to require detailing.<sup>155</sup> That the question is a matter of degree does not remove it from the realm of constitutional judgment.<sup>156</sup>

## 2. *Debt Ceiling Crisis, 2011*

Consider now another example, drawn from the debt ceiling crisis of the summer of 2011.<sup>157</sup> Members of Congress threatened to refuse

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155. That multiple uses of formal legal powers can move systems in anti-constitutionalist directions has been noted in a different context, in which formally legal procedures are used to move systems away from democracy and towards more authoritarian status. *See generally* David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

156. *Cf., e.g.*, Pozen, *supra* note 61, at 63-67 (arguing for norm of proportionality in evaluating the appropriateness of measures of constitutional self-help); *Developments, supra* note 150, at 2061 (“Sometimes, the line dividing legitimate use of presidential authority from abuse of power is only a matter of degree.”).

157. *See* Pildes, *supra* note 41, at 808 (treating near default as an example of the decline

to raise the debt ceiling in order to allow Treasury borrowing to fund decisions already made by Congress authorizing spending and making appropriations therefor, despite predictions of adverse effects for the U.S. bond market.<sup>158</sup> The apparent aim of the threat, largely made by Tea Party Republicans, was to require spending cuts that equaled increases in the debt ceiling; the President and most Democrats opposed this proposal, believing that if the budget deficit were to be trimmed, both taxes and spending should be considered.<sup>159</sup>

Interestingly, the most lively debate among legal scholars that this crisis generated initially seemed to focus on what the President should do, rather than on what members of Congress should do.<sup>160</sup>

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of government in the United States).

158. Buchanan and Dorf describe the situation in more detail:

In the spring of 2011, federal officials announced that, at some point later in the year, the federal government would be unable to meet all of its obligations unless the federal debt ceiling was raised. There was no economic problem. Interest rates on U.S. Treasury bills were close to zero percent, and the government could readily issue new debt to cover its expenses, if only Congress would go through the formal process of raising the debt ceiling to conform with the budget that it itself had then only recently approved. There was a political problem, however. Expressing concern about long-term fiscal deficits, Republicans in Congress—especially those allied with the Tea Party movement—insisted on a dollar of current spending cuts for every dollar increase in the debt ceiling. Even as Keynesian economists warned of the dangers of premature austerity, Democrats, including President Barack Obama, accepted the Republican view that deficit reduction was imperative, but they insisted that increased tax revenues had to be part of the formula for achieving that goal. A standoff ensued

....  
 ... [A]t the eleventh hour Congress ... pass[ed] legislation raising the debt ceiling and punting to a newly created bipartisan congressional “super-committee” the question of how to achieve the deficit reduction that was also mandated by the legislation. The super-committee failed to send a legislative proposal to Congress for consideration, so ... automatic spending cuts are slated to occur unless Congress enacts superseding legislation.

Buchanan & Dorf, *Least Unconstitutional Option*, *supra* note 7, at 1176-78 (footnotes omitted). On July 14, 2011, Standard & Poor’s warned that it might act to downgrade the quality of U.S. Treasury bonds, and in August 2011 it did so, largely because of the apparent lack of political will to manage the budget in a responsible way (and even though the immediate debt ceiling crisis had been resolved). See MANN & ORNSTEIN, *supra* note 76, at 4, 25; Zachary A. Goldfarb, *S&P Downgrades U.S. Credit Rating for First Time*, WASH. POST (Aug. 6, 2011), [http://www.washingtonpost.com/business/economy/sandp-considering-first-downgrade-of-us-credit-rating/2011/08/05/gIQAqKeIxI\\_story.html](http://www.washingtonpost.com/business/economy/sandp-considering-first-downgrade-of-us-credit-rating/2011/08/05/gIQAqKeIxI_story.html) [https://perma.cc/YA2P-EXVM].

159. Buchanan & Dorf, *Least Unconstitutional Option*, *supra* note 7, at 1177.

160. See, e.g., *id.* at 1196-1217; Chad DeVeaux, *The Fourth Zone of Presidential Power: Analyzing the Debt-Ceiling Standoffs Through the Prism of Youngstown Steel*, 47 CONN. L. REV. 395 (2014); Zachary L. Hutchison, Note, *Whose Authority? Executive Power and the Debt*

But if, as some scholars argued, the President was faced only with unconstitutional alternatives, would this not imply that Congress—the lawmaking body that has the authority to raise the debt ceiling or modify the budget—had some duty itself to take action that would respond to these potentially unconstitutional situations? And

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*Crisis of 2011*, 34 U. LA VERNE L. REV. 167 (2013) (arguing that unilateral executive action would be unconstitutional); Steven L. Schwarcz, *Bypassing Congress on Federal Debt: Executive Branch Options to Avoid Default*, 31 YALE J. ON REG. 269 (2014). In the press and on the blogs, see Jack M. Balkin, *3 Ways Obama Could Bypass Congress*, CNN (July 28, 2011, 10:48 AM), <http://www.cnn.com/2011/OPINION/07/28/balkin.obama.options/index.html> [<https://perma.cc/Q3K4-QWVG>] (suggesting the possibilities that the Treasury could mint trillion-dollar platinum coins or could sell the Federal Reserve an “exploding option” to purchase government property); Ronald Dworkin, *Can Obama Extend the Debt Ceiling on His Own?*, N.Y. REV. BOOKS (July 29, 2011), <http://www.nybooks.com/blogs/nyrblog/2011/jul/29/can-obama-extend-debt-ceiling-his-own/> [<https://perma.cc/799X-X4CV>] (arguing that the President has authority to ignore the debt ceiling based on the Fourteenth Amendment “validity of the public debt” clause); Eric A. Posner & Adrian Vermeule, *Obama Should Raise the Debt Ceiling on His Own*, N.Y. TIMES (July 22, 2011), <http://www.nytimes.com/2011/07/22/opinion/22posner.html?r=0> [<https://perma.cc/T9J2-BEHR>] (arguing for presidential authority to act for “the necessities of state”); Laurence H. Tribe, *A Ceiling We Can’t Wish Away*, N.Y. TIMES (July 7, 2011), <http://www.nytimes.com/2011/07/08/opinion/08tribe.html> [<https://perma.cc/EJK5-GVTJ>] (disagreeing with arguments that the President may ignore the debt ceiling; “[T]he argument that the president may do whatever is necessary to avoid default has no logical stopping point.”). In a later article, to be sure, Buchanan and Dorf do address both the President and Congress. See Neil Buchanan & Michael Dorf, *Bargaining in the Shadow of the Debt Ceiling: When Negotiating over Spending and Tax Laws, Congress and the President Should Consider the Debt Ceiling a Dead Letter*, 113 COLUM. L. REV. SIDEBAR 32 (2013), [http://www.columbialawreview.org/wp-content/uploads/2013/03/32\\_Buchanan\\_Dorf.pdf](http://www.columbialawreview.org/wp-content/uploads/2013/03/32_Buchanan_Dorf.pdf) [<https://perma.cc/2Q7C-PY3R>]. For other scholarship focused on congressional as well as presidential action, see, for example, Zachary K. Ostro, *In the Debt We Trust: The Unconstitutionality of Defaulting on American Financial Obligations, and the Political Implications of Their Perpetual Validity*, 51 HARV. J. ON LEGIS. 241 (2014) (calling for congressional action to prevent future crises); Jacob D. Charles, Note, *The Debt Limit and the Constitution: How the Fourteenth Amendment Forbids Fiscal Obstructionism*, 62 DUKE L.J. 1227 (2013) (arguing that Congress’ actions violated the Constitution and that the President could under some circumstances ignore the debt limit); Kelleigh Irwin Fagan, Note, *The Best Choice out of Poor Options: What the Government Should Do (or Not Do) If Congress Fails to Raise the Debt Ceiling*, 46 IND. L. REV. 205, 207 (2013) (emphasizing need for compromise to assure compliance with Public Debt Clause). Cf. Stuart McCommas, Note, *Forgotten but Not Lost: The Original Public Meaning of Section 4 of the Fourteenth Amendment*, 99 VA. L. REV. 1291 (2013) (arguing, based on original meaning, for a narrow interpretation of the Public Debt Clause, and that congressional failure to raise the debt ceiling is not a repudiation of the debt within the meaning of the Clause and that the Clause provides no basis for presidential action to raise the debt ceiling). For an approach centered on judicial power, see, for example, Adam Rosenzweig, *The Article III Fiscal Power*, 29 CONST. COMMENT. 127 (2014) (suggesting that courts have power under Article III to impose taxes and authorize spending during certain fiscal showdowns between Congress and the President).

if different members of Congress had different views on constitutionality, would the obligation to compromise not come importantly into play?

In addition to factors discussed in connection with the first example (withholding confirmation), there are other potentially relevant factors here. First, the issues raised by the 2011 debt crisis had clearer implications for foreign affairs;<sup>161</sup> the damage done might thus be less within the control of domestic institutions to repair. Second, much graver harm to the domestic economy was potentially at stake.<sup>162</sup> Third, the situation arguably posed a more serious rule of law problem, as evidenced by the development of constitutional theories and proposals that substantially “pushed the envelope” of accepted understandings.<sup>163</sup> These three factors, together with the availability of other means in the near future to take steps to redress budget deficits for those who believed they were harmful to the economy, made the costs of playing “chicken” much higher in this case than in the first, and, arguably, increased the importance of compromise to avoid such harms.

### 3. Government Shutdown

Still another example of a failure of pro-constitutional representation was the sixteen-day government shutdown in October 2013.<sup>164</sup> Described in scholarship as a “distinctively American version of political failure,”<sup>165</sup> this sixteen-day period saw the suspension of all “nonessential services,” including environmental

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161. A substantial portion of U.S. national debt is owned by foreigners. See Dinah Walker, *Quarterly Update: Foreign Ownership of U.S. Assets*, COUNCIL ON FOREIGN REL. (Jan. 21, 2015), <http://www.cfr.org/united-states/quarterly-update-foreign-ownership-us-assets/p25685> [<https://perma.cc/GL36-22QH>]; *Major Foreign Holders of Treasury Securities*, DEP'T TREASURY (Dec. 15, 2015), <http://ticdata.treasury.gov/Publish/mfh.txt> [<https://perma.cc/LXS3-SY8Z>].

162. See *supra* notes 157-58.

163. See *supra* note 160; cf. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 535 (2004) (offering examples of “hardball” that push the envelope of existing understandings).

164. See Jonathan Weisman & Jeremy W. Peters, *Government Shuts Down in Budget Impasse*, N.Y. TIMES (Sept. 30, 2013), <http://www.nytimes.com/2013/10/01/us/politics/congress-shutdown-debate.html> [<https://perma.cc/M5EY-RDNH>].

165. Katharine G. Young, *American Exceptionalism and Government Shutdowns: A Comparative Constitutional Reflection on the 2013 Lapse in Appropriations*, 94 B.U. L. REV. 991, 991 (2014).

monitoring, work on a backlog of veterans' disability claims, and services for over six thousand preschool children.<sup>166</sup> The shutdown resulted from efforts by the Republican majority in the House of Representatives to prevent implementation of the Patient Protection and Affordable Care Act of 2010, by "condition[ing] its support for continuing resolutions [to fund the government] on the delaying or defunding of the Affordable Care Act."<sup>167</sup> The costs of the shutdown to the government (and taxpayers) were estimated at between two and six billion dollars.<sup>168</sup> As Professor Young observes, the Republican Party is "more tolerant of shutdowns," and thus has a "bargaining advantage."<sup>169</sup> But shutting down the government is the antithesis of what any elected representative—whether in favor of smaller government or larger government—should want. Such shutdowns sweep indiscriminately and, as noted above, result in the disruption of programs that had been authorized by law. Use of budget shutdowns to bargain for changes in recently enacted legislation has a high risk of inviting retaliatory responses; the increasing use or threat of shutdown is hard to reconcile with a basic commitment to the public good and a working government.<sup>170</sup>

#### 4. Legislative Walkout

Examples of concern arise not only at the national level but in state legislatures as well. Consider the decision of the Democratic members of the Wisconsin State Senate physically to leave the State of Wisconsin in early 2011, so as to prevent a quorum from existing in the State Senate, and thereby prevent the Republican Governor and legislative majority party from enacting a budget and anti-union measures with which the Democrats disagreed.<sup>171</sup>

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166. *Id.* at 993, 994 & n.15.

167. *Id.* at 996.

168. *Id.* at 997.

169. *Id.* at 1001.

170. On the relationship between the debt ceiling and government shutdowns, threatened or actual, see Buchanan & Dorf, *supra* note 160, at 34-35; Young, *supra* note 165, at 996-97.

171. For news accounts, see Bill Glauber et al., *Democrats Flee State to Avoid Vote on Budget Bill*, MILWAUKEE J. SENTINEL (Feb. 17, 2011, 12:01 AM), <http://www.jsonline.com/news/statepolitics/116381289.html> [<https://perma.cc/VYZ3-ZKYL>]; Amy Merrick & Kris Maher, *Wisconsin Governor Seeks Deep Cuts*, WALL ST. J. (Mar. 2, 2011), <http://www.wsj.com/articles/SB10001424052748704506004576174413551008574> [<https://perma.cc/7C9Q-T7SN>]; Lila Shapiro, *Wisconsin Protests: State Police Pursue Democratic Lawmakers Boycotting Vote*,

The legality of their move is debatable.<sup>172</sup> Even if lawful, a decision by elected legislators to absent themselves, if exercised frequently, could undermine the possibility of democratic self-government altogether.

### 5. Pork

Finally, consider legislative spending projects that are often referred to disparagingly as “pork,” as in “pork barrel politics.” An example might be the funding for the so-called “bridge to nowhere” promoted by public officials from Alaska.<sup>173</sup> Although such projects

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HUFFINGTON POST (May 25, 2011), [http://www.huffingtonpost.com/2011/02/17/wisconsin-protests-scott-walker-police\\_n\\_824697.html](http://www.huffingtonpost.com/2011/02/17/wisconsin-protests-scott-walker-police_n_824697.html) [<https://perma.cc/T9PW-ZV68>].

172. The Wisconsin Constitution authorizes each house to provide for the compulsory attendance of its members. See WIS. CONST. art. IV, § 7. The 2011 Wisconsin Senate Rules stated that “[m]embers of the senate may not be absent from the daily session during the entire day without first obtaining a leave of absence,” granted by majority vote, and that the body can “compel the attendance of absent members.” S. Rules 15, 16 (adopted as part of S. Res. 2 (Wis. 2011)), <http://docs.legis.wisconsin.gov/2011/related/rules/senate/> [<https://perma.cc/V4A2-327K>]. Permission to be absent was not given to the Democratic legislators. During the impasse, Senate Republicans held the Democrats in contempt, but the legality of this decision was questioned at the time. See Mary Spicuzza & Dee J. Hall, *Senate Orders Arrest of Missing Democrats*, WIS. ST. J. (Mar. 4, 2011), [http://host.madison.com/wsj/news/local/govt-and-politics/senate-orders-arrest-of-missing-democrats/article\\_8d9ad090-45bd-11e0-bf68-001cc4c03286.html](http://host.madison.com/wsj/news/local/govt-and-politics/senate-orders-arrest-of-missing-democrats/article_8d9ad090-45bd-11e0-bf68-001cc4c03286.html) [<https://perma.cc/VT9K-SFB7>]. The walk-out was ultimately resolved by the Governor’s re-submission of a bill concerning collective bargaining, that, by removing certain fiscal measures, enabled Republicans to pass it under rules not requiring a special majority and thus without the presence of the Democrats in the Senate. See Paul M. Secunda, *The Wisconsin Public-Sector Labor Dispute of 2011*, 27 A.B.A. J. LAB. & EMP. L. 293, 299 (2012). The law thereby enacted was held invalid by a state trial court, whose judgment was then reversed by a 4-3 vote in the Wisconsin Supreme Court (in an event linked to an alleged physical assault by one justice on another). *Id.* at 299-301. Voters who disagreed with the new law then procured a recall election, which resulted in a two-seat gain for the Democrats—not enough to secure repeal of the law. *Id.* at 301.

173. A proposed Gravina Island Bridge would have linked Gravina Island, with its roughly fifty residents and the Ketchikan airport, to Ketchikan, a town of about eight thousand on the Alaskan mainland, and replaced an existing ferry service; the cost for the bridge at one time was reflected in earmarks in the hundreds of millions of dollars. See Associated Press, *Alaska: End Sought for ‘Bridge to Nowhere,’* N.Y. TIMES (Sept. 22, 2007), [http://www.nytimes.com/2007/09/22/us/22brfs-ENDSOUGHTFOR\\_BRF.html](http://www.nytimes.com/2007/09/22/us/22brfs-ENDSOUGHTFOR_BRF.html) [<https://perma.cc/S7ML-TQ8F>]; Carl Hulse, *Two ‘Bridges to Nowhere’ Tumble Down in Congress*, N.Y. TIMES (Nov. 17, 2005), <http://www.nytimes.com/2005/11/17/politics/two-bridges-to-nowhere-tumble-down-in-congress.html> [<https://perma.cc/482Y-93U8>]; Yereth Rosen, *Palin ‘Bridge to Nowhere’ Line Angers Many Alaskans*, REUTERS (Sept. 2, 2008, 1:26 PM), <http://www.reuters.com/article/2008/09/02/us-usa-politics-palin-idUSN3125537020080902> [<https://perma.cc/CY9E-Q37J>]; Danielle Schlanger, *Bridge to Nowhere Becomes Ferry to Nowhere as ‘Uncle Ted Is No Longer With Us,’*

are often criticized as wasteful and not in the public interest, it is hard to imagine that an elected representative would seek such funding if it were not in the interests of some of the representative's constituents. Those "public interests" of particular constituencies might well be served by the spending; when "pork barrel" accusations are made, it is often the case that there is *some* public-spirited reason for the spending from the viewpoint of particular constituents.<sup>174</sup> "Pork barrel" politics claims often involve assessment of comparative benefit, of where is there greater need for distribution or use of public funds. In Congress, this puts into tension accountability to particular electoral constituencies and accountability to the national constituency. It is understandable that for particular representatives, pleasing local constituents will often be more attractive than foregoing local "pork" in the national interest. But arguably, in the long run, "pork" in the system may facilitate more effective governance at the national level. Sometimes "pork barrel" or "log-rolling" exchanges can facilitate negotiations that allow projects to go forward that plainly benefit the national public interest. Providing for such "pork" or "side payments" in an overall legislative package might thus be understood as an important way in which democratic legislatures are actually able to "act."<sup>175</sup>

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HUFFINGTON POST (Aug. 8, 2013, 4:58 PM), [http://www.huffingtonpost.com/2013/08/08/bridge-to-nowhere\\_n\\_3727865.html](http://www.huffingtonpost.com/2013/08/08/bridge-to-nowhere_n_3727865.html) [<https://perma.cc/46XE-AHE3>]; Ronald D. Utt, *The Bridge to Nowhere: A National Embarrassment*, HERITAGE FOUND. (Oct. 20, 2005), <http://www.heritage.org/research/reports/2005/10/the-bridge-to-nowhere-a-national-embarrassment> [<https://perma.cc/APP8-A9PB>].

174. See, e.g., Joshua Bone, Note, *Stop Ignoring Pork and Potholes: Election Law and Constituent Service*, 123 YALE L.J. 1406, 1419 (2014) (noting a beneficial public purpose of the proposed "bridge to nowhere" in providing a non-ferry link between a significant airport and the mainland). This is not to deny that some "pork" may funnel resources to those already highly advantaged or to projects that are detrimental to any reasonable understanding of a general public interest even within the constituency. Cf., e.g., Hardin, *supra* note 116, at 37 (criticizing the 2004 House of Representatives' approach for funding to protect against domestic terrorism that allocated approximately seven times as much, per capita, to Wyoming as to New York).

175. On the potentially positive role of "side payments" in public deliberative negotiations, see Warren & Mansbridge, *supra* note 87, at 113 ("[T]he question as to whether trading is on balance good or bad often depends on the kinds of items and the kinds of trades."). The authors locate the problem of pork and log-rolling in the negotiation literature on expanding the subjects of a negotiation to enhance ability to reach agreement. See *id.* at 113-14; see also Jonathan Cohn, *Roll Out the Barrel: The Case Against the Case Against Pork*, in THE ENDURING DEBATE: CLASSIC AND CONTEMPORARY READINGS IN AMERICAN POLITICS 141, 146-49 (David T. Canon et al. eds., 2d ed. 2000) (analyzing purported "pork" projects and finding

### III. PAY OFFS FOR LEGAL EDUCATION?

I want to conclude by arguing that law schools and legal scholars should begin to rectify the relative lack of attention to good representation. I recognize that even if one thinks it would be generally good for people to be exposed to a broader range of thinking about what it means to be a good representative, a question may arise whether this really should have a significant role in a law school curriculum. It might be thought that the idea of good representation falls within the domain of “politics,” which should be studied in political science departments, by political theorists or political philosophers, or even in general civics classes. In the day-to-day work for which we train lawyers, it might be argued, these questions are of little practical or theoretical relevance.

Here are six possible reasons why it matters that law schools do more to expose students to complex normative ideas and discourses about representation. I am not sure each is persuasive, and I suspect there are others. But here is a start.

#### *A. Improved Understandings of Alternative Approaches to Legislatures and Electoral Representation*

First, trying to specify what it means to be a “pro-constitutional” elected representative might shed interesting light on the different character of legislative bodies, and their members, in differently structured constitutional systems. That is, for example, being a “pro-constitutional” representative in the U.S. federal system at the national level might be quite different, and involve a different balance of “representational” roles and considerations, than being a “pro-constitutional” representative in a proportional representation (PR) system.<sup>176</sup> The role of representatives in a PR system

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value and noting that, even if wasteful, “pork still represents a very cheap way to keep our sputtering legislative process from grinding to a halt”). *But see* Sean Paige, *Rolling out the Pork Barrel*, in *THE ENDURING DEBATE*, *supra*, at 138 (describing bipartisan condemnation of perceived “pork” projects).

176. For brief discussion of proportional representation, see JACKSON & TUSHNET, *supra* note 9, at 847-49. Proportional representation requires voting on “party lists,” with seats in the legislature distributed in some rough proportion to the amount of electoral support a party list had compared to other party lists. PR may be contrasted with “winner-take-all” elections



might be thought to include larger elements of accountability to the political party on whose list the representative ran than that of a representative elected in a single-member district in a first-past-the-post electoral system. In the absence of an individual constituency—as is not uncommon in PR systems<sup>177</sup>—no distinction would in theory exist between the interests of any particular geographic constituency and the interests of the country as a whole (though geographic concentrations of particular party members may produce a similar effect).

Moreover, if differences in the weight of different normative pulls of accountability are associated with different structures for electing members of a legislature, it might have implications for intentionalist theories of legislative interpretation. In parliamentary systems with national lists, one could imagine arguments directing more focus on political party agendas and less on statements of individual members in parliamentary systems.

Further, in a parliamentary system with the ready possibility of new elections if the government in power loses the people's confidence, the "pro-constitutional" role of members of the majority might be thought to weigh more heavily in favor of acting in accord with what their constituents want or will accept in the near term, than, for example, for members of the United States Congress—especially Senators, who serve fixed six-year terms designed to promote the ability to take a somewhat longer, more generally public-spirited view. And the role of being a "pro-constitutional" minority member in a parliamentary system may be more importantly shaped—throughout the term in office—by an understanding that members of the minority party must be prepared in the event that they need to take over actual governance; in a presidential system like the United States, terms of elected officials at the national level are fixed.

A related set of questions might explore links between the competitive structure of the political system and the responsibilities of representatives. Although there is some disagreement on this point,

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in single member districts, in which whoever receives the most votes ("first-past-the-post") wins.

177. See, e.g., DAVIDSON, OLESZEK ET AL., *supra* note 85, at 9 ("[S]ome PR systems, such as those in Israel and the Netherlands, do not tie representatives to local geographic constituencies at all; legislators represent the entire nation.").

the weight of recent scholarship suggests a decline in the degree of competitiveness within districts.<sup>178</sup> In a more competitive district, representatives may feel more of an obligation to be responsive to constituents; in a less competitive district, representatives may feel more freedom to act independently or to seek to influence constituencies to the representatives' views. Although there is some suggestion that even incumbents in "safe" districts do not feel safe,<sup>179</sup> beyond this empirical question is the normative question of whether being in a highly competitive, or safe, district should affect the mix or weight of representatives' different obligations, which, in turn, raises further empirical and normative questions about the overall functioning of the legislative body.

A final example of how a focus on the responsibilities of representatives might shed light on different structures of governance: Consider differences between unicameral and bicameral legislatures. In a bicameral legislative body, different chambers may have different constitutional responsibilities that impact its members' obligations to sustain working constitutional government; and if one house has longer terms—as in the U.S. Senate—that fact might imply a greater responsibility for independent deliberation—in comparison to members of the House.<sup>180</sup>

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178. See, e.g., Issacharoff, *Gerrymandering*, *supra* note 34, at 624-26; see also Gary C. Jacobson, *Competition in U.S. Congressional Elections*, in *THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS* 27, 27-52 (Michael P. McDonald & John Samples eds., 2006); Drew DeSilver, *For Most Voters, Congressional Elections Offer Little Drama*, PEW RES. CTR. (Nov. 3, 2014), <http://www.pewresearch.org/fact-tank/2014/11/03/for-most-voters-congressional-elections-offer-little-drama> [<https://perma.cc/PC2Q-EHSQ>]. *But cf.* Nathaniel Persily et al., *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1327 (2002); Persily, *supra* note 124, at 668-73 (noting that gerrymandering may produce a legislature that better reflects the partisan make-up of the electorate).

179. See Persily, *supra* note 124, at 659-60.

180. Differences between membership in the United States House and Senate have been often remarked upon. See, e.g., Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 604-22 (2014). Do the lengthier terms in the Senate suggest that more attention to the national perspective should be expected from a "pro-constitutional" senator given senators' greater independence from immediate electoral pressures?

*B. Theories of Constitutional Interpretation*

Second, an enduringly important question in constitutional interpretive theory is the relevance of the position of other branches in evaluating the constitutionality of their actions. Whether this inquiry is framed in terms of “deference,” degree of certainty of constitutional error, or John Hart Ely’s theory of “representation reinforcement,”<sup>181</sup> development and defense of these theories might call for an appreciation of both the normative aspirations of a representative government and its actual operations. For example, on Ely’s approach (very bluntly stated), courts should intervene most aggressively when the processes of representative democracy are blocked.<sup>182</sup> Although this has traditionally been understood in terms of the exclusion of minorities from participation by virtue of prejudices, it could be understood in deeper or different ways if we had a richer understanding of the normative aspirations for what a good representative does in a constitutional democracy.<sup>183</sup> Moreover, as Richard Fallon has argued, what constitutional theory of judicial review one adopts should be based in part on some prediction of whether that theory will, on the whole, yield better results than others.<sup>184</sup> Evaluating the quality of representatives and representative institutions might thus be an aspect of choosing the right interpretive theory, for a particular period.

It is, to be sure, theoretically possible to have a system that works reasonably well in producing democratic outcomes even if its component parts are unattractive.<sup>185</sup> One could say that as long as there are elections (or contested elections), there is no need for

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181. See ELY, *supra* note 21.

182. See *id.* at 152-64.

183. Cf. David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT’L L.J. 319, 345-54 (2010) (describing judicial review of the deliberative quality of legislative processes in Colombia, and the challenges such efforts faced). On the challenges for judicial review of single-party dominance of the Congress and the Presidency, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2364-68 (2006) (arguing that there are more constraints on judicial review and greater risks of legislative overreach when a single party dominates all organs in the legislative process).

184. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 558-62 (1999).

185. Cf. Vermeule, *supra* note 30, at 17-23 (discussing various combinations of offsetting “second bests”).

normative theories of what good representatives do; the check of being voted out of office suffices to achieve acceptable levels of democratic functioning. One could also argue that constitutional interpretive theory might not vary depending on the quality of particular representatives in a legislative body but would instead depend on an evaluation of how an overall system of democratic deliberation and decisionmaking—including legislatures, media, and civic society—works to produce legislation. Perhaps enough competing forces, all unattractively motivated and acting selfishly and without any normative aspirations other than maximizing their own self-interest, can produce a good enough, and democratically legitimate, set of laws.<sup>186</sup> Thus, it could be argued that an understanding of “representation” as something undertaken by particular persons called “representatives” (as “judging” is an activity undertaken by particular persons called “judges”) is simply not important for constitutional law—that what matters is some aggregate understanding of whether the legislature as a whole is representative or whether the overall system of which the legislature is a part meets some form of democratic criteria.

But it seems unlikely that the kinds of “virtues,” “attitudes,” or “good conduct” to which (at least some) representatives aspire would be irrelevant to how the legislative body worked as a part of that overall system.<sup>187</sup> Although institutional and economic structures no doubt play strong roles in producing the kind of Congress and congressional process we have, the possibility of legislative “statesmanship,” motivated by aspirations of what being a good representative in a constitutional democracy entails, should not be dismissed. Especially if one believes that generally representatives do, or should, act on behalf of the narrow, presentist interests of their constituencies, downward spirals of conduct that are not in the collective self-interest may occur; and on this conception of what representatives do or should do, it is hard to see why courts should

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186. There are elements of this idea in some of Madison’s writings, *see, e.g.*, THE FEDERALIST NOS. 10, 51, *supra* note 52, at 47-53, 263-67 (James Madison), that may be connected to more modern “competitive” or “pluralist interest group” understandings of democracy.

187. Without some numbers of members with sufficiently pro-constitutional attitudes (if not natural to them, then produced by fear of falling short of constituents’, the media’s, or fellow legislators’ expectations), a legislature might become simply a place of gridlock or abuse. How many such legislators are needed is uncertain; the numbers might be small. *See supra* note 143 and accompanying text.

assume that Congress considered constitutional issues or that, if they did, their views should be given great deference.<sup>188</sup> Whether one views the legislative process as best operating under pluralist interest group assumptions, deliberative democracy assumptions, or even critical structural reform assumptions,<sup>189</sup> representatives in any of these modes will sometimes need to compromise with others of very different views; they will need to be responsive to their constituencies and provide and receive information; they will be asked if they are in Congress to provide help to their constituents; and they will face many choices about how to participate in a government that works. How well legislators individually, and together, fulfill these functions may well bear on evaluating the relative roles of the Congress and the courts in interpreting and enforcing the Constitution.

### *C. Theories of Statutory Interpretation*

Third, assessing “pro-constitutional” behavior may yield some pay off for thinking about approaches to statutory interpretation. If, for example, one conceives of legislators’ duties as no more than advancing the interests of their constituents, one might be more persuaded of the importance of treating legislation as reflecting presumptive compromises worthy of respect by the judiciary.<sup>190</sup> On the other hand, if one conceives of legislators as having sometimes conflicting duties to their constituents’ more particular interests and to a conception of the public good that transcends immediate understandings of the interests of the constituency, one might be more attracted to theories that seek to presume more public-regarding interpretations of ambiguous legislation.<sup>191</sup> And, as noted

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188. Even if one were to believe that the best way to interpret the Constitution is for legislatures and executive branch officials, as well as courts, to seek simply to “do justice,” *but cf.* Abram Chayes, Commentary, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026 (1988) (arguing that the courts are the “institutional custodian[s] of justice” under the Constitution), there is—on the self-interested account of representatives—little reason to think that legislative product is informed by well deliberated views of justice.

189. See generally WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 19-22 (2d. ed. 2006).

190. *Cf.* Manning, *supra* note 140, at 1978 (viewing the Constitution as a “bundle of compromises”).

191. *Cf.* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (arguing, on the

earlier, attention to the differing weight of different demands of accountability for representatives in different institutions may bear on the relative hierarchy of sources relevant to determining legislative meaning.<sup>192</sup>

#### *D. Comparative Institutional Insights on Judging*

Fourth, paying more attention to what being a “good” representative means may heighten understanding of what being a good “judge” entails. Is the opposition between the need for legislators to “compromise” and the importance of “principle” in judging correct? Should judges on appellate or multi-member tribunals compromise (generally? sometimes? never?) with other judges to promote a more unified statement of the law? If one thinks legislators should compromise, are judges different and if so why? Do judges have a greater obligation than legislators to act consistently? to give reasons for their actions? Why? Is the appeal of “equity” something that applies to both judges and legislators? more to judges?<sup>193</sup> As one thinks about a “pro-constitutional” legislator, efforts to answer these questions in this comparative institutional setting may illuminate the judicial role.

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assumption that legislators may act in response to private interests advanced by “special interest” groups to the detriment of the public interest, for approaches to statutory interpretation that transform private interest driven legislation into more public interested law).

192. See *supra* Part III.A.

193. Alexander Hamilton, in THE FEDERALIST NO. 78, *supra* note 52, at 396, discussed the expectation that judges would, through interpretation, temper the otherwise unjust application of laws. See also Macey, *supra* note 191, at 226 (arguing that the “judiciary... inevitably checks legislative excess” in statutory interpretation); cf. ARISTOTLE, *Nicomachean Ethics*, in 2 THE COMPLETE WORKS OF ARISTOTLE 1729, 1795-96 (Jonathan Barnes ed., David Ross trans., James Urmsen rev. 1984) (“[A]ll law is universal but about some things it is not possible to make a universal statement which will be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error.... When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over-simplicity, to correct the omission—to say what the legislator himself would have said had he been present.... And this is the nature of the equitable.”).

*E. Law Graduates as Elected Representatives*

Fifth, law school graduates will themselves be elected to political offices, including legislatures, in disproportionate number.<sup>194</sup> Those of our students who become judges are likely to have rich and deep understandings of both contests over and core areas of agreement about the normative expectations of judges, but those law graduates who become elected representatives are likely to have had less exposure to core and competing normative expectations for representatives. The opportunity to consider, analyze, apply, critique, and reflect critically about different normative theories of the obligations of elected representatives—to their constituents who voted for them, to all their constituents, to their political party, to the collegial body of which they are a part, to a broader community of which their district may be a part, to a particular policy agenda about which the representative deeply cares—can only enhance their ability conscientiously to balance the multiple pulls to which they will be subjected in performing their office.

*F. Ameliorating Current Political Pathologies*

Sixth, and concomitantly, the undernourished normative view that we provide about political representation and elected representatives—especially to the extent it is based on rational actor models that focus only on reelection or forms of personal rent-seeking—may in its own small way contribute to the pathologies of U.S. constitutional democracy.<sup>195</sup> Providing a more complex, realistic, and, at

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194. Since independence, more than half of all Presidents, Vice Presidents, Cabinet members and Members of Congress have been lawyers, although the percentage of lawyers now in Congress has declined from about 80 percent in the late nineteenth century to just under 40 percent. Nick Robinson, *The Declining Dominance of Lawyers in U.S. Federal Politics* (HLS Ctr. on the Legal Profession, Research Paper No. 2015-10, 2015), <http://ssrn.com/abstract=2684731> [<https://perma.cc/MQV5-3GG2>]. Law is still the field that contributes the highest percentage of members of Congress. *See id.* at 8 tbl.1.

195. Although some attribute the ills of democracy to citizen apathy, some scholars of democracy report that citizen participation is on the rise. Perhaps more significant is the decline of moderation and nonpartisanship as an organizing ideal, *see Pildes, supra* note 41, at 823-24 (summarizing data from Robert Putnam and others), and the increased polarization of elected representatives in legislatures, *see Samuel Issacharoff, Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 423-25 (2004). *See generally* NOLAN MCCARTY ET AL., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND

the same time, normatively aspirational view of political representation in scholarship, teaching, and policy may in a small way contribute to more healthy democratic politics.<sup>196</sup> In order to have representatives who behave in “pro-constitutional” ways, we need to provide richer and thicker accounts of the normative obligations of elected representatives, accounts that go beyond assumptions that behavior in the legislatures is unconstrained by anything other than each representative’s present self-interest in promoting his or her own reelection, power, or wealth.<sup>197</sup> By not teaching or developing richer normative accounts of elected political representation in our scholarship, but instead implicitly offering accounts that assume little to no public-spiritedness by elected representa-

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UNEQUAL RICHES (2006) (exploring the simultaneous rise of income inequality and political polarization); BARBARA SINCLAIR, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING (2006) (exploring reasons for increased polarization and noting its advantage in creating clearer choice between political parties, as well as its disadvantages). For an argument that “spatial homogeneity” in the distribution of voters within districts may decrease polarization, see Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 HARV. L. REV. 1903, 1947 (2012). While polarization may increase the sense of choice that voters have in deciding among candidates and parties, in extreme forms it can be debilitating to the ability of decisionmakers to compromise and—in its most extreme forms—can threaten the protection of basic human rights.

196. Cf. Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 938-39, 942-47 (1991) (arguing that some social goals require subjective attitudes that may or may not be produced through public programs, and urging attention to the “cultural” consequences of the “contractualization” of, for example, military service or pro bono legal work). *But cf.* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011) (arguing that the causes of political hyperpolarization are historic and structural, and thus are likely to endure).

197. For example, in a period leading up to the use of the “nuclear option” in November 2013, Democrats had debated whether to change the filibuster rule to allow appointments to advance by simple majority, before finally doing so after further Republican refusals to allow votes on judicial nominees. Alex Rogers, *Fallout from the Filibuster Rule Change*, TIME (Nov. 21, 2013), <http://swampland.time.com/2013/11/21/filibuster-fallout-the-sober-senate-looks-like-the-hell-raising-house/> [<https://perma.cc/2Z8Q-RZ7L>]. Even then, some Democrats, it was reported, were concerned about the implications of such a move for a time when their party may be in the minority; three voted no. *Id.* Whether one regards their concern as not self-interested, or as self-interested over the longer run, it illustrates the distinction suggested between “present” self-interest and a longer run perspective. In the longer run, it might be thought, decisionmakers may become somewhat more public-spirited because their own future circumstances are less certain. Cf. VERMEULE, *supra* note 122, at 45-54 (evaluating the possibility that making decisions designed to last for a long time can create uncertainties that function as a veil of ignorance, concluding that because of foreseeable unenforceability this impartiality-inducing mechanism may fail, and exploring “delayed-effect” rules as an alternative mechanism).



tives, are law schools contributing to a broader constitutional culture in which the only hope for “good” decisions is believed to lie with the least democratic branch? Alternatively, by offering simplistic accounts that assume the democratic legitimacy of whatever the legislature does, are law schools depriving students of the opportunity to consider the normative complexity and empirical challenges of being a representative? In either case, law schools miss an opportunity to reinject complex normative understandings (and the possibilities for moderation that better understanding of other parties’ challenges can induce) into the centrally important role of being an elected representative in a democracy.

#### CONCLUSION

Some may think it naive to consider the possibility that having normative aspirations for being a good “pro-constitutional” legislator may make some difference in behavior. I think it naive to disregard the effects of ideology, world-view, and self-understandings on behavior. A world-view that rests entirely on narrow definitions of immediate self-interest can lead, we know, to the loss of the common good. A world-view, by political power holders, that rests entirely on principles will likely result in the failure of representative government in a diverse and heterogeneous polity; but a world-view without principled aspirations to serve the common good may also have this result. My hope is to encourage other constitutional lawyers, whether they accept or reject any particular arguments in this Essay, to engage in a project central to the success of constitutional democracy—the normative reconstruction of representation.