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ARTICLE

POLITICIANS AS FIDUCIARIES

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## POLITICIANS AS FIDUCIARIES

D. Theodore Rave\*

*When incumbent legislators draw the districts from which they are elected, the conflicts of interest are glaring: incumbents can and do gerrymander district lines to entrench themselves. Despite recognizing that such incumbent self-dealing works a democratic harm, the Supreme Court has not figured out what to do with political gerrymandering claims, which inherently require first-order decisions about the allocation of raw political power — decisions that courts are institutionally ill suited to make. But the same type of agency problem arises all the time in corporate law. And though we do not think courts are any better at making business decisions than political ones, or trust elections alone to align the interests of corporate directors with their shareholders, courts nevertheless play an important role in checking self-dealing by corporate agents. They do so through an enforceable fiduciary duty of loyalty. Courts apply a strict standard of review when corporate agents act under a conflict of interest, typically invalidating the transactions unless the taint of self-dealing is cleansed by approval through a neutral process (such as ratification by disinterested directors or shareholders), in which case courts apply the much more deferential “business judgment rule.” Drawing from constitutional history and political theory, this Article argues that political representatives should be treated as fiduciaries, subject to a duty of loyalty, which they breach when they manipulate election laws to their own advantage. Courts can thus check incumbent self-dealing in gerrymandering by taking a cue from corporate law strategies for getting around their institutional incompetence. As in corporate law, courts should strictly scrutinize incumbent decisions that are tainted by conflicts of interest (such as when a legislature draws its own districts). But when the taint is cleansed by a neutral process (such as an independent districting commission), courts should apply a much more deferential standard of review. The threat of searching review would likely create as a powerful incentive for legislators to adopt neutral processes for redistricting, allowing a reviewing court to focus not on the substantive political outcomes, but on ensuring that the processes are free from incumbent influence — a role for which courts are institutionally well suited.*

### INTRODUCTION

While the line-drawing phase of the 2010 round of redistricting has come to a close, the litigation phase has only just begun. The predominant practice of allowing incumbent legislators to draw the districts from which they are elected — to essentially pick the voters who will get to vote for them — creates a glaring conflict of interest. It comes as no surprise that incumbents have taken advantage of this opportunity to manipulate district lines for political ends, either to entrench themselves or to gain partisan advantage.

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Despite recognizing that manipulation by incumbents of the very processes from which they draw their legitimacy can work a harm of constitutional proportions, the Supreme Court remains at a loss when confronted with claims that districts were gerrymandered for political ends. The Court simply threw up its hands the last time around in *Vieth v. Jubelirer*.<sup>1</sup> A plurality of four Justices would have declared political gerrymandering a nonjusticiable political question because they could not discern any judicially manageable standards by which to assess such claims.<sup>2</sup> But Justice Kennedy, although he found each of the three different standards proposed by the dissenters unworkable, was unwilling to abandon the project entirely. He concurred in the judgment only, in the hope that a manageable standard might someday be identified.<sup>3</sup> The doctrine on political gerrymandering thus remains in limbo<sup>4</sup> (the only thing that is clear is Justice Kennedy's invitation for more litigation), but the issue will not go away. Indeed, Texas's districts in the current round of redistricting have already made one round-trip to the Supreme Court,<sup>5</sup> and more cases will surely follow.

Academic commentary has identified two primary strategies for dealing with gerrymandering: (1) to identify a workable substantive standard against which to measure political gerrymanders or (2) to alter the process by which districting decisions are made to limit the influence of self-interested incumbents. Still others have rejected both approaches, siding with the plurality in *Vieth* and arguing that courts have no role to play in policing gerrymandering.<sup>6</sup>

Numerous scholars have attempted to meet Justice Kennedy's challenge by proposing substantive standards for determining when political gerrymanders have crossed the constitutional line. These standards include partisan bias,<sup>7</sup> district compactness,<sup>8</sup> partisan in-

<sup>1</sup> 541 U.S. 267 (2004).

<sup>2</sup> *Id.* at 281 (plurality opinion).

<sup>3</sup> *Id.* at 311 (Kennedy, J., concurring in the judgment).

<sup>4</sup> The Court shed no light on the issue in its subsequent decision in *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 414 (2006) [hereinafter *LULAC*] ("We do not revisit [*Vieth*'s] justiciability holding . . .").

<sup>5</sup> *Perry v. Perez*, 132 S. Ct. 934 (2012).

<sup>6</sup> See, e.g., Michael A. Carvin & Louis K. Fisher, "A Legislative Task": Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts, 4 ELECTION L.J. 2 (2005); Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 37-49 (1985); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 677-79 (2002); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987).

<sup>7</sup> See, e.g., Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After LULAC v. Perry*, 6 ELECTION L.J. 2 (2007).

<sup>8</sup> See, e.g., Richard G. Niemi et al., *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. POL. 1155 (1990); Daniel D.

tent,<sup>9</sup> and faithfulness to traditional districting criteria.<sup>10</sup> The latest proposal, by Professor Nicholas Stephanopoulos, argues that the Court should require districts to conform, as nearly as possible, to organic “territorial communities” that share similar social, cultural, and economic interests.<sup>11</sup> Stephanopoulos then offers a sophisticated quantitative technique for measuring the “spatial diversity” or homogeneity of districts.<sup>12</sup>

But all substantive approaches share a common weakness. The real question at the heart of the Court’s difficulty with political gerrymandering claims is not one of manageable standards. Any number of proffered standards have been manageable.<sup>13</sup> Rather the question is one that has been present since the Court’s first forays into the “political thicket” of redistricting during the reapportionment revolution of the 1960s<sup>14</sup>: are courts institutionally competent to handle these claims?<sup>15</sup> Drawing districts inherently requires first-order decisions about the proper allocation of political power. As the Court explained last Term in *Perry v. Perez*, this is not a task for which unelected judges are well suited.<sup>16</sup> No substantive standard, however precise the statistical tools have become, can relieve courts of the obligation to make choices among normatively contestable districting criteria. And those choices will directly impact the distribution of raw political power.

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Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL’Y REV. 301 (1991).

<sup>9</sup> See, e.g., Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781 (2005); Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL’Y 397 (2005).

<sup>10</sup> See, e.g., Gordon E. Baker, *The “Totality of Circumstances” Approach*, in POLITICAL GERRYMANDERING AND THE COURTS 203 (Bernard Grofman ed., 1990); Bernard Grofman, *Criteria for Redistricting: A Social Science Perspective*, 33 UCLA L. REV. 77 (1985).

<sup>11</sup> Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1385 (2012).

<sup>12</sup> Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 HARV. L. REV. 1903, 1905 (2012).

<sup>13</sup> See Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 649 (2007); Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626, 638–39 (2004).

<sup>14</sup> *Colegrove v. Green*, 328 U.S. 549, 552–56 (1946) (cautioning that such questions are “not meet for judicial determination,” *id.* at 552); see also *Reynolds v. Sims*, 377 U.S. 533, 620 (1964) (Harlan, J., dissenting) (noting that reapportionment requires “political judgments which [courts] are incompetent to make”).

<sup>15</sup> Luis Fuentes-Rohwer, *Looking for a Few Good Philosopher Kings: Political Gerrymandering as a Question of Institutional Competence*, 43 CONN. L. REV. 1157, 1164–65 (2011); see also *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1432 (2012) (Sotomayor, J., concurring) (“The second and third *Baker* factors reflect circumstances in which a dispute calls for decisionmaking beyond courts’ competence.”).

<sup>16</sup> 132 S. Ct. 934, 941 (2012) (“[E]xperience has shown the difficulty of defining neutral legal principles in this area, for redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment. . . . [To draw districts itself, a court] would be forced to make the sort of policy judgments for which courts are, at best, ill suited.”).

Indeed, *Vieth* is merely a manifestation of decades of review of political gerrymandering claims, during which time courts have demonstrated their unwillingness to apply *any* substantive standard for determining when a gerrymander crosses the constitutional line.<sup>17</sup>

At the same time, the Court has not embraced a process-based approach either. The Court has ignored scholarly calls for a prophylactic prohibition on incumbent participation in redistricting based on the need to prevent collusion among incumbents and to preserve competition in districted elections.<sup>18</sup> Indeed, the Court was not even willing to adopt a prophylactic rule against mid-decade re-redistricting with *no* justification other than partisan gain.<sup>19</sup> Process-based approaches to controlling gerrymandering have seen success only in states like Arizona and California, where the citizens have used popular initiatives to bypass their legislatures and amend their state constitutions to transfer redistricting authority from legislatures to independent districting commissions.<sup>20</sup>

Part of the Court's skepticism may stem from its discomfort in relying on the purely structural commitment to electoral competition that proponents of process-based approaches have used to justify judicial intervention. In their seminal article, *Politics as Markets: Partisan Lockups of the Democratic Process*, Professors Samuel Issacharoff and Richard Pildes sought "to read into the Constitution an indispensable commitment to the preservation of an appropriately competitive political order" and, in doing so, to shift the discourse from a focus on individual rights to a focus on the background structures of partisan competition.<sup>21</sup> They drew on a similar shift in corporate law scholarship from a focus on the direct fiduciary duties of corporate managers to a focus on the background rules that structure the market for corporate

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<sup>17</sup> Since the Court first declared political gerrymandering claims justiciable in *Davis v. Bandemer*, 478 U.S. 109 (1986), "no final court decision *anywhere in the country* has invalidated a single districting plan under [*Bandemer*], despite literally hundreds of such challenges." Ronald A. Klain, *Success Changes Nothing: The 2006 Election Results and the Undiminished Need for a Progressive Response to Political Gerrymandering*, 1 HARV. L. & POL'Y REV. 75, 78 (2007).

<sup>18</sup> See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 643 (2002) [hereinafter Issacharoff, *Cartels*]. Issacharoff's approach got little traction in *Vieth*, as even the dissenters declined to embrace it. See *Vieth v. Jubelirer*, 541 U.S. 267, 351 n.5 (Souter, J., dissenting) ("The analogy to antitrust is an intriguing one that may prove fruitful, though I do not embrace it at this point out of caution about a wholesale conceptual transfer from economics to politics.").

<sup>19</sup> See *LULAC v. Perry*, 548 U.S. 399, 416–20 (2006); cf. Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 271–76 (2006) (advocating a prohibition of mid-decade re-redistricting).

<sup>20</sup> See ARIZ. CONST. art. IV, pt. 2, § 1; CAL. CONST. art. XXI; see also CAL. GOV'T CODE §§ 8251–8253.6 (Deering 2010).

<sup>21</sup> Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 717 (1998).

control to ensure that managers face competitive pressures to act in the interests of shareholders.<sup>22</sup>

While Issacharoff and Pildes's structural approach is compelling, it is not easily framed in the individual-rights-based terms through which the Court has traditionally approached gerrymandering claims.<sup>23</sup> And they have done too little to lay a strong constitutional foundation in terms the Court can accept.<sup>24</sup> Moreover, by focusing on competition as the central structural value that courts should vindicate, they invite questions about how competitive districts *ought* to be<sup>25</sup> and how their theory can be squared with a commitment to geographic districting, which often leads to uncompetitive districts — even without incumbent manipulation — simply because people with similar preferences tend to live near each other.<sup>26</sup>

This Article attempts to provide a more solid grounding for a primarily process-based approach to controlling incumbent self-dealing in redistricting. This approach corresponds to a deeper intuition about conflicts of interest reflected in established bodies of private law, finds support in the history and political theory that animated the adoption of the U.S. Constitution, and does not require courts to make the types of judgments where we question their institutional competence.

At its core, the conflict of interest faced by incumbent legislators in redistricting is a familiar agency problem. Political representatives are agents acting on behalf of diffuse principals: the people. Sometimes the interests of the agents and their principals diverge (particularly on issues surrounding how agents keep their jobs), giving rise to agency costs. And, because the principals are numerous and diffuse, collective action problems make those agency costs difficult to address.

The agency problem in political representation is far from unique; as Issacharoff and Pildes observe, the same problem is present in corporations all the time.<sup>27</sup> Like legislators, corporate directors are elected agents acting on behalf of diffuse principals: the shareholders. But we do not trust elections alone to sufficiently align the interests of corporate directors with the interests of the shareholders they represent.

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<sup>22</sup> *Id.* at 647–49.

<sup>23</sup> See Charles, *supra* note 13, at 605, 655–58, 667.

<sup>24</sup> See Issacharoff & Pildes, *supra* note 21, at 713–16 (noting “great silences of the Constitution regarding the structure of electoral politics,” *id.* at 713); Samuel Issacharoff, Surreply, *Why Elections?*, 116 HARV. L. REV. 684, 687–88 (2002) [hereinafter Issacharoff, *Why Elections?*] (admitting that “no narrow textual justification” exists for competition theory, *id.* at 687).

<sup>25</sup> See, e.g., Persily, *supra* note 6, at 679–80.

<sup>26</sup> See, e.g., Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409, 422–27; Stephanopoulos, *supra* note 11, at 1394–96. To be clear, neither Issacharoff nor Pildes has advocated an approach that would maximize the competitiveness of *all* districts.

<sup>27</sup> Issacharoff & Pildes, *supra* note 21, at 646–47.

Nor do we typically think that courts are institutionally any better at making business decisions than political ones.

In corporate law, however, courts do not simply throw up their hands when faced with self-dealing by directors. Instead, corporate law employs a venerable private law tool — fiduciary duties — to limit agency costs. And courts have developed doctrines to get around their incompetence with business decisions when enforcing fiduciary duties in corporate transactions.

I want to suggest that, as agents, political representatives should also be treated as fiduciaries, subject to a duty of loyalty, which they breach when they manipulate election laws to their own advantage. Here I pick up the traditional tool for controlling agent self-dealing that Issacharoff and Pildes cast aside in their attempt to shift the focus to background structural principles for ensuring a competitive political marketplace.<sup>28</sup> Fiduciary duties address the same structural agency problem, but in terms that courts may find more familiar.

This idea of fiduciary government has a distinguished constitutional pedigree, finding support in both political theory and the historical debates surrounding the adoption of the Constitution. Indeed, recent legal historical work has demonstrated that the Framers of the Constitution recognized the agency problem in political representation, thought about governance in private law terms, and designed a constitutional framework that was intended to impose fiduciary obligations on government officials.<sup>29</sup> A growing body of scholarship has argued that the Constitution in general, and several of its specific clauses in particular (including the General Welfare, Necessary and Proper, Due Process, and Equal Protection Clauses), should be interpreted with reference to fiduciary principles.<sup>30</sup> Accordingly, the argument goes, government officials, such as agency administrators, operate under fiduciary obligations.<sup>31</sup> But, to date, this scholarship has largely ignored the

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<sup>28</sup> *Id.* at 647–48.

<sup>29</sup> See Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077, 1116, 1124–25, 1128–30 (2004) [hereinafter Natelson, *Public Trust*].

<sup>30</sup> See, e.g., Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 *GEO. WASH. L. REV.* 1, 3 (2010); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 *CASE W. RES. L. REV.* 243, 273–76 (2004) [hereinafter Natelson, *Agency Law*]; Natelson, *Public Trust*, *supra* note 29, at 1168–78; Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 *U. KAN. L. REV.* 1, 49–54 (2003) [hereinafter Natelson, *General Welfare Clause*]; 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, 245–47 (2007) [hereinafter Natelson, *Judicial Review*].

<sup>31</sup> See, e.g., Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 *TEX. L. REV.* 441, 472 (2010) [hereinafter Criddle, *Fiduciary Administration*]; Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 *UCLA L. REV.* 117, 135 (2006). See generally EVAN FOX-DECENT, *SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY* (2011); Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from*

area of law where the fiduciary model would seem to have its most natural application — the field of election law.

Incumbent control over the electoral process creates an obvious conflict of interest. When incumbents use the power of the state to manipulate the processes by which they are elected to frustrate challengers and entrench themselves, they violate their fiduciary duty of loyalty and, if we take the fiduciary model of government seriously, cause a harm of constitutional magnitude. Treating politicians as fiduciaries thus shifts the emphasis from preserving competition to preventing conflicts of interest and allows courts to address underlying structural pathologies in political representation in more familiar rights-based terms — that is, breach of fiduciary duty.

The fiduciary model that I begin to flesh out here could have broad application in the election law field. Incumbents face conflicts of interest when legislating on a range of issues relating to the electoral process. To name a few: voter qualification requirements can be used to keep people likely to support challengers from even going to the polls,<sup>32</sup> ballot access rules can increase barriers to entry for new parties or challengers,<sup>33</sup> and campaign finance regulations can restrict challengers' abilities to amass the funding needed to overcome incumbents' advantages in name recognition, visibility, and access to government perks.<sup>34</sup> This Article, however, will limit its focus to gerrymandering in state legislatures because that is the area where the conflict of interest is most stark, the incumbent self-dealing most brazen, and the courts most at sea.

Under a fiduciary model, courts can effectively check incumbent self-dealing in gerrymandering without exceeding their institutional competence — that is, without the need to make first-order decisions about the proper allocation of political power — by taking a cue from corporate law. In corporate law, courts generally do not interfere with the substantive business decisions of the directors. But when corporate agents engage in conflicted transactions, courts apply a strict standard of review, typically invalidating the transaction unless the

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*Fiduciary Theory*, 1996 U. ILL. L. REV. 57; Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEENS L.J. 259 (2005) [hereinafter Fox-Decent, *The Fiduciary Nature*]; Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2029001](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029001); David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249 (2011); E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025 (1975).

<sup>32</sup> See, e.g., *Carrington v. Rash*, 380 U.S. 89, 93 (1965).

<sup>33</sup> See, e.g., Issacharoff & Pildes, *supra* note 21, at 670–74, 681–87; Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 521–22, 535–36 (1997).

<sup>34</sup> See, e.g., *McConnell v. FEC*, 540 U.S. 93, 249–50 (2003) (Scalia, J., dissenting).



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taint of self-dealing is cleansed by approval through a neutral process (such as ratification by disinterested directors or shareholders). If such a process is used, however, courts apply the much more deferential “business judgment rule” when reviewing the transaction, focusing on the adequacy and independence of the process instead of the substantive fairness of its outcome. The threat of searching judicial scrutiny encourages corporate agents to adopt neutral processes for their conflicted transactions, thereby allowing courts to defer to the business decisions of better-situated, yet still disinterested, decisionmakers.

As in corporate law, when incumbent decisions are tainted by a conflict of interest (such as when a legislature draws its own districts), courts should apply a strict standard of review and invalidate laws showing any sign of self-dealing. But when the taint is cleansed through the use of a neutral process (such as an independent districting commission), courts should apply a much more deferential standard of review, focusing on the adequacy and independence of the process and deferring to the substantive outcome of a sufficiently independent process. Just as it does in corporate law, the threat of searching judicial review would likely create a powerful incentive for legislators to adopt neutral processes for redistricting, allowing reviewing courts to focus not on the substantive political outcomes, but on ensuring that the processes are free from incumbent interference — a role for which courts are institutionally well suited.

This Article proceeds in four parts. Part I provides a brief overview of the practice and effects of gerrymandering in legislative elections and of the Supreme Court’s tentative approach to the justiciability of political gerrymandering claims. Part II examines the nature of fiduciary duties and their use in private law to control agency costs, as well as the framework that corporate law uses to enforce fiduciary duties while addressing the institutional incompetence of courts in making business decisions. Part III argues that treating political representatives as fiduciaries — a view supported by constitutional history and political theory — who breach their duty of loyalty when they manipulate the processes by which they are elected, can help to control some of the agency costs in political representation. Part IV argues that, by borrowing the framework of corporate law and strictly scrutinizing districting decisions made by conflicted legislatures but deferring to districting decisions made through neutral processes, courts can adopt a workable standard for adjudicating gerrymandering claims without exceeding their institutional competence.

I. "ALL DISTRICTING IS 'GERRYMANDERING'"<sup>35</sup>A. *The Practice of Gerrymandering*

The power to determine how districts are drawn resides primarily with state legislatures. The Constitution places the authority for conducting elections for the U.S. House of Representatives with the state legislatures, although Congress can override them.<sup>36</sup> The power to draw state legislative districts is a matter of state law, subject to the requirements of the federal Constitution and the Voting Rights Act (VRA).<sup>37</sup> The state legislatures in most states draw their own districts, as well as congressional districts, through the normal legislative process.<sup>38</sup> Placing the responsibility to draw districts in the hands of the legislators who frequently will run in those districts creates a glaring conflict of interest. The legislators can and do use the redistricting process to manipulate the outcomes of their elections by drawing districts for partisan advantage, to protect incumbents, or both.

<sup>35</sup> ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 462 (1968).

<sup>36</sup> U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . ."); see also 2 U.S.C. § 2c (2006) ("In each State entitled . . . to more than one Representative . . . there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative . . .").

<sup>37</sup> 42 U.S.C. § 1973c (2006). For example, the Constitution requires that all districts have equal populations. See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964). And the VRA requires, in certain circumstances, that districts be drawn to bring together a majority of minority voters. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 69–70 (1986). Some states are covered by § 5 of the VRA, which requires any districts drawn to be precleared by the U.S. Department of Justice or approved by the District Court for the District of Columbia. See 42 U.S.C. § 1973c (2006); *Beer v. United States*, 425 U.S. 130, 131–33 (1976).

<sup>38</sup> Michael P. McDonald, *Redistricting and Competitive Districts*, in THE MARKETPLACE OF DEMOCRACY 222, 228 tbl.10-1 (Michael P. McDonald & John Samples eds., 2006) [hereinafter McDonald, *Redistricting*]. The normal legislative process is used to draw congressional districts in thirty-eight states and state legislative districts in twenty-six states. *Id.* Most other states use either districting commissions or some combination of commissions and the legislative process. *Id.* The vast majority of these commissions are composed of highly partisan members who are either elected officials or selected by the party leadership. *Id.* at 236–37. Only a handful of states (such as Arizona and California) have attempted to remove political considerations from the districting process by adopting more or less independent commissions. See Justin Levitt, ALL ABOUT REDISTRICTING, <http://redistricting.ils.edu/states.php> (last visited Dec. 1, 2012) (discussing the redistricting processes of various states). Almost all of these states moved to independent commissions through the initiative process, bypassing the legislature and putting the question of districting reform directly to the voters. McDonald, *Redistricting*, *supra*, at 237. Not all states have initiative processes available, and the fact that the overwhelming majority of states retain partisan control over redistricting shows that reform is unlikely to come from the legislatures themselves. See *id.* at 241. See Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001–02*, 4 ST. POL. & POL'Y Q. 371 (2004) [hereinafter McDonald, *Comparative Analysis*] for a comprehensive overview of state redistricting institutions.

Gerrymanders take two primary forms: the partisan gerrymander and the bipartisan (or incumbent-protecting) gerrymander. Partisan gerrymanders typically occur where one party controls the redistricting process, either by having sufficient support in the state legislature and the governor's office or, in states that use districting commissions, by having a sufficient number of commissioners appointed by, or beholden to, the party.<sup>39</sup> In a partisan gerrymander, the party in control manipulates district lines to maximize the number of legislative seats it will win. The traditional strategies include "cracking" districts where the party out of power enjoys a majority and dispersing voters of the rival party into districts where the party in control enjoys a comfortable margin or "packing" them into districts where the party out of power already has a large majority, thereby "wasting" their votes.<sup>40</sup> A similar technique is "stacking" districts together to create a multimember district where the party in power has a comfortable majority and then switching to at-large elections.<sup>41</sup> Finally, the party in control can carve an opposite-party incumbent's residence out of "his" district, either pairing him with another incumbent of his own party or placing him in a district favorable to the party in control, a technique Professors Samuel Issacharoff and Pamela Karlan have termed "shacking."<sup>42</sup> A well-crafted partisan gerrymander maximizes the number of districts where the party in control enjoys a slim but comfortable majority and wastes as many votes for the party out of power as possible by packing them into supermajority districts.<sup>43</sup>

For example, in the 1990 round of redistricting, the Texas Democrats, who were watching their historical statewide support erode but still controlled the state legislature and governorship, "carefully construct[ed] [D]emocratic districts 'with incredibly convoluted lines' and pack[ed] 'heavily Republican' suburban areas into just a few districts."<sup>44</sup> As a result, the Democrats managed to hold on to a majority of Texas's congressional delegation and one of the state legislative houses throughout the decade, despite Republican success in statewide

<sup>39</sup> McDonald, *Redistricting*, *supra* note 38, at 230.

<sup>40</sup> Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 551 (2004); *see also* Guillermo Owen & Bernard Grofman, *Optimal Partisan Gerrymandering*, 7 POL. GEOGRAPHY Q. 5, 6 (1988) (describing basic gerrymandering techniques as "concentration gerrymander," "dispersal gerrymander," and "incumbent displacement gerrymander" (emphasis omitted)).

<sup>41</sup> Issacharoff & Karlan, *supra* note 40, at 551 n.45; Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 250.

<sup>42</sup> Issacharoff & Karlan, *supra* note 40, at 552–53; *see also* Bruce E. Cain, *Assessing the Partisan Effects of Redistricting*, 79 AM. POL. SCI. REV. 320, 321 (1985).

<sup>43</sup> *See, e.g.*, Owen & Grofman, *supra* note 40, at 6.

<sup>44</sup> *LULAC v. Perry*, 548 U.S. 399, 411 (2006) (quoting *Henderson v. Perry*, 399 F. Supp. 2d 756, 767 n.47 (E.D. Tex. 2006)) (internal quotation marks omitted).

racers. When Republicans finally gained control of both state houses in 2003, they returned the favor. In a gerrymander orchestrated by former U.S. House Majority Leader Tom DeLay — which drew national attention when Democrats twice fled the state in attempts to frustrate quorum requirements — Republicans worked with what the Supreme Court described as a “single-minded purpose” to “gain partisan advantage” by pairing Democratic incumbents and creating safe districts for Republicans.<sup>45</sup>

Recently, Professors Adam Cox and Richard Holden have argued that an even more effective technique of partisan gerrymandering is to pursue a strategy of “matching slices.”<sup>46</sup> Recognizing that voters do not fall neatly into Democratic and Republican categories but rather along a spectrum from left to right, a partisan line-drawer looking to maximize statewide partisan advantage will not pack opponents into supermajority districts.<sup>47</sup> Instead, the line-drawer will try to match slices of strong supporters (whose voting behavior can be predicted most accurately) in districts with slightly smaller slices of strong opponents (whose voting behavior is also predictable) and then continue matching slices toward the center of the voter distribution.<sup>48</sup> This strategy allows the party to capture more districts by using its “diehard supporters most efficiently” and “draw[ing] districts with thinner margins of victory.”<sup>49</sup> Because the most polarized district is also the safest district, gerrymander beneficiaries may be insulated from effective challenge even when election results appear closely divided, and the most ardent members of the minority party end up represented by legislators from the opposite end of the political spectrum.

Perhaps even more insidious is the bipartisan gerrymander, which typically occurs when neither party has enough power to unilaterally control the redistricting process. Instead, the parties must compromise to draw districts.<sup>50</sup> This bipartisan collaboration can occur when control of the state legislature is closely divided, the governor is of a different party than the legislative majority, or supermajority voting rules are in place for redistricting decisions.<sup>51</sup> Instead of attempting to maximize one party’s power at the expense of the other, incumbents of

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<sup>45</sup> *Id.* at 412 (quoting *Session v. Perry*, 298 F. Supp. 2d 451, 470 (E.D. Tex. 2004) (per curiam)) (internal quotation marks omitted); see also Ronald Keith Gaddie, *The Texas Redistricting, Measure for Measure*, EXTENSIONS (Fall 2004), <http://www.ou.edu/special/albertctr/extensions/fall2004/Gaddie.html>.

<sup>46</sup> Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 567 (2011).

<sup>47</sup> See *id.* at 566.

<sup>48</sup> *Id.* at 566–71.

<sup>49</sup> *Id.* at 567.

<sup>50</sup> McDonald, *Redistricting*, *supra* note 38, at 229.

<sup>51</sup> *Id.*

both parties collude to draw safe districts for everybody.<sup>52</sup> Incumbents trade supporters to shore up “their” districts and increase their expected margins of victory.<sup>53</sup> The state ends up divided into fiefdoms, where incumbents of both parties enjoy safe districts populated by large majorities of their supporters. The overall composition of the legislature reflects the parties’ relative strengths among the entire state population, but there is little partisan competition in any given district. And unlike the partisan gerrymander, which can be self-limiting if line-drawers shave their margins too close,<sup>54</sup> the bipartisan gerrymander tends to be self-reinforcing, locking in the status quo distribution of power between the two major parties.<sup>55</sup>

In 2001, for example, to avoid the potential for gridlock and a referendum on district maps, California state legislators from both parties struck a deal to draw districts that would protect incumbents and minimize partisan turnover.<sup>56</sup> The parties worked together to shore up virtually all of the marginal seats, making them safe for incumbents.<sup>57</sup> This sweetheart deal worked well, and in 2004 not one of the 153 congressional and state legislative seats on the ballot changed party hands.<sup>58</sup>

### *B. The Effects of Gerrymandering on Legitimacy and Competition*

Both forms of gerrymanders cause serious democratic harms. First, incumbents undermine the legitimacy of elections when they manipulate district lines for their own advantage. When insiders use the power of the state to manipulate the rules and institutions governing the political process, the resulting distortion of election outcomes undermines the democratic legitimacy of those institutions and the outcomes they produce.<sup>59</sup>

Second, both forms of gerrymanders tend to reduce competition in districted elections, helping to insulate incumbents from challenge. Indeed, incumbents routinely win by landslides in the overwhelming

<sup>52</sup> See Issacharoff, *Cartels*, *supra* note 18, at 618–19.

<sup>53</sup> See McDonald, *Redistricting*, *supra* note 38, at 227.

<sup>54</sup> See *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O’Connor, J., concurring in the judgment) (citing BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 151–59 (1984)).

<sup>55</sup> See Issacharoff, *Cartels*, *supra* note 18, at 598–600.

<sup>56</sup> See Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans*, 4 CAL. J. POL. & POL’Y 1 (2012) available at <http://www.degruyter.com/view/j/cjpp.2012.4.issue-1/1944-4370.1197/1944-4370.1197.xml>; David S. Broder, *Calif. Democrats Seek Stability in Redistricting Plan*, WASH. POST, Aug. 31, 2001, at A2 (claiming that support by two-thirds majority in each state house would insulate plan from referendum).

<sup>57</sup> Tony Quinn, *The Bipartisan Redistricting: How It Happened*, FREE REPUBLIC (Oct. 16, 2005, 4:25:28 PM), <http://www.freerepublic.com/focus/f-news/1503533/posts>.

<sup>58</sup> Nancy Vogel, *Looking to Design a Fairer Map*, L.A. TIMES, Feb. 13, 2005, at B1.

<sup>59</sup> Charles, *supra* note 13, at 604–05, 615–16.

majority of districted elections.<sup>60</sup> The absence of competitive elections reduces ex post accountability of representatives,<sup>61</sup> diminishes legislative responsiveness to shifts in voter preference,<sup>62</sup> and may contribute to the election of more polarized candidates.<sup>63</sup>

Of course it would be neither possible, nor necessarily desirable,<sup>64</sup> to make *all* districts competitive in our predominantly single-member-

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<sup>60</sup> See Gary C. Jacobson, *Competition in U.S. Congressional Elections*, in THE MARKETPLACE OF DEMOCRACY 27, 27–31 (Michael P. McDonald & John Samples eds., 2006); Richard G. Niemi et al., *Competition in State Legislative Elections, 1992–2002*, in THE MARKETPLACE OF DEMOCRACY, *supra*, at 53, 56, 64–67 (finding that, in single-member-district elections for state lower houses from 1992 to 2002, the median incumbent reelection rate has been over ninety percent with approximately seventy-five percent of incumbents winning in landslides). Competition in legislative elections has been declining for several decades, and gerrymandering is certainly not the only factor, or even the dominant factor, in that decline. See, e.g., Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 309–12 (2011) [hereinafter Pildes, *Hyperpolarized Democracy*]. For example, Senate elections, which cannot be gerrymandered and remain substantially more competitive than House elections, have also seen a parallel decline in competition. Jacobson, *supra*, at 46–47. But although recent empirical literature has questioned the causal connection between gerrymandering and the increase in incumbent reelection rates over the past several decades, it has not questioned that incumbent-protecting gerrymandering contributes to high reelection rates. See, e.g., John N. Friedman & Richard T. Holden, *The Rising Incumbent Reelection Rate: What's Gerrymandering Got to Do with It?*, 71 J. POL. 593, 593–95 & fig.1 (2009); Jacobson, *supra*, at 43–44, 50. Indeed, a recent study of California's alternation between districts drawn by the legislature in the 1960s, 1980s, and 2000s and those districts drawn by court-appointed special masters in the 1970s and 1990s found that legislatively drawn districts were significantly less competitive than special master-drawn districts. Corbett A. Grainger, *Redistricting and Polarization: Who Draws the Lines in California?*, 53 J.L. & ECON. 545, 555–57 (2010).

<sup>61</sup> Issacharoff, *Cartels*, *supra* note 18, at 599–600; Issacharoff, *Why Elections?*, *supra* note 24, at 685–86. Indeed, the major advantage of single-member districts over proportional representation systems, which might more accurately represent a society's diverse interests, is the ex post ability to hold representatives accountable for their performance in office. See Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205, 229–30; Issacharoff, *Why Elections?*, *supra* note 24, at 694; Issacharoff & Pildes, *supra* note 21, at 678.

<sup>62</sup> See Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 OHIO ST. L.J. 1121, 1129–31 (2007) (finding that in the 2004 congressional election it would have taken a 4.9% shift in the national two-party vote in favor of the minority party for it to win only the five most vulnerable seats in the House (just over 1.1% of the seats), far greater than the 1.5% shift required to change five seats between 1946 and 1998).

<sup>63</sup> See Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 427–28 (2004); see also Grainger, *supra* note 60, at 548, 559 (finding that legislatively drawn districts in California are associated with increased polarization compared with districts drawn by court-appointed special masters). But see Pildes, *Hyperpolarized Democracy*, *supra* note 60, at 308–15 (suggesting that while the safest districts tend to elect the most polarized candidates and legislators from competitive districts vote in slightly less polarized patterns, “there does not appear to be strong evidence to support a linkage between polarization and safe election districts,” *id.* at 314, and the causes of polarization likely lie elsewhere).

<sup>64</sup> See, e.g., Persily, *supra* note 6, at 668–71 (arguing that maximizing district-level competition could lead to poorer representation of partisan preferences, undermine political diversity, and reduce the number of experienced legislators).

district, winner-take-all system because political preferences are often strongly correlated with geography.<sup>65</sup> But the lack of meaningful electoral competition in most districts — particularly when it stems, at least in part, from the conscious efforts of insiders to manipulate the institutions of democracy to their advantage — further strips elections of their legitimating effect and exacerbates the agency problem in political representation.<sup>66</sup>

### C. Madison's Failure

The Framers of the Constitution were not blind to the conflict of interest they created by leaving control over districting in the hands of legislators. Their solution was to provide a structural check in the form of federalism. They placed the primary responsibility for drawing congressional districts not with Congress but in the hands of the state legislatures; Congress was relegated to a secondary, supervisory role.<sup>67</sup> And with respect to state legislative districts, it is clear today that Congress can go to considerable lengths to supervise and regulate line drawing.<sup>68</sup> The theory was that the state and federal legislatures were independent actors with different interests, because they were responsive to different constituencies; therefore, they could serve as ef-

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<sup>65</sup> See Pildes, *Hyperpolarized Democracy*, *supra* note 60, at 312.

<sup>66</sup> *But see* Persily, *supra* note 6, at 667–73 (arguing that incumbent-protecting bipartisan gerrymanders provide better representation than competitive districts because almost everyone gets to vote for a winner). Other scholars also believe that concerns over the lack of competition are overblown. *See, e.g.*, RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW* 5–6 (2003); Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589, 1600–03 (1999); Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 724–28 (1998); Lowenstein & Steinberg, *supra* note 6, at 37–44; Schuck, *supra* note 6, at 1348–51.

<sup>67</sup> *See* Vieth v. Jubelirer, 541 U.S. 267, 275–77 (2004) (plurality opinion) (noting that Congress has power under Article I, Section 4 to regulate state design of districts for federal elections); Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 30–43 (2010) (discussing the debate surrounding the adoption of the Times, Places, and Manner Clause); Richard H. Pildes, *The Supreme Court, 2003 Term — Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 81–82 (2004) [hereinafter Pildes, *Foreword*].

<sup>68</sup> *See* Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 2, 5, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973, 1973c (2006)); Thornburg v. Gingles, 478 U.S. 30 (1986); Beer v. United States, 425 U.S. 130 (1976). Congressional regulation of state redistricting is grounded in the enforcement powers of Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. *See* Katzenbach v. Morgan, 384 U.S. 641, 646 (1966) (upholding the Voting Rights Act as a valid exercise of congressional power); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (same). It is not clear whether Congress had the power to supervise state elections under the original Constitution through the Republican Form of Government Clause. *See* U.S. CONST. art. IV, § 4. The Framers of the original Constitution were not particularly concerned with the workings of state government, but the Reconstruction Amendments demonstrated recognition of the need for federal supervision of state political processes.

fective checks on each other's self-interested behavior.<sup>69</sup> While the idea of having national and state legislatures police each other may have worked well in a purely Madisonian republic, things quickly fell apart with the rise of national political parties.<sup>70</sup>

Madison and the Federalists worried about localized factions gaining control of the instrumentalities of government.<sup>71</sup> National political parties are "superfactions" whose influence crosses state lines and aligns the interests of large numbers of people. In this way, political parties provide vehicles for concerted action at all levels of government.<sup>72</sup> In a world with national political parties, members of Congress have an interest in state elections and state legislators have an interest in congressional elections.

Aside from simply coordinating interests, well-organized political parties can broker deals and enforce party discipline. If individual state legislators do not want to go along with a congressional gerrymander (either a partisan power grab or a bipartisan deal), party leaders can threaten to withdraw support, cut off campaign funding, or even run an opponent in a primary. This factional power undermines the structural mechanism that the Framers thought would provide an independent check on incumbent self-dealing.<sup>73</sup> Because of their interdependence, we cannot count on state legislators to draw congressional districts without taking the interests of members of Congress into consideration, nor can we count on Congress to provide effective supervision of state legislative redistricting.<sup>74</sup>

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<sup>69</sup> See, e.g., THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 2003); see also *id.* NOS. 59, 60 (Alexander Hamilton).

<sup>70</sup> See Pildes, *Foreword*, *supra* note 67, at 81–82; see also Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 269 (2000). The Framers of the Constitution of 1789 did not expect political parties to play a significant role in their new republic. See Issacharoff & Pildes, *supra* note 21, at 713–14 (“[T]he constitutional structure was specifically intended to preclude the rise of political parties, which were considered the quintessential form of ‘faction.’” *Id.* at 713.); see also J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 530–31 (1966).

<sup>71</sup> See THE FEDERALIST NO. 10, *supra* note 69.

<sup>72</sup> See DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 128–29 (1989); DAVID A.J. RICHARDS, FUNDAMENTALISM IN AMERICAN RELIGION AND LAW 259 (2010) (describing “superfactions” as factions that form a dominant majority at both the state and national levels); see also Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627, 1659–63 (1999) (describing political parties as “superagents” able to overcome the collective action problems that Madison hoped would act as checks on factions).

<sup>73</sup> See Pildes, *Foreword*, *supra* note 67, at 81–82 (“Far from a detached check on the self-interested behavior of state politicians, party leaders in Congress are often the very catalysts who incite party affiliates in the states to aggressive partisan gerrymandering.”); see also Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2329 (2006) (“Intraparty cooperation . . . smoothes over branch boundaries and suppresses the central dynamic assumed in the Madisonian model.”).

<sup>74</sup> See Pildes, *Foreword*, *supra* note 67, at 81–82.



Such concerns are borne out in the real world. Professor Michael McDonald has explained that even without any formal role in the redistricting process, it is not unusual for a state's congressional delegation to be intimately involved in redistricting.<sup>75</sup> To take a high-profile example, former U.S. House Majority Leader Tom DeLay is widely credited with orchestrating the Republican gerrymander in Pennsylvania that was the basis for the controversy in *Vieth*.<sup>76</sup> McDonald argues that these practices reflect a widely followed norm that legislators "should draw their own maps."<sup>77</sup>

*D. The Justiciability of Political Gerrymandering Claims:  
A Search for Standards*

Although the Supreme Court has recognized, at least in the abstract, that gerrymandering works a democratic harm,<sup>78</sup> it has been reluctant to act on political (both partisan and bipartisan) gerrymandering claims. A majority of the Justices agree that political gerrymandering claims should be justiciable, but they have failed to come together to identify any judicially manageable standard to evaluate such claims. The Court's difficulty can be attributed in part to its failure to come to grips with a clear conception of the harm caused by gerrymandering. But more fundamentally, the Court's tentative approach to justiciability reflects concerns over its institutional competence.

*Gaffney v. Cummings*<sup>79</sup> was the first time the Supreme Court addressed a political gerrymandering claim and the only time the Court faced a bipartisan gerrymander. The Court did not address justiciability in *Gaffney*; rather, it implicitly assumed that the claim was justiciable and decided the case on the merits.<sup>80</sup> After the 1970 census, a bipartisan redistricting commission in Connecticut adopted a policy of "political fairness" and drew lines "with the conscious intent

<sup>75</sup> McDonald, *Comparative Analysis*, *supra* note 38, at 379–80.

<sup>76</sup> See Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 443, 466 (2005); see also Pildes, *Foreword*, *supra* note 67, at 82 n.221 ("National party leaders were reported to have played a central role in the recent partisan re-districtings and gerrymanderings in Texas, Colorado, and Pennsylvania."). See generally STEVE BICKERSTAFF, *LINES IN THE SAND* (2007). In a more recent example, news reports claim that U.S. House Speaker John Boehner, along with national Republican congressional leaders, played a central role in drawing Ohio's post-2010 congressional districts. See, e.g., Aaron Marshall, *Public Records Show Speaker Boehner's Aide Called Shots on Secret Redistricting Process (Updated)*, CLEVELAND.COM (Dec. 12, 2011, 7:07 PM), [http://www.cleveland.com/open/index.ssf/2011/12/documents\\_show\\_boehner\\_rep\\_par.html](http://www.cleveland.com/open/index.ssf/2011/12/documents_show_boehner_rep_par.html).

<sup>77</sup> McDonald, *Comparative Analysis*, *supra* note 38, at 379; see also McDonald, *Redistricting*, *supra* note 38, at 229.

<sup>78</sup> See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion); *Davis v. Bandemer*, 478 U.S. 109, 132–33 (1986).

<sup>79</sup> 412 U.S. 735 (1973).

<sup>80</sup> See *id.* at 751–52; see also *Bandemer*, 478 U.S. at 119–20.

to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties.”<sup>81</sup> The plan divided the state into safe Democratic and Republican districts roughly in proportion to the parties’ voting results in the preceding three statewide elections.<sup>82</sup>

The Supreme Court rejected the plaintiffs’ claim that the plan was “a gigantic political gerrymander, invidiously discriminatory under the Fourteenth Amendment.”<sup>83</sup> While the Court noted that districting decisions “to achieve political ends or allocate political power [are] not wholly exempt from judicial scrutiny under the Fourteenth Amendment,”<sup>84</sup> the Court had difficulty identifying the harm when the plan did not discriminate against any identifiable group. The Court stated that “judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so.”<sup>85</sup> Seeing no invidious discrimination, the Court was reluctant to invalidate the bipartisan, incumbent-protecting plan simply because it took political considerations into account.<sup>86</sup> Such an approach would place the responsibility for districting, which the Court noted “inevitably has and is intended to have substantial political consequences,”<sup>87</sup> in the hands of a federal court.

The Supreme Court first expressly addressed the justiciability of political gerrymandering claims in *Davis v. Bandemer*.<sup>88</sup> *Bandemer* dealt with a post-1980 partisan gerrymander of the Indiana state legislature that left Democrats significantly underrepresented relative to their statewide voting strength.<sup>89</sup> A majority of the Court held that political gerrymandering claims are justiciable under the Equal Protection Clause.<sup>90</sup> Under the political question doctrine set forth in *Baker v. Carr*,<sup>91</sup> the Justices agreed that gerrymandering claims do “not in-

<sup>81</sup> *Gaffney*, 412 U.S. at 752 (internal quotation marks omitted).

<sup>82</sup> *Id.* at 738 & n.4.

<sup>83</sup> *Id.* at 752.

<sup>84</sup> *Id.* at 754.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 752–53.

<sup>87</sup> *Id.* at 753.

<sup>88</sup> 478 U.S. 109 (1986). Three years earlier in *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court struck down a partisan gerrymander in New Jersey for violating the one-person, one-vote rule and therefore did not reach the partisan gerrymandering claim. *See id.* at 744, 750–62 (Stevens, J., concurring).

<sup>89</sup> 478 U.S. at 115 (plurality opinion).

<sup>90</sup> *Id.* at 123 (majority opinion).

<sup>91</sup> 369 U.S. 186 (1962). *Baker* set forth six independent tests for nonjusticiable political questions: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking

volve [the Court] in a matter more appropriately decided by a coequal branch of our Government” or present a “risk of foreign or domestic disturbance,” and they were “not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided.”<sup>92</sup> But the Court then fractured on what standard to use to adjudicate such claims.<sup>93</sup>

Under the discrimination framework that the Court applied in *Gaffney*, the harm in *Bandemer* was easier to grasp — the districting plan was intended to discriminate against Democrats. Writing for a plurality, Justice White observed that “[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.”<sup>94</sup> But the Court could not agree on any baseline against which to measure discriminatory effect or any standard for assessing when a partisan gerrymander has gone far enough to violate the Constitution.<sup>95</sup> Indeed, as Justice O’Connor pointed out in her concurrence, the plurality explicitly disavowed the only obvious baseline, proportional representation.<sup>96</sup>

In holding gerrymandering claims justiciable, the Court in *Bandemer* acknowledged that it was creating an underdeveloped jurisprudential tool. The Court noted that *Baker’s* holding that malapportionment claims are justiciable was also incomplete until two years later, when *Reynolds v. Sims*<sup>97</sup> provided the one-person, one-vote standard for adjudicating those claims.<sup>98</sup> “The mere fact . . . that we may not now similarly perceive a likely arithmetic presumption in the instant context does not compel a conclusion that the claims presented

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independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217. The first — a textual commitment to a coordinate branch — was not at issue in *Bandemer*, which dealt with a state legislative redistricting not subject to Article I, Section 4. However, in *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964), the Court held explicitly that Article I, Section 4 did not insulate the congressional redistricting process from judicial scrutiny. *See also* *Wright v. Rockefeller*, 376 U.S. 52, 56–58 (1964) (entertaining a racial gerrymandering challenge to congressional districts).

<sup>92</sup> *Bandemer*, 478 U.S. at 123.

<sup>93</sup> *Id.* at 124.

<sup>94</sup> *Id.* at 129 (plurality opinion).

<sup>95</sup> *See id.* at 171–73 (Powell, J., concurring in part and dissenting in part) (“The final and most basic flaw in the plurality’s opinion is its failure to enunciate any standard that affords guidance to legislatures and courts. . . . The failure to articulate clear doctrine in this area places the plurality in the curious position of inviting further litigation even as it appears to signal the ‘constitutional green light’ to would-be gerrymanderers.” (footnotes omitted)).

<sup>96</sup> *Id.* at 155 (O’Connor, J., concurring in the judgment).

<sup>97</sup> 377 U.S. 533 (1964).

<sup>98</sup> *Bandemer*, 478 U.S. at 123. Commentators have also noted this parallel, calling *Bandemer* a *Baker* without a *Reynolds*. *See, e.g.,* Hasen, *supra* note 13, at 637–38; Issacharoff, *Cartels, supra* note 18, at 605.

here are nonjusticiable.”<sup>99</sup> The Court explained, “[T]he issue is one of representation, and we decline to hold that such claims are never justiciable.”<sup>100</sup> But the Court has yet to find a *Reynolds* for *Bandemer*. Since it decided *Bandemer* in 1986, the Court has never sustained a partisan gerrymandering claim, nor has it set out a standard for adjudicating such claims.<sup>101</sup>

Eighteen years later, the Court revisited the justiciability question in *Vieth v. Jubelirer*, which involved a post-2000 Republican gerrymander of Pennsylvania’s congressional districts. Four Justices, in an opinion by Justice Scalia, would have overruled *Bandemer* and held political gerrymandering claims nonjusticiable for lack of a judicially manageable standard.<sup>102</sup> According to Justice Scalia, requiring judges to assess districting decisions “casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon.”<sup>103</sup> Four Justices dissented but proposed three different standards, all of which differed from the standard proposed by the plaintiff and the standards discussed in *Bandemer*.<sup>104</sup> Justice Kennedy concurred in the judgment, acknowledging that none of the proposed substantive standards were workable, but he was unwilling to hold political gerrymandering claims nonjusticiable.<sup>105</sup> Instead, he opted to dismiss the claim on the merits.<sup>106</sup> He concluded that the fact that no manageable standard had yet emerged did not mean that one would not emerge in the future, and he invited future litigants to expand their search for standards beyond the Fourteenth Amendment.<sup>107</sup>

There the doctrine on whether and when courts should intervene in political gerrymandering remains. The Court shed little light on the issue in *League of United Latin American Citizens (LULAC) v. Perry*,<sup>108</sup> which considered whether a mid-decade re-redistricting in Texas was an unconstitutional partisan gerrymander when no justification

<sup>99</sup> 478 U.S. at 123.

<sup>100</sup> *Id.* at 124.

<sup>101</sup> See Klain, *supra* note 17, at 78. *Republican Party of North Carolina v. Martin*, 980 F.2d 943 (4th Cir. 1992), is the only case in which a plaintiff has actually stated a claim under *Bandemer*, but prior to entry of a final order in the case, the political dynamics of the state shifted and the plaintiff Republican Party swept the elections. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 886–88 (rev. 2d ed. 2002).

<sup>102</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion).

<sup>103</sup> *Id.* at 290.

<sup>104</sup> *Id.* at 292; *see id.* at 317 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

<sup>105</sup> *Id.* at 308–10 (Kennedy, J., concurring in the judgment).

<sup>106</sup> *See id.* at 313.

<sup>107</sup> *Id.* at 311 (noting that First Amendment concerns may be implicated when a districting plan has the “purpose and effect of burdening a group of voters’ representational rights,” *id.* at 314).

<sup>108</sup> 548 U.S. 399, 414 (2006).

other than partisan objectives was offered.<sup>109</sup> The Court did not revisit the issue left open in *Vieth*, noting simply that a majority of the Justices declined to hold political gerrymandering claims nonjusticiable political questions, and continued on to examine whether the parties in *LULAC* offered a manageable standard.<sup>110</sup> Justice Kennedy's plurality opinion held that a test that finds a districting plan unconstitutional when the presumed "sole intent" is partisan gain is not a manageable standard.<sup>111</sup> Referring back to *Gaffney*, Justice Kennedy could not see how a court could reliably apply a standard that would invalidate the mid-decade re-redistricting that more closely reflected the distribution of political power in the state, but leave untouched an earlier, highly effective gerrymander that entrenched a party on the verge of minority status.<sup>112</sup> Instead, Justice Kennedy stayed focused on the effects prong of the equal protection analysis, stating that a successful claim of unconstitutional gerrymandering must "show a burden, as measured by a reliable standard, on the complainants' representational rights."<sup>113</sup>

While the Court has framed the question as a search for judicially manageable standards, the real concern underlying its tentative approach to justiciability in its political gerrymandering cases is one of institutional competence.<sup>114</sup> Indeed, questions of institutional competence have been ever present in this area of law since the Court's first foray into the political thicket in *Baker*.<sup>115</sup> The fear is that, without judicially manageable standards to guide their discretion, courts will become mired in the process of apportioning shares of raw political power — a job for which they are particularly ill suited given their lack of democratic accountability.<sup>116</sup> As the Court observed last term in *Perry v. Perez*, "experience has shown the difficulty of defining neutral legal principles in this area."<sup>117</sup>

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<sup>109</sup> *Id.* at 416–17 (plurality opinion).

<sup>110</sup> *Id.* at 414 (majority opinion).

<sup>111</sup> *Id.* at 418 (plurality opinion); *see also id.* at 417–20.

<sup>112</sup> *Id.* at 419.

<sup>113</sup> *Id.* at 418; *see also* *League of Women Voters v. Quinn*, No. 1:11-cv-5569, 2011 WL 5143044, at \*1 (N.D. Ill. Oct. 28, 2011), *summarily aff'd*, 132 S. Ct. 2430 (2012) (rejecting First Amendment challenge to partisan gerrymander).

<sup>114</sup> *See* *Fuentes-Rohwer*, *supra* note 15, at 1164–65.

<sup>115</sup> *See* *Reynolds v. Sims*, 377 U.S. 533, 620 (1964) (Harlan, J., dissenting) (painting "a jarring picture of courts threatening to take action in an area which they have no business entering, inevitably on the basis of political judgments which they are incompetent to make"); *Baker v. Carr*, 369 U.S. 186, 323–24 (1962) (Frankfurter, J., dissenting).

<sup>116</sup> *See, e.g.*, *HASEN*, *supra* note 66, at 154; *Fuentes-Rohwer*, *supra* note 15, at 1164–65; Michael S. Kang, *When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1117 (2007).

<sup>117</sup> 132 S. Ct. 934, 941 (2012). *Perry* did not involve a constitutional challenge to a political gerrymander. Rather, the case reached the Supreme Court on Texas's emergency appeal of a three-judge district court's decision to draw interim district lines itself for the 2012 elections while

Part of the problem is that the Court has approached the question through an equal protection framework. While the cases speak in terms of a “representational” harm, the Court cannot figure out how to measure the harm because it is looking for discrimination. The Court has acknowledged that the discriminatory intent of legislators can be presumed in any redistricting, but because the Court is (rightly) unwilling to mandate proportional representation, there is no baseline against which to measure the discriminatory effects of partisan gerrymandering. And bipartisan gerrymanders lack any simple external benchmark, because they already allocate power proportionally.

More fundamentally, the problem lies in the search for a substantive standard against which to measure political gerrymanders. To adopt a substantive standard would require the Court to make first-order choices among normatively contestable districting criteria. Echoing Justice Frankfurter’s warning in *Colegrove v. Green* that such “peculiarly political” issues are “not meet for judicial determination,”<sup>118</sup> the Court in *Perry* observed that for a court to weigh the substantive considerations that go into drawing districts, “it would be forced to make the sort of policy judgments for which courts are, at best, ill suited.”<sup>119</sup>

What is most disturbing about political gerrymandering, however, is not that it discriminates against some discrete group, but rather that insiders capture and manipulate the very processes from which they draw their legitimacy. Even as the Court has struggled to identify standards, it has acknowledged that manipulation of the political process by insiders to entrench incumbents — both in redistricting and in other contexts — works a democratic harm.<sup>120</sup> In the campaign finance arena in particular, the Court has been exceedingly skeptical of legislators’ attempts to regulate campaign spending because of the danger that those measures are aimed at incumbent entrenchment.<sup>121</sup>

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the Texas legislature’s districting plan awaited preclearance from the District Court for the District of Columbia under section 5 of the VRA. *Id.* at 940.

<sup>118</sup> 328 U.S. 549, 552 (1946) (plurality opinion); see also Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 461–63 (2004).

<sup>119</sup> 132 S. Ct. at 941.

<sup>120</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion).

<sup>121</sup> See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 236, 248–49 (2006) (plurality opinion) (striking down excessively low contribution limits because they could “harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability,” *id.* at 249); *McConnell v. FEC*, 540 U.S. 93, 249–50, 263 (2003) (Scalia, J., concurring in part and dissenting in part) (“The first instinct of power is the retention of power . . .” *Id.* at 263.); *id.* at 306 (Kennedy, J., concurring in part and dissenting in part) (suggesting that Title I of the Bipartisan Campaign Reform Act was little more than “an incumbency protection plan”); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 644 n.9 (1996) (Thomas, J., concurring in the judgment and dissenting in part) (“There is good reason to think that campaign reform is an especially inappropriate area for judicial deference to legisla-

As the Court explained in striking down portions of the Bipartisan Campaign Finance Reform Act of 2002, “it is a dangerous business for Congress to use the election laws to influence the voters’ choices.”<sup>122</sup> And in the redistricting context, although the Court has struggled to articulate the precise nature of the harm — or figure out what to do about it — it has consistently recognized that political gerrymandering works a constitutional injury. *Bandemer*, for example, recognized that if incumbents drew districts that consistently degraded the power of the opposing party, they would be unconstitutionally discriminating against challengers.<sup>123</sup> Even the plurality in *Vieth* tacitly recognized that severe partisan gerrymanders violate the Constitution.<sup>124</sup> And in *LULAC*, the Court recognized, at least in the racial redistricting context, that manipulating district lines to benefit incumbents and reduce their accountability is illegitimate.<sup>125</sup>

This type of self-dealing by political insiders is a structural agency problem, which is not easily described in the rights-based terms typically used in equal protection claims. Structural claims, almost by definition, are nonjusticiable political questions.<sup>126</sup> But, as Professor Guy-Uriel Charles has argued, it may be possible for courts to address underlying structural pathologies in political representation by framing the questions in individual rights-based terms.<sup>127</sup> The concept of fiduciary duty in agency law, for example, attempts to solve a structural problem (agency costs) through an individual right enforceable in court (the right of a principal to have the agent act for his sole benefit). And courts have well-developed doctrines in private law to get around their institutional incompetence when faced with structural agency problems.

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tive judgment . . . [because of] the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it.”)

<sup>122</sup> *Davis v. FEC*, 554 U.S. 724, 742 (2008); see also *id.* at 744–45; *Citizens United v. FEC*, 130 S. Ct. 876, 904–05 (2010); *id.* at 968–69 (Stevens, J., dissenting) (describing majority’s rationale as an attempt to control “legislative self-dealing”). Justice Stevens would have deferred to the legislature’s judgment that unlimited corporate spending threatens the integrity of the electoral process absent evidence of congressional intent to discriminate against challengers, but interestingly he would not give the legislature such deference in the redistricting process. See *id.* at 969 (citing his dissents in *LULAC* and *Vieth*).

<sup>123</sup> See *Davis v. Bandemer*, 478 U.S. 109, 132, 139–40 (1986).

<sup>124</sup> See 541 U.S. at 292 (plurality opinion).

<sup>125</sup> *LULAC v. Perry*, 548 U.S. 399, 440–41 (2006) (holding that a transparent attempt to prevent an emergent Latino majority from voting an incumbent out of office was an illegal racial gerrymander that could not be justified by a desire to protect incumbents because it was exercised to benefit only the officeholder and not the voters).

<sup>126</sup> See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1, 52–53 (1849).

<sup>127</sup> Charles, *supra* note 13, at 655–58.

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## II. CONTROL OF AGENCY COSTS THROUGH FIDUCIARY DUTIES

Agency problems abound in the world. Any time one person enlists another to act on his or her behalf, agency costs are present. Because their interests are not identical, there are costs involved in getting agents to act in the best interests of their principals. Agents may not work as hard to forward the principal's interests as the principal would, or worse, agents may pursue their own interests at the principal's expense. There are costs to monitoring the agents' behavior and costs to enforcing loyalty.<sup>128</sup> Agency costs are incurred, for example, whenever a trustee manages the assets of a trust, a real estate agent searches for a house for a buyer, a lawyer represents a client, a board of directors manages a corporation, and even when an employer hires an employee.

Several mechanisms help to control agency costs. Market forces and competition provide incentives for agents to align their interests with those of the principals. Elections can help select agents who are likely to have similar interests as principals and provide incentives for agents to act faithfully to increase their chances of reelection. But in many types of relationships, these mechanisms are not enough, and the law has turned to fiduciary duties to address the remaining agency costs. By requiring loyalty and care from the agent and allowing the principal to enforce these obligations in court, fiduciary law helps to further align the interests of the principal and agent.<sup>129</sup>

Legislators are also agents. And agency costs are present when the people elect legislators to represent them in government. The interests of politicians and their constituents may diverge on many issues, and elections alone are not sufficient to bring their interests in line, particularly on issues surrounding how politicians keep their jobs. But in many instances we are wary of relying on courts to police structural agency problems in the political process out of a concern for their institutional competence. Indeed, this very concern underlies the Supreme Court's reluctance to engage with political gerrymandering claims: in general, we think that courts are institutionally ill suited for making first-order decisions about political outcomes.<sup>130</sup>

But courts face the same problem all the time in corporate law. We do not think courts are any more competent at making business judg-

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<sup>128</sup> See generally Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

<sup>129</sup> For simplicity's sake, I will refer to any party bearing a fiduciary duty as an agent and any party that is the beneficiary of that duty as a principal, whether or not they meet the common law definition of agency.

<sup>130</sup> See, e.g., Fuentes-Rohwer, *supra* note 15, at 1164-65, 1180-81; Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1687-88 (1993) [hereinafter Issacharoff, *Judging Politics*].



ments than political ones.<sup>131</sup> In general, judges have no training in business and are poorly situated to second-guess the decisions of managers and directors years after the fact.<sup>132</sup> But we do not trust market forces and elections alone to sufficiently align the interests of directors and managers with their shareholders. Corporate law turns to judicially enforceable fiduciary duties to help control agency costs, and courts have developed doctrines to get around their institutional incompetence by creating incentives for directors and managers to have conflicted decisions approved by disinterested decisionmakers.

This Part addresses the core characteristics and theoretical underpinnings of the fiduciary duty of loyalty, before turning to the doctrines courts have crafted to enforce fiduciary duties in corporate law without straying beyond their competency.

#### A. *Fiduciary Duty of Loyalty*

A central mechanism for controlling agency costs in private law is the fiduciary duty of loyalty. The duty of loyalty requires the agent to act solely for the benefit of the principal and not for his or her own benefit.<sup>133</sup> This exclusive-benefit principle is the heart of the fiduciary relationship.<sup>134</sup> Agency costs are reduced by simply banning conduct by the agent that is contrary to the principal's interest. The only benefit that the agent can take from his position is compensation for acting as an agent.<sup>135</sup>

The exclusive-benefit principle is enforced through a prophylactic prohibition on self-dealing.<sup>136</sup> An agent is prohibited from engaging in transactions with the principal that might *either* harm the principal or

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<sup>131</sup> See, e.g., *Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (“[W]e do not mean to say that we have decided that the decision of the directors was a correct one. That is beyond our jurisdiction and ability.”); *Holmes v. St. Joseph Lead Co.*, 147 N.Y.S. 104, 107 (Sup. Ct. 1914) (Cardozo, J.) (asserting that substitution of the court's judgment for that of the directors “is no business for any court to follow” (internal quotation mark omitted)); Paula Walter, *The Directors' Business Judgment Rule — The Final Act?*, 22 SUFFOLK U. L. REV. 649, 650–51 (1988).

<sup>132</sup> See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“The judges are not business experts.”); William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 454–57 (2002); cf. Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 119 (2004) (“[B]ounded rationality and information asymmetries counsel judicial abstention from reviewing board decisions.”); Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398, 467–70 (2007) (arguing that a rational basis test is appropriate given judicial uncertainty as to the best allocation of decisionmaking authority).

<sup>133</sup> RESTATEMENT (SECOND) OF AGENCY § 387 (1958).

<sup>134</sup> See Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 601–02 (1997).

<sup>135</sup> *Id.* at 602.

<sup>136</sup> *Id.* at 601–02.

benefit the agent.<sup>137</sup> The mere presence of a conflict of interest is enough to breach the duty of loyalty, even in the absence of any substantive harm to the principal.<sup>138</sup> The prophylactic nature of the rule is designed to reduce the cost of monitoring the agent's behavior.<sup>139</sup> Rather than forcing the principal to determine whether the agent is acting in his interest in a conflicted transaction, the agent is simply prohibited from engaging in such a transaction.

In keeping with the exclusive-benefit principle, the principal can rescind a conflicted transaction, and the remedy for breach of fiduciary duty is not merely compensation for any loss suffered by the principal, but also disgorgement of any benefit gained by the agent.<sup>140</sup> Even if the principal suffered no harm — or indeed profited from the transaction — the agent must still turn over any profits he made, as the gains of the agent rightly belong to the principal.<sup>141</sup> The only way the prophylactic prohibition can be relaxed, and a self-dealing transaction allowed to go forward, is if the principal gives informed consent to the agent's conflict of interest.<sup>142</sup> Even so, the agent must disclose all relevant information and a court can review the transaction for fairness.<sup>143</sup>

Although fiduciary duties have long played a central role in several bodies of private law, including trusts, agency, partnership, and corporations, and their doctrinal contours are fairly well settled, their precise theoretical source has been elusive.<sup>144</sup> Of the many theories that have been offered,<sup>145</sup> the two most relevant for present purposes are based on contract and delegation of power.

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<sup>137</sup> See *Keech v. Sandford*, (1726) 25 Eng. Rep. 223 (Ch.); see also Brudney, *supra* note 134, at 602 & n.15.

<sup>138</sup> See RESTATEMENT (SECOND) OF AGENCY § 389. This principle is true to some extent in corporate law as well, see, e.g., *State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.*, 391 P.2d 979, 985 (Wash. 1964), especially in the case of directors' taking corporate opportunities for themselves.

<sup>139</sup> Brudney, *supra* note 134, at 603.

<sup>140</sup> RESTATEMENT (SECOND) OF AGENCY §§ 388, 389 cmt. a, 407.

<sup>141</sup> See, e.g., *Tarnowski v. Resop*, 57 N.W.2d 801, 802-03 (Minn. 1952).

<sup>142</sup> RESTATEMENT (SECOND) OF AGENCY § 390.

<sup>143</sup> *Id.* § 390 & cmts. a & b.

<sup>144</sup> See, e.g., Brudney, *supra* note 134, at 596-98; Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1045-46 (1991); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 425-28 (1993); see also Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1088 DUKE L.J. 879, 908-10, 915 (challenging idea that fully unified theory of fiduciary duty is available).

<sup>145</sup> Professor J.C. Shepherd outlines nine theories purporting to explain fiduciary duties: property, reliance, unequal relationship, contract, unjust enrichment, commercial utility, power and discretion, the dualistic theory (combining the preceding two theories, commercial utility and power and discretion), and the transfer of encumbered power. J.C. SHEPHERD, *THE LAW OF FIDUCIARIES* 51-110 (1981). Another potential theory not discussed by Shepherd is that fiduciary duties arise out of a relationship of trust and confidence. See Paul B. Miller, *Justifying Fiduciary Duties*, 59 MCGILL L.J. (forthcoming 2013) (manuscript at 31-36) (on file with the Harvard

Some scholars, such as Judge Frank Easterbrook and Professor Daniel Fischel, have argued that the fiduciary duty of loyalty reflects the implicit terms of a contract between parties inferred in certain types of relationships where the transaction costs of specification and monitoring are unusually high.<sup>146</sup> In other words, when courts enforce fiduciary duties, they are really filling in gaps in the contract between the parties with the terms the parties would have agreed to in the absence of transaction costs at the time the relationship was formed.<sup>147</sup> The goal of fiduciary duties, like any contract, is to promote the parties' own perception of their joint welfare, which explains why principals are allowed to waive conflicts of interest and contract around certain aspects of fiduciary duties.<sup>148</sup> Fiduciary duties are implied when the costs of specifying the terms of the contract governing the parties' relationship would be prohibitively high.

But contract principles may not fully explain all of the features of fiduciary relationships, such as the centrality of notions of trust and confidence; thus, it is possible that fiduciary duties carry some moral content.<sup>149</sup> Professor Victor Brudney has argued that because the duty of loyalty requires one party to focus solely on the interest of the other, interpreting that duty under the standard contract assumption that each party is acting to further its own self-interest does not capture the full nature of the fiduciary relationship.<sup>150</sup>

Another explanation for fiduciary duties may be that inherent in one party's delegation of power to another is a reciprocal duty that the agents use the power in the interest of the principal. The strong form of this theory might be called the Spider-Man approach: "With great power comes great responsibility."<sup>151</sup> When one party has power over the interests of another, that party has a duty to exercise his discretion

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Law School Library) (describing trust theory and finding it inadequate); *see also id.* (manuscript at 12-42) (describing and rejecting theories based on contract, property, tort, morality, public policy, and nonfiduciary legal duties).

<sup>146</sup> Easterbrook & Fischel, *supra* note 144, at 427, 437-38; *see also id.* at 438 ("When transactions costs reach a particularly high level, some persons start calling some contractual relations 'fiduciary' . . ."). Easterbrook and Fischel offer the example of corporate managers owing fiduciary duties to equity investors, but not to debt investors or employees. They argue that in the latter two relationships fiduciary duties are not needed because these claimants can contract at low cost. Residual claimants like equity investors, conversely, face prohibitively high costs to specifying adequate contract terms with managers. *Id.* at 437.

<sup>147</sup> *See id.* at 427, 429.

<sup>148</sup> *Id.* at 429.

<sup>149</sup> Brudney, *supra* note 134, at 604; Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303, 340 (1999) (arguing that fiduciary duties promote justice, virtue, and freedom, all of which have value independent from maximizing contractual parties' own perceptions of their well-being); Miller, *supra* note 145 (manuscript at 31-36).

<sup>150</sup> Brudney, *supra* note 134, at 631.

<sup>151</sup> SPIDER-MAN (Columbia Pictures 2002).

in the interests of the other.<sup>152</sup> This approach is not concerned with the source of the power, but demands responsible use of any power, whatever the source. Professor Evan Fox-Decent suggests something along these lines in arguing that a fiduciary obligation arises when one party, by agreement or unilaterally, “assumes discretionary power of an administrative nature over the important interests of another, interests that are especially vulnerable to the fiduciary’s discretion,” though Fox-Decent roots this obligation in trust, not in delegation.<sup>153</sup>

Professor J.C. Shepherd suggests a softer form of the delegation-of-power approach, which incorporates some ideas from the contract theory. Shepherd argues that fiduciary duties arise from the “transfer of encumbered power.”<sup>154</sup> “A fiduciary relationship exists whenever any person acquires a power of any type on condition that he also receive with it a duty to utilize that power in the best interests of another . . . .”<sup>155</sup> Shepherd’s formulation contemplates an implicit contract in which the power is delegated to the agent only on the condition that he use it for the benefit of the principal.<sup>156</sup>

An approach that maintains more independence from the contract theory would be to *presume* that no one could willingly delegate power without attaching a reciprocal duty of loyalty.<sup>157</sup> No one could willingly give up power and subject himself to the power of another without an assurance that the power would be used in his interest. Professor Paul Miller suggests something similar in defining a fiduciary relationship as one where the “[f]iduciaries wield discretionary authority relative to significant practical interests of the beneficiaries and de-

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<sup>152</sup> Professor J.C. Shepherd suggests (and rejects) this approach. SHEPHERD, *supra* note 145, at 83–88.

<sup>153</sup> Fox-Decent, *The Fiduciary Nature*, *supra* note 31, at 275, 302; *see also* Criddle, *Fiduciary Administration*, *supra* note 31, at 470 (arguing that fiduciary duties stem from a principal’s vulnerability to domination by an agent based on Immanuel Kant’s theory of parental obligations to children).

<sup>154</sup> SHEPHERD, *supra* note 145, at 93.

<sup>155</sup> *Id.* at 96 (emphasis omitted). The requirement that a fiduciary receive power “on condition that he also receive with it a duty” has been criticized as question-begging. *See* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1428 (2002).

<sup>156</sup> To make this contract really binding, the principal might have to pay the agent in consideration for acting solely on the principal’s behalf. Otherwise the agent could argue that he must be allowed to use the delegated power to benefit himself as compensation.

<sup>157</sup> Shepherd describes a similar approach in comparing power encumbered by a duty of loyalty to property encumbered by a mortgage. SHEPHERD, *supra* note 145, at 101. According to Shepherd, the two cannot be severed; acceptance of the property or power is necessarily acceptance of the liability or duty. *Id.*; *see also* Miller, *supra* note 145 (manuscript at 62) (“Given that fiduciary power is a means of the beneficiary, the interaction between fiduciary and beneficiary must be presumptively conducted for the sole advantage of the beneficiary.”). *But see* Andrew S. Gold, *On the Elimination of Fiduciary Duties: A Theory of Good Faith for Unincorporated Firms*, 41 WAKE FOREST L. REV. 123, 124 (2006) (noting that Delaware permits parties to contractually eliminate fiduciary duties for LLCs if they clearly manifest intent to do so).

rive that authority from another person,” either the beneficiaries themselves or a grantor who originally had legal authority over those interests (for example, a settlor establishing a trust for another’s benefit).<sup>158</sup> In a sense, the agent is wielding the principal’s power, and must do so in the interests of the principal, who is rendered vulnerable to the agent by the transfer of that power.<sup>159</sup> But while consent is typical in the transfer of authority to the agent, according to Miller consent is not necessary to establish a fiduciary obligation.<sup>160</sup> Thus, inherent in the very delegation of power to an agent is the duty to use it solely to further the interests of the principal.

### B. Fiduciary Duties in Corporate Law

Fiduciary duties play a central role in corporate law, even though the corporate form complicates the agency problem. While the relationships between management, directors, and shareholders do not constitute common law agency, the fiduciary principles are substantially the same.<sup>161</sup> Managers and directors owe a duty of loyalty to the corporation and must direct all of their energies toward its exclusive benefit.<sup>162</sup> In most situations this translates into a duty to the common stockholders to maximize the value of their shares.<sup>163</sup>

Unlike in a common law agency relationship, however, in a corporation the agents (the directors and managers) are not under the direct control of the principal (the shareholders). On the contrary, in many ways the agents control the corporate principal. Shareholders elect directors to represent them, and the directors, in turn, select the managers (often themselves), but it is the directors and managers who decide how to run the corporation.<sup>164</sup> Shareholders have little say in controlling the corporation other than deciding whom to elect as directors.<sup>165</sup>

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<sup>158</sup> Miller, *supra* note 145 (manuscript at 54) (emphasis omitted).

<sup>159</sup> *Id.* (manuscript at 55).

<sup>160</sup> *Id.* (manuscript at 55–56). For example, when the state invests biological parents with authority over a child, a fiduciary relationship is established without the consent of the child or the parents. *See id.* (manuscript at 56 & n.159).

<sup>161</sup> Brudney, *supra* note 134, at 611.

<sup>162</sup> *See, e.g.*, *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

<sup>163</sup> *E.g.*, *Katz v. Oak Indus.*, 508 A.2d 873, 879 (Del. Ch. 1986). According to the conventional shareholder-primacy view, the common stockholders, as the residual claimants, in some sense “own” the corporation, at least during normal operations while the corporation is solvent. *See, e.g.*, Brudney, *supra* note 134, at 611; Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440–41 (2001). *But see, e.g.*, Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 551 (2003); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249 (1999).

<sup>164</sup> *See, e.g.*, DEL. CODE ANN. tit. 8, § 141 (West 2012).

<sup>165</sup> *See, e.g.*, *Paramount Commc’ns Inc. v. Time Inc.*, Nos. 10866, 10670, 10835, slip op. 705, 743 (Del. Ch. July 14, 1989), *aff’d*, 571 A.2d 1140 (Del. 1989); *Cont’l Sec. Co. v. Belmont*, 99 N.E.

Their other primary recourse if they are dissatisfied with management is to sell their shares and exit the corporate relationship.

The agency problem is further complicated by the fact that the principals in a public corporation are typically numerous and diffuse. Shareholders face collective action problems in monitoring their agents' behavior — most shareholders are rationally ignorant of such matters — and they are limited in their ability to terminate and replace agents who shirk.<sup>166</sup> Thus, in many ways, the need for prophylactic prohibitions on self-dealing is even greater in the corporate context than it is in common law agency.<sup>167</sup> Likewise, consent to a departure from the exclusive-benefit principle is problematic in the corporate context because of the difficulty of obtaining informed approval from a diffuse principal.<sup>168</sup>

Because market forces and board elections are not sufficient to align the interests of managers and directors with the interests of shareholders, corporate law turns to courts to enforce the fiduciary duties of corporate agents. The mere fact that agency costs are present, however, does not give courts any special expertise in business matters, and there is little reason to think they are competent to second-guess the business judgments of managers and directors. But courts have developed doctrines to address their institutional incompetence.

In most transactions, courts adopt a deferential approach to reviewing the business judgments of corporate directors. If a shareholder alleges a breach of the fiduciary duty of care when the director has no conflict of interest, the court will apply the deferential “business judgment rule” and not second-guess the good faith decisions of directors or hold them liable for corporate losses caused by their negligence.<sup>169</sup> And courts are reluctant to infer bad faith based on the outcome of a board decision, focusing instead on the process by which the board reached its decision.<sup>170</sup> As long as the directors were disinterested and

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138, 141 (N.Y. 1912); *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame*, [1906] 2 Ch. 34 (C.A.) at 34 (Eng.).

<sup>166</sup> See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 395 (1983).

<sup>167</sup> Brudney, *supra* note 134, at 612.

<sup>168</sup> *Id.*

<sup>169</sup> See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (defining the business judgment rule as the “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”); see also WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 248, 252 (2003) (“[D]isinterested directors who act deliberately and in good faith should never be held liable for a resulting loss, no matter how stupid their decisions may seem ex post.”).

<sup>170</sup> E.g., *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 n.17 (Del. 1994). There is some evidence that courts are more skeptical of directors' exercise of due care in transac-

reasonably informed, “the board’s decision will be upheld unless it cannot be attributed to any rational business purpose.”<sup>171</sup>

Self-dealing corporate transactions, however, trigger a much higher level of judicial scrutiny. When the directors have a conflict of interest, the court cannot trust their business judgment to be in the best interests of the corporation. But nothing about these transactions makes courts any more competent to review substantive business decisions. Early courts got around this institutional incompetence by adopting a *per se* rule that conflicted transactions were voidable.<sup>172</sup> But as people began to recognize that many conflicted transactions could be beneficial to the corporation — knowledgeable directors are often willing to give the corporation better terms than it could get in an arm’s length deal<sup>173</sup> — corporate law developed mechanisms to allow conflicted transactions to go forward under judicial supervision.

### *C. Cleansing Tainted Transactions: Dealing with Conflicts in Corporate Law*

Under modern corporate law, a self-dealing transaction between a corporation and its directors is not void solely because of the conflict of interest.<sup>174</sup> Directors may offer two defenses to a claim that they breached their duty of loyalty: they can show that the transaction was entirely fair, or they can show that a disinterested decisionmaker approved the transaction through one of several process safe harbors.<sup>175</sup> If the directors cannot show that the transaction was approved through a neutral process, the court will engage in a searching review of the fairness of the transaction. If the directors do use one of the safe-harbor processes, the court will apply a much more deferential standard of review. By adopting a two-track standard of review, cor-

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tions involving a change in corporate control when directors have an entrenchment interest. *See, e.g.,* *Smith v. Van Gorkom*, 488 A.2d 858, 893 (Del. 1985).

<sup>171</sup> *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 74 (Del. 2006); *see* William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function over Form: A Reassessment of Standards of Review in Delaware Corporations Law*, 56 BUS. LAW. 1287, 1296 (2001).

<sup>172</sup> Harold Marsh, Jr., *Are Directors Trustees?*, 22 BUS. LAW. 35, 36 (1966). *But see* Norwood P. Beveridge, Jr., *The Corporate Director’s Fiduciary Duty of Loyalty: Understanding the Self-Interested Director Transaction*, 41 DEPAUL L. REV. 655, 659 (1992) (arguing that the traditional view espoused by Marsh was wrong and nineteenth-century judges *were* willing to permit interested director transactions to stand if they found them fair in all respects). By the twentieth century, a conflicted transaction was void unless it was both fair and approved by a board composed of a majority of disinterested directors (with interested directors not counting toward a quorum). ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 169, at 292; *see also* ROBERT CHARLES CLARK, CORPORATE LAW 160–66 (1986) (discussing change away from *per se* rule).

<sup>173</sup> *See* CLARK, *supra* note 172, at 164–65.

<sup>174</sup> *See, e.g.,* DEL. CODE ANN. tit. 8, § 144(a) (West 2012).

<sup>175</sup> *See* ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 169, at 302–04; Note, *Interested Transactions by Corporate Directors: A Weakening of the Fiduciary Duty of Loyalty*, 28 SUFFOLK U. L. REV. 93, 105–07 (1994).

porate law creates a powerful incentive for conflicted directors to seek the approval of a disinterested decisionmaker, to whose business judgment the court can defer instead of engaging in its own substantive review.

1. *Entire Fairness Review.* — In a self-dealing transaction, the normal presumptions of the business judgment rule do not apply, and courts will review the substance of the transaction for fairness. The directors bear the burden of showing that the transaction was entirely fair.<sup>176</sup> Courts will review both the substantive terms of the transaction (such as the price) and the fairness of the bargain to the interests of the company.<sup>177</sup> As the Delaware Supreme Court put it in *Weinberger v. UOP, Inc.*:

The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed [transaction], including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock. However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.<sup>178</sup>

And a director must disclose not only his interest in the transaction, but also all material information relevant to the transaction;<sup>179</sup> failure to disclose a conflict is per se unfair.<sup>180</sup>

If the disclosure is adequate and the dealings are fair, courts will focus on the transaction's intrinsic fairness. There are two ways a court can go about this inquiry: it can compare the transaction with a hypothetical arm's length deal, or it can compare the transaction to similar actual transactions in a competitive market.<sup>181</sup> In the first method, the court compares the terms the parties would have reached had they conducted the transaction at arm's length with the terms that the directors actually approved.<sup>182</sup> The directors must show that, had a rational, well-informed, disinterested board considered the transac-

<sup>176</sup> *E.g.*, *Lewis v. S. L. & E., Inc.*, 629 F.2d 764, 768–69 (2d Cir. 1980); *Cookies Food Prods., Inc. v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 452 (Iowa 1988); *Des Moines Bank & Trust Co. v. George M. Bechtel & Co.*, 51 N.W.2d 174, 216 (Iowa 1952).

<sup>177</sup> *E.g.*, *Fill Bldgs., Inc. v. Alexander Hamilton Life Ins. Co. of Am.*, 241 N.W.2d 466, 469 (Mich. 1976).

<sup>178</sup> 457 A.2d 701, 711 (Del. 1983) (citations omitted).

<sup>179</sup> *See Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985); *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1978).

<sup>180</sup> *See State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.*, 391 P.2d 979, 984 (Wash. 1964).

<sup>181</sup> CLARK, *supra* note 172, at 147–48.

<sup>182</sup> *Id.*



tion, the outcome would have been essentially the same.<sup>183</sup> In the second method, the court relies on an objective factor — market price — to determine whether the transaction was fair.<sup>184</sup> While this method has the advantage of an extrinsic benchmark for evaluating the result, finding truly comparable transactions in a competitive market may prove difficult.<sup>185</sup>

This sort of substantive review, of course, is exactly what we think courts are institutionally ill suited to do in the duty of care context.<sup>186</sup> The court must engage in post hoc evaluation of business decisions to determine whether the price was fair. While obviously unfair deals may be easy to spot, valuation of corporate transactions can be difficult and indeterminate.<sup>187</sup> The duty of loyalty requires that the board try to achieve the most favorable price that the market will bear, but determining that price after the fact, without having bargained for it, can be very difficult.<sup>188</sup> The parties will tend to supply valuations that support their sides, and the “battle of experts” may lead to widely divergent estimates, introducing uncertainty into the assessment.<sup>189</sup> In practice, the searching review of entire fairness, coupled with the burden of proof on the directors, usually results in the invalidation of the transaction if any indication of unfairness is present.<sup>190</sup>

2. *Process Safe Harbors.* — To take some pressure off of courts in evaluating substantive business decisions, corporate law provides two primary safe harbor options for cleansing the taint of interested director transactions: (1) approval by a majority of the disinterested directors or (2) ratification through a fully informed vote by a majority of the disinterested shareholders.<sup>191</sup> If a transaction between the corporation and an interested director is approved through one of these processes, the taint of self-dealing is removed and the court will review the transaction under the business judgment rule’s deferential stand-

<sup>183</sup> See *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 407 (Del. 1988); CLARK, *supra* note 172, at 148; Beveridge, Jr., *supra* note 172, at 672.

<sup>184</sup> See CLARK, *supra* note 172, at 148.

<sup>185</sup> *Id.*

<sup>186</sup> See *supra* notes 169–171 and accompanying text.

<sup>187</sup> See ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 169, at 312.

<sup>188</sup> See Allen, Jacobs & Strine, Jr., *supra* note 171, at 1302.

<sup>189</sup> Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 CALIF. L. REV. 393, 404 n.31 (2003).

<sup>190</sup> See, e.g., *Nixon v. Blackwell*, 626 A.2d 1366, 1376 (Del. 1993) (“Because the effect of the proper invocation of the business judgment rule is so powerful and the standard of entire fairness so exacting, the determination of the appropriate standard of judicial review frequently is determinative of the outcome . . .” (alteration omitted) (quoting *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1988))).

<sup>191</sup> E.g., CAL. CORP. CODE § 310(a)(1)–(2) (Deering 1990); DEL. CODE ANN. tit. 8, § 144(a)(1)–(2) (West 2012); N.Y. BUS. CORP. LAW § 713(a)(1)–(2) (McKinney 2003).

ard.<sup>192</sup> Because the decisionmaker that authorized the transaction had no conflict of interest, there is no reason to suspect that it was not acting for the exclusive benefit of the shareholders.<sup>193</sup> Thus, the standard presumption of the business judgment rule — that courts should not second-guess the substantive business decisions of disinterested directors — applies.

In a conflicted transaction approved by the disinterested directors or ratified by the shareholders, the focus of review thus shifts from the substantive fairness of the outcome to the adequacy of the procedure used for approval. Review of process is a role that courts are institutionally much better suited to play.<sup>194</sup> Courts examine the adequacy of the disclosure to ensure that the decisionmakers had access to all material information relevant to the transaction.<sup>195</sup> They also examine the independence of the directors who voted to approve the transaction to ensure both that they do not have any conflicts of interest themselves and that they were not misinformed, dominated, or manipulated by the conflicted directors.<sup>196</sup> When reviewing shareholder ratification, courts ask whether the shareholders were fully informed, disinterested, and uncoerced.<sup>197</sup> As long as the court finds these processes fair and adequate, the deferential business judgment rule applies and the burden of proof shifts to the party challenging the transaction.<sup>198</sup> The only substantive inquiry a court will make is whether the outcome of the transaction was so irrational that it constitutes corporate “waste.”<sup>199</sup>

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<sup>192</sup> See, e.g., *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 120–21 (Del. 2006) (approval by disinterested directors); *Cooke v. Oolie*, No. 11134, 2000 Del. Ch. LEXIS 89, at \*44 (Del. Ch. May 24, 2000) (same); *Gantler v. Stephens*, 965 A.2d 695, 713 (Del. 2009) (shareholder ratification); *In re Wheelabrator Techs., Inc. S’holders Litig.*, 663 A.2d 1194, 1200 (Del. Ch. 1995) (same).

<sup>193</sup> See *Cooke*, 2000 Del. Ch. LEXIS 89, at \*44 (“The disinterested directors’ ratification cleanses the taint of interest because the disinterested directors have no incentive to act disloyally and should be only concerned with advancing the interests of the corporation. The Court will presume, therefore, that the vote of a disinterested director signals that the interested transaction furthers the best interests of the corporation despite the interest of one or more directors.”).

<sup>194</sup> See, e.g., Jeffrey Jowell, *Of Vires and Vacuums: The Constitutional Context of Judicial Review*, in *JUDICIAL REVIEW AND THE CONSTITUTION* 327, 330–32 (Christopher Forsyth ed., 2000).

<sup>195</sup> See *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985); *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977); see also ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 169, at 301–02.

<sup>196</sup> ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 169, at 302–03.

<sup>197</sup> *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997); *Wheelabrator Techs.*, 663 A.2d at 1200.

<sup>198</sup> See cases cited *supra* note 192.

<sup>199</sup> See *Lewis*, 699 A.2d at 336 (“Roughly, a waste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade.”).

There is, of course, a danger that conflicted insiders could capture these safe harbor processes. But if there is reason to suspect that the disinterested parties approving the transaction are not truly independent, courts use a more exacting standard of review. Courts presume, for example, that a controlling shareholder (one who owns a majority of the shares of a corporation) will have influence over even “disinterested” directors because he has the ability to dictate the composition of the board.<sup>200</sup> Therefore, in self-dealing transactions involving a controlling shareholder, merely obtaining independent director or shareholder ratification only shifts the burden of proof; it does not change the standard of review to the business judgment rule.<sup>201</sup> The court will still review the transaction for entire fairness, but the challenging party bears the burden of showing that it is unfair.<sup>202</sup>

But even in transactions where capture is particularly likely, corporate law encourages companies to adopt a neutral decisionmaking process to which a reviewing court can give some deference. Thus, in transactions between corporations and controlling shareholders, corporations often form special committees of independent directors (usually advised by outside investment banks and lawyers) to negotiate opposite the conflicted, controlling shareholders in attempts to simulate arm’s length transactions.<sup>203</sup> While courts ultimately retain the authority to review the transaction for fairness, if the special committee is sufficiently independent and “exercised real bargaining power ‘at an arm[’]s-length,’” courts will give substantial weight to its recommendations.<sup>204</sup> And when approval by special committee is combined with the additional structural protection of fully informed ratification by a majority of the minority shareholders, some courts are willing to give business judgment rule deference to the result.<sup>205</sup>

Through the use of process safe harbors, courts are able to get around their institutional incompetence at making business judgments. Instead, judicial review focuses on ensuring that self-dealing transactions are approved by a disinterested decisionmaker in a fair process.

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<sup>200</sup> See *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997).

<sup>201</sup> See *Kahn v. Lynch Commc’n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994); *Cookies Food Prods., Inc. v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 452–53 (Iowa 1988).

<sup>202</sup> See *Kahn*, 638 A.2d at 1117; *Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 500 (Del. Ch. 1990).

<sup>203</sup> See 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, *THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS* § 4.16[D] (1998 & Supp. 2012).

<sup>204</sup> *Kahn*, 694 A.2d at 429 (quoting *Rabkin v. Olin Corp.*, C.A. No. 7547, 1990 WL 47648, at \*861 (Del. Ch. Apr. 17, 1990), *aff’d*, No. 164, 1990 WL 259720 (Del. Dec. 20, 1990)).

<sup>205</sup> See, e.g., *In re CNX Gas Corp. S’holders Litig.*, 4 A.3d 397, 412–13 (Del. Ch. 2010); *In re Cox Commc’ns, Inc. S’holders Litig.*, 879 A.2d 604, 643–44 (Del. Ch. 2005); see also Allen, Jacobs & Strine, Jr., *supra* note 171, at 1308–09 (arguing that ratification by a majority of the minority shareholders should shift the standard of review to the business judgment rule).

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These alternative decisionmakers are better suited institutionally than courts are to make business judgments.<sup>206</sup> Courts retain some power to review the substance of the transactions for egregious unfairness, but their review focuses primarily on the independence of the decisionmakers and the adequacy of the procedures to make sure the decisionmakers are fully informed and competent.

In short, corporate law uses fiduciary duties to reduce agency costs and solves the institutional incompetence problem at the same time by creating incentives for directors to use neutral processes to authorize self-dealing transactions. Directors engaging in a self-dealing transaction without using a process safe harbor triggers exacting scrutiny by the courts. But by obtaining approval from disinterested directors or through shareholder ratification, directors can avoid the substantial likelihood that a court will invalidate their transactions after a searching review for unfairness. Thus, the primary role of courts in corporate law is to review the adequacy of process — rather than the substantive fairness of outcomes — a role for which courts are well suited.

### III. POLITICIANS AS FIDUCIARIES

Political representation presents a complex agency problem and unsurprisingly gives rise to agency costs. Indeed, the structure of the agency problem in the political process looks remarkably similar to the agency problem in public corporations. Both involve elected agents acting on behalf of diffuse principals who face substantial collective action problems in monitoring agents and imposing their will. Both offer opportunities for agents to advance their own interests instead of, or at the expense of, their principals' interests. Generally, neither shareholders nor citizens can directly control the behavior of their agents and both are, in many ways, controlled by their agents. Representatives make laws that citizens are bound to follow, while representatives are not bound to follow instructions even from groups of cit-

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<sup>206</sup> This observation is almost certainly true of decisions approved by disinterested directors. Approval by shareholders, on the other hand, raises questions about their ability to make sound business judgments. Shareholder ratification is problematic in many ways because the diffuse principals face collective action problems and may sometimes have divergent interests (for example, different risk preferences) with respect to the transaction they are asked to ratify. Shareholders are rationally ignorant of much of the information that they would need to make a sound business judgment, and Professor Robert Clark has argued that their ratification is either superficial (because they are not adequately informed) or wasteful (because the cost of becoming informed outweighs the potential gain from the transaction or the benefit of eliminating agency costs). CLARK, *supra* note 172, at 181–82. However, fully informed and uncoerced ratification by shareholders lends great legitimacy to the corporate action. See Allen, Jacobs & Strine, Jr., *supra* note 171, at 1308. With knowing approval by the principal, it is difficult to identify the abuse of the agent.

izens comprising a majority in their districts.<sup>207</sup> The board of directors makes decisions for the corporation and is generally not bound to follow instructions from a majority of the shareholders.<sup>208</sup>

In many ways, the agency problem is even more severe in political representation because the principals lack the options of easy exit or diversification.<sup>209</sup> In the corporate context, if shareholders are unhappy with the behavior of management, they can simply sell their shares and exit the agency relationship. Similarly, shareholders can reduce exposure to the harms of agent disloyalty by diversifying their investments. In the political process, exit is much more difficult — at least it requires emigration, at most, rebellion — and diversification is not typically an option.

In corporate law, we do not trust elections to be enough of a check on agent misbehavior. Monitoring, bonding, and enforcement costs are too high. Instead, we rely on courts enforcing fiduciary duties to help ensure that the agents act in the interests of the principals. The agents are prohibited from engaging in self-dealing behavior, and when they do, the principals have a judicial remedy.

Similar judicially enforceable fiduciary duties could help reduce the agency costs in the political process as well. The idea that political representatives are fiduciaries is a venerable one, deeply embedded in political theory, though it is not typically operationalized in terms of judicially enforceable duties.<sup>210</sup> But giving actual force to politicians' fiduciary duty of loyalty — at least in the gerrymandering context — can help courts address the seemingly intractable problems that they have recognized when self-interested incumbents manipulate the processes by which they are elected.

This Part argues that it is appropriate to think of political representatives as standing in a fiduciary capacity to the people they represent, giving rise to a fiduciary duty of loyalty. It goes on to argue that representatives breach that duty when they self-deal by manipulating laws regulating the political process to entrench themselves. Finally, it

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<sup>207</sup> See, e.g., *Cook v. Gralike*, 531 U.S. 510, 519–22 (2001).

<sup>208</sup> See sources cited *supra* notes 164–165; see also ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 169, at 97–98 (“[B]oard members are not required by duty to follow the wishes of a majority shareholder; thus, the corporation has a republican form of government, but it is not a direct democracy.”).

<sup>209</sup> See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 104–05 (1970).

<sup>210</sup> *But see, e.g., Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201, 221–22 (N.J. 1952) (“[Public officials] stand in a fiduciary relationship to the people whom they have been elected or appointed to serve. . . . [T]hey are under an inescapable obligation to serve the public with the highest fidelity. . . . These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect . . . . The citizen is not at the mercy of his servants holding positions of public trust nor is he helpless to secure relief from their machinations except through the medium of the ballot, the pressure of public opinion or criminal prosecution. He may secure relief in the civil courts . . . .”).

argues that courts should enforce the fiduciary duties of representatives by subjecting self-dealing laws to heightened scrutiny.

### A. *Politicians' Duty of Loyalty*

The first step in applying a private law fiduciary framework to the agency problem created by incumbent control over political process regulations is to ask whether political representatives can be properly understood to bear a fiduciary duty of loyalty. Treating politicians as fiduciaries, subject to a duty of loyalty to the people they represent, is consistent both with the history and political theory that surrounded the adoption of the U.S. Constitution and with the theoretical justification for fiduciary duties in private law.

1. *Constitutional History and Political Theory.* — The idea that rulers stand in a fiduciary relationship to the ruled is not new; its origins date back at least as far as the Middle Ages and can be seen even earlier in the writings of Cicero.<sup>211</sup> “Political trusteeship” played a prominent role in the trial of Charles I in 1649.<sup>212</sup> Defending the divine right of kings, Charles I maintained that he had received power in trust from God to be used on behalf of the people.<sup>213</sup> The Whigs in Parliament agreed that the king was a trustee, but they argued that the *people* had entrusted him with a limited power and could call him to account for breaching it.<sup>214</sup> The idea that Parliament received its power from, and acted as trustee on behalf of, the people was widespread by the mid-seventeenth century.<sup>215</sup> Oliver Cromwell repeatedly referred to public office, both that of Parliament and his own station of Lord Protector, as a trusteeship.<sup>216</sup>

In his *Second Treatise of Civil Government*, John Locke argued that the government with supreme legislative power stood in a fiduciary relationship to the people.<sup>217</sup> In the original social contract, according to Locke, the people delegated power to the legislature on the condition that the power be used only for the “public good of socie-

<sup>211</sup> J.W. GOUGH, *Political Trusteeship*, in JOHN LOCKE'S POLITICAL PHILOSOPHY 154, 165, 173–74 (2d ed. 1973); CICERO, DE OFFICIIS 87 (Walter Miller trans., Harvard Univ. Press 1947) (“[T]he administration of the government, like the office of a trustee, must be conducted for the benefit of those entrusted to one’s care, not of those to whom it is entrusted.”); see also Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration From the Reign of Trajan*, 35 U. RICH. L. REV. 191, 211–32 (2001).

<sup>212</sup> GOUGH, *supra* note 211, at 167–69.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 168–70; see also JOHN MILTON, THE TENURE OF KINGS AND MAGISTRATES 10 (1649) (“[T]he power of Kings and Magistrates is nothing else, but what is [only] derivative, transferred and committed to them in trust from the people to the Common good of them all . . .”).

<sup>215</sup> GOUGH, *supra* note 211, at 176–80.

<sup>216</sup> *Id.* at 179–80.

<sup>217</sup> See *id.* at 162–63; J.W. Gough, *Introduction to JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT* xxiv (J.W. Gough ed., Basil Blackwell 1946) (1690).

ty.”<sup>218</sup> The legislative power was “only a fiduciary power to act for certain ends,”<sup>219</sup> and the government was obliged to act only on behalf of the community and not in its own interests.<sup>220</sup>

Locke’s approach was widely accepted in England by the eighteenth century, when Henry St. John Bolingbroke, an English politician and political philosopher, declared that a patriot king “will make one, and but one, distinction between his rights and those of his people: he will look on his to be a trust and theirs a property.”<sup>221</sup> Whig pamphleteers argued that the House of Commons “ought to be, what they reckon themselves, *Trustees* and *Guardians* of the Liberties of England.”<sup>222</sup>

And Locke’s political philosophy had tremendous influence on the American colonists in the lead-up to independence and later on the Framers of the Constitution.<sup>223</sup> As Professor John Reid argues, the theory of governmental “constraint through delegated trust” played a prominent role in shaping the constitutional debate surrounding the American Revolution.<sup>224</sup> According to the theory:

“The power of parliament . . . is a power delegated by the people, to be always employed for their use and benefit, never to their disservice and injury.” It was, therefore, a limited power, “bounded by the good and ser-

<sup>218</sup> LOCKE, *supra* note 217, § 135; *see also id.* § 131 (“[T]he power of the society, or legislative constituted by them, can never be supposed to extend farther than the common good . . . . And all this [power] to be directed to no other end but the peace, safety, and public good of the people.”); *id.* § 171 (“Political power is that power which every man having in the state of nature has given up into the hands of society, and therein to the governors whom the society hath set over itself, with this express or tacit trust that it shall be employed for their good and the preservation of their property.”).

<sup>219</sup> *Id.* § 149. Locke argued that legislative acts in breach of fiduciary duty were *ultra vires* and that the people retained a “supreme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them; for all power given with trust for attaining an end, being limited by that end, whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it . . . .” *Id.*; *see also id.* §§ 221–22.

<sup>220</sup> Gough, *supra* note 217, at xxiv; *see also* LOCKE, *supra* note 217, § 142 (“[L]aws also ought to be designed for no other end ultimately than the good of the people.”); Natelson, *Public Trust*, *supra* note 29, at 1117 (“According to Locke, public officials should not engage in self-dealing . . . .”).

<sup>221</sup> GOUGH, *supra* note 211, at 183 (quoting Bolingbroke) (internal quotation mark omitted).

<sup>222</sup> *Id.* at 184 (quoting pamphlets) (internal quotation marks omitted).

<sup>223</sup> *See* LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955); Natelson, *Public Trust*, *supra* note 29, at 1115 & n.157; *cf.* Donald Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 192 (1984) (finding that Locke was cited with great frequency before the Revolution, but that his rate of citation fell off after independence).

<sup>224</sup> JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 52 (abridged ed. 1995).

vice of the people; and whenever such power shall be perverted to their hurt and detriment, the trust is broken, and becomes null and void."<sup>225</sup>

And Professor Robert Natelson has observed that "both defenders and opponents of the Crown had adopted public trust views of government" and "agreed that public officials were bound by fiduciary-style obligations."<sup>226</sup>

In the years following the Revolution, the newly independent Americans frequently used the language of agency and trusteeship in reference to their legislative representatives.<sup>227</sup> Governor William Paca of Maryland asserted that the "legislature are the trustees of the people and accountable to them," in arguing that the people of Maryland could give binding instructions to their legislative representatives.<sup>228</sup> Professor Gordon Wood has argued that this understanding of the representative as a "mere agent"<sup>229</sup> reflected a new concept of representation, distinct from the "virtual"<sup>230</sup> representation that was prevalent in England and the colonies before the Revolution.<sup>231</sup> Under this newer theory of "actual" representation, representatives derived their authority solely from the power delegated to them by their election,<sup>232</sup> not by any identity of interests with the people as a whole.<sup>233</sup>

Although the Federalists in their arguments for ratification retreated from some of the more radical implications of actual representation (like instructing legislatures) in favor of a revived form of virtual representation, they held on to the ideas of delegation and agency from the post-Revolutionary period.<sup>234</sup> They too saw representatives as limited agents of the people, holding delegated power for a limited

<sup>225</sup> *Id.* (quoting London press criticizing parliamentary legislation for American colonies).

<sup>226</sup> Natelson, *Public Trust*, *supra* note 29, at 1121. Other political theorists frequently invoked by the Framers during the constitutional debates, including Pufendorf, Vattel, Montesquieu, and Blackstone, also promoted the application of fiduciary norms to government. *Id.* at 1128-34.

<sup>227</sup> See GORDON S. WOOD, REPRESENTATION IN THE AMERICAN REVOLUTION 26-45 (1969).

<sup>228</sup> *Id.* at 39 (emphasis omitted) (quoting William Paca) (internal quotation mark omitted). Professor Gordon Wood argues that unlike petitioning, which implies that the representative is superior and cannot be commanded, instructing implies that the representative is a mistrusted agent of the electors bound to follow their directions. *Id.* at 27.

<sup>229</sup> *Id.* at 39.

<sup>230</sup> *Id.* at 26.

<sup>231</sup> *Id.* at 26-28, 38-39.

<sup>232</sup> *Id.* at 28 ("The representatives were in effect agents elected and controlled by quasi-independent constituencies. If they were otherwise, 'if, after election, the members are free to act of their own accord, instead of abiding by the direction of their constituents,' then election by districts was meaningless, for 'it would be a matter of indifference from what part of a Republic the Legislative body was taken.'" (quoting 1783 Charleston, South Carolina pamphlet)).

<sup>233</sup> See *id.* at 2-12. See generally HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967).

<sup>234</sup> See WOOD, *supra* note 227, at 45-46, 52-53.



time.<sup>235</sup> In *The Federalist No. 46*, for example, James Madison said: “The federal and [s]tate governments are in fact but different agents and trustees of the people . . . .”<sup>236</sup>

Natelson argues that concepts of agency law were central to the Framers’ understanding of political representation during the period when the Constitution was drafted, debated, and ratified.<sup>237</sup> According to Natelson, the Framers’ repeated references to the “fiduciary” nature of political representation were more than mere rhetoric; rather, a primary objective of the Constitution was to impose on public officials fiduciary obligations comparable to those duties borne by private law fiduciaries.<sup>238</sup> The vast majority of delegates to the Constitutional Convention were lawyers who had experience and familiarity with private fiduciary law and were accustomed to thinking of governance in private law terms.<sup>239</sup> And the fiduciary theory of government was nearly universally accepted by both proponents and opponents of the Constitution alike.<sup>240</sup> Natelson argues that the Framers drew on these private law principles in crafting a constitutional arrangement that was intended to incorporate fiduciary norms and impose fiduciary duties — including a duty of loyalty that prohibited self-dealing — on government officials.<sup>241</sup>

Determining by what means and to what extent their duties get enforced may present challenges, but treating politicians as fiduciaries is consistent with the political theory that framed the constitutional debates. And there is evidence that the Framers intended to incorporate fiduciary principles into the constitutional structure.

2. *Theoretical Justifications for Politicians’ Fiduciary Duties.* — Recognizing that political representatives bear a duty of loyalty is also consistent with two major theoretical justifications for fiduciary duties in private law: contract and delegated power. American constitutional democracy is based on a contractual theory of government, and the terms of that contract involve the delegation of power from the people to the government.<sup>242</sup> Indeed, Professor Geoffrey Miller has argued

<sup>235</sup> *Id.* at 53.

<sup>236</sup> THE FEDERALIST NO. 46 (James Madison), *supra* note 69, at 291; *see also id.* NOS. 14, 49, 55, 57, 63 (James Madison).

<sup>237</sup> Natelson, *Public Trust*, *supra* note 29, at 1083–86.

<sup>238</sup> *Id.* at 1087, 1178; Natelson, *Judicial Review*, *supra* note 30, at 245–47.

<sup>239</sup> Natelson, *Public Trust*, *supra* note 29, at 1124–25; *see also* Natelson, *Agency Law*, *supra* note 30, at 271–74.

<sup>240</sup> Natelson, *Public Trust*, *supra* note 29, at 1086; Natelson, *Judicial Review*, *supra* note 30, at 245 n.18 (noting that only a single contemporaneous commentator — Noah Webster — dissented from the fiduciary model).

<sup>241</sup> *See* Natelson, *Public Trust*, *supra* note 29, at 1128, 1146–50.

<sup>242</sup> *See, e.g.*, Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121–22 (1998).

that the Constitution is appropriately understood as a corporate charter that establishes a “body politic and corporate,” delegates power to agents, and specifies rules of governance.<sup>243</sup>

On the contract theory, the U.S. Constitution (or any constitution for that matter<sup>244</sup>) can be viewed as the contract defining the relationship between the agents (the representatives) and the principals (the people). It would have been prohibitively costly to specify all of the terms of the social contract in the Constitution, so the gaps should be filled with fiduciary duties.<sup>245</sup> We can discern those duties by asking what the parties would have agreed to if bargaining were costless, and the natural answer is that the people would have agreed to be bound by the rules of the legislature only if the legislature had agreed to act solely in the interests of the people. Thus, the duty of loyalty that the representatives owe the people can be viewed as an implicit term in the contract created by the Constitution.

On the theory that the delegation of power implies a reciprocal obligation to use that power in the exclusive interests of the principal, representatives would likewise owe a duty of loyalty to the people. The U.S. Constitution is based on the theory that power is derived from the people and delegated by them to the government.<sup>246</sup> The people elect representatives to be their agents and to act on their behalf in governing the country. Through elections, the principals delegate power to their agents to exercise discretionary authority over their interests and to legally bind them. The people thus render themselves vulnerable to their representatives, who are empowered to determine and pursue the interests of the people.<sup>247</sup> But because their power is delegated from the people, representatives owe a reciprocal duty of loyalty to the people.<sup>248</sup> Indeed, several state constitutions in existence

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<sup>243</sup> Miller, *supra* note 30, at 3; see also Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, 6 WASH. U. J.L. & POL'Y 1, 16 (2001).

<sup>244</sup> See, e.g., MD. CONST. of 1776, § 1 (1776) (“That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.”); see also REID, *supra* note 224, at 100 (“Some state constitutions said they were contracts, even codifying the contractarian doctrine that government is founded in compact.”).

<sup>245</sup> See *supra* notes 146–48 and accompanying text.

<sup>246</sup> See U.S. CONST. pmbl. (“We the People . . . do ordain and establish . . .”).

<sup>247</sup> Cf. Miller, *supra* note 145 (manuscript at 54–55) (arguing that a fiduciary relationship is established when the agent is empowered to determine and pursue the ends of the principal, rendering the principal vulnerable to the agent).

<sup>248</sup> See *supra* notes 154–57 and accompanying text. As John Austin observed of the British Parliament in 1885:

[S]peaking accurately, the members of the Commons' house are merely trustees for the body by which they are elected and appointed. . . . That a trust is imposed by the party delegating, and that the party representing engages to discharge the trust, seems to be imported by the correlative expressions delegation and representation. It [would be] absurd to suppose that the delegating empowers the representative party to defeat or abandon any of the purposes for which the latter is appointed.

at the time of the Framing were explicit about the delegation of power from the people and the reciprocal fiduciary obligation imposed on government officials.<sup>249</sup>

Some, like Fox-Decent, would go further and argue that even without a hypothetical bargain or delegation of power, the ruler still stands in a fiduciary capacity to the governed.<sup>250</sup> This view would treat all state power as fiduciary, even when consent to the state's authority is impossible or impracticable.<sup>251</sup> But one need not accept such an expansive view of state fiduciary obligation to accept that democratically elected representatives in our constitutional system stand in a fiduciary capacity to the people they represent.<sup>252</sup>

Again, determining when and how politicians' fiduciary duties should be enforced raises additional questions. Indeed, a central part of most fiduciary relationships is the (often substantial) discretion that agents exercise in determining the interests of their principals and choosing the means by which to pursue those interests.<sup>253</sup> But it is consistent with both political and private law fiduciary theory to recognize that politicians bear a duty of loyalty to the people they represent.

### B. Breach of the Politicians' Duty of Loyalty

If political representatives can be properly understood to bear fiduciary duties, the next question is: what would a breach of those duties look like? In most fiduciary relationships, agents breach their duty of loyalty when they act in the face of a conflict of interest. The eighteenth-century fiduciary law known to the Framers contained the same prophylactic prohibition on self-dealing.<sup>254</sup> If the agent engages

GOUGH, *supra* note 211, at 187 (emphasis omitted) (citing Austin).

<sup>249</sup> E.g., PA. CONST. of 1776, art. IV (“[A]ll power [is] . . . derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.”); VA. CONST. of 1776, § 2 (“That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.”); *see also* MASS. CONST. of 1780, pt. I, art. V; MD. CONST. of 1776, art. IV (“That all persons invested with the legislative or executive powers of government are the trustees of the public . . .”); N.H. CONST. of 1784, art. I, § 1 (“[A]ll government of right originates from the people, is founded in consent, and instituted for the general good.”); VT. CONST. of 1786, ch. I, art. VI; Natelson, *Public Trust*, *supra* note 29, at 1134–36.

<sup>250</sup> Fox-Decent, *The Fiduciary Nature*, *supra* note 31, at 259.

<sup>251</sup> *Id.* at 286, 308–10 (“In principle, fiduciary doctrine can apply to dictatorships installed by foreign powers as well as to national governments of representative democracies.” *Id.* at 286.); *see also* Criddle, *Fiduciary Administration*, *supra* note 31, at 473 (“All agents and instrumentalities of the state are . . . subject to fiduciary duties in discharging their responsibilities.”).

<sup>252</sup> *See* PITKIN, *supra* note 233, at 128 (“[Representation is] a fiduciary relationship, involving trust and obligation on both sides.”).

<sup>253</sup> *See* Miller, *supra* note 145 (manuscript at 44–45).

<sup>254</sup> *See* Natelson, *Public Trust*, *supra* note 29, at 1125, 1128 (“By the eighteenth century, [private fiduciaries] had an absolute duty to eschew self-dealing. . . . [Equity] prohibits a trustee from

in a self-dealing transaction, even in the absence of any substantive harm to the principal, he has breached his fiduciary duty.<sup>255</sup> Accordingly, political representatives would breach their duty of loyalty when they act under a conflict of interest because of the risk that they will violate the exclusive benefit principle by passing laws in their own interests rather than in the interests of the people they represent.

The most obvious example is when representatives vote to raise their salaries. They face a direct, financial conflict of interest; any increase in salary benefits them directly at the expense of the public fisc. The Twenty-Seventh Amendment attempted to solve what would otherwise be a breach of the duty of loyalty by providing that no change in compensation may take effect before an intervening election of representatives, thus giving the electorate a chance to ratify the conflicted decision or hold their agents accountable.<sup>256</sup>

More important than setting their own salaries, representatives may use their control over laws regulating the rules and mechanisms of the electoral process to attempt to entrench themselves. Incumbent control over the election laws, in other words, presents an inherent conflict of interest.

Corporate law recognizes a similar conflict of interest when incumbent directors manipulate the shareholder voting process to preserve their control over the corporation. The Delaware Chancery Court explained in *Blasius Industries, Inc. v. Atlas Corp.*:

Action designed principally to interfere with the effectiveness of a vote inevitably involves a conflict between the board and a shareholder majority. Judicial review of such action involves a determination of the legal and equitable obligations of an agent towards his principal. This is not . . . a question that a court may leave to the agent finally to decide so long as he does so honestly and competently; that is, it may not be left to the agent's business judgment.<sup>257</sup>

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making any profit by his management, directly or indirectly.” *Id.* at 1128. (quoting LORD KAMES, PRINCIPLES OF EQUITY 255 (2d ed. 1767)); Natelson, *Judicial Review*, *supra* note 30, at 257–58.

<sup>255</sup> See *supra* notes 133–39 and accompanying text.

<sup>256</sup> U.S. CONST. amend. XXVII (“No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”). Although it was not ratified by enough states until 1992, this amendment was actually proposed by the First Congress as part of the original Bill of Rights. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1145–46 (1991). In practice it has little effect as senators and representatives receive nearly annual raises in the form of cost-of-living adjustments.

<sup>257</sup> 564 A.2d 651, 660 (Del. Ch. 1988); see also *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1132 (Del. 2003) (holding that manipulation of the voting process is invalid even if it does not involve a challenge for outright control of the board and does not actually prevent dissident shareholders from winning seats).

Thus, even though the incumbent directors in *Blasius* believed in good faith that appointing two new, friendly directors to frustrate a hostile proxy contest was in the best interests of the corporation, they still breached their fiduciary obligations by interfering with the shareholder voting process to “prevent[] the shareholders from electing a majority of new directors.”<sup>258</sup> Likewise, directors breach their duty of loyalty when they attempt to perpetuate themselves in office by advancing the date of a stockholder vote to block a shareholder group from effectively mounting an election campaign.<sup>259</sup>

When incumbent politicians manipulate the election laws to entrench themselves, they too breach their fiduciary duty of loyalty. With their interests in retaining their power and positions directly at stake, representatives cannot be trusted to act in the interests of the people they represent. Redistricting is the prime example: state legislatures get to draw the very districts from which they are elected. Where placement of a line along one street instead of another can spell the difference between electoral victory and defeat, and an effective gerrymander can create safe districts that will insulate incumbents from challenge, the temptation to manipulate the districting process must be tremendous.<sup>260</sup>

While there is a strong argument that such incumbent self-dealing comes at the expense of the principal — in the form of increased polarization and reduced accountability and responsiveness<sup>261</sup> — a showing of substantive harm is not necessary to establish a breach of the duty of loyalty. Under the standard fiduciary framework, a conflict of interest alone is enough to presume that the duty of loyalty is breached.<sup>262</sup> Therefore, any time representatives pass laws regulating the electoral process, they are effectively self-dealing. They are legislating about their own interests, because the results may serve to entrench them by stifling competition from potential challengers. Under the prophylactic prohibition on self-dealing, incumbent regulation of the electoral process is a breach of the duty of loyalty. Indeed, even if political representatives believe in good faith that their manipulation of the electoral machinery is in the best interests of the public, they still violate their fiduciary obligations when they do so.<sup>263</sup> Because of

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<sup>258</sup> *Blasius*, 564 A.2d at 658; see also Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 480–83 (2009).

<sup>259</sup> *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971).

<sup>260</sup> Incumbents might also manipulate other, less direct mechanisms like ballot access restrictions, voter qualifications, and campaign finance regulations to entrench themselves. See *supra* notes 32–34 and accompanying text.

<sup>261</sup> See *supra* notes 61–63 and accompanying text.

<sup>262</sup> See *supra* notes 137–39 and accompanying text.

<sup>263</sup> Cf. *Blasius*, 564 A.2d at 658–60.

the fundamental conflict of interest they face, incumbents cannot be trusted to make these sorts of decisions.

I do not mean to suggest that *all* laws that either touch on incumbent legislators' self-interest or that might have some incidental entrenchment effect would violate their fiduciary duty of loyalty. There is an important distinction between substantive legislation that serves to increase incumbents' chances of reelection and legislation regulating the electoral process. In corporate law, the deferential business judgment rule is justified in part by the competitive market pressures that directors and managers face.<sup>264</sup> Legislators face similar competitive pressures when they enact substantive laws that may increase their chances of reelection — whether good public policy or pork-barrel spending — and are thus entitled to the same kind of deference. But when incumbents legislate on the *processes* by which they are reelected, there is a risk that they will manipulate those processes to reduce the very competitive pressures that might otherwise justify deference.

Indeed, corporate law recognizes a similar distinction between substantive board decisions that may have an entrenchment effect and decisions that interfere with the effective operation of the shareholder voting process. When a corporation faces a hostile tender offer that threatens the board's control over the company, directors are generally permitted to adopt takeover defenses (such as "poison pills" or selective stock buybacks), as long as they do so in good faith and for the benefit of the corporation.<sup>265</sup> "Because of the omnipresent specter that a board may be acting primarily in its own interests"<sup>266</sup> in adopting takeover defenses, courts will apply an intermediate form of scrutiny to the transaction. But they will typically defer to the board's business judgment as long as the defensive measures adopted are reasonable in relation to the threat posed to corporate policy and, critically, the channels of corporate democracy remain open.<sup>267</sup> Conversely, when the board attempts to entrench itself by manipulating shareholder voting processes, courts apply what some scholars have described as "perhaps the most exacting" standard of review in corporate law.<sup>268</sup> As

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<sup>264</sup> See John C. Coffee, Jr., *Conflicts, Consent, and Allocation After Amchem Products — Or Why Attorneys Still Need Consent to Give Away Their Clients' Money*, 84 VA. L. REV. 1541, 1544 (1998).

<sup>265</sup> See, e.g., *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

<sup>266</sup> *Unocal*, 493 A.2d at 954.

<sup>267</sup> See, e.g., *Unitrin*, 651 A.2d at 1367; cf. *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 930, 936 (Del. 2003) (invalidating deal protection "lock-up" where directors owning a majority of shares entered voting agreements to grant an irrevocable proxy to vote in favor of the deal, rendering the shareholder vote a foregone conclusion).

<sup>268</sup> Dale A. Oesterle & Alan R. Palmiter, *Judicial Schizophrenia in Shareholder Voting Cases*, 79 IOWA L. REV. 485, 535 (1994).

the court in *Blasius* explained, the ordinary justifications for the business judgment rule “are simply not present in the shareholder voting context.”<sup>269</sup>

It is not my goal here to attempt to catalog all of the potential conflicts of interest that might result in a breach of political representatives’ fiduciary duties of loyalty, nor am I proposing a uniform way for courts to address any such breach. It is possible that some legislative actions that indirectly implicate incumbents’ entrenchment interests might justify increased scrutiny by courts. I will leave for future work an exploration of how such an intermediate standard might be applied to legislation that is aimed at entrenchment but is not a direct manipulation of the electoral process. Difficult questions might also arise when representatives have personal stakes in the legislation — like awarding government contracts to companies in which they or their close relatives own stock — that might outweigh the competitive pressures that they face.<sup>270</sup> But exploring the boundaries of representatives’ fiduciary duties when they face financial conflicts of interests is beyond the scope of this Article. The important point for present purposes is that when incumbent representatives are able to manipulate the very processes from which they draw their power and legitimacy to entrench themselves — as in the redistricting context — they face a very real and direct conflict of interest that is inconsistent with their duty of loyalty.

If we think of politicians as fiduciaries, the harm of gerrymandering that the Court found so elusive in *Gaffney*, *Bandemer*, *Vieth*, and *LULAC* becomes apparent. The harm is not that one political party suffers discrimination at the hands of another, nor that a group of voters has its votes diluted to less than their proper strength. Those conceptions of harm lead to an endless search for a baseline appropriate level of party strength or a baseline undiluted vote.<sup>271</sup> Nor is the harm simply a lack of competition. That conception also runs into the baseline problem: what is the appropriate level of competition for a given

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<sup>269</sup> *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1998).

<sup>270</sup> See, e.g., Scott Higham, Kimberly Kindy & David S. Fallis, *Close Connections: Some Legislators Have Delivered Millions to Organizations in Which Their Relatives Play a Role*, WASH. POST, Feb. 8, 2012, at A1; Dan Keating et al., *Members of Congress Trade in Companies While Making Laws that Affect Those Same Firms*, WASH. POST (June 23, 2012), [http://www.washingtonpost.com/politics/members-of-congress-trade-in-companies-while-making-laws-that-affect-those-same-firms/2012/06/23/gJQAIXwVyV\\_story.html](http://www.washingtonpost.com/politics/members-of-congress-trade-in-companies-while-making-laws-that-affect-those-same-firms/2012/06/23/gJQAIXwVyV_story.html). A plausible argument could also be made that congressional insider trading would violate the duty of loyalty. See Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 B.U. L. REV. 1105, 1111, 1140–47 (2011); cf. Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, § 2038, 126 Stat. 291 (outlawing congressional insider trading).

<sup>271</sup> See Lowenstein & Steinberg, *supra* note 6, at 60; Schuck, *supra* note 6, at 1364–65.

district or for the electoral system as a whole?<sup>272</sup> Rather, the harm is the disloyalty — the manipulation by self-interested political actors, for their own benefit, of the very mechanisms by which they derive their power and legitimacy. Reduced competition, and any substantive harm it may inflict on the electorate, is a side effect of the real harm<sup>273</sup> — the agents' failure to act for the exclusive benefit of the principals. The disloyalty of the agents, and the distortion of electoral outcomes that it causes, undermines the legitimating function that elections serve.<sup>274</sup>

Of course, the valid, informed consent of the principal can provide an exception to the prophylactic prohibition on agent self-dealing. If the people could validly consent to their representatives' conflicts of interest in regulating the electoral process, the taint of incumbent self-dealing would be cleansed. Obtaining the informed consent of the people presents similar problems to obtaining the informed consent of shareholders in the corporate context. Because the principals are diffuse, they face substantial transaction costs, both in becoming informed about the nature of the conflict and in aggregating and voicing their preferences. One way that self-dealing transactions are approved in the corporate context is through shareholder ratification. But a similar *ex post* mechanism would be inadequate in the political arena. Surely it would be futile to consider incumbents' electoral victories in gerrymandered districts to be consent to their self-dealing behavior of drawing their districts to assure victory.<sup>275</sup> Yet some valid mechanisms may exist to cleanse the taint of self-dealing when incumbents regulate the electoral process. These mechanisms are the subject of Part IV.

One must be careful in drawing analogies from private law. A major difference between the agency problems in public and private law is in determining the interests of the principals. In a public corporation, for example, the primary interest of the principals is generally presumed to be fairly uniform — to maximize shareholder value.<sup>276</sup> In

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<sup>272</sup> Charles, *supra* note 13, at 621 n.122. At some point competition may become undesirable. If every district were perfectly competitive, small shifts in voter preferences could lead to massive shifts in the composition of the legislature, much in the same way that at-large elections give all of the seats to the winning party even if it has a bare majority. See, e.g., Persily, *supra* note 6, at 668.

<sup>273</sup> Lack of competition, however, may be a useful indicator of agent disloyalty. Incumbents seeking entrenchment will make every effort to reduce competition for their jobs.

<sup>274</sup> See Charles, *supra* note 13, at 615–16.

<sup>275</sup> This proposition, of course, depends on the definition of the principal. If the principal consists of only the voters in the district, the futility is obvious. Conversely, a statewide referendum would have a much greater legitimating effect. See *infra* section IV.B.3, pp. 737–39.

<sup>276</sup> See, e.g., Brudney, *supra* note 134, at 612 (describing an undifferentiated “public stockholder” who “seeks increase in the value of his or her investment”). Shareholders (particularly those with different risk preferences) may disagree about the best way to maximize value, but these deviations in interests tend to be minor compared to the political context. See Iman Anabtawi,



the political context, on the other hand, the interests of the principals are far from uniform. There are some interests that are nearly universally shared by the people (for example, security or law and order), but on most issues the people's interests will diverge and will often be in direct conflict. Even identifying the relevant group of people to consider as the principal is not straightforward: is it all of the people or only the people in an individual representative's district?

While these are complicated and interesting questions, they need not detain us too long. Even in the corporate context, where we presume a uniform interest in maximizing shareholder value, many self-dealing transactions would be beneficial to groups of shareholders or to the corporation as a whole, but because the directors' own interests are at stake, we distrust them to make those decisions. Only by using special procedures to cleanse the taint of self-dealing or by showing entire fairness can such a transaction go forward. Indeed, courts have not found it necessary to adopt a definitive theoretical account of corporations that treats shareholders as principals in order to find director self-dealing suspect;<sup>277</sup> competing accounts that identify different constituencies as principals are consistent with the prophylactic prohibition on director self-dealing.<sup>278</sup> Likewise, even if we cannot specify the interests of the electorate (or even identify the relevant portion of the electorate to consider principals), we should still mistrust representatives when they are making decisions that directly affect their own interests without some sort of independent check. Thus, the fiduciary duty of loyalty can play a role under various models of representation. Even if opinions differ regarding whether representatives should be acting in the general public interest or in the interests of their specific constituents, people are likely to agree that representatives should not be acting primarily in their own interests. Whether representatives are thought of as trustees or delegates, both are fiduciaries.

### C. *Remedy for Politicians' Breach of Their Duty of Loyalty*

If we treat political representatives as fiduciaries who bear a duty of loyalty the breach of which works a constitutional harm, the question becomes one of remedy. Suits against individual legislators are

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*Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 577-92 (2006) (describing divergent shareholder interests: short term versus long term, diversified versus undiversified, inside versus outside, pension fund versus economic, and hedged versus unhedged).

<sup>277</sup> Andrew S. Gold, *Theories of the Firm and Judicial Uncertainty*, 35 SEATTLE U. L. REV. 1087, 1096-1101 (2012).

<sup>278</sup> See, e.g., Blair & Stout, *supra* note 163, at 253 (describing the team production theory of the firm where the board should take into account interests of many constituencies).

not available to enforce their fiduciary duties.<sup>279</sup> But private fiduciary law can provide guidance. Just as the remedy for breach of the duty of loyalty in agency or corporate law is invalidation of the conflicted transaction, the remedy for a law passed in breach of representatives' duty of loyalty should be invalidation of the law. If we take seriously the fiduciary duties of legislators, then courts should hold unconstitutional laws aimed at entrenching incumbents.

Natelson has argued that, under the prevailing political theory on which the Constitution was based, laws passed in breach of the legislature's fiduciary obligations were *ultra vires*, and therefore courts had an obligation to declare them void.<sup>280</sup> Indeed, in *The Federalist No. 78*, Alexander Hamilton explained that it was the role of the judiciary to keep elected agents within the limits of their delegated authority.<sup>281</sup> To do otherwise would be to subordinate "the intention of the people to the intention of their agents."<sup>282</sup>

If courts were to bear the role of supervising and enforcing the fiduciary duties of representatives, the presence of a conflict of interest should trigger heightened scrutiny. If the legislature passed a normal substantive law, ordinary rational basis scrutiny would apply.<sup>283</sup> If the legislature passed a law regulating the political process — like a districting plan — a conflict of interest would exist. A law that affects the legislators' interests would raise the suspicion that it serves to entrench incumbents rather than advance the interests of the people. This conflict of interest would trigger a higher level of scrutiny, and if the reviewing court found the law to be motivated by entrenchment, it should invalidate the law as a breach of the legislature's fiduciary duty to the people, unless the legislature could show that the people had given valid consent to the conflict.

Many would contend that judicial review is usually reserved for textually enumerated constitutional rights.<sup>284</sup> It would be disingenuous to pretend that the Constitution contains any clear textual command for courts to enforce legislators' fiduciary duties in reviewing laws regulating the electoral process in general or districting decisions in particular. The Constitution is strikingly silent on many issues central to the structure of the democratic process; yet that silence has not stopped courts from intervening in the reapportionment or racial-

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<sup>279</sup> See U.S. CONST. art. I, § 6, cl. 1; GOUGH, *supra* note 211, at 188; Issacharoff & Ortiz, *supra* note 72, at 1646–47; Natelson, *Judicial Review*, *supra* note 30, at 269–70.

<sup>280</sup> Natelson, *Judicial Review*, *supra* note 30, at 271–73; see also Natelson, *Public Trust*, *supra* note 29, at 1173 ("If a 'general purpose' of the Constitution is to erect a fiduciary government, then any law violating fundamental fiduciary norms is not a 'proper' one." (footnote omitted)).

<sup>281</sup> THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 69, at 465–66.

<sup>282</sup> *Id.* at 466.

<sup>283</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–54 (1938).

<sup>284</sup> See, e.g., Easterbrook, *supra* note 242.

gerrymandering contexts.<sup>285</sup> In much the same way that the Supreme Court has given force to structural values in the Constitution such as federalism<sup>286</sup> and the separation of powers,<sup>287</sup> the Court could recognize the structural commitment to fiduciary government as the basis for judicial review of incumbent self-dealing.<sup>288</sup>

The Court need not, however, recognize a freestanding cause of action against individual legislators or the legislature as a whole for breach of fiduciary duty. Rather, what I am suggesting is an interpretive principle that courts can apply when dealing with claims brought under the Constitution's open-textured clauses.<sup>289</sup> That is, courts should apply heightened scrutiny in constitutional challenges to laws involving legislative conflicts of interest — such as districting plans — based on a structural commitment to fiduciary government. The textual or doctrinal hook for any particular claim is not all that important to this framework. Thus, challenges to districting plans might proceed as fundamental rights equal protection claims under the Fourteenth Amendment, as have most political gerrymandering claims to date (as well as many other voting-related claims).<sup>290</sup> Or they might be brought under the Due Process Clause, which could easily be read to impose a duty on legislators to avoid self-dealing — that is, to refrain from being judges in their own causes<sup>291</sup> — and, under the rationale of *Carolene Products* footnote four, to authorize courts to strictly scruti-

<sup>285</sup> See Issacharoff, *Why Elections?*, *supra* note 24, at 687–88; Issacharoff & Pildes, *supra* note 21, at 713–16.

<sup>286</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706, 748–49 (1999); *Printz v. United States*, 521 U.S. 898, 923 n.13 (1997); *Younger v. Harris*, 401 U.S. 37, 44–45 (1971).

<sup>287</sup> See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 450–51 (1998) (Kennedy, J., concurring); *Mistretta v. United States*, 488 U.S. 361, 380–84 (1989); *Morrison v. Olson*, 487 U.S. 654, 693–96 (1988); *INS v. Chadha*, 462 U.S. 919, 944–59 (1983); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–89 (1952).

<sup>288</sup> Cf. Pildes, *Foreword*, *supra* note 67, at 41–47 (arguing that courts should recognize a structural commitment to political competition); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 343, 397–405 (2009) (arguing that courts should recognize a structural anticorruption principle in the Constitution); Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 1, 20–22 (2012), available at <http://www.law.northwestern.edu/lawreview/colloquy/2012/7/LRColl2012n7Tillman.pdf> (arguing that the structural anticorruption principle is actually an extension of the constitutional commitment to fiduciary government).

<sup>289</sup> Similarly, Natelson has argued that several clauses, including the Due Process Clauses, the Equal Protection Clause, the General Welfare Clause, and the Necessary and Proper Clause, were intended to incorporate, and should be interpreted with reference to, fiduciary principles. See Natelson, *Agency Law*, *supra* note 30, at 271–76; Natelson, *Public Trust*, *supra* note 29, at 1168–78; Natelson, *General Welfare Clause*, *supra* note 30, at 49–54; Natelson, *Judicial Review*, *supra* note 30, at 244–47.

<sup>290</sup> See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 123–24 (1986).

<sup>291</sup> E.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876–81 (2009); THE FEDERALIST NO. 10 (James Madison), *supra* note 69.

nize legislation that blocks the channels of political change.<sup>292</sup> Regardless of the specific hook, courts would ask whether the legislature violated its fiduciary duty in determining how to treat the challenged law.

There are also several other potential textual hooks that, when combined with the structural, theoretical, and historical justifications for imposing fiduciary duties on legislators, could authorize courts to enforce such duties. For example, in *Vieth*, Justice Kennedy suggested that the First Amendment might form a basis for gerrymandering claims,<sup>293</sup> and some scholars have argued that the First Amendment can be read to prohibit partisan considerations in redistricting.<sup>294</sup> Others have argued that Article I's Elections Clauses can form a textual basis for gerrymandering claims, at least with respect to congressional districts.<sup>295</sup> Perhaps the most obvious candidate for a textual hook is the Republican Form of Government Clause,<sup>296</sup> although that path appears foreclosed by the Supreme Court's longstanding position that claims under that clause present nonjusticiable political questions.<sup>297</sup> Still, those holdings reflect a skepticism about the institutional competence of courts, rather than any explicit limitation on the content of the constitutional guarantee, and might be worth revisiting if a fiduciary approach proved workable.<sup>298</sup>

<sup>292</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 75–77 (1980).

<sup>293</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment).

<sup>294</sup> See Klain, *supra* note 17, at 86–90 (arguing that the First Amendment imposes a duty of impartiality that prohibits states from discriminating against persons based on their association with a political party, and recommending that courts enforce this duty to limit political gerrymandering); Persily, *supra* note 6, at 652–53 & n.11 (arguing that a requirement for nonpartisan redistricting could be derived from a combination of the equal protection analysis in the *Shaw v. Reno*, 509 U.S. 630 (1993), line of cases, which say that a suspect classification cannot be a predominant factor in districting decisions, with the patronage cases, which hold that the First Amendment prohibits discrimination on the basis of partisan affiliation).

<sup>295</sup> U.S. CONST. art. I, § 4, cl. 1 (granting states authority to regulate the “Times, Places and Manner” of congressional elections); *id.* art. I, § 2 (requiring members of the House to be “chosen every second Year by the People of the several States”); see Brief for Samuel Issacharoff, Burt Neuborne, and Richard H. Pildes as Amici Curiae Supporting Appellants at 8–21, *LULAC v. Perry*, 548 U.S. 399 (2006) (No. 05-204) (arguing that political gerrymandering to create safe districts exceeds the Elections Clauses’ grant of power to the states to design congressional districts and violates Article I, Section 2’s requirement that members of the House be chosen by “the People,” not the state legislatures); Pildes, *supra* note 19, at 262–70.

<sup>296</sup> U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”); see Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103 (2000) (arguing that the Court should have based its decision in *Baker* and the reapportionment cases on the Republican Form of Government Clause instead of the Equal Protection Clause); Issacharoff, *Cartels*, *supra* note 18, at 613–14.

<sup>297</sup> See, e.g., *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

<sup>298</sup> See *Kerr v. Hickenlooper*, No. 11-cv-01350-WJM-BNB, 2012 WL 3089865, \*1 (D. Colo. July 30, 2012) (holding that the Republican Form of Government Clause claim is not per se

Textualism, however, is not the main concern in relying on courts to enforce the fiduciary duties of legislators in redistricting decisions.<sup>299</sup> Indeed, courts appear willing to recognize that gerrymanders violate the Constitution without identifying any narrow textual foundation.<sup>300</sup> The main concern is the institutional competence of courts.<sup>301</sup> It is all well and good to say that legislators should not draw district lines to entrench themselves, but do we really want courts making those decisions instead? And what standards could unelected judges possibly use in making such first-order decisions about the proper allocation of political power? Here the analogy to corporate law can provide critical guidance.

#### IV. A CORPORATE LAW FRAMEWORK FOR DEALING WITH INCUMBENT SELF-DEALING

We do not generally think that courts are any better at making business judgments than political ones. But we cannot trust either corporate agents or political agents to make decisions in the best interests of their principals when their own conflicting interests are at stake. Corporate law deals with the problem of institutional incompetence by creating incentives for agents to seek approval of their conflicted decisions from disinterested decisionmakers, allowing courts to focus their review on the adequacy of the process of approval, instead of focusing on its substantive outcome.

A similar framework can help to address the agency problem in the political process, without forcing courts to make the types of judgments for which we question their institutional competence. When legislatures pass laws regulating the political process that might serve to entrench incumbents (such as drawing districts), a conflict of interest exists. That conflict should trigger heightened judicial scrutiny, just like a conflict of interest would in the corporate context. But if the legislature could show that it used neutral processes to formulate or approve the political process regulation, the taint of self-dealing would be cleansed, and the courts should adopt a much more deferential standard of review, analogous to the business judgment rule. Judicial review would then focus on the fairness and independence of the

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nonjusticiable with respect to a state constitutional amendment that prohibits the legislature from raising taxes without a vote of the people).

<sup>299</sup> None of the Justices who proposed substantive standards for evaluating political gerrymanders in *Bandemer*, *Vieth*, or *LULAC* even attempted to provide a textual foundation for their approaches. See Stephanopoulos, *supra* note 11, at 1429 n.221.

<sup>300</sup> See *supra* notes 120–25 and accompanying text.

<sup>301</sup> See Fuentes-Rohwer, *supra* note 15, at 1159–60, 1180 (“[T]he question at the heart of the gerrymandering debate is not really a question of standards. . . . [It is] a question of institutional competence.”).

process and would defer to the substantive outcome it produced. The threat of exacting review of substantive outcomes should force nearly all political process regulations into these safe harbors, leaving courts to review processes — a role that they are institutionally well suited to perform.<sup>302</sup>

This corporate law framework could potentially be applied to many types of political process claims where representatives have an entrenchment interest, such as ballot access restrictions, voter qualifications, campaign finance regulation, and legislative redistricting. This Article, however, focuses on state legislative redistricting because it presents the most obvious (and perhaps most egregious) case of incumbent self-dealing — the incumbent legislators literally pick the people who will be voting for them in the next election — though the framework is easily transferable to redistricting in states that use partisan or bipartisan commissions where the line-drawing institutions, though formally separate from the agents, are captured by insiders.<sup>303</sup>

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<sup>302</sup> See John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825 (2006); cf. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006); Issacharoff, *Cartels*, *supra* note 18, at 641–48.

<sup>303</sup> It may also be possible to apply this framework to gerrymandering of congressional districts, but doing so requires a few more steps. Congress does not draw its own districts; state legislatures draw them. But because national political parties function as superfactions, able to coordinate interests across levels of government, the congressional redistricting process that takes place at the state level is not free from interference by incumbent members of the national legislature. Indeed, congressional incumbents are often intimately involved in the line-drawing process. See *supra* notes 72–77 and accompanying text. The redistricting process is thus captured by conflicted insiders, who use the national political party mechanisms to influence state processes to their own advantage. Congressional representatives breach their duty of loyalty by attempting to manipulate the state districting processes to their advantage. But it is not obvious why that breach should lead to invalidation of a *state* law. For congressional gerrymanders to be invalid, the fiduciary violation must lie in congressional inaction. Congress breaches its duty by assigning redistricting responsibility to captured institutions — the state legislatures — and not using its power under Article I, Section 4 to adopt a more independent process.

The politicians-as-fiduciaries approach to gerrymandering claims is thus much cleaner for state legislatures, where the conflict of interest is more direct. Further, there are reasons that we should perhaps be less concerned with congressional gerrymandering than with gerrymandering in state legislatures. First, the indirect conflict of interest is less offensive to fiduciary principles of government. Second, a congressional gerrymander affects only the gerrymandered state's congressional delegation; unlike a state gerrymander, it does not affect the institution as a whole. See Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409. Third, there is an argument that a state legislature's influence over the makeup of its congressional delegation serves as a political safeguard of federalism — in effect replacing the role that senators were supposed to play in the original constitutional design, before they were directly elected. See Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859. But see Pildes, *supra* note 19, at 262–70 (arguing that Article I, Section 2 requires members of the House to be chosen by “the People,” not state legislatures). And fourth, congressional gerrymanders are more likely to be aimed at partisan advantage than entrenchment and thus might be self-limiting and reversible if competition is preserved in the state legislature. See *LULAC v. Perry*, 548 U.S. 399 (2006) (allowing mid-decade re-redistricting).

A. “Entire Fairness” Review of Redistricting

There can be little question that state legislative redistricting is self-dealing. Thus, the conflict of interest faced by state legislatures should trigger heightened judicial scrutiny whenever a legislatively drawn redistricting plan is challenged.

One way to deal with the conflict of interest would be for courts to adopt a *per se* rule, as they did for self-dealing corporate transactions in the nineteenth century<sup>304</sup>: districts drawn by legislatures are invalid. Issacharoff has suggested a rule along these lines, arguing that the courts should adopt an *ex ante* prophylactic prohibition — analogous to the *Miranda* rule — on the participation of legislators in the redistricting process.<sup>305</sup> Issacharoff’s account, however, is incomplete because it does too little to provide a constitutional foundation for prophylaxis and because it provides courts with little guidance in evaluating the institutions and processes that would replace legislatures as line-drawers.<sup>306</sup> But, as demonstrated above, treating representatives as fiduciaries is well grounded in constitutional history and theory, and, as the rest of this Part explains, application of corporate fiduciary principles supplies a framework for evaluating the independence of line-drawers from incumbent capture.

Another way to deal with incumbent self-dealing would be to take a cue from the entire fairness standard in corporate law.<sup>307</sup> Courts could put the burden on the legislature to show that, despite the conflict of interests, the redistricting was entirely “fair.” This approach, of course, puts courts in the position of evaluating the substantive outcome of the political process and making first-order decisions about the distribution of political power. This is exactly the problem that plagued the Supreme Court in *Vieth* — by what standard should courts evaluate the “fairness” of the districts that the legislature drew? There is no extrinsic, objective benchmark like market price with

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This is not meant to be an endorsement of congressional gerrymandering. Under a fiduciary model, incumbents should not use their positions and influence to entrench themselves whether directly or indirectly. But state legislative gerrymandering is perhaps the more disturbing and remediable problem.

<sup>304</sup> See *supra* note 172 and accompanying text.

<sup>305</sup> Issacharoff, *Cartels*, *supra* note 18, at 641–43.

<sup>306</sup> Critics, such as Professor Nathaniel Persily, have argued that prophylactic rules, like the *Miranda* rule, have typically been used to protect rights with “some clear textual basis that can shape the contours and content of the prophylactic rule,” Persily, *supra* note 6, at 677, and cannot be justified by the antitrust metaphor and procompetitive democratic theory propounded by Issacharoff. *Id.* at 676–77.

<sup>307</sup> Cf. *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 661–62 (Del. Ch. 1988) (declining to adopt *per se* rule against the manipulation of shareholder voting process and instead placing on directors “the heavy burden of demonstrating a compelling justification for such action,” *id.* at 661).

which to compare the outcome.<sup>308</sup> Market price may be difficult to ascertain in the corporate context, but at least it can provide a normative baseline for measuring a transaction's fairness. Although we can say that a corporate transaction occurring at the price a well-functioning market would have set is "fair," we do not believe that courts are the proper institutions to say what the baseline distribution of political power *should* be. Even if we could say that the outcome of elections in a well-functioning, competitive political market was a desirable normative baseline<sup>309</sup> (a position to which I am somewhat sympathetic), determining that baseline would be extraordinarily difficult.<sup>310</sup> Because we usually base our notions of a fair distribution of political power on the revealed preferences of the electorate expressed through elections, there is little else to recommend an extrinsic baseline.<sup>311</sup> No comparable political "transaction" in a competitive political market exists.<sup>312</sup>

A return to fiduciary principles, however, can provide guidance to courts when no objective baseline is discernible. Under the exclusive benefit principle, fiduciaries have a duty to act *solely* in the interests of their principals, their own interests notwithstanding.<sup>313</sup> Courts could apply something akin to the other type of entire fairness review — the hypothetical arm's length comparison.<sup>314</sup> Instead of comparing the outcome to some extrinsic baseline, courts would ask whether the districting plan drawn by the legislature is the same as one that would have been drawn by a hypothetical disinterested body. A disinterested body would have no interest in entrenchment and thus no reason to manipulate district lines for political gain or to create safe districts. While the fairness of the substantive outcomes, in terms of the distribution of political power in differently drawn districts, would still be

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<sup>308</sup> Statewide proportional representation could, in theory, provide a benchmark for measuring the outcome of a gerrymander, but it has little to recommend it as a standard. The Court has repeatedly disavowed proportional representation as a constitutional guarantee, or even a desirable goal. *See, e.g.,* *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) ("Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." (citing *White v. Regester*, 412 U.S. 755, 765–66 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 153, 156, 160 (1971))). And if proportional representation really were the goal, contorted single-member districts would be a terribly inefficient way to achieve it. *See* Issacharoff, *Why Elections?*, *supra* note 24, at 686.

<sup>309</sup> *See* Issacharoff & Pildes, *supra* note 21.

<sup>310</sup> *See* Issacharoff, *Cartels*, *supra* note 18, at 602–04 (discussing difficulties with attempts to measure baseline competitiveness); *see also* Lowenstein & Steinberg, *supra* note 6, at 41–44.

<sup>311</sup> *See* Charles, *supra* note 13, at 620–21 (discussing exogenous and endogenous preferences); Issacharoff, *Cartels*, *supra* note 18, at 616.

<sup>312</sup> *See* Issacharoff, *Cartels*, *supra* note 18, at 616–17.

<sup>313</sup> *See supra* notes 133–35 and accompanying text.

<sup>314</sup> *See supra* notes 181–83 and accompanying text.



difficult to evaluate, certainly no one could reasonably claim that the standard methods of gerrymandering (packing, cracking, stacking, shacking,<sup>315</sup> or the collusive agreements of the bipartisan gerrymander<sup>316</sup>) are the kinds of districting decisions that a disinterested body would make.

Under an entire fairness standard, the government would face a heavy burden to show that any redistricting by a legislature was valid. Locating the burden of proof with the legislature would play an important role in entire fairness review. Instead of putting the onus on the plaintiff to identify a manageable standard by which to measure gerrymandering, the burden would be on the conflicted legislature to identify — and demonstrate that it used — an objective standard unrelated to entrenchment for its districting decisions. Legislators would be hard pressed to explain most of their districting decisions or the bizarre shapes of gerrymandered districts<sup>317</sup> in plausible nonentrenchment terms, and most legislative redistricting would probably be invalidated. Because courts are institutionally ill-equipped to evaluate the relative fairness of differently drawn districts and because, under this standard, the legislature would bear the burden of proof, instances where it is questionable whether a disinterested body would have made the same decision would be resolved against the legislature.

In practice, entire fairness review may end up looking a lot like strict scrutiny — strict in theory, but fatal in fact.<sup>318</sup> But this type of review is consistent with fiduciary principles. Like entire fairness review in corporate law, by subjecting conflicted transactions to searching scrutiny with heavy burdens on the fiduciary to show that the decision was in the best interests of the principal, this standard applies an almost prophylactic prohibition against self-dealing, which is the hallmark of the duty of loyalty.<sup>319</sup> Such searching review would approach the *per se* rule advocated by Issacharoff — though it would preserve the possibility that the legislature could make a truly compelling showing that it ignored partisan and entrenchment effects in favor of some (as yet undetermined) objective standard — and would pro-

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<sup>315</sup> Issacharoff & Karlan, *supra* note 40, at 551–52 & n.45.

<sup>316</sup> See Issacharoff, *Cartels*, *supra* note 18, at 598–99.

<sup>317</sup> The Court took a similar approach with respect to racial gerrymandering in the *Shaw v. Reno*, 509 U.S. 630 (1993), line of cases. There, the Court viewed unexplained (or inexplicable), “extremely irregular,” and bizarrely shaped districts as evidence of an impermissible “effort to segregate the races for purposes of voting.” *Id.* at 642; see also Charles, *supra* note 13, at 672–74.

<sup>318</sup> Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Courts have often employed strict scrutiny in voting-rights and reapportionment claims. See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966); *Reynolds v. Sims*, 377 U.S. 533, 581 (1964).

<sup>319</sup> See *supra* notes 136–39 and accompanying text.

vide a powerful incentive for legislatures to adopt a process safe harbor for redistricting decisions. The prospect of having to defend their districting decisions in open court, against plaintiffs with every incentive to marshal evidence portraying incumbent legislators as disloyal, self-dealing agents, would be an additional incentive to seek a safe harbor. Thus, the nuances of the entire fairness standard need not be specified much more beyond the fact that it would be extraordinarily difficult for current practices of legislative districting to survive. In reality, entire fairness review would most likely function as a default rule.<sup>320</sup>

### B. *Process Safe Harbors for Redistricting*

As in corporate law, the conflict of interest inherent in incumbent control of redistricting creates an unacceptable risk of disloyalty. We cannot trust legislators to act for the exclusive benefit of their principals when their own interests are at stake. But if the legislature could show that the districting decisions were made through some neutral process that could cleanse the taint of self-dealing, searching review of the outcomes by courts would be unnecessary. The key, as in corporate law, is to have districting decisions made or approved in a disinterested manner.

If the legislature could show that the process used to draw districts was indeed neutral and adequate, that process could serve as a safe harbor, like approval by disinterested directors or shareholder ratification in corporate law. Courts could then apply a much more deferential standard of review — one analogous to the business judgment rule — to the outcome. This approach would both mitigate the self-dealing nature of redistricting and keep courts out of the business of reviewing the substantive outcome — the distribution of political power. Review would instead focus on the adequacy and independence of the safe harbor process.

The details of judicial review would vary depending on the process adopted but would focus on the same types of factors that the courts use to evaluate safe harbors in corporate law. Courts would ask whether the decisionmakers had conflicts of interest themselves.<sup>321</sup> They would examine the independence of the process from the influence of conflicted legislators.<sup>322</sup> And they would determine whether the decisionmakers were provided with the relevant information<sup>323</sup>

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<sup>320</sup> See generally Ferejohn & Friedman, *supra* note 302.

<sup>321</sup> Cf. *Cooke v. Oolie*, No. 111134, 2000 Del. Ch. LEXIS 89, at \*40-41 (May 24, 2000).

<sup>322</sup> Cf. *In re W. Nat'l Corp. S'holders Litig.*, No. 15927, 2000 Del. Ch. LEXIS 82, at \*34-76 (May 22, 2000).

<sup>323</sup> Cf. *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 939 (Del. 1985); *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977).

and sufficient resources to make a disinterested decision.<sup>324</sup> If the legislature could show that the process used to draw districts was fair and conflict-free, the burden would shift to the party challenging the districting plan, and the court would defer to the outcome of the safe harbor process unless the challenger could show that it was egregiously unfair<sup>325</sup> — the analog of corporate waste.<sup>326</sup>

Several mechanisms that place control or approval of the districting process out of the hands of legislatures already exist or have been suggested by commentators. Independent districting commissions are in place in a handful of states, and commentators have advocated for their use more broadly.<sup>327</sup> Others have suggested using automated computer programs to draw districts based on criteria that would not include political data.<sup>328</sup> Another option would be to put a proposed redistricting plan before the voters in a statewide referendum.<sup>329</sup>

All of these mechanisms have potential as safe harbors as long as courts maintain a supervisory role to ensure that the process is adequate and conflict-free. It is not the purpose of this Article to advocate for one districting process, nor to survey all of those processes that have been suggested. Rather, the purpose is to provide a framework for evaluating their success at cleansing the taint of self-dealing and thus allowing redistricting to occur without breaching legislators' duty of loyalty. The corporate law framework does not require courts to dictate all valid processes at the outset. Instead, courts can review processes on a case-by-case basis, allowing for flexibility and innovation on the part of the states. The key is for courts not to dictate the normative goals of districting (for example, the proper level of competitiveness, the proper amount of respect for political subdivisions, or the proper level of respect for communities of interest), but rather to monitor the districting process for capture by insiders.

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<sup>324</sup> Cf. *In re W. Nat'l Corp. S'holders Litig.*, 2000 Del. Ch. LEXIS 82, at \*76–77.

<sup>325</sup> Cf. *Cooke*, 2000 Del. Ch. LEXIS 89, at \*44–45.

<sup>326</sup> See *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997).

<sup>327</sup> See, e.g., Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J.L. & PUB. POL'Y 115 (2004); Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 602–03 (2011); Justin Levitt, Essay, *Weighing the Potential of Citizen Redistricting*, 44 LOY. L.A. L. REV. 513, 532–42 (2011); Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 337–42 (2007); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837 (1997).

<sup>328</sup> See, e.g., Issacharoff, *Judging Politics*, *supra* note 130, at 1696–98; Michelle H. Browdy, Note, *Computer Models and Post-Bandemer Redistricting*, 99 YALE L.J. 1379 (1990).

<sup>329</sup> See, e.g., Michael S. Kang, *Derigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 668–69 (2006).

The balance of this section examines how courts might go about reviewing the adequacy of a handful of examples of potential safe-harbor processes.

1. *Independent Districting Commissions.* — Many states use commissions as part of their redistricting processes, but very few of these commissions would pass muster as a process safe harbor. Most commissions were created in the 1960s or 1970s because state legislatures failed to draw any new districts.<sup>330</sup> They were designed to avoid legislative gridlock by either centralizing redistricting responsibility in the commission or allowing the legislature to act first and then to hand redistricting off to a commission if gridlock occurred.<sup>331</sup> It was never the goal of these commissions to remove politics from the process or to eliminate the legislators' conflicts of interest, but simply to ensure that redistricting actually occurred.<sup>332</sup> As a result, members of these commissions typically are highly partisan and maintain close ties with the legislators.<sup>333</sup>

It is only recently that states have begun to experiment with truly *independent* districting commissions.<sup>334</sup> These commissions have been established almost exclusively through the initiative process, thereby bypassing the conflicted legislature.<sup>335</sup>

In Arizona, for example, a ballot initiative led to a state constitutional amendment creating an independent districting commission and placing strict restrictions on who could be a commissioner.<sup>336</sup> Under the law, commissioners cannot have served in or been a candidate for public office in the preceding three years, must be vetted by the state's commission on appellate court appointments, and are barred from serving in public office or as a paid lobbyist for three years thereafter.<sup>337</sup> The majority and minority leaders in each house of the state legislature each select one commissioner from the pool of prevetted candidates and then those four commissioners select a fifth who will chair the commission.<sup>338</sup> The Arizona Constitution also specifies substantive criteria for the commission to follow, including equipopulation, compliance with the U.S. Constitution and the Voting

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<sup>330</sup> McDonald, *Redistricting*, *supra* note 38, at 236.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 236–37.

<sup>334</sup> For the 2010 round of redistricting, six states — Alaska, Arizona, California, Idaho, Montana, and Washington — used more or less independent citizen districting commissions. See Levitt, *supra* note 327, at 534–36.

<sup>335</sup> McDonald, *Redistricting*, *supra* note 38, at 237.

<sup>336</sup> See ARIZ. CONST. art. IV, pt. 2, § 1 (codifying Proposition 106, available at <http://www.azsos.gov/election/2000/info/pubpamphlet/prop2-C-2000.htm>).

<sup>337</sup> *Id.* § 1(3)–(4), (13).

<sup>338</sup> *Id.* § 1(6), (8).

Rights Act, compactness, contiguity, respect for “communities of interest” and geographic features, and, most interestingly, a preference for competitive districts where they would create “no significant detriment” to the other goals.<sup>339</sup> Commissioners are forbidden from considering the location of incumbent or candidate residences, and in the initial process of drawing districts, they may not use party registration or voting history data, though they may use such data to test their plan for compliance with the substantive redistricting goals.<sup>340</sup> Commission meetings must be open to the public, and draft maps are subject to a public notice-and-comment requirement.<sup>341</sup> The Arizona Constitution guarantees independent funding for the commission and support staff, so it is not dependent on legislative appropriations, and the commission is disbanded once it has fulfilled its function.<sup>342</sup>

Likewise, in a pair of ballot initiatives in 2008 and 2010, California adopted an independent Citizens Redistricting Commission for drawing state and congressional districts.<sup>343</sup> As in Arizona, there are strict eligibility criteria for commissioners, barring applicants who have, within the previous ten years, run for elective office, served on a party central committee or as a paid staffer to a candidate or party, been registered as a lobbyist, or donated \$2000 or more to any candidate for public office.<sup>344</sup> And commissioners are prohibited from holding elective office for ten years after appointment to the commission, and from holding any appointed public office, working as a paid legislative staffer, or registering as a lobbyist for five years.<sup>345</sup> California’s commissioner selection process provides more independence from the legislature than Arizona’s process. The independent State Auditor’s office screens qualified applicants for analytical skills, impartiality, and diversity, and then selects twenty Democrats, twenty Republicans, and twenty people who are not members of either party as nominees.<sup>346</sup> The majority and minority leaders in each house of the state legislature are each allowed to strike two nominees from each pool.<sup>347</sup> The first eight commissioners (three Democrats, three Republicans, and

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<sup>339</sup> *Id.* § 1(14).

<sup>340</sup> *Id.* § 1(15).

<sup>341</sup> *Id.* § 1(12), (16).

<sup>342</sup> *Id.* § 1(18)–(19), (23).

<sup>343</sup> See California Proposition 11: Voters First Act (2008); California Proposition 20: Voters First Act for Congress (2010).

<sup>344</sup> CAL. GOV’T CODE § 8252(a)(2)(A) (West 2012); see also *Vandermost v. Bowen*, 269 P.3d 446, 455–56 (Cal. 2012); Justin Levitt, *California*, ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/states-CA.php#institution> (last visited Dec. 1, 2012).

<sup>345</sup> CAL. CONST. art. XXI, § 2(c)(6); see also STATE OF CAL. CITIZENS REDISTRICTING COMM’N, FINAL REPORT ON 2011 REDISTRICTING 2 (2011), available at [http://wedrawthelines.ca.gov/downloads/meeting\\_handouts\\_o82011/crc\\_20110815\\_2final\\_report.pdf](http://wedrawthelines.ca.gov/downloads/meeting_handouts_o82011/crc_20110815_2final_report.pdf).

<sup>346</sup> CAL. GOV’T CODE § 8252(b), (d).

<sup>347</sup> *Id.* § 8252(e).

two neither) are then chosen at random; those eight go on to choose six colleagues (two Democrats, two Republican, and two neither) from the remaining nominees for a total of fourteen commissioners.<sup>348</sup> District maps must be approved by a majority of each class of commissioner (three Democrats, three Republicans, and three neither)<sup>349</sup> and are subject to a public referendum if challenged by a petition signed by five percent of the number of voters in the last gubernatorial election.<sup>350</sup> If the commission deadlocks and fails to produce a map or if the map is overturned by referendum or legal challenge, redistricting responsibility is not returned to the legislature; rather, the California Supreme Court would then appoint special masters to draw the maps.<sup>351</sup>

California also specifies substantive criteria for the commission to follow, including equipopulation, compliance with the Voting Rights Act, contiguity, respect for political subdivisions, compactness, and respect for communities of interest.<sup>352</sup> Unlike Arizona's plan, the California commission is not required to attempt to create competitive districts. The commission is, however, barred from considering incumbent or candidate residences and from drawing districts to favor or discriminate against any incumbent, candidate, or party.<sup>353</sup> The commission is guaranteed funding to hire staff, legal counsel, and consultants as needed, and it is required to hold open hearings, encourage public participation, and issue public reports explaining its decisions.<sup>354</sup>

When reviewing a districting decision made by a commission, the court should focus primarily on the independence of the commissioners and the fairness of the process, not on the ultimate outcome. This approach tracks the function that courts typically play in reviewing the approval of a conflicted transaction by disinterested directors. As long as the directors were truly independent, were adequately informed, and used fair procedures, courts apply the deferential business judgment rule to their substantive decisions.

In evaluating the independence of commissions, important factors for courts to consider include how commissioners are appointed, who is eligible to be a commissioner, whether commissioners are barred from seeking public office or lobbying positions after their tenure, whether the commission was provided with sufficient funding and information, and whether commissioners are otherwise beholden to incumbents or political parties. Courts should also evaluate the fairness

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<sup>348</sup> *Id.* § 8252(f)–(g).

<sup>349</sup> CAL. CONST. art XXI, § 2(c)(5).

<sup>350</sup> *Id.*; see also *id.* art. II, § 9(b).

<sup>351</sup> *Id.* art. XXI, §§ 2(j), 3(b)(3).

<sup>352</sup> *Id.* § 2(d).

<sup>353</sup> *Id.* § 2(e).

<sup>354</sup> *Id.* § 2(h); CAL GOV'T CODE §§ 8253, 8253.6 (West 2012).

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of the commission's procedures, considering transparency and faithfulness to its own rules. Commissions whose members are chosen by, or beholden to, the legislature — like the majority of districting commissions currently in existence — do little to cleanse the taint of self-dealing and should not be entitled to deference.

The idea is not to exclude people with political opinions or any party affiliation from commissions, but to exclude people who are part of, or beholden to, the legislature or party machine. While this will necessarily require a flexible inquiry, courts should generally focus on procedural criteria, such as commissioner selection methodology. Obviously, commissioners chosen directly by the legislature will generally not be sufficiently independent. And, because the influence of political parties can cut across departments of government, internal party leadership can be presumed to have connections with incumbent legislators, as can other partisan state officials. Accordingly, commissions composed of, or selected by, these insiders should also be suspect. Likewise, evidence that commissioners sought or obtained *quid pro quo*s from legislators (such as patronage appointments or lobbying access) would also undermine their independence.

Once a court has determined that the commission is independent and its processes are fair, the court should apply a deferential standard of review to the commission's substantive districting decisions. It is not the job of the courts to make first-order value judgments about how competitive districts should be or what degree of incumbent protection is appropriate. Perhaps an excess of competitive districts provides inferior representation to diverse communities of interest. Perhaps some degree of incumbent protection is desirable to promote stability. We cannot trust incumbents to make these decisions because of the conflicts of interest they face, but once the court has assured itself that the decision was made free from incumbent influence, it should defer to the value judgments of the commission. If the outcome resembles the side effects of incumbent self-dealing — like the creation of uncompetitive, incumbent-protecting districts — that may be evidence that the commission lacks independence and should prompt further investigation into the process, but it should not be an independent reason to invalidate a commission-drawn districting plan.

The danger with treating independent districting commissions as safe harbors is that they might be captured by political insiders beholden to incumbents. A captured commission would be little better than leaving line drawing in the hands of the legislatures themselves. But capture by insiders is exactly what courts are looking for when they review the commission process for independence. If a plaintiff challenging a commission's districting decisions could show that the commissioners themselves lacked independence or that they relied on staff or consultants beholden to incumbents or party insiders, the process would not cleanse the taint of self-dealing and a reviewing court

should not defer to its outcome, proceeding instead to scrutinize the entire fairness of the districting plan.<sup>355</sup>

California's Citizens Redistricting Commission measures up fairly well against these criteria. The eligibility requirements, vetting, and randomized selection process for commissioners ensure that the commission is not beholden to the legislature or political parties. Independent funding and transparent procedures that invite public participation help ensure that the process is well informed, fair, and adequate. And the temporary bar on future office-holding or lobbying reduces the chances that commissioners will compromise their independence in search of patronage. If California's procedures are followed, districting plans adopted by the commission should be entitled to deference by a reviewing court.<sup>356</sup>

Arizona's independent districting commission, while still a vast improvement over the way most states go about redistricting, is less robust as a safe harbor than California's process. The problem is that the leaders of the state legislature appoint a majority of the Arizona commissioners. Although the tiebreaking fifth commissioner is independently selected, the four commissioners selected by the legislature could, in theory, collusively agree on a bipartisan gerrymander. Arizona does have several mechanisms in place to ensure the independence of the commissioners — namely strict eligibility criteria, the vetting process, and the temporary prohibition on holding public office or lobbying — and the limits on the use of partisan data in the mapping process, backed by transparency and public participation requirements, make it less likely that the commissioners would attempt such an incumbent-friendly gerrymander. But a reviewing court must assure itself that the commissioners are not beholden to the incumbent legislators before it can safely defer to the commission's districting plan.

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<sup>355</sup> One suggestion to guard against capture has been to use *advisory* commissions to propose nonbinding districting plans that the legislature could then vote up or down without amendment. See Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366 (2005). Courts might approach an advisory commission's recommendations like those of a special committee in a transaction with a controlling shareholder, giving them some deference if the legislature goes along, but treating them as evidence of self-dealing if the legislature rejects them. But a purely advisory process would not warrant business judgment rule-type deference to a decision ultimately made by a conflicted legislature.

<sup>356</sup> See Kogan & McGhee, *supra* note 56, at 7–26 (finding that the commission's 2011 districts measured up well against districting criteria specified by the California Constitution, were significantly more compact than previous districts, and are likely to produce a modest increase in competition); cf. *Vandermost v. Bowen*, 269 P.3d 446, 485 (Cal. 2012) (holding that the commission-drawn map for state Senate will serve as the interim map in the event that the referendum challenging the map qualifies for ballot); *id.* at 486–88 (Liu, J., concurring) (criticizing the majority for retaining discretion to evaluate the substantive merits of proposed interim maps).



Thus, in reviewing a challenge to the competitiveness of the Arizona commission's map in the 2000 round of redistricting, the Arizona Supreme Court had the right instinct in focusing on the commission's compliance with its mandated procedures and deferring to the commission's judgment on how competitive districts ought to be, rather than attempting to make such a judgment itself.<sup>357</sup> But under a fiduciary model, the court should have first assured itself that the commission was truly independent and operated free from incumbent capture. While the appropriate degree of competitiveness is properly a decision for the commission that the court lacks institutional competence to make,<sup>358</sup> the claim that the commission ignored this particular criterion — one that looks like the expected result of capture — should have raised red flags and prompted further judicial inquiry into the commission's independence.<sup>359</sup>

2. *Automated Computer Programs.* — Another potential safe harbor process would be using automated computer programs to draw districts.<sup>360</sup> Computer programs are no panacea; the output of a computer program is entirely dependent on the input. A computer program that used only census data (and no political data) to draw equipopulous districts would eliminate the conflict of interest inherent in incumbents drawing districts,<sup>361</sup> but the random outcome would have difficulty passing muster under the Voting Rights Act's mandate to create majority-minority districts.<sup>362</sup> Once we go beyond completely apolitical data, the questions that emerge — what criteria are used to

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<sup>357</sup> See *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 686–89 (Ariz. 2009); see also *id.* at 690 (Hurwitz, J., concurring in part and concurring in the judgment) (“[O]ur substantive deference in review of the end product is, in my mind, a corollary of the Commission’s adherence to the Constitution’s procedural mandates.”).

<sup>358</sup> See *id.* at 687, 689 (majority opinion); see also *id.* at 690 (Hurwitz, J., concurring in part and concurring in the judgment) (“[T]he people necessarily recognized that the process involved a series of value judgments; they left those judgments to the Commission, but required that they be made through a specific process, so as to optimize consideration of the listed constitutional goals and minimize the partisan concerns that traditionally dominate redistricting efforts.”).

<sup>359</sup> The Arizona Supreme Court has subsequently taken an active role in protecting the commission from political interference. In November 2011, the court overturned an attempt by the governor (with the support of a party-line vote in the state Senate) to remove the commission’s independent chairwoman. The court held that the governor lacked the power to impeach the chairwoman without making a showing of “substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.” *Ariz. Indep. Redistricting Comm’n v. Brewer*, 275 P.3d 1267, 1273 (Ariz. 2012); see Mary Jo Pitzl, *Court Orders Reinstatement of Redistricting Official*, ARIZ. REPUBLIC (Nov. 18, 2011), <http://www.azcentral.com/news/election/azelections/articles/2011/11/17/20111117arizona-court-hears-challenge-redistricting-ouster.html>.

<sup>360</sup> See, e.g., Issacharoff, *Judging Politics*, *supra* note 130, at 1695–1702; Browdy, *supra* note 328, at 1384–89. For a discussion of the feasibility and computational challenges of using fully automated programs to draw districts, see Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 DUKE J. CONST. L. & PUB. POL’Y 69, 80–88 (2010).

<sup>361</sup> See Altman & McDonald, *supra* note 360, at 75–76.

<sup>362</sup> See 42 U.S.C. § 1973 (2006); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

design the program, the relative weight of those criteria, and what data can be used as inputs — involve the sorts of first-order decisions for which we think incumbents untrustworthy and courts incapable. Therefore, automated computer programs may work best when used in conjunction with another safe harbor process, such as an independent commission.

Even when used alone, automated computer programs have several advantages over redistricting through the normal legislative process. Computer programs can increase the transparency of redistricting decisions.<sup>363</sup> Because the criteria used in redistricting decisions must be coded explicitly into the program in advance, the process of redistricting becomes reviewable.<sup>364</sup> The decisions and tradeoffs made in determining the criteria for redistricting, along with any incumbent self-dealing, can be exposed to meaningful public and judicial scrutiny.<sup>365</sup> Automated computer programs can also be used to force decision-makers to precommit to explicitly stated aims of redistricting.<sup>366</sup> If line drawers had to reduce their redistricting objectives to a computer program before census data became available and live with the districts drawn by the computer program, they would be forced to debate the merits of redistricting principles before they could know how the outcomes would affect them.<sup>367</sup> Of course, this assumes that the political insiders could not accurately predict the census data in advance, a strained assumption given the stakes of redistricting and the forecasting abilities of modern political consultants. On the other hand, recent experiments with “open” redistricting, where the public is given access to redistricting software and encouraged to draw their own plans, offer opportunities for increased transparency and public participation and may help shame legislators into avoiding severe gerrymanders.<sup>368</sup>

In short, automated computer programs offer the potential for increasing transparency and forcing debates over districting criteria before consequences can be known with certainty. But because first-order decisions must be made in designing the programs, they are inadequate by themselves to cleanse the taint of incumbent self-dealing. Combined with other safe harbor processes that take the responsibility

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<sup>363</sup> Altman & McDonald, *supra* note 360, at 72, 102–05.

<sup>364</sup> Browdy, *supra* note 328, at 1386.

<sup>365</sup> *Id.* at 1389.

<sup>366</sup> See Issacharoff, *Judging Politics*, *supra* note 130, at 1699; cf. Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567 (1996) (discussing more generally the mechanisms by which politicians might make enforceable promises in advance to their constituents).

<sup>367</sup> Issacharoff, *Judging Politics*, *supra* note 130, at 1699; cf. Adam Cox, *Designing Redistricting Institutions*, 5 ELECTION L.J. 412, 418–21 (2006) (arguing that temporal veil rules that force legislators with incomplete information to commit to districting decisions that will be implemented after a time lag can help limit gerrymandering).

<sup>368</sup> See Altman & McDonald, *supra* note 360, at 98–101.

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for determining program design criteria out of the hands of legislatures or courts, automated computer programs appear promising.

3. *Ratification by Referendum.* — Perhaps the most straightforward, and certainly the most democratic, of the possible safe harbors, ratification by referendum is also one of the most problematic. It is elementary in corporate law that the taint of director self-dealing can be cleansed through ratification by a shareholder vote as long as the conflict of interest is fully disclosed and the shareholders are adequately informed before the vote.<sup>369</sup> The same should be true in the context of redistricting. Surely, it would be futile to consider mere reelection of incumbents from manipulated districts to be ratification of the very manipulation of those districts. But if the legislature draws a map and then puts it to the people in a statewide referendum, it is difficult to argue that principals have not waived the conflict of interest if the majority approves the proposed districting plan. Such a process would lend democratic legitimacy to a districting plan, as the principals themselves would make the necessary first-order political decisions, instead of relying on conflicted legislators or post hoc review by unelected judges.

The problems with ratification by referendum, however, stem from the collective action problem inherent in having diffuse principals. Voters are (rationally) unlikely to be informed about districting issues or able to understand the consequences of a proposed map. Framing effects may allow insiders to manipulate the outcome.<sup>370</sup> Ratification also runs the risk that the voters are presented with a *fait accompli*. If the legislature presented a map for an up-or-down vote and offered no alternative districting plan, ratification of the only option would lend little legitimacy. Because of the constitutional requirement of decennial redistricting, a vote against the plan would not be a vote for the status quo; it would be a vote to allow the legislature simply to propose another self-serving plan. Collective action problems would keep voters from effectively organizing to amend the proposed plan even if the legislature gave them the option.

Ratification by referendum might work if there were certain safeguards in place. First, courts would have to ensure that the conflict of interest was fully disclosed and the people were adequately informed about the consequences of districting. Second, the courts would have to ensure that the people were presented with a meaningful choice. Two similar plans drawn by the legislature would not suffice. Mean-

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<sup>369</sup> See, e.g., *In re Wheelabrator Techs., Inc. S'holders Litig.*, 663 A.2d 1194, 1200–05 (Del. Ch. 1995).

<sup>370</sup> See generally Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981) (discussing how the presentation of a decision can affect the way individuals perceive potential outcomes).

ingful choice could be infused into the process in several ways. Courts could make clear that if the legislature's initial plan failed to garner enough support in the referendum, it would not be returned to the legislature to try again; districts would instead be drawn by a court. This strategy should force legislatures to propose maps that will garner public support rather than maps that serve only entrenchment interests. Another option to ensure meaningful choice would be to combine the ratification model with an automated computer program. Proposed districting criteria could be put to the electorate before redistricting, with only those criteria approved by referendum included in the computer redistricting program. But because of the difficulties inherent in translating voter-approved criteria into an automated computer program,<sup>371</sup> careful scrutiny of the programming process would be necessary to prevent manipulation for entrenchment purposes.

*Lucas v. Forty-Fourth General Assembly*<sup>372</sup> provides an interesting case study into ratification by referendum. There, Colorado had adopted by popular initiative an apportionment scheme that provided greater representation in the state legislature's upper house to less populous rural districts. The Supreme Court invalidated the plan under the Fourteenth Amendment, holding that an "individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate."<sup>373</sup> At first blush, *Lucas* seems wrongly decided on a fiduciary theory. There was no entrenchment concern in *Lucas*. An overwhelming majority of voters, including a majority of voters in each county, approved the apportionment scheme.<sup>374</sup> Any taint of self-dealing appeared to be cleansed by the apportionment plan's ratification through popular referendum.<sup>375</sup> But a closer reading of the opinion reveals that the Court was concerned with the process of the referendum and therefore not confident that a fully informed majority had made a "definitive choice" in favor of the apportionment plan.<sup>376</sup> Structural defects in the decisionmaking process rendered the referendum insufficient to cleanse the taint.<sup>377</sup> The result in *Lucas* may still be questionable, but the case illustrates that the Court is capable of recognizing the legitimacy of ratification by referendum as a safe harbor process and evaluating its efficacy against manageable standards.

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<sup>371</sup> See Altman & McDonald, *supra* note 360, at 88–91.

<sup>372</sup> 377 U.S. 713 (1964).

<sup>373</sup> *Id.* at 736.

<sup>374</sup> *Id.* at 717–18, 731.

<sup>375</sup> See *id.* at 719–21.

<sup>376</sup> *Id.* at 731–32.

<sup>377</sup> *Id.* at 732 (“[T]he assumption of the court below that the Colorado voters made a definitive choice between two contrasting alternatives . . . does not appear to be factually justifiable.”); see also Charles, *supra* note 13, at 669–70.

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Courts should be wary of ratification by referendum as a safe harbor because of the potential that incumbents will manipulate the result by taking advantage of the collective action problems faced by the people. But with the proper judicial supervision, ratification may suffice to cleanse the taint of incumbent self-dealing in redistricting.

#### CONCLUSION

This Article represents a first step toward a workable approach for taking seriously the theory of fiduciary government underlying our constitutional arrangement. Treating politicians as fiduciaries — and recognizing their corresponding fiduciary duties — has the potential to gain traction on some of the more perplexing structural pathologies of our representative democracy. And by drawing on the lessons from private law enforcement of fiduciary duties, courts can adopt strategies to give real force to this important constitutional value, without the need to make the types of decisions for which they have questionable competence or legitimacy.

In no area are the conflicts of interest as stark or the existing structural protections against self-dealing as deficient as in redistricting. Thus, the fiduciary model has natural application to gerrymandering claims. Courts should not throw up their hands in the face of agent disloyalty simply because the substantive choices in redistricting are inherently political. Rather, by looking to the way that private fiduciary law treats similar agency problems, courts can set up default rules of judicial review that serve as powerful incentives for political actors to create process-based approaches to controlling incumbent self-dealing. This approach keeps courts out of the business of making first-order judgments about the allocation of political power and legislators out of the business of manipulating district lines to their own advantage.