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Making What Present Again? A Critique of Argumentative Judicial Representation

AQ1 Donald Bello Hutt

1. Introduction

Courts do many good things. Judges carefully consider individual claims and arguments,¹ and contrast them against the law in light of evidence. Their decisions are argued for, are public, and can be contested in form and content in different hierarchical stages. Additionally, and among other things, these practices are said to contribute to the will-formation of the public sphere and improve the quality of the legislative process.²

These are good things, indeed. Yet, there are some virtues that some scholars claim judges have that seem to require further scrutiny before accepting such characterisations. Consider, for example, the notion advanced by some legal scholars that judges are good at morality,³ a thesis that has been strongly criticised.⁴ Or the claim that courts engage in deliberation, some even placing

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1. Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) at 32.
2. Jürgen Habermas, “Lecture One: How is Legitimacy Possible on the Basis of Legality”, translated by Kenneth Baynes (Law and Morality, The Tanner Lectures on Human Values delivered at Harvard University, 1 and 2 October 1986) at 248; Ittai Bar-Siman-Tov, “The Role of Courts in Improving the Legislative Process” (2015) 3:3 *The Theory and Practice of Legislation* 295.
3. Dworkin, *supra* note 1 at 70; Alon Harel, “Why Legislatures Owe Deference to the Courts: A Commentary on Dimitrios Kyritsis’ *Where Our Protection Lies: Separation of Powers and Constitutional Review*” (2019) 38 *Revus: Journal for Constitutional Theory & Philosophy of Law* 7.
4. Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007) at 33-34; Jeremy Waldron, “Do Judges Reason Morally?” in G Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2008) 38; Jeremy Waldron, “Judges as Moral Reasoners” (2009) 7:1 *Intl J of Constitutional Law* 2.

the judiciary as the institutional embodiment of central principles of deliberative theory.⁵ Again, and for good reasons, that association has been questioned.⁶

Here, I examine another category associated with the judiciary: political representation. Scholars have generally used three types of arguments to claim that the judiciary is a representative institution. One relies on the fact that judges are appointed through the political process.⁷ A second avenue is to focus on the fact that in judicial procedures, the representation of clients by their attorneys is mediated by judges.⁸ These are important discussions to have, but here I am interested in a third important argument that has not undergone proper scholarly scrutiny.⁹ It is as follows: some commentators take the judges' duty to argue for and justify their decisions as reasons supporting the claim that they perform representative functions. This claim is usually advanced when the representation of the people at the constitutional level is at stake. These authors thus consider that judicial decisions would be able, due to their argumentative features, to represent the constituents' better self as expressed in constitutional principles. Conversely (and perhaps ironically) it is implicitly assumed that traditional representative institutions fall short of accomplishing these desiderata.

This article provides reasons to reject the contention that argumentative *representation* is something characteristic of or to be demanded from judges in a constitutional democracy. Judges look at the law, not at the will of constituents; their practice and the norms ensuing from it are not to be evaluated on the basis of their reflecting or their answering to the will of no-one, but on the basis of their compliance with the requirements or mandates of the legal system. Those norms and practices may effectively, and even oft-times, coincide with what the public

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5. See John Ferejohn & Pasquale Pasquino, "Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice" in W Sadurski, ed, *Constitutional Justice: East and West* (Kluwer, 2002) 21 at 22. See also Stephen Macedo, "Introduction" in S Macedo, ed, *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, 1999) 3 at 6. Some examples of scholars arguing along these lines are John Rawls, *Political Liberalism* (Columbia University Press, 1996) at 231-40; Christopher L Eisgruber, *Constitutional Self-Government* (Harvard University Press, 2001) at 3, 5; Jürgen Habermas, *Between Facts and Norms* (MIT Press, 1996) at 279-80; Conrado Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford University Press, 2013).
 6. Donald Bello Hutt, "Measuring popular and judicial deliberation: A critical comparison" (2018) 16:4 Intl J of Constitutional Law 1121; Donald Bello Hutt, "Constitutional Interpretation and Institutional Perspectives: A Deliberative Proposal" (2018) 31:2 Can JL & Jur 235["Constitutional Interpretation"].
 7. I partially confront this argument in section 4.1. For a different take also setting aside discussions of electoral representation in favour of discussing "other important aspect[s] of representation", see Margit Cohn, *A Theory of the Executive Branch: Tension and Legality* (Oxford University Press, 2021).
 8. For a brief discussion of this possibility, concluding that this type of representation "proves decidedly limited," see Richard Bellamy & Cristina E Parau, "Introduction: Democracy, Courts and the Dilemmas of Representation" (2013) 49:3 Representation 255 at 261.
 9. Richard Bellamy briefly analyses some arguments made in this article, but his discussion leaves significant room for further development. Additionally, my argument here grants fewer representative credentials to courts than Bellamy, who affirms that because judges operate in a democratic environment "they can sometimes be categorized under gyroscopic and anticipatory representation". For the reasons I give in this paper, I am less inclined to buy into this narrative. See Richard Bellamy, "The Democratic Qualities of Courts: A Critical Analysis of Three Arguments" (2013) 49:3 Representation 333 at 343-44.

prefers or with its best interests. Such coincidences are, however, contingent, and differences between the content of a judicial ruling and the preferences, interests, and so on, of the people they affect with their decision, are not best accounted for as failures in representing or as breaches of some alleged representative function. With this feature in the background, which I will refer to as ‘functional orientation’, I will show that the notion of an argumentative judicial representation judiciary falls prey to two types of mistakes: descriptive and normative. Descriptive because when claiming that the judiciary is a representative institution due to their argumentative duties, scholars fail to properly account for what courts do and should do. Several other terms of legal and political theory account for what happens in the courtroom, but they do not map squarely onto the concept of representation. And, to be clear, this is not merely about words. Each category conflated with what is allegedly judicial representation (e.g., legitimacy, adjudication, interpretation, etc.) is significantly laden with its own distinctive meaning, and raises theoretical disagreements about its own scope, normative relevance, etc.

But scholars also incur a normative problem. Underpinning the notion of argumentative judicial representation is a concern with imagining mechanisms by which constitutional democracies are kept safe from the sound and fury of short-term, electoral party politics. Courts do this allegedly by embodying something other than transient electoral majorities, namely higher, principled forms of the people inbuilt in the constitution. These may be fine objectives but, I will argue, putting the burden of representation on the courts is a not a suitable path to their achievement. Nothing in this endeavour impedes what we traditionally refer to as representative institutions from representing higher, more principled, forms of the people. I will thus argue that scholars should avoid talking of judicial representation on the pain of incurring two types of fallacies: moralistic and nirvana. Moralistic because since representing is important and it is not properly realised by majoritarian institutions, it is assumed that courts incarnate it. This reasoning, however, unwarrantedly shifts from a desideratum to an affirmation about how the world is. And nirvana because the idea of judicial representation rests on an unfair contrast between the ideal features of the judiciary and the ‘real’ practice of majoritarian institutions.

These questions are related to other pressing issues of legal and constitutional theory, for example, to which domains are “inherently unsuited for adjudicative disposition and should be left to the legislature.”¹⁰ Yet, my interest here is independent of how these questions are answered. My reflection is rather closer to Weale’s question: “on what *grounds* can we assign an institutional right to

10. Lon Fuller, “The forms and Limits of Adjudication” (1978) 92:2 Harvard Law Review 353 at 354; Adam Tomkins, “The Role of Courts in the Political Constitution” (2010) 60:1 UTLJ 1 at 4; Cass R Sunstein & Adrian Vermeule, “Interpretation and Institutions” (2003) 101:4 Mich L Rev 885; Jeff King, *Judging Social Rights* (Cambridge University Press, 2012); Cass R Sunstein, “There is Nothing Interpretation Just Is” (2015) 30:2 Const Commentary 193.

one type of political agent rather than another?”¹¹ My claim is that the powers given to judges are not grounded on their putative representativeness.

I proceed as follows. I begin describing three theses claiming (or lending support to the claim) that the judiciary is or can be a representative institution due to its argumentative functions or capacities: Robert Alexy’s ‘argumentative representation’, Pierre Rosanvallon’s ‘reflexive legitimacy’, and Philip Pettit’s ‘indicative representation’. These three are, in my view, the best and most articulate versions of the argument I target here.¹² I abstract some of their common features under one thesis I call the ‘judicial representation thesis’ (JRT) (section 2).

I then examine political representation. I am interested in identifying a feature found in different views of representation in the circumscribed domain of democratic law-making procedures that few would take as controversial. This feature is the ‘functional orientation’ of representatives towards the will of their constituents. Representation may be more than that,¹³ granted, but the difficulties in specifying what this animal exactly looks like demand this type of methodological stipulation. I conclude that, notwithstanding the disparities of the different conceptions of political representation available in the scholarly literature, we can observe a broad convergence on the etymological definition of representation, to wit making something present again, in this case, someone’s will. This feature shall be at the background of the remainder of the article (section 3).

The question, “is the JRT warranted?” then hinges on whether courts have this functional orientation. My claim is that they do not. The job of courts is not best described by the contention that their duty to argue for and to justify their decisions is a proxy for representation (section 4).

11. Albert Weale, *Democracy* (Macmillan, 1999) at 87 [emphasis added].

12. Others make similar points. Matthias Kumm, for example, also argues for judicial representation, but his argument is generally covered by Alexy’s. The difference, which I take as ancillary to my analysis, is that Alexy focuses on ideal argumentation, while Kumm focuses on interpretive methodologies. See Matthias Kumm, “On the Representativeness of Constitutional Courts: How to Strengthen the Legitimacy of Rights Adjudicating Courts Without Undermining Their Independence” in C Landfried, ed, *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press, 2019) at 281-291. One could also argue that there is a claim for judicial representation in Habermas’ contention that the judiciary contributes to the will-formation of the public sphere. But this is an indirect claim for representation inasmuch as it follows Ely’s procedural account that limits the contribution of the judiciary to clearing the paths for representative law-making that takes place outside the courtroom. See Habermas, *supra* note 5 at 267-96. Having said that, here I nonetheless offer some indirect critical remarks about adopting Elyan approaches to warrant the idea of judicial representation. For other scholars discussing these problems along similar lines, see for example, Eisgruber, *supra* note 5 at 110; Horacio Spector, “Judicial Review, Rights, and Democracy” (2003) 22:3 *Law & Phil* 285; Dimitrios Kyritsis, “Representation and Waldron’s Objection to Judicial Review” (2006) 26:4 *Oxford J Leg Stud* 733; Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Judicial Review* (Oxford University Press, 2017) at ch 4, 6; Dimitrios Kyritsis, “Justifying Constitutional Review in the Legitimacy Register” (2020) 42 *Revue: Journal for Constitutional Theory & Philosophy of Law* [Kyritsis, “Justifying Constitutional Review”]. For an alternative but partially overlapping overview, see Pierre Brunet, *Para un análisis del discurso jurídico*, translated by Adriana Maria Cely (Univ Externado de Colombia, 2019) at 263-95.

13. Or it may be described from other theoretical backgrounds, for example, from aesthetics. See, for example, Frank Ankersmit, *Political Representation* (Stanford University Press, 2002).

I flesh out the argument in two subsections. My first contention is that the JRT is better described as comprising sundry practices that judges indeed perform and principles that they indeed embody, such as adjudication, argumentation, justification, interpretation, reasoning, legitimacy, legality, *inter alia*, not representation. Representation may incorporate those features, but the converse—that these features are necessarily linked to representation—does not necessarily hold (4.1). Second, I delve into the reasons why scholars may seek to find representation of the people in the constitution in the judiciary rather than in where it intuitively seems like its more natural place, namely what we ordinarily refer to as representative institutions. I submit that the reason is the longstanding image of majoritarian institutions as incapable of engaging in principled discussions about constitutional politics. Since majoritarian institutions supposedly fail at engaging in the type of discourse and at meeting the justificatory demands required by constitutional politics, the will of the people enshrined in a constitution should be represented elsewhere; courts are the main candidate for filling that role (4.2). As I mentioned above, however, this reasoning incurs a moralistic (4.2.1) and a nirvana fallacy (4.2.2). The final part offers concluding remarks (section 5).

2. Judicial Representation

Some scholars see the judiciary as a representative institution due to their duty to argue for and justify their decisions. They share what I call the ‘Judicial Representation Thesis’ (JRT):

JRT: Courts are argumentative representative institutions. By expressing (a) certain constitutional objective(s) through their arguments, justifications and decisions, they retrieve and/or express the will of the people inbuilt in the constitution.¹⁴

This section overviews three accounts that are, to different degrees, expressive of the JRT: Robert Alexy’s ‘argumentative representation’ (2.1), Pierre Rosanvallon’s ‘reflexive legitimacy’ (2.2), and Philip Pettit’s ‘indicative representation’ (2.3). The JRT will be my general target, but I will address these three authors directly when needed, for the sake of nuance.

2.1. Argumentative Representation

Alexy’s ‘argumentative representation’ is part of a scheme aimed at justifying judicial review of legislation through his theory of balancing rights and the use of his weight formula.¹⁵ The overall theory yields a system of constitutional rights and freedoms oriented towards correctness.¹⁶

14. For the reasons I offer in section 3, I use the term ‘will’ as comprising wills in *sensu strictu*, preferences, and interests.
 15. Robert Alexy, “On Balancing and Subsumption. A Structural Comparison” (2003) 16:4 Ratio Juris 433 at 443-48.
 16. Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002).

Alexy wants to make sense of the fact that courts of law lacking electoral legitimacy are given a prominent place in the determination of the meaning and scope of constitutional provisions in democratic systems. That is, in systems whose legitimacy is predicated upon the will of the people, not the will of judges. As he acknowledges, constitutional review by judges sits at odds with this requirement.¹⁷ In his view, “[t]he only way to reconcile constitutional review with democracy is to conceive of it . . . as representation of the people.”¹⁸

Alexy quickly spots two problems. First, “representation seems necessarily connected with elections, and, second, if representation were possible without elections, why should this kind of representation have priority over representation based on elections?”¹⁹

The author circumvents these difficulties by conceiving of representation as a relationship between represented and representative whose existence in the case of Parliament is almost primarily determined by elections and majority rule. But, the idea goes,

[a]n adequate concept of democracy must . . . comprise not only decision but also argument. . . . For this reason, the connection between the people and the parliament must not only be determined by decisions expressed in elections and votes but also by argument.²⁰

Courts generally lack electoral legitimacy, so their relationship with the people is ‘purely argumentative’. Because Alexy considers that representation “necessarily lays claim to correctness . . . a fully-fledged concept of representation must include an ideal dimension, which connects decision with discourse.”²¹ This ideal dimension is realised by courts.

Finally, Alexy recognises that “the existence of good or plausible arguments is enough for deliberation or reflection, but not for representation.”²² Yet, he thinks that a middle point between arguments and numbers is possible if a sufficient number of rational people accept those arguments for reasons of correctness.²³

2.2. *Reflexive Legitimacy*

Another version of the JRT is Rosanvallon’s idea of ‘reflexive legitimacy’, an attempt to correct and compensate for what he takes as three flawed considerations of political theory: that voters choice is equated with the general will; that voters are equated with the people; and that politics and legislation flow continuously from

17. Robert Alexy, “Balancing, Constitutional Review, and Representation” (2005) 3:4 Intl J of Constitutional Law 572 at 578.

18. *Ibid.*

19. *Ibid.*

20. *Ibid.* at 579.

21. *Ibid.* at 578.

22. *Ibid.* at 580.

23. *Ibid.* at 580.

the moment of the vote.²⁴ ‘Reflexive legitimacy’ questions the view of the people as a monolithic unity with a single will. Rather, the people exist in different times and styles of deliberation, under different labels: the electoral people, the social people, and the people as principle.²⁵

Each of these varieties relates to the general will in different ways. The *electoral people* corresponds to the numerical definition of the general will. The *social people* is mainly incarnated in the institutions of what Rosanvallon calls counter-democracy, comprising different means by which citizens may monitor elected rulers, mobilize resistance to specific policies, and control corruption.²⁶ Finally, the *people as principle* “refers to an inclusive, egalitarian idea of the general will, grounded in full respect for the existence and dignity of each individual.” Neither of these three images of the people “can by itself claim to be an adequate incarnation of the democratic subject.”²⁷ We need the three.

These distinctions bear on the alleged representativeness of constitutional courts. Rosanvallon avows that, “[a]s reflexive third parties, the primary function of the constitutional courts is social and political representation.”²⁸ But it is a rather special type of representation by which courts “attest to the existence of the people as principle.”²⁹ Their essential role is to make clear “that the sovereign is more than just the party that wins a majority on election day and that no definition of it is sufficient.”³⁰

Rosanvallon thus endorses the JRT inasmuch as he thinks that qua reflexive institutions, courts embody a form of representation “of the moral or functional order, structurally distinct from the immediate expression of opinions and interests, which is what elections are all about.”³¹ They strengthen the representative system by playing “a positive role in structuring democracy”, creating more faithful images of the general will,³² and preventing “the future from being foreclosed by the party that happens to be in the majority at a particular point in time.”³³

2.3. Indicative Representation

Representation, says Pettit, may be responsive or indicative in character. In a responsive model, the preferences, attitudes, opinions, etc., of representees “are the causal source of the attitudes displayed by the representer.” Accordingly, representatives should speak or act on the attitudes of those they represent. In an indicative model, by contrast, “the attitudes displayed by the representer are a non-causal sign of the

24. Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Princeton University Press, 2011) at 123.

25. *Ibid* at 130.

26. Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge University Press, 2008).

27. Rosanvallon, *supra* note 24 at 132.

28. *Ibid* at 140.

29. *Ibid* at 140.

30. *Ibid* at 141.

31. *Ibid* at 141.

32. *Ibid* at 145.

33. *Ibid* at 143.

attitudes held by the representee.”³⁴ Indicative representers stand for the representees; 203
 their actions are indicative of how the representees would act. Just as a painting is 204
 indicative of how the subject of the painting looks, “so on this image should repre- 205
 senters be indicative of representees; they should be fitted to serve as proxies, not— 206
 or not just—as deputies.”³⁵ 207

‘Indicative representation’ is presented not only as a plausible abstract ideal, 208
 but as one that is manifested in different periods in the history of democracy and 209
 in concrete democratic institutions, primarily in proportional representation.³⁶ 210

Yet Pettit also suggests that once we understand the distinctiveness and value of 211
 ‘indicative representation’ we may then see that some institutions, although not 212
 directly elected, can still be accounted for as representative, and so possessing dem- 213
 ocratic credentials on their own.³⁷ Placed at the constitutional level, we can therefore 214
 conclude that if these institutions can point at principled ways of interpreting the con- 215
 stitution, we may be able to link such interpretation to the will of the people on cer- 216
 tain constitutional matters. Indicative judicial representation would respond to the 217
 objection that judges do not track the preferences of citizens, simply by granting 218
 the point, as their representativeness does not depend on their retrieving no one’s 219
 preferences. Judicial decisions at the constitutional level then are an indication of 220
 someone else’s preferences, voices, opinions, etc., expressed in the constitution, 221
 not a retrieval of them. 222

3. Representation and Functional Orientations 223

One way of determining the cogency of the JRT hinges on how the term repre- 224
 sentation is used—on its meaning. But determining its meaning is no easy task. 225
 As one of the most prominent theorists of representation claims, there is a “striking 226
 lack of precision in the literature on political representation.”³⁸ The concept is 227
 complex, ambiguous, vague, and underspecified. Hence, contrasting *the* or per- 228
 haps even *a* concept of representation against the JRT leads most likely to a dead 229
 end. I would fall prey to the objection that there are other conceptions competing 230
 with the one that one prefers. 231

I will not solve these problems in one subsection. Yet, I think this conceptual 232
 mix-up can be attenuated by circumscribing my analysis to what representation 233
 does in democratic law-making contexts. That is, in contexts in which the quarrel 234

34. Philip Pettit, “Representation, Responsive and Indicative” (2010) 17:3 *Constellations* 426 at 428.

35. *Ibid* at 429.

36. *Ibid* at 430.

37. *Ibid* at 433.

38. Andrew Rehfeld, “On Representing” (2018) 26:2 *J of Political Phil* 216 at 219 [Rehfeld, “On Representing”]. See also, Andrew Rehfeld, “Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy” (2009) 103:2 *Amer Political Science Rev* 214 at 216 [Rehfeld, “Representation Rethought”]; Suzanne Dovi, “Political Representation” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Fall 2018 Edition (Metaphysics Research Lab, Stanford University, 2018). See also, Monica Brito Vieira & David Runciman, *Representation*, (Polity, 2008) at 4.

about the idea of judicial representation finds its place. We care about whether courts, or any institution for that matter, are representative, qua institutions that are part of a democratic system. This does not settle discussions about what political representation is, but it does provide a general vantage point from which different conceptions of political representation may be seen as broadly converging.

Hence, in this section, I submit, without necessarily committing myself to one particular view on what representation is,³⁹ that a fixed point in theories of political representation in democratic law-making contexts is that representatives are mandated to trace their decisions back to the will of their constituents; to making their will present again. That is, every conception of political representation concerned with democratic collective decision-making, relates to the relationships between the actions of an individual or a group A, the imputation of those effects to another individual or group B, and the evaluation of the latter about the former on the basis of a criterion X, where X stands for B’s preferences, wills, desires, interests, reasons, etc.

I insist: this is what representation is supposed to do in these particular circumscribed democratic contexts. Representation then gives representative democratic institutions a ‘functional orientation’: agents and institutions engaged in processes of collective decision-making are reasonably accounted for as representatives when the warrantedness of their practices and their results hinge to some higher or lesser degree on their duty to either advance, seek, or pursue the interests of a constituency, or to track their preferences in a manner responsive to it.

It could be objected that this description is limited to what Rehfeld terms the “Interest and Responsiveness Account” of representing. If, *arguendo*, we take Rehfeld’s analysis as correct, my account could be deemed incomplete, as it would not consider the full panoply of phenomena falling under the label ‘representation’. Representing as such, the objection would go, “does not require the pursuit of another person or group’s interests, nor does it require that an action be done in a manner responsive to them.”⁴⁰ Instead, Rehfeld tells us, the activity of representing has three senses, unrelated to interest and responsiveness. I will consider these senses for they articulate the objection and allow me to dispel it in an orderly fashion.

The first sense refers to the exercise of the social power that individuals acquire when they take on the social status of representative. In contexts of democratic decision-making, “this often occurs after an individual is elected; in non-democratic or non-institutional contexts this can occur through informal audience recognition, often including the process of ‘claims-making.’”⁴¹ In this

39. I elaborate on my own view in Donald Bello Hutt, “Political Representation as Interpretation: A Contribution to Deliberative Constitutionalism” (2021) 33:4 Ratio Juris 351; Donald Bello Hutt, “Political Representation as a Regulative Ideal: a Comment on the Democratic Objection to Constitutional Review” (2019) 38 Revus: Journal for Constitutional Theory & Philosophy of Law 39.

40. Rehfeld, “On Representing”, *supra* note 38 at 217.

41. *Ibid.*

first case, representing happens if the actions undertaken are done by someone using a social power: “[w]hen those actions are not an exercise of a representative’s social power, they are not cases of ‘representing,’ they are merely cases of voting, deliberating, negotiating, and so on.”⁴²

The second sense derives from the first and refers to those instances where individuals holding the social power to act as representatives are not performing the activities typically attributed to them *qua* representatives. In Rehfeld’s example, this sense “explains the case in which we might say, ‘Karen represents the third district in Congress’, even when Karen is sleeping.”⁴³

The third sense refers to the act of “conveying one thing for another”, much as symbols convey a message, or language conveys a meaning. This sense is not related to the exercise of social powers but “merely refers to the successful conveyance through language or other means of one thing for another.”⁴⁴

Nevertheless, none of those senses prove the JRT. The first two senses identified by Rehfeld are question-begging for the purposes of my argument. Both versions assume that the office is already one occupied by someone with social status of representative. For example, Alexy’s explicit acknowledgement that the representativeness of the court is not based on election or numbers implies that additional argumentative steps are to be taken to grant the judiciary such status. If anything, this recognition shows that the judges’ authority is one that does not naturally derive from their status as representatives. In contrast, my discussion presupposes that the nature of judicial office is not of such kind. My discussion is about whether the *actions* of officials whose selection is—barring exceptional cases where they are elected—supposed to place them outside the political sphere, can be nevertheless taken as representative because the content of those actions could be indicative of something akin to the people’s will. The same applies to the second sense as it is “derivative on the first.”⁴⁵

The third sense poses, *prima facie*, a bigger challenge to my account. It implies, just as Rosanvallon’s and Pettit’s accounts do, that there are ways in which we can talk about representation that are detached from the particular function the official is supposed to carry forward. Forms of representation emerge, the argument goes, from the actions of the court whether its members have been selected for those purposes or not. One can still analyse the performance of a court through the lenses of political representation. We can still ask the question: “did X judicial decision incarnate the will of the people?”

I grant this possibility. Yet, I argue that such possibility can only be contingent if allegiance to the law is not to be lost as the primary function of the court. Put differently, the content of a decision may coincide with what the public prefers or with its interests. But it may also not, because the legal system applied by the court may not provide the tools for it to issue decisions that will be aligned with

42. *Ibid.*

43. *Ibid.*

44. *Ibid.*

45. *Ibid.*

the people’s will or with the people’s interests. And this, which I here refer to as 313
 the functional orientation of a court towards the law, implies that an evaluation of 314
 the court as negative or wrong because “it failed to fulfil a representative role it is 315
 expected to fulfil” will miss the target. 316

Moreover, should one use the language of representation to account for what 317
 courts do because they convey one thing for another, one should simply assume 318
 that representation is anything that the court decides. Inasmuch as courts translate 319
 the meaning of a text or of a practice into decisions, then whatever a constitu- 320
 tional court decides will be imputed to the people. 321

But this is wrong for two reasons. One will be discussed below in a brief refer- 322
 ence to originalism or legislative intent. Here I will dispel the second one. It is 323
 this: describing what courts do and should do as representation in the sense 324
 described abuses the term. It says too much and thus too little. Such line of rea- 325
 soning would easily lead us to conclude that any public institution, inasmuch as 326
 its powers can be traced back to an original constitutional moment and inasmuch 327
 as every act of application of the law involves the conveying one thing for an- 328
 other, is a representative one. But certainly not any institution exists for the sake 329
 of expressing the people’s will, nor their actions are to be evaluated on the bases 330
 of whether they represented someone. Applying the language of representation to 331
 describe what any institution does by virtue of its partaking in a representative 332
 system waters down the term conceptually and normatively; it overshadows the 333
 boundaries separating representation from other concomitant terms. And, as I 334
 show below using the example of Central Banks, it makes us lose sight of the 335
 evaluative tools we have to assess the performance of institutions designed to 336
 pursue objectives that could run counter to representative ideals, courts 337
 among them. 338

So courts are functionally oriented towards the law, and representative insti- 339
 tutions are functionally oriented towards the will of their constituents. Of course, 340
 different theories will interpret this feature differently. Most prominently, there 341
 will be differences as to whether the functional orientation is either towards the 342
 will (in *stricto sensu*), the preferences or the interests of the represented. In par- 343
 ticular, interest-based theories of representation may consider that the will of the 344
 individuals bound by the decisions of the representative will count as secondary; 345
 best interests and preferences do not necessarily, and often do not, overlap. Yet 346
 my point still stands, namely that the relationship between representative and rep- 347
 resented is one where the latter’s preferences and wills of interest count as a grav- 348
 itational point for the actions of the former; as a normative criterion of assessment 349
 of the actions of a representative. This normative relationship is present in the 350
 entire spectrum of theories concerned with representation in a democratic law- 351
 making context, from delegate to virtual representation, and thus is present in 352
 representative institutions. But, as I will argue, although it may be contingently 353
 present in courts, it is not something mandatory for them or something that fol- 354
 lows from their functions. 355

This functional orientation is present in the traditional delegate/trustee dichot- 356
 omy for which the central question is who has the right to decide how to cast 357

votes, whether the constituency or the representative. The question is explicitly 358
 formulated in terms of these two alternatives, and it emerges because it is either 359
 the nearness or the distance of the represented that is the criterion by which the 360
 delegate and trustee extremes are defined. The link between representative and 361
 represented shall, of course, be tighter in the case of delegate conceptions of 362
 representation, and looser when representatives are given independence in judg- 363
 ing what the best course of action is in a given case.⁴⁶ But the distinction and the 364
 different positions one might find in between those two extremes are always 365
 framed with regard to the will of constituents. 366

This functional trait does not disappear when one adds more layers of com- 367
 plexity to the delegate/trustee distinction, a distinction that, like Rehfeld shows, 368
 obscures additional categories and questions in theories of representation. He 369
 argues that the distinction clouds three underlying distinctions regarding aims 370
 (whether the representative-lawmakers aim at the good of all or the good of a 371
 part), sources of judgement (whether the representative-lawmakers rely on their 372
 own judgement or on the judgement of a third party to determine the good at 373
 which they aim), and responsiveness (the degree to which the representative-law- 374
 makers are responsive to sanctions).⁴⁷ But it can be readily seen that this more 375
 complex story is also told in terms of the functional orientation I describe. 376

This even holds for so-called theories of ‘virtual representation’ where represen- 377
 tatives have no electoral relationship with their constituents, but where nevertheless 378
 the relationship between their practice and the constituency to which decisions are 379
 imputed, remains. This includes, for example, Mansbridge’s ‘gyroscopic representa- 380
 tion’, where representatives are self-reliant and relatively unresponsive to sanction,⁴⁸ 381
 because, again, the question of what makes an action whose effects are imputed to 382
 others representative or not, is one about the relationship between the decision-maker 383
 and the will of those individuals affected by the decision and the degree to which the 384
 latter must be responsive to the former. Every conception of representation, irrespec- 385
 tive of the degree of independence in judgement granted to the representatives, ori- 386
 ents them towards their constituent in some way. Borrowing Brito and Runciman’s 387
 wording regarding trusteeship, “trustees may be thought of as representatives *if there* 388
is some way of making the interests of those whom they represent present in their 389
*actions, independently of whatever the trustees themselves happen to say or do.”⁴⁹ 390
 Although there are sundry ways of establishing that presence, it is always necessary 391
 to have the represented in sight, the actual individuals who will be affected by the 392
 representative’s actions. Should the transfer of competences from represented to rep- 393
 resentatives be total—what Brito and Runciman refer to as ‘literal trusteeship’—then 394*

46. Constructivist theories currently being the most influential. See, for example, Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (University of Chicago Press, 2006); Michael Saward, *The Representative Claim* (Oxford University Press, 2010). Yet, they are not the only ones accepting this independence in judgement. See, for example, Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) at 90.

47. Rehfeld, “Representation Rethought”, *supra* note 38 at 215.

48. Jane Mansbridge, “Clarifying the Concept of Representation” (2011) 105:3 *Amer Political Science Rev* 621 at 622.

49. Brito-Vieira & Runciman, *supra* note 38 at 79 [emphasis added].

the relationship is no longer one of representation but of paternalism.⁵⁰ In short, 395
 independent judgement is not always representative independent judgement.⁵¹ 396

Theories of political representation thus share that the will of constituents is 397
 their gravitational point, the object they are supposed to interpret, and that diver- 398
 gences about the meaning of representation are relative to this functional trait. 399
 And this is irrespective of the degree to which that will binds the representative. 400
 Consequently, what Rehfeld thinks for democracy also goes for representation, 401
 namely that “we must always justify and explain cases in which law deviates 402
 from citizens preferences, whereas no such *prima facie* justification is required 403
 in cases when law conforms to the preferences and wills of those it governs”.⁵² 404
 Those preferences and reactions become, in the end, vantage points from where 405
 the activity of a decision-maker is either conceptualised or evaluated as 406
 representative. 407

These reflections take us back to the rather simple—though not trivial—ety- 408
 mological point that representation involves making someone’s will present 409
 again.⁵³ It is useful then to close this subsection by remembering that every ideal 410
 view of representation already identified by Pitkin expresses this functional 411
 orientation: in delegation, representatives act as *the represented*; in trusteeship, rep- 412
 resentatives act for *the represented*; in descriptive representation, representatives 413
 stand as *the represented*; in symbolic representation, representatives stand for *the* 414
represented.⁵⁴ But, are *the represented* the gravitational point of judicial deci- 415
 sions? Are courts functionally oriented in this way? 416

4. Is the Judiciary Representative? 417

I have hitherto described three versions of the JRT and shown that the functional 418
 orientation towards determining what is the will of the represented pervades dif- 419
 ferent conceptions of political representation. 420

It is now time to answer whether the JRT is about that, about representation. I 421
 mentioned at the outset that it is not clear to me that the JRT uses the term ‘rep- 422
 resentation’ in a way that captures the functional orientation of courts towards the 423
 law, and not towards the will of constituents. With the idea that representative insti- 424
 tutions are functionally oriented towards the will of their constituents in the back- 425
 ground, I can now show why. The reasons are two. First, what the JRT-endorsers 426
 refer to when they use the term representation is best described by using an array of 427

50. *Ibid* at 79. An argument that counts against theories of representation that completely sever the actions of the representative from the preferences of the represented, for example, Saward’s. See Saward, *supra* note 46. An example of these criticisms is found in Lisa Dish, “The Constructivist Turn in Democratic Representation: A Normative Dead-End?” (2015) 22:4 Constellations 487.

51. It is quite telling of the difficulties in calling courts representative institutions that Brito and Runciman hesitate in accounting for literal trusteeship as representation “because literal trusteeship is a property relation upheld by specialized courts of law”. See Brito-Vieira & Runciman, *supra* note 38 at 79.

52. Rehfeld, “Representation Rethought”, *supra* note 38 at 214.

53. Hanna Pitkin, *The Concept of Representation* (University of California Press, 1967) at 144.

54. *Ibid*; Bellamy & Parau, *supra* note 8 at 256.

other categories, with similar or concomitant, yet distinct semantic domains such as 428
legitimacy, acceptance, conformity, rationality, justification, argumentation, inter- 429
pretation, *inter alia*. As a result, judicial practices are not best accounted for by 430
describing them as representative practices (4.1). 431

Second, the JRT is an expression of the traditional wariness that majoritarian 432
institutions lack the incentives and the institutional structures to give the consti- 433
tution the importance it has. This concern leads the scholars discussed in section 2 434
to look at the courtroom as the proper representation of something other than the 435
short-termist, transient wills and preferences of the citizen of here and now. This 436
concern is understandable, but the solution relies on a fallacious contrast between 437
non-judicial and judicial institutions; between the worst features of the former 438
and an ideal version of the latter. A fairer balance should acknowledge that 439
although legislators often fail at representing what Rosanvallon calls the ‘people 440
as principle’, it does not follow that this role is performed by courts. The tendency 441
is, however, to unwarrantedly downplay the value and capacity of parliaments 442
and to extol the role of courts (4.2). 443

4.1. *Calling Things by Their Name* 444

I have argued that political representation involves a functional orientation 445
towards the constituents’ will. Whether courts have such an orientation deter- 446
mines whether they are representative institutions. 447

The JRT says that there is a relationship between judicial decisions, the 448
Constitution, and, borrowing Rosanvallon’s language, the will of the people 449
as principle. It then concludes that courts can be representative institutions. 450
But this move is not warranted, and it leads scholars to use the term representation 451
to describe things that occur within the courtroom for which we already have 452
other terms. 453

Let me begin by stating a non-controversial fact pertaining to the courts’ func- 454
tional orientation: constitutions are legal *and* political documents. Qua political 455
instruments, they embody principles whose instantiation is open for political 456
debate among the different branches of government and among citizens. Any in- 457
stitution interpreting and applying a constitution will inevitably be judging mat- 458
ters with political content. Courts too. 459

But, of course, constitutions are also *law* of the land. Many of their provisions 460
are judicially enforceable, and this power is given to courts on the grounds of the 461
distinctive ways in which they frame and decide cases. Should this function be of 462
the kind exerted by the other branches of government, then its existence would be 463
either superfluous or redundant. If the judiciary is to be considered a separate, 464
distinct body, the mechanisms and the language by which judges decide must 465
be unique in their content and effects.⁵⁵ This is shown in cases with clear political 466

55. Dieter Grimm, “What Exactly is Political About Constitutional Adjudication” in Christine Ladfried, ed, *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press, 2019) 307 at 308-09 [emphasis added].

content where judges strive to describe their function as part of the realm of the legal. Consider, by way of example, two recent decisions by the UK Supreme Court, informally known as *Miller 1* and *Miller 2*,⁵⁶ where the Court explicitly recognised the political character of the issue at hand while also being explicit about the strictly legal task with which the Court is entrusted. Referring to UK government ministers’ announcement of their willingness to terminate the UK membership of the European Union, the Court said in *Miller 1* that the case,

has nothing to do with issues such as the wisdom of the decision . . . the terms of withdrawal . . . or the details of any future relationship with the European Union. Those are all political issues which are matters for ministers and Parliament to resolve. They are not issues which are appropriate for resolution by judges, *whose duty is to decide issues of law which are brought before them by individuals and entities exercising their rights of access to the courts in a democratic society*.⁵⁷

In *Miller 2*, the court insisted on this point from the very outset:

It is important to emphasise that the issue in these appeals is not when and on what terms the United Kingdom is to leave the European Union. *The issue is whether the advice given by the Prime Minister to Her Majesty the Queen on 27th or 28th August 2019 that Parliament should be prorogued . . . was lawful*.⁵⁸

This bears on whether representation is what we should expect from courts. If, as I have explained above, representation in democratic law-making contexts involves making someone else’s will present again, and if judicial procedures are triggered by how facts relate to legal sources and arguments and not to anyone’s particular will, then judicial practice should be accounted for by using other terms, for example, adjudication, argumentation, justification, interpretation, *inter alia*. Every normative discussion about whether representatives should aim at the good of their constituents and be more or less responsive to their sanctions,⁵⁹ does not apply to the actions of courts. To the extent that courts can justify their decisions and describe them as the result of legal arguments, deviation from the will of the people says little about the validity of those actions.

Mind you, this is not to say that some of the standards of the kind judges apply do not in fact emanate from institutions which are clearly representative. The point is a different one: judges use those standards because they stem from legal sources, and it happens to be the case that in many contemporary democracies those sources are in fact representative. But the coincidence is contingent. Borrowing a Hartian distinction, judicial decisions may be described as representative seen from the perspective of an observer. For example, it is common among some authors to claim that despite their countermajoritarian character courts have

56. *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5 [*Miller 1*]; *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland*, [2019] UKSC 41 [*Miller 2*].

57. *Miller 1*, *supra* note 56 at para 3 [emphasis added].

58. *Miller 2*, *supra* note 56 at para 1 [emphasis added].

59. Rehfeld, “Representation Rethought”, *supra* note 38 at 218.

historically remained close to public opinion. The argument goes that courts cannot systematically remain out of tune with the people's preferences about constitutional matters. When they have deviated from the preferences of the majority of the public, they have not done this for long.⁶⁰ An observer could then say that this convergence between the people's and the judges' preferences shows that the latter take the former as normatively binding.

Yet even if judicial opinions were statistically aligned with the preferences of the public,⁶¹ it would not be because the nature of their function mandates them to express the views of the public on what the law means. Rather, the practice is better accounted for by saying that judges interpret and apply the law, and that the stability of their interpretations is as a matter of fact dependent on their long-term acceptance by a large part of the public. But this does not mean that the function of the courts is in the first place to express the people's will and that they are accountable or responsive to it; that this was an expression of judicial duty, derived from the nature of the institution. It is not. What these arguments show is that inasmuch as courts are part of a democratic joint project of governing,⁶² they cannot perform their functions in a political vacuum. Yet this is a far cry from the contention that their practice is best accounted for as a representative one. Coming back to our borrowed Hartian distinction, such analysis fails to adopt an internal point of view.⁶³ The statistical correlation between popular will and judicial preferences does not imply that popular will is a source of law. Rather, we better describe those sorts of statistical coincidences between the popular will and the content of judicial decisions as contingent. And we may describe them by saying that in those cases judges represent the people as a contingent by-product of their job of applying the law. Yet things could have been otherwise. That is, judges could have decided in ways that clearly run counter to the popular will. And in those cases, it would be misleading to criticise those judicial decisions by claiming that judges failed at performing representative roles.

But these distinctions are collapsed by the JRT. Alexy, for example, explicitly acknowledges that the type of representation he attributes to judges is purely argumentative. But I find it difficult to understand why anything would be lost in Alexy's argument if, instead of accounting for his thesis as one about representation one would just call it argumentation, or justification, or reasoning, or

60. Robert Dahl, *Pluralist Democracy in the United States: Conflict and Consent* (Rand McNally, 1967) at 155; David Shapiro, "Courts, Legislatures, and Paternalism" (1988) 74:3 Va L Rev 519 at 556-57; Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Strauss & Giroux, 2009).

61. This coincidence is not really that clear-cut, as judges sometimes decide on the basis of their political affiliation, sometimes on the basis of principle, sometimes attitudinally, etc., but I will assume it is *ex arguendo*. See Lee Epstein & Andrew D Martin, "Does Public Opinion Influence the Supreme Court? Probably Yes (But We're Not Sure Why)" (2011) 13:2 U Pa J Const L 263; Jeffrey Segal & Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press, 2002); Jeffrey Goldsworthy, "The Limits of Judicial Fidelity to Law: The Coxford Lecture" (2011) 24:2 Can JL & Jur 305.

62. I take the expression from Kyritsis, "Justifying Constitutional Review", *supra* note 12 at 3.

63. HLA Hart, *The Concept of Law* (Oxford University Press, 2012) at 56-57.

adjudication, or any other term that points at the distinctive ways in which judges decide cases. 537
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I want to consider one argument by Matthias Kumm that could rescue the JRT. Kumm agrees with Alexy that “there is no place in a democracy for an institution that can claim *only* argumentative representation.”⁶⁴ He grapples with this problem by falling back on the procedures by which constitutional court justices are usually appointed, which involve the political branches of government. This, he thinks, “is at least a weak form of volitional/decisional representation of the people by courts that complements the argumentative dimension.”⁶⁵ Provided that this warrants the representativeness of constitutional courts, Kumm then claims that now “the point would be to require courts to be as representative as possible, ensuring the stronger possible volitional link without undermining the court’s specific function relating to argumentative representation.”⁶⁶ 539
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This argument has three problems. First, it ignores that although appointment procedures include the political branches of government, they are designed to prevent ideological bias, not to reflect the judges’ partisan affiliation.⁶⁷ Second, that to the extent that those procedures result in partisan courts,⁶⁸ this would be a deviation from the ideal of isolating the judiciary from party politics,⁶⁹ not a manifestation of it. Finally, Kumm’s argument explains too much. Following his reasoning, we could give the title ‘representative’ to agents and institutions with clearly no representative function at all. Take the case of the selection and appointment processes of the Governor of a Central Bank as an example.⁷⁰ This functionary is formally appointed by the Government after designation by the Head of State. Once appointed, the Minister of Economy and Finance must inform Parliament of such nomination, following a procedure created by Congress. Does this clearly political process of appointment give the Governor of the Bank and indirectly the Bank itself, representative functions? How can one square this with the autonomous and independent nature of this institution? It is certainly counterintuitive to call the Bank a representative institution. Kumm’s reasoning, however, leads to this conclusion. 550
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The problem with Kumm’s argument is that it fails to consider the functional orientation of courts towards legal sources. The example of Central Banks shows that just because an agent has competence to issue decisions with *erga omnes* effects it does not necessarily mean that it is mandated to make anyone’s will present again. Their functions are certainly of a different nature (e.g., issuing tender money, supervising credit institutions, etc.), which although changing over 567
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64. Matthias Kumm, “The Problem of Judicial Review”, in Matthias Klatt, ed, *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press, 2012) 201 at 207 [emphasis added].

65. *Ibid.*

66. *Ibid.*

67. Bellamy & Parau, *supra* note 8 at 261.

68. As they often do. See JGA Griffith, *The Politics of the Judiciary* (Fontana Press, 1997).

69. Kathleen Doherty & Ryan Pevnick, “Are There Procedural Objections to Judicial Review?” (2014) 76:1 *The Journal of Politics* 86.

70. I here use a simplified description of the Spanish regulation as an example.

time, have always taken place in the context of relationships between the institu- 573
tion and government and between the bank and the financial system, not between 574
the bank and the will of the people.⁷¹ Even those criticising the increase in 575
independence gained by Central Banks in recent decades from representative 576
institutions express worries about lack of accountability, not lack of representa- 577
tiveness.⁷² One could of course insist that the law is the instrument that governs 578
these relationships, and the law has been democratically enacted by representa- 579
tives, but this would lead us into the absurd conclusion that anything that is reg- 580
ulated by law could be an instance of representation. As Pitkin avowed regarding 581
formalistic views of representation: “[a] judge may issue a judicial injunction 582
binding on [a] union; yet we do not say that he is the union’s representative 583
or represents it when he does so.”⁷³ 584

Something similar goes for constitutional courts, whose orientation is fore- 585
mostly towards interpreting and applying the constitution even if they lead to 586
results which have nothing to do with the wills of those who are affected by their 587
decisions. This orientation towards functions different from making anyone’s 588
will present again makes it the case that although constitutional courts justices, 589
like Central Banks’ governors, are indirectly appointed by elected politicians, it is 590
a different thing to say that they are representative institutions. This is not to say 591
that Central Banks or courts are not accountable. They are.⁷⁴ Accountability and 592
legitimacy certainly constrain the independence of both Central Banks and 593
courts. As Lastra avows, “[a] democratic society always retains the discretion 594
to reinvent itself; and should the people of a country make a considered, deliber- 595
ate choice to seek some other goal, the institutions of central bank independence 596
should respect that decision.”⁷⁵ But should we call this representation? Why not 597
legitimacy and/or accountability? 598

Pettit faces a similar problem. ‘Indicative representation’ of the kind that 599
judges would allegedly incarnate, would require them to read a constitution 600
and provide its provisions with meanings, with which constituents would then 601
be in a position to feel identified. But I wonder then, how ‘indicative representa- 602
tion’ would be different from the notion of interpretation. I struggle to see the 603
gains in calling this practice of meaning ascription ‘representation’.⁷⁶ Judges 604
are not mandated to make anyone’s will present again; they interpret and apply 605
the law, and the law is an instrument that by definition applies to everyone 606

71. Charles Goodhart, *The Evolution of Central Banks* (MIT Press, 1991); Rosa M Lastra, *International Financial and Monetary Law* (Oxford University Press, 2015) at 34-72.

72. See Kathleen McNamara, “Rational Fictions: Central Bank Independence and the Social Logic of Delegation” (2002) 25:1 *West European Politics* 47.

73. Pitkin, *supra* note 53 at 52.

74. Although the independence and lack of accountability of Central Banks have increased considerably in the past decades. See Jens van’t Klooster & Clément Fontan, “The Myth of Market Neutrality: A Comparative Study of the European Central Bank’s and the Swiss National Bank’s Corporate Security Purchases” (2020) 25:6 *New Political Economy* 865.

75. Lastra, *supra* note 71 at 76.

76. On the concept of interpretation, see Bello Hutt, “Constitutional Interpretation”, *supra* note 6 and the references included there.

irrespective of anyone’s particular desires, wills, opinions, or preferences. It applies even if its addressees ignore its existence. Of course, this story is one step closer to a noble dream than to a nightmare,⁷⁷ but it holds true even if one considers that judges create law every time they decide. Law creation and change can happen through several avenues,⁷⁸ many of which will not be representative, if only because many of them—for example, those enacted in parliament—cannot be attributed to anyone’s particular intention.⁷⁹

It is by no means obvious that those goals courts point to are best described as objects of representation and not as objects of interpretation. Interpreters do what *Malone* in Samuel Becket’s *Malone Dies* affirms in his reveries: “I have to look long and fixedly and give things time to travel the long road that lies between me and them.”⁸⁰ Judges ought to look long and fixedly at the law, not at someone’s will. As a US Supreme Court Justice aptly put it, “[t]he Court’s power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary *as fit to determine what the nation’s law means and to declare what it demands.*”⁸¹ It may well be the case that what the law demands is different from what the public would prefer. And in such cases, the analytical tools we may use to criticise such decisions will not come from theories of representation.

4.2. Fallacies and Neglects

Of course, the concerns behind the JRT are understandable. In describing the judiciary as representative of the people, the thesis paves avenues for coping with the deficiencies of democratic, majoritarian, collective, and election-based decision-making procedures. The argumentative force backing judicial decisions and the stringent criteria judges must meet when justifying their decisions, especially at the constitutional level, supplement majoritarian volitional procedures. Absent these institutional safeguards, constitutions would fail at fulfilling their function of constituting a distinctive political identity, different from the particular wills and preferences of their framers, elected politicians, and citizens.⁸² In such a scenario, citizens are abandoned to arbitrariness.⁸³ Individuals at the receiving end of judicial decisions are given actual reasons that they may or may not share, but that they can understand and accept because the reflexive process leading to their

77. HLA Hart, “American Jurisprudence through English Eyes: The Nightmare and the Noble Dream”, in *Essays In Jurisprudence and Philosophy* (Oxford University Press, 1983) 123.

78. Ekins, *supra* note 46 at 121, 152.

79. Ronald Dworkin, *Law’s Empire* (Cambridge University Press, 1986) at 336; Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) at 43; John Gardner, *Law as a Leap of Faith* (Oxford University Press, 2012) at 60.

80. Samuel Beckett, *Three Novels: Molloy, Malone Dies, & The Unnamable* (Grove/Atlantic, 2009) at 230.

81. *Planned Parenthood of Southeastern Pa v Casey*, 505 US 833 at 865 (1992) [emphasis added].

82. Seldon Wolin, *The Presence of the Past: Essays on the State and the Constitution* (John Hopkins University Press, 1989) at 9.

83. Alon Harel, *Why Law Matters* (Oxford University Press, 2014) at 148.

enactment was rational, fair, impartial, etc. But the move from this concern to the JRT incurs two fallacies: moralistic and nirvana. 639
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4.2.1. Moralistic Fallacy 641

A moralistic fallacy is a reasoning stating that the world is as one thinks it should be. In the context of my discussion, it goes as follows: we need representation at the constitutional level, but political institutions fail at achieving this purpose. Therefore, the judiciary is a representative institution. 642
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Pettit, for example, shifts his focus from representation to democracy when he tells us that “[d]emocracy is too important to be left to elected politicians alone.”⁸⁴ One can only agree with this. But it is a very different thing to say that, because representation is too important, courts (can) do it. Rosanvallon’s narrative is, in this sense, problematic as well, for it assumes that because legislatures are concerned with keeping the electoral people happy, the people as principle escapes them. If, the argument then says, we want to secure that the people as principle are considered, we should then look at courts. But the need for finding spaces for constitutional politics that are not driven by whims and short-termism, does not in itself ground that courts are in fact the institutions where the constitutional people are represented. 646
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4.2.2. Nirvana Fallacy 657

The nirvana fallacy, in turn, is manifested in the JRT in that it involves an unfair or inadequate institutional comparison. A nirvana fallacy is one by which real things are compared or contrasted with ideal alternatives, and by virtue of those discrepancies it is deduced that the real is inefficient.⁸⁵ In terms of courts and legislatures, the JRT assumes that because the ideal features of constitutional representation are seldom found in real legislatures, one should look at courts and find those features there. That initially is a reasonable move to make, if it wasn’t that the features in the JRT are ideal, not real. 658
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I am not the first to argue that there is a tendency in legal theory to portray the courtroom in such ideal colours and contrast it with a gloomy picture of legislative assemblies.⁸⁶ But this comparison takes a unique shape when it comes to representation. Alexy’s confessed necessity to complement ‘argumentative representation’ with majoritarianism can only arise from the assumption that the institutional features of the judiciary prevent it from deciding on purely 666
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84. Pettit, *supra* note 34 at 433.

85. Harold Demsetz, “Information and Efficiency: Another Viewpoint” (1969) 12:1 *JL & Econ* 1 at 1.

86. Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999); Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press, 2006) at 17; Jeff King, *supra* note 10 at 157; Daniel Oliver-Lalana, “Legislative Deliberation and Judicial Review: Between Respect and Disrespect for Elected Lawmakers” in Daniel Oliver-Lalana, ed, *Conceptions and Misconceptions of Legislation* (Springer, 2019) 207.

majoritarian grounds. It fails, however, to consider judicial decisions that have been either poorly argued for or not argued for at all.⁸⁷ Imagine that the decision is never contested by the public, neither in the formal nor the informal public sphere, and that, in fact, the outcome (not the reasoning) is shared by the majority of the population. Should we call this decision a ‘representative’ one? Imagine the same thing about a legislature. Would we call this a completely non-representative decision?

These alternatives suggest that Alexy’s ‘argumentative representation’ works under idealised conditions where the judges’ opinions about a certain legal question largely coincide with a public that is willing to take their arguments as its own, combined with an image where legislators simply voted without properly debating what they were legislating about and for. The public to which ‘argumentative representation’ appeals, Alexy’s ‘constitutional persons’ and courts, are highly idealised, but legislators are not portrayed in such charitable terms.

Rosanvallon falls into the same problems by stating that legislatures represent the electoral people, assuming away the possibility that they may also be reflexive institutions. As with ‘argumentative representation’, this institutional comparison neglects the instances in which legislatures have in fact reflected upon constitutional principles. There is nothing in the institutional setting of a legislature impeding it from engaging in dialogue about the constitutional implications of its decisions.

Rosanvallon (and Kumm for that matter) too has to grapple with the problem that constitutional judges use sundry interpretive methods, grounded on different principles. Such plurality of approaches does everything but guarantee that courts will always have Rosanvallon’s representative goals in mind. Textualist judges will be happy to say that they do not care about the intention of a constituent or of the general public, or of the legislature when it enacted a certain law, but only what the words of the constitution mean. Should the general will run in a direction different from the one allegedly inbuilt in the text, then a textualist should decide against that will. Textualist judges have no authority to pursue any other broader purposes.⁸⁸

In turn, constitutional judges following Ely’s structuralist approach might choose to read the constitution as a document primarily concerned with clearing the channels of political change and with safeguarding the rights of discrete and insular minorities.⁸⁹ It should be admitted that this approach is prima facie not hostile to my account.⁹⁰ Yet, it is by no means obvious that, first, this approach is the only one legitimately available for them to follow and, second, that as

87. See for example, Ivan Hunter, “Vistos: se confirma la sentencia apelada” ¿Existe el deber de motivar las sentencias en segunda instancia? (Corte de Apelaciones de Valdivia)” (2007) XX:2 *Revista de Derecho* 239.

88. Antonin Scalia, “Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws” in Amy Gutman, ed, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) 3 at 23.

89. John H Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).

90. I thank Jeff King for bringing this discussion to my attention.

critics of Ely have shown, structuralism needs to be grounded in some features of the constitution that is being interpreted. And it could be the case that some constitutions do not provide the materials for a judge to interpret in the way Ely thought the US constitution should be read. Or it also be the case that a constitution does provide the materials for such an approach, but that other approaches, depending on sundry factors, are better than a structuralist or proceduralist one.⁹¹

Moreover, judges committed to Dworkinian integrity might interpret and apply the constitution thinking that it instantiates moral principles about political decency and justice, which do not necessarily have to be linked to or emerge from the general will. Put differently, the best possible judicial Dworkinian interpretation of the scheme of moral and political expectations built up within the law does not have to be a representative one; it could derive from a commitment to moral principles that has little or nothing to do with the preferences of anyone.⁹²

Perhaps endorsers of the JRT could find refuge in originalism, namely the view that judges are bound by and should therefore express the original intentions of the framers of a constitution? This could count as a version of the will of the constituents. Perhaps, but as with Ely, this would be one among many possible methods of interpretation available to them and it is an ideal that admits sundry versions, some of which give pride of place to the framers' intentions, some preferring more textualist versions of the original meaning, among others.⁹³ Hence, there are no reasons for buying into the idea that the reflexivity of constitutional courts is necessarily oriented towards realising anyone's will.

Similar reflections apply to accounts that take legislative intent as a paradigm of constitutional interpretation. In Ekins' paradigmatic account, for example, it is clear that there is a difference between attributing to the judiciary a representative function and the judges' duty to decide on the basis of legislative intent. The difference lies in something akin to my idea of functional orientation. That is, in Ekins' view, that the legislature "is an institution that aims to act responsibly for the common good."⁹⁴ This, which Ekins presents as an axiom of interpretive practices, "responds to the rationale for legislative authority",⁹⁵ which in turn provides reason for interpreters to pursue the determination of legislative intent.

This appeal to the rationale of the legislature indicates that the centrality of legislative intent as an interpretive method is predicated upon the notion that the legislature grounds its powers in reasons specific to it.

One could affirm that the authority of the legislature to represent its constituency derives from these functional features. But these features are, as mentioned, specific to the legislature and though they place interpreters in a position to apply

91. As suggested by Judith S Koffler, "Constitutional Catarrh: Democracy and Distrust, by John Hart Ely" (1981) 1:2 *Pace L Rev* 403; Laurence Tribe, *American Constitutional Law* (Foundation Press, 1988); Roberto Gargarella, *La justicia frente al gobierno* (Ariel, 1996) at 154-57.

92. My thanks to Stuart Lakin and Dimitrios Kyritsis for recommending that I address this point.

93. Thomas Colby & Peter Smith, "Living Originalism" (2009) 59:2 *Duke LJ* 239.

94. Ekins, *supra* note 46 at 245.

95. *Ibid.*

the law in a way that tracks the former’s intention, it does not follow that such 746
 alleged duty derives from the same functional rationale (alleged because in this 747
 paragraph I am accepting the prominence of legislative intent as an interpretive 748
 method for the sake of the argument). To follow the law because it emanates from 749
 a representative institution is not tantamount to say that the application is an act of 750
 representation. 751

In conclusion, these different methods of interpretation and the differences in 752
 how different scholars understand them show that courts may or may not be concerned 753
 with determining what the will of the people as principle is. If that is the case, 754
 diversions from the preferences of the public are not better accounted for as 755
 failures in the way they exercise the practice. They cannot be attacked for not 756
 fulfilling representative functions. On the contrary, representative institutions 757
 failing to consider the will of their constituents do have to provide reasons for 758
 this digression. 759

5. Conclusion 760

My argument has been a negative one, namely that what judges do is not best 761
 accounted for as an instance of representation. Judges perform several important 762
 tasks, but they do not represent. 763

In a different context, Harel has recently made what I think is the right move. 764
 He claims that the court “is owed deference [by the legislature] *precisely because* 765
it is a non-representative body.”⁹⁶ I think the degree to which he trusts on courts 766
 is not fully warranted,⁹⁷ but for sure he is hitting the nail on its head by calling 767
 things by their name. Questions about representation will be better addressed by 768
 looking at institutions and agents whose functional orientation is towards make 769
 someone’s will present again. We would do well in looking at representative 770
 institutions if representation is what we value. 771

96. Harel, *supra* note 3 at para 25 [emphasis added].

97. As I argue in Donald Bello Hutt, “Against Judicial Supremacy in Constitutional Interpretation” (2017) 31 *Revus: Journal for Constitutional Theory & Philosophy of Law* 7.