PUBLIC AND PRIVATE FIDUCIARIES: REPRESENTATION IN STATES, CORPORATIONS, TRUSTS AND AGENTS

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ABSTRACT

Over the past decade, political and legal theorists began conscripting private fiduciary law to delimit and define the duties of public officials. While enlisting additional legal prophylactics against arbitrary government may have appeared especially appealing during a Trump administration characterized by corruption and racism, this Article argues that straightforwardly applying fiduciary doctrine to political office is risky business. While scholars rightly point out the long, cross-pollinated history of the law of public and private trust, and while they recognize that rules against self-dealing fiduciaries apply equally well to both public and private officials, they occlude an important conceptual difference between public and private office: one serves identifiable individuals with objectively identifiable interests; the other, a diverse population peppered with pluralism and conflict. As a result, transplanting private law fiduciary doctrine to public law and political office invites both juristocracy and populism – ironically reproducing the mischiefs of the erstwhile Trump administration. Acting as if the democratic demos is an agent or settlor capable of holding ascertainable interests and issuing clear instructions invites judges and demagogues to define those interests and instructions for themselves. Drawing from political theory and the history of fiduciary law, this Article demonstrates that political representation and private fiduciary relationships are conceptually distinct – and should be kept that way. Instead, this Article suggests that if any form of private fiduciary law can help elucidate the duties of public officials, that law is corporate law. The fiduciary duties of corporate law recognize that fiduciaries act for diverse and indefinite principles and, accordingly, provides for political (electoral), not merely juridical, accountability mechanisms.

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I. INTRODUCTION

The idea of the fiduciary is fungible for a reason. Throughout political, social and economic life, some people make decisions for those who cannot, or choose not, to act for themselves. Parents decide and act for children; teachers decide and act for students; real estate agents decide and act for buyers; trustees invest assets on behalf of beneficiaries; and so on. According to then-Chancellor Strine, "[a] fiduciary relationship is a situation where one person reposes special trust in and reliance on the judgment of another or where a special duty exists on the part of one person to protect the interests of another."[1] The characteristics ascribed to fiduciary relations by courts – power, discretion, vulnerability, confidence,[2] and trust percolate throughout society. Situations where one party possesses well-founded expectations that another will act in her interests are ubiquitous.[3] And whenever one person decides and acts for someone else, the law recognizes the risk that the former will abuse the latter. As a result, it often imposes other-regarding duties on the decision-maker: fiduciaries must ask with care, loyalty, and good faith.

It makes sense, therefore, that courts, legal scholars, and political theorists invoke fiduciary doctrine to delimit the powers and define the duties of public actors.[4] Lawmakers and other state officials, like their private-law

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[1] Auriga Cap. Corp. v. Gatz Properties, 40 A.2d 839, 850 (Del. Ch. 2012); *accord*, Tamar Frankel, *Fiduciary Duties as Default Rules,* 74 OR. L. REV. 1209 (1995).

[2] Paul B. Miller, *The Fiduciary Relationship,* THE PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 67 (Andrew Gold & Paul B. Miller eds., 2014) [hereinafter Miller, *Fiduciary Relationship*].

[3] *See id.* (tying fiduciary relations to such expectations).

[4] Metaphorical references to the trusteeship of public officials pepper U.S. caselaw. *See, e.g.,* Trist v. Child, 88 U.S. 441, 450 (1987); Providence Tool Co. v. Norris, 69 U.S. 45, 55 (1864); Nuesse v. Camp, 385 F.2d 694, 706 (D.C. Dir. 1967); United States v. Bryan, 58 F.3d 933, 942 (4th Cir. 1995); United States v. Barber, 668 F.2d 778, 784 n.4 (4th Cir. 1982); United States v. Rebrook, 842 F.Supp. 891, 893–94 (S.D.W. Va. 1994), *rev'd*, 58 F.3d 961 (4th Cir. 1995); Driscoll v. Burlington-Bristol Bridge Co., 86 A.2d 201, 221 (N.J. 1952); Fuchs v. Bidwill, 334 N.E.2d 117, 119-20 (Ill. App. Ct. 1975). Political theorists have also incorporated the concept of trusteeship when theorizing public law and the virtues of public officials. *See, e.g.*, Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children,* 20 J. POL. PHIL. 178 (2012); Ethan J. Leib, David L. Ponet,

counterparts, decide and act on behalf of constituents who cannot always look out for their own collective interests. "As a practical matter," observe Ethan Leib and David L. Ponet, citizens "must give representatives discretion, must trust them, and must remain vulnerable to their representatives' predation and exploitation."[5] Indeed, providing additional prophylactics against the ill-thought and self-dealing decisions of political officials was especially appealing during the Trump Administration – a period during which members of the Administration were accused of graft, self-dealing, political retribution, and racism.[6] Accordingly, scholars applied fiduciary duties to presidents, judges, criminal prosecutors and even the state itself.[7] Sometimes, the fiduciary doctrine they apply derives straightforwardly from private law. Invoking the law of agency and private trust to bind officials' discretion, they, *e.g.*: constrain the President's decision-making autonomy by holding him to high standards of care, loyalty and good faith; weaken the discretion afforded to administrative agencies;[8] forbid insider trading by members of Congress;[9] limit the power of Congress to pass laws in the general welfare;[10] urge judges to better recognize the public impact of their decisions;[11] and otherwise interpret the U.S. Constitution as explicitly imposing fiduciary duties on

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& Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91 (2013); Kate Jackson, *Administration as Democratic Trustee Representation,* 29 LEG. TH. 314 (2023); FIDUCIARY GOVERNMENT (Evan Criddle et al. eds., 2018).

[5] Leib & Ponet, *supra* note 4, at 184.

[6] *See, e.g.*, David Leonhardt & Ian Prasad Philbrick, *Trump's Corruption: The Definitive List – The Many Ways that the President, His Family and His Aides Are Lining Their Own Pockets,* N.Y. TIMES (Oct. 28, 2018), https://www.nytimes.com/2018/10/28/opinion/trump-administration-corruption-conflicts.html [https://perma.cc/2SJ4-2MUQ]; Andrew Prokop, *Donald Trump's History of Corruption: a Comprehensive Review,* VOX (Oct. 31, 2016), https://www.vox.com/policy-and-politics/2016/9/28/12904136/donald-trump-corrupt [https://perma.cc/9STU-JVDX]; Marshall Cohen, *Chronicling Trump's 10 Worst Abuses of Power,* CNN (Jan. 24, 2021), https://www.cnn.com/2021/01/24/politics/trump-worst-abuses-of-power/index.html [https://perma.cc/5W6R-3UVR].

[7] Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution,* 69 AM. U.L. REV. 805 (2020); EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY (2011) [hereinafter Fox-Decent, *Sovereignty's Promise*].

[8] Evan Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2005) [hereinafter Criddle, *Fiduciary Foundations*]; Evan Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010) [hereinafter Criddle, *Fiduciary Administration*].

[9] Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption,* 98 CORNELL L. REV. 845 (2012).

[10] Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1169–70 (2004) [hereinafter Natelson, *Public Trust*].

[11] Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judgment,* 101 CALIF. L. REV. (2013) [hereinafter, Leib *et al*., *Theory of Judgment*].

government officials.[12] Evan Fox-Decent argues, for example, that the state's authority itself hinges on its obligation to respect private-law fiduciary principles.[13] George Miller argues that the Necessary and Proper Clause of Article 1 should replicate the constraints imposed by Revolutionary Era state governments on specially chartered corporations.[14] Robert Natelson insists that the duties laid on public officials should "at least equal, if not exceed, those applied to private sector managers."[15]

In their more benign form, arguments that apply fiduciary duties to political officials provide extra ideological support to constitutional prophylactics against arbitrary, absolutist government. Presidents cannot make up any which regulation they want; they must use care, loyalty and good faith as they implement the legislation produced by bicameralism and presentment. Prosecutors should not prosecute citizens as a form of personalized political retribution; they must do so using some cognizable understanding of impartiality and the public interest when they decide whom to charge, what to charge, and whom to plead out. Fiduciary principles might also encourage lawmakers to make informed, rational decisions that are more likely to serve citizens' interests than those that are irrational, ill-informed, and corrupt. They impose on lawmakers a duty of impartiality, ensuring that lawmakers attend to the rights and interests of all citizens equally.[16] Fiduciary duties therefore seem, at first, to empower citizens by ensuring it is their good to which their public servants honorably and honestly attend.

The parallel historical development of the law of both public and private office confirms the wide-ranging relevance of fiduciary norms. As Ethan J. Leib and Andrew Kent persuasively argue, these norms emerged contemporaneously beginning as early as the 18th century and borrowed from each other's vocabulary and concepts.[17] According to the authors, to apply the

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[12] Natelson, *Public Trust, supra* note 10, at 1124–25, 1128–30.

[13] Fox-Decent, *Sovereignty's Promise*, *supra* note 7, at 111 (invoking private law conceptions of the duty of loyalty including the corporate opportunity doctrine).

[14] Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 GEO. WASH. L. REV. 1, 31 (2010).

[15] Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. RICH. L. REV. 191, 200 (2001) [hereinafter Natelson, *Government as Fiduciary*].

[16] Natelson, *Public Trust*, *supra* note 10.

[17] Ethan J. Leib & Andrew Kent, *Fiduciary Law and the Law of Public Office,* 62 WM. & MARY L. REV. 1297, 1338 (2021). Leib and Kent explain that while generous use of fiduciary language was used as part of anti-absolutist political rhetoric before this period, it was directly incorporated into the common law as early as 1701. *See also* John Barratt, *Public Trusts,* 69 MOD. L. REV. 514, 516–17 (2006) ("[T]he word 'trust' was in statutory use, from at least the late seventeenth century, to describe the personal obligation of those exercising governmental power" but also noting that Maitland's emphasis on the incorporation of "German" trust law may have been overblown); Charles Mitchell, *Public Trusts, 1750-1850, in* ESSAYS IN THE HISTORY OF EQUITY (David Foster & Charles Mitchell eds. Forthcoming).

private law fiduciary concepts to public law is not to apply mere analogy.[18] It is to recognize that the law took and continues to take similar approaches to the problems and paradoxes[19] of power, no matter where it may be found. When John Locke, James Harrington and John Milton called their kings "trustees," they were confronting the same kinds of abuses and corruption worked by fiduciaries over beneficiaries.[20] Sovereigns could be self-serving and selfish, using their resources to benefit themselves at the expense of others. Power therefore must be checked, limited, justified and held accountable. Our deep suspicion of power and its exploitation against the vulnerable is perhaps a reason why courts have never offered a "precise, and rule-like definition" for the fiduciary relationship.[21] The law must remain protean, flexible enough to address new forms of abuse as they arise.[22]

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[18] Leib & Kent*, supra* note 17, at 1300.

[19] I use "paradox" because people require power to vindicate their freedom, but people might go on to wield this power in a manner inimical to the freedom of others.

[20] Some historical scholarship indicates that Locke's apparent conflation of trust and government was wrongheaded. Conceptions of sovereignty that tied political authority to land and territory is more a German idea than an Anglo-American one – an idea encouraged by the famous legal historian F.W. Maitland. *See* Barratt, *supra* note 17, at 517; Mitchell, *supra* note 17 at 2–3 (explaining that local government arose through borough corporation, not trust, and indicating that trust was used as a stop-gap measure for communities that lacked a charter). Instead, the idea of the corporation was better suited for a peripatetic imperial power. *See,* Benjamin Mueser, *the Privilege of Territory: Christian Wolff and the Origins of Statist International Thought,*__ POL. TH. ___ 2024 (forthcoming) (it's available online in "early view" at https://doi-org.uc.idm.oclc.org/10.1177/00905917241277160); PHILIP STERN, THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATION OF THE BRITISH EMPIRE IN INDIA (2011); Kevin Blachford, *Revisiting the Expansion Thesis: International Society and the Role of the Dutch East India Company as a Merchant Empire,* 26 EURO. J. INT'L REL'NS 1230 (2020); DAVID KERSHAW, THE FOUNDATION OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW 290–92 (2018); cf. Lieb & Kent, *supra* note 17, at 1309 (describing the Ancient Roman conception of dominium as akin to the ownership of real property). In any event, the rhetorical and legitimizing power of the public fiduciary was also wielded by the Framers as they justified the U.S. break from Parliament. *See, e.g*., Seth Davis, *The False Promise of Fiduciary Government,* 89 NOTRE DAME L. REV. 1145, 1171–72 (2014); THE FEDERALIST NO. 46 (James Madison).

[21] Kim, *supra* note 11, at 868 (discussing the "definition" of fiduciary in relation to theories of insider trading liability under Rule 10b - 5); *see also, e.g*., J.C. SHEPHERD, THE LAW OF FIDUCIARIES 3 (1981); P.D. FINN, FIDUCIARY OBLIGATIONS 1 (1977); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty,* 55 VAND. L. REV. 1399, 1400 (2002); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation,* 88 DUKE L.J. 879, 915 (1988).

[22] *See* DeMott, *supra* note 21, at 881; Davis, *supra* note 20, at 1156.

But the absolutist state against which John Locke, John Milton, and James Harrington deployed the revolutionary language of public trusteeship is not the multiracial, pluralistic constitutional representative democracy that exists today. Rather, arguments enlisting the concept of public trust were but one strand of the rich tapestry of ideological justifications offered for democratization.[23] Nor are the state's constituent-beneficiaries (white, male) yeomen farmers and simple merchants that Locke *et al*. confronted. Contemporary citizens are instead participants in a complex, interdependent economy and pluralistic society, long accustomed to playing a role in the lawmaking process. It is no small task to determine what their collective interests are, especially when they are accustomed to articulating those interests for themselves. As a result, applying private-law fiduciary doctrine to political officials is not always a tool of democratic empowerment and freedom. Instead, fiduciary norms are sometimes wielded as weapons that can serve anti-regulatory purposes and cripple collective governance.[24] If the law constrains elected lawmakers in the same way it constrains private trustees and agents, they cannot do much governing at all. And when government can only govern if it first receives permission from courts narrowly focused on the policing of fiduciary duties, that government is less like a democracy and more like a juristocracy.

To illustrate, consider an elected prosecutor's ostensible fiduciary duty of impartiality. This prosecutor campaigned on the idea that, as a result of racist historical practices that focused on property crimes committed by minorities, she should spend her tenure bringing cases against white collar crime – crime often committed by white businessmen and commonly left under-enforced in her jurisdiction.[25] She decides, in other words, that impartiality is best served by correcting over-prosecution in the past. A court, however, might disagree, and substitute its own understanding of impartiality for the prosecutor's. As another illustration, consider lawmakers seeking to introduce climate legislation. A court, arguing that the legislators did not sufficiently consider research produced by fossil fuel companies, strikes down the legislation because it violates their duty of care. Consider also a member of Congress voting to impeach a sitting president notwithstanding polling within his district

[23] Other ideas used to rationally justify democratization were, *e.g*., social contract theory, natural rights theory, and popular sovereignty. *See generally, e.g.*, EDMUND MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1989); RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY (2016); Davis, *supra* note 20, at 1172 ("Fiduciary government was *part* of Locke's conception of the social compact") (emphasis added).

[24] As explained in section II, *infra*, fiduciary duties have occasionally been used in the past to undermine elected lawmakers' policy decisions.

[25] This illustration is inspired by Green & Roiphe, *supra* note 7.

that demonstrates citizens' lack of support for impeachment.[26] The member of Congress believes the country's best interests is served by impeachment – but a court might decide that he violated his duty of loyalty to his constituency. Finally, consider a decision by a legislator, anxious to rectify racial gerrymandering, to redraw electoral maps in a way she believes provides better representation of the electorate. A court might decide that since the legislator might personally benefit from the redistricting, she has violated her duty of loyalty.[27] To summarize, imposing fiduciary duties on government officials might amount to judicial strict scrutiny on anything and everything a government official tries to do on behalf of the people.

The specter of rule by judges only intensifies when one realizes that it is equity, not law, that typically enforces fiduciary duties. Equity steps in "[w]here principles of law by which the ordinary Courts are guided give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong."[28] It takes only a little imagination to predict the frequency by which judges will find that their own understanding of universal justice diverges from that embraced by political officials seeking to ameliorate racial injustice and climate change. Indeed, certain fiduciary scholars occasionally disclose their anti-government posture by the vocabulary they use to describe state power: without the saving grace of court-enforced[29] fiduciary law, lawmakers are "virtually unchecked,"[30] "arbitrary," full of "moral turpitudes"[31] and akin to inherently abusive kings[32] wielding "arbitrary"[33] power and "majoritarian domination"[34] over the

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[26] This illustration is inspired by Theodore D. Rave, *Politicians as Fiduciaries,* 126 HARV. L. REV. 671 (2013) and the political careers of former Members of Congress Liz Cheney and Adam Kinzinger.

[27] This illustration is inspired by *id*.

[28] Barratt, *supra* note 17, at 520 (quoting Stevens v. Chown [1901] 1 Ch 894, 904–05 (Farwell J); Austria (Emperor) v. Day (1861) 3 De G F & J 217, 253 (Turner LJ). Indeed, equity possess some strong Schmittian undertones, and scholars of equity are occasionally at pains to force it into a rational structure that avoids the decisionism of Schmitt's conception of sovereignty as "the exception." *See generally, e.g.,* Andrew S. Gold & Henry E. Smith, *The Equity in Corporate Law,* 100 NOTRE DAME L. REV. ___ (2024-2025) (making an impressive and creative effort to lend principled guidance and structure to equity, notwithstanding the risk of decisionism and judicial over-engagement) (manuscript on file with author); Henry E. Smith, *Equity as Meta-Law,* 130 YALE L.J. 1050 (2021) (arguing that equity is a "meta" tool of legally analysis that ought to be triggered only if courts face particular kinds of polycentric uncertainties and complexities).

[29] Natelson, *Public Trust, supra* note 10, at 1088 (argues that the fiduciary principles are to be *legal* obligations).

[30] Miller, *supra* note 14, at 31.

[31] Natelson, *Government as Fiduciary, supra* note 15, at 193.

[32] *Id.* at 193, 200.

[33] *Id.* at 193.

[34] Leib & Ponet, *supra* note 4, at 187.

"dependent" and "vulnerable"[35] public who is "lost" and "at the mercy of"[36] "stupid or negligent acts by public officials"[37] who "can spend their money…[and] take their homes"[38] after "ladling from the pork barrel."[39] The role that democratic politics might play not only in setting public policy, but also holding public power to account, too often disappears from their analysis. Seth Davis puts it succinctly: these authors seek to "constrain political discretion through judicial review based upon the law of fiduciary duties."[40] They "see an ambitious role for courts to hold politicians and bureaucrats, no less than partners and agents, to something more than market morality."[41] They seek, in other words, to collapse political contestation into judicial ratiocination.

In this paper, I argue that the application of private law fiduciary doctrine to the norms governing political offices is risky business.[42] Whether applied literally, by analogy, or as part of a suite of norms that political legitimacy happens to share with fiduciary relationships,[43] these norms have the potential to disfigure democratic processes. To be sure, demanding that public and private office be identical in any and all relevant characteristics before the standards of one may be applied fruitfully to the other is punctilious

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[35] Natelson, *Public Trust supra* note 10, at 198.
[36] Leib & Ponet, *supra* note 4, at 185.
[37] Natelson, *Government as Fiduciary*, *supra* note 15, at 200.
[38] Leib & Ponet, *supra* note 4, at 185-186.
[39] Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders,* 11 TEX. REV. L. & POL. 239, 242 (2007).
[40] Davis, *supra* note 20, at 1147.
[41] *Id.* at 1153.
[42] Examples of the "literal" application of ostensibly fungible, or "fractal," fiduciary norms include Fox-Decent, *Sovereignty's Promise*, *supra* note 7; Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights,* 15 LEG. TH. 301 (2009). Other scholars, however, agree with this Article that a straightforward translation of private fiduciary duties to public law is dangerous. *See, e.g.,* Ethan J. Lieb, David L. Ponet, & Michael Serota, *Translating Fiduciary Principles into Public Law,* 126 HARV. L. REV. F. 91, 93 (2013) (responding to Rave, *supra* note 26, and arguing that a simple transplantation of private law concepts to elected political officials avoids "hard questions about who is really best identified as the public fiduciary, who is the actual beneficiary, and what are the right ways to enforce the constraints of the sui generis fiduciary relationships in the political sphere").
[43] For a clarifying explanation of these three modes of undertaking fiduciary political theory, *see* Stephen R. Galoob and Ethan J. Leib, *The Core of Fiduciary Political Theory, in* THE RESEARCH HANDBOOK OF FIDUCIARY LAW 401, 413 (Evan J. Criddle et al eds., 2019) [hereinafter Galoob & Leib, *The Core of Theory*].

sophistry.[44] Analogies can yield productive insights even when inexact.[45] Moreover, parsimonious models[46], including ones describing the "morphological similarities"[47] between public and private fiduciary relationships, can be powerful tools of explanation even as their resemblance to real life is attenuated. Consider economic models. Although market actors like corporations and customers are not, literally speaking, numerical inputs into the supply and demand curves of microeconomics, microeconomics is nevertheless a valuable endeavor. As Ethan Leib and Andrew Kent rightly point out, we should not let the differences between the offices of private trustee and public tax collector deprive us of the insight that both ought to operate for the benefit of someone else. Nor should these differences distract us from the insight that some kind of accountability mechanism, like an equitable duty, might be useful to ensure that they do so.[48] For example, fiduciary duties, like prophylactics against naked self-dealing, may be equally suitable when applied to both public and private office.[49] Whatever these officers' purposes and duties may be, they surely should not be stealing their beneficiaries' assets to fund luxury vacations.[50] What's more, some of the instability between the public-private distinction in fiduciary law may reflect a broader instability between legal conceptions of "public" and "private" more generally.[51] Consequently, scholars should hesitate before relying on any fine doctrinal distinctions to explain why one cannot yield insights for the other.

At the same time, however, just because there is conceptual and historical "cross-pollination"[52] between the law of public and private office does not mean they are reducible to each other in all material respects. Analogizing dissimilar categories without any attention to their differences can lead, as

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[44] For an excellent example of an argument that rejects this kind of sophistry while finding useful commonalities between public and private fiduciary principles, *see id.* Galoob & Leib do not suggest judicial solutions to political fiduciary problems; their focus is on political institutional design. *Id*. at 404.

[45] I thank Professor Stephen Galoob for this important observation.

[46] *E.g.*, the parsimonious and "fractal" model of fiduciary obligation and authority offered in Fox-Decent, *supra* note 7.

[47] Leib & Ponet, *supra* note 4, at 183.

[48] Leib & Kent, *supra* note 17, at 1304.

[49] *See, e.g.*, Kim, *supra* note 9 (using fiduciary law to close a loophole in federal insider trading law as applied to members of Congress).

[50] For a history of the application of the fiduciary duty of loyalty against self-dealing, understood as the misappropriation of public funds, in the context of public trusts (like turnpikes), *see* Barratt, *supra* note 17.

[51] Morton J. Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860*, 40 U. CHI. L. REV. (1973); David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139 (2013).

[52] Leib & Kent, *supra* note 17, at 1305; *see also id*. at 1340 (the histories of the law of public and private office are not "easily severable").

Ethan Leib, David Ponet and Michael Serota argue, to distorting category mistakes.[53] Indeed, notwithstanding their shared historical provenance, several significant conceptual differences obtain between public and private fiduciaries. These differences are significant by virtue of their relevance to what I understand to be the primary purposes of fiduciary relationships: public and private liberty. Overall, these differences demonstrate that public officials must, and ought to, enjoy significant decision-making autonomy without copious amounts of judicial second-guessing. In contrast, private fiduciaries invite judicial examination and management.

To explain, private law doctrine presumes that: (1) principals and settlors are the source of the fiduciary's authority; (2) these principals and settlors are available to give clear guidance to their fiduciaries; and (3) beneficiaries and their interests are relatively ascertainable or, in Paul D. Miller's words, "specified" and "clearly defined."[54] These features ensure that private fiduciary relationships primarily serve the liberty interests of principals and settlors. In the context of agency, for example, an individual principal, exercising her liberty rights, authorizes, instructs and exerts ongoing control over her agent within a narrowly defined scope of action. These features ensure that private fiduciary duties are amenable to judicial enforcement without doing significant injustice to the expectations and liberty of the parties involved. Courts can readily check and critique the fiduciary's actions against identifiable standards set both by industry custom and the parties' own verbal manifestations.[55]

These assumptions simply do not hold for many political officers. Political officials very rarely receive clear guidance from their constituent "principles" whose geographic identity is subject to enduring political debate. The interests she is to serve are not only unclear, but also subject to robust public contestation.[56] The source of her authority, moreover, is often vague and ambiguous: is it a foundational legal text? The people who vote for her? The specific constituents she serves, or the country as a whole?[57] What role is

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[53] Leib *et al*., *Theory of Judgment*, *supra* note 11, at 712.

[54] Miller, *Fiduciary Relationship*, *supra* note 2, at 72; Davis, *supra* note 22, at 1170. It should be noted that many fiduciary law scholars insist that the fiduciary relationship is a conceptual construct that cannot be easily defined across different kinds of human relationships. Miller, *Fiduciary Relationship, supra* note 2, at 64–65; *accord*, PAUL D. FINN, FIDUCIARY OBLIGATIONS 1 (1977) ("it is meaningless to talk of fiduciary relationships as such"). As a result, they may object to this generalization of fiduciary relationships. However, in this paper, I do not mean to define the fiduciary relationship as such. Rather, I intend to identify some important properties of private fiduciary relationships that are not shared by public officials.

[55] *See* Andrew S. Gold, *The Fiduciary Duty of Loyalty*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 388 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019) [hereinafter Gold, *Duty of Loyalty*].

[56] *E.g.*, Davis, *supra* note 20, at 1149.

[57] *See, e.g.*, Leib & Ponet, *supra* note 4, at 183; Davis, *supra* note 22, at 1150.

played by relevant but indefinite statutory text subject to conflicting interpretations by different branches of government? Moreover, the scope of the public official's authority may not be clearly set forth in any legal instrument – like a constitution or a statute. Instead, the scope of her authority may be left open to a political process that includes elections and public deliberation. Accordingly, it is not at all clear that applying fiduciary norms to public officers will serve public autonomy in the same way they serve private autonomy.

Thus, while public and private-law concepts of the fiduciary correspond insofar as they serve liberty by supporting the limitation of power and encouraging the other-regarding representation of others,[58] they differ crucially in how and whether this "other" speaks, acts, and carries interests. The legal "person" to which private duties attend[59] is not the same kind and caliber of "person" attended to by public officials.[60] The state, as illustrated by Thomas Hobbes' infamous frontispiece, is a very particular (and monstrous) kind of person. Private fiduciaries, as Paul D. Miller reminds us, "are not sovereigns; they do not enjoy authority at large relative to a populace with diffuse and markedly divergent interests."[61] Although models of private fiduciary law might have fit a regime where absolute power was vested in a single monarch that could speak legibly when delegating tasks to his noble lieutenants,[62] they occlude more than they explain when it comes to contemporary representative constitutional democracies.

The upshot of these material conceptual differences is significant. It is not

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[58] Paul B. Miller, *Fiduciary Representation*, in FIDUCIARY GOVERNMENT, 23–24 (Criddle, Fox-Decent, Gold, Kim and Miller eds., 2018); Fox-Decent, *Sovereignty's Promise, supra* note 7, at 30.

[59] For an excellent discussion of the role of legal personality in private law fiduciary duty, *see* Miller, *Fiduciary Relationship*, *supra* note 2, at 70–71.

[60] Ethan J. Leib, David L. Ponet, & Michael Serota, *Mapping Fiduciary Relationships, in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 396 [hereinafter, Leib *et al., Mapping Relationships*] ("Most contemporary work in fiduciary political theory identifies all offices of government as fiduciary and posits that 'the people' are the corresponding beneficiaries. But this is problematic…[it] suggests a unitary referent for all public fiduciary relations –namely, 'the people.' However, the transition from abstract conceptions of fiduciary relationships in public law to governance of concrete relationships complicates the picture."). The authors go on to note that one influential theorist of political and public fiduciaries, Evan Fox-Decent, occludes the inescapable diversity and conflict of democratic politics when his identification of the beneficiary oscillates between "the public at large" and "the individual subject" without recognizing that the former is a fiction, and the latter possess irreducibly diverse understandings of their interests. Meanwhile, Fox-Decent argues that "consent," without elaboration, can help flesh out the substantive content of law.

[61] Miller, *Fiduciary Relationship*, *supra* note 2, at 72.

[62] For instance, a principal-agent model might have fit English administration up to the early nineteenth-century, where "central administrative government was still largely confined to the surviving royal prerogative." Barratt, *supra* note 17, at 517.

a matter of merely tweaking how fiduciary duties might be applied in different economic or policy contexts.[63] It is not a matter, for instance, of observing that a private trustee and a tax collector might be required to keep track of different entries on their balance sheets and report to different kinds of parties. Nor is it merely a matter of identifying situations within both public and private life where careful, considered decision-making (captured by the duty of care) and other-regarding behavior (captured by the duty of loyalty) might prove congenial to human rights and welfare.[64] The invocation of care and loyalty, without any understanding of how the public and private principal are crucially different, may displace democratic decision-making. Namely, in private law, fiduciary duties often function like contractual gap-fillers.[65] They approximate what a settlor or principal would have wanted, had they thought of the issue when instructing the fiduciary. Private law constrains fiduciaries in order to broaden the autonomy of the principal or settlor.[66] Applying those same constraints to public fiduciaries – whose authorization is indefinite and whose

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[63] For a discussion of how private fiduciary law has been tailored to specific relationships, *see* Paul B. Miller, *The Morality of Fiduciary Law,* 62 WM. & MARY L. REV. 1349, 1352–53 (2021) [hereinafter Miller, *Morality*].

[64] Galoob & Lieb, *The Core of Theory, supra* note 43, at 414, helpfully define this mode of engaging with fiduciary political theory as a work of translation, i.e., the reconfiguring of fiduciary principles to account for the distinctive, sui generis purpose and structure of the public sphere. For early articulations of the translation model, *see* Lieb, Ponet & Serota, *supra* note 42, at 94; Davis, *supra* note 20, at 1170.

[65] Scholars influenced by law and economics, as an example, posit that the "law erects fiduciary duties as default law in cases where it is difficult to specify a complete contract due to the continuing nature and intrinsic discretion of the parties' dealings." Joshua Getzler, *Ascribing and Limiting Fiduciary Obligations: Understand the Operation of Consent*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 46 (2014) (citing Frank Easterbrook and Daniel Fischel, *Contract and Fiduciary Duty,* 36 J. L. AND ECON. 425 (1993); Robert H. Sitkoff, *The Economic Structure of Fiduciary Law,* 91 B.U. L. REV. 1039 (2011)).

[66] For an argument that private financial fiduciary relations serve to enhance individual autonomy, *see* Hanoch Dagan & Sharon Hannes, *Managing Our Money: The Law of Financial Fiduciaries as a Private Law Institution*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 91, 105 (2014). For an argument that duties serve a republican conception of individual liberty, *see* Evan Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law,* 95 TEX. L. REV. 993, 995 (2017). For an argument that fiduciary relationships themselves are an extension of the legal personality of the principal, *see* Miller, *The Fiduciary Relationship*, *supra* note 2, at 63. *See also* Miller, *Morality*, *supra* note 63, at 1354 ("it seems reasonable to think that fiduciary law is often autonomy-enhancing insofar as it enables us to shift burdens of judgment and action to representatives."). Miller goes on to argue that fiduciary law serves other autonomy-enhancing values like individual welfare and facilitating cooperation. *Id.* at 1354–55. For an argument that liberty rights include positive liberties (like welfare), *see Thomas Hill Green, Liberal Legislation and Freedom of Contract*, *in* WORKS OF T.H. GREEN 365 (Vol. III, 1881); Isaiah Berlin, *Two Concepts of Liberty, in* LIBERTY 166 (2002); AMARTA SEN, RATIONALITY AND FREEDOM (2002).

beneficiaries possess diverse, conflicting, and contestable interests – empowers courts and invites demagogues to decide for themselves what the people want or would have wanted, had they thought of the issue when entering the voting booth. When the substantive content of the public fiduciary's responsibilities is left so indefinite, there is more room for reviewing courts, embracing private law fiduciary doctrine, to second-guess the fiduciary's decisions using contestable equitable conceptions of care and loyalty.[67]

To illustrate, consider Members of Congress voting to increase their salaries. A reviewing judge, empowered to enforce fiduciary principles, might strike down the pay raise as a breach of the duty of loyalty. Most citizens, a court might conclude, would not want their fiduciaries to take money from taxpayers' pockets in order to enrich themselves. Meanwhile, Members of Congress might argue that the pay raise is part of an anti-corruption policy designed to minimize lawmakers' incentives to accept bribes from regulated industries. The result of the expansion of fiduciary duties: judges make the laws, not the lawmakers. Meanwhile, pretending that "the people" speak with one voice and carry the same interests encourages populist demagogues to claim that they themselves possess the unique ability to define both the scope of a public fiduciary's authorization and the people's interests.

As a result of these mischiefs, altogether different strategies should be used to authorize and limit the use of private and public power. The former requires judges. The latter implicates democratic politics. Unlike a principal in an agency relationship or a trust settlor, a democratic *dêmos* is not a coherent, collective macro-agent capable of deciding and doing things.[68] If it is to act and decide at all, that action must come through some form of political

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[67] For instance, Leib & Ponet, *supra* note 5, at 187, suggest that because the public by virtue of, *inter alia*, its diversity, cannot hold their political fiduciaries accountable, representatives should be subject to even "broader fiduciary duties" than typically applied in private law. Although the authors are careful to insist that these duties need not and perhaps should not be enforced by courts, one cannot help but be wary of judicial mission-creep. When normative standards look like legal standards, courts might be tempted to intervene. In any event, whether the veto points are courts or other political institutions, the result will be less governance, not more – and thus betray a conservative and status-quo bias.

[68] *See, e.g.*, Criddle, *Fiduciary Administration, supra* note 8, at 473 (but note that Criddle does argue that the people, although without a coherent "will," has a coherent and objective public interest); Leib & Ponet, *supra* note 5, at 181–82 (describing unstable and indeterminate nature of constituent preferences and their relative priorities); Daniel A. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State,* 132 YALE L.J 9-10 (2022); HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 215 (1967); Lisa Disch, *Toward a Mobilization Conception of Democratic Representation*, 105 AM. POL. SCI. REV. 100, 101 (2011); MÓNICA BRITO VIEIRA & DAVID RUNCIMAN, REPRESENTATION 95–96 (2008) (discussing the use and limitations of the principal-agent framework). *See generally* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (2008).

representation by self-directing officials. Democratic citizen-principals do not and cannot micromanage their representative political fiduciaries. Instead, citizens play an equally distributed role in a political process that involves voting, donating, engaging in public deliberation, submitting petitions, serving on juries, and so on. In the public context, therefore, the law ought to lend fiduciaries the freedom to make decisions that have some credible (although inescapably contestable) claim to be in the public interest. Citizens, exercising their political rights, decide for themselves whether their public trustees have acted wisely, diligently, impartially, and in their interests (however citizens choose to define them). And citizens' individual judgments are not handed down like court orders, but instead amalgamated and absorbed into the outcomes of elections.

To be sure, private and public fiduciary law both serve autonomy: one serves individual freedom, the other public freedom. Both encompass the broad idea that power should not be absolute. As a result, both suggest that officers should serve someone – or something – other than themselves. But this is where the similarity ends. Individual autonomy involves readily enforceable individual choices and judgment. Public autonomy requires representative democratic procedures. Private power is limited by courts and legal instruments. Public power is limited by constitutional democracy: rights, elections, clever institutional design, and a professionalized civil service governed not by equity, but by statutes reflecting citizens' own expectations of their public servants. Public and private fiduciaries are conceptually, morally, and politically distinct – and they should stay that way.

Yet seeking insight into the proper role of public office through analogy with private law is not entirely fruitless. There is one area of private law that does not differ in all the material respects identified above: corporate law. Like democratic polities, corporations involve ambiguous sources of authority, act for numerous diverse principals, and possess interests that are reasonably contested and contestable.[69] Corporate constituents, like political constituents, cannot give ongoing instructions to their elected fiduciaries. Corporations, like states, adopt broad and diverse purposes that change over time and as a result of a political process. Consequently, it is perhaps no accident that courts avoid answering questions of "business judgment" in the same way they (should) avoid questions of politics and policy. If any analogy is to be applied to the state, it is the corporation. Indeed, one implication of this Article's argument is that corporate law cannot comfortably be classified as private law at all.

This Article will proceed as follows. Section II outlines the private law doctrine of agency, explains why the amount of autonomy granted the agent is limited, and argues that the value served by agency law is the individual liberty right of the principal. It further explains why applying agency principles to political offices can disfigure democratic values by encouraging both populism and libertarianism. Section III does the same for the private law

[69] Leib *et al*., *Mapping Fiduciary Relationships*, *supra* note 60, at 16.

of trust. Part IV explains why corporate law provides a qualitatively distinct set of duties for directors and officers. After showing where features of corporations and political associations fruitfully overlap, it demonstrates that corporate fiduciaries and public fiduciaries differ crucially: the former relies on a higher power for their authority. Part V then introduces the concept of democratic fiduciary representation and explains how it vindicates democracy's promise that each citizen will have a role to play in shaping the laws that bind them. The essay concludes by showing how lessons from corporate law might improve the quality of democratic representation.

II. THE PRINCIPAL AND THE AGENT

Perhaps the most common fiduciary relationship applied to public officials is that of agency.[70] Elected representatives are "agents" of their constituents[71]; bureaucratic officials are "agents" of Congress.[72] Some political scientists, for instance, use agency-based frameworks in their formal economic modeling.[73] As explained below, however, applying agency principles to lawmakers yields advice that encourages both libertarian and populist outcomes. After briefly outlining the law of agency, the next section will investigate the fiduciary duties that attend the agent and argue that agency law primarily serves the liberty interests of the principal. It will then argue that the empirical prerequisite of the agency relationship, the existence of a coherent principal capable of control, is inapt for polities committed to liberal, representative democracy.

A. *The Law of Agency: Empowering the Principal*

The private law of agency, which defines and governs the relations between two individuals, empowers one while constraining the other. An agent, according to The Restatement (Third) of Agency, "shall act on the principal's behalf and subject to the principal's control."[74] With an agent, a principal can expand the range of economic, personal, and social opportunities

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[70] *Id.* at 1–2 (arguing that democratic theorists that ascribe the duties of agents to principals can help "illuminate theories of representation, deliberative democracy, political and administrative power, political consent, and legality.").
[71] BRITO VIEIRA & RUNCIMAN, *supra* note 68, at 138. For a critical discussion of the use of agency in political representation, *see* Katharine Jackson, *Administration as Democratic Trustee Representation,* 29 LEG. TH. 314, 319 (2023).
[72] BITO VIEIRA & RUNCIMAN, *supra* note 68, at 138.
[73] Early seminal papers include Robert Barro, *The Control of Politicians: An Economic Model,* 14 PUB. CHOICE 19 (1973) and John Ferejohn, *Incumbent Performance and Electoral Control,* 50 PUBLIC CHOICE 5 (1986).
[74] RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

available to her.[75] A principal enjoys access to the agent's material and intellectual resources: the agent's time, experience, expertise, institutional support, and so on.[76] Principals can engage in more transactions, and more sophisticated transactions, than they can undertake alone. While legal rules protecting the interests of third parties and the bounded discretion of the agent constrains the principal's autonomy, there is no doubt the principal is in charge. Agency law incontrovertibly serves the autonomy of the principal.

The private law of agency supports the principal's autonomy rights in a few different ways. First, agents cannot bind their principals to legal duties without the principals' prior authorization. While this authorization can be implied as well as express, the agent's actions are often a legal nullity, at least far as the principal is concerned, without it.[77] Second, and unlike many trustees[78], agents are legally required to follow ongoing, real-time instructions of their principals. Changing instructions amounts to changing the scope of the agent's authorization, and, should principals believe that the agent fails to serve their purposes, they may dismiss their agents at any time.[79] In this way, the law ensures that agents carry out the desires and preferences of their principals – at least insofar as they are expressed or clearly implied. Third, agents are bound by a menu of fiduciary duties that center the interests of the principal over those of the agent.[80] These features of agency law are explicated in more detail below.

1. *Authorization*

Agency law applies when two parties manifest their consent to a specific kind of relationship: they each agree that one, the agent, will have the right to cause the other, the principal, to be legally bound to others. For example, the parties agree that the agent may cause the principal to enter into an enforceable sales contract with a third party. The law interprets this agreement as an act of authorization:[81] one party, the agent, is consequently entitled under the law to act and speak for another, the principal. Comment c of The Restatement (Third) of Agency § 1.01 characterizes this event as a "voluntary conferral [of

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[75] Dagan & Hannes, *supra* note 66, at 16; Davis, *supra* note 22, at 1151.
[76] *See* MILLER, *supra* note 61, at 7 (service-type fiduciary relations allow us to engage others who are "better positioned to realize our ends than we are.").
[77] *Cf.* Apparent authority, discussed in the next section.
[78] *Cf.* Revocable trusts.
[79] Kim, *supra* note 9 at 873. It should be noted, though, that such dismissal may be a breach of contract yielding damages.
[80] RESTATEMENT (THIRD) OF AGENCY §§ 8.01-8.11 cmt. C (AM. L. INST. 2006).
[81] MILLER, *supra* note 61, at 6 (noting a fiduciary's mandate from authorization from "someone with the innate or acquired…authority to confer fiduciary power upon a fiduciary."); Miller, *Fiduciary Relationship*, *supra* note 2, at 22.

power] by the principal."[82] Importantly, the right of the agent to act for the principal derives directly from the principal. Unlike public officials, whose authority might derive from democracy, justice, or religious tenets, and unlike guardians or custodians, whose authority derives from the state, agents' authority depends upon a voluntary choice by a private actor: the principal. Concomitantly, the principal has the right to define and constrain the power she chooses to grant her agent. The scope of the agent's authority will be delimited by the terms and context in which the principal manifests her consent. The act of authorizing an agent, therefore, is aptly described as an expression of the principal's individual autonomy.

2. *Instruction*

Under private law, the principal's authority to control the agent is existential. If the principal has no right to control the agent, and if the agent does not agree (implicitly or explicitly) to subject herself to the principal's control, the relationship is not a relationship of agency.[83] "The whole purpose of the relation of agency," wrote the drafters of the Restatement (Second) of Agency, "is that the agent shall carry out the will of the principal."[84] Accordingly, the principal must possess the legal capacity and right to direct the agent throughout the relationship or, at the very least, to control to goal of the relationship.[85] Stated a bit differently, the agent relinquishes the freedom to determine its own affairs and gives a portion of it into the hands of the principal.[86] Further, the principal's control can be quite invasive. A would-be principal's mere veto right over the end product of agent's actions is insufficient to establish a relationship of agency. Instead, the law contemplates that the principal has the right to direct and manage the agent over routine, day-to-day matters.

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[82] RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c. (AM. L. INST. 2006); Miller, *Fiduciary Relationship, supra* note 2, at 14, describes this relationship as the transfer (or substitution) of the legal personality of the principal to the agent.

[83] RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

[84] RESTATEMENT (SECOND) OF AGENCY Ch. 5, Intro. Note (AM. L. INST. 1958); Miller, *Fiduciary Relationship*, *supra* note 2 at 80; Deborah A. DeMott, *Disloyal Agents,* 58 ALA. L. REV. 1049, 1051 (2007) ("A defining characteristic of relationships that are ones of agency under the common law is the principal's power to give interim instructions to the agent although principal and agent have previously agreed the principal will not give such instructions, and although, in giving them, the principal breaches a contract with the agent. This power is a crucial aspect of the principal's position of control over the agent, itself necessitated by the agent's power to subject the principal to liability to third parties.").

[85] *E.g.,* Krom v. Sharp and Dohme, Inc., 180 N.Y.S. 2d 99 (1958).

[86] *E.g.*, A. Gay Jenson Farms Co. v. Cargill, Inc., 309 N.W.2d 285 (Minn. 1981) (holding that interfering with the internal affairs of corporate agent establishes agency relationship).

3. *Attribution*

The agent's right to bind the principal to legal relationships with third parties also supports the principal's autonomy rights. By lending the agent the "ability…to produce a change in a given legal relationship (between the principal and third parties),"[87] the private law of agency increases the scope of transactions available to the principal. The agent can reach a greater array of buyers, sellers, lenders, borrowers and others than the principal. These third parties, in turn, are willing to engage in transactions secure in the knowledge that they can hold the principal to legal account if something goes awry. Stated a bit differently, agency law expands the legal personality of the principal. It allows the principal to engage in more legal relationships with others, just as a large business can enter into considerably more fruitful contracts than can a solo proprietor.

B. *An Agent's Fiduciary Duties: A Relationship of Primacy and Subordination*

The law governing agency therefore promotes the autonomy of the principal while guaranteeing the subservience of the agent. The equitable fiduciary standards shore up this relationship of primacy and subordination. From the point of view of the principal, the purpose of agency is that the agent should act on her behalf. The principal's wishes are dominant; the agent is merely a tool to meet her goals. The principal expects that the agent will act for (represent) her as it undertakes its commissioned activities. Agents, of course, may buck the principal's expectations. They may be self-interested, corrupt, lazy, and so on. Accordingly, equity imposes on agents a duty to act in their principal's interests, to "act solely for the benefit of the principal in all matters connected with [the] agency."[88]

The fiduciary duty of the agent to act in the principal's best interests incorporates the usual menu of fiduciary sub-duties (care, loyalty, good faith, disclosure, *etc*.). The agent must seek, as far as she is able, congruence between her own desires and the wishes of the principle. Indeed, the agent owes her principle her "undivided loyalty,"[89] and must essentially step into her principal's shoes while setting aside her own interests. As Justice Cardozo famously put it, "thought of self [is] to be renounced"[90] as the agent embraces "the duty of finest loyalty."[91] Similarly, an agent's duties include the duty to

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[87] RESTATEMENT (SECOND) OF AGENCY) § 6 (AM. L. INST. 1958).
[88] *Id.* at § 387.
[89] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).
[90] *Id.* at 548.
[91] *Id.* at 545. (Note, however, that Cardozo was drawing from trust law and applying it to a "coadventure," understood in contemporary parlance as a partnership).

keep the principal well-informed of her actions. With this information, the principal can determine how next to instruct the agent.[92]

Consequently, an agent's fiduciary duties function like contractual gap-fillers: they direct the agent to act in a way the principal would have reasonably directed them to act, had the principal thought of the issue beforehand.[93] For example, an agent has a fiduciary duty to avoid usurping business opportunities that come to her by virtue of her role as the principal's agent.[94] Had the principal thought of the possibility that their agent might take the opportunity, they probably would have instructed the agent to bring it to her first. Similarly, an agent has a fiduciary duty of care. Had a principal imagined that agent would be reckless in her conduct, the principal probably would have instructed her to be more diligent and careful. Notably, the amount of guesswork involved in approximating the principal's desires is significantly limited. A principal, typically a single person with ascertainable interests and preferences, retains the legal power to rescind her authority.

C. *The Bounded Autonomy of the Agent*

Notwithstanding its heavy fiduciary duties, an agent enjoys some limited decision-making autonomy thanks to the law and some empirical realities. Though subject to the principal's control and bound to act in the principal's best interests, the agent is no artificially unintelligent algorithm. Instead, the law sometimes grants the agent discretion when this discretion serves the competing rights and interests of third parties and the agent itself. Further, if the agent enjoys superior access to time and expertise, an agent may enjoy some *de facto* autonomy from the principal.

First, and importantly, the agent's status as an agent is contingent upon the agent's manifested assent. An agent is not obligated to become an agent, and it may relinquish its agency status at its discretion.[95] Insofar as a principal

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[92] Kim, *supra* note 11.

[93] For an argument that fiduciary law is an extension of contract law, *see* Arthur B. Laby, T*he Fiduciary Obligation as the Adoption of Ends,* 56 BUFF. L. REV. 99, 107–09 (2008). For an argument explaining why fiduciary duties vindicate reasonable expectations, *see* Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences,* 48 ARIZ. L. REV. 925, 926 (2006). For an argument that the fiduciary duties of loyalty and care are a "method of gap-filling in incomplete contracts," *see* Jonathan R. Macy, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties,* 21 STETSON L. REV. 23, 25 (1991). For counterarguments, *see* Demott, *supra* note 21; Scott FitzGibbon, *Fiduciary Relationships are Not Contracts,* 82 MARQ. L. REV. 303, 305 (1999).

[94] *E.g.*, *Meinhard*, 164 N.E. at 545; Gen. Auto. Mfg. v. Singer, 120 N.W.2d 659 (Wis. 1963).

[95] This may, of course, amount to a breach of contract. The agent may therefore be subject to contract liability.

may want the agent to become and remain an agent, accordingly, the principal's autonomy is limited. Second, the law permits an agent to invade the autonomy of its principal when doing so serves the interests of innocent third parties. Under the doctrine of apparent authority, for instance, an agent may bind a principal without the principal's consent if necessary to preserve the third party's reasonable expectations. Third, the law affords agents a certain amount of discretion to undertake actions that the agent reasonably believes is included within the principal's express directions.[96] An agent hired to mow the principal's lawn, for instance, might reasonably believe that the principal's instructions included the authority to purchase gas for the lawnmower. The principal's assent to the agency relationship is determined objectively (an "objective manifestation" of consent), and the law entitles the agent to interpret this manifestation reasonably, even if the interpretation exceeds the principal's subjective expectations. Of course, the law's acknowledgment of this *de minimus* amount of discretion does not go very far. A principal is always entitled to issue further instructions that countermand the agent's reasonable interpretation of her orders.

Thus, while the law occasionally curtails the authority of the principal and enforces the discretion of the agent, it does so only to safeguard the interests and rights of the agent and third parties in discrete circumstances. This sort of circumscription, however, mirrors the kinds of circumscription commonly placed on *all* legal rights and powers: my right to swing my arm ends at your nose.

An agent may also enjoy discretion for empirical reasons. Agents might possess expertise that allows them to better understand the circumstances and choices available to the principle. Further, because agents will spend more time engaging in their appointed task than the principal, they will possess a greater familiarity with all the relevant issues and facts. Based on this experience, expertise, and familiarity, they can speak with some authority to the principal or guide the principal towards a preferred outcome.[97] While the agent's duty to report and inform will reduce this source of the agent's *de facto* authority, it cannot eliminate it. Instead, the private law of agency relies upon the agent's fiduciary duties to ensure that the agent exercises her irreducible discretion in a manner that the principal might approve, had she the chance to understand and consent.

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[96] *E.g.*, Mill St. Church of Christ v. Hogan 785 S.W.2d 263 (Ky. Ct. App. 1990) (hiring someone to paint implies that agent has authority to hire helper); Dweck v. Nasser, 959 A.2d 29, 31 (Del. 2008); RESTATEMENT (SECOND) OF AGENCY § 34 cmt. A (AM. L. INST. 1958); RESTATEMENT (THIRD) OF AGENCY § 2.02(3) (AM. L. INST. 2006); RESTATEMENT (SECOND) OF AGENCY § 35 (AM. L. INST. 1958) (includes incidental transactions); Miller, *Fiduciary Relationship*, *supra* note 2, at 80.

[97] Miller, *Fiduciary Representation*, *supra* note 2, at 79–80 (explaining that deferring to an agent's discretion often makes sense for a principal relying on their expertise and forming the relationship by virtue of that expertise).

D. *Agency as Political Disfigurement*

Accordingly, the primary value served by the private law of agency, as well as by the fiduciary principles that attend it, is individual autonomy: namely, the autonomy of the principal.[98] As Paul D. Miller argues, a fiduciary gains her authority via a "juridical"[99] act by a principal: contract and consent, legal rights that vindicate the principal's liberties. While the law may circumscribe the principal's autonomy in order to protect the interests of others, this circumscription is not different in character from how the law bounds other kinds of legal rights and powers.

Those concerned that political representatives might abuse their power understandably reach for agency as a critical standard. If, in a democracy, power (*kratos*) is supposed to be wielded by the people (*dêmos*),[100] it makes intuitive sense that elected lawmakers should follow the commands of their constituents. Many jurists take it as a given that elected legislators should "produce coincidence between the wishes of the sovereign and the wishes of the subjects."[101] Further, it makes intuitive sense that a liberal democracy, committed to both democratic decision-making and individual rights, should attend to the instructions of each citizen individually. An agency model, moreover, might be appealing to social scientists (and law and economics scholars) who, as a result of its simplicity, build it into their formal models.[102]

Nevertheless, given its individualist orientation, the private law of agency provides very limited guidance to scholars searching for a way to assess the

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[98] *See id.* at 24 ("fiduciary powers are in the nature of legal powers derived from the person…of the grantor of a mandate undertaken by a fiduciary."). Agency law is also often justified using efficiency arguments. Unless efficiency arguments speak to collective wealth and therefore to collective (positive) freedom, they therefore fall outside the scope of this essay. For an argument that private financial fiduciary relations serve to enhance individual autonomy, *see* Dagan & Hannes, *supra* note 66, at 105. For an argument that duties serve a republican conception of individual liberty, *see* Criddle*, supra* note 68, at 995. For an argument that fiduciary relationships themselves are an extension of the legal personality of the principal, *see* Miller, *Fiduciary Relationship*, *supra* note 2. *See also* Miller, *Morality*, *supra* note 63, at 1354 ("it seems reasonable to think that fiduciary law is often autonomy-enhancing insofar as it enables us to shift burdens of judgment and action to representatives."). Miller goes on to argue that fiduciary law serves other autonomy-enhancing values like individual welfare and facilitating cooperation. *Id*., at 1354–55. For an argument that liberty rights include positive liberties (like welfare), *see* SEN, *supra* note 66; Green, *supra* note 66; Berlin *supra* note 66.

[99] Miller, *Fiduciary Representation*, *supra* note 2, at 75.

[100] PHILIP PETIT, *Varieties of Public Representation*, *in* POLITICAL REPRESENTATION 61 (Ian Shapiro, Susan C. Stokes, Elisabeth Jean Wood, & Alexander S. Kirschner eds., 2009).

[101] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 81 (8th ed. 1982).

[102] *See* Ferejohn, *supra* note 73; *see also* Barro, *supra* not 73.

legitimacy of political decision-making — an inherently *collective* enterprise.[103] The implied, but nonetheless crucially important, fact that conditions the applicability of private agency law is that there exists a person capable of manifesting her assent to a relationship of authority and control. Agency requires the existence of a principal capable not only of granting authority, but also issuing instructions. Whether any *collection* of diverse citizens can speak with sufficient clarity is empirically impossible and normatively problematic.[104] At the extreme, would-be demagogues can disfigure of the law of agency to serve their own ends.

As argued above, the private law of agency empowers the individual principal. It does so because an agency relationship does not arise unless and until a principal and an agent agree that the agent shall, subject to the principal's control, act for and in the interests of the principal. The agent's fiduciary duties to the principal shore up any gaps in the principal's instructions, ensuring that when an agent does enjoy some discretion, she exercises it in a manner that the principal most likely would approve.

The problem, though, is that in representative politics, there is no principal that can speak its intentions clearly to an agent.[105] Empirically, it is absurd that a Congressional district consisting of hundreds of thousands — let alone a national electorate — could ever agree on the instructions they will issue to their authorized agent. Nor will they, without heavy gerrymandering and other voter-suppression tactics, likely even agree on the identity of the agent they should send to Congress. Political science research confirms time and again that citizens possess no clear, identifiable policy preferences that are capable of aggregation into coherent collective instructions. Hannah Pitkin, a seminal theorist of democratic representation, noted decades ago that "a constituency is not a single unit with a ready-made will or opinion on every topic; a representative cannot simply reflect what is not there to be reflected."[106] As districts grow or merge, constituent mandates become increasingly unknowable.[107] The vote, moreover, is a coarse tool for conveying information about voters' instructions.[108] It says nothing, for example, about a voter's tax policy preferences, let alone their thoughts on the thousands of pages of proposed tax exemptions and loopholes (presuming they even have any). Further, voters' preferences are not always stable and explicit. The answers

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[103] *See* Leib et al., *Mapping Fiduciary Relationships*, *supra* note 60.
[104] Davis, *supra* note 22, at 1158.
[105] *See*, *e.g.*, *id.* at 1153.
[106] HANNA PITKIN, THE CONCEPT OF REPRESENTATION 147 (1967).
[107] Andrew Verstein, *Trustee or Delegate? Understanding Representation to Illuminate Shareholder Governance and Regulatory Change*, 9 EUR. CO. FIN. L. REV. 74, 81 (2012).
[108] *E.g.*, Davis, *supra* note 22, at 1154 (citing Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process,* 98 COLUM. L. REV. 1, 38 (1998).

that voters give to surveys and polls change when questions are reworded.[109] Meanwhile, since the populace is too diverse to achieve collectivized reason and consensus, they certainly cannot form it in fine legislative detail.[110] Everyone might agree, for example, that there should be freedom of speech. But because of the "inherently formal and indeterminate nature" of principles like freedom, there will be many reasonable but inconsistent elaborations.[111] As political theorists David Runciman and Monica Brito Vieira[112] argue,[113] voters do not behave in a way that makes them a plausible principal.[114]

This history of agency in politics demonstrates the model's unworkability. The governments of 17th century colonial North America tried their best to implement a principal-agent model of political representation. After several northern colonies struggled to implement direct democracy, they adopted a proxy system whereby individual constituents would instruct their delegates to vote on legislation in their stead. Some freemen, after all, had to stay home from the town hall to "protect the safty [sic] of their towne [sic]."[115] Further, decision-making became utterly impracticable when each and every

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[109] *E.g.*, JOSEPH HEATH, THE MACHINERY OF GOVERNMENT: PUBLIC ADMINISTRATION AND THE LIBERAL STATE 64 (2020).

[110] MÓNICA BRITO VIEIRA & DAVID RUNCIMAN, REPRESENTATION 138 (2008); RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENSE OF THE CONSTITUTIONALITY OF DEMOCRACY 54–55 (2007); JEREMY WALDRON, LAW AND DISAGREEMENT 277 (1999); JURGEN HABERMAS, BETWEEN FACTS & NORMS 300 (William Rehg trans. 1996) ("The public opinion that is worked up via democratic procedures into communicative power cannot 'rule' of itself but can only point the use of administrative power in specific directions").

[111] CHIARA CORDELLI, THE PRIVATIZED STATE 57 (2020).

[112] VIEIRA & RUNCIMAN, *supra* note 110, at 138.

[113] *Id.* at 54–55.

[114] One response is to conclude that most lawmaking lacks democratic legitimacy. Rousseau argued that laws should be simple, general, and obvious. Many conservative jurists – including Justice Gorsuch – might agree. Voters are only able to consent, *en masse*, to these types of law. This outcome is not, however, straightforwardly democratic. Where the state does not rule, powerful private actors will rule instead. Brian Hutler & Anne Barnhill, *SNAP Exclusions and the Role of Citizen Participation in Policy-Making*, 38 SOC. PHIL. & POL'Y 266, 286–87 (2021). Further, if laws are vague and general, unelected judges will inevitably fill in the regulatory blanks. DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA 13 (2014). Moreover, legal complexity is a result of democratic demands for market intervention. NORBERTO BOBBIO, THE FUTURE OF DEMOCRACY 38 (Richard Bellamy ed., Roger Griffin trans., 1987); BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY (2019). In any event, it's notable that Rousseau himself leaned heavily on expert government ministers that, like a travel agent, were to present legislation to the sovereign for approval. Nadia Urbinati, *Continuity and Rupture: The Power of Judgment in Democratic Representation*, 12 CONSTELLATIONS 194, 207 (2005).

[115] PEVERILL SQUIRE, THE RISE OF THE REPRESENTATIVE: LAWMAKERS AND CONSTITUENTS IN COLONIAL AMERICA 15 (2017).

constituent could show up to the assembly. A proxy system, it was believed, would streamline proceedings while ensuring each and every constituent principal had control over her legislative agent. The system, however, soon bogged down in confusion. Constituents revoked proxies, appointed new proxies, or simply showed up personally as their agents' positions fluctuated or their own positions changed.[116] Counting votes became a near impossible task as "elected members holding proxies for various freeman and with those proxies being shifted among members or withdrawn in favor of a freeman's personal participation."[117] The practice was abandoned by the end of the 17th century in favor of per capita or territorial representation.

Without clear guidance from their constituent principals, representative agents necessarily rely on their own discretion. They must choose whose instructions to obey, try to find some compromise between conflicting instructions, or simply invoke their own judgment about what actions best serve their principal's interests. Applying the private law of agency, this discretion cannot be freewheeling. Instead, the agent is subject to the constraints of the agent's fiduciary duties. Since many citizens explicitly, necessarily, and reasonably rely on their representatives' judgment in framing the best tax policy, the best environmental policy, the best financial policy, *etc*., letting fiduciary duties guide the behavior of political agents is a tempting solution.

Yet the application of these duties to political representation begs the question. Recall that the fiduciary duties ascribed to agents aim to reproduce what the principal would have wanted, had she had the opportunity to consider the issue. They are akin to the gap-filling provisions of contract law. But how can anyone decide what the populace would have wanted, when the populace is so unwieldy and diverse? How can anyone adjudicate what the populace would have wanted, when reasonable minds routinely and reasonably disagree about what political representatives are supposed to do? While it might be relatively easy to predict what an individual commercial actor might reasonably want when its agent faces an unanticipated financial risk, pretending that we can predict what the citizens of the State of Massachusetts would reasonably want when its Senator is voting on a national abortion ban is ludicrous.

Whatever political representation is doing, therefore, it is not replicating the private law of agency. Representatives do not — indeed, cannot — follow ascertainable instructions expressed by an ascertainable "macro principal." Moreover, pretending that they can yields several frightening implications. The first implication is that since political agents receive no clear instructions, they are not authorized to act at all. An agent without authorization is not an agent that can bind a principal. Although this conclusion might appeal to the most vulgar sort of libertarian, it is not a recipe for successful collective

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[116] *Id.* at 18.
[117] *Id.* (describing Maryland in the 17th century).

governance.

While this first implication is anti-regulatory, the second is tyrannical. A would-be demagogue might be tempted to argue that he has, in fact, identified a clear instruction manifested by his constituent principals. His claim, however, would not be based on the fact that society has suddenly found consensus and harmony. He would be doing so because claiming to speak with the voice of the people[118] is an effective way to shut down dissent and delegitimize the opposition. The idea that a political agent can accurately represent their constituent principals is a lie. "[L]ike all such political lies," note Runciman and Brito Vieira, "it [can] be maintained not only at the cost of truth but of blood as well."[119] Pretending that all constituents want a certain thing not only gives the demagogue permission to do as he likes. It also means that anyone who disagrees perhaps isn't a citizen at all. She is, instead, a traitor or an enemy.

The third implication involves the empowerment of judges. Individual citizens, unhappy with the policies of incumbent officials, might ask courts to rescind and revise those policies. Plaintiffs might invoke their political agents' fiduciary duties as they argue that their representatives failed to adequately protect their interests and follow their instructions. A court, weighing the history of political discourse and debate, might find that the officials' actions lacked the requisite authorization. It might find that officials did not follow clear instructions. It might find that the policy conflicted with the citizen principals' best interests. In other words, agency law would provide courts reasons to void statutes and regulations above and beyond the authority granted them by extant statutes, common law, and constitutional provisions.

Perhaps, given contemporary technology, institutional designers could succeed where the 17th century colonies failed. Perhaps they could create a system of political representation that aligned perfectly with the factual presumptions of the private law of agency. Through the use of algorithms and big data, each citizen might be assigned a proxy who would vote for other citizens whose preferences and expectations are an exact match for each other. These citizens could give clear instructions to their proxy and, when unclear, the proxy could make an educated guess about what they might want, had they the opportunity and capability to consider the issue. In this instance, would not the private law of agency provide a successful standard from which an adjudicator might assess the success of the proxy's representation?

Proponents of an aggregative notion of democracy might be delighted with this solution. For them, lawmaking is most democratic when it is the outcome of the aggregation of individual voter preferences. For many others, though, this solution is not a democratic solution. Deliberative democrats do not

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[118] Bryan Garsten, *Representative Government and Popular Sovereignty*, POLITICAL REPRESENTATION 90, 99 (Ian Shapiro, Susan C. Stokes, Elisabeth Jean Wood & Alexander Kirschner eds., 2009).

[119] BRITO VIEIRA & RUNCIMAN, *supra* note 110, at 43.

believe that raw voter preferences should be crystallized into the law. Instead, these preferences should change under the "unforced force of the better argument."[120] The private law of agency cannot tell us which arguments are better, and which preferences will or ought to change. Civic Republicans, for their part, are committed to a public good that is greater than the sum of individuals' well-being.[121] The private law of agency might prevent representatives from even considering it. Neorepublicans, on the other hand, seek non-domination, even if some citizens would freely choose to be dominated.[122] A private law agency model, however, would frustrate a neorepublican; an agent must abide by a principal's instructions even when she disagrees.

E. *Lessons for the Public Fiduciary*

Accordingly, the private law of agency is a bad fit for political fiduciaries. Democratic publics cannot act in ways that make them plausible principals. Pretending that they fit facilitates anarchy, juristocracy or populism. A law whose purpose is to expand autonomy may work, ironically, to suppress it.

Nevertheless, certain aspects of private agency law remain appealing. First, some duties reproduce certain well-settled virtues of democratic legitimacy.[123] For example, an agent's fiduciary duty to disclose her activity to her principal would serve voters' autonomy. Especially given the mass surveillance and manipulation wielded more and more often by political actors,[124] holding representatives to a duty of disclosure and transparency

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[120] Andrew Sabl, *The Two Cultures of Democratic Theory: Responsiveness, Democratic Quality, and the Empirical-Normative Divide*, 13 PERSPECTIVE ON POLITICS 346 (2017); Jürgen Habermas, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 306, 304 (citing John Dewey, Habermas argues that the means by which a majority becomes a majority – debates, modification of views to meet the opinions of minorities – provides the foundation for democratic legitimacy)(William Reg trans., 1996).

[121] Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1528 (1992); Alex Gourevitch, *Labor Republicanism and the Transformation of Work,* 41 POL. TH. 591, 597 (2013) (describing the 19th century idea, found amongst the Knights of Labor, that labor could emancipate itself by "cooperative" decision making amongst workers for the common good"); Habermas, Between Facts and Norms, *supra* note 110, at 300 (characterizing the republican view as one where a state is "programmed by voters to carry out certain policies").

[122] K. Sabeel Rahman, *Democracy Against Domination: Contesting Economic Power in Progressive and Neorepublican Political Theory*, 16 CONTEMP. POL. THEORY 41; PETTIT, *supra* note 101.

[123] This conclusion is akin to that made by Galoob & Lieb, *The Core of Theory*, *supra* note 45, when they argue that certain fiduciary duties may be "translated" to comport with the unique, *sui generis* characteristics and norms of the public sphere.

[124] For an excellent historical and theoretical analysis of manipulative political rhetoric, *see* ROBERT L. GOODMAN, WORDS ON FIRE (2021).

might serve democracy. If the people are to wield power in any meaningful sense, they should do so after making deliberate choices guided by facts, not by manipulative conspiracy theories and fairy tales. Agency might inspire creative judicial thinking about how best to counteract the dilemmas of fake news and propaganda while keeping voters informed of facts they would likely deem material or even lifesaving.[125]

Second, a principal-agent model is indeed analogous to particular kinds of political activity. Discrete constituencies committed to discrete policy measures might be well-served by a private law agency model. To illustrate, consider a group of student borrowers seeking debt relief. They might authorize an agent (lobbyist) to advocate on their behalf to adopt legislation that would implement a debt jubilee. They can give relatively clear instructions to the agent and the agent, when exercising her discretion, can make an educated guess about what her principals would like her to do if they had the opportunity to weigh in. In any event, when the agent is uncertain about her instructions – she need only ask.[126]

Third, a fungible and parsimonious description the fiduciary relationship – including agency and political relations alike – might define this relationship as including other-regarding behavior.[127] What amounts to other-regarding behavior is of course open to broad contestation, but most would likely agree that it does not include stealing or quid-pro-quo corruption without any credible attending benefit for the public good.[128] Of course, what counts "quid

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[125] A recent harrowing example that might include the flood of misinformation, myth, and AI-generated alarmist propaganda, some of it published by public officials, following Hurricanes Helene and Milton in the Autumn of 2024. For a discussion, see Charlie Warzel, *I'm Running out of Ways to Explain How Bad This Is,* THE ATLANTIC (Oct. 10, 2024).

[126] A lobbyist's ability to consult her constituency is notability absent from a form of political office that scholars often suggest as ripe for the application of fiduciary norms: administrative agencies. *See*, *e.g.*, Criddle, *Fiduciary Administration*, *supra* note 8.

[127] Fox-Decent & Criddle, *supra* note 42, at 311 (describing essential characteristics of the fiduciary relationship (like vulnerability and power) and applying them to human rights organizations); Galoob & Leib, *The Core of Theory*, *supra* note 43, at 402 (identifying "core" principles of loyalty and care found within all public and private fiduciary theory); for a discussion of the over- and under-inclusivity of this definition, *see* Austin W. Scott, *The Fiduciary Principle,* 37 CALIF. L. REV. 539, 540 (1949); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty,* 55 VAND. L. REV. 1399, 1427 (2002).

[128] *See* Davis, *supra* note 20, at 1182 (citing William Magnuson, *International Corporate Bribery and Unilateral Enforcement,* 51 COLUM. J. TRANSNAT'L L. 360, 369 (2013)). I circumscribe corruption in this way because what counts as "patronage" and "quid pro quo corruption" may be in the eye of the beholder. Some may see a campaign contribution as a legitimate exercise of political rights; others may see it as buying regulatory favors. Some may see welfare entitlements as buying votes; others may see it as sensible policy.

pro quo corruption" may be in the eye of the beholder. Some may see a campaign contribution as a legitimate exercise of political rights; others may see it as buying regulatory favors. Some may see welfare entitlements as buying votes; others may see it as sensible policy.[129] As a result, this upshot is likely best implemented not by judges, but by those democracy empowers to make choices about what best serves their interests: the voters themselves.

III. TRUST

Just because agency fits uncomfortably to political office does not mean, however, that other models might not. For many, analogizing public and political office to trusteeship carries significant intuitive and analogical appeal.[130] Unlike agency models, trusteeship recognizes that officers will make decisions without direct oversight and based upon their own expert judgment. Furthermore, trust law accommodates the existence of multiple beneficiaries – *cestui que trust* – whose interests might conflict.[131] Consequently, when translated and applied to political representation, private trusteeship avoids some of the empirical and normative pitfalls of the agency model.[132] A trustee enjoys the authority to decide and act notwithstanding the lack of any definite instructions from an ascertainable principal capable of issuing clear commands. A trustee can use her authority to resolve conflicts of interests amongst the beneficiaries when it comes to the administration and distribution of the trust corpus. Accordingly, private trusteeship skips some of the conceptual compression that invites judges and demagogues to offer their own determinative opinions about what the public wants and what its interest requires. A certain amount of indeterminacy and fiduciary discretion is already accommodated by the model and quarantined from judicial review.

Indeed, trust has long been used as a tool of political organization and decision-making in the past.[133] As renowned legal historian Frederick W. Maitland explains in *State, Trust, and Corporation*, early modern communities

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[129] *See* John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics,* 19 AM. CRIM. L. REV. 117, 144 (1981).

[130] *See* Kim, *supra* note 9, at 872 (applying a trustee analogy to legislators trading on inside information); *see* Davis, *supra* note 20, at 1160 ("Fiduciary theorists sometimes analogize public officials to private trustees").

[131] Davis, *supra* note 22, at 1161 ("[A] simple duty of undivided loyalty is incoherent whenever a trustee serves more than one beneficiary. To address that problem, courts have interpreted the duty of loyalty to impose a duty of impartiality").

[132] *See* Leib & Ponet*, supra* note 5, at 181–82 (arguing that the trustee model better captures the empirical impossibility of principal-agent relationships amongst politicians and constituents).

[133] *E.g.,* Barratt, *supra* note 17 at 516; Mitchell, *supra* note 17, at 3–4 (citing RICHARD TITTLER, THE REFORMATION AND THE TOWNS IN ENGLAND: POLITICS AND POLITICAL CULTURE C.1540–1640 82–83 (1998)); *see generally* Leib & Kent, *supra* note 19.

used the trust—a conceptually flexible legal device—to facilitate their self-ordering, notwithstanding their lack of any official political or legal standing under the English monarchy.[134] Modern administration and the early 20th-century concept of the public utility[135] seem to parallel the public and charitable trusts established during the 18th and 19th centuries in the United Kingdom.[136] By dividing legal and equitable ownership of property, religious and commercial groups could not only maintain public infrastructure, but also engage in the long-term planning required to maintain stable relationships amongst their neighbors.[137] The trustee would manage community assets not for himself, or for the settlor, but in the interests of the community.[138] In an iteration congenial to empire-building, the federal Indian trust doctrine vested in the government a proprietary trust to manage the property of otherwise (ostensibly) self-governing indigenous communities.[139] Thus, the trust once empowered both trustees and their beneficiaries. The latter would hopefully enjoy the freedom to self-determine; the former the authority to decide what legal transactions would best help them do so. To this day, business, real estate and self-settled asset protection trusts obscure collective activity from regulators' prying eyes by operating under the façade of the trustee's individual legal personality.[140]

Nonetheless, while the law of private trust[141] avoids some of the conceptual problems presented by agency law, it replicates others. Like agency law, contemporary private trust law functions mainly to empower one party (here, the settlor or trustor) by constraining the autonomy of her fiduciary, the trustee. Under trust law, the trustee is authorized by a settlor to

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[134] F.W. MAITLAND, MAITLAND: STATE, TRUST AND CORPORATION 98–105 (David Runciman and Magnus Ryan eds., 2003) (describing how trust was used, e.g., to protect the self-governance of charities, Jewish and Catholic religious communities, etc.).

[135] Novak, s*upra* note 114, at 139.

[136] *See* Mitchell, *supra* note 17, at 5–6 (describing the use of statutory public trusts in connection to paving roads, lighting streets, constructing infrastructure, regulating markets, collecting taxes, establishing prisons, and so on).

[137] *Id.*

[138] *Id.* at 4.

[139] *E.g.*, Davis, *supra* note 20, at 1185; Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 591–92 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

[140] *See, e.g.,* Eric Chaffee, *A Theory of Business Trust,* 88 U. CIN. L. REV. 797, 808 (2020); Lee-Ford Tritt & Ryan Scott Teschner, *Re-Imagining the Business Trust as a Sustainable Business Form,* 97 WASH. U. L. REV. 1 (2019) (demonstrating that businesses run as trusts avoid ordinary corporate governance rules); Louis Story & Stephanie Saul, *Stream of Foreign Wealth,* N.Y. TIMES (Feb. 7, 2015), https://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html [https://perma.cc/YY9L-PMV5](identities of human owners of real estate hidden behind trust).

[141] I avoid including the law of public trust in this argument because it collapses conceptually into trustee political representation, discussed *infra* Section IV.B.

manage private property for the benefit of an ascertainable beneficiary chosen by the settlor. Accordingly, the trustee's discretionary authority is limited by the settlor's "settled" intent as manifested in a deed of trust. The trustee's authority to act, moreover, is further restrained by the ascertainability of the identity and interests of trust beneficiaries. Meanwhile, because private trust exists to empower settlors, it does little to empower beneficiaries. Beneficiaries enjoy negligible rights to influence the trustee. Even their right to equal (impartial) treatment is tempered by any conflicting commands expressed by the settlor.[142] A trustee's fiduciary duties follow suit; they emphasize the function that trust law plays in vindicating the liberty of the settlor. Thus, like agency law, the equitable law of trust looks more like a contractual gap-filler intended to preserve the expectations of a privileged settlor than it does a duty to do right by vulnerable beneficiaries.[143] This settlor-friendly conception of trust is *not* the same kind of trusteeship that Locke and others invoked when justifying the rebellion and regicide committed by citizen-*cestui que trust*.[144]

Because trust law empowers an individual settlor and her desire to benefit a limited population in a limited manner, using it to critique collective political arrangements leads to troublesome conclusions. It suggests that democratic decision-making is unjustifiable, that the most successful representatives focus on avoiding action altogether, and that ultimate policymaking authority rests with judges. History illustrates the purpose of this logic. According to legal historian Martin Loughlin, English Chancery Courts in the 18th and 19th centuries used the idea that public money was held in "trust" as a metaphorical device that justified their assertion of jurisdiction over local public officials.[145] In this manner, courts could second-guess the spending decisions of politically accountable lawmakers.

After providing a brief sketch of private trust law, the sections below demonstrate why private trust provides a democratically dangerous analogy that might allow courts to usurp legislators' role in making policy.

A. *The Law of Trust: Protecting the Settlor's Disposition*

Private trustees, though enjoying more authority to exercise their discretion than agents, are not dictators. Instead, they mainly serve the settlor. First, no trust relationship arises unless and until a settlor manifests an intent

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[142] For an economic analysis of trust law's balancing of a trustees conflicting duties to settlors and beneficiaries, *see* Robert Sitkoff, *An Agency Costs Theory of Trust Law,* 89 CORNELL L. REV. 621, 657–58 (2004).
[143] Davis, *supra* note 20, at 1168.
[144] *See* Leib & Kent, *supra* note 17, at 1323–24.
[145] Mitchell, *supra* note 17, at 19; MARTIN LOUGHLIN, LEGALITY AND LOCALITY: THE ROLE OF LAW IN CENTRAL-LOCAL GOVERNMENT RELATIONS 208 (1996).

to create one.[146] Trust law aims to vindicate the settlor's freedom of disposition.[147] Second, the private law of trust holds trustees to the instructions contained in the trust instrument,[148] a document prepared by the settlor[149]. The controlling consideration in trust interpretation is the settlor's intent.[150] The trustee's autonomy, therefore, is constrained by the settlor's expressed preferences.[151] Indeed, many contemporary trusts are formed precisely to empower settlors in their business, tax, and estate planning. Settlors often construct trusts to give away as few of their rights as possible while still retaining the tax savings and limited liability benefits of a transfer.[152] Other trusts use financial incentives to encourage others (the beneficiaries) to behave in a way the settlor wants them to behave.[153] Settlors may also provide binding instructions about how trustees must invest and distribute trust property. Third,

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[146] *E.g.*, Jimenez v. Lee, 547 P.2d 126 (Or. 1976); *In re* Smith's Estate, 22 A. 916 (Pa. 1891) (settlor must manifest intention to hold certain property in trust for ascertainable beneficiary); Otto v. Gore, 45 A.3d 120 (Del. 2012) (court requires strong evidence of settlor's intent to create a trust); Hebrew Univ. Ass'n v. Nye, 169 A.2d 641 (Conn. 1961); *In re* Estate of Fournier, 902 A.2d 852 (Me. 2006) (no trust unless settlor indicates intention to create a trust).

[147] Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 624–25 (2004); Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property is it, Anyway?*, 38 AKRON L. REV. 649 (2005).

[148] Of course, inter vivos oral trusts of personal property may also be enforceable if established by clear and convincing evidence, barring any applicable statute of frauds. *E.g.,* UNIF. TR. CODE § 407 (2005); *Fournier*, 902 A.2d at 852.

[149] *Fournier*, 902 A.2d at 852; Robert G. Natelson, *The Government as Fiduciary,* 35 UNIV. RICH. L. REV. 191, 211 (2001).

[150] *E.g.*, Uniform Trust Code at § 801; Huffer v. Huffer, 2017 Iowa Dist. LEXIS 157 (Iowa Dist. Ct. Dec. 26, 2017) (courts seek to construe trusts according to settlor intent); Univ. of S. Ind. Found. v. Baker, 843 N.E.2d 528, 532 (2006) ("The primary purpose of the court in construing a trust instrument is to ascertain and give effect to the settlor's intentions"); Morris v. Mathers, 2024 Ohio 2774 (5th Dis. Ohio Ct. App. July 22, 2024) ("A court's purpose in interpreting a trust is to effectuate…the settlor's intent")(citing Arnott v. Arnott, 972 N.E.2d 586 (Ohio 2012)). Furthermore, the duty of impartiality is parsed not as a duty to treat beneficiaries equally, but instead as a duty to give due regard to beneficiaries' interests as defined by the settlor when creating the trust. E.g., Howard v. Howard, 156 F.3d 89 (Or. App. 2007);

[151] John H. Langbein, *Rise of the Management Trust*, 143 TRS. & ESTS. 52, 54 (2004) (traditionally, trustees "had only those powers that the trust instrument expressly granted."); Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Partitioning*, WORLDS OF THE TRUST 428 (Lionel Smith ed., 2013) (contemporary trust law grants trustees broad default powers in the event settlor's instructions afford discretion).

[152] *See, e.g.*, I.R.C. §§ 2036(a)(2), 2038, 2501, 2503(b), 2503(c); Old Colony Trust Co. *v.* United States, 423 F.2d 601 (1st Cir. 1970) (tax advantages and disadvantages related to retention of use and enjoyment of property).

[153] *E.g.*, Howard v. Howard, 156 P.3d 89 (Or. Ct. App. 2007); Harootian v. Douvadjian, 954 N.E.2d 560 (Mass. App. Ct. 2011).

when a trustee does enjoy discretion to exercise her own judgment, that discretion must be exercised for the benefit of beneficiaries identified by the settlor.

Of course, the settlors of irrevocable trusts are not permitted to interfere with a trustee's day-to-day decision-making. Once the settlor executes a deed of (irrevocable) trust, her active role in the relationship ends. Nevertheless, the settlor's voice commands obedience from afar. When a dispute arises about the propriety of a trustee's actions, it's the settlor's intentions, as contained in the deed of trust, that are determinative. Only when the terms are *not* determinative (they are, *e.g.*, vague, ambiguous or amount to a delegation of discretionary decision-making power) must the trustee attend to the interests of the beneficiaries. The importance of the settlor's intentions under trust law is illustrated by the various perpetuities rules that apply to them. Only when the settlor is long dead—when it becomes impossible to argue that the trust serves the settlor's autonomy—may courts dissolve them.

The trustee's autonomy is further limited by the relative clarity of the identity and the interests of the trust beneficiaries. The law requires that the settlor name beneficiaries whose identities are ascertainable during the settlor's lifetime.[154] A trust benefiting "friends," the "community," or far-future relations is not a private trust at all. Nor can a settlor delegate to a trustee the responsibility of selecting beneficiaries.[155] Only the settlor, and the settlor alone, may decide for whom the trustee will manage and distribute property. Trusts fail as a result of "the indefiniteness of the cestui que trust."[156] Even charitable trusts must serve a purpose that does not indiscriminately benefit everyone and anyone at all.[157] As a result, a trustee may only act in a manner that serves the interests of these ascertainable parties, each hand-picked by the settlor. Particularly when settlors create trusts that define the beneficiaries' interests in terms of "ascertainable standards," the trustee's discretion to make trust distributions is limited by objective criteria: what is required to provide for, *e.g.*, the health, education, maintenance and support of the beneficiary.[158]

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[154] *E.g.,* UNIF. TR. CODE § 402(a)(3) (2005); Clark v. Campbell, 133 A. 166 (N.H. 1926).

[155] *Clark*, 133 A. at 170.

[156] *Id.*; *cf.* UNIF. TR. CODE § 402(c) (2005) (interpreting such delegation as a power of appointment).

[157] *E.g.*, Shenandoah Valley Nat'l Bank v. Taylor, 63 S.E.2d 786 (Va. 1951); Marsh v. Frost Nat'l Bank, 129 S.W.3d 174 (Tex. App. 2004).

[158] *See, e.g.,* Uniform Trust Code s 504(c)(2); Marsman v. Nasca, 573 N.E.2d 1025 (Mass. App. 1991); Weaver v. Riha (In re Helen R. MacMasters), 2016 Iowa App. LEXIS 1315, *4-*5 (Dec. 21, 2016); Bohac v. Graham, 424 N.W. 2d 144, 147 (N.D. 1988); Bureau of Support in Dept' of Mental Hygiene & Corr. V. Kreitzer, 16 Ohio St. 2d 147, 150 (Ohio 1968) (overruled on other grounds, Pack v. Osborn, 117 Ohio St. 3d 14 (2008); Martin v. Martin (1978), 54 Ohio St.2d 101, 8 (Ohio 1978) (trustees of a discretionary trust subject to a support standard may be required to exercise their

B. *A Trustee's Duties: Service to the Settlor, Crumbs for the Beneficiary*

Given the determinative nature of the trust instrument and the ascertainable interests of the beneficiary, the fiduciary duties of the trustee resemble the implied covenants of contract law. They bind the fiduciary more closely to the likely intentions and preferences of the settlor. For instance, the duty of prudence requires a trustee to conform to an objective, determinate standard a care a prudent person would adopt in similar circumstances.[159] When faced with a decision requiring an exercise of discretion, trustees are bound to exercise it in a way the settlor would have likely wanted, according to the ascertainable standards incorporated by the trust instrument and for the benefit of beneficiaries named by the settlor.[160] Other fiduciary duties guard against trustee misconduct that betrays settlors' reasonable expectations: laziness, carelessness,[161] prudent investment,[162] and self-serving behavior[163]. Notably, the law permits settlors to override many of these duties in the trust instrument.[164] Settlors may even exculpate trustees from liability for breach of their duties.[165]

While the law of private trust empowers settlors, it does little to empower trust beneficiaries. Trust law's elevation of the settlor's liberty rights is on full display when courts enforce terms that openly discriminate amongst beneficiaries. Though a trustee owes a duty of impartiality to beneficiaries,

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discretion to distribute income and principal in accordance with the standard); In re Trust Under the Will of Riessen, 2022 Iowa App. LEXIS 925 (Dec. 7, 2022); Torgerson v. Barkema (In re Trust of Barkema), 690 N.W.2d 50, 54 (Iowa 2004).

[159] *See, e.g.*, Davis, *supra* note 20, at 1161 (citing RESTATEMENT (THIRD) OF TRUSTS § 227 (AM. L. INST. 2007)); Under the duty of prudence, the trustee is held to an objective standard of care of a prudent person in like circumstances and must administer the trust in a manner suited to the purpose of the trust and the circumstances of the beneficiaries. *E.g.*, Boyden v. Stevens, 188 N.E. 741, 743 (Mass. 1934).

[160] *E.g.*, Woodberry v. Bunker, 268 N.E.2d 841, 844 (Mass. 1971).

[161] UNIF. TR. CODE § 804 (2000) (the duty of prudence).

[162] Robert H. Sitkoff, *Other Fiduciary Duties: Implementing Loyalty and Care*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 419 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

[163] *E.g.*, *In re* Gleeson's Will, 124 N.E.2d 624 (Ill. App. 1955); Hartman v. Hartle, 122 A. 615 (N.J. Ch. 1923); *In re* Rothko, 372 N.E.2d 291 (N.Y. 1977).

[164] RESTATEMENT (THIRD) OF TRUSTS §§ 78, cmt. c(2), d(1) (AM. L. INST. 2007); UNIF. TR. CODE § 802(g) (2000, rev. 2004).

[165] *E.g.*, New England Trust Co. v. Paine, 59 N.E. 2d 263 (Mass. 1945); RESTATEMENT (SECOND) OF TRUSTS § 222 (AM. L. INST. 1959); RESTATEMENT (THIRD) OF TRUSTS § 96 (AM. L. INST. 2007); Rutanen v. Ballard, 678 N.E.2d 133 (Mass. 1997); UNIF. TR. CODE § 1008(b) (2005); McNeil v. McNeil, 798 A.2d 503 (Del. 2002) (exculpation permitted except for bad faith or intentional misconduct).

that duty gives way to a settlor's express discriminatory intentions.[166] Thus, while a trustee's fiduciary duties undoubtedly function to protect beneficiaries from abuse,[167] this function is subordinate to the settlor's own freedom of disposition. Moreover, the only "governance" rights a beneficiary possesses are a limited right to information,[168] and a right to bring a lawsuit to enforce the trustee's fiduciary duties. Sometimes, beneficiaries are permitted to ask a court to terminate the trust and distribute the corpus. Beneficiaries, however, can only exercise this power under extraordinary circumstances.[169] A trustee's fiduciary duties, from time to time, might require the trustee to seek input from the beneficiaries.[170] But this input is not solicited in order to effectuate the beneficiary's preferences. Rather, it is collected as data relevant to determining whether and how to fulfill the settlor's purposes. Only because a settlor requires a trustee to keep a beneficiary in material comfort must a trustee assess the level of actual comfort enjoyed by the beneficiary.

C. *Trust Law Disfigures Political Representation*

Given its prioritization of the settlor's intentions, the private law of trust primarily serves one particular value: the individual autonomy rights of the settlor. Like agency law, therefore, trust law serves individual rights, not public freedom. Unlike agency law, however, trust law also benefits a second party: the beneficiaries. It does so, however, in an indirect and paternalistic way—a way that flies in the face of the democratizing aspirations of Locke, Harrington, and other revolutionary liberal democratic figures. Namely, it benefits beneficiaries only because the settlor both wishes it and provides the required means. Even charitable trusts, which tend to loosen many of the trustee's tethers to a settlor and its chosen beneficiaries,[171] foreclose the

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[166] *E.g., In re* Heller; Howard v. Howard, 156 P.3d 89 (Or. Ct. App. 2007); Harootian v. Douvadjian, 954 N.D. 2d 560 (Mass. App. 2011); UNIF. TR. CODE § 803 (2000).

[167] RESTATEMENT (THIRD) OF TRUSTS §§ 87, 70 cmts. a, d (AM. L. INST. 2007).

[168] UNIF. TR. CODE §§ 105, 813 (2000) (duties to inform, report, account, and disclose); Wilson v. Wilson, 690 S.E.2d 710 (N.C. Ct. App. 2010); Allard v. Pac. Nat'l Bank, 663 P.2d 104 (Wash. 1983).

[169] *See, e.g.*, Claflin v. Claflin, 20 N.E. 454 (Mass. 1889) (Claflin doctrine); *In re* Estate of Brown, 528 A.2d 752 (Vt. 1987); UNIF. TR. CODE § 411 (2000).

[170] *E.g.*, Marsman v. Nasca, 573 N.E.2d 1025 (Mass. App. Ct. 1991); Old Colony Trust Co. v. Rodd, 254 N.E.2d 886 (Mass. 1970). Leib & Ponet, however, argue that a trustee's duty to act in a beneficiary's best interests has inherently deliberative democratic characteristics. In order to act in a beneficiary's best interests, a trustee must deliberately engage with those beneficiaries, actively seeking their feedback on what activities might best serve them. Leib & Ponet, *supra* note 4, at 189; *accord*, Jackson, *supra* note 4 at 25.

[171] For instance, charitable trustees may deviate from a settlor's expressed charitable intentions under the doctrine of *cy pres*. *See, e.g.*, UNIF. TR. CODE § 413 (2000);

possibility of public autonomy and collective self-determination. Neither rich benefactors funding poorhouses nor their trustees poll the poor to ensure the trust attends properly to their needs as the poor themselves understand them.

Yet for many, the binding nature of the trustee's instructions, when combined with the trustee's menu of fiduciary duties, make it an appealing benchmark for politics. Citizens, like disenfranchised trust beneficiaries, are vulnerable to the discretion of their political "trustees." They might find some protection in the binding commands of a settlor (like the U.S. Constitution) and in a trustee's duties to avoid self-serving and reckless behavior. Thus, scholars like Evan Fox-Decent deploy private law trust concepts to protect citizens who must entrust their lives and livelihoods to political actors, and who suffer from "de facto" and "de jure" dependence on a state[172] authorized by some founding document. Robert Natelson, for his part, while observing that some Founders "repeatedly characterized officials as the people's servants, agents, guardians or trustees,"[173] favors a dis-empowering interpretation of lawmakers' constitutional authority. Sung Hui Kim, while avoiding many of the originalist preoccupations of Natelson, argues that members of Congress ought as trustees to avoid insider trading based on information they receive as part of their duties to manage the country in its best interests.[174]

Like agency law, however, applying trust law to politics is hazardous business. Like agency law, trust law relies on the existence of a settlor who is both (1) ascertainable and (2) whose choices are worth vindicating through legal enforcement. Recall that trust law serves primarily to empower a settlor whose wishes are "settled" without much possibility for later emendation. But who is this settlor, precisely, when it comes to political association?[175] Jurists might point to the Founders and the U.S. Constitution. They might then celebrate a normative model that defers to this text when answering any and all questions about how political trustees ought to govern. The doctrine of private trust, in other words, provides additional intellectual ballast for

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Obermeyer v. Bank of America, 140 S.W.3d 18 (Mo. 2004). For an argument in favor of the expansion of *cy pres*, *see generally* Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353 (1989). In addition, the charitable trustee's fiduciary duties are not ordinarily owed to or enforceable by a settlor. Instead, duties run to the public beneficiary and are mainly enforceable by attorneys general and certain individuals with a "special interest." *See, e.g.,* RESTATEMENT (THIRD) OF TRUSTS § 94(2); In re Milton Hershey Sch. Tr., 807 A.2d 324 (Pa. Commw. Ct. 2002); *cf*., Smithers v. St. Luke's-Roosevelt Hosp. Ctr., 723 N.Y.S.2d 426 (App. Div. 2001).

[172] Fox-Decent, *Sovereignty's Promise*, *supra* note 7, at 99.

[173] Natelson, *Public Trust*, *supra* note 10, at 1084, 1092.

[174] Kim, *supra* note 9, at 872–75. For another similar argument, *see* Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 B.U. L. REV. 1105 (2011).

[175] Davis, *supra* note 20, at 1160-1161.

conservative originalists.

Many others, however, would object. They might reject as anti-democratic the elevation of originalist understandings of the under-determinate text of the Constitution, especially when the determinative elaboration of those understandings is assigned to U.S. Supreme Court justices. They might further deny that the business of governing ought to proceed according to the expressed preferences of long dead national Founders. Meanwhile, as Seth Davis points out, the Founders *already* provided political mechanisms to address breaches of the public trust: impeachment and elections.[176] Adding an additional legal remedy can be fairly characterized as naked judicial self-aggrandizement. But the problem of the inaccessible political settlor is not resolved by embracing a living constitutionalism or by redefining the settlor as citizens more broadly. If we identify the settlor as the sovereign people as it exists now, then the trust model repeats the normative and empirical mistakes of the agency model. "The people" cannot speak with a coherent voice. They have vastly different, but reasonable, interpretations of the provisions of the U.S. Constitution. The result, as in agency law, is either regulatory quietism (the political trustee carries no mandate) or demagoguery (the political trustee is uniquely capable of deciphering the will of the settlor).

Even setting aside the intractable problems related to settlor identity, the trustee model flounders. In politics, what amounts to the beneficiary's "best interests" is far from clear.[177] Political beneficiaries are not ascertainable with the kind of certainty contemplated by trust law. Populations change from day-to-day. Representatives make decisions both for their own constituencies and for the country as a whole; their choices impact citizens existing now and citizens who are as yet unborn.[178] Citizens' disagreements about which policies might serve the public interest best motors political debate and discourse. Citizens cannot even agree, for instance, about what kind of treatment is truly impartial. Some embrace the equality of formalism;[179] others the equality of equity and inclusion.[180] A trustee representative cannot, moreover, easily make impartial choices when citizens' interests are often irreconcilable and zero-sum.[181] A private trust model, however, would invite

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[176] *E.g.*, *id.* at 1150, 1172–74 (citing THE FEDERALIST NO. 65 (Alexander Hamilton); Buckner F. Melton, Jr., *Federal Impeachment and Criminal Procedure: The Framers' Intent*, 52 MD. L. REV. 437, 456–57 (1993)).

[177] *E.g.*, Davis, *supra* note 20, at 1158-1159.

[178] Leib & Ponet, *supra* note 4 at 181–83.

[179] For an example, see Natelson, *Public Trust*, *supra* note 10, at 1090.

[180] *See, e.g.*, the public debate surrounding the U.S. Supreme Court's striking down race-based college admissions policies in Students for Fair Admissions v. President and Fellows of Harv. Coll., 600 U.S. 181 (2023); Nina Totenberg, *Supreme Court Guts Affirmative Action, Effectively Ending Race-Conscious Admissions*, NPR (June 29, 2023), https://www.npr.org/2023/06/29/1181138066/affirmative-action-supreme-court-decision [https://perma.cc/Z8JN-2XCH].

[181] Natelson, *Public Trust*, *supra* note 10, at 1150.

courts and demagogues to declare that they can nonetheless ascertain who the people are and what lies in their best interests.

To explain, private trust law invites judges to make best interest determinations when they are asked by disgruntled citizens to overrule politicians' judgments. If political trusteeship is believed to involve the same kind of ascertainable standards invoked in private trusteeship, then a judge can claim to be uniquely competent to apply them. A private trust model, stated more simply, facilitates judicial paternalism and impedes democracy.[182] A few historical examples should demonstrate that this conclusion is not mere alarmism. In the 19th century, U.K. courts of chancery deployed trust law at the behest of citizens disgruntled with their political leaders' decision-making regarding the spending of public money. In 1805, litigants tried to convince a court to vitiate a former officials' decision to use money for partisan purposes.[183] Of course, what amounts to an improper partisan purpose and what objectively serves the common good depends crucially upon one's party identification. Avoiding administrative, electoral, and parliamentary channels of accountability, "some newly seated officials used trust doctrine to recover funds alienated by [former officials] . . . before the local elections that followed."[184] In more recent cases, a court of chancery struck down a policy undertaken by a local London official to reduce public transit fares, arguing that this "unlawful extravagance," which followed budget cuts, violated the officials' duties as public trustees.[185] A 1953 court similarly voided a policy to give free bus fare to senior citizens, arguing that the local government violated its duty of impartiality to taxpayers: "it would amount to simply making of a gift…to a particular section of the local community at the expense of the general body of ratepayers."[186] One can only imagine the havoc such doctrine might wreak on school lunch programs, Pell educational grants, and Social Security.[187]

Asking a court to decide how public money is best spent may strike U.S. lawyers as odd. After all, the U.S. Constitution grants the power to tax and spend to Congress, not to Article III courts. But this violation of the separation of powers is *precisely* what applying trust to political decisions encourages.

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[182] *See id.* at 1164–65 (arguing that juridical accountability measures are particularly important when policing fiduciary duties).
[183] Barratt, *supra* note 17, at 518, 521–22.
[184] Mitchell, *supra* note 17, at 17 (citing AG v. Wilson, (1837) 40 Eng. Rep. 773, 790; 2 My & Cr 613, 630 (Shadwell VC)).
[185] Barratt, *supra* note 17, at 533–34 (citing Bromley LBC v. GLC, [1983] AC 768 (CA and HL)).
[186] *Id.* at 532.
[187] *See* Davis, *supra* note 20, at 1177 (citing United States. v. Carolene Prods. Co., 304 U.S. 144, 152 n. 4 (1938) (noting that the special judicial protections that courts afford to traditionally disenfranchised minorities would be undermined by the fiduciary framework); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 152–154 (1980).

These are all cases where unhappy citizens eschewed the ordinary way of solving policy disputes about where the public's best interests lie: elections. Instead, litigants invited courts of equity to step into the legislature's shoes, offering judges the alluring opportunity to answer quintessential political questions of public expenditures and fiscal policy. To be sure, U.S. courts, when they deploy the fiduciary duties of trust against public officials, they seem to do so only in instances of clear *quid-pro-quo* corruption.[188] Yet entrepreneurial judges and litigants may someday ask for more. "[I]t is difficult," after all, "to distill a limited principle" for fiduciary duties.[189] The threat may be attenuated, but it is real.

D. *Lessons for Public Fiduciaries*

Like the private law of agency, the private law of trust does not serve as a useful model for political and public office. Since trust serves the autonomy of the settlor, an ascertainable settlor must exist whose choices are worth facilitating through a trust mechanism. Finding an identifiable "settlor" worthy of empowerment is, as explained above, difficult in the political context. One must either: (1) elevate the desires of the Founders and the text of the U.S. Constitution above the desires of the contemporary public; or (2) commit the mistake of insisting that citizens can speak with the intelligibility of an ascertainable settlor. Furthermore, the trustee's duties to act in the best interests of the beneficiary lacks clarity in the political context. By nonetheless applying the private law model, scholars inadvertently suggest that these duties can be non-controversially identified and applied by judges. It therefore risks juristocracy while inadvertently delegitimizing collective democratic decision-making.

Certain aspects of the law of private trust nonetheless may be useful to a concept of public office that prioritizes public autonomy. For example, an administrative agency carrying out the commands of Congress after bicameralism and presentment (codified, or "settled," in the agency's organic statute) might benefit from a private law trust model.[190] The model could explain, for instance, why agencies do not, in fact, usurp the powers of elected lawmakers. Agencies empower Congress to expand its capacities just as

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[188] Driscoll v. Burlington-Bristol Bridge Co., 86 A.2d 201 (N.J. 1952); Fuchs v. Bidwill, 334 N.E.2d 117 (Ill. App. Ct. 1975); United States v. Gray, 790 F.2d 1290, 1294 (6th Cir. 1986) (quoting in part *United States v. Mandel*, 591 F.2d 1347, 1363 (4th Cir. 1979), *rev'd* McNally v. United States, superseded by statute, 18 U.S.C. § 1346 (2006)).

[189] Davis, *supra* note 20, at 1150.

[190] *See* Natelson, *Government as Fiduciary*, *supra* note 17, at 211; Criddle, *Fiduciary Administration, supra* note 8, at 135–138. But, as Galoob & Leib, *Core of Theory, supra* note 43, at 414, point out, "[a] commitment to thinking that fiduciary principles should and do explain some aspects of administrative law does not entail that these principles generalize across (or within) all fields of public administration.".

trustees expand the power of settlors to devise their property. While congressional intent is controlling in the same way that a settlor's intent is controlling, Congress is no principal ready, able, and willing to give guidance to agents uncertain of their instructions. As a result, courts might derive some insight from trust law to answer hard questions about the contours of agency discretion—at least insofar as the answers serve public autonomy. For instance, trust suggests that agencies can do a better job acting in the interests of their citizen-beneficiaries if they inquire into the beneficiaries' state of wellbeing. Just as a trustee tasked by a settlor to look after the health of a beneficiary must examine her beneficiary's doctor bills, an Equal Employment Opportunity Commission official tasked to fight discrimination against workers must consult working people about their experience of discrimination. As Leib and Ponet correctly argue, taking the rights and interests of a beneficiary seriously means taking an active role in determining their needs and preferences.[191] Notably, the solution suggested by trust law can be one of judicial modesty: neither the trustee nor the court can answer questions about the interests and preferences of citizens subject to and benefitting from regulation. Those citizens should be able to speak for themselves.

IV. CORPORATION

As argued above, agency and trust, whether applied literally or analogized to political office, ironically produce outcomes inimical to liberty. Furthermore, making their features legible to a theory of constitutional democracy yields only piecemeal insights. In contrast, corporate law provides a significantly more accurate template. Unlike trust law, corporate law features an unascertainable beneficiary ("the corporation and its shareholders") whose interests are not only subject to reasonable disagreement, but strong political division. The authority of the corporate board, like the authority of public representatives, has a composite and indeterminate source derived from both legal rules and member input. Like a democratic polity, furthermore, those involved in authorizing the fiduciary (whether shareholders or citizen voters) are not identical to those subject to the fiduciary's decision-making (whether an entire population of state subjects or corporate stakeholders). Corporate law and democratic procedures likewise overlap. Each lends significant decision-making autonomy to their officers and often rely on non-judicial, political accountability mechanisms. Both corporate law and democratic politics, finally, serve a common value: the interest and autonomy of a group—a public. In Evan Criddle's words, both involve the "coordination and cooperation of individuals in. . . associations devoted to the pursuit of common or shared ends."[192]

Yet significant differences relevant to autonomy exist between the public

[191] Leib & Ponet, *supra* note 4, at 13; Jackson, *supra* note 4, at 324–325.
[192] FIDUCIARY GOVERNMENT, *supra* note 4 at 25.

fiduciary and the corporate fiduciary. First, the power wielded by corporations, although often impressive, pale in comparison to the power of the state. When shareholders and other corporate constituents object to fiduciaries' decision-making, they can easily "vote with their feet" rather than engage in costly collective action. Furthermore, though the corporate interest may be judicially indeterminable and subject to contestation and disagreement, it is at least limited in scope. A corporate purpose can be almost anything, but it cannot be everything. A state's purposes are much more capacious and comprehensive. Accordingly, the risk that corporate fiduciaries will abuse those vulnerable to their decision-making may be less significant and, consequently, the need to police their behavior may be reduced. Corporations cannot, on their own, put you in jail.

Corporations' limited "jurisdiction" over those vulnerable to their behavior hints at a second, and perhaps more important, difference. Corporate authority is at least partly a result of a state's delegation of power.[193] In contrast, the state's authority is a *sovereign* authority: it is comprehensive. The state's authority is comprehensive not because it regulates all things at all times, but because no other source of authority, whether religious, ethical, or political, can compete with it.[194] Within a liberal constitutional democracy, the state's sovereignty is justifiable because it is *popular*: power is constituted and exercised according to constitutional, liberal, and democratic desiderata that include everyone equally within the collective decision-making process. Thus, while a corporate fiduciary's authority comes "from above" by express statutory delegation, a political fiduciary's authority is part of a self-generating, self-constituting democratic political process. Stated in simpler language, the state is the mechanism through which citizens collectively exercise their public freedom. A corporation is a mechanism through which some citizens may exercise some of their associational freedoms.

These differences suggest that while corporate law can provide a powerful analogy to public and political office, its features cannot be accepted without modification. The section below addresses these differences and similarities in more detail. It concludes by arguing that fiduciary law scholars looking to corporate law for guidance about the norms that ought to guide public officials can find reliable, but incomplete, inspiration from corporate law.

A. *Corporation and Constitution: A Shared Historical Provenance*

First, though, it is worth noting that the overlapping characteristics of the United States and its corporations is no accident. The monarchy itself was considered a kind of corporation.[195] Many American colonies, whose charters

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[193] *See, e.g.*, DEL. CODE ANN. TIT. 8, § 141(a) (West 2024).
[194] Jean L. Cohen, *Freedom of Religion, Inc.*: *Whose Sovereignty?*, 43 NETH. J. L. PHIL. 169, 204–210 (2015).
[195] *Id.*; MAITLAND, *supra* note 134, at 46 (discussing corporation sole).

provided inspiration for the Founders, were corporations. Massachusetts had its beginnings as the Massachusetts Bay Company.[196] So too did Virgina, which began as the Virginia Company[197]. As political historian Peverill Squire explains, many of these colonial corporations were governed, from the outset, by representative bodies chosen by an electorate of property holders[198] and freemen.[199] Except for a few New England communities that started with directly democratic assemblies,[200] American colonies, like the United States, were governed by representative bodies. Indeed, the King of England required such bodies in their charters.[201] Furthermore, the United States was perhaps the first country to adopt a written constitution of higher law precisely because of its experience with the written corporate variety.[202] Moreover, as Mary Sarah Bilder explains, the idea of judicial review of state action arose from longstanding English corporate law.[203] If the decision-making of English corporations could be judged for their compliance with higher English law, the decisions of U.S. lawmakers could be weighed for their compliance with higher constitutional law.

The shared historical provenance of the corporation and the liberal, constitutional, representative democracy of the United States is not, however, itself a good reason to apply the same norms and fiduciary duties to each[204]. Both the state and the corporation have gone through substantial moral and empirical transformations since the 17th and 18th centuries.[205] States democratized and corporations became explicitly commercial. As explained further below, applying the norms of the corporation to representative democracies might delegitimatize the political system and needlessly restrict the scope of political governance. Nevertheless, corporate and political

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[196] Ciepley, *supra* note 51, at 142; Natelson, *Public Trust*, *supra* note 10, at 1112; Geoffrey P Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 GEO. WASH. L. REV 1, 3–5 (2010); SQUIRE, *supra* note 115, at 14; MORGAN, *supra* note 23, at 39.

[197] SQUIRE, *supra* note 115 at 12; Ciepley, *supra* note 51, at 142.

[198] SQUIRE, *supra* note 115, at 19.

[199] MORGAN, *supra* note 23, at 44.

[200] SQUIRE, *supra* note 115.

[201] MORGAN, *supra* note 23, at 41.

[202] David Ciepley, *Is the U.S. Government a Corporation? The Corporate Origins of Modern Constitutionalism*, 111 AM. POL. SCI. REV. 418 (2017); David Ciepley, *The Corporation as Chartered Government*, 51 HOFSTRA L. REV. 815, 818 (2018).

[203] Mary S. Bilder, *The Corporate Origins of Judicial Review,* 116 YALE L.J. 502 (2006).

[204] Of course, originalists might interpret the U.S. constitution's fiduciary language according to how that same language was used and understood in the corporate context in the late 18th century. I am neither an originalist nor a constitutional law scholar, so I will leave this argument to others who can make it much more capably. For excellent examples, *see* Miller, *supra* note 14, at 1; Natelson, *Public Trust*, *supra* note 10.

[205] For an excellent and concise discussion of these changes, *see* Ciepley, *supra* note 51.

officers share many characteristics relevant to collective and individual autonomy.

B. *Shared Features: Inchoate Beneficiaries, Composite Principals, and Political Accountability*

Several characteristics shared by corporations and democratic states are congenial to collective self-determination. First, when their beneficiaries and their interests are left undefined by legal doctrine, participants are free to self-determine. Second, this self-determination is possible because officers are authorized through a legal process that distributes political power in an even-handed way. Third, individual freedom is guaranteed in the face of collective decision-making not just by the judicial enforcement of individual legal rights, but by *political* accountability mechanisms.

1. *Inchoate Group Beneficiaries*

In contrast to agency and trust, the identity of the beneficiary of corporate law is not easy to pin down. Although corporate officers owe duties to "the corporation and its shareholders,"[206] corporate law leaves "the corporation" – and therefore its interests – largely undefined. Nor is there definitional help to be had outside case law. Conflicting philosophical and legal examinations into the nature and ontology of "corporate personhood" continue to proliferate.[207] Nor does the addition of "and its shareholders" provide much clarification. A corporation is, by law, necessarily something distinct from its shareholders.[208]

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[206] *E.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) ("the board's power to act derives from its fundamental duty and obligation to protect the corporate enterprise, which includes stockholders, from harm reasonably perceived, irrespective of its source."); *In re* Trados, Inc. Sh. Litig., 73 A.3d 17, 40–41 (Del. Ch. 2013).

[207] For a very recent summary and analysis of theories of corporate personhood, *see* Katharine Jackson*, The Three False Choices of Corporate Personhood: Building a Framework for Corporate Constitutional Rights*, 21 BERK. BUS. L.J. (forthcoming 2024). For an agenda-setting argument about the irreducible indeterminacy of corporate personhood, *see* John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926). For seminal statements of real entity theory, *see* OTTO VON GIERKE, COMMUNITY IN HISTORICAL PERSPECTIVE 130 (1990); JOHN NEVILLE FIGGIS, CHURCHES IN THE MODERN STATE 40 (1914); G.D.H. COLE, NEVILLE FIGGIS, & HAROLD LASKI, THE PLURALIST THEORY OF THE STATE 20–21 (Paul Q. Hirst ed. 1989).

[208] *E.g.*, Verlaque ex rel. Narrows Joint Venture v. Charles A. Zonko Builder, Inc., 1989 Del. Super. LEXIS 375, at *17 (Sept. 11, 1989) ("the corporation is an entity distinct from its shareholders even if its stock is wholly owned by one person or corporation") (quoting Scott-Douglas Corp. v. Greyhound Corp., 3904 A.2d 309, 314

Regardless, shareholders, like political citizens, are no monolith. Retail investors, pension funds, pension fund beneficiaries, hedge funds, employee stock owners, day traders, and short sellers have different ethical priorities and financial horizons.[209] Some shareholders might support corporate policies that attend to environmental and social justice. Others might not. Some want to sell the company immediately to the highest bidder; others want to wait to see the company grow over the long run. Some shareholders invest because they simply want to be a part of a favored company — Disney's large cadre of retail investors comes to mind. Others want a secure and comfortable retirement. When individual investors are organized through institutions, the heterogeneity of shareholder preferences and interests remains. Institutional investors themselves embrace different goals.[210] Even the rules of procedure governing shareholder litigation recognize their diversity. Under Del. R. Civ. P. 23.1(c)(ii), only those shareholders who can "fairly and adequately represent" the interests of the corporation may serve as a plaintiff. The rules recognizes that some shareholders will have different interests that make them inadequate representatives — for instance, short sellers and others with conflicts of interest.

A similar indeterminacy characterizes political office.[211] The amount of academic ink spilled in attempts to define "the corporation" and its interests is dwarfed only by the amount of ink spilled in worthy but ultimately unsatisfying endeavors to define "the people" and its interests.[212] Politics has its own real entity theorists (*e.g.*, Carl Schmitt on the right, Chantal Mouffe on the left), aggregation theorists (*e.g.*, the social choice theory of Marquis de Condorcet and Kenneth Arrow), and concession theorists (*e.g.*, Robert

(Del. Super. 1973)); Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1034–1040 (Del. 2004) (addressing the difference between direct and derivate causes of actions against boards of directors). Indeed, a separate cause of action to pierce the corporate veil is required to ascribe wrongs committed by the corporation to its shareholders. *E.g.*, Green v. House of Wright Mortuary, Inc., 2005 Del. Super. LEXIS 415, at *6-7 (June 21, 2005).

[209] *E.g.,* Equity-Linked Investors, L.P. v. Adams, 705 A.2d 1040 (Del. Ch. 1997) (a case addressing a conflict between long-term oriented common shareholders and short-term oriented preferred shareholders).

[210] *E.g.*, SRI funds; private equity; short-sellers, etc.

[211] *See* Rave, *supra* note 26, at 676. (Rave characterizes shareholders and voters as "diffuse principals"). I would not characterize either as principals, since this term is one associated with agency law and suggests a right of the principal to control the fiduciary agent.

[212] *E.g.*, MORGAN, *supra* note 23.

Filmer,[213] Hobbes and Hans Kelsen).[214]

Arguably, in politics and corporations, the identity and interests of the beneficiary are things actively and continuously constructed by both members and their leaders alike.[215] The definitional slipperiness is an autonomy-enhancing feature, not a bug. When the law fails to codify a meaning, participants can come up with and advocate for their own. The shareholders and employees of Patagonia, Inc., for example, can decide that their corporate interests include the environment and those negatively impacted by climate change. The shareholders of Boeing, Inc., reeling from years of disaster, might decide their interests are best served not through cost-cutting and buy-backs, but through expensive long-term investments in product safety. The absence of legal determination invites self-determination – not unlike how democratic citizens debate different visions about of who they are, or should be, as a people.

Of course, some shareholder "populists" may nevertheless insist on the homogeneity of shareholder interests and occlude dissenting shareholder viewpoints.[216] For instance, in derivative litigation surrounding mergers and acquisitions, shareholder representatives might assert that directors would best serve shareholder interests by accepting a deal that maximized share price.[217]

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[213] ROBERT FILMER, PATRIARCHA: OR THE NATURAL POWER OF KINGS 12 (1680) ("And this subjection of Children being the Fountain of all Regal Authority; It follows that Civil Power not only in general by Divine Institution, but even the Assignment of it specifically to the Elder Parents, which quite takes away that New and Common distinction, which refers only Power Universal and Ab solute to God; but Power Respective, in regard of the Special Form of Government to the Choice of the people."). For Filmer, God is the sovereign who gives the concession to govern not to the people democratically, but to a monarch.

[214] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 115–120 (Anders Wedberg Trans., 1949) (explaining the concept of the *grundnorm*, or basic norm, which forms the underlying basis for an entire legal system – but which may not be a substantive first principal, but a hypothetical.).

[215] MORGAN, *supra* note 23; TUCK, *supra* note 23.

[216] One (in)famous example is found in Dodge v. Ford Motor Co., 204 Mich. 459, 507–508 (1919). Shareholder Dodge asserted that the company's investments in new manufacturing facilities were not in the best interests of shareholders – who would be served best with a dividend. Reasonable minds, however, disagreed; the Court held, *inter alia*, that longer-term investors may very well be best served by expansion of capital expenditures. Similarly, populist politics involves the conceptual and strategic suppression of dissenting viewpoints. *See, e.g.*, Nadia Urbinati, *Political Theory of Populism,* 22 ANN. REV. POL. SCI. 111, 116, 118 (2019); ANDREW ARATO & JEAN L. COHEN, POPULISM AND CIVIL SOCIETY: THE CHALLENGE TO CONSTITUTIONAL DEMOCRACY 13, 138–39 (2022).

[217] For a seminal article exploring the relationship between the shareholder franchise and share value, *see* Lucian A. Bebchuk, *The Case for Increasing Shareholder Power,* 118 HARV. L. REV. 833 (2005). The implication of the argument is that since shareholders like high share value, giving them more political rights within the corporation will lead to higher firm value.

The higher the price, the better it is for shareholders. All shareholders want more money now. Similarly, economic models characterize shareholders as interchangeable one-dimensional "principals" that uniformly desire their director "agents" to refrain from shirking and slacking.[218] But as Delaware Courts have pointed out time and again, shareholder preferences and interests are heterogeneous and do not fit comfortably with such simplification.[219] Short-sellers want a company to *lose* money. Day traders care about short-term swings in share price. Activist institutional investors look for quick profits.[220] Ordinary investors carry diversified portfolios and care about long-term value creation and the overall health of the economy. Unlike Wall Street movers and shakers, they still owe the bulk of their wealth to their employment.[221] Some shareholders invest not to make money, but instead because they want to feel connected to a particular brand or personality.[222] Other shareholders might gladly sacrifice some growth in exchange for environmentally friendly investment decisions.

In short, shareholders – like political citizens – are no monolith. Why bother allowing shareholders to vote on a merger if it were impossible for them to disagree about where their interests lie? If shareholder interests always align, why bother engaging in proxy campaigns geared toward persuading shareholders to vote one way rather than another?[223]

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[218] *See, e.g.*, Michael C. Jenson & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. FIN. ECON. 305 (1976). I do not mean to argue that these models fail to generate useful insights or predict outcomes. I mean to argue, rather, that it is possible for decision-makers to enlist them to justify decisions that can be quite controversial, all the while claiming that their decisions are in everyone's best interests.

[219] The legal doctrine governing controlling shareholders easily demonstrates that shareholders do not always share interests. Indeed, they often conflict. *See, e.g*., In re Molycorp S'holder Derivative Litig., 2015 Del. Ch. LEXIS 152 (May 27, 2015); In re CompuCom Sys. S'holders Litig., 2005 Del. Ch. LEXIS 145 (Sept. 29, 2005). Likewise, if a corporation is facing insolvency, preferred shareholders will benefit from decisions that maximize cash flow in the short term. Meanwhile, common stockholders might support a "moonshot" investment that has some non-zero chance of paying off in the speculative long-run. *See, e.g.*, Equity-Linked Inv. v. Adams, 705 A.2d 1040 (Del. Ch. 1997).

[220] Leo E. Strine, Jr., *Who Bleeds when the Wolves Bite? A Fleish-and-Blood Perspective on Hedge Fund Activism and -Our Strange Corporate Governance System,* 126 YALE L.J 1870, 1871–72 (2017) [hereinafter Strine Jr., *Who Bleeds When the Wolves Bite*?].

[221] Leo E. Strine Jr., *Toward a Fair and Sustainable Capitalism* 3, ROOSEVELT INST. (2020); Strine Jr., *Who Bleeds When the Wolves Bite*, *supra* note 220, at 1872.

[222] *See* Brooks Barns & Lauren Hirsch, *For Disney, Small Shareholders Loom Large in Boardroom Fight,* N. Y. TIMES (Apr. 1, 2024); Eric Cortellessa, *Why is Trump's Truth Social Worth Billions?,* TIME (Mar. 26, 2024).

[223] For a useful discussion on the usefulness of proxy campaigns, *see* Kobi Kastiel & Yaron Nili, *Competing for Votes,* 10 HARV. BUS. L. REV. 287 (2020).

2. *Composite Principals*

Corporate and political office share another characteristic relevant to collective autonomy. In both, the party authorizing the officer is not an identifiable agent or individual, but a composite. Corporate authority derives from human beings working together according to procedures set out elsewhere. These procedures tend to facilitate individuals' equal right to exercise their collective freedom together. Specifically, a corporation's directors derive their authority from statute. Section 141(a) of the Delaware General Corporation Law, for example, holds that "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors…" "A cardinal precept of Delaware law," according to the Delaware Supreme Court, "is that directors, rather than shareholders, manage the business and affairs of the corporation."[224] Other sections set out how directors ought to decide and how they are selected: majority rule and election.[225] Corporations do not spring from the earth like mushrooms,[226] fully-formed and under their own innate powers. Instead, flesh-and-blood human incorporators organize it by filing the correct kind of paperwork with a secretary of state. Further, it is human beings — shareholders or their proxies — who, by law, must elect the directors authorized to manage the corporation. The shareholder franchise is, according to Chancellor Allen, "the ideological underpinning upon which the legitimacy of the directorial power rests."[227] Similarly, the source of political officers' authorization is a composite of rules and people.[228] Elected lawmakers and other officials can point to the U.S. Constitution as a source of their authority. Also like corporations, the identity of those filling the seats of authority are selected by real-life living human beings according to legal processes designed to distribute political power equally.

As a result, authorization for both corporations and polities is a collective process, not simple diktat. That process can be, and has been, democratized

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[224] United Food & Com. Workers Union & Participating Food Indus. Emp. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034 (Del. 2021) (internal quotations omitted); *also, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985) ("The ultimate responsibility for managing the business and affairs of a corporation falls on its board of directors."); *see also, e.g.*, DEL. CODE ANN. tit. 8, §141(a) (West 2024); 17 C.F.R. § 240.14a-8 (2020) (shareholders may not access proxy materials for routine business matters).

[225] DEL. CODE ANN. tit. 8, § 411(b) (West 2024); U.S. CONST. Arts. I and II; Rave, *supra* note 26, at 676.

[226] Or fall from the coconut tree.

[227] Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988).

[228] For an excellent account of the corporate "person" as an institution constituted by both rules (laws, charters and by-laws) and human beings, *see* ERIC W. ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM (2013).

over time for each. Since more individuals have more say about the scope of officers' authority, characterizing officer authorization as an act of collective autonomy is apt.

3. *Non-identity and Political Accountability*

Corporations and polities are also both alike in that the authorizer, admittedly a composite, does not share an identity with the beneficiary. The people doing the voting are not the same population as those subject to the fiduciary's decision-making. As a result, the possibility that officers will betray the liberty rights of their beneficiaries exists for both polities and corporations. Within the corporate context, the incorporators, the state, and the shareholders are not "the corporation and its shareholders," though certainly there will be some overlap. Within the political context, the individuals voting for their representatives are not the same population of individuals subject to representatives' lawmaking. Some voters will die, face incarceration or legal incapacitation, and move away. Others will immigrate, reach majority or register to vote for the first time. Lawmakers in 2024 will make laws binding on citizens who won't be born until the year 2054. A voter in New York will elect a representative who will help make laws that are binding in Texas and California. A voter who casts her ballot for the losing candidate will nonetheless be subject to the laws passed by the winner.

To be sure, both citizens and shareholders can petition their representatives.[229] They also occasionally enjoy a right a direct referendum[230] in exceptional circumstances.[231] But generally speaking, on a day-to-day basis, only the determinations made by a convened body of elected decision-makers[232] (and their authorized delegates)[233] will be legally binding.[234] Of

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[229] *E.g.*, U.S. CONST. amend, I; 17 C.F.R. § 240.14a-8 (2020).

[230] Even here, shareholders do not have the legal right to make substantive rule changes. Instead, they can only suggest amendments to decision-making procedures. They cannot specify the outcome of these procedures. CA, Inc. v. AFSCME Emp. Pension Plan, 953 A.2d 227, 232 (Del. 2008).

[231] *E.g.*, DEL. CODE ANN. tit. 8, §§ 242(b) (Amendment to articles of incorporation); 251(c) (mergers); 271(a) (sale of assets); 275 (dissolution) (West 2024).

[232] *E.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 953 (Del. 1985) ("The board has a large reservoir of authority upon which to draw. Its duties and responsibilities proceed from the inherent powers conferred by 8 Del. C. § 141(a), respecting management of the corporation's 'business and affairs'"); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 179 (Del. 1986) ("The ultimate responsibility for managing the business and affairs of a corporation falls on its board of directors."; "Duties of care and loyalty owed to corporation and its shareholders.").

[233] In politics, administrative agencies; in corporations, executive officers. *See* DEL. CODE. ANN. tit. 8, § 142(b) (West 2024).

[234] One important exception is found within shareholder derivative litigation, whereby

course, the obligations to obey the state's laws (derived from sovereignty) are different from obligations to obey corporate decision (derived from agency and contract, enforced by a sovereign state). Yet both modern states and corporations are managed hierarchically by personnel chosen via election and acting through official bodies

Furthermore, without a distinct principal who can give clear, ascertainable instructions, and without an identifiable beneficiary with objectively ascertainable interests, both corporate and political officers will enjoy considerable discretion when making decisions. The inaudibility of the popular voice is further muffled by the fact that neither shareholders nor citizens enjoy the kind of knowledge necessary to rationally and regularly direct their fiduciaries in most matters that come before them.[235] Many are, quite rationally, either apathetic or indifferent.[236] Voters' and shareholders' irreconcilable policy disagreements only add to the cacophony. Some voters want to cut taxes; some shareholders want short-term profits. Other voters want a robust social welfare state; other shareholders prefer long-term value and enterprise-building.[237] Unable to extract a clear signal from the voters'

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a shareholder is permitted by a court to speak and act for the corporation. Del. R. Ch. Ct. R. 23.1; DEL. CODE ANN. tit. 8, § 327 (West 2004). This feature will be discussed in the next section.

[235] For a discussion, *see* Katharine Jackson, *The Public Trust: Administrative Legitimacy and Democratic Lawmaking,* 56 CONN. L. REV. 1, 13 (2023) (citing Lisa Disch, *The End of Representative Politics?, Introduction* to THE CONSTRUCTIVIST TURN IN POLITICAL REPRESENTATION 1, 10 (Lisa Disch, Mathijs van de Sande & Nadia Urbinati eds., 2019); Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 378–81 (2010) (summarizing research holding that voters often lack accurate understandings of candidate policy positions); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2128–43 (1990) (discussing the weaknesses of social choice theory).

[236] JEFFREY EDWARD GREEN, THE EYES OF THE PEOPLE: DEMOCRACY IN AN AGE OF SPECTATORSHIP 33 (2010); André Blais & Robert Young, *Why do People Vote? An Experiment in Rationality*, 99 PUB. CHOICE 39, 43 (1999); Martin A. Maldonado, *Voter Apathy*, in ENCYCLOPEDIA OF U.S. CAMPAIGNS, ELECTIONS, AND ELECTORAL BEHAVIOR 829–31 (Kenneth F. Warren ed., 2008); Joseph A. Schumpeter, CAPITALISM, SOCIALISM AND DEMOCRACY 251 (2008); Stephen M. Bainbridge, *Response, Director Primacy and Shareholder Disempowerment,* 119 HARV. L. REV. 1735, 1746 (2005) (addressing shareholders' rational apathy); Lynn Stout & Sergio Gramitto, *Corporate Governance as Privately-Ordered Public Policy: A Proposal,* 41 SEATTLE U. L. REV. 551, 553 (2018).

[237] *See* Stout & Gramitto, *supra* note 236, at 553 (explaining how investors more interested in long-term value are rationally apathetic, thus empowering short-term oriented institutional investors); Fink Letters dated March 31, 2015 and April 10, 2016 (endorsing ESG investing) (available at http://www.businessinsider.com/larry-fink-letter-to-ceos-2015-4 and https://www.blackrock.com/corporate/en-gb/investor-

noise, fiduciaries enjoy the liberty to make their own judgments.

The law crystallizes this relationship of hierarchy and subordination. Both corporate and public law vest elected officers with authority to make decisions for the group. Shareholders have no legal right to second-guess directors' decisions[238] just as citizens must acknowledge that the U.S. Constitution vests the legislative power in Congress.[239] Neither the Senate, nor the U.S. House of Representatives, nor Senators and Members of Congress individually, can make law. Any citizen attempting to assert this power herself is an insurrectionist. Unlike agency and trust, however, the solution to the risk of abuse and domination is not tempered[240] primarily by the imposition of judicially enforced equitable duties. Instead, accountability mechanisms are *political* in nature. As a result, the obstacle to collective autonomy posed by corporate and state hierarchy is resolved through tools that facilitate further collective autonomy. Beneficiaries' remedy, if they are unhappy with their leaders' choices, is to vote the bums out. Citizens and corporate stakeholders alike can organize opposition parties and campaign for different policy priorities. Beneficiaries might also employ other extra-judicial bonding mechanisms, tools that align officers' priorities with beneficiaries' interests. In the corporate context, the use of stock options as part of directors' compensation packages is one important example. As a final example, beneficiaries can leave the organization entirely. Citizens can leave the jurisdiction; shareholders can sell their stock; employees can find a new job. Indeed, the threat of exit[241] can serve as sufficient leverage to induce a change in leadership. The so-called "market for corporate control" is a powerful tool for shaping corporate policy.

4. *Collective Autonomy and Group Agency*

The morphological similarities between corporations and states – their indeterminate group beneficiaries and collective interests, their unavoidable

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relations/larry-fink-chairmans-letter, respectively); Strine Jr., *Who Bleeds When the Wolves Bite?, supra* note 220, at 1872 (describing the different priorities of different classes of investors).

[238] Verstein, *supra* note 107, at 83; DEL. CODE. ANN. tit. 8, § 141(a) (West 2024). Nor may shareholders amend bylaws in a manner that usurps the board's substantive decision-making authority. *E.g*., CA., Inc. v. AFSCME Employees' Pension Plan, 953 A.2d 227 (Del. 2008); Auer v. Dressel, 118 N.E.2d 590 (N.Y. 1954); Campbell v. Loew's, 134 A.2d 852 (Del. Ch. 1957).

[239] U.S. CONST. art. I.

[240] The risk is also tempered by the non-identity of the rights of the association and the rights of its individual members. Thus, for example, neither shareholders nor individual citizens are legally liable for the torts committed by their respective associations through their representatives.

[241] For an explanation of this logic, *see* ALBERT O. HIRSCHMANN, EXIT, VOICE & LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

hierarchy, their composite authorization processes, and their political accountability mechanisms – are not only relevant to the enjoyment of collective autonomy, but also facilitate it. Indeed, if it is possible for an association like a state or a business to have preferences and interest, it can only do so through democratic processes. As political philosophers Philip Pettit and Christian List explain,[242] group agents can perform as agents – expressing intentions and performing actions – precisely because their internal decision-making procedures create a "fit" between the will of members and the actions of the group.

C. *Corporate Fiduciary Duties: Facilitating Political, not Judicial, Best Interest Determinations*

It should therefore be unsurprising that courts of equity do not, for the most part, disturb the political devices used to authorize and hold corporate officers to account. It does not usurp directors' authority, derived from law and elections, to determine what lies in the corporations' best interests. In fact, when equity intervenes, its aim is to improve the (political) decision-making processes that advance collective autonomy. Indeed, courts of equity step into controversy when they occasionally usurp directors' decision-making authority to opine upon a corporation's proper purposes. When the Delaware courts held, in *Revlon v. Forbes & MacAndrews,*[243] that directors have a fiduciary duty to maximize share price when a corporation is up for sale, they inspired a monstrously large cottage industry of debate not just between legal and economic scholars, but also the public. The court subsequently undermined the purpose that *Revlon* seemed to ascribe to the corporation – to maximize shareholder profits – in later decisions that quarantined and circumscribed its application.[244] Meanwhile, *Dodge v. Ford Motor Company* excites and angers law students to this very day.

1. *Preserving Political Discretion: The Business Judgment Rule*

A corporation's collective autonomy is preserved by perhaps the most important and striking feature of corporate fiduciary law: the business judgment rule. Like other fiduciaries, corporate directors and officers are charged by equity to act in their beneficiaries' best interests. Unlike many other fiduciaries, however, equity lends them significant autonomy to pursue

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[242] CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENTS (2011); *see also generally* ORTS, *supra* note 223.

[243] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1985).

[244] *See* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989); Paramount Commc'ns, Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994).

those interests according to their own judgment.[245] Boards, unlike courts, "have a large reservoir of authority upon which to draw,"[246] including both legal and electoral authorization. On the other hand, courts are not well-placed to opine authoritatively on the corporation's best interests. Their ignorance arises not merely because chancellors lack business degrees.[247] Given the financial sophistication of Delaware's deep bench, such modesty may be misplaced. Rather, *no one* can know what best serves a corporation's interests — at least as a matter of objective truth. Unlike HEMS trusts, no ascertainable standard is available for consultation; no document preserves a settlor's definition of the beneficiary's best interests. Unlike agency, there's no identifiable individual available to issue instructions about what would best serve their interests. The only person a court might consult — the corporation — is a fiction. As a result, courts wisely leave the best interests determination up to the intra-corporate political process. They do so using the business judgment rule.

Under the business judgment rule, the law "clothe[s directors with] the presumption…of being [motivated] in their conduct by a bona fide regard for the interests of the corporation."[248] Equity presumes that directors and officers act "on an informed basis in good faith and in the honest belief that the action was taken in the best interests of the company."[249] Courts will not, therefore, intervene to question a board's decisions – no matter how dubious they appear in hindsight.[250] Only when corporate officers exhibit certain kinds of egregious behavior will courts step in to second-guess their decisions. And even then, courts will do their best to avoid substituting their own judgment for that of corporate members. Multiple mechanisms exist that "cleanse" an otherwise problematic transaction using the tools of corporate democracy. Conflicted transactions can be ratified by, for example, independent elected officers or by the shareholders themselves.[251] Moreover, the entire fairness standard, whereby a court decides whether a tainted decision was entirely fair, has been reduced to a procedural standard: fair price and fair dealing.

Like citizens unhappy with their elected lawmakers' decisions, therefore,

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[245] Geoffrey Miller points out that even Revolutionary Era/early corporate charters often gave directors discretion to determine whether their actions were within the scope of their concession of power. MILLER, *supra* note 14, at 14.

[246] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 953 (Del. 1985) (citing DEL. CODE ANN. tit 8, § 141(a)).

[247] D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 677 (2013).

[248] Gimbel v. Signal Cos., 316 A.2d 599, 608 (Del. Ch. 1974).

[249] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

[250] Gagliardi v. Trifoods Int'l Inc., 683 A.2d 1049, 1051 (Del. Ch. 1996).

[251] Lewis v. Vogelstein, 699 A.2d 327 (Del. Ch. 1997); Benihana of Tokyo, Inc. v. Benihana, Inc., 906 A.2d 114 (Del. 2006); Harbor Finance Partners v. Huizenga, 751 A.2d 879 (Del. Ch. 1999); DEL. CODE ANN. tit. 8, § 144 (West 2024).

corporate members' main recourse is to vote their leaders out of office.[252] Unless officers' conduct violates some codified norm – whether bylaw, charter, constitution, or statute – corporate and political beneficiaries usually cannot seek a judicial remedy. Consequently, most policy disagreements play out politically, not juridically, as both directors and politicians compete for votes.[253] Corporate law black-boxes the definition of the corporation's best interests just like constitutional law black-boxes an administrative agency's determination of which drugs are safe and effective and which legislation best serves the public welfare.[254]

One of the political judgments that directors' duties call them to make is one that settles their constituents' conflicts. The court's judicial modesty is particularly evident when parties ask it to evaluate directors' handling of a quintessentially political conflict: a conflict over the distribution of collective wealth. Courts of equity will not question fiduciaries' choice to follow policies that favor long-term investors at the expense of short-term investors.[255] They will protect directors seeking to safeguard the integrity of their business against shareholders looking for a quick payday.[256] In any event, as directors make day-to-day management decisions, they routinely find themselves favoring one corporate constituent over another. They give one a raise but not another; they issue a buyback or a dividend rather than open a new factory, *etc*. Only when directors' discriminatory treatment is utterly unjustifiable and motivated by self-interest will a court intervene.[257]

D. *Defending Corporate Democracy: Loyalty and the Shareholder Franchise*

While Delaware courts are loathe to intervene in directors' business

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[252] Of course, federal legislation is subject to the forgiving rational basis review, which is, as this paper suggests, roughly analogous to the business judgment rule standard.

[253] Directors' competition for control "is a perfectly legitimate objective which is a part of the very fabric of corporate existence." Campbell v. Loew's, Inc., 134 A. 2d 852, 861 (Del. Ch. 1957).

[254] Peter Strauss, *Rule-Making and the American Constitution*, in THE REGULATORY STATE: CONSTITUTIONAL IMPLICATIONS 53–55 (Dawn Oliver et al. eds., 2011) (discussing political "discretion" in agency rulemaking).

[255] Equity-Linked Invs., L.P. v. Adams, 705 A.2d 1040, 1053 (Del. Ch. 1997).

[256] Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 953 (Del. 1985); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1985).

[257] *See, e.g.,* Sinclair Oil Corp. v. Levien (Del. 1971) (corporate parent/majority shareholder causes board to issue dividends to majority shareholder only); Wilkes v. Springside Nursing Home, Inc. (Mass. 1976) (majority shareholders cause board to fire/squeeze out minority shareholder without legitimate business purpose); Nixon v. Blackwell, 626 A.2d 1366 (Del. 1993) (applying an entire fairness approach to discriminatory treatment); Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).

judgment, their enforcement of the shareholder franchise is energetic.[258] Courts do not only enforce shareholders' equal right to vote. They also intercede to ensure that shareholders have the information they need to make informed decisions at the ballot box.

1. *Protecting the Franchise*

Courts are relatively keen to protect shareholders' voting rights and therefore preserve their collective autonomy. Board decisions that tend to disenfranchise shareholders, first, usually escape the onerous pleading requirements[259] of derivative litigation. They are often heard, instead, as direct claims. Second, when anti-takeover devices function to deny shareholders the opportunity to vote on a potential merger, the court will apply the relatively onerous *Unocal* test: the defense must be proportionate to the threat posed to corporate policy.[260] The court, in *Blasius*, held that boards must provide a "compelling justification"[261] for a decision to "imped[e] the exercise of the stockholder voting power."[262] In other words, decisions that interfere with voting are subject to strict scrutiny.

Both state and federal law, moreover, help ensure shareholders votes are meaningful by guaranteeing the disclosure of material information in the officers' proxy solicitations, *i.e.*, their campaign materials. The proxy rules under Section 14(a) of the Securities Exchange Act, as well as Delaware caselaw,[263] guarantee shareholders a capacious amount of information[264] and courts have lent them a private right of action to enforce this guarantee.

2. *Section 220 and the Duty of Disclosure*

Shareholders' rights to information about their officers extends beyond elections. Under Section 220 of the Delaware General Corporation Law, shareholders enjoy a right to demand corporate books and records related to a proper purpose. But courts do not usually take the vague language of "propriety" as an invitation to arrogate to themselves the right to determine what kinds of information is useful for a shareholder to possess. Instead, they

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[258] Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988).
[259] Plaintiffs need now show that demand was made or excused under Rule 23.1. *See*, *e.g.*, Aronson v. Lewis, 473 A.2d 805, 818 (Del. 1984).
[260] *Unocal Corp.*, 493 A.2d at 955; Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1375 (Del. 1995); *Revlon*, 506 A.2d at 183; Chesapeake Corp. v. Shore, 771 A.2d 293, 333 (Del. Ch. 2000); *Paramount Commc'ns, Inc.*, 571 A.2d at 1142.
[261] *Blasius*, 564 A.2d at 661.
[262] *Id.*
[263] Lynch v. Vickers Energy Corp., 383 A.2d 278 (Del. 1977).
[264] 17 C.F.R. § 240.14a-101 (2020); 17 C.F.R. § 240.14a-9 (2020).; J.I. Case Co. v. Borak, 377 U.S. 426, 430–31 (1964) (implying a private right of action).

construe it broadly, permitting shareholders access to all documents "reasonably related"[265] to their interests as stockholders and sometimes even putting the burden of proof on boards to demonstrate that their purpose is improper.[266] Shareholders' informational rights even extend to documents prepared by third parties or predate the shareholders' initial investment with the company.[267]

3. De Minimus *Substantive Constraints: Waste and Unjustifiable and Unjustified Self-Dealing*

Unlike the robust protections afforded to corporate beneficiaries' political rights, the substantive equitable duties placed on corporate officials are *de minimus*. They police only the most egregious behavior, namely, the kind of behavior no corporate constituent could ever countenance.[268] Maximizing collective autonomy as much as possible, Delaware courts rarely substitute their own judgment about a decision's rationality when real-life beneficiaries have an opportunity to weigh in for themselves. Moreover, as mentioned above, when a substantive determination is unavoidable, courts do their best to apply a procedural solution, not an objective standard. Finally, when courts find themselves self-consciously inserting their own judgment about what lies in the corporation's best interests, it is on an occasion that implicates the courts' own unique competence: whether a particular piece of litigation lacks sufficient merit to warrant dismissal.

First, courts will void transactions that amount to waste, *i.e.*, those transactions involving consideration so disproportionately small that they are beyond the range at which *any* reasonable person might assent.[269] Whatever a corporation's best interests are, they are surely not this. But wasteful transactions are exceedingly rare; they are unlikely to arise unless directors are also engaging in fraud and gross negligence.[270] Furthermore, the court has opined that if an ostensibly wasteful transaction has been approved by shareholders, it cannot, as a matter of law, be considered irredeemably irrational. As then-Chancellor Strine, Jr. observed, "judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information (in the case of directors) or an actual economic

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[265] Saito v. McKesson HBOC, Inc., 806 A.2d 113, 117 (Del. 2002).
[266] DEL. CODE ANN. tit. 8, § 220(c) (West 2024).
[267] *Saito*, 806 A.2d at 118.
[268] Namely, actions for corporate waste (e.g., Harbor Fin. Partners v. Huizenga, 751 A.2d 879 (Del. Ch. 1999) (defining waste as something that no shareholder would ever ratify and that, therefore, actions so ratified are not corporate waste) and unjustifiable discrimination against minority shareholders (*see supra* note 257).
[269] Lewis v. Vogelstein, 699 A.2d 327 (Del. Ch. 1997); Harbor Finance Partners v. Huizenga, 751 A.2d 879 (Del. Ch. 1999).
[270] Steiner v. Meyerson, No. 13139, 1995 WL 441999 (Del. Ch. July 19, 1995).

stake in the outcome (in the case of informed disinterested stockholder)."[271]

Second, although the courts police transactions for conflicts of interest, they will nonetheless hold those transactions legally enforceable if they are "entirely fair,"[272] understood as carrying a fair price and negotiated under conditions approximating an arm's length deal. Though ostensibly a substantive standard, the entire fairness doctrine is a sign of judicial modesty. The two-part test of entire fairness, fair price and fair dealing, is largely a procedural one. Robust process, like substantial negotiations, will drive a court to conclude that the price received is fair.

Third, courts weigh in on whether directors are adequately policing employee and officer misconduct. Directors' *Caremark*[273] duties state that whatever else a director's fiduciary duties amount to, they amount to doing *something* rather than *nothing* when circumstances arise that might harm the corporation.[274] Directors cannot turn a blind eye to theft, legal violations, or other egregious misconduct. But the kinds of risk-management systems directors choose to implement are left, like other decisions, to directors' business judgment.[275] Likewise, how directors choose to respond to any red flags those systems uncover are a matter of business judgment.[276]

Finally, Delaware courts self-consciously reserve for themselves the power to make substantive determinations about what serves the corporations' best interests in only one circumstance: the decision by a special litigation committee to dismiss derivative litigation previously brought by shareholders against corporate officers and directors.[277] This situation, however, is conspicuously distinct from other kinds of business decisions. Courts possess not only unique expertise, but unique authority, to opine upon not only what the law is, but whether it is adequately enforced. The state has an interest and a legitimate role to play in whether and to what extent its laws are enforced.

Before moving on, it's worthwhile to note that equity only requires directors to maximize shareholder value when directors *have already determined,* using their business judgment, that the interests of the corporation

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[271] Corwin v. KKR Financial Holdings L.L.C., 125 A.3d 304, 113–14 (Del. 2015); *cf.* Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024).

[272] DEL. CODE ANN. tit. 8, § 144(a)(3) (West 2024); Bayer v. Beran, 49 N.Y.S.2d 2 (N.Y. 1944); Benihana of Tokyo, Inc. v. Benihana, *Inc.*, 906 A.2d 114 (Del. 2006); *see also* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (entire fairness applied in a controlling shareholder squeeze-out transaction).

[273] *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

[274] Francis v. United Jersey Bank, 432 A.2d 814 (N.J. 1981); Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362 (Del. 2006); *In re* Walt Disney Co. Derivative. Litig., 906 A.2d 27 (Del. 2006).

[275] *Ritter*, 911 A.2d at 368; *In re* Citigroup Inc. Derivative Litig., 964 A.2d 106, 122 (Del. 2009).

[276] *In re* Citigroup Inc. Derivative Litig., 964 A.2d 106, 130 (Del. 2009).

[277] Zapata Corp. v. Maldonado, 430 A.2d 779, 789 n.18 (Del. 1981) ("Under our system of law, courts and not litigants should decide the merits of litigation.").

are best served by putting the company up for sale.[278] The duty to maximize price, stated more simply, is not a court opining on a corporation's best interests. It is a court holding directors accountable to their own choices. And even then, courts leave it up to directors to determine, in their business judgment, what "value" — a vague term that could include cash, debt, human and material capital, and so on — actually means.

E. *The Differences between Corporate and Public Fiduciaries: Sovereignty and The Universality of Political Rights.*

There is much to recommend the use of analogy between corporate and political office. Both involve uncertain collective beneficiaries. Both ascribe authority to a group of people making decisions through binding procedure. Both resolve questions about their beneficiaries' best interests and their officers' authorization using political accountability mechanisms. As a result, it is reasonable to conclude that collective autonomy is best served if political officers enjoy the same autonomous decision-making discretion enjoyed by their corporate counterparts. Nevertheless, as mentioned above, corporations and states are different in one notable respect relevant to autonomy: states are *sovereign* powers. They are the final court of appeal over social conflict. No one is above their laws. Their jurisdiction over their members is comprehensive. As a result, states' capacity to trod on the rights and liberties of their vulnerable citizens is accordingly greater.

The upshot, however, is not that courts ought to police political officers' decisions more invasively. This answer merely swaps one powerful sovereign official for another. Rather than lawmakers and elected representatives wielding an absolute right to rule, an apex court would rule in their stead. The solution, consequently, must involve the universalization of citizens' political rights and liberties. Even if no one can authoritatively claim to speak for the people and their interests, each and every individual subject to the public officer's decisions can claim to form a part of the fictional popular sovereign. They can claim, therefore, to possess interests relevant to the public's best interests. Decisions taken in the ostensible public interest, accordingly, should be the result of their input. Moreover, even if no one individual has the power to authorize political officials, each individual citizen can claim to be a part of the fictional popular sovereign who does. Each individual citizen, therefore, should play a role in the electoral authorization process. Indeed, democratic states justify their sovereignty *because* they are democratic; each citizen has an equal right to help shape the laws that bind them.

To be sure, a corporation might get away with ascribing franchise rights to shareholders alone. Corporate officials' decisions, confined to the context of a corporation's business affairs, often weigh most heavily on equity

[278] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1985); Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1151 (Del. 1989).

investors. Workers and other corporate stakeholders, meanwhile, enjoy the protections of the labor law promulgated by the sovereign state – law that these stakeholders helped shape by virtue of their participation in the democratic process. But a democratic state cannot claim legitimacy by lending the right to vote to property owners alone. Disenfranchised citizens, unlike workers, cannot rely on any higher law for protection.

Furthermore, because states are sovereign and corporations are not, states may be subject to more robust liberal desiderata. Corporations can adopt thick ethical purposes without necessarily violating their members' individual autonomy rights. A religious company, for example, might promulgate internal bylaws that comply with religious tenets. Those objecting to these tenets are not required[279] to associate with the corporation. As a result, their First Amendment rights to free exercise remain unmolested. In contrast, citizens cannot easily escape a sovereign state. Theocracy, to say the least, would violate their First Amendment liberties.

A little intellectual history may help illustrate these conclusions. In the early modern era, both state and corporation were not so different. The state, represented by the king, was thought to receive his authority, *legibus solutus*, from God.[280] Parsed in terms of the tripartite corporate framework, God authorized the king, a fiduciary, to look after the state, the beneficiary. After the democratic revolutions, the people, or "popular sovereign," replaced the monarch in this schematic. Furthermore, the people's sovereignty no longer depended on any divine mandate; it derived from themselves. Indeed, constitutional monarchies began citing the "sleeping" popular sovereign as the source of their political authority.[281] Of course, "the people" cannot rule any more than "the shareholders" can. They cannot act as some kind of supersized macro-agent[282] with an intelligible mind and will of its own. They can only act through their representatives.

As a result, the idea of sovereignty became a kind of feedback loop: the people, acting through an authorized representative, would authorize their

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[279] But exit may not be a viable option. Accordingly, a strong case may be made that large public companies should be required to adopt liberal values. *See, e.g*., Katharine Jackson, *Disaggregating Corpus Christi: The Illiberal Implications of Hobby Lobby's Right to Free Exercise*, 14 FIRST AM. L. REV. 376, 379(2018); ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017).

[280] JEAN BODIN, ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH 1–2 (Julian H. Franklin ed., trans., Cambridge U.P. 1992) (1576); MORGAN, *supra* note 23, at 18–19.

[281] TUCK, *supra* note 23*;* Daniel Lee*,* POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT (2016); MORGAN, *supra* note 23.

[282] THOMAS HOBBES, LEVIATHAN 227, 128 (C.B. MacPherson ed., Penguin Books 1985) (1651). *See generally* Quentin Skinner, *Hobbes and the Purely Artificial Person of the State*, 7 J. POL. PHIL. 1 (1999) (for an explanation of the corporate conception of the state as both human and corporate (artificial) person); LEE, *supra* note 280, at 11.

representatives to act for them.[283] Thomas Hobbes' analytical framework illustrates this idea:[284] in the pre-political state of nature, each individual authorizes a "Mortall God," the modern state, which itself is represented by the very mortal bodies of a King or a parliament.[285] After democratization, this "Mortall God" was supposed to be represented by the people themselves. As another illustration, the "people" or "constituent power" authorized the U.S. Constitution, the highest law of the land, which then would be enforced and fulfilled by the people. There was just one pesky detail: the people themselves cannot do much in the way of speaking and acting coherently.[286] They can neither authorize nor rule. This conundrum is exactly what Jean Jacques Rousseau tried to solve in *The Social Contract*. The people cannot effectively act *like* a sovereign or *for* the sovereign unless they all share precisely the same "General Will." Otherwise, they are just a multitude with multitudes of preferences and opinions. Like ERISA requirements and employer-provided retirement accounts, Rousseau flattened the politically debilitating differences between individuals by presuming that they all want the same thing.

As a result of these logical impossibilities, the idea of popular sovereignty morphed into a metaphor and a critical standard.[287] The popular sovereign can neither authorize a ruler nor rule itself. But democratic decision-making procedures can at least try to make the idea as real as possible. If there were such a thing as a popular sovereign, for instance, it would include everybody. Therefore, everybody should have a hand in authorizing their representatives. The franchise should be a universal right. If there were such a thing as a popular sovereign, then each citizen would be able to rule. Therefore, each citizen should have some kind of guaranteed influence in their representation, *i.e*., in shaping the laws that bind them. Everyone should enjoy, therefore, a right to free speech, to assemble, and to petition.

Admittedly, these logical gymnastics are not easy to follow. It is tempting, therefore, to reach back to the simpler early-modern corporate model. This is

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[283] PITKIN, *supra* note 106, at 30–31.

[284] *Id.*

[285] HOBBES, *supra* note 281, at 227–28; *see generally* Skinner, *supra* note 281, at 1, 24 (explaining the corporate conception of the state as both human and corporate (artificial) person).

[286] HOBBES, *supra* note 281, at 227 ("There is no coherent people; there is only 'the multitude.'").

[287] Morgan argues, for example, that "[w]hen the authority of representatives was thus magnified, their function as the agents of a subject population was necessarily diminished. With the fictional people suddenly supreme, actual people, as embodied in local communities, found their traditional rights and liberties in jeopardy from a representative body that recognized only a fictional superior. The members of a Parliament as agents of local communities had viewed themselves and had often acted, as protectors of popular rights against the arbitrary actions of a higher authority. When the Parliament, or more especially the House of Commons, itself became the government, who was left to protect actual people from its arbitrary actions?" MORGAN, *supra* note 23, at 53.

what constitutional originalists do. Their argument is easy to understand: The sovereign people, back in the late 18th century, authorized their representatives to make decisions binding on the country as a whole by creating the U.S. Constitution. Lawmakers' authority, therefore, cannot exceed the powers enumerated therein, just as corporate directors cannot act *ultra vires*. This kind of model, however, is not one that can be laid upon a polity without doing injury to its democratic credentials. It tells citizens: "the Founders authorized your lawmakers through this charter called the U.S. Constitution. The Constitution defines your representatives' authorized powers. Since you are neither the sovereign nor the Founders, you have no right to change them."

To illustrate, Geoffrey P. Miller applies Revolutionary-era corporate law to the powers vested in the Legislative Branch under Article I of the U.S. Constitution. Treating the U.S. Government as if it were a corporation authorized by a higher authority leads him to suggest that the Necessary and Proper Clause is a scope restriction intended to limit the power granted to Congress.[288] Miller further argues that since corporate charters were written to ensure that fiduciaries targeted only those goals the corporation was formed to achieve, the U.S. Constitution should be understood as a limited form of authorization for the exercise of specifically enumerated powers – and no more.[289] These arguments foreclose the possibility that contemporary citizens might have a role to play in expanding Congress' authorization to include, for instance, the establishment of independent administrative agencies and the regulation of firearm sales.

F. *Lessons for Public Fiduciaries*

Given these important differences, the lessons that corporate law teaches must be appropriately modified before applied to politics. The apt analogy between corporations and democratic states demonstrates that courts should not be in the business of telling either what lies in their best interests. It illustrates the importance of political accountability mechanisms. And it shows how courts might actively protect collective autonomy by vigorously enforcing the franchise and other political rights. But, given the differences, some changes are in order. One adjustment is that courts should safeguard the decision-making autonomy of political representatives even more than they safeguard the autonomy of corporate fiduciaries. In a multicultural democratic state, citizens must rely even more on their representatives to look out for their interests. They are even more diverse and diffuse than corporate stakeholders and shareholders, and therefore even less capable of acting for themselves during collective decision-making. Courts are, for the same reason, even less capable of ascertaining the public interest than they are the corporate interest.

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[288] Miller, *Fiduciary Relationship*, *supra* note 2, at 22–23.
[289] *Id.* at 25.

As mentioned above, because states enjoy sovereign power, and because those subject to their officers' decision-making cannot exit, political accountability mechanisms must be broader and more universal. Citizens should enjoy universal franchise rights, allowing them the chance to fire the public officers that harm them. They should also possess durable liberty rights that safeguard them from the possibility that harmful majority sentiments might percolate into representatives' decision-making.

Another important modification is that courts should not take the state's organic document - the U.S. Constitution - quite as literally as they take a corporate charter. A corporate charter, which defines the scope the directors' authorized powers, is binding because it is, in part, the product of a higher power: the state. No analogous higher power exists when it comes to the U.S. Constitution. The "We the People" that delegated authority to the federal government in the Constitution is a fiction. The popular sovereign is an idea, not an actually existing historical person. Since all citizens, including those existing now and those not yet born, can claim to be a part of this sovereign, all citizens can claim a role in authorizing their representatives. This feature suggests that the Constitution is more of a political document than a legal one. Therefore, it should remain permanently permeable to public feedback and emendation.

With these changes in mind, corporate law's lessons about how the values expressed by duties of loyalty, independence, diligence and care are well-suited to political office. The procedural solutions offered by equity are compelling because they police the worst kinds of official misbehavior without stepping on the toes of members' right to collective autonomy. They provide good reason to demand that political leaders behave responsibly and with investigation, but do not usurp members' rights to define responsibility for themselves. They discourage corruption and favoritism but leave open the possibility that members might understand ostensibly self-serving behavior as objectively good policy. Corporate law demands that officers make choices that serve the good of the whole rather than merely a good of the part but acknowledge that one members' apparent partisanship is another's definition of the common good. In sum, these duties encourage other-regarding behavior but leaves open to the political process the determination of what this other is, what it wants, and what serves its interests best.

V. TRUSTEE REPRESENTATION

One implication of the corporation/state analogy is that corporations are not creatures of private law at all. Instead, corporate law is more accurately understood as a kind of public law. The law that governs corporations is a law that grapples with public problems of power and accountability, where no one can claim to speak permanently and authoritatively for all. Indeed, an appropriately modified corporate model closely mirrors what political scientists call "trustee representation." As Hannah Pitkin explains in her

seminal work on representation,[290] a trustee form of representation lends political officers a large amount of decision-making autonomy. Trustee representatives are not "mandate" or "delegate" representatives. They are not beholden to constituent instructions. Instead, trustee representatives make decisions based upon their own judgment about what the public interest requires.

Notwithstanding trustee representatives' insulation from popular opinion, trustee representation is part and parcel of representative democracy. As political theorist Bryan Garsten explains, "[t]he impossibility of fully and completely representing the people's will is integral to the concept of representation itself."[291] Representation is not an institutional shorthand used only because direct, unmediated democracy is impracticable or otherwise undesirable.[292] A form of rule that perfectly transcribes the "will of the people" into binding law would indicate presence, not representation.[293] Instead, political representation is best understood as mediated rule. Although it does not promise that the will of the (fictional) popular sovereign will govern, democratic representation can promise that decisions will be made by representatives acting in the name of all[294] rather than by someone imposing her personal judgments on everyone else. To accomplish this "omnilateral" orientation,[295] democratic representation allows citizens to participate in decision-making in a way that helps (1) maintain the normative priority of the ruled over their rulers and (2) ensure that the ruled have some equally distributed role to play in their own governance. Thus, representative systems are often assessed according to how well they incorporate equal involvement in political decision-making[296].

Trustee representation fulfills these two goals in several ways. Citizens' universal and equal right to vote gives them a part to play in selecting their leaders. The vote, furthermore, incentivizes representatives to prioritize citizens' interests in an evenhanded manner. This is because citizens are less likely to reelect candidates who disregard their interests. It gives them a way, further, to object to what is being done in their name and purportedly in their interests.[297] Further, trustee's duty to seek the public good, and not private

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[290] PITKIN, *supra* note 106 at 39 .
[291] Garsten, *supra* note 118, at 105.
[292] Urbinati, *supra* note 114, at 196; PITKIN, *supra* note 106, at 191; Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 515 (2003); David Plotke, *Representation is Democracy*, 4 CONSTELLATIONS 19 (1997); THE FEDERALIST NO. 52.
[293] PITKIN, *supra* note 106, at 170; Garsten, *supra* note 118, at 105.
[294] CORDELLI, *supra* note 111, at 11, 67.
[295] *Id.* at 62.
[296] Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387, 387, 395 (2008).
[297] Runciman & Vieira, *supra* note 110, at 72; *see also* ANTHONY MICHAEL BERTELLI,

gain, helps ensure that the rulers attend to the good of the ruled.

A. *A Brief History of Trustee Representation*

Political representation did not start out quite so similar to the corporate model. The concept and practice of political representation began in England, and later in the American colonies, as a private legal relationship. At first, it mimicked agency law. The idea that representatives are the agents of their constituents began at least as early as the Tudor era in England, where representatives functioned as constituents' attorneys[298] who could bind their principles to taxes and other legislation. Representatives, understood as private subjects, would consent to laws and taxes on behalf of their fellow subjects.[299]

Only later, when representatives began asserting lawmaking authority in their own right, did practice become more corporate in character. Rather than merely consenting to the King's laws as proxies on behalf of a specific geographic constituency, representatives transformed into lawmakers themselves. Members of representative assemblies no longer looked and acted like mere subjects. They no longer merely consented, on behalf of their constituents, to laws pronounced by the King or colonial governor. Instead, they began to make their laws in their own right.[300] In the American colonies, "representative assemblies took the initiative in government almost from the beginning."[301] Representatives, as result, confronted a new set of questions: were they to follow the instructions of their principals as agents, or were they to decide on new legislation based on some other standard? Was the authority granted by constituents revocable or limited? Or was it given *plena potestas*, with full power to act for them? Furthermore, as soon as representatives began to make policy, they had to grapple with the fact that they were no longer acting merely for their own districts. Although "they did not cease to be the agents of local communities," representatives "ceased to be merely that. The laws they made were to bind not only their own communities but the whole realm, the whole nation, the whole society."[302] This change opened up another set of questions: should representatives advocate for the interests of their own district? Or for the polity as a whole? What should a representative do if the needs of the part differ from the needs of the whole? What if the good of the

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DEMOCRACY ADMINISTERED: HOW PUBLIC ADMINISTRATION SHAPES REPRESENTATIVE GOVERNMENT 13 (2021); *See generally* Robert A. Dahl, *Myth of the Presidential Mandate*, 105 POL. SCI. Q. 355, 362–64 (1990). For a similar account, *see* Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 37 (2022) ("[d]emocratic values are best instantiated when citizens have an opportunity to resist political settlement.").

[298] SQUIRE, *supra* note 115, at 158.

[299] MORGAN, *supra* note 23, at 39.

[300] *Id.* at 46.

[301] *Id.*

[302] *Id.*

whole is different from the good of the sum of its parts?[303] These are questions that do not trouble kings. A king might become a tyrant, privileging his own interests over those of the realm. But he was less likely than an elected representative to privilege a part of the polity at the expense of the other.[304] In any event, as explained above, agency models were tried and jettisoned for their unworkability in the early American corporate colonies.

Accordingly, new concepts and practices of political representation emerged: trustee representation and the agency-like mandate representation. The winner of this contest at the end of the 18th century was the trustee model, although its victory was not overwhelmingly decisive. The Framers designed Congress "in such a way that popular representation should be limited," but not nonexistent. They encouraged, but did not require, that "legislators act as trustees rather than delegates."[305] Madison famously argued, in *Federalist 46,* that transposing popular sentiment into law was ill-advised; instead, views had to be refined through the deliberation encouraged by bicameralism, presentment, and intra-legislative deliberation.

The idea that each individual representative, despite his ties to a specific geographic constituency, acts for the whole -- is at least as old as Sir Edward Coke in the first half of the seventeenth century.[306] Nevertheless, most scholarship attributes the concept of trustee representation to Edmund Burke,[307] an 18th century British parliamentarian renowned, often unfairly,[308] for his social conservatism and paternalism.[309] A harsh critic of British policies that led to the exploitation of Irish Catholics and the colonized Indian people, Burke identified virtual representation as a means to give political voice to those explicitly excluded from it. If neither Irish Catholics nor Indians could have a seat in parliament, a trustee representative could at least speak for them instead.

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[303] *Id.*

[304] *Id.* at 52.

[305] Jordan Butcher & Aric Dale Gooch, *The Development of Representation in American Political Institutions*, 46 LEGIS. STUD. Q. 1059, 1061 (2021).

[306] ". . . though one be chosen for one particular County or Borough, yet, when he is returned and sits in parliament, he serveth for the whole Realm; for the end of his coming thither, as in the Writ of his election appeareth, is general," EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS 14 (London, M. Flesher 1644).

[307] *E.g.,* MORGAN, *supra* note 23, at 49.

[308] For excellent discussions of Burke's humanitarianism - not paternalism - *see, e.g.,* Richard Bourke, *Living History: Reading Edmund Burke on Representation*, 22 JUNCTURE 190 (2015); UDAY SINGH MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT (1999).

[309] Burke, although the most famous early proponent of trustee representation, was not the first. Whether representatives should follow the mandates of voters, or his own best judgment was a dilemma that long preceded Burke. Butcher & Gooch, *supra* note 304, at 1062 (citing PEVERILL SQUIRE, THE RISE OF THE REPRESENTATIVE: LAWMAKERS AND CONSTITUENTS IN COLONIAL AMERICA 6–7 (2017).

The image of bewigged British elites making decisions on behalf of the Irish Catholic and Indian peoples smacks of self-congratulatory colonial paternalism. But Burke did not intend representation to be officious, interfering, and paternalistic. First, Burke argued that "not every representative function had to be underpinned by voting for the welfare of the people to be served."[310] As explained above, providing virtual representation is a normal part of democratic representative politics. A representative is not necessarily paternalistic and exploitative simply because the electoral process excludes a portion of the constituency. Even today's moral standards accommodate the disenfranchisement of convicted felons, children, and those suffering from certain mental disabilities.

Second, as Uday Singh Mehta convincingly argues, Burke does not view the benefiting constituency as a child who requires tutelage.[311] Instead, the *representative* is a child with much to learn about what best serves his constituents. A good representative will approach them with humility, respecting cultures, values and customs that he does not, and likely cannot, fully understand.[312] First, the representative much watch, listen, and learn. Only then can he empower his constituents without imposing on them some "general ethical or political viewpoint."[313] Second, the representative must not let his own greed, vice, and compulsion towards exploitation color his decisions. The constituency, in Kantian terms, is an end in itself, not a means that facilitates the growth of private bank accounts and the pursuit of personal pleasure. This kind of behavior is not empowerment, but betrayal.[314] Accordingly, Burke spent most of his decades-long career in a fruitless battle to ameliorate the atrocities and corruption perpetrated by the British East India Company on the Indian subcontinent.

Third, Burke's revulsion at the English hostility towards the Irish Catholic community colored Burke's idea of representation. Namely, he insisted that political representatives should enjoy autonomy from populist, demagogic popular sentiment. "[S]ome means of deliberation that would introduce distance between the process of decision and the expression of popular passions"[315] was necessary for the common good. Empowering one community means that another community's influence must take a back seat. "Politicians," for Burke, "were not just tribunes; they had to be sober judges too."[316] Legislators should not be guided by local prejudices - like those held

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[310] Bourke, *supra* note 307, at 194.
[311] MEHTA, *supra* note 307, at 174.
[312] *Id.* at 164 (Burke "will not countenance power arrogating to itself the right to meddle with other peoples' history, especially when those histories have produced a social coherence of their own.").
[313] *Id.;* Leib & Ponet, *supra* note 4, make a similar argument.
[314] Bourke, *supra* note 307, at 194.
[315] *Id.* at 195.
[316] *Id.*

against Catholics - but by their best understanding of the common good.[317]

During the American founding, the Framers picked up on many of Burke's arguments, identifying the weaknesses of an agency-like delegate model (which they ascribed to the Articles of Confederation)[318] and celebrating the strengths of the trustee model. Like Burke, Hamilton noted that the populace is unable, on its own, to engage in "regular deliberation and concerted measures."[319] Like Burke, Hamilton bemoaned the irrational sensibilities and prejudices of the people, complaining of democracy's "excess" and "imprudence."[320] And like Burke, Hamilton advocated for the autonomy of the representative, opining that "a representative ought to have full freedom of deliberation, and ought to exert an opinion of his own."[321] Madison, for his part, adopted some of Burke's humanitarian tendencies. He argued in *Federalist 35*, for instance, that men of virtue and intellectual humility would engage in "extensive inquiry" of the population's circumstances and preferences before committing to policy positions. Madison also recognized that the people did not have anything like an articulate voice of its own. "[I]f the opinions of the people were to be our guide," he argued during constitutional negotiations, "it would be very difficult to say what course we ought to take. No member of the convention could say what the opinions of his constituents were at this time; much less could he say what they would think if possessed of the information and lights possessed by the members here; and still less what would be their way of thinking six of twelve months hence."[322]

Furthermore, the Founders seem to have discerned the most important difference between trustee political representation and corporate representation: their differing sources of authority. Madison, in rejecting the Articles of Confederation, "envisioned a genuine national government, resting for its authority…on an American people, a people who constituted a separate and superior entity."[323] The U.S. Government, stated a bit differently, did not rely upon the delegation of authority from some higher power: God, or a state, or a king. It relied upon the popular sovereign itself.

B. *The Democratic Benefits of Trustee Representation*

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[317] Edmund Burke, *Speech to the Electors of Bristol, in* 2 WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 15–16 (1792).

[318] Butcher & Gooch, *supra* note 304, at 1069, 1082. The authors summarize the Antifederalists' support of the delegation model, noting that they advocated for, e.g., the right of recall, short term limits, small districts, and the right of instruction.

[319] THE FEDERALIST NO. 48.

[320] Butcher & Gooch, *supra* note 304, at 1065.

[321] *Id.* (citing MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 366 (1966).

[322] Verstein, *supra* note 107, at 81 (quoting John A. Fairlie, *The Nature of Political Representation,* 34 AM. POL. SCI. R. 236, 244 (1940)).

[323] MORGAN, *supra* note 23, at 267.

Trustee representation offers many benefits to collective autonomy. First, advocates of trustee representation offered it as a replacement for an empirically and normatively troubling principal-agent model. Burke, for instance, recognized the impossibility that any elected legislature could perfectly reflect constituent preferences in all their diversity.[324] David Hume seems to have agreed with Burke about the problems associated with a mandate model. According to Hume, a trustee model would make "it difficult, either by intrigue, prejudice, or passion, to hurry [representatives] into any measures against the public interest."[325] Trustee representation likewise accommodates the fact that representation is a "two-way" street. A representative has the ability to define her own constituency and convince that constituency of where their best interests lie.[326] As even Burke noted long ago, constituents are not always consciously aware of their own interests.[327] Furthermore, a mandate model that insists that legislatures must "reflect" the population does not help lawmakers as they address the complex and intractable social problems.[328] Trustee representation, moreover, tends to prioritize long-term stewardship of the entire community. Burke's conception of the social contract, to illustrate, was inter-generational.[329] Finally, trustees may more easily represent heterogeneous districts because "they need not actually ascertain the mandate of their constituents in order to follow what they judge to be in the best interests of the constituency."[330]

Another appealing upshot of trustee representation is that it respects citizens' expectations of a division of labor between themselves and their leaders.[331] Everyday people—law professors included—do not have the desire or wherewithal to form an educated opinion on every matter of public concern. Instead, they trust their leaders to do so for their benefit and on their behalf. Trustee representation, furthermore, gives representatives permission to act even without express instructions from their constituents. Citizens may not know how best to fight a deadly pandemic, defeat inflation, or throw back an invading army, and therefore may offer their representatives no useful instructions. A trustee model, on the other hand, lays upon representatives a

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[324] Serrin Rutledge-Prior & Edmund Handby, *Political Representation, the Environment and Edmund Burke: A Re-Reading of the Western Canon through the Lens of Multispecies Justices,* EUR. J. POL. THOUGHT 1, 3 (forthcoming 2024).
[325] DAVID HUME, ESSAYS AND TREATISES ON SEVERAL SUBJECTS 280 (1758) (quoted in MORGAN, *supra* note 23, at 268).
[326] Michael Saward, *The Representative Claim*, 5 CONTEMP. POL. THEORY 297 (2006).
[327] Rutledge-Prior & Handby, *supra* note 323, at 1, 3.
[328] Bourke, *supra* note 307, at 195.
[329] Rutledge-Prior & Handby, *supra* note 323, at 4.
[330] Verstein, supra note 107, at 81.
[331] BERTELLI, *supra* note 296, at 13; HEATH, *supra* note 109, at 76; Bernardo Zacka, *Political Theory Rediscovers Public Administration*, 25 ANN. REV. POL. SCI. 21, 29 (2022).

duty to act - and to act responsibly. An agency or mandate model might require leaders to sit on their hands until they receive their orders.

Yet trustee representation does not anticipate that representatives remain aloof and indifferent to their constituent beneficiaries. As Burke knew, good representation requires attention to the preferences, beliefs, values and interests of individuals and their communities. While the public interest does not amount to the aggregation of individual interests, those interests are surely not irrelevant to it. John Dewey once observed, for example, although the man who wears the shoe knows best that it pinches and where it pinches, it is the shoemaker who can best judge how the trouble is to remedied.[332] As the Long Parliament of 1640-1660 England discovered to its regret, when the relationship between a representative and her local constituency becomes too attenuated, a representative risks losing legitimacy.[333] Accordingly, good trustee representation requires a representative to be a student of the needs and expectations of her constituency.

Trustee representation also facilitates the representation of those least positioned to advocate on their own behalf. When political resources are stacked in a lopsided manner, when the marginalized are so overburdened by the demands of ordinary life that they cannot speak for themselves, only a trustee can give the marginalized any (admittedly ventriloquized) voice at all.[334] If Edmund Burke failed to speak for the Irish Catholic and Indian people, likely no one else would have instead. Relatedly, trustees have permission to ignore the loudest and wealthiest voices — voices from citizens already well-positioned to advocate on their own behalf.[335] Similarly, in a corporate takeover, only a board of directors can stop shareholders from selling to a buyer bent on layoffs and liquidation.

Though trustee representatives are legally free to follow their own judgments about what best serves the public interest, they are not utterly unaccountable. Instead, voters may hold them to account at the ballot box.[336] This method of political accountability helps motivate trustee representatives

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[332] JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 154 (2000) (mirroring Edmund Burke, who argued "[t]he most poor, illiterate, and uninformed creatures upon earth are the judges of a practical oppression. It is a matter of feeling…But for the real cause, or the appropriate remedy, they ought never to be called into council") (quoted in PITKIN, *supra* note 106, at 183).

[333] MORGAN, *supra* note 23,at 48.

[334] Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 678 (2000); RUNCIMAN AND VIEIRA, *supra* note 110, at 163. This argument reflects Federalists' counterintuitive point that by limiting the type of and number of individuals who might serve as representatives (here, that such representatives act as good faith, loyal and diligent fiduciaries of the public) could expand the means by which the people could be represented as a whole. *See id.* at 40. It also resonates with Burke's idea of "virtual" representation, whereby representatives act on behalf of the disenfranchised.

[335] Rutledge-Prior & Handby, *supra* note 323, at 4.

[336] *Id.* at 10.

to remain cognizant of her constituents' problems and goals. Furthermore, citizens can help shape trustees' best interests determination by exercising their freedom of speech and association. They can elect different trustees with different ideas about where the public's best interests lie.

C. *Lessons for Corporate Fiduciaries*

While corporate law provides useful guidance for political fiduciaries, trustee democratic representation may provide some guidance for corporate fiduciaries. One enduring question within corporate law, for example, is the duties that constituency directors owe to their unique constituencies. Must they make decisions in the interests of those constituencies alone? A political trustee model suggests that the answer should not furnished by courts but left to the director's own recognizance. Another suggestion, provided by both public and private models of trusteeship, is that corporate directors ought to inquire more actively into the experiences and preferences of their constituencies. Rather than merely assuming that they know what shareholders want and what amounts to their best interests, for instance, directors can add more participation to their annual meetings.

VI. CONCLUSION

The law of private fiduciaries is a law of restraint. Using gap-filling concepts derived from contract law, it empowers agents and settlors while subordinating the rights of others. In contrast, the law of public fiduciaries is a law of empowerment. It gives fiduciaries the political freedom to act for and behalf of others who cannot act for themselves. As a result, applying private fiduciary standards to public officers yields unattractive results. They may encourage anarchy and libertarianism because, when applied honestly, they fail to authorize any action at all. They may encourage populism and demagoguery because, when applied dishonestly, they authorize almost anything and everything. While corporate law closely approximates public representation, it features one crucial difference: corporations are not states. Corporations are subjects of sovereignty, not wielders of it. As a result, even though courts of equity grant directors and officers significant decision-making autonomy, public fiduciaries may require even more, even as they are constrained by citizens' relatively broader political and private autonomy rights.

Notwithstanding the many valuable lessons the law of private fiduciaries brings to democratic politics, the most important one is this: public fiduciaries make *political* decisions. A public fiduciary's determination about what lies in the public interest is not something that is justiciable and fair game for the courts to decide. Congress and the President should, at a minimum, enjoy the same amount of discretion afforded a corporate board of directors. Given the

current U.S. Supreme Court's apparent determination to step on lawmakers' shoes,[337] this is a lesson that we should all take to heart. While fiduciary scholars are right to concerned about the potential for self-serving factionalism and corruption within both the Congress and the White House,[338] the solution is more democracy, not more judicial review.[339] If too many well-heeled special interest groups have the ear of the President, then the answer is to make some effort to include those that represent marginalized constituencies.

For some lawyers and scholars, though, the prospect of tyrannical, arbitrary government is so fearsome that they would sacrifice the messiness of democracy for the anodyne safety of courts. But what some lawyers call tyrannical amounts of discretion, ordinary citizens may understand as an opportunity for collective self-determination.[340] If the Nazi-sympathizing German legal theorist Carl Schmitt is right – if the sovereign is he who decides the exception – then allowing courts to use equity as a reason to hold that the law just doesn't cut it, what we will get is not democracy. We will get juristocracy.

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[337] West Virginia v. EPA, 577 U.S. 1126 (2022) (major questions doctrine); Loper Bright Enterprises v. Raimondo, 144 S.Ct. 2244 (2024) (overruling *Chevron* deference).

[338] Criddle, *Fiduciary Administration, supra* note 8, at 492 (cited by Davis, *supra* note 20, at 1155).

[339] Criddle suggests that OIRA decisions should be reviewed for their" . . .purposefulness, integrity, solicitude, fairness, reasonableness and transparency." Criddle, *Fiduciary Administration, supra* note 8, at 441–42. One can only imagine how the U.S. Supreme Court, which has recently shown its willingness to undermine political officials' policy decisions by striking down *Chevron* and imposing the major questions doctrine, might deploy these additional tools of judicial review.

[340] *Cf.* Leib & Ponet, *supra* note 5, at 187 (Where residual control rights are attenuated, of course, beneficiaries must rely to a greater extent on fiduciary altruism…the higher degree of vulnerability, the more strictly the duties are imposed and the higher standard of conduct that is expected…The absence of a very meaningful residual control mechanisms is a striking feature of democratic representation; this likely means that political representatives should be subject to broader fiduciary duties…") (citing Criddle, *Fiduciary Foundations*, *supra* note 10, at 179).