

DEMOCRATIC REPRESENTATION AS DUTY DELEGATION

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# Democratic Representation as Duty Delegation

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## I. INTRODUCTION

In the summer of 2021, when discussing vaccine distribution and how to weigh international need against domestic interests, one of my colleagues eloquently articulated a common view about the obligations of our political representatives. I quote him with permission. As he wrote,

[T]he job of the US government is to use US resources and US tax revenues to help US citizens (and to a large extent US residents) first. Helping foreigners is nice—to the extent it doesn't interfere with our own ability to help our own. Indeed, my view is that it would be deeply unethical for our public servants (who are not the public servants of foreign countries) to do otherwise. This is of course our normal ethical judgment as to policy decisions.<sup>1</sup>

I think this common position is mistaken, but it is entirely understandable if one holds a familiar view of political representation as the implementation, in collective settings, of our rights of self-determination conceived in terms of the pursuit of our interests. On this view, we the people enable our political representatives to pursue our interests by largely transferring our rights of self-determination to them. Their remit is then limited by the circumference of our interests. As a consequence of this view's popularity, our political discussions of foreign aid are morally contorted by discussions of whether saving foreign nationals' lives would ultimately benefit US citizens, making the wrong considerations primary and often exclusive.

Of course, one way to tackle this myopic position is to argue that in this case, a duty to others constrains the scope of our rights to self-determination. In one sense, that's correct, but it's a rather patchy solution to a view that, as I will discuss, encounters other difficulties. The foreign aid distortion and the other problems that I will canvas trace to two related root causes, namely, (1) the familiar view conceives of the representation relationship as one of the sharing of normative powers grounded in a fundamental, nonderivative, self-oriented, interest-protecting right rather than as a relationship grounded in sharing other-regarding duties and the powers necessary to implement them; and (2) the familiar view conceives of the representation relation as conforming to a hierarchical principal-loyal agent model in which the agent's judgment must generally hew and defer to the principals' judgments and interests. (Notice my colleague's double reference to "public servants.")

Neither idea fits comfortably with an egalitarian theory of democracy in which we all have duties of justice to our fellow domestic citizens, duties of humanity and beneficence to our fellow global citizens, and, arguably, other collective duties (such as, perhaps, duties to animals and those duties to preserve and maintain things and projects of value that fall outside duties of justice). For the sake of brevity, henceforth, I'll refer to this list as "our collective moral duties" and I will often use duties of justice as a representative example. Roughly, what I have in mind are duties that each of us has by virtue of our membership in a group, that we each have to an equal degree, and that, prior to the designation of our roles and the circumstances of application, are identical. I will not here say more about the contested boundaries between them nor their specific content, except to affirm that (a) their content is not empty; (b) that whatever primacy the interests of our fellow citizens exert within the correct theory of justice and international obligations (and I do not deny they exert some), our domestic interests do not take *lexical priority* over all else; and (c) that our democratic commitments, as well as the satisfaction conditions of many of these duties, require a co-authored, communicative legal system by which they are fulfilled.<sup>2</sup>

Taking these as assumptions, my emphasis here will be on making some aspects of the structure of our co-authorship more prominent in our conception of representation by reframing how power emanates from the people. We should understand its predominant form not as a transfer of a fundamental right of individual self-determination but rather as a delegation of fundamental collective moral duties shared by one's fellow citizens and, hence, by one's representatives as fellow citizens. On such a reconceptualization, for example, foreign aid does not represent an abrogation of or a limitation on representation, but

rather an instance of its core exercise. This alternative model of political representation, as duty-centered, also comes hand in hand with a more robust picture of citizen participation than does a picture in which we imagine that political officials are our appointed servants, taking care of essential matters while we do other things.

Although this conceptualization is not commonplace, a duty-centered approach to politics isn't exactly novel either. For example, although Rawls devotes surprisingly little attention to representation, his short remarks point toward a duty-centered conception of politics and representation. Constitutional design is aimed at procedures that generate "just and effective legislation,"<sup>3</sup> which is also the citizens' "first interest in government."<sup>4</sup> Justice requires that political parties do not act as "mere interest groups," but that they advance and are guided by a conception of the common, public good.<sup>5</sup> Representatives' first priority is to use their judgment to enact just legislation and only secondarily, to further their constituents' compatible interests.<sup>6</sup>

While he works with a duty-centered model, it is unclear to me whether Rawls has a duty-delegation model in mind, in particular, because it is unclear whether Rawls thinks in terms of legitimate power as emanating from the people. Indeed, it is unclear whether he believes a theory should supply the functional equivalent of the true, underlying moral significance of power emanating from the people, along the lines of how justification from the original position serves to substitute for the moral value of actual, individual voluntary consent to be governed.<sup>7</sup> For my part, and putting aside individual, voluntary consent, I think the distinct idea of power emanating from the people has a normative importance that cannot fully be captured or satisfied by showing the structure of government is one that good-willed people could or should agree to. As I argue in *Democratic Law*, on analogy with individual moral action, the adequate fulfillment of our political duties of mutual respect to one another has both a structure or outcome component and a (collective) motive component. The motive component is satisfied through our expressive collective activities of endorsement and commitment to just arrangements through the expressive mechanisms of democratically formed law.<sup>8</sup> One way to think of this is that it's important not only that justice be done and be seen to be done but that we actually participate in committing to its being done by us, in our name. Adequate discharge of many of our collective duties, including our duties of mutual respect, requires us to exist harmoniously within a just basic structure *and* to cooperate with our compatriots to co-author and construct the terms of this required basic structure so that when the government acts and speaks, we are acting and speaking. Understanding democracy,

then, requires understanding how representation and egalitarian co-authorship relate to one another.

In any case, whether Rawls thought power emanated from the people or whether it suffices that people have equal rights of participation in a just government, Rawls does not detail the implications of a duty-centered conception for the relationship between the (duty-sensitive) representative and the (duty-bound) constituent. By exploring the resources of a duty-delegation model, I aim to revive attention to a duty-centered model of politics and to highlight some of its implications for the relationship between representative and constituent as well as some implications for our conception of the duties of citizenship and, in particular, the relationship between citizens and the law.<sup>9</sup>

Because, however, our philosophical attention has in recent years been riveted on the transfer of powers associated with rights (such as with promising and consent), to build and explore this picture, I will begin at some distance from politics and representation—by tracing some of the philosophically interesting and distinctive features of transferring and sharing normative power when that power emanates from a duty. This discussion will coincide with some reasons, especially in the case of delegating duties, to resist the temptation to use a hierarchical principal-agent model, in which a principal empowers an agent to act on the principal's behalf while the principal directs her attention and energies elsewhere. After then proceeding to describe how a duty-central account understands democratic representation and the implications for the representative, I conclude by describing the centrality of citizen participation in a flourishing democratic *legal* system.

## II. DUTY DELEGATION

Let's begin with duty delegation. Many discussions about normative powers and their transfer, whether critical or justificatory, focus on examples like promising and consent, whether and how those powers derive from rights, and the individual and moral advantages of possessing, exercising, or transferring those powers.<sup>10</sup> Often, these discussions have in mind rights grounded in autonomy values (as with some rights over personal property, many rights over the body, or rights to make personal decisions or to otherwise express or represent oneself). For many simple rights (by which I mean rights that are not derived from a duty), permanent or long-term alienation seems possible. Think of control over property such as when I give or sell to you my extra egg-beaters or, to promote family harmony, I promise you I will

attend the graduation and I lose my normative power for me, rather than you, to decide otherwise. Sometimes, alienation amounts to a central expression, and not merely an exercise, of the autonomy that the right enshrines. Think of how many conceive of marriage.

Often, transfer is temporary and more qualified as with cases in which the rights holder retains the ultimate power but for a period, lends or shares it with another. You may rent and occupy my property but only under certain conditions. To enhance my power or to free my time, I empower you to serve as my agent (perhaps paying you a fee) and I consent that you may use my normative powers, for a time and for a qualified purpose. You may examine me, or speak for me, or act for me, but, ultimately, I retain the power to make the decisions about where your acquired powers will be directed. Because the normative power to act emanates from me and my right to control a matter, and because that right is grounded in the value of choice or the benefits the right brings to me, it's often assumed that the temporary possessor must serve my interests and defer to my judgment (unless such deference comes up against some other duty, such as a prohibition or a role-based obligation).

What has been missing from this discussion is sustained attention to how the normative powers associated with duties might enter the picture and how their transfer and sharing, which I'll label *delegation*, works. The neglect is strange since many powers and rights arise because they are necessary to execute a duty. For example, the putative right and power to direct and arrange one's child's education would have to derive from a parental duty to ensure one's child's welfare and development. The justification for this power will have more to do with the needs and vulnerabilities giving rise to the duty than with the salutary effects the power has for the parent or those with whom she shares power.<sup>11</sup>

Considering those normative powers that trace their origins to duties complicates the simple picture of transfer I have just described, both with respect to efforts at more or less comprehensive alienation and with respect to more limited transfers of power. First, given their nature, the alienation and partial transfer of duties is usually not a *simple* matter of exercising one's will, as it might be in the cases of consent and promises (at least those that do not impose significant externalities). Although there are certainly cases of incapacity that justify relinquishing parental responsibility, one cannot permanently renounce or outsource some or all of one's parental duties at will, because those duties are importantly *personal* and specific to their holder.<sup>12</sup>

The resistance of those duties to transfer is not solely because they are part of an intimate relationship. After all, if I have a responsibility to verify that the water quality meets minimal standards of safety and I have the powers to certify their quality, I cannot offload that responsibility and those powers to just *any* person who offers to handle it. There are complex procedures by which I may revise or quit my role, which in turn will affect a wide range of my duties, powers, and rights. In standard cases, though, picking out a particular duty or a range of duties (or the powers that flow from them) to alienate or to share is not a matter of our mutual preferences. The grounding of the duty may restrict whether I can alienate it or share it at all, with whom, and for what reasons.

At the same time, for many duties, often, one must recruit assistance to manage them well and to retain one's sanity. Given their complexity and the complexity of our social circumstances, the execution of duties often cannot be a solitary affair. It requires the aid or cooperation of others and so requires their empowerment by the original duty-holder.

To be sure, some duties are more outcome-oriented than personal, so that the successful arrangement of a relevant state of affairs counts as its satisfaction whether or not the duty-holder personally delivers. Even in these cases, though, the duty-holder retains ultimate responsibility if the arrangements fail. This form of ongoing, ineliminable responsibility represents a second notable feature of duty delegation. Even when a duty holder may (or must) share the powers necessary to fulfill the duty and may temporarily make another the point person, the duty cannot be entirely sloughed off, even temporarily, just at will. A parent may authorize a bus driver to be responsible for taking his child to school, but if the bus does not arrive, the parent must transport the child to school; even if the bus driver is at fault, the parent is still on the hook for taking measures to ensure the duty is fulfilled. To use a familiar term, short of alienation, successful duty delegation leaves a residue; even when one attempts permissibly to locate the performance obligation in another person, the duty is sticky enough that one must play the role of backup.

The stickiness of duties might be thought to lend succor to a highly hierarchical principal-agent model of delegation. Since the principal bears the ultimate responsibility for ensuring a duty is fulfilled and is the source of the delegate's duty, it may seem fitting that her directions and judgment be followed by the delegate. On the surface, some examples may seem to conform to this model. For instance, parents choose daycare providers, give directions about their parenting philosophies and preferences, and retain the power to terminate if the provider does not conform.

This description, however, is misleading and the temptation to embrace a fully hierarchical principal-agent model should be resisted. After all, the original duty is not seated in a duty-holder in order to celebrate her judgment or protect her reputation. What should govern the delegation relationship and the division of power within it is the ground of the duty and the appropriate mechanisms of its fulfillment.

Let's redescribe the example. The parent delegates partial responsibility to the daycare provider for the child and the power to fulfill that responsibility. The role of the daycare provider may inflect the duty in ways not entirely controlled by the parent. For example, the daycare provider may need a license. To serve the children well, that license may require certifications and regular updates that the parent would not choose (increasing the price). It may require the daycare provider to report suspected abuse or enforce vaccination requirements, whether the parent accedes or not. Morally, the daycare provider must treat children of all genders equally and allow them to play with the same toys (even if the parent's preference and practice is patriarchal) and must not lie in response to a child's (age-appropriate) questions, even if the parent requests mendacity about certain topics. These requirements are not, as with attorney licensing, for the sake of the transferor (the rights holder) or for the sake of an administrable system (to serve rights holders in general and control externalities). These requirements reflect what is necessary for the execution of the duty to the child by the occupant of the role.

Still, the parent retains ultimate responsibility for ensuring the child's welfare. This gives the parent an oversight role over her delegate, which may include the power to terminate. We should not assume, however, that an oversight role and the *de facto* range of power it brings entails that the parent therefore has the *moral* authority to dictate all manner of terms and to terminate the relationship over any difference over the duty's method of execution. The practical leverage bestowed to facilitate that oversight relation may exceed the moral bounds and moral purposes in and over which the delegator should exercise that power. This is not merely because the parent may be mistaken but also because, through delegation, the delegator has put the delegate into direct contact with the grounds of duty generation. That is, the delegator has put the delegate into a direct relationship with a child and the child's needs, and the delegate has her own responsibility, as a moral agent, to discharge the duties that come with that relationship faithfully.

To elaborate, the daycare provider's duties and power with respect to the child begin with the access and normative power bestowed by the



parent. Yet, the provider's normative role cannot be reduced to acting as a mere conduit for the parent's instructions, because the provider's role is to enter into a caring relationship with the child. The child's needs and the relationship itself require the provider's own agency and application of her own judgment. Although the parent's judgment about how the caretaking should proceed should have substantial weight, the parent's judgment isn't normatively controlling or decisive. That is to say, the delegate must use her own judgment about how to satisfy her duties to the child. A parent may declare that she wants her child to gain exposure to unmasked children to bolster the child's immunity, but that judgment need not dictate what the caregiver does by way of some relationship of fealty. The caregiver may reasonably think that, as a general matter, the parent knows more about the child's welfare and for that *epistemic* reason, he should usually defer to the parent's judgment. Further, because the parent is the primary caretaker and will have to integrate the consequences of the caregiver's decisions into the parent's plan, the caretaker also has that reason to give substantial deference to the parent's judgment to ensure a cohesive plan *for the child*. Also, the parent may claim a substantial measure of authority because the value of the parental relationship is realized through the parties' evolution through an asymmetric relationship of care, dependence, authority, and responsibility into one of mutual care and interconnected independence.

Nonetheless, since the caregiver's responsibility to the child, emanating from the child's needs and their own relationship, is not fulfilled simply by following orders from the parents, the caregiver has to develop and apply her own judgment about what duty in context requires; that judgment may incorporate and give substantial weight to the parent's judgment, but cannot merely reflect it on the grounds of the parent's status or authority with respect to the child.<sup>13</sup> The buck makes a pit stop at the caretaker before ending with the parent and it could turn out that the pit stop requires masks.

Thus, respect for the delegate's moral agency and responsibility as well as for the relationship between the delegate and the child militate that the delegator should not, morally, consider herself the dictator of the delegated relationship. It's more of a supervised collaboration that requires coordination as well as making (some) room for the delegate's judgment. The delegator has greater actual than normative power and must use her discretion to align the two in ways that are consistent with both the underlying duty to the child as well as respect for the delegate's moral agency and relationship to the child.

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I have used an everyday case to illustrate four points about duty-delegation. First, there are distinct obstacles to their alienation and transfer at will. Second, when delegation is permissible, the delegator still retains accountability for the duty's fulfillment. Third, the delegate is accountable to the duty and its source and not just the delegator. Fourth, the contours of duties may morph depending on who has them, rather than who delegated them.

These observations in turn have implications for the relationship between delegate and delegator. First, the delegate's role involves some independent judgment, rather than mere substitution or amplification of the delegator's judgment. Second, the power-sharing relation itself contains within it moral elements requiring sound discretion and mutual respect for the boundaries and roles of both delegator and delegate. These points illustrate some hazards of thinking of duty delegation on a model in which the delegate just serves to carry out the delegator's aims—whether to amplify their power or substitute for their presence.<sup>14</sup> They also illustrate some of the hazards of thinking of the duty-delegation relationship as a simple division of labor (you take these hours, I'll take those; and if there's anything left over, we'll see who has time). Delegating a *moral responsibility* is distinct from simply delegating a task. When a new moral agent is both enabled and trusted with a responsibility, the moral terrain described by the duty shifts, both in terms of what can be achieved in the service of the duty (the delegate may be capable of more or less, in various regards, than the delegator) and with respect to what powers and obligations reside within the delegator's portfolio. The delegator may not merely lighten her load through delegation, but may pick up new collaborative responsibilities, including respecting and ceding space to the delegate's judgment, taking on new tasks that arise in light of the delegate's role, abilities, and decisions, and, potentially, refraining from otherwise standard or required behaviors to maintain continuity or preserve a previously unattainable standard set by the delegate.

### III. POLITICAL REPRESENTATION

Having sampled some of the moral intricacies of duty-delegation in an everyday case that involves asymmetrical power, let's turn to political representation, where we often implicitly (1) vacillate between a duty-delegation and a rights-transfer model and (2) wield a hierarchical model when we should, in democratic contexts, develop a more egalitarian model instead.

First, the vacillation. Discussions of citizenship often invoke the language of duty, citing the duty to vote or the civic duty to serve on a jury. But, then, oddly, the idea of duty fades into the background when we think about representation. Rather than thinking of a representative as one's delegate in the execution of a duty, we talk as though the representative is the represented's agent, beholden to the represented's interests, needs, desires, or judgments. As my colleague's comments about vaccine distribution indicated, the idea is that the representative acts *ultra vires* if she attempts to contribute to any aim (such as a global humanitarian aim) that cannot be reconstructed as a pragmatic maneuver entirely rooted in the represented's interests.

Upon reflection, the combination of civic duty talk and rights-oriented representation models is a bit peculiar. If the idea is that by voting, we collectively transfer our simple rights of self-governance to our representatives, so that our representatives are to act in our stead to implement our interests, needs, or our chosen ends, then how does that square with a putative *duty to vote*? Is it a duty to oneself to ensure that political power is responsive to one's own needs or interests? That interpretation seems strange given the tension between the frequent, often high-minded, invocation of the duty to vote and the common ambivalence about duties to self. It also makes little sense of the fact that the duty to vote, the civic duty to serve on a jury, and other civic duties of political participation are invoked in the same breath, yet the duty to offer jury service is even harder to wrangle into a duty-to-self frame.

To be sure, functional state institutions serve us all well; voting and civic participation operate as crucial accountability mechanisms to ensure their sound operation. So perhaps the idea is that the duty to vote falls under the umbrella of duties not to free ride on collective, mutually beneficial activities. This is a coherent idea, but less straightforward than the alternative idea that our duty to vote derives from a more general duty to ensure our collective duties are performed and to contribute to their achievement. Before turning to some of the theoretical strengths of this alternative idea, I'll observe that the free-riding account on its own does not by itself yield a principal-loyal agent model of representation. That is, a duty to vote grounded in a duty not to free ride on accountability measures presupposes some account of the institution that is to be held accountable. There must be some prior content to and grounding of the relationship of representation before concerns of free-riding come on the scene. So that picture is incomplete.

Perhaps the idea is that we each have rights to self-determination, which we transfer to our representatives who must exercise them on our behalf, beholden to our directions and interests. This in turn generates a mutually beneficial system that we must maintain through voting. Maybe. It still remains unclear on this picture how the right to self-determination, so understood, relates to our collective duties. It seems rather strange that we would have a collective duty of justice, for example, one that our representatives in some way are bound to pursue and that infiltrates all aspects of our collective life, but our collective duty and their empowerment are unrelated. Instead, their empowerment arises from a right of self-determination that is understood separately from our duty of justice, but is constrained and diverted at every turn by our duty of justice? This convoluted description sounds absurd when spelled out, but it seems to be implicit in many discussions of representation that center on notions of constituents' interests and their good, whether common or fractured.

A more straightforward model of duty delegation might make a congenial difference to our theorizing about representation and citizenship. Suppose our collective duties do not so much *constrain* what our representatives can do for us, but instead lie at the root of their empowerment. So the thought would be that we have a duty to install and maintain an institutional system of justice, for instance, and for reasons both theoretical and practical, even with all the will in the world, that duty's fulfillment requires divisions of labor involving representatives whose full-time occupation is to deliberate about, construct, and maintain such institutions and to master the relevant knowledge to do so. On the model of democracy to which I subscribe, these divisions of labor require active citizen participation in constructing them and selecting these representatives, because our duties of justice require actions, outcomes, and also forms of expression endorsing these actions and outcomes. Our duty to vote is not, primarily, a downstream duty to contribute to a system of accountability of a scheme of mutual benefit, but rather it is an aspect of the primary provision of justice and the satisfaction of our other collective duties—of our both lending our judgment to the process of articulating what they require and who is well suited to articulate and implement them.

Consequently, the framing of some persistent debates about the representative's mandate seem out of place. That is, common debates about whether the representative should vote for the constituents' own sense of the constituents' interests, her perceived, tutored sense of the constituents' interests, or her judgment about the national interest (which may bear a complex relationship to the constituents'

interests) all miss the point.<sup>15</sup> The representative is not delegated to pursue her constituents' interests or good *in particular*, whether objectively understood, (collectively) subjectively understood, or as constituted after dialogic, deliberative, dynamic interactions with the representative.<sup>16</sup> Nor is it obvious that the representative is empowered only to serve the (actual or perceived) general public interest comprised solely of the interests of the citizens of the republic, however complexly configured, as previously suggested by my colleague.<sup>17</sup> Perhaps these debates, and their more complex variations, make sense, if what one has in mind is a simple rights-delegation model in which citizens share their right to make decisions for their own welfare to their representatives. This constrained perspective then produces morally stunted efforts to demonstrate that humanitarian assistance efforts serve our own national self-interest.<sup>18</sup>

From a duty-delegation perspective, this perspective and the convolutions that accompany it would make sense only if our collective duties of justice and of aid are entirely self-centered and have no extraterritorial component. This is quite implausible. We may have special duties to establish a polity and, then, to our co-members, but it is nearly inconceivable that our collective duties do not range outside our community. When our governmental representatives distribute resources to extraterritorial recipients, they are not curtailing their representation for the sake of an external duty. Nor need extraterritorial assistance be prudential to avoid charges of illegitimacy. Their actions are as straightforward as their decisions on any other policy matter, actions taken to discharge a collective duty.

Our understanding of representation and the constituent-representative relationship would also register differently on a duty-delegation model. On a duty-delegation model, citizens' right to vote is not primitive or foundational, but originates in their collective duties and the normative powers those duties generate. By voting, citizens share some of their power to execute those duties. Importantly, they share power with citizens who already have the very same duties. The representative, as a citizen, shares the same duties of justice with her constituency prior to election and they persist after she steps down from office.

Unlike many agents, the political representative does not have any special distance from the conditions that ground the empowerment relation. This marks an important point of contrast with the child-care case and with many familiar principal-agent relationships. In those cases, generally speaking, the delegate does not have the duty in question prior to the onset of the delegation relationship. Should the delegator

terminate the delegation relationship, the delegate's acquired duties expire (or, at least, contract substantially).<sup>19</sup>

By contrast, the representative is one citizen among others who shares the same duties and the same exposure to the effects of her duty-related actions as the rest of her community (putting aside contingent inequalities and corruption). These features mark important departures from the features that standardly ground the case for a hierarchical principal-agent relation in which the principal is thought to have a special, authority-based claim to deference from the agent about the content of the duty-oriented decisions the agent makes. If the representative and constituents share the same duty, then the idea that the delegator's primary relationship to the duty grounds an authority claim over the representative gets no traction. As part of their accountability role, the delegators may have the authority to remove the representative, whether on grounds of malfeasance, sheer disagreement, or something in between, but that power does not translate into any normative power or expectation to demand that the representative's decisions mirror the delegators' judgments.

Notice also that the implicitly posited tension between representatives is not foundational on a duty-delegation model. All citizens share in a collective duty and they empower representatives, as part of a division of labor, to discharge it by working among themselves to refine their understanding of this duty, find ways to concretize its expression and acknowledgment further, and authorize the means to implement it. Whereas, on a simple rights model in which representatives' mandate is to push the interests of their constituents, representatives stand in a bargaining relation to one another, which may only become contingently cooperative should interests coincide. On a duty-delegation model, the relationship is foundationally cooperative.

If the duty is shared prior to the delegation and if the duty is collectively shared across the population, what then is the relationship between the representative's judgment and the citizen-delegators' on a duty-delegation model? Does the representative have any sort of special relationship with the representative's unique constituents? For that matter, why would there be local districts at all?

On a duty-delegation model of representation, the primary work of a representative is to contribute to the execution of our collective duty, which is not unique to the representative's constituents. Nevertheless, in some systems and some polities, partly depending on size, local districts may play important roles in the execution of our collective duties,

directly and indirectly. Organizing at least some political solutions around localities provides the occasions to experiment, to tailor solutions to specific populations and locales, to build the sort of distinctive community character that inspires community attachment and participation, and to develop specialized knowledge about the community, its needs, and its figures. This specialized knowledge likely makes local constituents of larger political entities more informed about potential representatives, their views, their competence, and their characters than they would about a large number of national candidates. Moreover, representatives may bring important local information to the assembly that bears on the proper execution of collective duty. In that sense, representatives may owe special duties to their constituents, grounded in the latter's epistemic expertise, to ensure that their constituents' needs and conditions are understood and, further, their opinions about what justice requires are registered and engaged with. This special duty should not be understood as situated within a large-scale bargaining situation but rather as situated in a large-scale epistemic investigation of the requirements and sites for justice to be done and endorsed. In many cases, the difference between these framings is practically minimal, but the difference may be more evident with respect to more visible constituencies. With respect to those constituencies whose needs are more regularly and reflexively recognized and serviced, often for structural reasons, their representatives should not be chastised for "not fighting for the interests of their constituents." Their job is not to extract the best political bargain for their constituents, but rather to work to ensure justice is done. Sometimes, that may mean deprioritizing their constituents' interests (narrowly understood).

The duty-delegation conception would thus reframe some of the persistent debates about representation. Asking whether fealty to constituents requires pursuing their actual interests, their perceived interests, their actual preferences, their informed preferences, or even their preferences after a dynamic exchange would not be the appropriate question to ask. The duty in question is not to the constituents' interests or preferences as such and, furthermore, fealty is the wrong understanding of a duty-delegation relation. The more pertinent question would be about the appropriate structure of collaboration between representatives and constituents and the degree to which a representative's judgment about our collective duties should yield to her constituents' sense of our collective duties. The pragmatic calculations involved for re-election prospects may be quite similar (how much deviation from constituents' judgments will constituents tolerate), but the relevant normative considerations differ.

In large part, this difference traces to my contention that duty delegation is neither alienation nor a relationship of substitution akin to a mouthpiece. The delegator retains residual duties: to ensure that the delegated duty is properly executed, using criteria that accommodates respect for the delegate's judgment and acknowledgment of disagreements about the content and scope of the shared duty; to step in should there be gaps or lapses by the delegate; and to perform those aspects of the duty that are nondelegable or otherwise not delegated. Although the delegator's residue transforms oversight from a pragmatic to an obligatory affair, the oversight relation depends upon the nature of the relevant duty. Constituents and representatives are engaged in an epistemic and an expressive collaboration, with a division of labor (though not a simple division of labor).<sup>20</sup> Constituents attempt to select a representative they think well suited to the project of identifying policies and crafting laws to realize our collective duties and to communicate citizens' sincere commitment to its realization. Because many of the details involve specialized knowledge, constituents have some reasons to defer to representatives and others who cultivate expertise about technical areas as well as the political dynamics of implementation.<sup>21</sup> Those experts, even in their role as delegates, have reasons based in the nature of their delegated duty and role not to yield to popular pressure about such technical matters.

But successful democratic legislation is not purely an instrumental matter. Democratic law aims to express our commitment to justice, *et alia*, and not only to effectuate its structures because many aspects of our collective duties have a collective expressive content. The expression predominantly occurs through the commitments involved in articulate law forged through democratic processes, including public debates, private conversations, regular input to representatives, notice and comment, litigation, and elections.<sup>22</sup> Citizens cannot expect fealty from their representative/co-authors, but the alternative is not citizens' deferential abdication either. When appropriate, their accommodation and acceptance of divergent judgments by their representatives must accompany rather than replace the many sorts of active engagement that convey not only our conceptions of justice but also our underlying collective commitment to and interpretations of justice.

Given our varying interpretations of what justice requires, the expressive requirements of justice require more than constituent participation in the process. The achievement of the expressive function will be strained by apathy, but also by ongoing and substantial resistance to legislative outputs or omissions that exceeds mere disagreement. Constituents must be able to read legislative action (and inaction) as an



interpretation, however flawed, of their, of our, joint commitments. That reading is consistent with serious disagreement and hence is consistent with being in a substantive minority, but it is not compatible with extended and deep disagreement that generates alienation. This does not mean that representatives must merely reflect their constituents' judgments. But ensuring that gaps of disagreement do not yawn into (reasonable) alienation requires representatives' transparency. It also requires responsive interactions between constituents and representatives, where representatives respond to constituents as their co-authors, with whom they are in an ongoing conversation and cooperative negotiation about the content and interpretation of their shared commitments. This perspective need not demand that representatives vote their constituents' conscience rather than their own nor that they always forge a compromise. (Depending on the grounds and depth of disagreement and the relationship's track record, sometimes they should and sometimes they shouldn't.) It may, however, require that representatives ensure their constituents' judgments are voiced and known. This dynamic process may assure constituents that representatives are interpreting their shared commitments in good faith and may also influence the content of constituents' and representatives' judgments.<sup>23</sup>

#### **IV. DELEGATION-BACK**

##### ***A. Citizens' Ongoing Role in Legal Implementation***

I've been discussing the citizens' role in the representation process. On this model, there is a further dimension to constituent participation in effecting our collective duties surrounding implementation. We're more than familiar with citizen implementation in non-ideal cases when the government simply abdicates its responsibility and devolves power back to the citizenry to do individually what should have been done collectively. The Bushes, their plans for social security, and their thousand points of light were famous for this.<sup>24</sup> The fact that they somehow thought the work to be done required agents countable in the mere hundreds was already a clue that they failed to understand the gravity of the problems and the need for institutional forms of collective action. But, though the Bushes were champions of nonfeasance, the strategy was not exclusive to them. Many pressing issues involving poverty, inequality, and climate have festered due to governmental nonfeasance and malfeasance, forcing citizens, individually and in associations, to advance justice themselves, however haltingly, or to offer a partial substitute for justice by providing contingent aid in the absence of a guarantee by right.

Although such devolution is familiar and dispiriting, citizen implementation is not purely a feature of nonideal conditions of government abdication. Even in ideal theory, in addition to those duties that involve constituting and empowering the state and endorsing its duty-promoting measures, citizens have residual duties that take two forms. First, there are substantive duties beyond the purview of the state because they were never delegated to the state, perhaps because state execution would be wholly inappropriate or infeasible or perhaps because the state's role is properly understood as a backup and support from the outset. Many think of the default custodial relation of intending parent to child in this latter, backup way. To cite a potential, but more controversial, example of the former rationale: justice may require that, socially, we censure racist speech in ways or on occasions that exceed what it would be legitimate for the state to do given the shape that the state's guarantee of freedom of speech must take.

Second, the state may delegate duties back to citizens, in those cases in which it deems citizens important agents in legal implementation. I mean something here beyond the obvious case of issuing specific directives that citizens are meant to follow. I have in mind, further, the generation and enabling of implicit and explicit expectations on citizens to engage in initiative and deliberation to further the aims and purposes of law. This is one way to understand requirements of jury service, self-reporting duties (as with taxes and other data gathering requirements), the role of the private attorney-general, and the role of the whistleblower. In addition to these discrete roles and activities, there are also more diffuse forms of delegation-back, occurring wherever citizens need to engage in normative interpretation to understand or follow the law. These interpretative roles are most evident with the use of standards as a legal form (e.g., invoking notions of "reasonability," "good faith," or "fair dealing") in the law's articulation. They also arise when there are gaps in the explicit law's articulation of how compliance is to be understood, measured, and verified. Such gaps will arise from inevitable vagueness and failures of foresight in articulating legal norms, when circumstances and technologies change from the conditions in place during initial legal development, and from the intentional incorporation of discretion and flexibility in legal design. Managing these interpretative roles requires actors in good faith to consider how to achieve a specific law's purposes and how to reconcile their achievement with other social and legal norms.

To be sure, the use of private agents to identify, interpret, and implement the law must be deployed with care so that their empowerment does not amount to an abdication of the state's responsibility to ensure the pursuit of justice according to fair procedures. Part of that responsibility

must also involve efforts to constrain and prevent the abuse of power between individual citizens. There should be a special reluctance to deputizing citizens (whether explicitly or through doctrines of self- and other- defense) to use violence to enforce the law. Such deputizing may only on sparing occasion be justified. Without careful training about the obligations of public officials to show restraint and observe norms of due process and equal protection, the hazards of abuse are high and may be exacerbated by historical and cultural dynamics, such as our experience of the citizens' arrest power encouraging and immunizing racist vigilantism.<sup>25</sup> This is just one of those cases in which the delegated party (here, the state) is capable of setting and achieving a (normative) standard that the delegators (here, members of the public) cannot set and achieve. To maintain that standard requires the original delegators entirely to relinquish the exercise of powers they once possessed.

Texas's most recent effort to constrain women's reproductive freedoms provides another cautionary tale. In essence, SB8 bans abortions after the sixth week of pregnancy and abdicates enforcement by the state, enabling private citizens and organizations to sue anyone who performs, facilitates, or funds an abortion.<sup>26</sup> Both the content and the procedure of the law are abhorrent. Motivated by an effort to circumvent constitutional scrutiny and accountability, the procedure constitutes an insidious form of state abdication that fosters intimidation, uncertainty, and distrust of one's neighbors and friends.<sup>27</sup>

Despite these hazards, it would be unwarranted to conclude that citizen involvement in legal implementation should be avoided entirely and that we should support a monopoly on governance, including implementation, by state officials. Such monopolies risk the hazards of massive shortfalls in implementation, untenable levels of government oversight and scrutiny, and citizen distrust and alienation from government. A generous level of self-reporting, self-monitoring, and self-enforcement is essential to avoiding the trappings of an overbearing surveillance state and to securing a legal and social culture that features a robust level of basic liberties, actually available for exercise.<sup>28</sup> At the same time, we must be sensitive to the facts that citizen implementation may introduce differences of treatment and that some agents may be particularly poor at self-reporting or self-monitoring, whether for predictable reasons (e.g., corporations in lucrative yet competitive economic environments), or for contingent, contextual reasons. Managing such susceptibilities may provide reasons for shifting the balance more toward state oversight in particular contexts, for particular sorts of agents, or to ensure that transient and minor differences do not reify into unjust inequalities. Thus, a hefty degree of trust and responsibility must be delegated back

to citizens, while concurrently, we must ensure that the use made of citizens through delegation back should not come at the expense of the development and vitality of public norms, impartiality, equality of treatment, and role distance. Careful, contextualized tailoring about when to and when not to delegate back, which mechanisms to use, and what oversight to deploy is called for.

For instance, exclusive reliance on citizen investigation and enforcement of one's peers without judicial review certainly raises the alarms that I've just referenced. In other contexts, supplementary citizen involvement in legal implementation may uncover information close to the ground (as in whistleblowing) and provide important normative feedback and disciplining of state excesses (a function of jury service and community review boards). Citizen engagement with law may supply elusive information and independent perspectives about significant problems—as when enforcement by private attorneys general (as well as private litigants) supplement state omissions or provide the occasion for clarifying interpretation, as in a case of first impression. In other cases, legal norms take concrete shape through citizen interpretation of their responsibilities to one another, as when legal interpreters look to “best practices” or customs to establish legal expectations or, as referenced earlier, when the legal expectation is articulated in terms of a standard such as “reasonable,” “good faith,” or “unconscionable,” that requires normative judgment to apply to a particular situation.<sup>29</sup> While judicial reflection and oversight on these norms and practices may be necessary to refine them and to render them consistent with impartiality, fairness, and other public norms, that does not render these practices otiose. Rather, one may think of citizen-generated legal culture and judicial culture as having a mutually provocative and informative dynamic.

### ***B. Complementary Culture***

I have been focusing on citizen initiative in direct legal implementation, but one may also identify residual duties and delegation-back in those cases in which the legal system's success depends upon the cultivation and maintenance of complementary social normative cultures and practices (and vice versa). For the legal culture to work well and to sustain itself from either yielding to political pressure, resorting to exorbitant and even undemocratic enforcement tactics, or generating an alienated population, a surrounding supportive and complementary social culture needs to thrive.

The development of a free speech social culture offers one example. Citizens must themselves accept and practice a social culture of

engaged listening, tolerance, and openness to dissent, partly in order to train to be officials who resist pressure and the temptation to squelch unpopular speech but mostly, as everyday citizens, to learn how to endure and manage the challenging, controversial, and sometimes even distasteful speech that a free speech legal culture will make room for. Often the supporting social culture and the legal culture will work on parallel principles, but many divergences may be appropriate given the different roles of private agents and state actors, as the prior example of social censoring of racist speech illustrates.<sup>30</sup>

Free speech is not an isolated example. A further example might point to the need to establish a culture of egalitarian gender expectations in interpersonal interactions to complement and support civil rights laws governing equal treatment on the basis of gender. The point also holds of our economic relations. Contract law explicitly delegates back when it requires contractors act in good faith toward one another, respond to others' reasonable reliance, and adhere to reasonable modifications. But its success also depends upon the maintenance of a social culture of trust, honor, and unenforceable forms of fair dealing. Were these virtues scarce in the social culture, contracts would be avoided, limited to those who could afford large forfeitable deposits and private enforcement, or far more social resources would have to be devoted to legal enforcement. In a more just society that understood contract law as one of many legal institutions that structure *equitable* forms of economic cooperation, its successful operation would also require that contractors show regularly good faith to one another *before* and after the agreement takes place and that they bargain for and extract only fair and equitable prices, even when they enjoy a superior bargaining position. Although some of these behaviors could be subject to greater legal enforcement than we currently observe, even so, many violations might be evident to the parties but difficult to prove—and thus, dependent on the parties' honor.

Notably, these delegations-back involve a transformation of the form the collective duty took prior to delegation. That is, the delegated duties take a particular shape that has been refined by the legal system's effort to instantiate justice. It won't do for citizens simply to set out armed with their knowledge of the "original" collective duty of justice. Their own judgments of what that collective duty requires or how it might best be realized may not dovetail with the actual collective effort that has been mounted. (Some gender activists may think gender equality and freedom would be best served without a state institution of marriage, but that given its existence, justice requires access to marriage for families, whatever their gender composition, and support for such marriages.) Their delegated duties return to them refracted through the

institutions and the layers upon layers of particularized decisions about how to instantiate justice that legislation, regulation, and other legal forms represent.

The significance of this point may emerge by considering how the picture I have been drawing of delegation and delegation-back connects to Rawls's understanding of the individual duty to support just institutions and the ongoing dispute that erupted twenty-odd years ago about the ethos of the citizenry and the centrality of the basic structure. As Rawls understood it, the principles of justice govern only the basic structure. Individuals' natural duties of justice are "to support and further just institutions."<sup>31</sup> This division, in part, aimed to ensure that a just system made adequate room for the expression and development of individuals' capacity for a conception of the good. Critics such as G.A. Cohen and Liam Murphy, to put it roughly, thought this division was first, insensitive to the urgency of the needs served by justice and second, let individuals off the hook too easily. Individual citizens too were accountable, directly, to the principles of justice.<sup>32</sup>

I have not addressed the former concern, but this exploration may shed a different light on the latter. Rawls did not say much about what precisely individuals' duties to support and further just institutions amounted to. One gets the impression that he has in mind activities like legal compliance including the payment of taxes, voting (for candidates dedicated to instantiating justice), and remaining educated to perform accountability functions. In part, the impression that citizens have a fairly limited portfolio of responsibilities may be bolstered by Rawls's pains to avoid Hart's criticism that Rawls presupposed a politically infused conception of the good life by emphasizing the importance of *equal* access to political participation over political participation itself.<sup>33</sup>

To be sure, there is no pressure for the Rawlsian citizen to run for office or join the League of Women Voters and so to be politically active in those ways. Still, what is required by the natural duty to support and further just institutions may be less parsimonious than is often assumed by participants on both sides of this debate. The residual and delegated-back duties of citizens I have been describing fall under the rubric of supporting just institutions, but they don't amount to a discrete set of tasks that border on periodic abdication, punctuated by brief demands every election cycle. The role of the citizen is robust and continuous. It extends past erecting the institutions, populating them with representatives, and then adhering to a robotic model of compliance.

Although a simplistic model of compliance is often implicitly taken for granted, legal compliance need not and should not be understood through a textualist lens as something akin to “not violating explicit directions.” It is a mistake to think of law just as a set of explicit directions and a legal system as flourishing so long as the explicit directions are not disobeyed. Law is not computer code, somewhat naturalized for its buggy, organic hardware. Admittedly, some parts of the law do work that way, but to work as it should, the successful implementation of a substantial portion of the law requires taking a greater degree of initiative through normative interpretation, understanding, and responsive, supportive conduct by citizens and officials alike.<sup>34</sup>

The considerations I’ve explored here lend themselves to something like the division of labor associated with the “basic structure” move, but impart a rather different impression. As in Rawls’s picture, the basic structure is the primary focus of a theory of justice both because the basic institutions have such a comparatively profound impact on the shape of the society and the lives that are possible within it and because the central duties of justice require collective, institutional actions; given the latter, the central duties of justice require the people to delegate their duties and powers to a basic structure and the representatives who craft and operate it. Nonetheless, the division of labor does not ease the burden on citizens in the “set it and forget it” way that repelled Cohen and Murphy. What’s left and what’s delegated back, as I have described it, is fairly demanding, even in ideal conditions.

The division of labor does, however, shape and define those burdens in ways that may be more readily incorporated into a wider array of life plans because the shape that citizens’ residual and delegated-back duties take is not isomorphic to the principles that institutions follow. The institutions themselves shape the duties left to citizens to ensure complementary exertions, but also in ways that are sensitive to citizens’ circumstances, needs, interests, and abilities. Indeed, much of the citizen effort I have described as falling under the “delegation back” category is best suited to both formal and informal associations, not individuals. (The relative absence of discussion of the role of voluntary associations from much of the basic structure debate literature is striking given their significance in Rawls’s own theory.) Although the deliberative demands may be high, the duties themselves (qualitatively transformed by the division of labor effected through the basic structure) can be incorporated into a wide diversity of ways of living in ways that they could not be were the duties understood to require individuals to dedicate themselves to the simple and direct application and pursuit of the fundamental principles of justice.

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## V. CONCLUSION

I have been exploring the resources and implications of a model of representation that takes duty delegation as the primary and foundational source of representative power. I have argued that it offers a more unified account of the continuity between citizens' political duties and the responsibilities of representatives than do hierarchical models that begin by thinking of representatives as our loyal agents in our exercise of simple rights of individual self-determination. It also makes greater sense of the appropriate balance of power between citizens and representatives in a democracy and of the source of the significant responsibility that citizens bear in making democratic institutions work.

Such a view need not exclude the complementary pursuit by representative bodies of common interests and common ends that are consistent with, but not required, by duty. Indeed, such pursuit may indirectly contribute to the sort of community individuation that both makes places interesting and that also elicits community affiliation and identification, which in turn motivates participation and engagement.<sup>35</sup> Thus, the duty-delegation mission and a secondary mission of the pursuit of common interests and common ends may often synergize.<sup>36</sup>

These points could be recast by rethinking what the right of self-determination amounts to in a political context. The language of self-determination and its use in other contexts has often lent itself to thinking mainly of self-determination as an exercise of unbounded individual autonomy and personal expression, which in turn lends itself to thinking of one's agents or representatives as mere extensions of one's will, dedicated to the pursuit of our interests, narrowly defined. It's not evident that this idea, unbridled, makes a great deal of sense, or could offer much satisfaction, in a political, collective context in which, as we know, individual wills often conflict.

We might instead orient our attention toward the development of the self as a moral agent, who works in concert with other moral agents who, necessarily, have the same ends. The relevant form of self-determination here is not the exercise of choice that distinguishes one as an individual from others, but rather the self-conscious exercise of judgment that represents one's recognition of one's duties and one's (required) effort to contribute to their joint realization. A collective of people who do so together, will, of course, in the process generate distinctive ways and styles of discharging these duties, partly because many of them involve indeterminacy and choice in their execution. Distinctive modes of execution will also result because of possibly inevitable good-faith



disagreements about the content, scope, and proper execution of their shared duties and the variable compromises that emerge from these disagreements.

These distinctive modes of execution will individuate collectives and they may also individuate themselves by pursuing those discretionary ends that are consistent with their duties. Such individuation is entirely welcome and, as I suggested earlier, an important aspect of inspiring citizen attachment and spurring experimentation and innovation. But, although there is a dimension of collective self-expression-as-individuation in collective political activity, it rests on top of and does not operate independently of what I posit is its main purpose and thus the main purpose of representation, namely, to execute our collective moral duties.

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### NOTES

1. Eugene Volokh, email to Epidemic Law listserv, June 9, 2021.
2. Seana Valentine Shiffrin, *Democratic Law* (Berkeley Tanner Lectures, ed. Hannah Ginsborg, with commentaries from Niko Kolodny, Richard W. Brooks, and Anna Stilz) (New York: Oxford University Press, 2021).
3. John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971), 197.
4. Rawls, *A Theory of Justice*, 227.
5. Rawls, *A Theory of Justice*, 222, 226.
6. Rawls, *A Theory of Justice*, 227.
7. Rawls, *A Theory of Justice*, 13.
8. Shiffrin, *Democratic Law*.
9. Although I cite Rawls as an example of a recent duty-centered theorist and am inspired by myriad features of his theory, I make no claim that my contentions are compatible with or a complement to Rawls’s theory more generally.
10. See, e.g., Ruth Chang, “Do We Have Normative Powers?” *Proceedings of the Aristotelian Society* Supplementary Volume XCIV (2020): 275–300; Victor Tadros, “Appropriate Normative Powers,” *Proceedings of the Aristotelian Society* Supplementary Volume XCIV (2020): 301–26; Gary Watson, “Promises, Reasons, and Normative Powers,” in *Reasons for Action*, ed. David Sobel and Stephen Wall (Cambridge: Cambridge University Press, 2009), 155–79; David Owens, *Shaping the Normative Landscape* (Oxford: Oxford University Press, 2012); Neil

MacCormick, "Voluntary Obligations and Normative Powers i," *Proceedings of the Aristotelian Society* Supplementary Volume 46 (1972): 59–78; Joseph Raz, "Voluntary Obligations and Normative Powers ii," *Proceedings of the Aristotelian Society* Supplementary Volume 46 (1972): 79–102. I'm no stranger to the trend, having written about the egalitarian importance of being able to transfer the power to decide so as to mitigate some dynamics of vulnerability. "Promising, Intimate Relationships and Conventionalism," *Philosophical Review* 117, no. 4 (2008): 481–524.

11. I discuss limitations on the transfer of intertwined rights and duties that involve responsibility for others' vulnerabilities in "Hidden Delegations: The Assignment of Contractual Rights and Consumer Debt," *Modern Law Review*, forthcoming.
12. To acknowledge the personal nature of parental duties is not to take a stand on whether parental duties are foundational or themselves delegated by the state to those parties who are deemed best suited to protect children's welfare and to engage in the personal relationships such welfare requires.
13. This description explains the delegate's sphere of judgment as emanating from the requirements of the duty itself. It contrasts with an account like that of Justice Alito's that explains why schools may impose requirements on students (including speech requirements) as stemming from parental implicit consent to those rules necessary for the school to run its curriculum and its programs. See, e.g., Justice Alito's concurrence in *Mahonoy Area School District v. B.L.*, No. 20-255, slip op at 10 (June 23, 2021), a recent case that found the suspension of a student from extracurricular activities due to her expletive-ridden off-campus speech unconstitutional.

Justice Alito's position does not ring true for two reasons. First, given the requirement to educate children, many parents lack the means to refuse this consent by homeschooling or enrolling their children elsewhere. Second, suppose some schools did not assume consent, but solicited it and recorded refusals, but then, nonetheless, defied such refusals. If it still implemented its own rules (e.g. by punishing ribald off campus speech), it might wrong the parents (by pretending to respect their consent provisions and refusals), but whether it wronged the children would depend upon whether the *children* had a right to engage in that speech and whether it was true that the duty to educate depended on the suppression of that speech. Justice Alito's position renders it hard to understand why a case about state school regulation of vulgar off-campus speech was a First Amendment case about free speech rather than a contracts case.

14. Further reflection may generate skepticism about how well the amplification model fits the case of simple rights in the first place. That is, arguably the first two points hold, though perhaps more faintly and contingently, in many cases of the transfers of powers that originate in what I am calling simple rights, i.e., rights that do not derive from duties. Although the source of the delegate's power is a simple right, not a duty, the right's exercise may impact third parties toward whom the delegate may bear responsibility.
15. A classic discussion of this dispute and its more complex iterations may be found in Hannah Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), ch. 7.
16. See, e.g., Andrew Rehfeld, "Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy," *American Political Science Review* 103, no. 2 (2009): 214–31.
17. Rehfeld gestures at this point when he notes that "[a]lthough the "good of all" has traditionally been described in terms of the good of "the nation," there is no reason to conceptually limit this—the extreme would be the good of all humanity through conceptions of global justice" ("Representation Rethought," 222). The

difficulty in Rehfeld's taxonomy and his recognition that the representative's "aim" might extend in ways that include consideration for people outside a nation's borders, is that it and the alternative targets for representatives' aim are all framed in terms of the good of this or that set of people. But, considerations about the good may not exhaust or fully determine what justice and other duties require (particularly if it is true that the right is prior to the good). While a duty-based conception may be interested in the common good as a partial component of justice, it is unlikely to equate, conceptually, what justice requires with the common good; global conceptions of justice may be more oriented toward fair treatment than by the aim to further the common good as such; and our duties to the environment, to animals, or to preserving cultural heritage may be distorted if we place too much emphasis only on notions of the good.

18. See, e.g., Alan W. Dowd, "In Defense of Foreign Aid," *Legion*, September 19, 2019, <https://www.legion.org/magazine/247062/defense-foreign-aid>.
19. Interesting issues arise about what, if any, duties a caretaker has to a child or a patient after the relationship has ended, whether because of the delegator's termination or because a pre-set term has expired, such as a school year. Even if the power sharing from the delegation has ended, the cultivated relationship itself may have generated duties on its own that persist past the point of the expiration of delegation. For instance, the former caretaker may have moral duties to the patient or child to take the occasional phone call to offer support and advice, to write a letter of reference, and to offer basic training to any subsequent delegate.
20. See also Jane Mansbridge, "Rethinking Representation," *The American Political Science Review* 97, no. 4 (2003): 515–28, 515–16.
21. See also Jane Mansbridge, "Clarifying the Concept of Representation," *The American Political Science Review* 105, no. 3 (2011): 620–30, 622. Oren Bar-Gill and Cass R. Sunstein, "Regulation as Delegation," *Journal of Legal Analysis* 7, no. 1 (2015): 1–36.
22. See my defense of this position in *Democratic Law*.
23. So, while Jane Mansbridge's point that a model of self-reliant representatives need not be elitist where constituents and representatives alike regard their representatives as "one of them" or "resembling them," may resonate for some homogenous districts, avoiding hierarchy and elitism is not sufficient for *democratic* representation. See Mansbridge, "Clarifying the Concept of Representation," 633–34. Achieving the expressive ends of democratic law, in particular, requires a greater level of citizen engagement with law and dialogue with their representatives, even if constituents and representatives are in sync from the outset.
24. See, e.g., George H. W. Bush, "Inaugural Address," (January 20, 1989), [https://avalon.law.yale.edu/20th\\_century/bush.asp](https://avalon.law.yale.edu/20th_century/bush.asp); George W. Bush, "State of the Union Address," (February 2, 2005), <https://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050202-11.html>.
25. See, e.g., Sharon Finegan, "Watching the Watchers: The Growing Privatization of Criminal Law Enforcement and the Need for Limits on Neighborhood Watch Organizations," *University of Massachusetts Law Review* 8, no. 1 (2013): 105, 120–23 (discussing the Trayvon Martin case and criticizing many neighborhood watch programs for "[l]ack of training, poor organization, tendencies to target certain demographic groups . . . overzealous interactions with suspects . . . [and] their tendency to impinge upon the civil liberties of those living within the community"); Ira P. Robbins, "Vilifying the Vigilante: A Narrowed Scope of Citizen's Arrest," *Cornell Journal of Law and Public Policy* 25, no. 3 (2016): 580–81 (2016) ("lack of training and potential for abuse are common among [neighborhood watch] organizations").

26. S.B. 8, 87th Leg., Sess. 87(R) (Tex. 2021).
27. See Laurence H. Tribe and Stephen I. Vladeck, "Texas Tries to Upend the Legal System with Its Abortion Law," *New York Times*, July 19, 2021, <https://www.nytimes.com/2021/07/19/opinion/texas-abortion-law-reward.html>.
28. See also Robert C. Hughes, "Law and the Entitlement to Coerce," in *Philosophical Foundations of the Nature of Law*, eds. Wil Waluchow and Stefan Sciaraffa (Oxford: Oxford University Press, 2013), 183–206.
29. I discuss the role of legal standards in inducing moral deliberation by citizens and officials in "Inducing Deliberation: On the Occasional Merits of Fog," *Harvard Law Review* 123, No. 5 (2010): 1214–46.
30. One case of delegation-back may involve private enforcement of the First Amendment against government actors whose arguable violations of the First Amendment may be nonjusticiable. I have in mind applying the commitment of many social media companies not to provide a platform for illegal speech to government speech that transgresses the First Amendment. I would cite President Trump's characterizations of dissenters as traitors as well as his many lies while in office as examples. I explore these examples in "Unfit to Print: Government Speech and the First Amendment," forthcoming, *UCLA Law Review* (2022).
31. Rawls, *A Theory of Justice*, 334.
32. See e.g., Liam B. Murphy, "Institutions and the Demands of Justice," *Philosophy and Public Affairs* 27, No. 4 (1998): 282.
33. See H. L. A. Hart, "Rawls on Liberty and Its Priority," *University of Chicago Law Review* 40, no. 3 (Spring 1973): 555; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 330. I do not think the level of political involvement that justice requires of citizens reflects a picture of a conception of the good so much as it reflects what a sense of justice demands in the circumstances. Its satisfaction may limit what good ways of life are available to us, but only because those limitations follow from what is possible under a structure that is fair to all.
34. I defend this claim at greater length in a companion paper, "Democratic Civic Education and Democratic Law," in *Civic Education in Polarized Times*, *NOMOS*, forthcoming.
35. I offer a more extended discussion of the pursuit of discretionary state interests and some requirements on their pursuit at the intersection of constitutionally protected individual liberty interests in Chapter Three of *Democratic Law*.
36. When representatives are engaged in this secondary project, does their relationship to the represented differ than when they are executing delegated duties? This is a large question, suited for a longer investigation than there is room for here. I suspect the answer is complex, given the dominance of, and potential side-effects for, the duty-delegation aspect. That is, even were some sort of loyal agent model appropriate to simple rights transfer on its own, the combination of duty delegation with simple rights transfer may require cautionary measures to ensure that whatever norms are followed with respect to the secondary project, there is no backslide by the citizens-qua-delegators into the passive habits and demanding expectations of the loyal agent model on the duty side. How one conceives of these interactive effects also depends, in part, on substantive considerations about how vast the scope of duty is and how much room there is for purely discretionary ends and interest advancement.