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Essay

The Political Morality of Voting in Direct Democracy

Michael Serota & Ethan J. Leib[†]

The voting levers in candidate elections and direct democracy elections are identical. The political obligations that bind the citizens that pull them are not. This Essay argues that voters in direct democracy elections, unlike their counterparts in candidate elections, serve as representatives of the people and are, accordingly, bound by the ethics of political representation. Upending the traditional dichotomy between representative and direct democracy, this Essay explains why citizens voting in direct democracy are representative legislators who must vote in the public interest and must not vote in their private interests.

We begin with a simple question but one that is not asked often enough: Do voters have obligations to their fellow citizens in how they vote?¹ Answering this question requires a consideration of the voter's role—and relationship to her fellow citizens—in a democratic polity. Although the philosophical literature on the ethics of voting does not differentiate between voting in candidate elections and direct democracy elections, we explain in this Essay how important and underappreciated differences between these two types of voting—and the roles and

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1. We do not consider whether there is a duty to vote in the first place; we ask only whether those who do vote are ethically bound to vote in a particular manner.

relationships they involve—can underwrite different obligations.

Voting in direct democracy materially differs from voting in a candidate election, we shall argue, because voters in direct democracy are in a relationship of political representation with the citizenry. The ethics of representation accordingly constrain voter representatives in the kinds of reasons they can permissibly use as a basis for formal action within the scope of the relationship. Few, for example, think that a member of Congress may exclusively pursue her private interests when voting in the legislative chamber;² indeed, we call that kind of self-dealing corruption, even when it offends no law or is impossible to prosecute for one practical reason or another.³ Here we argue that similar self-dealing in the direct democracy voting booth is inconsistent with the political morality of representation because the product of the legislative chamber and the direct democracy voting booth is the same: coercive law.⁴

2. Put to one side debates over whether elected officials have a “free mandate” to pursue the public interest unencumbered by the direction of constituents and electors. In many countries, representatives are bound by the doctrine of the free mandate as a first principle of public law and must leave their constituents’ interests at the door to the parliament halls. See MARC VAN DER HULST, *THE PARLIAMENTARY MANDATE: A GLOBAL COMPARATIVE STUDY* (2000). While legislators may have the “prerogative of obscurantism” about the reasons for their votes on the parliamentary floor, see *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977), we take it as a first principle that votes there ought to be cast in the public interest, however defined, rather than in legislators’ own private interests. Even if legislators also have some duties to their particular constituents, they clearly have no permission to pursue their personal private interests when they vote on behalf of the people.

3. This is not a universal view of corruption, but it is surely a “received conception”: “the abuse of public office for private gain.” Mark E. Warren, *Political Corruption as Duplicitous Exclusion*, 37 PS: POL. SCI. & POL. 803, 803 (2006). One of the difficulties of this too-simple view of corruption is political science’s assumption that politicians are interested, first and foremost, in their own re-election. If the interest in re-election is a private interest, politicians are always corrupt under standard models of political science—and that cannot be right. But refining the concept of corruption (and political science’s modeling) is not our project here. For a book-length treatment, see ZEPHYR TEACHOUT, *BENJAMIN FRANKLIN’S SNUFF BOX* (forthcoming 2013).

4. It is important to note that our argument is limited to cases of direct democracy that produce binding law directly. This excludes instances of direct democracy in which the citizenry is not enacting law, as in the referendum generally, where the voters serve as a vetogate in a larger lawmaking process involving legislators. For an introduction to the variety of direct democracy mechanisms and why their structural differences probably counsel for different treatment, see Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903 (2006) and Ethan J. Leib, *Interpreting Statutes Passed Through Referendums*, 7 ELECTION L.J. 49 (2008). There are also some

Our argument proceeds as follows. Part I focuses attention on the candidate election voter and explains how voting in the private interest in candidate elections coheres with the conventional narrative about how American democracy is supposed to function.⁵ Part II argues that the internal logic of the candidate election voting narrative has no application to the context of direct democracy: whereas voters in candidate elections are engaged in the process of *selecting* representatives, voters in direct democracy elections are *acting as* representatives. Direct democracy voters—like legislators, administrators, and other government officials—exercise public authority on behalf of others to make coercive law that binds a larger class of citizens. This form of citizen representation triggers certain political obligations that inhere in the normative structure of the relationship between representative and represented. The most basic and foundational obligation is that the representative must vote in the pursuit of a credible and good faith conception of the public interest, rather than her private interests.

Having established the representative relationship between direct democracy voters and their fellow citizens, and the obligation of public-interest voting it entails, we further support this provocative finding with empirical and doctrinal arguments. Although determining whether someone is serving as a political representative is principally a project of conceptual analysis and normative political theory, descriptive political science and doctrinal evidence help reinforce our argument. In particular, data on electoral turnout and the pluralist picture of U.S. politics, combined with features of First Amendment jurisprudence and the state action doctrine, reinforce the argument that direct democracy voters are representatives.

Once we have identified direct democracy voters as representatives, Part III considers in more detail the ethical obligations that attach to direct democracy voting given its representative function. We explain how these duties clarify what it

exercises of local direct democracy that are merely *advisory*. See, e.g., *S.F. Voters Pass Advisory Measure Aimed at Restoring Coit Tower*, L.A. TIMES (June 6, 2012, 6:56 PM), <http://latimesblogs.latimes.com/lanow/2012/06/sf-voters-pass-advisory-measure-aimed-at-restoring-coit-tower.html> (reporting on a successful advisory measure in San Francisco that asked city officials for a greater monetary commitment to maintaining a local landmark). Since those actions are non-coercive and do not bind other citizens, they fall outside the ambit of our analysis here.

5. In this Essay, we decidedly *do not* endorse a private-interest model of candidate election voting. We only point out that the central justification for the private-interest model is absent in direct democracy.

means to vote in the public interest, as well as elucidate other important aspects of directly democratic political participation. Part III concludes by addressing a few potential objections.

I. THE CANDIDATE ELECTION VOTER IN A REPRESENTATIVE DEMOCRACY

The Madisonian account of representative democracy, deeply ingrained within the fabric of American life, offers the following story about what the candidate election voter is doing at the ballot box.⁶ It begins with its understanding of the citizen—that “autonomous person with a great degree of freedom to pursue her own goals, subject to limits set by law.”⁷ When the citizen votes in a candidate election, she does so with her own interests in mind; she is therefore expected to cast her ballot in favor of the candidate most likely to help her achieve her individual goals.⁸ When she and her similarly self-interested fellow citizens have finished voting, the votes are tallied and a candidate is selected.

Once sworn into office, that candidate, now a public officer, is entrusted with the authority to bind the electorate to coercive law backed by the force of the state. So long as a law has been passed in accordance with established procedures, the pol-

6. See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1566 (1988) (contrasting the liberal, federalist conception of politics and the republican, neo-federalist conception of politics, and concluding that “the basic program of the federalists was ultimately vindicated”).

7. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 19 (2d ed. 2006). This liberal vision builds upon “ideas generated by Hobbes, Locke, Bentham, Madison, and Mill.” *Id.* at 19 n.1.

8. See, e.g., Jane J. Mansbridge, *The Rise and Fall of Self-Interest in the Explanation of Political Life*, in *BEYOND SELF-INTEREST* 3, 7 (Jane J. Mansbridge ed., 1990) (noting Madison’s belief in the “ineradicable impulses of self-interest”); HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 192–93 (1967) (noting that Madison believed that the people are inevitably motivated by their individual interests).

Notwithstanding the self-interest assumption underlying the liberal model, recently “[p]olitical scientists have voiced serious doubts,” unearthing empirical data that is “far more consistent with the opposite assumption of sociotropic motivation.” Bryan Caplan, *Sociotropes, Systematic Bias, and Political Failure: Reflections on the Survey of Americans and Economists on the Economy*, 83 SOC. SCI. Q. 416, 417 (2002); see also GEOFFREY BRENNAN & LOREN LOMASKY, *DEMOCRACY AND DECISION* 108–14 (1993) (furnishing empirical evidence for and against self-interested voting). Whether the conventional narrative is empirically accurate is ultimately immaterial to our argument as our only goal in this Part is to demonstrate that the conventional narrative exists and to explicate the assumptions that underlie it.

ity's citizenry is expected to obey it. The corollary to this delegation is that, notwithstanding the private interests that may have contributed to her election, the public officer is obligated to exercise the power of her office in service of the public interest.⁹ Because the authority that inheres in political office is a public trust,¹⁰ all who exercise that authority are so constrained.¹¹ This is the conventional narrative of representative democracy in action.

As a matter of political theory, the Madisonian account of representative democracy combines a *liberal* view of the candidate election voter¹² with a *republican* view of political representation.¹³ For purposes of the present inquiry, the most dis-

9. See, e.g., Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1335 (1994) (noting "Madison's vision of a national legislature in which most members, most of the time, look to the public good rather than to the clamor of private interests").

10. See generally Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004) (describing the widely held founding-era view that political authority is a public trust).

11. There is some ambiguity about whether the elected official must pursue a wholly general interest or may pursue the partial interests of her particular electorate (her state, her district), see Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles Into Public Law*, 126 HARV. L. REV. F. 91, 92 (2013) (exploring these issues through the lens of fiduciary principles), but there is really no dispute that legislators must pursue some credible vision of the public good, and that not doing so is a derogation of duty and a moral failure.

12. Madison's account of the candidate election voter is liberal because it is based upon the citizen's pursuit of her own private interests through the ballot box. Note, however, that the liberal position does not *require* citizens to vote in the private interest. Rather, the liberal position appears to be that the candidate election voter is *permitted* to cast her ballot in the private interest, and that when she does so, she is not acting in a blameworthy manner. A virtuous voter may well be liberal but still go beyond the call of duty and vote in the public interest. Philosophers use the term "supererogation" to refer to acts or omissions that are virtuous and praiseworthy, but are not morally required. See DAVID HEYD, SUPEREROGATION: ITS STATUS IN ETHICAL THEORY 113-41 (1982).

13. Madison's account of representation is republican because it largely, although not unconditionally, views "[a] lawmaker's constituency [to be] the public good, and her role [] to deliberate as a trustee for the people." ESKRIDGE, FRICKEY & GARRETT, *supra* note 7, at 20. Contrast this with a *purely* liberal account of political representation, in which "[l]awmaking [is] merely the result of aggregating the preferences of a majority of representatives, who mirror the preferences of a majority of their constituents." *Id.* As Easterbrook phrases it, "Madison believed that . . . 'the core of the political process is the public and rational discussion about the common good, not the isolated act of voting according to private preferences.'" Easterbrook, *supra* note 9, at 1329 (emphasis added) (quoting JON ELSTER, SOUR GRAPES: STUD-

tinctive feature of the Madisonian view is that, although voters may pursue their own interests at the ballot box,¹⁴ the amalgamation of these private interests is ultimately filtered at the legislative level.

The most famous articulation of this view is presented in *Federalist No. 10*, in which James Madison argues for a representative democracy based upon its unique ability to “pass” private interests “through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”¹⁵ Selecting representatives through mass voting ensures that the salutary aspects of the people’s freedom to pursue private interests can be enjoyed, while avoiding a society governed for private interests alone. In this way, *Federalist No. 10* treats political representation as the “restraining, balancing, and accommodating machinery for processing interests.”¹⁶

This interpretation of the Madisonian account pervades the legal and political philosophic literature. For example, commenting on *Federalist No. 10*, Frank Easterbrook explains that, in the widely accepted founding-era view, self-interested voting “cannot and must not be conquered.”¹⁷ From this perspective,

IES IN THE SUBVERSION OF RATIONALITY 35 (1983)).

14. For some philosophical support for the standard view of private-interest voting, see Gerald F. Gaus, *The Place of Religious Belief in Public Reason Liberalism*, in MULTICULTURALISM AND MORAL CONFLICT 19 (Maria Dimova-Cookson & Peter M.R. Stirk eds., 2010). For further description (from someone unsympathetic), see RICHARD DAGGER, CIVIC VIRTUES: RIGHTS, CITIZENSHIP, AND REPUBLICAN LIBERALISM 104–05 (1997) (describing the “citizen as consumer” account). For an argument *against* public-interest voting, see RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 113 (2003) (“[E]ven well-educated and well-informed people find it difficult to reason accurately about matters remote from their immediate concerns. People who vote on the basis of their self-interest are at least voting about something they know firsthand, their own needs and preferences. Beware the high-minded voter.”). For a book-length treatment of the view that all voters are morally obligated to pursue the public interest when voting, see JASON BRENNAN, THE ETHICS OF VOTING (2011). As noted earlier, we do not advocate for either position with respect to the candidate election voter; our only commitment is that candidate election voters are not representatives, so any such obligation does not flow from their status as representatives, as it does for direct democracy voters who are making coercive law. *See supra* note 5.

15. THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

16. ALFRED DE GRAZIA, PUBLIC AND REPUBLIC: POLITICAL REPRESENTATION IN AMERICA 96 (1951).

17. Easterbrook, *supra* note 9, at 1330.

private interests are a boon to society: not only “are [they] to be treasured,” but they “are a hallmark of freedom, [and] are an objective of our government.”¹⁸ Yet, because of their destructive potential, such interests must also be tamed by the state. Madison’s solution, as Easterbrook tells it, was “government by elected representatives . . . [who would] make the effort necessary to choose [policies] wisely” and in the public interest.¹⁹

Jane Mansbridge echoes Easterbrook, explaining how Madison’s proposal for representative democracy, like all of his constitutional proposals, “had two prongs: one based on using self-interest, and one on repressing it.”²⁰ On the one hand, “the ineradicable impulses of self-interest” communicated by the candidate election voter would drive the selection process; on the other hand, the representatives chosen would be “‘fit to comprehend and pursue great and national objects,’ with the capacity to ‘refine and enlarge the public views.’”²¹

As Easterbrook and Mansbridge observe, the filtering mechanism of representative democracy is central to a private-interest voting paradigm.²² Voters get to vote in the private interest, while the constitutional architecture organizing the legislative process facilitates refining those private interests through the entrustment of political authority to those authorized to pursue public policy. On this account, however, the candidate election voter is conceptualized in a thoroughly non-representative way—that is, as one who directly presents her individual interests to the political system.²³ This approach

18. *Id.* at 1331.

19. *Id.* at 1331–32; *see also id.* at 1335 (“Madison’s vision [was] of a national legislature in which most members, most of the time, look to the public good rather than to the clamor of private interests.”).

20. Mansbridge, *supra* note 8, at 7.

21. *Id.* (quoting THE FEDERALIST NO. 10 (James Madison)).

22. For accounts aligned with Mansbridge and Easterbrook, *see*, for example, Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 425 (1998) (commenting on *Federalist No. 10*, and offering a similar evaluation), and Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1134 (1986) (noting that, under Madison’s vision of representative democracy, “the role of government is not simply to implement preferences, but to select them through a process of deliberation and debate”).

23. For definitions of “representation,” *see* PITKIN, *supra* note 8, at 209; Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515 (2003); Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214 (2009). None sees the political representative as per-

would appear to be justified because, in the Madisonian view, the candidate election voter is not herself engaged in the law-making process; she is “merely” engaged in the process of choosing representatives who are themselves constrained to legislate in the public interest.²⁴

This, in short, is the prevailing narrative of candidate election voting in American representative democracy. It is an account which tolerates, if not appreciates, private interests as inputs into the political system, and thereby suggests a non-representative vision of the voter. Candidate election voters individually pursue their goals, while the constitutional architecture of representation filters their self-interested votes through representatives required to make policy in the public interest. The representative obligation to pursue the commonweal is a function of a public official’s authority to act on behalf of others and bind them to coercive law.²⁵ The next Part considers how direct democracy voting differs from voting in a candidate election, and what implications this has for the orientation of the direct democracy voter to her fellow citizens.

II. THE DIRECT DEMOCRACY VOTER AS POLITICAL REPRESENTATIVE

The view of the candidate election voter that permits self-interested voting activity has no application to the exercise of direct democracy, where the votes cast directly bind citizens to policies backed by the coercive force of the state. The core as-

mitted to pursue her private interests.

24. See Easterbrook, *supra* note 9, at 1331–32. Admittedly, the plausibility of the Madisonian view is complicated by the concept of complicity—that is, the possibility that voters could know ahead of time that a candidate is likely to engage in corrupt behavior, and nonetheless vote her into office. It is unclear, though, how frequent an occurrence this actually is, as important constraints are placed upon even the most corrupt representatives through the requirement of multi-member, two-house action to enact laws. *But see id.* at 1333 (“Despite the genius of Madison’s plan, his predictions about the relation between the national government and faction have not come true.” (emphasis removed)); Matthew L. Spitzer, *Evaluating Direct Democracy: A Response*, 4 U. CHI. L. SCH. ROUNDTABLE 37, 39 (1997) (“The process of organizing and running a modern legislature is far from the ideal that the framers might have embraced.”). Regardless, our argument in this paper is not *for* the Madisonian model in the representative context, but *against* the application of that model to direct democracy voting.

25. See, e.g., Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. (forthcoming 2013); Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J. POL. PHIL. 178 (2012).

sumption that sanctions private-interest voting—that the self-interested preferences of the citizenry are filtered through those bound to pursue the public interest—are decidedly absent from direct democracy. These material differences suggest that the direct democracy voter is herself structurally in a relationship of political representation with her fellow citizens.²⁶

In classic exercises of what is usually called “representative democracy,” representatives in the legislative chambers do the deliberating and the negotiating that lead to the production of coercive law for the polity. The entrustment that inheres in the authority to make coercive law binds representatives to utilize the mechanisms of debate, discussion, and information gathering to devise sound policy in the public interest. Consider Phil Frickey:

The legislative process provides many opportunities for gathering relevant information and deliberating about it. Committee hearings and floor debates are the most visible of these processes, but there is also much of practical importance in more informal contacts such as discussions with constituents and lobbyists, staff studies, consultations with officers of the executive branch and subdivisions of state government, and conversations among legislators.²⁷

The states, cities, and localities that employ direct democracy, however, choose to make binding policies through the initiative process precisely to avoid the filtration that deliberation and negotiation in the legislative chambers provide.²⁸ Frickey, again:

Th[e] group [running an initiative] (perhaps only a small number of individuals) has total control over framing the issue and drafting the measure. Ordinarily a consultant is hired to handle these matters, including hiring paid signature solicitors. Once the petitions are floated to the public for signature, there is no way to correct any drafting problems discovered later, or to reformulate the measure in light of new facts, new arguments, or any sense of compromise. It is all or

26. For earlier treatments of the concept of citizen representation, see Mark Brown, *Citizen Panels and the Concept of Representation*, 14 J. POL. PHIL. 203 (2006); Ethan J. Leib & David L. Ponet, *Citizen Representation and the American Jury*, in IMPERFECT DEMOCRACIES: THE DEMOCRATIC DEFICIT IN CANADA AND THE UNITED STATES 269 (Patti Tamara Lenard & Richard Simon eds., 2012); Mark Stephan, *Citizens as Representatives: Bridging the Democratic Theory Divides*, 32 POL. & POL'Y 118 (2004); Mark E. Warren, *Citizen Representatives*, in DESIGNING DELIBERATIVE DEMOCRACY 50 (Mark E. Warren & Hilary Pearse eds., 2008).

27. Frickey, *supra* note 22, at 435.

28. More than two-thirds of the U.S. population lives in either a city or a state with the initiative, and most indications show that this number will only grow. See JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY 1, 8 (2004).

nothing, up or down, an unamendable matter. No hearings need be held and, in any event, whatever might be said at public meetings can have no effect on the measure's language.²⁹

The use of direct democracy reflects a choice by citizens to leave deliberation and negotiation, as well as the authorization to make binding law, to themselves. However, it is precisely because the direct democracy voter is authorized to make coercive law and bind her fellow citizens that she, like any other elected official in a democratic polity, must represent those citizens' interests when she exercises that authority. Although there may be many differences between the direct democracy voter and the elected representative, the most basic and foundational similarity—the ability to make coercive law that binds others—is the one that establishes a structural relationship of political representation.

That the citizen who casts her ballot in a direct democracy election represents others is easy to perceive under a range of circumstances: win or lose, the voter is pulling a lever for the too-young, too-infirm, too-lazy, and too-felonious. Less obvious, but more important, is the reality that the winners must represent the losers: just as those holding traditional political office must represent the interests not only of those who voted for them, but of the whole electorate—including minorities, racial and otherwise³⁰—so too must direct democracy voters. These structural facts, which intrude at the very moment of lawmaking at the polls during direct democracy, render the voter a political representative, bound to pursue the public interest.

In addition to this normative framing, there are also a variety of empirical reasons to differentiate the direct democracy voter from the candidate election voter along representative lines. While none of these reasons are alone dispositive, they each generally cohere with the philosophic picture offered here, and, in so doing, help to reinforce our argument.

First, and perhaps closest to the normative core of the paper, is the manner in which coalition-building, or logrolling, in the legislative process differentiates candidate elections from direct democracy. To wit, “if there are particular issues of distinctive concern to the minority community, a [legislative] representative directly dependent on that community will have the

29. Frickey, *supra* note 22, at 437.

30. See Ethan J. Leib & David L. Ponet, *Representation in America: Some Thoughts on Nancy Pelosi, Gavin Newsom, Tim Johnson, and Deliberative Engagement*, 16 GOOD SOC'Y 3 (2007).

ability to trade her vote on issues of relative indifference to her constituents for other representatives' support on those critical issues."³¹ Although legislators may be oriented toward their constituents' interests in pursuing their legislative agendas and considering what tradeoffs to make in legislative deliberation, their ultimate loyalty must be to the public good. However, minorities' vision of the public good may only get its day in the sun through the logrolling process, which provides a specific channel through which minority interests, otherwise disregarded by a self-interested majority of voters, are able to gain respect and recognition at the legislative level.³²

Yet no such protections for minority interests are clearly found in the procedures of direct democracy.³³ Generally speaking, logrolling requires that there be more than one voting occasion and that voting be done out in the open,³⁴ both of these phenomena are absent from the channels of direct democracy. Single-subject rules, by which state initiatives are limited to a unitary topic, are a common regulation within the jurisdictions that practice direct democracy—and the rules are an explicit attempt to disable logrolling.³⁵ This suggests that voters in di-

31. See Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 217–18 (1989).

32. See *id.*; see also DAVID LUBLIN, *THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS* (1999) (finding that the Voting Rights Act might not be helping minorities in the legislative process as much as might be expected or hoped for); Daniel M. Butler & David E. Broockman, *Do Politicians Racially Discriminate Against Constituents? A Field Experiment on State Legislators*, 55 AM. J. POL. SCI. 463 (2011) (finding that white legislators tend to discriminate against black constituent requests and that black legislators are more responsive to them). Thanks to Chris Elmendorf for the pointers here.

33. See generally Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 14–15 (1978) (arguing that the privacy of the voting booth makes “the referendum . . . a most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day”); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1555–56 (1990) (criticizing plebiscites for failing to accommodate minority views).

34. Karlan, *supra* note 31, at 217 (“Legislative coalition-building, or logrolling, requires that there be more than one voting occasion. The fact that voting in legislative bodies, unlike voting in general elections, is not anonymous furthers this process of accommodation.”).

35. See, e.g., Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 963 (1983); Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35, 36 (2002); see also Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV.

rect democracy must have a different posture: pursuing the public interest as political representatives.

The differences between voter turnout in direct democracy and candidate elections may provide yet another practical reason to differentiate the direct democracy voter from the candidate election voter. As a general matter, many fewer voters vote in direct democracy elections than in candidate elections.³⁶ Systematically low turnout in direct democracy elections may therefore underwrite thinking of the voter less as one who merely speaks on behalf of herself and more as one who speaks as a representative of the electorate. Because those who do vote in direct democracy elections is not a matter of sheer randomness—that could suggest a design of statistical “representativeness” rather than a relationship of representation³⁷—the stratification of *who* votes likely structures the relationship of *how* they vote.³⁸ And that is troublesome if this non-random subsample of citizens gets to pursue its private interests with no filter and no moral command to take into account the commonweal when making binding law.³⁹

434, 456–78 (1998) (arguing that direct democracy’s pathology is that it disables logrolling). Of course, some do not think logrolling actually disappears in the direct democracy context. *See, e.g.*, Kurt G. Kastorf, Comment, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633, 1635 (2005). But even if it doesn’t disappear, it largely produces only costs rather than the benefits that can accrue to legislation through logrolling during the legislative process. *See id.* at 1646–52.

36. CAL. COMM’N ON CAMPAIGN FIN., DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT 186 (1992); David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 31–32 (1995); *see also* DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 108–10 (1984) (providing a statistical analysis of voter drop off).

37. We don’t concede that randomness would enable those who vote to vote in their self-interest. As one of us argued in a prior paper, citizens in juries—randomly selected (in a manner)—serve in representative capacities and have obligations not to be self-interested in decision-making. *See* Leib & Ponet, *supra* note 26. We will take up this discussion in a future paper. *See* Ethan J. Leib, Michael Serota & David L. Ponet, *Fiduciary Principles and the Jury*, 55 WM. & MARY L. REV. (forthcoming 2014).

38. John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSP. 185, 199 (2005).

39. Of course, the empirical reality of voter turnout cannot by itself support the concept of voter representation in the context of direct democracy. It proves too much because if it is right that the direct democracy voter is a representative *because* of low turnout, then any low turnout election requires the voter to take on the role of the representative. That risks undermining the standard view of candidate elections. The argument proves too little as well,

Finally, it is also worth noting that traces of the distinction between candidate election and direct democracy voting are already embedded within American constitutional law doctrine.⁴⁰ With respect to candidate elections, the Supreme Court's First Amendment jurisprudence generally coheres with the liberal private-interest voting framework. As two prominent scholars of the law of democracy put it, "[t]he voting decisions of individual . . . citizens [in candidate elections] are absolutely protected under the First Amendment. This is true whether they decline to support candidates . . . out of ignorance, selective sympathy or indifference, or outright racism."⁴¹ Voting is political speech, the very core of the freedom guaranteed by the amendment, or so the argument goes.⁴² For example, in *Anderson v. Martin*, the Supreme Court went so far as to affirm "the right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases."⁴³

And yet, while it may be permissible for the candidate election voter to cast her vote "for whatever reason she pleases,"

for it suggests that any time a direct democracy election has solid turnout—at least as solid as an average candidate election—the voter is no longer aligned in a representative relationship, but rather is left to pursue her private interest free of moral condemnation. As we say above, these further empirical reasons to support the citizen-as-representative view are mere supplements to the main normative account.

40. This is not to say, of course, that legal doctrine necessarily serves as a moral compass. As Kent Greenawalt understood years ago, these issues concern "applied political philosophy, not constitutional law." KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 4 (1995). Yet, we do think that a well-established line of precedent spanning many years can nonetheless help to reinforce a particular political-philosophic principle.

41. Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1228 (1996). One may have legal and constitutional protection to vote out of outright racism—but that wouldn't bless the activity from a moral standpoint.

42. Gaus's defense of the standard view draws on voting's symbolic, expressive, and information-collecting function for the polity. See Gaus, *supra* note 14, at 29. As Brennan argues, however, it is hard to see why we should allow voting to be unconstrained just for these reasons: there are other civic activities—like writing letters to the editor—that are equally if not more effective at achieving those ends, without the means of risking harm to others with one's vote. See BRENNAN, *supra* note 14, at 85–87. Whatever the merits of Brennan's argument, Gaus's exposition probably coheres better with the folk political morality surrounding candidate elections.

43. 375 U.S. 399, 402 (1964); see also *Kirksey v. City of Jackson*, 663 F.2d 659, 662 (5th Cir. Unit A Dec. 1981) ("The first amendment assures every citizen the right to 'cast his vote for whatever reason he pleases.'"). For some analysis and skepticism about *Anderson* and whether the claim about voter freedom can be rooted in the First Amendment, see *infra* note 62.

the direct democracy voter enjoys no such freedom. This is because the products of direct democracy are “state action,”⁴⁴ and state actors are restrained from acting for certain types of reasons. Since direct democracy voters are acting on behalf of the state—and creating coercive law—they are constrained as state actors. Consider, for example, the U.S. Supreme Court’s opinion in *Romer v. Evans*, which struck down as impermissible state action under the Equal Protection Clause a Colorado ballot measure prohibiting state and local governments from adopting civil rights provisions protecting gays and lesbians.⁴⁵ In so doing, the Court specifically observed the voters’ improper motivation: “[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward [gays and lesbians].”⁴⁶

A more recent example of this type of motivation-based scrutiny can be seen in *Perry v. Schwarzenegger*, in which a federal trial judge struck down, once again under the Equal Protection Clause, a ballot proposition attempting to limit marriage in California to heterosexual couples.⁴⁷ In so doing, the trial judge performed “an intrusive inquiry into voters’ motivations,” which focused upon the specter of religious bigotry in the voting booth.⁴⁸ Whether the U.S. Supreme Court will ultimately uphold the lower court in *Perry* is unknown at the time of this writing,⁴⁹ but the more basic point—that courts constrain voter sentiment or intent when it is part of state action in direct democracy—is deeply embedded within the Court’s jurisprudence.⁵⁰

44. See, e.g., *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199 (2003); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982); *Hunter v. Erickson*, 393 U.S. 385, 389 (1969); *Reitman v. Mulkey*, 387 U.S. 369, 378–79 (1967).

45. 517 U.S. 620, 635 (1996).

46. *Id.* at 634.

47. 704 F. Supp. 2d 921, 996–97 (N.D. Cal. 2010), *aff’d*, 671 F.3d 1952 (9th Cir. 2012), *reh’g en banc denied*, 681 F.3d 1065 (9th Cir. 2012), *cert. granted sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012).

48. Tim Taylor, Note, *Why We Cannot Ask Why: Ethical Independence and Voter Intent*, 34 HARV. J.L. & PUB. POL’Y 1099, 1105 (2011); see *Perry*, 704 F. Supp. 2d at 985–87.

49. See Lyle Denniston, “*Proposition 8*” *Defenders’ Appeal Filed (FINAL UPDATE)*, SCOTUSBLOG (July 31, 2012, 2:41 PM), <http://www.scotusblog.com/2012/07/proposition-8-appeal-filed/>. The Supreme Court granted certiorari on December 7, 2012. *Hollingsworth*, 133 S. Ct. 786.

50. See cases cited *supra* note 44.

While the Court's differential treatment of candidate elections and direct democracy generally tracks our argument, the fit is by no means exact: to the extent the Court is willing to limit, or even inquire into, voter motivations in the context of direct democracy, the limitations and inquiries are rooted in constitutional parameters set for all state actors, and not in any desire to hold voters to the pursuit of the public interest. And the Court is not pursuing actual individual voter motivations but inferring state purpose from a collective's presumptive intent.

Yet, judicial oversight of voter motivations in direct democracy nonetheless stands in direct contrast with the Court's approach to voters in candidate elections, who are granted the freedom to pursue their private interests without intervention.⁵¹ The candidate election voter is not treated as engaging in "state action," reinforcing what Larry Sager calls "solicitude for the sanctity of individual choice in the electoral context."⁵² But because the product of direct democracy is coercive law and the

51. It's worth noting here that the candidate election voter's First Amendment right to vote for *any* reason whatsoever is a significant step beyond the liberal conception of candidate electoral voting in the private interest. Nonetheless, this variance does not undercut the more basic point here about the Court's bifurcated approach to candidate election voting and direct democracy voting.

52. Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1421 (1978). Indeed, on this point the Supreme Court has also been explicit: "[T]he selection of state officials . . . through election by all qualified voters" does not constitute state action. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991). *But see* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 434–36 (2012) (relying on Supreme Court precedent, including *Edmonson*, to support the argument that "the *putting in office* of an official cloaked with coercive lawmaking or law-enforcement authority should be treated as a 'public function' within the meaning of the state action doctrine"). Of course, the fact that the convoluted "conceptual disaster area," Charles L. Black, Jr., *Foreward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967), that is the state action doctrine distinguishes between direct democracy and candidate election voters does not itself do the heavy lifting for the potentially unfamiliar moral claim that direct democracy voters are political representatives. State action—for the purposes of doctrine and philosophical analysis—is not a primordial concept with completely stable boundaries; indeed, the Supreme Court itself is not impressed with the level of consistency achieved by the doctrine either. *See* *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) (citing *Edmonson*, 500 U.S. at 632 (O'Connor, J., dissenting)). For an impressive recent effort to make sense of it, see Christian Turner, *State Action Problems*, 65 FLA. L. REV. 281 (2013).

voters in direct democracy are state actors, direct democracy voters are constrained in the kinds of reasons upon which they may act.⁵³

To briefly sum up, the direct democracy voter's authorization to make coercive law, and the concomitant lack of filtering when this authority is exercised, provides the normative basis for rendering the direct democracy voter a political representative. Furthermore, the lack of logrolling in direct democracy—and the additional burdens this imposes upon minority interests—as well as the low levels of voter turnout in direct democracy elections reinforce this point. Finally, the Court's bifurcated approach to candidate election and direct democracy voting, although not a perfect parallel, generally supports differentiating between candidate election voters and direct democracy voters and their obligations in their voting activity. The next Part considers the implications of this view of the direct democracy voter in greater detail and considers a few objections.

III. THE RAMIFICATIONS OF REPRESENTATION

We have shown that the private-interest voting model envisioned by the Madisonian account of representative democracy is inappropriate in the context of direct democracy and that it simply cannot be squared with the duties the voter owes to her fellow citizens in that context. By exercising state authority that binds other citizens, the direct democracy voter becomes a representative and is bound by the ethics of representation: to pursue vigorously the interests of the represented and to refuse to self-deal. But we have to say more about the contours of these duties.

The most obvious issue surrounding the public-interest voting obligation is how to demarcate what counts as pursuing the public interest. One might question, for example, whether it

53. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (“It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause.”); *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) (emphasizing that state action enacted via the populace is still subject to constitutional limitations). BeVier and Harrison distinguish in the state action doctrine between principals “entitled to act on their own behalf” and “agents acting on behalf of others.” Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1768 (2010). This turns out to map pretty well on our distinction in this paper between voters acting in candidate elections (when they are acting on their own behalf) and voters acting in direct democracy (when they are acting on behalf of others).

is truly even possible to separate the public interest from private interests. Some argue that “self-denying charity is often a great source of benefit[] to oneself” and that acting altruistically is really “acting for one’s own greatest benefit.”⁵⁴ Others may contend that all private interests can be generalized into some theory of the public interest. Whatever the difficulties of identifying precise conceptual contours, however, we are comfortable that the distinction between the private interest and public interest remains sensible in most cases for the vast majority of citizens.

When a voter goes into the voting booth to vote on an initiative in direct democracy, we imagine that she would find it coherent and meaningful to ask herself what her true motive in voting one way or another is—and that she is capable of suppressing her private interests in order to channel her thinking toward a credible view of the public good.⁵⁵ Good faith pursuit of the public interest is not easily reducible to bad faith pursuit of self-interest. For although “we can no longer plausibly argue that there is a known and agreed ‘public interest,’”⁵⁶ we think it is not hard to acknowledge that certain kinds of voting—say, out of mere ethnic pride or solely to lower one’s own tax burden—cannot plausibly be interpreted to be in the public interest. It doesn’t require too much faith in the American people to believe that the average voter knows in her heart when she is being selfish and when she is being other-regarding. It would be a good first step for voters to ask themselves this question before casting their votes in a direct democracy election.

Yet, it would be insufficient to conclude that a voter must vote consistently with her sense of public interest without a concomitant obligation to execute her task of voting with some degree of diligence.⁵⁷ Thus the ethical voter cannot just intro-

54. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 37 (1957).

55. As explained earlier, empirical data actually suggests that sociotropic voting better describes actual voter behavior than private interest voting. *See supra* note 8.

56. Paul Finn, *Public Trust and Accountability*, 3 GRIFFITH L. REV. 224, 232 n.20 (1994).

57. *See* BRENNAN, *supra* note 14, at 70, 128–29 (arguing that a voter must use a reasonable standard of care such that she justifiably believes the candidate or policy will promote the common good). Brennan thinks his view applies to all voters, including those in candidate elections. *See id.* at 86. Indeed, he draws no distinction between direct democracy voters and candidate voters. *See id.* at 129 (“[V]oters must be justified in believing that the *candidate or policy* they vote for will promote the common good” (emphasis added)). As we argue here, however, one can reject Brennan’s arguments about voters in

spect to ensure that she “means well” before casting her ballot; she must also make an affirmative effort to calibrate her vote to accord with a credible view of the public good.⁵⁸ For while every voter is morally entitled a berth of discretion to pursue the public interest as she best conceives it, that conception—as well as the voter’s effort at translating that conception into a particular vote—must be credible.⁵⁹ In other words, the citizen who takes on the “office of voter” in direct democracy ought to pick the policy that, given the evidence, can be reasonably expected to promote citizen interests overall.⁶⁰ The policy she picks must be evidence-based rather than intuition-based, and there must be a plausible logical and causal connection between the policy and the promotion of the common good.⁶¹

Staking out the position we have here requires us to consider some basic objections. For one, recalling the intuition supporting the standard view, a voter might reasonably ask whether direct democracy voting isn’t just a form of expressive speech, too. And if it is, then why wouldn’t some moral corollary of the First Amendment protect this form of core political expression? Although our concern here isn’t First Amendment doctrine in the courts,⁶² it is important to emphasize that we

candidate elections and still apply some of his arguments to voters in direct democracy.

58. *See id.* at 128–29.

59. *See id.*

60. *See id.*; *see also id.* at 113–17 (discussing the meaning of “common good” and providing examples, including “well-functioning markets, liberal democratic government, the rule of law . . . greater wealth, longer and healthier lives, and lives with more cultural, and social opportunities”).

61. *See id.* at 161–63 (arguing that justified voters must be “well informed and rational” in believing a policy or candidate promotes the common good).

62. If that were the point of departure, there is some reason to believe that the First Amendment might not as easily extend to voting as suggested by *Anderson v. Martin*, 375 U.S. 399, 402 (1964). The Court recognizes that “voting is of the most fundamental significance under our constitutional structure,” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), and that the “expression of a political view implicates a First Amendment right.” *Doe v. Reed*, 130 S. Ct. 2811, 2817 (2010). Indeed, *Reed* held that citizens’ petition signing is an inherently expressive activity subject to First Amendment protection (but one that is not inviolable and can be subject to disclosure). *See id.* at 2818. However, in the context of candidate elections, *Burdick* emphasized that “the function of the election process is to winnow out . . . candidates, not to provide a means of giving vent to short-range political goals, pique, or personal quarrel[s]. Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.” *Burdick*, 508 U.S. at 438 (citations omitted) (internal quotation marks omitted). In his dissent, Justice Kennedy agreed: “the purpose of casting, counting,

are not arguing for enforcement of the direct democracy voter's moral duties through the legal system—we only identify the existence of the ethical framework. Indeed, it would be both practically impossible and normatively undesirable to attempt to prosecute individual voters for failing to uphold their representational obligations, bringing the coercive force of the state to bear on this moral command.⁶³ But that doesn't change the calculus of whether individual voters are constrained in the moral realm: the legal freedom to speak—even if it applies in this context—does not preclude moral judgment for *how* one speaks.

and recording votes is to elect public officials, not to serve as a general forum for political participation." *Id.* at 445 (Kennedy, J., dissenting).

Is voting in direct democracy, then, more like signing referendum petitions (which "implicates" a First Amendment right under *Reed*) or like electing officials (which may not under *Burdick*)? We have sympathy for Justice Scalia's view in his concurrence in *Reed*, where he argues that a voter in direct democracy is "acting as a legislator [and] is therefore exercising legislative power." *Reed*, 130 S. Ct. at 2833 (Scalia, J., concurring). This is not protectable expression, Scalia argues, because there is "no precedent . . . holding that legislating is protected by the First Amendment." *Id.* Indeed, in the most recent case on point, *Nevada Commission on Ethics v. Carrigan*, Scalia persuaded an eight-justice majority to agree that voting as a legislator is not expressive, and is not protected by the First Amendment. *See* 131 S. Ct. 2343, 2350–53 (2011). *Carrigan* limited—or at least clarified—*Reed* by noting that voting, in general, is not inherently expressive. *See id.* at 2351 (rejecting the argument that *Reed* established the "expressive character of voting"). Rather, only certain political acts, such as citizens signing a petition, are sufficiently expressive, while other acts, such as voting by legislators, are not. Putting *Burdick*, *Reed*, and *Carrigan* together enables one to conclude that if voters voting in direct democracy elections are representative governmental actors, they might not have First Amendment protection. *See id.* at 2351 n.5 ("A legislator voting on a bill is not fairly analogized to one simply discussing that bill or expressing an opinion for or against it. The former is performing a governmental act as a representative of his constituents; only the latter is exercising personal First Amendment rights." (citations omitted)).

63. There is, we acknowledge, a visceral objection to telling voters that they are constrained in what they may "say" in the voting booth when voting directly on policy. But our argument is about what they should say as a moral matter, not what the law requires them to say with any specificity. Like legislative and executive representatives, voters in direct democracy do not, as political representatives, have unfettered speech rights from a moral perspective. For example, the "government speech" doctrine highlights how the right of the state to express itself is neither wholly unfettered nor wholly constrained. Since the core of the argument here analogizes the direct democracy electorate to state action, the speech within that practice might be analogized to government speech. For an introduction to the government speech doctrine, see Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 611–19 (2008) and Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695 (2011).

One may be free to speak in favor of the KKK, but this does not disable others from finding such speech morally blameworthy.

And yet, although it would be undesirable to use the force of law to enforce the moral command to vote in the public interest at the individual voter level, it could be acceptable and potentially attractive to police the electorate *collectively* for extreme default of this obligation. Direct democracy's enactments are judicially policed for "saying" things offensive to the commonweal (like expressing discriminatory preferences); and even legislators can disregard the electorate's commands when they depart too far from the public interest, which must be protected in a legitimate state. Other state actors take oaths of fidelity to the public good that could require disrupting or challenging another state institution's failure to abide by their obligations as representatives.

There is also another way of envisioning a method of reinforcing the moral command to pursue the public interest without judicially policing each citizen's private motives and evidence-based reasoning: by doing away with the private vote within direct democracy.⁶⁴ Institutional design is a way to reinforce social norms without needing to bring the force of law to bear directly in a domain where it is likely incompetent in any event. By designing a direct democracy that provides more transparency and accountability for how people vote, there is a higher likelihood that people will fulfill their primary duty to pursue their visions of the public good. After all, being watched often encourages people to do the right thing, even when the law won't punish them for doing the wrong thing.

64. Justice Scalia's concurrence in *Doe v. Reed* suggests the probable constitutionality and potential virtues of such a system. See 130 S. Ct. at 2834 (Scalia, J., concurring) (noting that the "history of voting in the United States completely undermines th[e] claim" that the First Amendment protects "the right to vote anonymously"); *id.* at 2837 ("There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.").

For an engaging essay on the history of private and non-written voting, see Jill Lepore, *Rock, Paper, Scissors: How We Used to Vote*, NEW YORKER, Oct. 13, 2008, http://www.newyorker.com/reporting/2008/10/13/081013fa_fact_lepore?currentPage=all. More academic inquiries are available in John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483 (2003) and L. E. FREDMAN, *THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM* (1968).

A second quite important objection focuses on the fact that we seem to be asking too much of voters. One could think the epistemic demands of representation are too high; by requiring voters to find out what is in the public interest, and requiring them to engage in evidence-based reasoning in effectuating their votes, we are demanding that they devote more time to democracy than is truly ideal.⁶⁵ This objection is sometimes called the “epistocracy” objection.⁶⁶ Given the well-known literature on voter ignorance,⁶⁷ it may be too much to make a moral demand of voters that they discover and rely upon only hard evidence for what is in the public interest. Voters in direct democracy almost certainly have serious cross-cutting obligations to their families, their friends, and their communities, and may very well have other venues for exercising their “civic virtue,” such as in the workplace or within an activist political framework.⁶⁸ If we insist that it is a wrong to vote only in one’s own personal interest—which one might assume people know best and without much analysis⁶⁹—or that it is wrong to vote based

65. Direct democracy performs relatively poorly on most measures of correct voting. See PHILIP L. DUBOIS & FLOYD F. FEENEY, *IMPROVING THE CALIFORNIA INITIATIVE PROCESS: OPTIONS FOR CHANGE* 121–22 (1992). On the other hand, Lau and Redlawsk’s optimistic model found correct voting prevalent in the electorate. See Richard R. Lau & David P. Redlawsk, *Voting Correctly*, 91 AM. POL. SCI. REV. 585, 590–91 (1997) (“[V]oters in our experiment . . . do a pretty good job of selecting the candidate for whom they would have voted had there been . . . full information . . .”). But those results are probably overestimated because the model did not account for immoral or unethical voting. See BRENNAN, *supra* note 14, at 167 (criticizing the Lau & Redlawsk model on this ground). Our implicit model of correct voting, which does account for this normative dimension, owes its origin to Brennan’s theory of voting ethics. See *id.*

66. See, e.g., BRENNAN, *supra* note 14, at 95.

67. See, e.g., SCOTT L. ALTHAUS, *COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS* (2003); MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413 (1998). For a recent meditation on this topic, see Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. (forthcoming), available at <http://ssrn.com/abstract=2010115>. Low levels of constitutional and legal literacy also permeate the public. See, e.g., Michael Serota, *Intelligible Justice*, 66 U. MIAMI L. REV. 649, 659–62 (2012); Michael Serota, Essay, *Popular Constitutional Interpretation*, 44 CONN. L. REV. 1637, 1658–62 (2012).

68. See BRENNAN, *supra* note 14, at 43–67 (exploring what it might mean to have civic virtue without politics).

69. See POSNER, *supra* note 14, at 113. Let’s leave to one side the debate about THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS?* (2004) (arguing that some voters, specifically low-income Americans in the Midwest, may un-

on mere intuition about what is in the public interest, we are asking of voters something that may be beyond the reach of ordinary citizens and could divert them from more important activities.

Let us be clear, then, about the relatively low bar we think is required of the direct democracy voter to fulfill her obligations as a representative: the voter need only have a credible belief that her vote promotes the best interests of the public. This means that the voter may get wrong what the public interest is—after all, our nation’s elected officials are routinely mistaken—without being morally culpable so long as her mistaken belief was credible and based on meaningful evidence when her vote was cast.⁷⁰ And while identifying the precise contours of this minimum epistemic threshold is likely to be difficult in a particular case, surpassing this threshold will not be. The direct democracy voter need not solely depend upon her own empirical and normative analysis; she can also supplement, or even supplant, her individual deliberation by relying upon heuristics such as endorsements from political newspapers and public interest organizations.⁷¹ Moreover, given the low probability of any voter’s ability to effectuate an outcome, this limited duty of care can be calibrated to the underlying risk of harm the voter creates. Ultimately, a PhD in public policy and/or moral philosophy is not necessary for a direct democ-

knowingly vote contrary to their self-interest, due to a “derangement” of political ideology and a “backlash” against liberalism).

70. For an explanation of such a threshold, see BRENNAN, *supra* note 14, at 95–111.

71. This creates an additional obligation of reasonable heuristic selection. For example, relying upon the editorial board of the well-regarded and apolitical Lake Woebegon Gazette on a smoking tax will be credible. Relying upon a mail flyer from the Association of Lake Woebegon Tobacco Companies on the same issue will not. Admittedly, there is a danger that even an objectively-minded newspaper or public interest organization will be unable to offer an evidence-based endorsement, given the lack of the cues generated by political parties, upon which newspapers presumably rely. *See generally* Ethan J. Leib & Christopher Elmendorf, *Why Party Democrats Need Popular Democracy and Popular Democrats Need Parties*, 100 CALIF. L. REV. 69 (2012) (explaining that direct democracy might be improved with better party-based cues); *see also* DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000) (discussing how direct democracy is substantially infected by misleading media campaigns that do not conduce to long-term dialogue between competing sides as in party politics). Another part of the problem is that deceptively named organizations can infect the cue system in direct democracy—so the voter does have to be on guard and look to the real source of the cue. We are comfortable, however, that in most instances reliance upon a respectable newspaper endorsement will satisfy our epistemic requirement.

racy voter to meet her duties as a representative; rather, the direct democracy voter need only make an affirmative effort to discover the public interest and to find some meaningful evidence that links her policy choice to the promotion of the public interest.

This low bar raises a further question, however: can a voter claim that voting in her private interest is actually itself in the public interest? That is, the private interest voter might claim that the public good would be best promoted by allowing and encouraging egoistical voting. Whether or not the argument is supported by a substantive view about maximizing personal freedom for all, or a supposition about how an “invisible hand” will produce the common good with the aggregation of private interest votes,⁷² it is possible to construct a view that would “excuse” private-interest voting by the individual, even if the public good must be pursued as a function of her representative status. Although we would need a different paper to investigate whether any of these arguments for private-interest voting can withstand careful scrutiny (that is, is that view evidence-based?), for our purposes it is sufficient to say that if a direct democracy voter credibly believes in good faith, and based on actual evidence, that it is in the public interest to vote her private interest, *rather than merely rationalizing to herself an excuse to vote her own personal pocketbook*, that could be sufficient to meet her moral obligation as a representative.⁷³

As if we haven’t sauntered into too many minefields as it is in making our core argument, there is yet another deep and important issue lurking here: what does our view have to say to those who vote in direct democracy largely on the basis of strongly-felt religious views? Are those who vote for religious reasons when they vote in direct democracy meeting their obligations as political representatives?

The broad ambit of this question about the permissible role of religious reasons in political choice implicates a rich literature with subtle arguments on each side, in both constitutional theory and political philosophy.⁷⁴ For our purposes, though, we

72. See BRENNAN, *supra* note 14, at 124–27 (criticizing the “invisible hand” argument based on the disanalogy between politics and markets).

73. It’s worth noting here that at least one study has found that uninformed altruistic voting is much more dangerous to the common good than voting that is self-interested but informed. See Caplan, *supra* note 8, at 416.

74. The work of Kent Greenawalt is an essential guide for thoughtful approaches to these issues. See generally GREENAWALT, *supra* note 40, at 1–5; KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

need not settle these questions beyond the quite limited reach of our argument for the immorality of private interest voting in the context of direct democracy—and concomitant affirmative obligation to vote for a credible conception of the public good. Those who vote for religious reasons are generally not pursuing their own private welfare, but are instead often acting in pursuit of something they genuinely believe to be in the welfare of all, with their own set of evidence-based stories about why certain types of voting are in the public interest. For these reasons, such voters could be understood to be meeting their obligations *so long as there is a credible way of moving from the underlying genuinely held religious belief to an authentic view about the public good*. Whether such voters deriving their sense of the public good from religion run afoul of other contested moral commands—to provide public reasons for justifiable political action that all could accept or none could reasonably reject;⁷⁵ to forbid the state (or private persons) to discriminate on the basis of creed or religion in the public sphere; or to refuse to establish religion in a liberal state—extends beyond the scope of our argument here and would require its own treatment. We suspect our commitment to voters in direct democracy as state actors and political representatives might be relevant to that inquiry, but we do not pursue those potential applications in this context.

CONCLUSION

Our main effort here has been to show that even if political morality's standard view of voting in candidate elections holds, it cannot easily be applied to voting in direct democracy. Direct democracy, as we have argued, is more "representative" than is usually understood—and voters have obligations similar to those of political representatives when they are voting on law directly. Admittedly, this vision upends the well-settled distinction between direct and representative democracy. But we think the theory and practice of direct democracy invites thinking about the voting activity there as constrained by the moral limits of political representation, and accordingly requires direct democracy voters to refrain from voting in service of their

75. See generally T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998); James Bohman & Henry Richardson, *Liberalism, Deliberative Democracy, and "Reasons That All Can Accept,"* 17 J. POL. PHIL. 253 (2009); T.M. Scanlon, *Contractualism and Utilitarianism, in UTILITARIANISM AND BEYOND* 103 (Amartya Sen & Bernard Williams eds., 1982).

private interests. A direct democracy supported by public interest votes may still be far from perfect, but it is surely a more normatively desirable means of law-making than the private-interest-oriented alternative.