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The False Promise of Fiduciary Government

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THE FALSE PROMISE OF FIDUCIARY
GOVERNMENT

*Seth Davis**

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ABSTRACT

This Article critiques the borrowing of private law concepts to develop doctrines of judicial review in public law. A rising chorus of scholars has argued for a fiduciary theory of government designed to constrain political discretion through judicial review based upon the model of private fiduciary duties. Treating politicians and bureaucrats as fiduciaries, they argue, promises a workable judicial solution to the problem of faction in legislative and administrative decision-making. This Article argues the promise of fiduciary government is a false one. There are problems of fit, intent, and function with fiduciary government. Politicians and bureaucrats are not like private fiduciaries because they do not serve discrete classes of beneficiaries and are not subject to demands that can be distilled into a discrete maximand. Fiduciary government cannot be founded in the intent of the Founders or of Congress. Moreover, fiduciary government has not functioned well where courts have experimented with it. Either the analogy to fiduciary law operates at such a high level of generality that it simply restates public law problems in different terms, or it imports freestanding fiduciary principles that yield unworkable constraints on political decisionmaking. The failure of fiduciary government is instructive, however, on the promises and potential pitfalls of translating between public and private law.

INTRODUCTION

Private law labels some relationships of power and dependence between persons “fiduciary.” With the label come duties, enforceable through private rights of action, which aim to protect the beneficiaries of delegations of power to others from becoming victims of that dependence. To some, modern life is characterized by the emergence of a “society . . . based predominantly on fiduciary relations.”¹ Understood thus, fiduciary law encompasses not only the traditional doctrinal categories—trust, agency, partnership, corporations, and so on—but also all “important social and economic interactions of *high* trust and confidence that create an *implicit* dependency and *peculiar* vulnerability of the beneficiary to the fiduciary.”²

The work of the antebellum scholar Francis Lieber reveals how far this thinking can run. Writing in 1838, Lieber lumped constitutional law with

1 Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 798 (1983).

2 Leonard I. Rotman, *Fiduciary Law’s “Holy Grail”: Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U. L. REV. 921, 933 (2011).

trust law.³ Every citizen, from the federal postmaster to the local haberdasher, was a fiduciary. The foundation of political duties, no less than that of duties that run from trustee to trust beneficiary, could be found in fiduciary law.

More recently, a rising chorus of contemporary scholars has begun to argue for a model of government designed to constrain political discretion through judicial review based upon the law of fiduciary duties.⁴ Like private

3 See Paul D. Carrington, *Meaning and Professionalism in American Law*, 10 CONST. COMMENT. 297, 305 (1993) (“For Lieber, Constitutional Law was a branch of the law of Trusts.”) (discussing FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* (William G. Hammond ed., 1880) (1838) and FRANCIS LIEBER, *II MANUAL OF POLITICAL ETHICS* (Theodore D. Woolsey ed., 1888)).

4 There are four strains to the contemporary fiduciary theory of government. One applies the fiduciary model to constitutional law. See, e.g., D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 706–22 (2013); Mitchell F. Crusto, *Obama’s Moral Capitalism: Resuscitating the American Dream*, 63 U. MIAMI L. REV. 1011, 1021–22 (2009); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1088–91 (2004) [hereinafter Natelson, *Public Trust*]; Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 317–21 (2004) [hereinafter Natelson, *Necessary and Proper*]; Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003) [hereinafter Natelson, *General Welfare*]; Philip J. Levitz, *A Modern Fiduciary Theory of the Necessary & Proper Clause* (Aug. 21, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2014468>. Another looks to reform administrative law by reference to fiduciary theory. See, e.g., Jeremy A. Blumenthal, *Expert Paternalism*, 64 FLA. L. REV. 721, 728 (2012); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 448 (2010) [hereinafter Criddle, *Administration*]; Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. 1271 (2010); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 359–65 (2009); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006) [hereinafter Criddle, *Foundations*]. Yet a third strain aims at particular substantive areas of regulation. Some envision a thorough overhaul of existing regulatory approaches, particularly in the area of environmental and natural resources regulation. See, e.g., FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST (Ken Coghill, Charles Sampford, & Tim Smith eds., 2012); Peter Manus, *To a Candidate in Search of an Environmental Theme: Promote the Public Trust*, 19 STAN. ENVTL. L.J. 315, 360–61 (2000); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43 (2009) [hereinafter Wood, *Part I*]; Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance*, 39 ENVTL. L. 91 (2009) [hereinafter Wood, *Part II*]. Others are more focused upon extensions of existing approaches, particularly in areas where there is a risk of quid pro quo corruption or naked self-dealing. See, e.g., Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 63; Claire Hill & Richard Painter, *Compromised Fiduciaries: Conflicts of Interest in Government and Business*, 95 MINN. L. REV. 1637, 1640 (2011); Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845 (2013). The fourth strain is more concerned with the political theory of state authority and less with its doctrinal implications. See, e.g., EVAN FOX-DECENT, *SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY* (2011); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331, 347–59 (2009); Dimitrios Kyritsis,

fiduciaries who owe duties to beneficiaries, public officials possess discretionary authority to act on behalf of citizens, who cannot protect themselves from abuse, or so the analogy runs. By applying fiduciary duties of loyalty and care to politicians and bureaucrats, fiduciary theorists aim to resolve the “problem of faction” in political and bureaucratic decisionmaking.⁵ For example, fiduciary theorists point to the duty of loyalty to check incumbent “self-dealing” in legislative redistricting,⁶ or, paired with a “duty of impartiality,” to revive substantive due process review of economic legislation.⁷ Another scholar finds in fiduciary law six principles of judicial review that cut “strongly against presidential administration” and in favor of substantial changes to federal administrative law, including hard look review of every rulemaking and of agency inaction, as well as disclosure of all agency communications with the White House during rulemaking proceedings.⁸ There are other examples including, perhaps most boldly, fiduciary theories that would rewrite *McCulloch v. Maryland*’s longstanding gloss on the Necessary and Proper Clause.⁹

In short, fiduciary theorists see in fiduciary law a political morality from which to derive judicial constraints on political discretion. By “drawing on the lessons from private law enforcement of fiduciary duties,” the federal courts can create a “workable approach” to judicial review of political decisionmaking.¹⁰ That is the promise of fiduciary government.

This Article argues the promise of fiduciary government is a false one. Fiduciary constraints are riven with problems even in the private law context, where there is a consensus about the interests of beneficiaries and the ends of judicial review. Identifying when a fiduciary relationship exists is a matter

Representation and Waldron’s Objection to Judicial Review, 26 OXFORD J. LEGAL STUD. 733, 742–43 (2006); Ethan J. Leib et al., *A Fiduciary Theory of Judging*, 101 CAL. L. REV. 699, 712 (2013) [hereinafter Leib et al., *Judging*]; David L. Ponet & Ethan J. Leib, *Fiduciary Law’s Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249, 1255–61 (2011); Jedediah Purdy & Kimberly Fielding, *Sovereigns, Trustees, Guardians: Private-Law Concepts and the Limits of Legitimate State Power*, 70 L. & CONTEMP. PROBS. 165 (2007); Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070, 1097–1109 (2008); Stephen B. Young, *The Moral Basis of American Law: An Hypothesis*, 82 U. DET. MERCY L. REV. 649, 681 (2005). Finally, there is a literature exploring the theory of fiduciary government in other common law countries. See, e.g., Paul Finn, *Public Trust and Public Accountability*, 3 GRIFFITH L. REV. 224 (1994); P.D. Finn, *The Forgotten “Trust”: The People and the State*, in EQUITY: ISSUES AND TRENDS 131 (Malcolm Cope ed., 1995); Lorne Sossin, *From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion*, 55 U. TORONTO L.J. 427 (2005) [hereinafter Sossin, *Neutrality*]; Lorne Sossin, *Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law*, 66 SASK. L. REV. 129 (2003) [hereinafter Sossin, *Obligations*].

5 See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 29–30 (1985) (comparing disparate areas of law, including Madisonian idea of factions, while reflecting on the role of representatives).

6 Rave, *supra* note 4, at 679.

7 Natelson, *Public Trust*, *supra* note 4, at 1170, 1177–78.

8 Criddle, *Administration*, *supra* note 4, at 448, 486–87, 495.

9 See Levitz, *supra* note 4, at 31–35; Natelson, *Necessary and Proper*, *supra* note 4, at 246.

10 Rave, *supra* note 4, at 739.

of significant debate. Even where fiduciary constraints are well accepted—from trust to corporate law—specifying their content sparks more disagreement. Indeed, some scholars have argued fiduciary law is dead.¹¹ Hence, we face an irony. While private law scholars chart the decline and indeterminacy of fiduciary constraints and the rise of private discretion, public law scholars look to fiduciary law to constrain public discretion. Yet designing fiduciary rights and duties is even more difficult in the public law context, where, unlike its private counterpart, there is not a consensus about the interests of beneficiaries and the ends of judicial review.

As a result, the fiduciary model suffers a kind of Goldilocks problem. Taken for all it suggests, fiduciary government would hold government to the “punctilio of an honor the most sensitive.”¹² That constraint is simply too much. Unsurprisingly, fiduciary theorists have acknowledged the “uncompromising moralistic rhetoric” of fiduciary law and sought to restate public fiduciary duties in compromising terms.¹³ But that approach provides too little guidance. Does it advance analysis, for example, to recast the arbitrary-and-capricious standard of federal administrative law as a fiduciary duty of care? In either case, a court must still “calibrat[e] the degree of judicial deference to be accorded” and the administrative procedure it will demand of agencies.¹⁴

The problem lies in fiduciary doctrine itself. Fiduciary law overlays moralistic standards of conduct upon legally enforced norms, but what links the two remains uncertain. When it comes to corporate governance, for example, judges act “more as preachers than as policemen.”¹⁵ Delaware corporate law has a shadowy “penumbra,”¹⁶ with moral exhortations that “can never be fully realized nor even defined with specificity in advance.”¹⁷ Importing fiduciary law into constitutional and administrative law carries this indeterminacy with it.

My arguments unfold as follows. Part I elaborates the fiduciary theory of government. Part II discusses the *problem of fit* between private fiduciaries and public officials. The “hallmark” of a fiduciary relationship is an altruistic duty requiring the fiduciary to be loyal to her beneficiary.¹⁸ This rule of undivided loyalty gives rise to a distinctive set of rules of justiciability, primary rights and duties, and remedies focused upon a discrete set of beneficiaries

11 See *infra* Section II.E.

12 *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

13 Criddle, *Foundations*, *supra* note 4, at 133.

14 CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 13 (1990).

15 Edward B. Rock, *Saints & Sinners: How Does Delaware Corporate Law Work?*, 44 *UCLA L. REV.* 1009, 1016 (1997).

16 Claire A. Hill & Brett H. McDonnell, *Stone v. Ritter and the Expanding Duty of Loyalty*, 76 *FORDHAM L. REV.* 1769, 1795 (2007).

17 John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 *YALE L.J.* 1875, 1879 (1992).

18 Carter G. Bishop, *A Good Faith Revival of Duty of Care Liability in Business Organization Law*, 41 *TULSA L. REV.* 477, 480 (2006).

and interests. A trust, for example, involves a trilateral relationship among the settlor, who creates the trust, the trustee, who administers it, and the trust beneficiaries. Trust law directs the trustee to resolve conflicts of interest by reference to the settlor's intent and to a well-understood set of economic principles regarding the management of trust assets. By contrast, networks among politicians, bureaucrats, and citizens are multifarious. Much debate in political life and public law concerns not the means but the ends of regulation. There is no single maximand that a public official must pursue, and no generally accepted means for her to pursue it. Moreover, to the extent fiduciary relationships are contractual, and fiduciary duties are default terms, they provide poor guides to public law.

Part III explains the *problem of intent* with fiduciary government. Federal courts do not have unfettered authority to enforce freestanding fiduciary constraints on Congress and the executive as a matter of federal common law. And the interpretive case for public fiduciary law is ultimately unconvincing. The absence of fiduciary precedent is compelling evidence against the theory. The Founders, to be sure, spoke of public office as a "public trust" and were concerned with limiting "corruption," defined broadly to include "conscious or reckless abuse of the position of trust."¹⁹ But it is far from clear that fiduciary government was a background understanding of *legal* rights at the Founding. When the Founders raised the theory of fiduciary government, they often did so in connection with *political* mechanisms—chiefly impeachment and elections—for holding government officials responsible for breaches of the public trust. And whatever its persuasiveness as an account of Founding Period political theory, fiduciary government cannot explain the political compromise at the center of the charter of federal administrative law, the Administrative Procedure Act.

Part IV lays out the *problem of function* with fiduciary government. To test the promise of fiduciary government, it makes sense to look at the public law contexts where federal lawmakers have experimented with fiduciary analogies, including the honest services statute,²⁰ the STOCK Act,²¹ First Amendment public forum doctrine, the public trust doctrine in environmental and natural resources law, and the Indian trust doctrine. The results do not commend fiduciary government. The connection of fiduciary duties to constitutional values is opaque at best. In many cases, fiduciary government has served as a shield for government defendants, not as a sword for private plaintiffs. In other cases, the model aggrandizes judicial authority at the expense of the daily operations of government. Moreover, it is difficult to distill a limiting principle for public fiduciary duties.

Part V shows that the problems of fit, intent, and function arise with respect to three proposed fiduciary reforms. Fiduciary government is attrac-

19 Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 374, 378 (2009).

20 18 U.S.C. § 1346 (2006).

21 The Stop Trading on Congressional Knowledge Act (STOCK Act), Pub. L. 112–105, 126 Stat. 291 (2012).

tive as a theory of political ethics. But the fiduciary metaphor does not advance the analysis of troubling problems in public law, or so Part V argues.

Which is to say politics is not a problem to be solved by collapsing public into private law. Part VI considers the problem of translating between public and private law. Taking fiduciary government as an example, Part VI argues that the success of translation depends upon recognizing the interdependence of justiciability, rights, and remedies, mediating between general principles and decision rules in particular cases, and identifying the logical connections between the values at stake in the relevant doctrinal debates. Along all three metrics, fiduciary government fails to fulfill its promise of a workable approach to constitutional and administrative law. The analogy to fiduciary law either imports freestanding fiduciary principles that yield unworkable constraints on political decisionmaking or operates at such a high level of generality that it simply restates public law problems in different terms.

I. THE THEORY OF FIDUCIARY GOVERNMENT

To take seriously the theory of fiduciary government means to “hold government officials and employees, including policymakers, to standards analogous to those imposed on private fiduciaries.”²² A fiduciary relationship implies not only private rights and duties, but also private remedies. The fiduciary owes the beneficiary of the relationship a duty of loyalty and a duty of care. The duty of loyalty directs a fiduciary to act only in the beneficiary’s interest. And the duty of care requires the fiduciary competently to pursue those interests.²³

Fiduciary law is thus one response to the agency problem that arises where one person (the fiduciary) is tasked with making decisions regarding the interests of another (the beneficiary). An agency relationship may be desirable for any number of reasons, including to allow the principal to devote time to other activities and to harness the specialized skills and knowledge of another person to accomplish her goals.²⁴ But with delegation comes vulnerability. Corporate managers may shirk, for instance, spending more time on the golf course than in the boardroom, or, worse still, self-deal at the expense of the shareholders. They may be negligent or reckless. The

²² Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. RICH. L. REV. 191, 193 (2001).

²³ Whether the fiduciary relationship implies other judicially enforceable duties is a matter of debate among private law scholars. Some treat the duty of loyalty as the only uniquely fiduciary duty. See, e.g., Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 220–21. Others enumerate additional duties. See, e.g., Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231, 1234–35 (2010). Yet a third approach sees the duties of loyalty and of care as manifestations of the fiduciary’s underlying duty of obedience. Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, 34 J. CORP. L. 43, 46 (2008).

²⁴ See, e.g., Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627, 1635 (1999).

shareholders may not have the information, wherewithal, or incentives to monitor manager misfeasance and malfeasance. Similar problems can arise in other relationships where one person is dependent upon the discretion of another. In such circumstances, private law sometimes imposes fiduciary duties.

Fiduciary law is explicitly altruistic, not individualistic. The classic treatment remains then-Chief Judge Benjamin Cardozo's majority opinion in *Meinhard v. Salmon*:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.²⁵

Cardozo's dictum frames the crucial divide between the altruists, who consider moralizing rhetoric to be a defining feature of fiduciary law, and the individualists, who treat fiduciary law as a species of contract law, subject to nothing more than the morals of the market place.²⁶ For the past three decades, the individualists have offered an increasingly influential contractarian account in which the duties of loyalty and care are "a method of gap-filling in incomplete contracts."²⁷ To individualists, fiduciary duties are preference-estimating default terms that reduce the transaction costs of bargaining. By contrast, like Cardozo, altruists do not account for fiduciary duties in market terms. To them, "fiduciary relationships are not contracts" and the core fiduciary duties are not waivable or negotiable.²⁸ The moralizing rhetoric of fiduciary law matters; even though courts do not enforce fiduciary duties in an unyielding way, their exhortations encourage fiduciary loyalty.²⁹

Much the same debate animates the fiduciary turn in public law. The individualist conception, sometimes called "pluralism," treats politics like a marketplace.³⁰ In this market, competing interest groups push, pull, grap-

25 *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

26 Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 *BUFF. L. REV.* 99, 107–09 (2008).

27 Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 *STETSON L. REV.* 23, 25 (1991); see *infra* Section II.E (discussing contractarian account).

28 Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 *MARQ. L. REV.* 303, 305 (1999).

29 See, e.g., Anthony Duggan, *Contracts, Fiduciaries, and the Primacy of the Deal*, in *EXPLORING PRIVATE LAW* 275, 276 (Elise Bant & Matthew Harding eds., 2010) (discussing altruistic account). For a forceful and influential statement of altruism, see Frankel, *supra* note 1, at 829–30 ("Courts regulate fiduciaries by imposing a high standard of morality upon them.").

30 In using the pluralist label, I follow Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *COLUM. L. REV.* 1689, 1692–93 (1984). But scholars sometimes distinguish between the "pluralist" political science of the 1960s and the public choice theory that

ple, and horse trade their way to influence political and bureaucratic decisionmakers to promote their pre-political preferences. Public officials, for their part, may aim at political spoils, such as reelection or bigger agency budgets, not the public interest. In this view, the role of institutional design is to “filter[]” private interests in pursuit of the public good and to correct for failures and barriers to entry in the political marketplace.³¹ Courts, for example, should simply “police the processes of representation to ensure that all affected interest-groups may participate.”³²

The theory of fiduciary government both reflects and rejects the market model. With the pluralists, fiduciary theorists describe contemporary political life as characterized by the tug and pull of competing interest groups. But unlike the pluralists, fiduciary theorists aspire to public governance that transcends normal politics and see an ambitious role for courts to hold politicians and bureaucrats, no less than partners and agents, to something more than market morality.

In a polity of any size, citizens cannot coordinate with one another to achieve many public goods because the collective action barriers are too high.³³ Hence the demand for political agents. Representatives can shoulder the burdens of policymaking, develop specialized skills and knowledge to address public problems, and reduce the costs of achieving public goods.³⁴ But for public officials to achieve these benefits, they must enjoy substantial discretion. They are tasked with meeting a goal—pursuing the public interest—that is not easily defined, and thus not readily observable, and which depends upon factors that may not be within an official’s control.

Political scientists have elaborated the resulting problems through principal-agent theory. Left unmonitored, politicians may be incompetent, lazy, and the like. But they may also pursue their self-interest through political patronage, “the allocation of the discretionary favors of government in exchange for political support.”³⁵ Patronage can consist of quid pro quo corruption and naked self-dealing or favoritism that aims to bolster a politician’s coalition for reelection or to achieve some other self-interested bene-

emerged in the 1970s. Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 33 (1998).

31 See, e.g., Michael Serota & Ethan J. Leib, *The Political Morality of Voting in Direct Democracy*, 97 MINN. L. REV. 1596, 1601–02 (2013).

32 Sunstein, *supra* note 30, at 1692–93. The foundational account is George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

33 See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 9 (1971); see also Croley, *supra* note 30, at 18–20 (discussing collective action problem).

34 See Issacharoff & Ortiz, *supra* note 24, at 1635–37.

35 Richard L. Hasen, *An Enriched Economic Model of Political Patronage and Campaign Contributions: Reformulating Supreme Court Jurisprudence*, 14 CARDOZO L. REV. 1311, 1311 (1993) (quoting MARTIN TOLCHIN & SUSAN TOLCHIN, *TO THE VICTOR . . . : POLITICAL PATRONAGE FROM THE CLUBHOUSE TO THE WHITE HOUSE* 55 (1971)).

fit.³⁶ These agency problems are compounded in the administrative state, where politicians delegate substantial discretion to bureaucrats, creating a second layer of slack. Bureaucrats may seek to maximize their agency budgets, not the public interest, be captured by those they regulate, and so on.³⁷

As in other agency contexts, two mechanisms may reduce these problems: monitoring and bonding.³⁸ Citizens may monitor public officials' performance and sanction them for selfish or incompetent decisions. Or public officials may seek to assure their principals through bonding strategies that precommit them to pursue the public interest. But monitoring of political principals by citizens, particularly at the federal level, may be "crude," as elections are infrequent, citizens have "very little information about . . . candidates' positions" and, in any event, "must . . . vote for a mixed bundle" of policy positions in any given election.³⁹ And "[i]n a world in which elected representatives are known to do things contrary to the apparent preferences of their legal constituents," voters may rightly be skeptical of the durability of officials' precommitments.⁴⁰

To improve bonding and monitoring mechanisms and thus to address the problem of faction, fiduciary theorists would extend the fiduciary metaphor from private law by treating politicians and bureaucrats as fiduciary agents of the public (or some subset thereof). In so doing, they would apply the duty of loyalty or the duty of care, or both, to government officials. Teddy Rave argues, for example, for stricter judicial review of electoral redistricting because "[n]ational political parties" are "superfactions" that have corrupted the districting process.⁴¹ Robert Natelson points to "widespread sentiment that Congress is spending too much time laddling from the pork barrel and conniving with the lobbyists thereby accommodated" as a reason for a fiduciary prohibition upon special interest spending.⁴² Similarly, Evan Criddle points to "the so-called 'iron triangles' between private industry, agency administrators, and congressional committees, which institutionalize factionalism" and thus lead to "decay into corruption, cronyism, capricious-

36 See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 708 (1998) (discussing public choice assumption that "elected officials are utility maximizers who pursue actions that maximize their chance of reelection" (citing ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957))).

37 See, e.g., WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) (arguing that agency officials maximize utility by maximizing their budgets); OLSON, *supra* note 33, at 3 (discussing capture of regulators by special interests); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 23 (2010) (discussing causes of capture).

38 Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 323–26 (1976).

39 Croley, *supra* note 30, at 38 (citing Stigler, *supra* note 32, at 12).

40 Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 575 (1996).

41 Rave, *supra* note 4, at 686 (internal quotation marks omitted).

42 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).

ness, and waste.”⁴³ In his view, the rise of presidential administration feeds faction in federal administration, with the White House and the Office of Information and Regulatory Affairs (OIRA) catering to SIGs (special interest groups) rather than PIGs (public interest groups).⁴⁴ The solution, Criddle argues, is judicial review of federal administration by reference to six fiduciary principles: “purposefulness, integrity, solicitude, fairness, reasonableness, and transparency.”⁴⁵

In sum, fiduciary theory promises a workable scheme of judicially enforceable rights and duties to constrain political agents to the aims of their principals. In particular, fiduciary theorists seek to limit special interest influence and presidentialism through robust judicial review of federal action under the Constitution and the Administrative Procedure Act.

Thus, fiduciary theory hopes for a politics that is more than a nasty and brutish marketplace. It rejects raw power as a reason to deploy the coercive power of the state, even as it describes normal politics in those terms. It acknowledges the obvious counter-majoritarian difficulty—that authorizing fiduciary review of policymaking will lead to government by judiciary—by pointing to the contextual nature of fiduciary duties and the possibility of calibrating them to comport with the separation-of-powers principle. Taking the public trust seriously by treating officials as fiduciaries, they promise, will prevent the polity’s “decay into corruption, cronyism, factionalism, capriciousness, and waste.”⁴⁶

It is tempting to dismiss fiduciary government as unrealistic. It is reasonable to wonder whether judicial review can transform the morals of the political marketplace. And it is reasonable to wonder whether federal judges would act differently from their political counterparts. There is wisdom in this critique, but it is too easy. There are enough reasons to doubt the market model of politics,⁴⁷ and the claim that judges decide cases based solely upon naked preferences,⁴⁸ to justify a sympathetic assessment of fiduciary government.

43 Criddle, *Foundations*, *supra* note 4, at 147–48.

44 See Criddle, *Administration*, *supra* note 4, at 464. On SIGs and PIGs, see Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 32 (2007).

45 Criddle, *Administration*, *supra* note 4, at 476.

46 Criddle, *Foundations*, *supra* note 4, at 147.

47 See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 33 (1991) (“Our best picture of the political process . . . is a mixed model in which constituent interest, special interest groups, and ideology all help determine legislative conduct.”).

48 See FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 9 (2007) (reporting, based upon empirical analysis of federal courts of appeals, that “[l]egal rules are much better determinants of outcomes than is judicial ideology,” while acknowledging that “other aspects of judicial background” and “other judges on the panel matter”).

II. THE PROBLEM OF FIT

What makes a government official a fiduciary? Fiduciary theorists focus upon the vulnerability of citizens that arises from a public official's discretion. In brief, "public officials serve as fiduciary representatives for persons subject to their power" because "[a]ll agents and instrumentalities of the state . . . are vested by law with discretionary administrative powers" for the public, who "is uniquely vulnerable to officers' inept or unreasonable misuse of administrative power."⁴⁹ Put simply, the state's monopoly over making and enforcing laws, and the people's resulting vulnerability, give rise to a fiduciary relationship.⁵⁰

Descriptively, fiduciary theorists claim that public law doctrines are grounded in a (largely implicit) fiduciary model of government. Where that is not the case, fiduciary theorists propose to reform public law. In this Part, I address the fiduciary theorists' descriptive claim and call into question whether the solutions to public law problems can be found in a formal analogy between private fiduciaries and public officials.

A. *The Many Faces of Fiduciary Law*

The fiduciary theorists' altruistic account of the fiduciary concept is far too neat. On one view, the fiduciary relationship is "one of the most elusive concepts in Anglo-American law,"⁵¹ more "a concept in search of a principle" than a decision rule for assigning rights and duties in private law.⁵² One definition—"a person who undertakes to act in the interest of another person"—is both over- and under-inclusive.⁵³ Another is taxonomic—a fiduciary relationship is any relationship where one person controls another's property, or has an obligation to act for another, or has "undue influence" over another, and so on—but not instructive.⁵⁴ Yet a third would collapse fiduciary law into contract,⁵⁵ while a fourth would treat it as a species of property.⁵⁶ Perhaps "the only general assertion . . . that can be sustained" is that fiduciary duties are appropriate when "one person's discretion ought to be

49 Criddle, *Administration*, *supra* note 4, at 472–73.

50 FOX-DECENT, *supra* note 4, at 111.

51 Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879.

52 A.F. Mason, *Themes and Prospects*, in *ESSAYS IN EQUITY* 246 (P. Finn ed., 1985).

53 Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 540 (1949); see D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1427 (2002).

54 L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69, 74–79.

55 Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 426 (1993).

56 Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1637 (2001).

controlled because of characteristics of that person's relationship with another."⁵⁷

"And should I then presume? And how should I begin?"⁵⁸ Courts usually start by distinguishing between formal relationships that "give rise to a fiduciary duty as a matter of law," and informal fiduciary relationships, which exist "as a result of the special circumstances of the parties' relationship."⁵⁹ Generally speaking, the common law of the several states has settled upon a list of traditional, formal fiduciary relationships that includes agents and their principals, trustees and beneficiaries, business partners, corporate managers and shareholders, guardians and their wards, and attorneys and their clients.⁶⁰ As for informal fiduciary relationships, the "exact limits . . . are impossible of statement."⁶¹ Many state courts employ a general standard, as in, "[a]n implied fiduciary relationship will lie when there is a degree of dependency on one side and an undertaking on the other side to protect and/or benefit the dependent party."⁶² Some have adopted multi-factor tests,⁶³ which others have rejected.⁶⁴ Yet others have adopted presumptions against finding informal fiduciary relationships, which are "extraordinary . . . and will not be lightly created."⁶⁵

There is even more variation in the states' treatment of fiduciary duties. At a general level, the duty of loyalty requires fealty to the beneficiary and the duty of care some modicum of competence. These general principles hardly prescribe decision rules for specific cases. When it comes to applying the principles, states vary, sometimes widely. Consider, for example, the multifa-

57 DeMott, *supra* note 51, at 915. DeMott seems to have relaxed that skepticism in later work. See Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 926 (2006).

58 T.S. Eliot, *Love Song of J. Alfred Prufrock*, lines 68–69, available at <http://www.bartleby.com/198/1.html> (line break omitted).

59 *Ransom v. A.B. Dick Co.*, 682 N.E.2d 314, 321–22 (Ill. App. 1997).

60 See, e.g., *Wolf v. Super. Ct.*, 130 Cal. Rptr. 2d 860, 863–64 (Cal. App. 2003); *Ransom*, 682 N.E.2d at 321–22; *Swenson v. Bender*, 764 N.W.2d 596, 601 (Minn. Ct. App. 2009); *Doe v. Harbor Sch., Inc.*, 843 N.E.2d 1058, 1064 (Mass. 2006); *Gregan v. Kelly*, 355 S.W.3d 223, 227 (Tex. App. 2011).

61 *Penato v. George*, 383 N.Y.S.2d 900, 904 (N.Y. App. 1976).

62 *Masztal v. City of Miami*, 971 So. 2d 803, 809 (Fla. Dist. Ct. App. 2007); see *Auriga Capital Corp. v. Gatz Props.*, 40 A.3d 839, 850 (Del. Ch. 2012); *Denison State Bank v. Madeira*, 640 P.2d 1235, 1241 (Kan. 1982); *Harbor Sch.*, 843 N.E. at 1064; *Pool v. Farm Bureau Town & Country Ins. Co. of Mo.*, 311 S.W.3d 895, 907 (Mo. Ct. App. 2010); *EBC I, Inc. v. Goldman Sachs & Co.*, 832 N.E.2d 26, 31 (N.Y. 2005); *Lippy v. Soc. Nat'l Bank*, 651 N.E.2d 1364, 1368 (Ohio App. 1995); *Moore v. Moore*, 599 S.E.2d 467, 472 (S.C. Ct. App. 2004); *Augusta Mut. Ins. Co. v. Mason*, 645 S.E.2d 290, 295 (Va. 2007).

63 See, e.g., *Wright v. Roberts*, 797 So. 2d 992, 998 (Miss. 2001) (listing seven-factor test); see also *Ransom*, 682 N.E.2d at 322 (listing three factors).

64 See, e.g., *City of Hope Nat. Med. Ctr. v. Genentech, Inc.*, 181 P.3d 142, 151–52 (Cal. 2008) (rejecting attempt to reduce fiduciary relationships to multi-factor test).

65 *Gregan v. Kelly*, 355 S.W.3d 223, 228 (Tex. App. 2011); cf. *Ransom*, 682 N.E.2d at 321–22 (requiring clear and convincing evidence).

rious state regimes regulating limited liability companies.⁶⁶ All of which is to ask of fiduciary theorists who would impose fiduciary duties on public officials: Which duties?

The question is not rhetorical. Fiduciary law is built around the axiom that “[t]he foremost duty which a fiduciary owes to its beneficiary is undivided loyalty.”⁶⁷ Translating from that context to public governance is hardly straightforward. And to the extent that fiduciary constraints are in decline in private law, it is worth asking whether the game is worth the candle.

What is the resolving power of the analogy of public officials to private fiduciaries? At one level of analysis, fiduciary law is thin rather than thick. It offers abstract concepts rather than decision rules. Natelson, for example, enumerates five fiduciary principles that may apply to government conduct: “(1) the duty to follow instructions, (2) the duty of reasonable care, (3) the duty of loyalty, (4) the duty of impartiality, and (5) the duty to account.”⁶⁸ Similarly, Criddle identifies six principles by which to judge federal administrative rulemaking: “purposefulness, integrity, solicitude, fairness, reasonableness, and transparency.”⁶⁹ Almost no one would disagree that government should act purposefully, reasonably, fairly, and so on. But if that is all the fiduciary analogy offers, then it largely restates existing questions regarding judicial review of legislative and administrative action.

Treating the analogy between public officials and fiduciaries as thick rather than thin promises to resolve some of these questions. Two principles animate fiduciary law. First, private fiduciaries owe a single beneficiary or a discrete class of beneficiaries a duty of undivided loyalty. It is difficult, however, to specify how politicians and bureaucrats are fiduciaries for a discrete class of beneficiaries. Second, in discharging her duties, the fiduciary must pursue one or a set of agreed-upon ends, which are measured by a specific set of doctrinal maximands. By contrast, in public law there is no agreement upon specific maximands. This distinction is significant because the existence of a rough consensus on specific ends mediates between the general, indeterminate concepts of “loyalty” and “care” and the outcomes that courts reach in fiduciary litigation. As a result, the thick analogy between private fiduciaries and public officials fails as a formal matter, whether the analogue is the parent-child, trustee-beneficiary, or corporate manager-shareholder relationship.

B. *Public Officials as Parents*

Some modern fiduciary theorists analogize public officials to parents. In particular, they draw upon Immanuel Kant’s conception of private fiduciary duties as elaborated through his famous example of the parent-child relation-

66 See Sandra K. Miller, *What Fiduciary Duties Should Apply to the LLC Manager After More Than a Decade of Experimentation?*, 32 J. CORP. L. 565, 568 (2007).

67 *Ledbetter v. First State Bank & Trust Co.*, 85 F.3d 1537, 1540 (11th Cir. 1996).

68 Natelson, *Public Trust*, *supra* note 4, at 1088.

69 Criddle, *Administration*, *supra* note 4, at 476.

ship.⁷⁰ A parent owes his child a fiduciary duty of care and loyalty, Kant argues, *not* because the child has delegated authority to the parent. The child has no choice. It is *that* vulnerability, and the natural power a parent has either to act in his child's best interest or not, Kant reasons, which gives rise to a fiduciary obligation running from parent to child.⁷¹ Observe, the argument runs, that government officials possess discretionary power over the citizenry and that citizens are vulnerable to wrongful exercises of power. From this structural similarity springs the analogy between parents and public officials.⁷²

One obvious objection is that the analogy is paternalistic. Parents may not be dictators, but that's not far off, as the law gives them extraordinarily wide latitude over their children. A parent can instruct a child when to sleep and when to wake up; what to wear; how to style his or her hair; where to go to school, and where to worship; what to believe and to think, and so on.⁷³ Courts—particularly federal courts—are generally loath to question these decisions, presuming instead “that natural bonds of affection lead parents to act in the best interests of their children,” who lack the “maturity, experience, and capacity for judgment required for making life's difficult decisions.”⁷⁴

Perhaps less obvious is the objection that, as a matter of *doctrine*, the parent-child relationship does not, without more, give rise to fiduciary duties of loyalty and care. That is true under federal law.⁷⁵ And it is true under state law too. The Kansas Supreme Court has explained, “The mere relationship of parent and child does not raise a presumption of a confidential and fiduciary relationship.”⁷⁶ Similarly, the Connecticut Court of Appeals has opined, “The relationship between a parent and a child does not *per se* give rise to the establishment of a fiduciary relationship.”⁷⁷ Or, as the Illinois court of appeals put it: “The mother and daughter relationship alone does not create a fiduciary status.”⁷⁸ In some settings, parents may have limited

70 See Criddle & Fox-Decent, *supra* note 4, at 352–55.

71 IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 64–65 (Mary J. Gregor trans., Cambridge University Press 1996) (1797).

72 See Criddle & Fox-Decent, *supra* note 4, at 355 (“Applying the fiduciary principle, states are no more at liberty to deny *jus cogens* than parents are at liberty to deny the fiduciary obligations that accompany parenthood.”).

73 See Donald C. Hubin, *Parental Rights and Due Process*, 1 J.L. & FAM. STUD. 123, 125 (1999) (giving non-exhaustive list of parental rights).

74 *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality opinion).

75 See *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (“[M]ore than the gratuitous reposal of a secret to another who happens to be a family member is required to establish a fiduciary or similar relationship of trust and confidence.”).

76 *Olson v. Harshman*, 668 P.2d 147, 151 (Kan. 1983).

77 *Cooper v. Cavallaro*, 481 A.2d 101, 104 (Conn. App. Ct. 1984).

78 *Estate of Eisberger v. Nickel*, 376 N.E.2d 793, 795 (Ill. App. Ct. 1978); see also *Upman v. Clarke*, 753 A.2d 4, 9 (Md. 2000) (holding that parent-child relationship “is not presumed as a matter of law” to be fiduciary relationship); *Liapis v. Dist. Ct.*, 282 P.3d 733, 738 (Nev. 2012) (“Mark and Marie’s mother-son relationship, standing alone, does not establish a confidential relationship.” (citing, *inter alia*, *Texas Bank & Trust Co. v. Moore*,

fiduciary duties arising from some accident of their relationship with their children, as in, for example, a parent who receives child support payments for her child from her ex-spouse.⁷⁹ But the parent-child relationship is not an established fiduciary relationship.

Moreover, the reasons we might treat parents as fiduciaries do not extend to politicians and bureaucrats. Robert Scott and Elizabeth Scott have explained that by “re-articulating informal norms in legal prescriptions,” a fiduciary law of parenthood could “reinforce the independent weight of the informal precommitments” that usually exist between a parent and a child but may be weaker in fractured families.⁸⁰ Reinforcing informal kinship norms is a far cry from treating public officials as fiduciaries and does not provide a helpful template for thinking about public fiduciary duties.

C. Public Officials as Trustees

Fiduciary theorists sometimes analogize public officials to private trustees. A trust exists when a trustee “holds the trust property and is subject to equitable duties to deal with it for the benefit of” one or more beneficiaries, as designated by the settlor who creates the trust and conveys legal title to the trustee.⁸¹ The trust’s separation of risk from control creates agency problems. As Robert Sitkoff has argued, the first exists between the settlor and trustee.⁸² Dead settlors cannot monitor their trustees. Nor can living settlors specify all the trustee’s obligations in advance, at least in a trust of any complexity. The second agency problem exists between the trustee and the beneficiaries.⁸³ The beneficiaries bear the risk of the trustee’s mismanagement, “cannot exit” the trust, and are unlikely to be able to monitor the trustee effectively.⁸⁴ That is not to say non-legal monitoring and bonding mechanisms won’t work in the trust context. Where, for example, a trustee and the beneficiary are family, the risks of selfish behavior may be minimal.⁸⁵ Moreover, many professional trustees are repeat players, recruited by attor-

595 S.W.2d 502, 508 (Tex. 1980); *Simpson v. Dailey*, 496 A.2d 126, 128 (R.I. 1985); *Economopoulos v. Kolaitis*, 528 S.E.2d 714, 718 (Va. 2000)).

79 See, e.g., *Cumberland v. Cumberland*, 564 So. 2d 839, 847 (Miss. 1990); RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b(1) (2003); Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665, 732 (2009).

80 Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2449–50 (1995).

81 RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. f (1959).

82 Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 639–40 (2004).

83 *Id.*

84 Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 82–83 (2005).

85 See *id.* at 84 (“[I]f the trustee is an individual, chosen by the settlor for her honesty, competence and knowledge of family relationships, the beneficiary trusts that the trustee will continue to act consistently with past behavior.”). But see John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 666 (1995) (“Family and personal trustees often have interests adverse to the trust.”).

neys who represent settlors and who have reasons to keep the gates secure, so to speak.⁸⁶

Imposing fiduciary duties on trustees is a potential solution to these agency problems. Under the duty of loyalty, a trustee cannot self-deal or act on the basis of a conflict of interest. The no-further-inquiry rule lays down a firm rule in this regard: upon discerning a conflict of interest, a court will hold a trustee liable for a breach of fiduciary duty without inquiring into whether her action benefitted the trust corpus.⁸⁷ But 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, requiring the trustee fully to consider and fairly to balance all the beneficiaries' interests, consistent with the settlor's intent.⁸⁸ In some cases, these interests may compete. An income beneficiary wants the trustee to maximize the trust's current capacity to produce income, while a remainder beneficiary wants to maximize the principal.⁸⁹

The duty of impartiality is intertwined with the trustee's duty to manage the trust property prudently. The *Restatement (Third)* reflects the generally accepted definition: "The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust."⁹⁰ The rule sets a relatively determinate standard. It refers a court to prevailing market practices and investment strategies. Did the trustee reasonably diversify trust investments, in order to minimize the risk to the trust portfolio?⁹¹ Did the trustee seek to preserve the "safety of the principal" and

86 See John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 937 (2005) (discussing the "strong reputational incentives" for repeat players). See generally Elisabeth de Fontenay, *Private Equity Firms as Gatekeepers*, 33 REV. BANKING & FIN. L. (forthcoming 2014) (manuscript at 16–21) (on file with *Notre Dame Law Review*) (canvassing gatekeeping literature). But see Leslie, *supra* note 84, at 83–84 (questioning efficacy of trust attorneys as gatekeepers).

87 There are exceptions to this firm rule, "the most important of which is the statutory authorization, now in nearly all states, for trust companies to participate in the establishment of proprietary mutual funds and to receive compensation for their services to those funds." Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 CAL. L. REV. 1877, 1911 (2000).

88 In the light of the possibility of conflicts of interest between the settlor and the beneficiaries, the question whether trustees owe fiduciary duties to both naturally arises. Even so, the universe of persons to whom duties may be owed remains discernible and discrete. For a discussion of the law's attempts to balance trustee duties towards settlors and beneficiaries, see Sitkoff, *supra* note 82, at 657–58 (examining the settlor-benefit tension).

89 Similar issues can arise in the charitable trust context. See Halbach, *supra* note 87, at 1912.

90 RESTATEMENT (THIRD) OF TRUSTS § 227 (2007).

91 See, e.g., *In re State St. Bank & Trust Co. Fixed Income Funds Inv. Litig.*, 842 F. Supp. 2d 614, 652 (S.D.N.Y. 2012) (holding that fiduciary breached duty by failing to diversify).

to “assure” a reasonable total return and capital appreciation?⁹² Did the trustee seek advice from an investment professional?⁹³ Did the trustee make reasonable adjustments between principal and income?⁹⁴ Did she use a total return strategy under the modern portfolio theory?⁹⁵ If so, then she likely discharged her duties of impartiality and of care to the trust beneficiaries. Thus, trust law defines the fiduciary duties of trustees by reference to a discrete class of beneficiaries, whose interests are discernible and observable through a well understood maximand rooted in prevailing investment strategies.

There is no real analogue in public law. For whom is a congressional representative a fiduciary? The voters who elected her? Everyone who resides within her district? We the People? What about the President—where do her fiduciary duties lie? Or federal administrative officials—are they the agents of the President, as the theory of the unitary executive would suggest; Congress, an understanding also reflected in administrative law; the beneficiaries of the regulatory programs they implement; or, yet another possibility, the people writ large? In canvassing our constitutional order, for example, Steven Calabresi has identified four sets of principal-agent relationships, among four principals—“We the People,” the President, congressional representatives and judges, and congressional committees—and four corresponding agents—“all government officers,” “all executive officers,” “all legislative and judicial personnel and staff,” and “the cabinet departments and other related entities.”⁹⁶

A few examples should serve to make the point. Consider the Administrator of the Environmental Protection Agency, an executive branch agency. The President appoints her, and, on the unitary executive theory, is her principal.⁹⁷ That theory is controversial, however.⁹⁸ Perhaps it is more apt to look to federal environmental law to identify whether, and to what extent, the EPA’s head is a fiduciary. But which law? The Toxic Substances Control

92 AMY MORISS HESS ET AL., *BOGERT’S LAW OF TRUSTS AND TRUSTEES* § 612 (3d ed. 2012).

93 See, e.g., UNIF. PRUDENT INVESTOR ACT § 9 (1994) (“A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances.”).

94 See, e.g., *In re Orpheus Trust*, 179 P.3d 562, 567 (Nev. 2008) (discussing reasonable adjustments between interest and principal).

95 See, e.g., UNIF. PRINCIPAL & INCOME ACT § 104 (2000).

96 Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1524 (1994).

97 See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

98 See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1810–36 (1996) (disputing theory on functionalist grounds); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994) (disputing theory on historical grounds).

Act?⁹⁹ The Clean Air Act?¹⁰⁰ CERCLA?¹⁰¹ The answer seems to be all of the above. But that answer is far from a clear one. Under the CAA, for example, does the EPA Administrator owe duties to the residents of metropolitan areas,¹⁰² farmers, property owners,¹⁰³ state and local governments,¹⁰⁴ the public writ large,¹⁰⁵ or even the environment itself? All seem plausible answers under the statute. Perhaps it is more cogent, then, to view EPA as the fiduciary of Congress, which has tasked it with implementing environmental regulation. If so, then, its fiduciary duties are delimited by statute and in no need of further elaboration. But viewing Congress as EPA's principal brings us full circle to the controversy regarding the separation of powers between the legislative and executive branches. It is easy to say that the EPA Administrator, like every other public official, is ultimately answerable to the public. What that means for public fiduciary law is not easy to discern; after all, achieving a regulatory benefit invariably means imposing a regulatory burden.¹⁰⁶

What about politicians as fiduciaries? Consider the President deciding whether to commit the armed services to an armed conflict. Suppose he decides that the armed forces will suffer unimaginable casualties in the course of the conflict, but that the fight is necessary to protect the nation. Can we speak of such decisions in fiduciary terms? In what sense is it sensible for the President, much less the courts, to think of the office as a fiduciary for the soon-to-be fallen dead?

Fiduciary theorists might look to the trust analogy to derive a duty of impartiality for public officials. But the duty of impartiality in trust law entails a specific set of obligations to a specific set of beneficiaries. At some level, there is likely to be broad agreement that public officials should treat all citizens fairly. But that just restates the difficult questions that arise from our constitutional commitments to equal protection and to due process.

D. Public Officials as Corporate Managers

Another potential analogy runs between public officials and corporate managers. Traditionally, courts have imposed fiduciary duties on directors in both close and public corporations to protect the interests of the corporation

99 15 U.S.C. §§ 2601–2692 (2006).

100 42 U.S.C. §§ 7401–7428 (2006).

101 *Id.* §§ 9601–9675.

102 *Id.* § 7401(a)(1) (finding that nation's metropolitan areas are growing).

103 *Id.* § 7401(a)(2) (finding that air pollution harms farmers and property owners).

104 *Id.* § 7401(b)(3) (establishing as purpose of CAA assistance of state and local governments).

105 *Id.* § 7401(b)(1) (declaring Congress's purpose to "promote the public health and welfare").

106 See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (illustrating importance of transaction costs in determining demand for regulation to address externalities).

and shareholders.¹⁰⁷ Much of the literature on agency problems concerns the corporate setting. In Adolph Berle and Gardiner Means's classic treatment, agency problems arise from the "separation of ownership and control" in the corporate form.¹⁰⁸ This separation creates problems to the extent that managers control decisionmaking but do not bear the risks of mismanagement, which fall instead on the shareholders. Due to problems of asymmetric information, observability, and collective action, shareholders often will not or cannot monitor managers' decisions. Management may harm shareholder interests through incompetence, of course. Moreover, corporate managers may pursue their own interests at the expense of shareholders.

Jurists and scholars debate which fiduciary duties directors owe, and whether they owe them to the corporation as an entity or to the shareholders.¹⁰⁹ At the risk of over-simplification, the conventional wisdom is that directors owe a duty of loyalty that limits self-dealing and self-interested decisionmaking. The duty of loyalty is not unyielding, however: directors may defend a self-interested transaction as substantively fair under the "entire fairness" doctrine, or obtain ratification of the transaction from an independent decisionmaker.¹¹⁰ Directors also owe a duty of care, which requires informed decisionmaking and some modicum of monitoring of the corporation's activities. Even so, the business judgment rule protects directors from liability for any number of poor decisions. This rule sets a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."¹¹¹ For a time, Delaware, the leading corporate law jurisdiction, flirted with an independent duty of good faith,

107 Whether corporate officers have fiduciary duties has been a more vexing question, which raises problems for the analogy between public officials and corporate managers. See generally Usha Rodrigues, *From Loyalty to Conflict: Addressing Fiduciary Duty at the Officer Level*, 61 FLA. L. REV. 1, 3-4 (2009) (comparing ubiquity of discussions of fiduciary duties at director level with absence at officer level).

108 ADOLPH A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 5 (1932); see also FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983); Jensen & Meckling, *supra* note 38, at 305. That is not to say, however, that principal-agent theory is the only theory of the corporate firm. See Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757 (1989) (discussing modern theories of firm).

109 See, e.g., Andrew S. Gold, *Dynamic Fiduciary Duties*, 34 CARDOZO L. REV. 491, 493 (2012) (discussing debate and citing sources). There is also an ongoing debate among jurists and scholars as to whether directors of insolvent corporations owe fiduciary duties to creditors. The seminal case supporting such a duty is *Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.*, No. 12150, 1991 WL 277613 (Del. Ch. Dec. 30, 1991). For discussions of the debate, see Douglas G. Baird & M. Todd Henderson, *Other People's Money*, 60 STAN. L. REV. 1309 (2008); Henry T.C. Hu & Jay L. Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321 (2007).

110 See, e.g., *Merritt v. Colonial Foods, Inc.*, 505 A.2d 757, 763-65 (Del. Ch. 1986).

111 *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

suggesting *In re Walt Disney Co. Derivative Litigation* that shareholders could hold a director liable for failing to act “in the face of a known duty to act, [thus] demonstrating a conscious disregard of his duties.”¹¹² But in *Stone v. Ritter* the court folded the duty of good faith into the duty of loyalty,¹¹³ and in subsequent cases the court has suggested that nothing short of an “extreme set of facts” will make out a breach of this aspect of the duty of loyalty.¹¹⁴

The upshot is that corporate law imposes a limited set of legally enforceable obligations that require directors to maximize the value of the corporation for shareholders. Absent an apparent conflict of interest, the decisions of directors are subject to procedural review and shielded by the business judgment rule. Many of corporate law’s monitoring and bonding mechanisms—disclosure and reporting requirements, incentive-based compensation, and the like—have little to do with these fiduciary duties. Scholars continue to debate whether these market mechanisms suffice, given that placing private rights of action in the hands of shareholders promises to reduce agency problems but comes with the social costs of private enforcement and the risk of over-deterrence.¹¹⁵ Moreover, many scholars criticize corporate law’s commitment to value maximization, given that shareholders are not the only corporate constituents and that corporate decisions have ramifications beyond shareholder value.¹¹⁶ But there is general agreement that the law, at its base, imposes fiduciary duties on directors in the interests of a discrete class of beneficiaries, as defined by a well-understood maximand. Directors must pursue the “best interests of the corporation and its shareholders” by maximizing long-term corporate value.¹¹⁷ As Henry

112 906 A.2d 27, 67 (Del. 2006).

113 911 A.2d 362, 370 (Del. 2006) (“[T]he fiduciary duty of loyalty . . . encompasses cases where the fiduciary fails to act in good faith.”).

114 *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009).

115 *Compare, e.g., FitzGibbon, supra* note 28, at 352 (arguing that market mechanisms cannot achieve benefits of mandatory fiduciary duties), *with* Larry E. Ribstein, *Takeover Defenses and the Corporate Contract*, 78 GEO. L.J. 71, 144 (1989) (“[The] justifications for fiduciary duties . . . fail to recognize fully the costs of fiduciary duties compared with other available alternatives.”). Some scholars seek a third way beyond the debate between contractarians and altruists. *See, e.g.,* John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1620 (1989).

116 *See, e.g.,* Ethan J. Leib et al., *Mapping Public Fiduciary Relationships*, in *THE PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* (Andrew Gold & Paul Miller eds., Oxford University Press, forthcoming 2014) [hereinafter Leib et al., *Mapping*], available at <http://ssrn.com/abstract=2320548> (discussing shareholder and stakeholder models of corporate constituencies); *see also* Douglas M. Branson, *Corporate Social Responsibility Redux*, 76 TUL. L. REV. 1207, 1217 (2002) (discussing corporate social responsibility movement); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249 (1999) (arguing for more encompassing “team production approach” to corporate governance). *See generally* LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY* (2001) (calling for broader concept of corporate constituencies).

117 Velasco, *supra* note 23, at 1281 (citation omitted).

Hansmann and Reiner Kraakman put it, this is the “end of history for corporate law.”¹¹⁸

Consider, for example, the classic corporate opportunity case *Guth v. Loft, Inc.* The court’s opinion strikes the moralistic tones common to fiduciary law:

A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.¹¹⁹

Stirring rhetoric, but it hardly decides a case. In *Guth*, an officer, who was also a shareholder, took advantage of a business opportunity that he developed by exploiting his position with the corporation. The court gave legal content to the duty of loyalty by holding that a corporate manager may not exploit a business opportunity when the corporation “is financially able to undertake it,” the opportunity is “in the line of the corporation’s business and is of practical advantage to it,” and, finally, the “corporation has an interest or a reasonable expectancy” in the opportunity.¹²⁰ This framework distills a decision rule from the duty of loyalty based upon the goal of maximizing corporate value.

Interpolating the duty of loyalty into public law cannot work that way. There is no similar consensus on the ends of administrative or constitutional law. Moreover, it is far from clear, in any given case, who the beneficiaries of public fiduciary duties are. The most difficult problems in public law do not correspond to those in *Guth* and other cases where courts have defined the metes and bounds of the corporate director’s duty of loyalty. At its base, the duty of loyalty “is really only a way to say ‘don’t steal’ from the corporation,”¹²¹ a command that is unhelpful for deciding whether politicians or bureaucrats have acted consistently with the Constitution or the Administrative Procedure Act (APA) in the mine run of cases.¹²²

118 Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) (“There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”).

119 *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. Ch. 1939).

120 *Id.* at 511.

121 Kelli A. Alces, *Debunking the Corporate Fiduciary Myth*, 35 J. CORP. L. 239, 249 (2009).

122 In their careful exploration of the promises and pitfalls of the fiduciary analogy, Ethan Leib, David Ponet, and Michael Serota point out that “[m]ultiple beneficiaries arise in private law too.” Leib et al., *Judging*, *supra* note 4, at 712. The question, however, is whether fiduciary doctrine can help us translate the “public interest” or “regulatory beneficiary interest” that public officials presumably are to maximize under a public fiduciary model into judicially manageable criteria in public law. For the reasons discussed in the text, I doubt it can. Leib, Ponet, and Serota frankly acknowledge this difficulty and emphasize how a fiduciary analogy and political remedies (such as impeachment) might shape judges’ behavior without “direct civil actions” to enforce judges’ fiduciary duties. *Id.* at 729.

When it comes to the duty of care, the APA already requires agency officials to act reasonably based upon the information in the administrative record. Does that mean that administrative law is fiduciary in character? It would be just as easy to ask, with corporate law scholars, whether the duty of care “is . . . distinctively fiduciary.”¹²³ In any event, treating administrators like corporate managers might lead one to dial down, or even to abandon, the substantive components of arbitrary-and-capricious review. “Due care” in the corporate context “is process due care only.”¹²⁴ Even “stupid,” “egregious,” or “irrational” decisions will suffice if they were based upon a “good faith effort to advance corporate interests.”¹²⁵ Limiting breaches of the duty of care to gross negligence makes some sense given the threat of over-deterrence from personal director liability. Arbitrary-and-capricious review takes place within a different remedial framework, which undercuts the analogy between corporate and administrative officials.

E. *The Decline of Fiduciary Law?*

The analogy to corporate law is interesting in a different respect, however: scholars have explored whether, and to what extent, fiduciary duties are in decline in the corporate setting because, first, they are subject to partial contractual override and, second, courts have narrowed them to “address very specific and limited misbehavior.”¹²⁶ Both developments call the theory of fiduciary government into question.

The contractarian account of fiduciary law is straightforward. Fiduciary relationships are one type of contractual relationship. If contracting parties could provide rules to govern every potential conflict of interest between them, then there would be no need for fiduciary law. But often they can't. Courts enforce fiduciary duties where one party hires the expertise of another, on the “obvious condition” that she not be “at the mercy of an agent” she cannot monitor.¹²⁷ The content of those duties should, the argument runs, maximize the size of the contractual pie, leaving the parties to divide it as they please.¹²⁸

The contractarians are correct that much of fiduciary law arises from agreement. Some state courts, for example, have suggested informal fiduciary relationships may be limited to contractual relationships.¹²⁹ Moreover, many formal fiduciary relationships have contractual features. Corporate law, for example, gives the parties freedom to shape the contours of standard

123 DeMott, *supra* note 51, at 915.

124 Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000).

125 *In re Caremark Int'l, Inc. Deriv. Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996).

126 Alces, *supra* note 121, at 281.

127 Easterbrook & Fischel, *supra* note 55, at 426.

128 *See id.*

129 *See, e.g.*, First Nat. Bank & Trust Co. of Treasurer Coast v. Pack, 789 So. 2d 411, 414 (Fla. Dist. Ct. App. 2001); Latty v. St. Joseph's Soc'y of Sacred Heart, Inc., 17 A.3d 155, 162-63 (Md. Ct. Spec. App. 2011); Zastrow v. Journal Commc'ns, Inc., 718 N.W.2d 51, 60 (Wis. 2006).

corporate arrangements.¹³⁰ Through the charter or bylaws, for example, corporations may opt out of default rules regarding the structure and operation of the board of directors.¹³¹ They may also alter the fiduciary duties of care and loyalty. By statute, for example, Delaware permits the certificate of incorporation to limit the liability of directors for breaching the duty of care.¹³² Corporations can opt out of the duty of loyalty on a retail basis. Boards may engage in transactions that give rise to a director conflict of interest if they obtain approval from a majority of disinterested directors or shareholders and a court, reviewing the transaction under the deferential business judgment rule, concludes it was proper.¹³³ To the extent, moreover, that a particular jurisdiction imposes mandatory terms of corporate governance, it is possible to select another jurisdiction in which to incorporate. Thus, freedom of contract plays an important role in corporate law.

It is also possible to make sense of much of trust law—usually thought to be strictly altruistic—in contractarian terms. On the one hand, the trust arrangement does not mirror a standard bilateral contract. And trust law has traditionally embraced stringent fiduciary duties. Under the no-further-inquiry rule, for example, the trustee is *per se* liable for self-interested transactions, without regard to damages to the trust property. On the other hand, state courts routinely permit trust agreements to exculpate the trustee from breaches of the duty of care and to limit the duty of loyalty by specifying actions that do not violate it.¹³⁴ The Uniform Trust Code develops trust law in a contractarian direction by, *inter alia*, permitting exculpatory clauses and permitting some self-dealing transactions involving the trustee.¹³⁵

All of which is to suggest that there is a risk of treating fiduciary law as more altruistic than it currently is, or has been for some time. Most public fiduciary theorists offer an altruistic account. Rave, by contrast, argues that politicians are fiduciaries even on the contractarian account. Pointing to Locke's social contract, Rave argues there is a tacit agreement between the people and public officials that supports fiduciary government.¹³⁶

There are a number of well-known objections to social contract theory, many of which Evan Fox-Decent presents while elaborating an altruistic

130 See, e.g., *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 120 (Del. 2006) (“It is settled law that certificates of incorporation are contracts . . .”).

131 See, e.g., Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 S.M.U. L. REV. 383, 437–39 (2007) (providing summary in tabular format).

132 DEL. CODE ANN. tit. 8, § 102(b)(7) (2010).

133 See, e.g., McDonnell, *supra* note 131, at 415 (citing DEL. CODE ANN. tit. 8, § 144 (2010)).

134 See Langbein, *supra* note 86, at 660.

135 UNIF. TRUST CODE §§ 105(b), 801–804 (2010). Contractarians acknowledge that there are mandatory trust rules, but argue that “[t]he law of trusts consists overwhelmingly of default rules that the settlor who creates the trust may alter or negate.” John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1105 (2004). For criticism of the contractarian account, see Leslie, *supra* note 84, at 82–83.

136 Rave, *supra* note 4, at 712.

account of fiduciary government.¹³⁷ More interesting for our purposes, however, is an objection that is particularly troublesome for fiduciary government. If the social contract, embodied in the Constitution, is the basis for imposing fiduciary duties on public officials, then it is worth asking whether the Constitution derogates from or modifies those duties. It seems beyond peradventure that private agreements can at least tailor the duties of loyalty and of care. Yet fiduciary theorists have not offered an account of constitutional interpretation that would permit us to determine whether, and to what extent, the Constitution modifies fiduciary defaults. Nor have they explained whether, and to what extent, Congress might have the power to derogate from fiduciary defaults by statute.¹³⁸

Rather, one of the more startling features of the commentary on fiduciary government is its insistence upon an altruistic public fiduciary law in the face of anxiety and uncertainty about the scope of private fiduciary law. Contrast fiduciary government with, for example, Lawrence Mitchell's elegy upon the "death of fiduciary duty in close corporations."¹³⁹ As Mitchell explains, the law of close corporations first adopted the aspirational standard of *Meinhard v. Salmon*,¹⁴⁰ but its "unyielding principle" soon gave way to a test that balances a fiduciary's business interests against the harm to the plaintiff-beneficiary.¹⁴¹ Under this balancing test, a court will not question a fiduciary's decision unless there is a showing of an *intentional* attempt to freeze a minority shareholder out from corporate decisions, fraud, oppression, or other illegal conduct. The result is a doctrine that adds little to tort in its restrictions on majority shareholders.¹⁴²

Kelli Alces has described a similar retrenchment in the law of public corporations. There is no shortage of paeans to fiduciary duties in the cases. But Delaware law allows for the parties to contract out of the duty of care, and the business judgment rule protects against poor decisions short of gross negligence. Courts have narrowed the duty of loyalty such that "it is a standard that could be agreed to and enforced contractually."¹⁴³ Rather than

137 These objections are: (i) hypothetical consent is not consent; (ii) there is no basis for inferring tacit consent from a decision not to leave the polity, because exit is not a realistic option; (iii) voting does not imply consent because we are subject to the state's power even if we don't vote; and (iv) the dead-hand problem vitiates an argument from consent based upon the written Constitution. See FOX-DECENT, *supra* note 4, at 117–19.

138 A social contract account of fiduciary government also has the undesirable consequence of making the already complicated question of non-citizens' rights more complicated and possibly leading to denial of constitutional protections for non-citizens. See generally Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 927 (1991) (discussing problem of specifying rights of aliens under social contract theory of government).

139 Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675 (1990).

140 *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

141 Mitchell, *supra* note 139, at 1708.

142 *Id.* at 1715.

143 Alces, *supra* note 121, at 249; see Park McGinty, *The Twilight of Fiduciary Duties: On the Need for Shareholder Self-Help in an Age of Formalistic Proceduralism*, 46 EMORY L.J. 163, 169

the flexible standard celebrated by altruistic accounts, the corporate duty of loyalty limits only naked self-dealing and exploitation of corporate opportunities.¹⁴⁴

The reasons for this retrenchment are not hard to discern. Having recognized the harshness of *Meinhard*'s "punctilio of an honor the most sensitive,"¹⁴⁵ courts have limited private fiduciary duties.

F. *Public Fiduciaries as a Sui Generis Category*

If politicians and bureaucrats are fiduciaries, they are a *sui generis* category. For all their differences, the private law contexts in which courts have imposed fiduciary relationships share a few key features: (i) they involve single beneficiaries or a discrete class of beneficiaries; (ii) there is rough consensus about the ends of the relationship, with debate focusing upon the means of achieving those ends; and (iii) the duties of loyalty and care can be specified in these relationships by reference to a specific maximand and a discernible set of decision rules. None of these features obtains when we treat public officials as fiduciaries. There is also some amount of healthy partisanship in a functioning democracy. Moreover, the Constitution commits us to values that limit judicial authority to enforce public officials' fiduciary duties. Unlike their state counterparts, for example, Article III courts have limited jurisdiction and authority to shape federal law in a common law mode.¹⁴⁶

In careful examinations of the promises and pitfalls of the fiduciary analogy, Ethan Leib, David Ponet, and Michael Serota have forthrightly described public fiduciaries as *sui generis*.¹⁴⁷ Morphological similarity between private and public agency problems is not enough, they argue, to justify treating public fiduciaries like private ones. As a result, the possibilities for translating private fiduciary law into public law are limited, particularly in light of "how little headway has been made in delineating fiduciary-beneficiary relationships in the public context."¹⁴⁸

(1997) (calling duty of loyalty "increasingly impotent"); Celia R. Taylor, *The Inadequacy of Fiduciary Duty Doctrine: Why Corporate Managers Have Little to Fear and What Might Be Done About It*, 85 OR. L. REV. 993, 994 (2006) (arguing that "viability" of fiduciary duties "has been largely erased").

144 Blair & Stout, *supra* note 116, at 298–99.

145 *Meinhard*, 164 N.E. at 546.

146 See *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011) ("There is no federal general common law," *Erie* famously recognized.) (citation omitted).

147 Ethan J. Leib et al., *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91, 94 (2013) [hereinafter Leib et al., *Translating*]; cf. Leib et al., *Judging*, *supra* note 4, at 712 ("Of course, in understanding public officeholders as fiduciaries, one must consider the differences between private and public fiduciaries. Translation is one thing, but transplanting an idea from one category to another can lead to category mistakes.")

148 Leib et al., *Mapping*, *supra* note 116, at 12. In forthcoming work, Leib, Ponet, and Serota rightly reject "unitary" models of public fiduciaries and seek to start a new "conversation" on specifying the ways in which politicians, bureaucrats, and the institutions they work within serve as fiduciaries for different beneficiaries with potentially opposing inter-

With this, the stakes of the debate are clarified. Given that nothing in the form of public governance demands fiduciary treatment, and that there are serious problems with translating from private fiduciary duties to public ones, what warrant is there for judicial adoption of fiduciary government? Two possibilities present themselves. Either legislative intent directs courts to do so, or a common law of fiduciary government would be desirable for the polity. The next two Sections consider these justifications in turn.

III. THE PROBLEM OF INTENT

A. *Constitutional Law as Fiduciary Law*

As a political theory, fiduciary government resonates with deeply felt commitments to the rule of law. It is true that influential political theorists have described the political duty of a public official in fiduciary terms. And it is also true that some of these theorists were among the Founding generation and deployed political claims of fiduciary government to great rhetorical effect.

Given this background, the fiduciary account presents a serious alternative to our contemporary understandings of constitutional law. Because “the newly independent Americans frequently used the language of agency and trusteeship in reference to their legislative representatives,” perhaps we should interpret constitutional rights in fiduciary terms.¹⁴⁹ The Framers’ commitments to popular sovereignty seem consistent with a fiduciary account that directs politicians, as the people’s agents, to act in the people’s interests.¹⁵⁰

It is far from clear, however, that fiduciary government was a background understanding of legal rights at the Founding, rather than a way to think about the political claims that citizens may make upon their representatives. Indeed, when the Founders raised the theory of fiduciary government, they often did so in connection with political, not judicial, mechanisms for holding government accountable. As a result, there simply is not compelling enough evidence that the Founders intended to incorporate trust law as constitutional law to justify disturbing settled constitutional understandings.

To unpack the argument, begin with the social compact theory of John Locke. The influence of Locke’s philosophy on Anglo-American political theory, including the theories of the Founders, is well known. In particular, his conception of the relationship between the government and the gov-

ests. *Id.* at 10, 17. Recognizing that “each context may present sui generis problems,” they sketch a granular approach by suggesting that corporate law may shed new light on public fiduciary relationships, and vice versa. *Id.* at 10, 18. For my view of the corporate law analogy, see *supra* Sections II.D–E.

149 Rave, *supra* note 4, at 710–11.

150 See *id.* at 712 (arguing that constitutional structure imposes duty of loyalty upon political officials).

erned in terms of a social compact resonated with a revolutionary generation making a decisive and unprecedented break with a monarchical past.¹⁵¹

Fiduciary government was part of Locke's conception of the social compact. As he put it, "the community put the legislative power into such hands as they think fit with this *trust*, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of nature."¹⁵² It is commonplace among fiduciary theorists to equate Locke's political conception of the sovereign trust with a legal one.¹⁵³ But should the sovereign breach the trust by violating his fiduciary obligations, Locke explained, the people were empowered to reconstitute the polity: "[T]he legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them"¹⁵⁴ Thus was the fiduciary obligation of the sovereign enforced by political action.

The Founders similarly spoke of political duties in terms of a public trust. In *Federalist 46*, for example, Publius opined, "[t]he federal and State governments are in fact but different agents and trustees of the people."¹⁵⁵ Similar statements abound, among both the Federalists and Anti-Federalists. During the ratification debates, writers appealed to the "public trust" in popular pamphlets alternatively celebrating and denouncing the proposed Constitution. For example, Madison, writing as Publius, assured his readers that constitutional structure would hold congressional representatives to the "public trust."¹⁵⁶ Brutus was less sanguine: "[T]he representation in the legislature," he opined, "is not so formed as to give reasonable ground for public trust."¹⁵⁷ Thus, both sides drew upon a tradition with which Americans would have been familiar. Colonial charters, as well as several state constitutions adopted after the Declaration of Independence, referred to political office as a public trust.¹⁵⁸

The Constitution refers to public office as a public trust several times. Three of those instances involve little more than the use of "trust" to refer to public office.¹⁵⁹ The fourth is more instructive. In Article I, Section 3, which

151 See, e.g., Donald L. Doernberg, "We the People": John Locke, *Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 57 (1985) ("It would be difficult to overstate John Locke's influence on the American Revolution and the people who created the government that followed it.").

152 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 190 (Thomas I. Cook ed., 1947) (emphasis added).

153 See, e.g., Rave, *supra* note 4, at 708–09.

154 LOCKE, *supra* note 152, at 196.

155 THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961).

156 THE FEDERALIST NO. 55, at 345 (James Madison) (Clinton Rossiter ed., 1961).

157 See Natelson, *Public Trust*, *supra* note 4, at 1145 (quoting Brutus).

158 See *id.* at 1111–14.

159 Article I, Section 9 prohibits a person holding a "Trust" under the United States from accepting an office from a foreign power "without the Consent of Congress." U.S. CONST. art. I, § 9. Article II, Section 1 prohibits any "Person holding an Office of Trust . . .

provides for impeachment of “[t]he President, Vice President and all civil Officers of the United States,”¹⁶⁰ the Constitution specifies that “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.”¹⁶¹ Impeachment, of course, is a political remedy for a public wrong. As Publius put it: “The subjects of [the] jurisdiction” of a “well-constituted court for the trial of impeachments . . . are of a nature which may with peculiar propriety be denominated [political], as they relate chiefly to injuries done immediately to the society itself.”¹⁶² The concept of political injuries to society itself, as opposed to justiciable injuries to private rights, was a familiar one from the common law. The common law forms of action generally did not provide private rights to sue to right political wrongs.¹⁶³ In keeping with this understanding of the judicial role, the Framers chose a political body to try impeachments.¹⁶⁴

It is thus telling that the Framers consistently described breaches of the public trust as offenses that would subject an official to impeachment. Again, Publius: “[O]ffenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust . . . are of a nature which may with peculiar propriety be denominated [political]”¹⁶⁵ Charles Cotesworth Pinckney, speaking at the South Carolina ratifying convention, said that impeachment is the proper remedy for “those

under the United States” from being appointed to the Electoral College. *Id.* art. II, § 1. And Article VI protects freedom of conscience by providing “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” *Id.* art. VI.

160 *Id.* art. II, § 4.

161 *Id.* art. II, § 3.

162 THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see James Wilson, *Lectures on Law*, in 2 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 166 (Bird Wilson ed., 1804) (“In the United States and in Pennsylvania, impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments.”).

163 See, e.g., Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 404–07 (1995).

164 See THE FEDERALIST NO. 65, *supra* note 162, at 397 (“If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves?”). Nor did the Framers see impeachment as impacting private rights. Rather, the majority rejected the notion that impeachment was subject to the constitutional rules governing the criminal process. See Buckner F. Melton, Jr., *Federal Impeachment and Criminal Procedure: The Framers’ Intent*, 52 MD. L. REV. 437, 456–57 (1993). That is not to say the adjudicatory nature of an impeachment proceeding was lost on the Framers. In its address to the state convention, for example, the Pennsylvania minority argued that to lodge the power to try impeachments in the Senate was to mix judicial and legislative powers in violation of the separation of powers. See *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 251 (Ralph Ketcham ed., 2003).

165 THE FEDERALIST NO. 65, *supra* note 162, at 396.

who behave amiss, or betray their public trust.”¹⁶⁶ James Madison at the Convention stated that because the President “might betray his trust to foreign powers,” among other wrongs, impeachment was a constitutional necessity.¹⁶⁷ And Gouverneur Morris, who found Madison’s argument convincing, stated that the President “may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard agst it by displacing him.”¹⁶⁸ Joseph Story, heir to this understanding, described impeachable offenses as including “what are aptly termed, political offences, . . . various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law.”¹⁶⁹ Story, like the Framers, was echoing Blackstone, whose *Commentaries* listed “mal-administration of . . . high officers, as are in public trust and employment” as the “first and principal” impeachable offense “towards the king and government.”¹⁷⁰ A breach of the public trust was, in short, an impeachable political offense.

Thus, the link between fiduciary theory and political remedies was explicit in the Founders’ thinking. Natelson, who has offered a robust interpretivist defense of fiduciary government, acknowledges the point. “Impeachment,” he notes, “was the principal punitive measure associated in the public mind with [an official’s] breach of trust.”¹⁷¹ That description suggests, however, that a breach of the public trust was a political wrong “to the society itself”—just the sort of public wrong that a private plaintiff could not litigate in court. As Michael Gerhardt has explained, following the English understanding, the Framers viewed “impeachable offenses [as] political crimes *against the state.*”¹⁷²

One objection is that only executive officials and judges, not members of Congress, are “civil Officers”¹⁷³ subject to impeachment under Article II. The failed impeachment of Senator William Blount is often taken as conclusively establishing that members of Congress are not subject to the Senate’s impeachment jurisdiction, although that reads the evidence for more than it

166 JONATHAN ELLIOT, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 281 (Jonathan Elliot ed., 1891).

167 See Natelson, *Public Trust*, *supra* note 4, at 1165 (quoting James Madison, Journal (July 20, 1788), *reprinted in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66 (Max Farrand ed., 1937)).

168 See *id.* at 1166 (quoting James Madison, Journal (Jul. 20, 1788), *reprinted in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 167, at 70).

169 JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 234 (1833); see also MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS 105 (2d ed. 2000) (describing how delegates to state ratifying conventions identified impeachable offenses as deviations from duty and abuse of power).

170 4 WILLIAM BLACKSTONE, COMMENTARIES 121–22 (1765–69).

171 Natelson, *Public Trust*, *supra* note 4, at 1165.

172 GERHARDT, *supra* note 169, at 103–04 (emphasis added).

173 U.S. CONST. art. II, § 4.

is worth.¹⁷⁴ But the conventional wisdom does not require a contrary reading of the Founders' understanding of the public trust. At the Convention, Madison assured his colleagues that, unlike in the case of the President, "[i]t could not be presumed that all or even a majority of the members of an Assembly would either lose their capacity for discharging, or be bribed to betray, their trust."¹⁷⁵ Thus, impeachment was not a necessary remedy for a legislator's breach of trust. Moreover, each house can expel its members for "disorderly Behaviour,"¹⁷⁶ and there is reason to think impeachable offenses—including, of course, breach of the public trust—would be sufficient grounds for expulsion.¹⁷⁷ Admittedly, expulsion has rarely occurred in American history,¹⁷⁸ but elections have, and the ballot box provides an additional remedy for a legislator's derogation of political duties.

So far we have considered an official's breach of the public trust. What of *institutional* breaches of the trust? As far as I am aware, the Founders tended to speak of officials, rather than the branches as institutions, as potentially breaching the public trust. That may go a long way toward explaining why Madison was more concerned with presidential rather than congressional breaches of the trust. Put simply, even if individual members could breach the public trust, that did not necessarily mean that *Congress* as a body could.¹⁷⁹ On that understanding, violations of the public trust could not be the basis for a private right against congressional action.¹⁸⁰

It is important not to press the distinction between institutions and individual officials too far, though. Corporate boards of directors may be fiduciaries, after all.¹⁸¹ Yet the corporate analogy may be instructive in another

174 David P. Currie, 42 AM. J. LEGAL HIST. 427, 428 (1998) (reviewing BUCKNER F. MELTON, JR., *THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT* (1998)).

175 James Madison, Journal (July 20, 1787), in 4 THE WRITINGS OF JAMES MADISON 15 (Galliard Hunt ed., 1903).

176 U.S. CONST. art. I, § 5, cl. 2.

177 See GERHARDT, *supra* note 169, at 76 ("[T]he expulsion power given to Congress most logically qualifies as Congress's analogue to impeachment for the purposes of disciplining its members."); Timothy Zick, *The Consent of the Governed: Recall of United States Senators*, 103 DICK. L. REV. 567, 569–70 (1999) (noting that recall by the states was yet another potential remedy for senators).

178 See Zick, *supra* note 177, at 594.

179 In *Federalist* 55, for example, Publius wrote of *congressmen*:

I am . . . unable to conceive that there are at this time, or can be in any short time, in the United States, any sixty-five or a hundred men capable of recommending themselves to the choice of the people at large, who would either desire or dare, within the short space of two years, to betray the solemn trust committed to them.

THE FEDERALIST NO. 55, *supra* note 156, at 344 .

180 See Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1210 (2010) ("Every constitutional inquiry should begin with a basic question that has been almost universally overlooked. The fundamental question, from which all else follows, is the *who* question: *who has violated the Constitution?*").

181 Leib et al., *Mapping*, *supra* note 116, at 16.

respect. To the extent that the Founders thought of judicial review of legislative action in private law terms, there is strong evidence they would have looked to the corporate law doctrine of repugnancy rather than to private fiduciaries' duties of loyalty and care. Mary Sarah Bilder has traced the origins of judicial review to "a longstanding English corporate practice under which a corporation's ordinances were reviewed for repugnancy to the laws of England."¹⁸² The Founders were familiar with this doctrine as a constraint on their colonial governments, which, as chartered English corporations could not legislate contrary to English law. Bilder amasses a trove of evidence suggesting that "'the Constitution' replaced the 'laws of England'" following the Revolution.¹⁸³ Importantly, *Marbury v. Madison* accords with Bilder's account. In justifying judicial review, Chief Justice Marshall echoed the repugnancy doctrine of corporate law. "[T]he constitution controls any legislative act repugnant to it," he held, and, therefore, a law "repugnant to the constitution [] is void."¹⁸⁴ Though *Marbury* once describes the justice of the peace as an "office [] of trust,"¹⁸⁵ it gives no hint that the *content* of constitutional law lies in the fiduciary duties of loyalty and care.

More importantly, *McCulloch v. Maryland's*¹⁸⁶ longstanding gloss on the Necessary and Proper Clause makes no explicit mention of trust law, and describes the constraints it imposes in forgiving terms.¹⁸⁷ Natelson, however, argues that the trust origins of the Clause are implicit in its text. The argument begins by canvassing incidental powers clauses in eighteenth-century legal documents that created agency relationships.¹⁸⁸ Some of these documents included the phrase "necessary and proper," and others used similar wording, to convey that an agent had implied powers necessary to make the grant of authority effective.¹⁸⁹ More particularly, Natelson argues, the word "proper" connoted the fiduciary duties of loyalty, due care, and impartiality.¹⁹⁰ So too, he argues, the Necessary and Proper Clause connotes not only incidental powers—the focus of *McCulloch's* gloss—but also fiduciary constraints on Congress.¹⁹¹

Natelson marshals strong evidence that the Framers had a stock of private law examples upon which to base constitutional constraints, but he is on

182 Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 504 (2006).

183 *Id.*

184 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

185 *Id.* at 164.

186 17 U.S. (4 Wheat.) 316 (1819).

187 Because the strongest evidence of incorporation concerns the Necessary and Proper Clause, it is appropriate to focus upon it when considering the interpretive case for constitutional law as a branch of fiduciary law.

188 See Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in GARY LAWSON ET AL., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 68–70 (2010).

189 *Id.* at 56–67.

190 *Id.* at 79.

191 See Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in LAWSON ET AL., *supra* note 188, at 119.

shakier ground in suggesting that incorporation of such a clause in the Constitution carried with it eighteenth-century fiduciary constraints on agents. As other scholars have shown, incidental powers clauses appeared in other types of legal documents during the time, including corporate charters, and the concept also appeared in the common law of administrative review in England.¹⁹² Why then conclude that the Constitution's incidental powers clause incorporated trust law, rather than corporate or administrative common law?¹⁹³ Absent a showing that "necessary and proper" was a term of art that necessarily entailed judicial review under a fiduciary model—which Natelson concedes the evidence does not support—the argument for incorporation falters.¹⁹⁴ Recalling Chief Justice Marshall's admonition in *McCulloch* seems unavoidable: "we must never forget, that it is a *constitution* we are expounding," not a trust document.¹⁹⁵

As a constitution, the meaning of our founding document has been "liquidated" over time in ways that are inconsistent with the fiduciary account.¹⁹⁶ Take, for example, *Carolene Products* footnote four,¹⁹⁷ which John Hart Ely expounded upon in elaborating his influential representation-reinforcing account of judicial review.¹⁹⁸ The outlines of this approach are familiar: government action that clogs the political process, or burdens discrete and insular minorities, is subject to greater judicial scrutiny.¹⁹⁹ Judicial protection of traditionally disenfranchised minorities is warranted on the theory that it is necessary to ensure that their interests, which politicians are apt to ignore, will be represented in the polity. The logic of footnote four is that judges should be especially partial to some interest groups. For example, it does not direct searching review towards special interest legislation that burdens the economic interests of one well-heeled group at the expense of another. Thus, the logic of footnote four sits uneasily within the fiduciary framework, which is why it is unsurprising that Natelson has suggested abandoning it in favor of an approach that lessens scrutiny of legislation burdening discrete and insular minorities and ratchets up scrutiny of social and economic legislation.²⁰⁰

As an account of Founding-era political theory, fiduciary government has purchase. As an account of judicially enforceable constitutional rights,

192 See Gary Lawson & Guy I. Seidman, *Necessity, Propriety, and Reasonableness*, in LAWSON ET AL., *supra* note 188, at 121–35, 150–54.

193 John Manning offers a similar critique in John F. Manning, *The Necessary and Proper Clause and Its Legal Antecedents*, 92 B.U. L. REV. 1349, 1353, 1369–74 (2012) (reviewing LAWSON ET AL., *supra* note 188).

194 See *id.*

195 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

196 Manning, *supra* note 193, at 1375 (quoting THE FEDERALIST NO. 37, 229–30 (James Madison) (Clinton Rossiter ed., 1961)).

197 *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

198 See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

199 See *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

200 Natelson, *Public Trust*, *supra* note 4, at 1177–78.

however, it is unconvincing. The Constitution's text does not state, or even strongly suggest, that constitutional law is a branch of the law of trusts, leaving fiduciary theorists to argue from evidence of historical intent that is at best ambiguous and, importantly, hard to square with precedent. That leaves the case for fiduciary government to turn upon the practical consequences of retooling constitutional law to fit the fiduciary model, as Part IV discusses.²⁰¹

B. *The Fiduciary Account of Administrative Law*

What of a fiduciary theory of federal administrative law? The *sine qua non* of a fiduciary relationship is that the fiduciary must act solely in the interests of her beneficiary. But neither the APA nor administrative common law encourages agencies singularly to focus upon the interests of the beneficiaries of a regulatory program. Consider, for instance, arbitrary-and-capricious review of agency action. The cases are legion in which federal courts have vacated agency action not for a failure loyally to pursue regulatory beneficiaries' interests, but rather for doing so at the expense of competing and incommensurate values they should have considered but did not.²⁰²

201 It is worth contrasting the rights-based approach of fiduciary government with Zephyr Teachout's structuralist account of the anti-corruption principle in constitutional law. As Teachout shows, many of the Framers' institutional design choices responded to a concern about political corruption, broadly defined. She argues that the Constitution embodies an anti-corruption principle no less important than other structural commitments, such as the separation of powers and federalism. As her careful assessment shows, the Framers instantiated this principle through specific design choices about the three branches of the national government, ranging from Article I, Section 2's design for the frequency of elections to Article III, Section 2's requirement of jury trials. Teachout, *supra* note 19, at 355. In interpreting those structural provisions, a court might be guided by the anti-corruption principle. More broadly, Teachout argues that the anti-corruption principle supports election reforms designed to address political corruption, helping shield them from challenge under rights provisions of the Constitution, such as the First Amendment. *See id.* at 343, 345 (arguing that an anti-corruption principle gives "Congress . . . leeway to pursue [election law reforms] absent very strong countervailing constitutional limitations"). Teachout's call for consideration of a freestanding anti-corruption principle in deferring to legislative attempts to curtail political corruption is a far cry from treating constitutional rights like the rights that beneficiaries enjoy against private fiduciaries. *Compare, e.g., id.* at 410 (arguing that, like separation of powers, "anti-corruption principle . . . is . . . worthy of weighing directly against other freestanding principles"), with Natelson, *General Welfare*, *supra* note 4, at 55 (arguing for judicial enforcement of "[t]he General Welfare Clause . . . as a trust-style rule denying Congress authority to levy taxes for any but general, national purposes").

202 *See, e.g., Goldstein v. SEC*, 451 F.3d 873, 881–82 (D.C. Cir. 2006). Fiduciary theorists might address this problem by treating the public writ large, or some subset of affected or potentially aggrieved parties, as the beneficiaries of all agency action. But there are two problems with this approach. First, as Criddle argues, many regulatory programs are designed to benefit some interests and not others, and it is a "mistake" to treat the general public as the beneficiary for fiduciary analysis. Criddle, *Foundations*, *supra* note 4, at 138. Second, treating the public as the beneficiary for purposes of fiduciary analysis makes the formal and conceptual problems with the analogy particularly acute. *See supra* Part II.

Indeed, many doctrines in federal administrative law favor regulated parties rather than regulatory beneficiaries. Thus, administrative law enables regulated parties to influence agency action in ways and to a degree that fiduciary theory cannot explain. In particular, by permitting agencies to crystallize policy before issuing notices of proposed rulemaking, allowing them to use guidance documents to set enforcement priorities, limiting review of agency inaction, and denying standing to regulatory beneficiaries for lack of an “injury-in-fact,” federal administrative law seems designed in part to *disempower* regulatory beneficiaries.²⁰³ Moreover, the Court’s balancing approach to procedural due process—which limits regulatory beneficiaries’ rights based upon the costs to the agency of additional procedures²⁰⁴—is difficult to explain in fiduciary terms.

Fiduciary government does not find support in the “political origins” of the grand charter of federal administration, the APA.²⁰⁵ To be fair, fiduciary theorists do not base their normative claims about judicial review of federal administrative action on the New Deal Congress’s intent in enacting the APA. Instead, they look to administrative common law. But fiduciary theory does not provide a compelling account of the superstructure of administrative common law that courts have built upon the base of the APA.

The APA was “a hard-fought compromise” between Democrats who wanted to entrench New Deal policies against future agency change and aggressive judicial review and Republicans, joined by Southern Democratic allies, who hoped to permit agency policy to drift with a change in the political winds.²⁰⁶ There is no evidence either party intended to authorize robust judicial review of agency action based upon a fiduciary model. The terms of the debate were rather different. New Deal Democrats “favored a form of government in which expert bureaucrats would influence even the details of the economy, with little recourse for the people and businesses that felt the impacts of the bureaucrats’ commands.”²⁰⁷ Their conservative opponents

203 See Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking Via Pre-Notice Transparency*, 47 WAKE FOREST L. REV. 681, 683 (2012) (discussing how rulemaking procedures “may often disfavor” beneficiaries); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1459 (1988) (noting the Court’s “hostility” to beneficiary suits in nonreviewability doctrine); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1325 (2010) (“[L]ess well-financed interest groups find it hard to continue participating in the process.”).

204 See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (creating balancing test for due process claims).

205 The phrase is Mathew D. McCubbins, Roger Noll, and Barry Weingast’s. See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 181 (1999).

206 For an encyclopedic account of the legislative origins of the APA, see George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560–61 (1996); see also Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 219 (1986); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1191 (1986); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 447 (1986).

207 Shepherd, *supra* note 206, at 1559.

were not concerned with protecting regulatory beneficiaries; instead, they aimed to protect the property rights of regulated parties through “rule of law” constraints on agency action.²⁰⁸

Both parties scored partial victories. Conservatives could be satisfied that when private rights were at stake in adjudicatory proceedings, the APA imposed procedural due process protections. New Deal Democrats could look to the text’s comparatively lax demands for legislative rulemaking, as well as its commitment of legal questions to the federal judiciary, then staffed with New Deal appointees.

The fiduciary model is at odds with some of the New Deal Congress’s specific compromises. Consider, for example, the argument, grounded in fiduciary theory, that all agency rulemaking should be subject to “full notice-and-comment procedural requirements.”²⁰⁹ With the APA, Congress exempted interpretive and procedural rules from those requirements.²¹⁰ That exemption is legible in light of congressional concerns over agency flexibility. Under the *Vermont Yankee* doctrine, federal courts have no warrant to layer notice-and-comment procedures on top of interpretive and procedural rulemaking.²¹¹ As a result, implementing a fiduciary model would require political action. To embrace fiduciary theory, in short, would be to deny the political compromise reached in the APA.

The retort is that courts have already departed from interpreting the APA. Consider, for instance, the *Chevron* doctrine, which seems flatly inconsistent with the APA’s instruction in § 706 that courts will determine questions of law when reviewing agency action.²¹² There is much to be said for this reply. Fiduciary theory may ultimately rise and fall on pragmatic rather than interpretive considerations.

Still, *Chevron* cannot be reconciled with a fiduciary theory of administrative law. Under *Chevron*, when Congress has spoken clearly, an agency, like a court, must follow its direction. But when Congress has left a question in an agency-administered statute open, the agency may adopt any reasonable statutory interpretation into law. The *Chevron* Court justified deference to an agency’s statutory interpretations as follows:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its

208 *Id.*

209 Criddle, *Administration*, *supra* note 4, at 480.

210 5 U.S.C. § 553(b)(A) (2012).

211 *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) (“The court should . . . not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are ‘best.’”).

212 *See* 5 U.S.C. § 706.

judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices²¹³

Thus, one justification for *Chevron* deference concerns agencies' comparative expertise in regulatory policy, and the other involves their greater political accountability through the President. The emphasis throughout the opinion is on the competitive nature of the political process, in which warring coalitions in Congress may "take their chances with the scheme devised by the agency," which is then tasked with "resolving the struggle between competing views of the public interest" based upon the "incumbent administration's views of wise policy."²¹⁴

Criddle has offered the most complete argument that *Chevron* is consistent with fiduciary theory. The centerpiece of his argument is *United States v. Mead Corp.*, which presumes that Congress intends to delegate statutory questions to an agency when a statute is ambiguous, Congress has tasked the agency with administering the statute, and the agency has adopted the interpretation in a rulemaking or adjudication that carries the force of law.²¹⁵ Under *Mead*, legislative intent to delegate remains a "thinly veiled fiction," but, Criddle argues, "it is no greater fiction than private fiduciary law's attribution of entrusted authority to parents, guardians, and other noncontractual fiduciaries."²¹⁶ But the analogy does not hold. Nothing in *Mead* suggests a fiction based upon fiduciary government. Moreover, nothing in *Chevron* suggests that it would be desirable or proper for federal courts to hold agencies to freestanding "duties of fidelity"²¹⁷—instead, *Chevron* shifted authority away from the Article III judiciary and towards the "incumbent administration[]" and its "views of wise policy."²¹⁸

Absent grounding in the text of the Constitution or a statute, fiduciary government's legitimacy rises or falls upon the functional grounds we use to judge any federal common law. For those who take a narrow view of judicial competence, the absence of a specific authorization for fiduciary government will be fatal to the theory. I do not take that tack. Rather, in Part IV I consider whether fiduciary government is desirable and conclude it is not.

213 *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

214 *Id.* at 865–66.

215 *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

216 Criddle, *Foundations*, *supra* note 4, at 146–47.

217 *Id.* at 139, 146–47.

218 See *Chevron*, 467 U.S. at 865; see also Richard J. Pierce, Jr., Response, *Presidential Control Is Better Than the Alternatives*, 88 TEX. L. REV. 113, 116 (2009) ("Criddle . . . is actually urging adoption of a legal regime that would prefer judges to either the President or agency heads as the primary determinants of agency policy decisions. Of course, that is exactly the opposite of the holding and reasoning of the Supreme Court in *Chevron*."); cf. Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1444 (2013) (arguing Criddle "cannot explain why agencies are preferable to political actors—particularly the President—for resolving fundamental issues of values that are embedded in rulemaking decisions").

IV. THE PROBLEM OF FUNCTION

To assess fiduciary government, it makes sense to consider the areas where federal lawmakers have experimented with it. In a few cases, they have imposed relatively narrow constraints on political corruption and naked self-dealing. These cases provide little heft for fiduciary government, not only because of their limited scope, but also because they suggest problems with the theory in practice. These problems become acute where federal courts experiment with broader fiduciary constraints.

A. *Narrow Public Fiduciary Constraints*

1. Political Corruption and the Honest Services Statute

Curiously, fiduciary theorists do not make anything out of the one context where federal courts frequently describe government in fiduciary terms: criminal prosecutions of state and local officials under the federal honest services statute. Federal criminal law prohibits wire and mail fraud, including fraudulent deprivations of the “intangible right of honest services.”²¹⁹ Federal courts have held that “[e]lected officials generally owe a fiduciary duty to the electorate,” and that, when they breach that duty and deprive citizens of something of economic value, officials may be criminally liable under the honest services statute.²²⁰

Many honest services prosecutions have involved naked self-dealing. Although there are reasons to object to federal policing of state and local government on federalism grounds, a narrow criminal constraint on self-dealing seems largely unobjectionable. Only the Department of Justice (DOJ) can prosecute honest services fraud, which limits the risk of over-deterrence that would arise from broad private enforcement of public fiduciary duties. And given the widespread norm against quid pro quo corruption,²²¹ prosecution does not impose fiduciary constraints in the absence of consensus about the ends of regulation.

Criminal prohibition of political corruption need not depend upon a fiduciary model of political ethics, however. One may object to corruption on equality grounds: it allows some citizens unequal access to political decisionmakers. Another objection is that it effectively suppresses the speech of some by elevating the speech of others. Yet a third objection is that it leads to inefficient governance and has market-distorting effects. A fourth focuses upon the expressive impact of political corruption: “Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”²²² None of these objections focuses upon an official’s breach

219 18 U.S.C. § 1346 (2006).

220 *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997).

221 See William Magnuson, *International Corporate Bribery and Unilateral Enforcement*, 51 COLUM. J. TRANSNAT’L L. 360, 369 (2013).

222 *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (2000).

of a duty of loyalty, but rather upon the harms that may arise from a corrupt political system.²²³

Had the DOJ confined itself to prosecuting state and local officials for naked self-dealing, the honest services statute might have remained a relatively uncontroversial mechanism for addressing those potential harms. But in the 1970s, the DOJ sought to broaden the scope of the statute to include “abstract” breaches of a politician’s duty towards her constituents, without regard to an injury to money or property.²²⁴ *United States v. Mandel* is illustrative. In that case, the Fourth Circuit held that the Governor of Maryland could be liable for honest services fraud when he promoted the enactment of legislation that redounded to the benefit of his friends in the race track industry, even though the government had not shown that he had any “direct interest” in the race track business, much less that his friends had offered him a bribe.²²⁵

Mandel and similar cases launched a firestorm of criticism. It was far from clear, commentators pointed out, that the honest services statute authorized an expansive federal common law of political crimes. The *Mandel* approach threatened to expand prosecutorial discretion beyond acceptable bounds and to turn tortious activity into federal crimes. John Coffee offered a trenchant statement of the critical view:

To describe political patronage as in conflict with the common morality, and hence “a scheme to defraud” citizens of their tangible right to honest government, seems inconsistent with the undeniable existence of that institution as a recognized and highly visible part of American political life at least since the time of Andrew Jackson.²²⁶

Perhaps judicial retrenchment was inevitable. In *Skilling v. United States*, the Court construed the honest services statute narrowly to avoid constitutional concerns under the void-for-vagueness doctrine.²²⁷ Under *Skilling*, the statute proscribes bribes and kickbacks, nothing more.²²⁸ Thus ended the DOJ’s experiment with a broad doctrine of public fiduciary duties for state and local officials. To be sure, the Court’s reasoning was unique to the criminal context. No void-for-vagueness doctrine compels judicial reluctance to recognize private rights of action to enforce public fiduciary duties. But many of the objections to broad honest services prosecutions are cogent in

223 For further discussion of these theories of political corruption, see Teachout, *supra* note 19, at 342. Of course, the existence of multiple theories of the prohibition on political self-dealing does not itself count against fiduciary government. My point is simply that there may be alternative accounts of political corruption that do not present the same problems of fit, intent, and function as fiduciary government.

224 W. Robert Gray, Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 563 (1980).

225 591 F.2d 1347, 1359–60, 1364 (4th Cir. 1979).

226 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).

227 130 S. Ct. 2896, 2931–32 (2010).

228 *Id.*

the civil setting. Fiduciary government may unduly interject judicial oversight into the workings of government. Whether the federal courts have a warrant to interject themselves in this way is at least debatable in some cases, particularly where the textual or doctrinal hook is vague at best.

2. Insider Trading and the STOCK Act

Where Congress has mandated public fiduciary duties, this last objection does not arise. Some ethics-in-government provisions can be understood in fiduciary terms but impose constraints that are narrow and thus not a model for the broad fiduciary theory of government. Consider, for example, the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act).²²⁹ The Act requires members of Congress, their staffs, and executive branch employees to disclose their financial information in order to deter them from trading in securities based upon nonpublic information they obtained in their capacity as public servants.²³⁰ The Act also clarifies that the securities laws' prohibition upon insider trading applies to public officials.²³¹ Thus, the STOCK Act imposes a limited prohibition founded in a fiduciary duty of trust and confidentiality.

In its short life the STOCK Act has had a mixed record. Congress thrice postponed the reporting requirements, and critics have argued the Act could undermine national security and the privacy of federal employees.²³² A federal district court temporarily enjoined implementation of the Act on the ground that the Act unduly burdens the substantive due process right to privacy.²³³ Moreover, the insider trading prohibitions turn upon the misuse of "material" information, and defining materiality in the public setting will prove difficult at best.

Whatever the STOCK Act's merits, the problems with its implementation suggest the potential pathologies of a broad doctrine of fiduciary government. Imposing fiduciary duties upon a bureaucracy as far reaching as the national government raises a bevy of competing concerns that do not arise in the traditional fiduciary case. The STOCK Act, for example, threatens daily political interactions with the specter of insider trading liability, which includes trading upon "tips" from covered persons.²³⁴ That is not to say the STOCK Act is bad policy, although it is terribly in need of clarification. It is

²²⁹ Stop Trading on Congressional Knowledge Act of 2012, Pub. L. 112-105, 126 Stat. 291.

²³⁰ *Id.* § 6.

²³¹ *Id.* § 4(a).

²³² See Kellie Lunney, *Congress Again Delays STOCK Act for Senior Execs*, GOV'T EXEC. (Dec. 6, 2012), <http://www.govexec.com/pay-benefits/2012/12/congress-again-delays-stock-act-senior-execs/60006/>.

²³³ See *Senior Execs. Ass'n v. United States*, 891 F. Supp. 2d 745, 750 (D. Md. 2012).

²³⁴ See, e.g., Brad S. Karp, *Unintended Consequences of the STOCK Act*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 14, 2012, 9:35 AM), <http://blogs.law.harvard.edu/corpgov/2012/03/14/unintended-consequences-of-the-stock-act/>.

to say, however, that even narrow fiduciary constraints on government may cause significant functional problems.

B. *Broad Fiduciary Government*

In some cases, courts have experimented with broad fiduciary rules for government, usually with questionable, sometimes with disastrous, results.

1. The Federal Indian Trust Doctrine

Perhaps the best example is the federal Indian trust doctrine. The foundation of the doctrine lies in the Founding period. The Constitution recognizes Indian tribes as preconstitutional sovereigns.²³⁵ The federal trust relationship between the United States and Indian tribes is “traceable” to a bilateral relationship stretching back “to the first cessions of Indian land to the federal government.”²³⁶ When the United States, by virtue of the doctrine of discovery and treaties with Indian tribes, obtained title to tribal lands, it accepted the duty of treating the tribes with the faithfulness of a fiduciary. In the Marshall trilogy of cases, Chief Justice John Marshall grounded the trust relationship in international law and the “doctrine of discovery” that legitimated European claims to Indian lands based upon conquest or agreement with tribes.²³⁷ Marshall drew an analogy to the relationship between a “ward” and a “guardian,” while suggesting the federal-tribal relationship was a unique one that required the national government to protect tribal sovereignty.²³⁸

The trust relationship imposes upon the United States a proprietary trust responsibility in so far as it manages Indian property for tribes or individual Indians. In form, this proprietary trust mirrors private trusts in which a trustee manages property for the benefit of another. It does not depend upon the United States’ status as a sovereign, and its contours “are largely defined in traditional equitable terms.”²³⁹

That is the conventional understanding anyway. In recent years, however, the Court has shown little patience for even the narrow proprietary trust. Its recent decision in *United States v. Jicarilla Apache Nation*²⁴⁰ portends reluctance to treat the United States as a conventional fiduciary. The *Jicarilla* Court held that because the United States government is tasked with representing many competing public interests, the fiduciary exception to the attorney-client privilege does not apply when tribes request documents pertaining to the Department of Interior’s alleged mismanagement of Indian trust

235 U.S. CONST. art. I, § 8, cl. 3.

236 Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1495–96.

237 *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 591–92 (1823).

238 *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

239 *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001).

240 131 S. Ct. 2313, 2326 (2011).

funds.²⁴¹ In treating a proprietary trust relationship as something other than a conventional trust, the Court rejected fiduciary constraints on government even when the analogy was most apt.

There are a few additional features of the Indian trust doctrine that should give one pause when considering the promise of a broader doctrine of fiduciary government. For one, when expanded beyond the classic proprietary trust, the Indian trust doctrine has proved, according to various scholars, “‘elusive and confusing,’ ‘vexing’ and ‘vague,’ ‘unsatisfactorily amorphous’ and ‘unclear,’ ‘schizophrenic,’ ‘ill-defined,’ a ‘double-edged sword,’” and the like.²⁴² Nor has the Indian trust proven an effective moral constraint on the federal government. While the Court has described the Indian trust in moral terms that recall *Meinhard’s* famous rhetoric,²⁴³ “the government, more often than not, has failed to keep its pledges to its Indian beneficiaries.”²⁴⁴

Indeed, courts have often treated the trust relationship as a shield for government action, not a sword to challenge it. As Reid Chambers has written, “while courts recognize that Congress has a trust responsibility, they uniformly regard it as essentially a moral obligation, without justiciable standards for its enforcement.”²⁴⁵ In a series of late nineteenth-century cases, most notoriously in *Lone Wolf v. Hitchcock*,²⁴⁶ the Court linked the trust relationship with a “plenary” power doctrine giving Congress unilateral authority to disregard the United States’ treaty responsibilities.²⁴⁷ Nell Jessup Newton has summarized the depth and breadth of Congress’s “plenary” power to abrogate or to alter Indian rights:

The [C]ourt has upheld congressional power to reduce the boundaries of a reservation without tribal consent or compensation, thereby reducing, for all practical purposes, a tribe’s power to govern. In addition the Court has

241 See *id.* (“[T]he Government seeks legal advice in its sovereign capacity rather than as a conventional fiduciary of the Tribe.”).

242 Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 MD. L. REV. 290, 307 (2009) (footnotes omitted).

243 *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (stating that the federal government, in its relationships with Indian tribes, “has charged itself with moral obligations of the highest responsibility and trust”).

244 Eugenia Allison Phipps, Note, *Feds 200, Indians 0: The Burden of Proof in the Federal/Indian Fiduciary Relationship*, 53 VAND. L. REV. 1637, 1640 (2000).

245 Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1227 (1975).

246 187 U.S. 553 (1903).

247 In *Lone Wolf* the Court gave a judicial stamp of approval to Congress’s action to force the allotment of Indian lands in violation of treaties between the United States and several tribes. Emphasizing notions of racial superiority, the Court held that there are no constitutional constraints on Congress’s control over Indian affairs. See *id.* at 567. The decision has been roundly criticized as one of the Court’s “worst.” See, e.g., Joseph William Singer, *Lone Wolf, Or How to Take Property by Calling It a “Mere Change in the Form of Investment,”* 38 TULSA L. REV. 37, 37 (2002). The Court will not, however, let *Lone Wolf* disappear. See *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324 (2011) (quoting *Lone Wolf*, 187 U.S. at 565).

upheld power to divest a tribe of all criminal, civil, or regulatory jurisdiction; to abrogate treaties; and to subject tribal laws and constitutions to federal approval. As to tribal property rights, . . . Congress may abrogate without liability future interests in Indian lands granted by earlier statutes, and may enlarge or decrease the class of beneficiaries of tribal trust funds or lands. Congress may take one kind of tribal property, aboriginal Indian property, without paying compensation; it may, without consent, dispose of recognized-title tribal property under the guise of management and sell it at less than fair market value without liability, as long as the tribe receives some proceeds.²⁴⁸

A fiduciary relationship indeed.

The plenary power doctrine speaks to the dubious associations between fiduciary government and colonial and imperial self-justification. The charge of paternalism is potentially an embarrassment to fiduciary theory, particularly when one considers how it was deployed by European powers to justify colonial and imperial expansion. According to colonial theory, European powers had not only a warrant but also a *fiduciary* duty to act on behalf of non-European peoples who, as history would have it, were especially vulnerable to European guns and European diseases. Fiduciary theorists respond to this potential embarrassment by distinguishing that use of fiduciary government as rhetorical and racist. But postcolonial scholarship has charted the ways in which the fiduciary idea was *productive* of a racist colonial project and not simply *reflective* of it.²⁴⁹

Still, tribes have had occasional success in trust litigation. Fiduciary claims against the executive branch have fared better than those against Congress, particularly where Indians seek damages under money-mandating statutes that impose a proprietary trust responsibility upon the United States to manage property and resources.²⁵⁰ But this literal trust is hardly a model for the broad theory of fiduciary government. Sweeping appeals to the trust doctrine are common: “It is fairly clear,” the Ninth Circuit has said, “that *any* Federal government action is subject to the United States’ fiduciary responsi-

248 Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 234–35 (1984) (footnotes omitted).

249 See, e.g., Nele Matz, *Civilization and the Mandate System Under the League of Nations as Origin of Trusteeship*, in 9 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 47, 50, 54 n.19 (2005); Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT’L L. & POL. 513, 558 (2002); Ashwini Tambe, *Climate, Race Science and the Age of Consent in the League of Nations*, 28 THEORY, CULTURE & SOC’Y 109, 110 (2011). For a discussion of the racist origins of federal Indian law, see Robert A. Williams, Jr., *Columbus’s Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples’ Rights of Self-Determination*, 8 ARIZ. J. INT’L & COMP. L. 51, 52 (1991) (“The racist law which Columbus and other Europeans brought to the New World is still enforced and applied as the law of the colonizer and colonized in the United States.”).

250 See, e.g., *United States v. Mitchell*, 463 U.S. 206, 226 (1983) (holding that statutorily established trust responsibility implied tribal right to sue). An earlier decision, *United States v. Mitchell*, held that the General Allotment Act did not by itself imply a right of action for damages. 445 U.S. 535, 546 (1980).

bilities toward Indian tribes.”²⁵¹ But, as is the case with the gap between private fiduciary law’s aspirations and its legally enforceable rules, the law on the ground is different. Where Indians have succeeded in broader trust claims, it is largely because courts have construed the trust as synonymous with the executive’s statutory responsibility to engage in reasoned administrative decisionmaking under the APA.²⁵² And the cases that take the opposite view strike a tone discordant with the Court’s recent *Jicarilla* decision: in *Northern Cheyenne Tribe v. Hodel*, for example, the district court held the Bureau of Land Management to a special fiduciary duty, reasoning the agency’s “conflicting responsibilities” under the governing statute “do not relieve [it] of [its] trust obligations.”²⁵³

Even with judicial review, moreover, the United States has an appallingly dismal track record in meeting its fiduciary obligations. Notwithstanding Congress’s repeated pronouncements in favor of the trust, and a tradition (since Richard Nixon) of presidential affirmations, the Department of Interior has mismanaged billions of dollars worth of Indian assets. The Department of Justice has consistently resisted imposition of fiduciary constraints in the courts. And the Court, as *Jicarilla* suggests, has often forgiven the executive branch’s fiduciary failures. As Kevin Gover, the former Assistant Secretary for Indian Affairs, put it, “the three branches have together created a largely useless trust.”²⁵⁴ Many Indian tribes would like to get out from under the trust relationship in the interests of economic development, believing that they can better manage their resources without an elaborate federal guardianship.²⁵⁵

It remains an open question whether Indian tribes would be better off without the trust doctrine than with it, but not because fiduciary government can fulfill the promises made in its name. Rather, the Indian trust doctrine is embedded in federal common law and provides some, albeit inconsistent, constraints on the United States when it comes to its treaty obligations to Indians. In particular, the trust relationship is often cited as the basis for preemption of state authority over tribal lands and resources,²⁵⁶ and in support for a canon of treaty and statutory construction that favors Indians in

251 *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981).

252 See Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 363–64 (2003).

253 *N. Cheyenne Tribe v. Hodel*, 12 Indian L. Rptr. 3065, 3071 (D. Mont. 1985).

254 Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317, 356 (2006).

255 One might object that the Indian trust context is an inapt comparison to fiduciary government on the theory that federal Indian law is exceptional. There are two reasons the comparison is appropriate. First, some fiduciary theorists rely upon it in justifying fiduciary government. See Criddle, *Foundations*, *supra* note 4, at 169. Second, in many cases, Indians invoke the trust relationship to make claims upon the government that mirror those others might make, as in the APA cases discussed in the text.

256 See *United States v. Kagama*, 118 U.S. 375, 380 (1886).

cases of ambiguous terms.²⁵⁷ But in elaborating these doctrines, the courts have not looked to private fiduciary law. Preemption of state authority can be explained as an incident of incorporating the tribes within the constitutional structure, and the canon favoring Indians is consistent with the treaty relationship between the two sovereigns.²⁵⁸ Vindicating the interests of Indians does not require a fiduciary doctrine that does not limit Congress, often serves as a shield, not a sword, and leads to internally incoherent outcomes.

2. The Public Trust Doctrine

Many of the same problems have arisen in the public trust context. The federal public trust doctrine is first and foremost a property rule against privatization of public resources. The Court's 1892 decision in *Illinois Central Railroad Co. v. Illinois*²⁵⁹ is the "lodestar" of the public trust doctrine.²⁶⁰ In that case, the Court held that the state of Illinois did not have the authority to grant a railway company title to the bed of Lake Michigan because the state held title in trust for its citizens to ensure common access for navigation and fishing.²⁶¹ According to the conventional history, the King of England held navigable waters and the land submerged beneath them subject to this public trust, which devolved onto the thirteen states following the Revolution. Under the equal footing doctrine, each new state acceded to the same public trust, with its limitations on alienation, upon admission to the Union.²⁶²

The *Illinois Central* rule thus protects a limited public right in submerged lands and navigable waterways. Navigable waters are a quintessential "mixed asset" that presents particularly difficult problems of balancing public access in the interests of interstate commerce with private development where necessary to maximize public use of the resource.²⁶³ *Illinois Central's* resort to trust principles to limit alienation of submerged lands attempted to ensure a favorable mix of "access-enhancing" public control and private development with respect to a "uniquely vexed resource."²⁶⁴

It is worth pausing to consider how "radical" even that limited doctrine of public rights is.²⁶⁵ Conventionally Anglo-American law has embraced pri-

257 See *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973).

258 See, e.g., DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 135–40 (2001); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 412–13 (1993).

259 146 U.S. 387 (1892).

260 Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1970).

261 *Illinois Central*, 146 U.S. at 452.

262 *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012).

263 Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 779, 928–29 (2004).

264 *Id.*

265 Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 716 (1986).

vate property rights as leading to the most fruitful uses of resources. Property law gives individuals a right to exclude others so as “to ensure that the person who places the highest value” on a resource can control its use.²⁶⁶ The federal public trust does not fit within that framework: it is neither a private right to exclude others, nor a system of state ownership designed to respond to a market failure.²⁶⁷

In *Illinois Central* the Court was opaque about the source of the doctrine, likely because in a pre-*Erie* world the question mattered little. Scholars have struggled to pin down what authorizes federal courts to recognize public trust constraints. Most importantly, courts have not applied the public trust doctrine to Congress or the executive. That has “substantial, practical significance,” because the United States manages a wide range of natural resources, particularly in the American West.²⁶⁸ There is no constitutional hook for imposing the doctrine on the political branches. Nor would the modern understanding of federal common law, which is confined to a few enclaves and certain conflicts between state law and federal concerns, support a judge-made trust constraint.²⁶⁹ Moreover, Congress’s extensive legislation in the area likely would displace this federal common law.²⁷⁰

Federal courts’ refusal to fashion public trust constraints on congressional and executive action highlights fiduciary government’s legitimacy problem. That neither courts nor scholars have reached anything approaching consensus regarding the legal source of the narrow public trust doctrine suggests that a broader federal doctrine of fiduciary government cannot be founded in positive law.

State experiments with broader public trust doctrines underscore the functional problems with fiduciary government. Any generalizations about

266 Tessa Davis, *Keeping the Welcome Mat Rolled-Up: Social Justice Theorists’ Failure to Embrace Adverse Possession as a Redistributive Tool*, 20 J. TRANSNAT’L L. & POL’Y 73, 76 (2011).

267 See Rose, *supra* note 265, at 720.

268 See Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 680 (2012) (explaining that federal government owns nearly half of California’s land area and 90% of Nevada’s area).

269 See *supra* note 146.

270 The Supreme Court’s latest foray into public nuisance law underscores judicial reluctance to elaborate common law environmental policy. In *American Electric Power Co. v. Connecticut*, several states, New York City, and private plaintiffs sued on a public nuisance theory to cap the carbon-dioxide emissions of several power companies, including the federal Tennessee Valley Authority. The Court dismissed their claim, holding that Congress had addressed the problem through the Clean Air Act and thus displaced “the need for . . . law-making by federal courts.” *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981)). As Richard Lazarus has argued, the growth of environmental statutes since the 1970s has similarly displaced the need for public trust constraints on environmental policymaking. See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 631–33 (1986). Or, to press the point, what warrant is there for federal courts to elaborate broad fiduciary constraints on federal policymaking without a textual or doctrinal hook? *But cf. Rave, supra* note 4, at 721 (arguing that “textual or doctrinal hook” for treating politicians as fiduciaries does not matter).

the fifty states' laws must be made with care, of course. The majority of states still hew to relatively narrow versions of the doctrine, limiting it to restraints on privatization of water resources.²⁷¹ In some states the doctrine has expanded through common lawmaking, constitutional amendment, or statutory enactment to reach beyond navigable waterways and to impose procedural and substantive constraints on environmental policymaking.²⁷²

Expansion of the public trust doctrine springs from Joseph Sax's famous 1970 defense of the doctrine. In Sax's vision, the trust requires the state to take a hard look at the environmental impacts of its regulatory policies and to protect certain natural resources against private exploitation. The virtue of the public trust doctrine lies, Sax argued, in its "support for whatever decision a court might wish to adopt."²⁷³ By imposing certain decisionmaking procedures and substantive limits on resource allocation, courts could "promote equality of political power for a disorganized and diffuse majority" against "self-interested and powerful minorities [who] often have an undue influence" on environmental policy.²⁷⁴

The reach of this modern public trust remains vague, however. As Bill Araiza points out, there is no meaningful limiting principle to Sax's representation-reinforcing account. Many public interests are disorganized and "diffuse," not just environmental protection.²⁷⁵ There has been no shortage of commentary applying Sax's theory to an ever-greater range of water, land, air, wildlife, and man-made resources.²⁷⁶ Why stop there? The structural concern that Sax identified—that the political process may favor special interest groups over public interest groups—exists "whenever the public's interest can be described as diffuse."²⁷⁷ Why not then apply public trust constraints to consumer protection? To education policy? To questions of military defense, traditionally subject to little or no judicial review? It is difficult

271 See Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 *ECOLOGY L.Q.* 53, 58 (2010) (discussing variation in western states' treatment of broad public trust doctrine).

272 Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 *NOTRE DAME L. REV.* 699, 707–08 (2006) (discussing how states have expanded public trust doctrine as matter of common law and positive enactment).

273 Sax, *supra* note 260, at 553.

274 *Id.* at 560.

275 William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 *UCLA L. REV.* 385, 422 (1997).

276 Perhaps the most ambitious use of the doctrine concerns judicial solutions to global climate change. Unless and until governments reach a multilateral, treaty-based solution, the argument runs, domestic judiciaries should treat political inaction as a breach of the public trust responsibility to preserve the planet's climate. See Wood, *Part II, supra* note 4, at 111–24. In the United States, however, the prospects for this atmospheric trust at the federal level appear dim. See *supra* note 267 and accompanying text.

277 Araiza, *supra* note 275, at 437.

to see a cabining principle for the doctrine, other than historical accident,²⁷⁸ or a simple preference for environmental interests.²⁷⁹

The principle limiting public trust requirements is also elusive. That is particularly true once the doctrine expands beyond *Illinois Central's* restraint on alienation of “inherently public property”²⁸⁰ to what Robin Kundis Craig has labeled the “ecological public trust” doctrine.²⁸¹ On the one hand, the ecological public trust promises to force state governments to take care with the regulation and use of natural resources. On the other hand, the doctrine has largely served to *empower* state governments to affect private property rights. The public trust provides a defense to private landowners’ challenges to regulation, which has led to a cottage industry of doctrinal criticism. Although some of this criticism is overheated,²⁸² the vagueness of the doctrine gives it bite. In theory, there can be no taking of public trust property because any individual landowner gains rights to it subject to the trust.²⁸³ But in practice, the uncertain and shifting contours of the ecological public trust can undermine property owners’ reasonable expectations regarding their rights. Indeed, one need not look beyond the narrow confines of *Illinois Central* to see that the trust concept’s implications for judicial enforcement of private rights are far from clear. There, as in the case of the ecological public trust, fiduciary government expands public power at the expense of private rights.

This indeterminacy is built into the public trust analogy. As Carol Rose has explained, the public trust doctrine has “gravitated between two different definitions of the public: the public as governmental authority, whose ability to manage and dispose of trust property is plenary, and the public at large, which . . . has . . . rights that may be asserted even against its own representatives.”²⁸⁴ Fiduciary theorists emphasize the latter understanding, but, as both the Indian and public trust contexts show, the former is immanent in treating government as a fiduciary.²⁸⁵

278 See James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL’Y F. 1, 2 (2007) (“American public trust law . . . is founded on a New Jersey decision that misunderstood the Roman and English history and contradicted the contemporary law and practice of that state.”).

279 See Araiza, *supra* note 275, at 438–51.

280 Rose, *supra* note 265, at 739.

281 Craig, *supra* note 271, at 71.

282 Cf. Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 418–21 (1987) (reconciling takings and public trust doctrines).

283 See, e.g., *Just v. Marinette Cnty.*, 201 N.W.2d 761, 767 (Wis. 1972).

284 Rose, *supra* note 265, at 739.

285 See James L. Huffman, *A Fish out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 543 (1989) (“A trust relationship would . . . constrain [] the ability of the people to control the state.”).

3. The First Amendment Public Forum

The First Amendment's public forum doctrine protects rights to speech in certain public spaces, such as streets and parks. The Court has justified protecting speech in public fora in fiduciary terms. *Hague v. Congress of Industrial Organizations* provides the foundational statement: “[S]treets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”²⁸⁶ As a “fundamental premise” of First Amendment law,²⁸⁷ this public trust has spawned decades of judicial confusion.

The public forum doctrine is a notorious mess. The black letter law is easy enough to state. A government may restrict speech in public through narrowly tailored time, place, and manner restrictions that serve a significant government purpose and leave open sufficient channels of communication. Content-based regulation of speech in a public forum must satisfy strict scrutiny. But applying the black letter law is anything but easy. Scholars have received the jurisprudence with “nearly universal condemnation.”²⁸⁸ One leading commentator has called it “virtually impermeable to common sense.”²⁸⁹ Others describe it as “an edifice now so riven with incoherence and fine distinctions that it is on the verge of collapse.”²⁹⁰

Why is the public forum doctrine such a muddle? Part of the answer is disagreement among jurists on the reasons for protecting speech in public fora. But I doubt that the problems would be solved if courts consistently applied the trust analogy. By pointing to the property-focused concept of the trust, the public trust analogy invites the doctrine's ever-finer parsing of types of property—“quintessential public forums,” “limited-purpose” public fora, nonpublic fora, and so on, each with greater or lesser speech rights and government duties—which “serves to obfuscate rather than clarify the issues at hand.”²⁹¹ And because this approach invites consideration of the “government's desire to control its ‘property,’”²⁹² it serves in uncertain ways—as we have seen in the Indian and public trust contexts—to *empower* rather than to restrain government regulation of private rights.²⁹³

286 307 U.S. 496, 515 (1939); *see also* *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (repeating public trust conception of public forum doctrine).

287 Timothy Zick, *Summum, The Vocality of Public Places, and the Public Forum*, 2010 BYU L. REV. 2203, 2205 (labeling public trust conception “fundamental premise” of public forum doctrine).

288 ROBERT C. POST, *CONSTITUTIONAL DOMAINS* 199 (1995).

289 *Id.*

290 Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1381 (2001).

291 *United States v. Kokinda*, 497 U.S. 720, 740–41 (1990) (Brennan, J., dissenting).

292 Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1979 (2011).

293 *See Kokinda*, 497 U.S. at 740–41 (Brennan, J., dissenting) (noting that parsing types of fora has led to “upholding restrictions on speech”).

Nowhere is that more evident than in the current trend towards displacing the public forum doctrine with a doctrine upholding “government speech.” In *Pleasant Grove City, Utah v. Sumnum*,²⁹⁴ for example, the Court held that a city could exclude a private religious monument from a city-owned park. The public forum doctrine did not apply, the Court held, even while acknowledging that *Hague* had labeled “streets and parks” as being “held in trust for the use of the public.”²⁹⁵ Placing monuments on city property involved government speech, which the government, as owner, could control. “The State, no less than a private owner of property,” as the Court put it in *Adderley v. Florida*, “has power to preserve the property under its control for the use to which it is lawfully dedicated.”²⁹⁶ In applying similar reasoning to hold that public trust principles do not apply to a quintessential public forum, *Sumnum* underscores the fragility of fiduciary government.

In some cases fiduciary models restrict government behavior too much, in others too little.²⁹⁷ These are perennial problems in public law, which

294 555 U.S. 460 (2009).

295 *Id.* at 469 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

296 385 U.S. 39, 47 (1966). Timothy Zick has argued that the public forum doctrine holds that “[a]ll members of the community are entitled to enjoy this portion of the trust corpus on equal terms.” Timothy Zick, *Property as/and Constitutional Settlement*, 104 Nw. U. L. REV. 1361, 1418 (2010). I am less hopeful than Zick that the trust conception can fulfill that promise. In any event, the analogy resolves only an *Illinois Central*-type case of privatization of public trust property.

297 Fiduciary government has not fared much better in other common law countries. The Canadian courts have rejected broad doctrines of fiduciary government. See *FOX-DECENT*, *supra* note 4, at 157 (noting that “in Canada . . . the fiduciary principle has only limited application to public law”). In *Harris v. Canada*, for instance, the court reasoned that “where duties are owed to a number of interests it is less likely that the Crown owes fiduciary obligations.” (2001), [2002] 2 F.C. 484, 550 (Can.); see *FOX-DECENT*, *supra* note 4, at 156–57 (citing *Harris*). Australia has a very narrow doctrine of fiduciary duties in private law and treats equity in general, and fiduciary government in particular, as inconsistent with the judicial role. See Paul Finn, *Public Trusts and Fiduciary Relations*, in *FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST*, *supra* note 4, at 31, 34–36 (“By the mid-nineteenth century it had become characteristic of English law and now even more of Australian law that, when the language of trust was used to describe the responsibility of government and its agencies, it was seen as a political metaphor and so imposing only a moral or political obligation.”). English courts have also usually rejected fiduciary government based upon attentiveness to its remedial implications. In *Swain v. Law Society*, for example, the House of Lords expressly refused to treat the government as a fiduciary. Lord Brightman explained, “the nature of a public duty and the remedies of those who seek to challenge the manner in which it is performed differ markedly from the nature of a private duty and the remedies of those who say that the private duty has been breached.” *Swain v. Law Soc’y*, [1982] 2 All E.R. 827, 837–38 (H.L.); see also *Windsor Roman Catholic Separate Sch. Bd. v. Windsor*, [1988] 64 O.R. 2d 241, 246 (Can.) (applying *Swain* as matter of Canadian law).

In a few cases involving challenges to municipal taxation and spending English courts have been more amenable to fiduciary government. See, e.g., *Roberts v. Hopwood*, [1925] All E.R. 24 (H.L.) (holding that borough had violated law by paying wages above market rate). Fiduciary theorists cannot make much of these cases for the American context,

broad doctrines of fiduciary government exacerbate. As Part V will show, proposed fiduciary reforms are subject to this functional objection, as well as the problems of fit and intent.

V. THE PROBLEMS WITH THREE PROPOSED FIDUCIARY REFORMS

A. *Imposing the Duty of Care on Congress*

Consider first the proposal to apply, through the vehicle of the Necessary and Proper Clause, a requirement that Congress “undertake appropriate factual and legal investigations” prior to acting.²⁹⁸ This requirement follows from the fiduciary duty of care, and could be based upon an analogy to trust or corporate law. The proposal is not as radical as it sounds at first. In particular, it recalls the Court’s congruence and proportionality test for § 5 legislation under *City of Boerne v. Flores*. That test precludes Congress from legislating to prevent Fourteenth Amendment violations unless it adopts means that are congruent and proportional to the Fourteenth Amendment evil it seeks to correct.²⁹⁹ As elaborated by the Court, the *Boerne* test requires Congress to point to evidence of a Fourteenth Amendment wrong that demands correction.

The *Boerne* test has come under substantial criticism. *Boerne* imposes upon Congress what Philip Frickey and Steven Smith called a “legislative deliberation model” similar to the APA’s requirement of reasoned decision-making.³⁰⁰ It suggests judicial review should look to the quality of congressional deliberation. The model suffers from several problems of fit, as Frickey and Smith described. For one, Congress is a “they,” not an “it” that can unitarily deliberate.³⁰¹ Second, and relatedly, congressional representatives do not assemble and consider evidence; according to rules of congressional procedure, support agencies, staff, committees, and so on assemble the legislative record. Moreover, the two houses of Congress deliberate separately and generate their own reports regarding contemplated legislation. And “neither house acts collectively”; instead, much of what passes for a house’s action is in significant measure the product of a few members and their staff.³⁰² Setting boundaries around the legislative record is also a prob-

because there are reasons to distinguish municipal from national governments. Traditionally, municipalities were corporations, which creates an obvious tether for imposing fiduciary duties in that setting. Moreover, in many instances municipalities govern a narrower set of interests and a more homogeneous population. But even there, “[n]othing is more dangerous than [judges’] use of the authority committed to them to suppress views or experiments they happen to dislike,” which, if cases like *Hopwood* are any indication, fiduciary government invites them to do. Harold J. Laski, *Judicial Review of Social Policy in England: A Study of Roberts v. Hopwood et. al*, 39 HARV. L. REV. 832, 846 (1926).

298 Natelson, *Public Trust*, *supra* note 4, at 1089.

299 *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

300 Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1709 (2002).

301 *Id.* at 1731.

302 *Id.* at 1733.

lem: Does it include all the information that legislators have before them but that does not make it into committee reports, hearing testimony, or floor debate?³⁰³ In short, Congress has a vast fact-finding apparatus. But it is far from clear that there is a meaningful and determinate way in which a court can measure whether Congress has engaged in reasoned decisionmaking.

Turning bicameralism and presentment into notice-and-comment rulemaking is no more sound under the Necessary and Proper Clause than it is under § 5. Indeed, so long as *McCulloch* remains good law, there is no warrant for it.

B. *Judicial Review of Political Gerrymandering*

A second fiduciary reform, grounded in an analogy to the safe harbor statute of Delaware corporate law, would impose strict scrutiny upon legislative redistricting unless it is done by an independent redistricting commission.³⁰⁴ In corporate law self-dealing is permissible when the principals give informed consent or the transaction is subject to review by disinterested decisionmakers. Drawing upon this framework, Rave argues that, much like corporate directors engaged in self-interested transactions, incumbent politicians harm the public by violating their duty of loyalty when they seek to entrench themselves or their political allies against electoral challenge. Courts should therefore strictly scrutinize decisions, such as redistricting, that entrench incumbents, unless, as in the case of corporate safe harbors, politicians cleanse the taint of self-interest by delegating the decisions to disinterested reviewers.

The problem of intent looms large here. “The textual or doctrinal hook for any particular claim is not all that important to this framework,” Rave argues.³⁰⁵ Rave relies upon Natelson’s account of the original understanding to argue that federal courts should hold that elected officials breach a fiduciary duty of loyalty when they “manipulate election laws to their own advantage,” as in, for example, “gerrymandering in state legislatures.”³⁰⁶ But Natelson acknowledges that, at most, the Constitution imposes fiduciary duties upon state officials in an “ad hoc” manner.³⁰⁷ On interpretivist grounds, then, it is unclear what warrant federal courts have to police state redistricting decisions under a fiduciary model.

The problem is more acute than that, however. Rave adopts a contractarian account of fiduciary duties.³⁰⁸ Such an account admits of the possibility of contractual modification. Therefore, constitutional modification of the standard package of fiduciary duties should be permissible. And it is per-

303 *Id.* at 1733–34.

304 *See* Rave, *supra* note 4, at 679.

305 *Id.* at 721.

306 *Id.* at 677–78, 710–11.

307 Natelson, *Public Trust*, *supra* note 4, at 1173 n.430.

308 Rave, *supra* note 4, at 708.

fectly plausible to think our redistricting system, as reflected in the “[United States] and state constitutions[,] tell[s] legislators that they may self-deal.”³⁰⁹

There is also the problem of fit. A state legislator participating in a redistricting decision could be considered a fiduciary for those who voted for her, her district, her state, or the nation as a whole. It is far from clear that she would violate a duty of loyalty to the nation, for example, even if she voted for a districting plan that would improve her odds of re-election. Moreover, it is even less clear that her decisions regarding congressional districts would present a conflict of interest, unless, as Rave insists, and contrary to the trend in corporate law, a benefit to a member of her party is tantamount to a benefit to her.³¹⁰

What about the problem of function? A plurality of the Court in *Vieth v. Jubelirer* treated partisan gerrymandering as non-justiciable for lack of judicially manageable standards.³¹¹ Rave argues that the creation of a safe harbor mitigates the separation-of-powers problem.³¹² But it is hard to see why that would be. Not only do “legislators possess crucial information about relevant constituencies and their distinctive problems,”³¹³ but also “it is almost impossible to design institutions to be authentically nonpartisan and politically disinterested.”³¹⁴ Who will sit on the redistricting commission? Appointees who, like their legislative principals, will likely be members of political parties. If Rave is correct that the fiduciary problem arises because of party affiliation, it is not clear that the creation of a commission will satisfy it.

C. *Hardening Hard Look Review of Agency Action*

Various formulations of the duty of care in private law enjoin the fiduciary to act with the attentiveness and deliberativeness of a “reasonable,” “ordinary,” or “prudent” person, but the content of this duty varies with the circumstances. On one account, applying the duty of care to public officials would simply replicate existing standards of judicial review. For example, the APA’s arbitrary-and-capricious standard already requires agencies “to competently exercise” their “lawmaking powers.”³¹⁵ It is hard to see what is gained by placing old wine into new bottles here.

More ambitiously, the fiduciary analogy would alter reasonableness review based upon the contextual approach of private law. Where, for example, “the political branches’ formal constraints on agency behavior are weak”—as in the case, for example, of independent agencies—fiduciary theo-

309 Leib et al., *Translating*, *supra* note 147, at 97.

310 *See id.* at 97–99.

311 541 U.S. 267, 281 (2004) (plurality opinion).

312 *See Rave*, *supra* note 4, at 705.

313 Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 404 (2012).

314 Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 674 (2002).

315 Mantel, *supra* note 4, at 363–64.

rists would have courts “apply” the duty of care “more rigorously.”³¹⁶ And they would expand judicial review of agency action by, among other alterations, amending the APA to increase the procedural requirements for, and eliminate the exceptions to, informal rulemaking.³¹⁷

The objections from fit and intent are by this point familiar. Functionally, the ossification critique of expanded hard look review points to the many instances in which “it can take many years for an agency to create a significant, controversial rule via notice-and-comment.”³¹⁸ Hard look review also alters the power dynamics within an agency, perhaps to the detriment of rational decisionmaking. It can empower attorneys at the expense of experts and lead agency officials to delegate the decisionmaking process to private consultants who have the time to prepare a record that will pass review.³¹⁹ Call this the last functional objection to fiduciary government: the unintended consequence of hardening hard look review may be to empower special interests at the expense of the public.

VI. THE PROBLEM OF TRANSLATING BETWEEN PUBLIC AND PRIVATE LAW

The problems of fit, intent, and function highlight the difficulties of translating between public and private law. Although there is a wealth of commentary on comparative law,³²⁰ and a growing literature on constitutional law borrowing across doctrinal areas,³²¹ there is little modern commentary on translating between public and private law. Perhaps this gap arises because the common wisdom treats “[a]ll law [as] public law.”³²² But with the emergence of a “new private law” that argues it “is erroneous to treat private law as just a species of public regulation,”³²³ it is worth considering the problem of translating between the two fields anew. This Part discusses several considerations that should drive doctrinal borrowing.

316 Criddle, *Foundations*, *supra* note 4, at 178–79.

317 See Criddle, *Administration*, *supra* note 4, at 448, 486–87.

318 Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 15 (2009).

319 See Paul R. Verkuil, *The Wait Is Over: Chevron as the Stealth Vermont Yankee II*, 75 GEO. WASH. L. REV. 921, 928–29 (2007).

320 See, e.g., David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 333–34 (2010) (discussing literature); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1257–85 (1999) (distinguishing between comparative constitutional theories).

321 See, e.g., Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 674 (2011) (discussing borrowing across criminal and civil contexts in development of exclusionary rule); Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 463–64 (2010) (describing doctrinal development through borrowing across different areas of black-letter law).

322 George P. Fletcher, *Remembering Gary—and Tort Theory*, 50 UCLA L. REV. 279, 289 (2002).

323 John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1658–59 (2012).

A. *The Interdependence of Justiciability, Rights, and Remedies*

Perhaps the most important lesson of the false promise of fiduciary government is that doctrinal translation must take account of the interdependence of justiciability, rights, and remedies. Both private and public law scholars have mapped this interdependence. As Richard Fallon has argued, “analysis goes wrong at the outset if it assumes that the substantive content” of rights is “fixed” regardless of changes in remedies, defenses, and justiciability doctrines.³²⁴

Consider first the fiduciary law of justiciability, which is equilibrated to provide remedies to beneficiaries against fiduciaries. Public law doctrines of justiciability are not similarly equilibrated. Instead, they turn upon different considerations of judicial competence, tradition, and the separation of powers.

The fiduciary law of standing springs from the duty of loyalty. Consider, for example, trust law. The standing of a beneficiary to sue a trustee for enforcement of a private trust is uncontroversial.³²⁵ Standing arises “by virtue of the fiduciary relationship,” and, while based in the beneficiary’s equitable property interest, is not dependent upon an “absolute entitlement or probability of receiving trust assets.”³²⁶ The difficult questions concern who counts as a beneficiary. Holders of beneficial interests obviously qualify, but it is less clear, for instance, whether an advisor has standing to enforce the trust, even where the trust documents empower her to advise the trustee.³²⁷ But where a recognized beneficiary sues a trustee for breach of a fiduciary duty, the requisites for standing are usually satisfied.³²⁸

The standing of beneficiaries in public law has never been so straightforward. Under the “private-law model” that dominated the law of standing from the New Deal through the early 1960s, regulated parties had standing to challenge agency action, but regulatory beneficiaries did not.³²⁹ Their remedy laid, if at all, with the political process. Thus, the standing of regulated parties has never been in doubt even though it is awkward to think of them as “beneficiaries” of government restrictions on their property and liberty interests.

Modern standing doctrine is also inconsistent with the fiduciary analogy. As a constitutional matter, a plaintiff must show she suffered an injury-in-fact, which the defendant caused and which would be redressable by a favorable

324 See Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 *FORDHAM L. REV.* 479, 480 (2011).

325 See *RESTATEMENT (THIRD) OF TRUSTS* § 94(1) (2011); HESS ET AL., *supra* note 92, § 861.

326 *Scanlan v. Eisenberg*, 669 F.3d 838, 844 (7th Cir. 2012).

327 *RESTATEMENT (THIRD) OF TRUSTS* § 94, cmt. b.

328 The broadest exception involves standing to sue the trustees of charitable trusts. Traditionally only the state attorney general has standing to enforce the fiduciary duties of charitable trustees. See, e.g., Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 *J. CORP. L.* 655, 657 (1998).

329 Sunstein, *supra* note 203, at 1433.

decision.³³⁰ The prudential constraints are also familiar: the plaintiff must sue to protect her own interests, not those of someone else; cannot sue to vindicate a generalized grievance; and must be within the zone of interests of the relevant statute or constitutional provision.³³¹ The modern Court has construed these requirements to restrict the standing of regulatory beneficiaries, citing concerns over judicial competence in matters of general public concern,³³² the President's authority to "take Care" to execute the laws,³³³ and the potential pathologies of private enforcement.³³⁴

The gap between fiduciary standing and public law standing is nicely illustrated by comparing the standing of co-trustees with the restrictions upon legislator standing. Co-trustees (as well as successor trustees) may, and, in some cases must, sue one another for breach of the trust obligations running to the beneficiaries.³³⁵ There is no such doctrine in the public law of standing. Then-Judge Robert Bork was only somewhat overstating the matter when he wrote: "When the interest sought to be asserted is one of governmental power, there can be no congressional standing, however confined."³³⁶ More generally, policing disagreements among politicians and bureaucrats as joint-trustees of the public "lies far from the model of the traditional common-law cause of action at the conceptual core" of modern standing doctrine.³³⁷

Doctrines of non-reviewability in public law similarly depart from the beneficiary-centered framework of fiduciary law. Regulatory beneficiaries commonly call upon the courts for more regulatory action, including to compel agencies to enforce regulations. Under the common law, an agency's decision not to enforce its regulations was presumptively unreviewable. In *Heckler v. Chaney*, the Court adopted this common law rule as the governing presumption in APA suits, citing concerns over comparative institutional competence and the separation of powers.³³⁸ The Court distinguished a beneficiary suit from a regulated party's challenge to an "exercise [of] coercive power," which is presumptively justiciable.³³⁹ Thus the doctrine of non-reviewability empowers regulated parties at the expense of regulatory benefi-

330 See, e.g., *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 598 (2007).

331 See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984).

332 See *Hein*, 551 U.S. at 600.

333 See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

334 See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 (1982).

335 RESTATEMENT (THIRD) OF TRUSTS § 81(2) (2007) ("Each trustee . . . has a duty to use reasonable care to prevent a co-trustee from committing a breach of trust and, if a breach of trust occurs, to obtain redress.").

336 *Barnes v. Kline*, 759 F.2d 21, 68 n.18 (D.C. Cir. 1984) (Bork, J., dissenting).

337 *Raines v. Byrd*, 521 U.S. 811, 833 (1997).

338 470 U.S. 821, 832 (1985); see Sunstein, *supra* note 203, at 1459 (noting that Court has shown "hostility" to beneficiary suits in nonreviewability doctrine).

339 *Heckler*, 470 U.S. at 832.

ciaries. It is hard to square that preference with the fiduciary theory of government.³⁴⁰

It is equally, if not more difficult, to square fiduciary remedies with those available in public law. Common remedies for breach of fiduciary duty are disgorgement, restitution, and punitive damages, and can include judicial removal of a fiduciary.³⁴¹ These remedies are a far cry from the prospective injunction that is part and parcel of modern public law litigation.

Courts have calibrated fiduciary law as part of a complex structure of jurisdictional and remedial rules. As Ethan Leib puts it, “[O]ne might even be tempted to define the entire field of fiduciary law by the remedies extracted from fiduciaries.”³⁴² Public law also has its own assortment of jurisdictional and remedial doctrines. To treat politicians and bureaucrats as fiduciaries requires more than a claim that they are, or should be, subject to similar primary rights and duties. It requires also a theory for equilibrating jurisdictional and remedial doctrines in public law to the fiduciary model. That theory has not been forthcoming.³⁴³ When stripped of its characteristic remedies, it is unclear how fiduciary law would function as a source for public law doctrines.

340 Criddle has argued that constraints on beneficiary suits are consistent with an analogy between public law and the corporate law doctrine that limits shareholder suits. Criddle, *Foundations*, *supra* note 4, at 175. Under corporate law, shareholders may bring derivative suits on behalf of the corporation to enforce the directors’ duties of loyalty and care. Before suing in a derivative capacity, however, a shareholder must either demand that the corporate board cause the corporation to sue, or show that the demand would be futile because the board would be unable to consider whether to sue in good faith. *See, e.g., Fagin v. Gilmartin*, 432 F.3d 276, 282 (3d Cir. 2005) (discussing influential Delaware law, including *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984)). Limiting shareholder suits thus is thought to protect against over-enforcement and frivolous lawsuits. *Aronson*, 473 A.2d at 811–12 (“[T]he demand requirement . . . exists at the threshold, first to insure that a stockholder exhausts his intracorporate remedies, and then to provide a safeguard against strike suits.”), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

Although Article III standing doctrine is often explained in similar terms, the similarity is superficial. The analogy to derivative suits cannot explain why regulated parties have greater standing than beneficiaries. Regulated parties are often special interest groups with greater access to political processes than regulatory beneficiaries and, correspondingly, less of a need for a “direct” rather than a “derivative” right to sue. *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1286 (2006) (“[W]ell-organized industry groups that stand to gain from a reduction in burdensome regulations will normally provoke an antiregulatory response from the administrative state.” (citing OLSON, *supra* note 33, at 9–16)).

341 *See* Leib, *supra* note 79, at 678.

342 *Id.*

343 Evan Criddle briefly considers the problem, suggesting that courts should have a “larger set of tools for remedying agency malfeasance” based upon the fiduciary theory. Criddle, *Fiduciary Foundations*, *supra* note 4, at 161. It is far from clear, however, that adoption of fiduciary remedies would leave fiduciary rights intact. As Richard Fallon has argued, expansion of the available remedies may motivate retrenchment on the scope of rights. *See* Fallon, *supra* note 324, at 480.

Consider disgorgement and restitution. (This is not the place to delve into the debate over the conceptual relationship between the two.)³⁴⁴ As Deborah DeMott puts it, the distinctiveness of fiduciary law lays in its prohibition upon “misappropriating or misusing entrusted property or power” and in the “distinctive remedy” of disgorgement “available to the beneficiary.”³⁴⁵ “So singular is this remedial consequence of a fiduciary obligation that one English judge made the disgorgement principle the hallmark of a fiduciary relationship.”³⁴⁶ The disgorgement remedy requires a fiduciary to hand over profits obtained in violation of the duty of loyalty. It is measured by the fiduciary’s gain, not the beneficiary’s loss. And the remedy is available whether or not the beneficiary suffered a harm from the fiduciary’s ill-gotten profit.³⁴⁷

By contrast, litigants cannot typically obtain damages, much less disgorgement or restitution, in suits challenging the federal government’s actions. Rather, declaratory or injunctive relief is the common remedy. The United States enjoys sovereign immunity from suit. It has waived that immunity for some claims arising in contract and tort, but these waivers would not extend to the award of disgorgement remedies for breach of general fiduciary duties of care and loyalty.³⁴⁸ Moreover, in contrast with the fiduciary law of disgorgement, under the harmless error rule a court may deny a remedy even when the government has violated the law.³⁴⁹ These remedial restrictions reflect the hard questions that arise in remedying public law wrongs, where courts balance claims of individual rights against competing public interests. The existing suite of fiduciary remedies is not designed to give nuanced answers to these hard questions. Instead, fiduciary remedies follow inextricably from the private duties they enforce.

Yet fiduciary theorists tend to treat fiduciary rights and duties as transportable from the context of private law remedies to that of public law. An alternative approach to translating between private and public law would

344 The recently completed *Third Restatement of Restitution and Unjust Enrichment* treats restitution and unjust enrichment as a unique right of action, distinguishing it from disgorgement as one type of remedy. See, e.g., Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1196–97 (1995) (arguing, in article by *Restatement* reporter, that the “law of restitution be defined exclusively in terms of its core idea, the law of unjust enrichment”); Doug Rendleman, *Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 WASH. & LEE L. REV. 973, 983–89 (2011) (discussing the *Restatement’s* effort).

345 Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. REV. 851, 852 (2011).

346 E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1356 (1985) (referring to *Ex parte Dale & Co.*, 11 Ch. D. 772, 778 (1879)).

347 See Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559, 563 (2006).

348 See Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 611 (2003).

349 See *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009) (discussing “harmless error” rule applied in government litigation).

begin with the difficult questions of fit that arise from the interdependence of justiciability, rights, and remedies. Take, for example, the suggestion that the fiduciary duty of impartiality bars Congress from special interest spending.³⁵⁰ In considering whether this thick translation is appropriate we should consider it alongside the difficult questions of standing and remedies it would necessarily raise. When, if ever, could a private party colorably allege a redressable injury-in-fact to challenge special interest spending that benefitted someone else? Would imposing a duty of impartiality on Congress lead courts to tighten up public law standing even further? If so, how might that spill over in undesirable ways to constrict standing elsewhere?

B. *The Importance of Mediating Principles*

To answer these questions, it is necessary to attend to the techniques that one doctrinal area uses to mediate between its general principles and decision rules for particular cases. Fiduciary law embraces abstract moral injunctions of loyalty and care. If the *sine qua non* of a fiduciary relationship is entrustment and the attendant vulnerability of the entrustor, then the scope and shape of judicial review should vary with the scope and shape of entrustment and vulnerability. The bite of fiduciary duties lies in the specific applications that, over time, develop into decision rules that specify the legally enforceable aspects of the aspirational duties of care and loyalty. This process occurs by reference to discrete classes of beneficiaries and discernible maximands. Thus, in trust law the prudent investor rule makes the duties of loyalty and care concrete. Without meaningful analogues in problems of public governance, fiduciary law simply is not fit to guide the design of public law.

C. *Connecting Values Across Doctrinal Areas*

Translating between rights and remedies in private and public law depends upon connecting the values of one doctrinal area with another. In part, then, its legitimacy depends upon the problem of intent. In part it also depends upon fit. As we have seen in the First Amendment context, for example, fiduciary law has little connection with the values of constitutional law.

Fiduciary theory in particular makes too little out of the reality of political self-interest. Representatives' responsiveness to special interests may serve the public interest by helping to input a diverse range of views and knowledge into the lawmaking machine. Legislators and the public suffer information asymmetries compared to special interest groups. Assuming a sufficiently diverse distribution of responsiveness to different special interests among legislators, factional politics might actually lead to a more even distribution of political satisfaction across the electorate.³⁵¹ The fiduciary theory

350 Natelson, *supra* note 42, at 242, 245.

351 See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 373 (1983); Herbert Hovenkamp, *Legislation, Well-Being, and Public*

of political ethics elides the potential benefits of special interest inputs into the legislative process.

To be sure, partisan politics undoubtedly causes problems for the Republic. Think of the recent spate of fiscal showdowns between the Republican-controlled House of Representatives and the Democrat-controlled White House and Senate. Nor is the gridlock the only problem. Single-party control of the three branches can undermine checks and balances. “[B]ut [partisanship] also provides the energy necessary to fuel a vibrant democracy.”³⁵² Franita Tolson has argued that partisan gerrymandering is a political safeguard of federalism; it allows states to use redistricting as a way of influencing federal policy.³⁵³ Michael Kang has distinguished between “offensive gerrymandering,” designed to make it tougher for the other party’s candidate to obtain re-election, and “defensive gerrymandering,” designed to entrench one’s preferred candidate, arguing that offensive gerrymandering is desirable as an anti-entrenchment device.³⁵⁴ Daryl Levinson and Richard Pildes have outlined a theory of the “separation of parties, not powers,” in which, under certain conditions, partisan strife substitutes for structural checks and balances.³⁵⁵ All of which is to say that partisanship “may be a normal, unavoidable, and perhaps even desirable byproduct of the basic constitutional design of the American political system.”³⁵⁶

The fiduciary duty of undivided loyalty to one’s beneficiaries is thus not part of the “background conditions [that] underlie” public law’s “combination of ideas.”³⁵⁷ That is fatal to the translation necessary to realize the promise of fiduciary government.

D. *The Possibility of Creative Restatement*

Nevertheless, might fiduciary government point towards a creative restatement of problems in public governance? In some instances, the aim of translating between private and public law is not to transfer packages of rights and duties, but rather to elaborate a problem in one context by reference to its discussion in another. Levinson, for example, has looked to contract and tort law to show how “decisions about rights or entitlements are

Choice, 57 U. CHI. L. REV. 63, 64 (1990); Nicholas R. Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734, 737 (1983); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1250–51 (2006).

352 Heather K. Gerken & Michael S. Kang, *Déjà Vu All Over Again: Courts, Corporate Law, and Election Law*, 126 HARV. L. REV. F. 86, 89 (2013).

353 Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 860.

354 Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL’Y 443, 444 (2005).

355 Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2312 (2006).

356 David G. Oedel et al., *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 VILL. L. REV. 57, 57 (2009).

357 Tebbe & Tsai, *supra* note 321, at 495.

bound up with decisions about remedies,” and has then elaborated how the content of constitutional rights is dependent upon constitutional remedies.³⁵⁸ That does not entail borrowing private law’s rights and remedies for use in public law, or vice versa.

The possibility of this form of creative restatement should not be surprising. Legal reasoning is transversal, and problems and concepts that arise in one doctrinal setting often arise in another.³⁵⁹ Fiduciary government focuses upon a problem that arises in both private and public law, namely, holding agents responsible to their principals. Perhaps the promise of fiduciary government rests not in its power to determine legal rights and duties, but rather in its potential to illumine new problems or new solutions in the design of public governance.

In my view, the problem of fit robs fiduciary government of the resolving power necessary for a creative restatement of public law. To make the fiduciary account of government fit, it is necessary to draw a thin comparison between public officials and private fiduciaries. Taken as a modest analogy between private fiduciaries and public officials—both, after all, are delegated powers by others—the theory of fiduciary government simply restates perennial problems in public law. Consider, for example, the fiduciary principles of solicitude and fairness. The former requires government to treat citizens “as ends in themselves and never as mere means,” Criddle explains, and the latter mandates “‘due regard’” for affected parties and similar treatment of those who are similarly situated.³⁶⁰ These concepts might be consistent with legacy admissions in higher education,³⁶¹ the “marriage penalty” in the Tax Code,³⁶² or prohibitions upon opticians’ businesses at the instance of the optometrists’ lobby,³⁶³ but, then again, they might not be.³⁶⁴ Nothing in the

358 Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 859 (1999).

359 See, e.g., J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 2–3 (1986); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 380 (1985).

360 See Criddle, *Administration*, *supra* note 4, at 477–78.

361 See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 368 (2003) (Thomas, J., concurring in part and dissenting in part) (opining that legacy admissions do not offend equal protection guarantee).

362 See *Druker v. Comm’r*, 697 F.2d 46, 51 (2d Cir. 1982) (upholding marriage penalty against equal protection challenge and reasoning that Congress had discretion to balance “competing interests and accomplish fairness”).

363 See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 485, 491 (1955).

364 See J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 315 n.96 (1989) (referring to regulation challenged in *Lee Optical* as instance of “naked redistribution”); Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 218–19 (1998) (discussing “unfairness” of marriage penalty, including its “disparate impact . . . on the working poor and African-Americans”); Steve D. Shadowen et al., *No Distinctions Except Those Which Merit Originates: The Unlawfulness of Legacy Preferences in Public and Private Universities*, 49 SANTA CLARA L. REV. 51, 54–55 (2009) (arguing that legacy admissions violate equal protection guarantee).

theory of fiduciary government seems to specify a new way of untying the knotty problems that politics present in a constitutional democracy.³⁶⁵

CONCLUSION

I end where we began, with Francis Lieber's ambition to develop a "science of duties and virtues."³⁶⁶ He defined civic virtue in terms that will be familiar from the theory of fiduciary government: "The patriotic citizen acts for the benefit of others; not for his interest, but because that sympathy and impulse, patriotism, impels him to share dangers, to work out liberty for those who are not yet born, to preserve liberty."³⁶⁷ This other-regarding impulse, which Lieber worked out largely in procedural rather than substantive terms, has become a familiar feature of debates in contemporary political ethics.³⁶⁸

This is not the place to extemporize on the relationship between political ethics and legal rights, but it is worth noting the inevitably rough correspondence between the two. Consider, for example, the well-known principle of political morality captured in the common law maxim *ubi jus ibi remedium*: "Where there is a right, there is a remedy." The law has never fully converged with this moral principle, and, if current doctrine is any indication, never will.³⁶⁹ The law's imperfect commitment to the right-remedy principle is telling, because the theory of fiduciary government would expand judicial enforcement of Lieber's political ethic.

The impulse towards fiduciary government is understandable. To address the problems of politics through the lens of fiduciary law is a non-obvious solution.

Fiduciary government cannot, however, fulfill the promise made in its name. Politicians and bureaucrats are not like private fiduciaries. They do not serve discrete classes of beneficiaries, and they are subject to demands that cannot be distilled into a discrete maximand. To translate private fiduciary law into public law results either in resort to general principles that provide no helpful guidance or fiduciary doctrines that are an ill fit for public law problems. To the extent the Founders or Congress mandated judicial

365 In this regard, it is worth recalling Heather Gerken and Michael Kang's critique of Rave's account of politicians as fiduciaries in the election law setting. As they point out, "even when one digs down into the specifics, Rave's arguments [about institutional design] are familiar." See Gerken & Kang, *supra* note 352, at 87.

366 1 FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* 19 (Theodore D. Woolsey ed., 2d ed. 1890); see also Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. LEGAL EDUC. 339, 348, 368 (1992) (discussing Lieber's "effort to coordinate individual rights with the duties of citizens and public officers in a constitutional democracy").

367 2 FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* 88 (Theodore D. Woolsey ed., 2d ed. 1890); see also Carrington, *supra* note 366, at 368.

368 See Carrington, *supra* note 366, at 370-71 ("What [Lieber] sought to provide was an intellectual process or a discipline for the consideration of public issues . . .").

369 See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779-86 (1991).

review along fiduciary lines, federal courts would be bound to employ it. But the interpretive case for fiduciary government is unconvincing. The solutions to our collective political problems do not lie in treating all law as fiduciary law.

