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Politicians as Fiduciaries

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When incumbent legislators draw the districts from which they are elected, the conflict of interest is glaring: they 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—decision 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 should serve 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 they are institutionally well-suited.

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POLITICIANS AS FIDUCIARIES

With the 2010 census behind us, the decennial process of redistricting is under way. 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.

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 is at a loss as to what to do with claims that districts were gerrymandered for political ends. The Court simply threw up its hands the last time around in Vieth v. Jubilirer. 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. 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. The doctrine on political gerrymandering thus remains in limbo (the only thing that is clear is Justice Kennedy’s invitation to 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 and more cases will surely follow.

Academic commentary has identified two primary strategies for dealing with gerrymandering: to either (1) identify a workable substantive standard against which to measure political gerrymanders or (2) 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.

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2 Id. at 281 (Scalia, J., plurality op.).
3 Id. at 311 (Kennedy, J., concurring).
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 include partisan bias,\(^7\) district compactness,\(^8\) partisan intent,\(^9\) or faithfulness to traditional districting criteria.\(^10\) The latest proposal comes from Nicholas Stephanopoulos, who 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.\(^11\) Stephanopoulos then offers a sophisticated quantitative technique for measuring the “spatial diversity” or homogeneity of districts.\(^12\)

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.\(^13\) 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:\(^14\) Are

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\(^{14}\) Colgrove v. Green, 328 U.S. 549, 552-56 (1946) (Frankfurter, J.) (cautioning that such questions are “not meet for judicial determination”); 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.”).
courts institutionally competent to handle these claims?\footnote{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).} Drawing districts inherently requires first-order decisions about the proper allocation of political power. As the Court explained this term in \textit{Perry v. Perez}, this is not a task for which unelected judges are well-suited.\footnote{565 U.S. slip op. at 4 (“[Experience has shown the difficulty of defining neutral principles in this area, for redistricting ordinarily involves criteria and standards that have been weighed 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.”).} 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. Indeed, \textit{Vieth} is merely a manifestation of decades of review of political gerrymandering claims, during which time the Court has demonstrated its inability to apply any substantive standard for determining when a gerrymander crosses the constitutional line.\footnote{Since the Court first declared political gerrymandering claims justiciable in \textit{Davis v. Bandemer}, 478 U.S. 109 (1986), “no final court decision anywhere in the country has invalidated a single districting plan under \textit{Bandemer}, despite literally hundreds of 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. & POLICY REV. 75, 78 (2007).}

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.\footnote{See Samuel Issacharoff, Gerrymandering and Political Cartels, 116 HARV. L. REV. 593 (2002) (hereinafter Issacharoff, Cartels). Issacharoff’s approach got little traction in \textit{Vieth}, as even the dissenters declined to embrace it. See 541 U.S. at 350 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.”).} Indeed, the Court was not even willing to adopt a prophylactic rule against mid-decade re-redistricting with no justification other than partisan gain.\footnote{See LULAC, 548 U.S. at 416-419; cf. Richard H. Pildes, The Constitution and Political Competition, 30 NOVA L. REV. 253, 271-76 (2006).} 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 to independent districting commissions.20

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 Market: Partisan Lockup of the Democratic Process*, 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.21 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 control to ensure that managers face competitive pressures that will discipline them to act in the interest of shareholders.22

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.23 And they have done too little to lay a strong constitutional foundation in terms the Court can accept.24 Moreover, by focusing on competition as the central structural value that courts should vindicate, they invite questions about how competitive districts *ought* to be25 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.26

This Article attempts to provide a more solid grounding for a primarily process-based approach to controlling incumbent self-dealing in redistricting—one that corresponds to a deeper intuition about conflicts of interest reflected in established bodies of private law, finds ample support in the history and political theory that animated the adoption of the U.S.

20 See AZ. CONST. art. IV, pt. 2 § 1; CAL. CONST. art. XXI; see also Cal. Gov’t Code §§ 8251-8253.6.
22 Id. at 647-49.
23 See Charles, supra note 13, at 605, 655-58, 667.
25 See, e.g., Persily, supra note 6, at 679-80.
26 See, e.g., Stephanopoulos, supra note 11, at 16-17. To be clear, neither Issacharoff nor Pildes has advocated an approach that would maximize the competitiveness of all districts.
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 observed, the same problem is present in corporations all the time. 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 shareholders they represent. 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 and that we should take seriously their fiduciary duty of loyalty to the people they represent. 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. 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. A

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27 Issacharoff & Pildes, supra note 21, at 646-47.
28 Id. at 647-48.
growing body of scholarship has argued that the Constitution in general, and several of its specific clauses in particular (including General Welfare, Necessary and Proper, Due Process, and Equal Protection), should be interpreted with reference to fiduciary principles and that government officials, such as agency administrators, operate under fiduciary obligations. But, to date, this scholarship has largely ignored the area of law where the fiduciary model would seem to have its most natural application—the field of election law.

Incumbent control over the political 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, such self-dealing behavior violates their fiduciary duty of loyalty and, if we take the fiduciary model of government seriously, causes 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—i.e., 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, as well as other aspects of legislative decision making. To name a few: voter qualifications can be used to keep people likely to support challengers from even going to the polls, ballot-access rules can increase barriers to entry for new parties or challengers, and campaign finance regulations can restrict challengers’ abilities to amass the funding needed to overcome the incumbents’ advantages in name recognition, visibility, and access to

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government perks. This Article, however, will limit its focus to gerrymandering because it 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 transactions unless the 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 their inquiry 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, decision makers.

As in corporate law, when incumbent decisions are tainted by a conflict of interest (like 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 like it does in corporate law, the threat of searching judicial review should serve as 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 they 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

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institutional incompetence of courts in making business decisions. Drawing on constitutional history and political theory, Part III argues that political representatives stand in a fiduciary relationship to the governed, and that they breach their duty of loyalty when they pass laws manipulating the processes by which they are elected. 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”

   A. The Practice of Gerrymandering

   The Constitution places the authority for conducting elections for the U.S. House of Representatives—including determining how districts are to be drawn—with the state legislatures, although Congress can override the state legislatures by law. 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. In most states, the state legislatures draw their own districts, as well as congressional districts, through the normal legislative process. Placing the responsibility to draw districts in the

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33 ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 462 (1968).
34 U.S. CONST. art. I § 4 (“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 (“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 . . . .”).
35 For example, the Constitution requires that all districts have equal populations. See Reynolds v. Simms, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964). And the Voting Rights Act requires, in certain circumstances, that district be drawn to bring together a majority of minority voters. See, e.g., Thornburg v. Gingles, 748 U.S. 30 (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 D.C. District Court. See 42 U.S.C. § 1973c; Beers v. United States, 425 U.S. 130 (1976).
36 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 38 states and state legislative districts in 26 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.
hands of the legislators who 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.

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, having a sufficient number of commissioners appointed by, or beholden to, the party. In a partisan gerrymander, the party in control manipulates district lines to maximize the number of legislative seats it will win. This is done by “cracking” districts where the party out of power enjoys a majority and dispersing voters of that 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. Another technique is to “stack” districts together to create a multimember district where the party in power has a comfortable majority and then switch to at-large elections. 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 Samuel Issacharoff and Pamela Karlan have termed “shacking.”

A well-crafted partisan gerrymander maximizes the number of districts where the party in control enjoys a slim but comfortable majority and

Id. at 236-37. Only a handful of states have attempted to remove political considerations from the districting process by adopting more or less independent commissions (such as Arizona and California). Id. at 237-40. 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. Id. at 237. Not all states have initiative processes available and the overwhelming majority of states that retain partisan control over redistricting show that reform is unlikely to come from the legislatures themselves. See Michael P. McDonald, A Comparative Analysis of US State Redistricting Institutions in the United States, 2001-02, 4 STATE POLITICS & POLICY QUARTERLY 371-96 (2004) (hereinafter McDonald, Comparative Analysis) for a comprehensive overview of state redistricting institutions.

37 McDonald, Redistricting, supra note 36, at 230.
40 Issacharoff & Karlan, supra note 38, at 552-53; see also Bruce E. Cain, Assessing the Partisan Effects of Redistricting, 79 AM. POL. SCI. REV. 320 (1985).
wastes as many votes for the party out of power as possible by packing them into supermajority districts.\footnote{See, e.g., Owen & Grofman, supra note 38.}

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 are forced to negotiate and compromise to draw districts.\footnote{McDonald, Redistricting, supra note 36 at 229.} This can occur when control of the state legislature is closely divided or the governor is of a different party than the legislative majority.\footnote{Id.} It can also occur when supermajority voting rules are in place for redistricting decisions.\footnote{Id.} Instead of attempting to maximize one party’s power at the expense of the other, incumbents of both parties collude to draw safe districts for everybody.\footnote{See Issacharoff, Cartels, supra note 18, at 618.} Incumbents trade supporters to shore up “their” districts and increase their expected margins of victory.\footnote{See McDonald, Redistricting, supra note 36 at 229.} 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 strength 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,\footnote{Davis v. Bandemer, 478 U.S. 109, 152 (1986) (O’Connor, J., concurring) (citing BRUCE CAINE, THE REAPPORTIONMENT PUZZLE 151-59 (1984)).} the bipartisan gerrymander tends to be self-reinforcing, locking in the status quo distribution of power between the two major parties.\footnote{See Issacharoff, Cartels, supra note 18, at 598-600.}

\section*{B. The Effects of Gerrymandering on Legitimacy and Competition}

Both forms of gerrymanders cause serious democratic harms. First, incumbents undermine the legitimacy of election outcomes when they manipulate district lines for their own advantage. Because insiders control the mechanisms regulating the political process, they can use the power of the state to distort the outcomes of elections by manipulating the rules and institutions that govern them.\footnote{Charles, supra note 13, at 604-05.} This distortion of election outcomes by self-interested political actors undermines the democratic legitimacy of those institutions themselves and the outcomes they produce.\footnote{Id. at 607-08, 615-16.}

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 majority of both congressional and state legislative elections.\textsuperscript{51} The absence of competitive elections reduces ex post accountability of representatives,\textsuperscript{52} reduces legislative responsiveness to shifts in voter preference,\textsuperscript{53} and may contribute to the election of more polarized candidates.\textsuperscript{54}

\textsuperscript{51} See Gary C. Jacobson, \textit{Competition in U.S. Congressional Elections}, in \textit{The Marketplace of Democracy} 27, 27-31 (Michael P. McDonald & John Samples, eds. 2006); Richard G. Niemi et al., \textit{Competition in State Legislative Elections}, 1992-2002, in \textit{The Marketplace of Democracy}, supra, at 53, 56, 64-67 (finding that in single-member-district state-lower-houses elections from 1992 to 2002 the median incumbent reelection rate has been over 90% with approximately 75% of incumbents winning in landslides). Competition in legislative elections has been declining for several decades, and gerrymandering is certainly not the only, or even the dominant factor, in that decline. See, e.g., Richard H. Pildes, \textit{Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America}, 99 CAL. L. REV. 273, 309-12 (2011) (hereinafter Pildes, \textit{Hyperpolarized Democracy}). For example, Senate elections, which cannot be gerrymandered, remain substantially more competitive than House elections, but have also seen a parallel decline in competition. Jacobson, supra, at 46. Recent empirical literature has questioned the causal connection between gerrymandering and the increase in incumbent reelection rates over the past several decades, but it does not question that incumbent-protecting gerrymandering contributes to high reelection rates. See, e.g., John N. Friedman & Richard T. Holden, \textit{The Rising Incumbent Reelection Rate: What's Gerrymandering Got to Do With It?}, 71 J. POLITICS 593, 593-95 & tbl.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 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. Granger, \textit{Redistricting and Polarization: Who Draws the Lines in California?}, 53 J. L. & ECON. 545, 555-57 (2010).

\textsuperscript{52} Issacharoff, \textit{Cartels}, supra note 18, at 599-600; Issacharoff, \textit{Why Elections?}, supra note 24, at 685-86. Indeed, the major advantage of single-member districts over proportional representation systems that might more accurately represent a society’s diverse interests is the ex post ability to hold representatives accountable for their performance in office. See id. at 694; Issacharoff & Pildes, supra note 21, at 678; Samuel Issacharoff, \textit{Supreme Court Destabilization of Single Member Districts}, 1995 U. CHI. LEGAL F. 205, 229-30, 238-39 (1995).

\textsuperscript{53} See Samuel Issacharoff & Jonathan Nagler, \textit{Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections}, 68 OHIO ST. L.J. 1121, 1129 (2007) (finding that in 2004 congressional election it would have taken a 4.9% shift in the national two-party vote in favor of the minority party for them 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 5 seats between 1946 and 1998).

\textsuperscript{54} See Samuel Issacharoff, \textit{Collateral Damage: The Endangered Center in American Politics}, 46 WM. & MARY L. REV. 415, 427-28 (2004); see also Granger, supra note 51, at 548, 559 (finding that legislatively drawn districts in California are associated with increased polarization compared with districts drawn by court-appointed special masters); cf. Pildes, \textit{Hyperpolarized Democracy}, supra note 51, at 308-15 (suggesting that while the safest district 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
Of course it would be neither possible, nor necessarily desirable,\textsuperscript{55} to make all districts competitive in our predominantly single-member-district, winner-take-all system because political preferences are often strongly correlated with geography.\textsuperscript{56} 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.\textsuperscript{57}

\textbf{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.\textsuperscript{58} And, with respect to state legislative districts, it is clear today that Congress can go to considerable lengths to supervise and regulate line drawing.\textsuperscript{59} The theory was that the evidence to support a linkage between polarization and safe election district,” and the causes of polarization likely lie elsewhere).

\textsuperscript{55} See, e.g., Persily, \textit{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 number of experienced legislators)

\textsuperscript{56} See Pildes, \textit{Hyperpolarized Democracy, supra} note 51, at 312.

\textsuperscript{57} But see Persily, \textit{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 H. HASEN, \textit{THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE} (2003); Bruce E. Cain, \textit{Garrett’s Temptation}, 85 VA. L. REV. 1589 (1999); Richard H. Hasen, \textit{The “Political Market” Metaphor and Election Law: A Comment on Issacharoff and Pildes}, 50 STAN. L. REV. 719 (1998); Schuck, \textit{supra} note 6; Lowenstein & Steinberg, \textit{supra} note 6.


state and national legislatures were independent actors with different interests because they were responsive to different constituencies; therefore they could serve as effective checks on each other’s self-interested behavior. 60 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. 61

Madison and the Federalists worried about localized factions gaining control of the instrumentalities of government. 62 National political parties are “superfactions” whose influence cross state lines and align the interests of large numbers of people, providing vehicles for concerted action at all levels of government. 63 In a world with national political parties, congressmen 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 undermines the structural mechanism that the Framers thought would provide an independent check on incumbent self-dealing. 64
Because of their interdependence, we cannot count on the state legislators to draw congressional districts without taking the interests of congressmen into consideration; nor can we count on Congress to provide effective supervision of state-legislative redistricting.\textsuperscript{65}

Such concerns are borne out in the real world. 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.\textsuperscript{66} To take a high profile example, former House Majority Leader Tom DeLay is widely credited with orchestrating the Republican gerrymander in Pennsylvania that formed the controversy in \textit{Vieth}.

McDonald argues that these practices reflect a widely followed norm that “legislators should draw their own districts.”\textsuperscript{68}

\begin{quote}
\textbf{D. The Justiciability of Political Gerrymandering Claims: A Search for Standards}
\end{quote}

Although the Supreme Court has recognized, at least in the abstract, that gerrymandering works a democratic harm,\textsuperscript{69} 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.

\textsuperscript{65} See Pildes, \textit{Foreword}, supra note 58, at 81-82.

\textsuperscript{66} McDonald, \textit{Comparative Analysis}, supra note 36 at 379-80.

\textsuperscript{67} See Pildes, \textit{Foreword}, supra note 58, at 82 & n.221 (“National party leaders were reported to have played a central role in the recent partisan redistrictings and gerrymanderings in Texas, Colorado, and Pennsylvania.”). \textit{See generally} Steve Bickerstaff, \textit{Lines in the Sand: Congressional Redistricting in Texas and the Downfall of Tom DeLay} (2007). In a more recent example, news reports claim that U.S. House Speaker John Boehner played a central role in drawing Ohio’s post-2010 congressional districts, along with National Republican Congressional leaders. \textit{Docs Show Boehner Key Part of Ohio Redistricting}, Cincinnati.com (Dec. 12, 2011), at http://news.cincinnati.com/apps/pbcs.dll/article?AID=/201112121855/NEWS010801/312120086.

\textsuperscript{68} McDonald, \textit{Comparative Analysis}, supra note 36, at 379; \textit{see also} McDonald, \textit{Redistricting}, supra note 36, at 229.

Gaffney v. Cummings\(^{70}\) was the first time the Supreme Court addressed a political gerrymandering claim and they only time the Court has been faced with 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.\(^{71}\) After the 1970 census, a bipartisan commission in Connecticut produced a districting map adopting a policy of “political fairness” and drawing lines “with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties.”\(^{72}\) 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.\(^{73}\)

The Supreme Court rejected the plaintiffs’ claim that the plan was “nothing less than a gigantic political gerrymander, invidiously discriminatory under the Fourteenth Amendment.”\(^{74}\) 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,”\(^{75}\) the Court had difficulty identifying the harm where 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.”\(^{76}\) Seeing no invidious discrimination, the Court was reluctant to invalidate the bipartisan, incumbent-protecting plan simply because it took political considerations into account.\(^{77}\) Such an approach would place the responsibility for districting, which the Court noted “inevitably has and is intended to have substantial political consequences,”\(^{78}\) in the hands of a federal court.

The Supreme Court first expressly addressed the justiciability of political gerrymandering claims in Davis v. Bandemer.\(^{79}\) Bandemer dealt

\(^{70}\) 412 U.S. 735 (1973).
\(^{72}\) Gaffney, 412 U.S. at 752.
\(^{73}\) Id. at 738 & n.4
\(^{74}\) Id. at 752.
\(^{75}\) Id. at 754.
\(^{76}\) Id.
\(^{77}\) Id. at 752.
\(^{78}\) Id. at 753.
\(^{79}\) 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, even though the disparity in district size was less than the margin of error in the Census, and therefore did not reach the partisan gerrymandering claim. See id. at 744, 750-61 (Stevens, J., concurring).
with a post-1980 partisan gerrymander in the Indiana state legislature which left Democrats significantly underrepresented relative to their statewide voting strength. A majority of the Court held that political gerrymandering claims are justiciable under the Equal Protection Clause, but then fractured on the standard by which to adjudicate them.

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 the legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.” But the Court could not agree on any baseline against which to measure discriminatory effect or standard for assessing when a partisan gerrymander has gone far enough to violate the Constitution. Indeed, as Justice O’Connor pointed out in her concurrence, the plurality explicitly disavowed the only obvious baseline of proportional representation.

In holding gerrymandering claims justiciable, the Court in *Bandemer* acknowledged that it was creating an underdeveloped jurisprudential tool. The Court noted that *Baker v. Carr*’s holding that malapportionment claims are justiciable was also incomplete until two years later, when *Reynolds v. Simss* provided the one-person, one-vote standard for adjudicating those claims. “The mere fact,” the Court explained, “that we may not now similarly perceive a likely arithmetic presumption in the instant context does not compel a conclusion that the claims presented here are nonjusticiable . . . . the issue is one of representation, and we decline to hold that such claims are never justiciable.” But the Court has yet to find a *Reynolds* for *Bandemer*. Since it was decided in 1986, the Court has

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80 478 U.S. at 115 (White, J., plurality opinion).
81 Id. at 124 (White, J., for the majority).
82 Id. at 129 (White, J., plurality opinion).
83 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 gerrymanders.”).
84 Id. at 145 (O’Connor, J., concurring in the judgment).
87 *Bandemer*, 478 U.S. at 123 (White, J., for the majority). Commentators have also noted this parallel, calling *Bandemer* a *Baker* without a *Reynolds*. See, e.g., Issacharoff, *Cartels*, supra note 18, at 605; Hasen, *supra* note 13, at 637-38.
88 478 U.S. 123-24 (White, J., for the majority).
never sustained a partisan gerrymandering claim under *Bandemer*, nor has it set out a standard by which such claims could be adjudicated.  

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. According to 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.” 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*. 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 and instead opted to dismiss the claim on the merits. He concluded that just because no manageable standard had yet emerged did not mean that one will not emerge in the future, and he invited future litigants to expand their search for standards beyond the Fourteenth Amendment.  

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*, which presented the question of whether a mid-decade re-districting in Texas was an unconstitutional partisan gerrymander when no justification other than partisan objectives was offered. The Court declined to revisit the issue left open in *Vieth*, noting simply that a majority of the justices

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89 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 plaintiffs’ Republican Party swept the elections. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS 888 (rev’d 2d ed. 2002).


91 *Id.* at 281 (Scalia, J., plurality op.).

92 *Id.* at 290.

93 *Id.* at 292; see *id.* at 317 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

94 See *id.* at 313 (Kennedy, J. concurring).

95 *Id.* at 311, 314 (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”).


97 *Id.* at 416-17 (Kennedy, J., plurality).
declined to hold political gerrymandering claims nonjusticiable political questions, and continued on to examine whether the parties in \textit{LULAC} offered a manageable standard.\footnote{Id. at 414 (majority opinion).} 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.\footnote{Id. at 417-20 (Kennedy, J., plurality)} Referring back to \textit{Gaffney}, 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.\footnote{Id. at 419 (Kennedy, J., plurality)} Instead, 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 complainant’s representational rights.”\footnote{Id. at 418 (Kennedy, J., plurality).}

While it has framed the question as a search for judicially manageable standards, the real concern underlying the Court’s tentative approach to justiciability in its political gerrymandering cases is one of institutional competence.\footnote{See Fuentes-Rohwer, \textit{supra} note 15, at 1164-65.} 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 \textit{Baker}.\footnote{369 U.S. 186, 322-23 (1962) (Frankfurter, J. dissenting); see also Reynolds v. Sims, 377 U.S. 533, 620 (1964) (Harlan, J., dissenting) (envisioning “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”).} 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.\footnote{See, e.g., HASEN, \textit{supra} note 57, at 154; Fuentes-Rohwer, \textit{supra} note 15, at 1164-65; Michael S. Kang, \textit{When Courts Won’t Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy}, 68 OHIO L.J. 1097, 1117 (2007).} But, as the Court observed this term in \textit{Perry v. Perez}, “experience has shown the difficulty of defining neutral legal principles in this area.”\footnote{565 U.S. \_\_\_\_, slip op. at 4 (2012). \textit{Perry} did not involve a constitutional challenge to a political gerrymander, but rather an emergency appeal by Texas of a three-judge court’s decision to draw interim district lines itself that would apply to the 2012 elections pending a challenge under § 2 of the VRA to the districts drawn by Texas’s legislature and § 5 preclearance of those districts from the D.C. District Court.}
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 Colgrove v. Green that such “peculiarly political” issues are “not meet for judicial determination,”\(^\text{106}\) 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.”\(^\text{107}\)

What is most disturbing about political gerrymandering, however, is not that it discriminates against some discrete group, but rather the capture and manipulation by insiders of the very processes from which they draw their legitimacy.\(^\text{108}\) Even as the Court has struggled to identify standards, it has acknowledged that manipulation of the political process by insiders to entrench incumbents works a democratic harm.\(^\text{109}\) This 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 non-justiciable political questions.\(^\text{110}\) But, as Guy-Urriel Charles has argued, it may be possible to for courts to address underlying structural pathologies in political representation by framing the questions in individual-rights-based terms.\(^\text{111}\) 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


\(^{107}\) 565 U.S. slip op. at 4.

\(^{108}\) See supra notes 13-50 and accompanying text.

\(^{109}\) See Vieth, 541 U.S. at 292-93 (Scalia, J., plurality); see also infra notes 247-264 and accompanying text.


\(^{111}\) Charles, supra note 13, at 655-58.
doctrines in private law to get around their institutional incompetence when faced with structural agency problems.

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 an agent to act in the best interests of the principal. 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 expense of the principal. There are cost to monitoring the agents’ behavior and costs to enforcing loyalty.\footnote{See, e.g., Michael Jensen & William Meckling, The Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structures, 3 J. Fin. Econ. 305 (1976).}

Agency costs are incurred 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 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, agency law helps to align the interests of the principal and agent.\footnote{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.}

Legislators are also agents. And agency costs are present when the people elect legislators to represent them in the government. The interests of politicians and their constituents may diverge on many issues, and elections alone are not sufficient bring their interests into 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

But courts face the same problem all the time in corporate law. We do not think courts are any more competent at making business judgments than political ones.\footnote[115]{See \textit{Paula Walter, The Directors' Business Judgment Rule—The Final Act?}, 22 Suffolk U. L. Rev. 649, 649-50; \textit{see also} Holmes v. St. Joseph Lead Co., 147 N.Y.S. 104, 107 (N.Y. Sup. 1914) (Cardozo, J.) (Substitution of the court's judgment for that of the directors “is no business for any court to follow.”).} 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.\footnote[116]{See, e.g., \textit{Melvin Aron Eisenberg, Corporations and Other Business Organizations} 547-48 (8th ed. 2000) (discussing hindsight bias).} 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 decision makers.

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.

\textit{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 own benefit.\footnote[117]{\textit{RESTATEMENT (SECOND) OF AGENCY} § 387} This exclusive-benefit principle is the heart of the fiduciary relationship.\footnote[118]{Victor Brudney, \textit{Contract and Fiduciary Duty in Corporate Law}, 38 B.C. L. Rev. 595, 601-02 (1997).} Agency costs are reduced by simply banning conduct by the agent that is contrary to the interests of the principal. The only benefit that the agent can take from his position is compensation for acting as an agent.\footnote[119]{Id. at 602.}

The exclusive-benefit principle is enforced through a prophylactic prohibition on self-dealing.\footnote[120]{Id. at 601-02.} An agent is prohibited from engaging in transactions with the principal that might \textit{either} harm the principal or
benefit the agent. The mere presence of a conflict of interest is enough to breach the duty of loyalty, even in the absence of any actual substantive harm to the principal. The prophylactic nature of the rule is designed to reduce the cost of monitoring agent’s behavior. 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, a conflicted transaction can be rescinded by the principal, 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. 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. 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. Even so, the agent must disclose all relevant information and a court can review the transaction for fairness.

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. Of the many theories that have been offered, the two that appear most coherent are based on contract or delegation.

121 Keech v. Sanford, 25 Eng. Rep. 223 (1726); see also Brudney, supra note 118, at 602 & n.15.
122 RESTATEMENT (SECOND) OF AGENCY § 389. This 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 (Wash. 1964), especially in the case of directors taking corporate opportunities for themselves.
123 Brudney, supra note 118, at 603.
124 RESTATEMENT (SECOND) OF AGENCY §§ 388, 389 cmt.a, 407.
125 See, e.g., Tarnowski v. Resop, 57 N.W.2d 801 (Minn. 1952).
126 RESTATEMENT (SECOND) OF AGENCY § 390
127 Id. § 390 and comments a & b.
129 J.C. Shepherd outlines eight theories purporting to explain fiduciary duties: property, reliance, unequal relationship, contract, unjust enrichment, 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. While this theory may explain trusts and
Some scholars, such as Frank Easterbrook and 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. 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. 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. 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. 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.

Another explanation for fiduciary duties may be that inherent in one party’s delegation of power to another is a reciprocal duty that the power be used in the interest of the delegator. The strong form of this theory might be called the Spider-Man approach: "With great power comes great responsibility." When one party has power over the interests of another,

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130 Easterbrook & Fischel, supra note 128, at 427, 437-38 (“When transaction costs reach a particularly high level, some persons start calling some contractual relations ‘fiduciary.’”). Easterbrook and Fischel offer the example of corporate manager 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 claimant like equity investors, on the other hand, face prohibitively high costs to specifying adequate contract terms with managers. Id.

131 See id. at 427, 429.

132 Id. at 429.

133 Scott FitzGibbon, Fiduciary Relationships Are Not Contracts, 82 MARQ. L. REV. 303, 305 (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); Brudney, supra note 118, at 604.

134 Brudney, supra note 118, at 631.

135 SPIDER-MAN (Columbia Pictures 2002).
that party has a duty to exercise his discretion in the interests of the other.\textsuperscript{136} This theory is not concerned with the source of the power, but demands responsible use of any power, whatever the source.

More plausible is the approach that J.C. Shepherd suggests, which incorporates some ideas from the contract theory. Shepherd argues that fiduciary duties arise from the “transfer of encumbered power.”\textsuperscript{137} “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.”\textsuperscript{138} Shepherd’s formulation contemplates an implicit contract in which the power is delegated to the agent only on the condition that it is used for the benefit of the principal.\textsuperscript{139}

An approach that would maintain somewhat more independence from the contract theory would be to presume that no one could willingly delegate power without attaching a reciprocal duty of loyalty.\textsuperscript{140} 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. 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.

\textbf{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.\textsuperscript{141} Managers and directors owe a duty of loyalty to the corporation and must direct all of their energies toward its exclusive benefit.\textsuperscript{142} In most situations

\begin{itemize}
\item \textsuperscript{136} This approach was suggested (and rejected) by J.C. Shepherd. \textsc{Shepherd, supra} note 129, at 83-85; \textit{see also} Cridde, \textit{Fiduciary Administration, supra} note 31, at 470 (arguing that fiduciary duties stem from principal’s vulnerability to domination by agent based on Kant’s theory of parental obligations to their children).
\item \textsuperscript{137} \textit{Shepherd, supra} note 129, at 93.
\item \textsuperscript{138} \textit{Id.} at 96.
\item \textsuperscript{139} To really make this contract 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.
\item \textsuperscript{140} Shepherd describes a similar approach in comparing power encumbered by a duty of loyalty to property encumbered by a mortgage. \textit{Shepherd, supra} note 129, at 101. The two cannot be severed; acceptance of the property or power is necessarily acceptance of the liability or duty. \textit{Id.}
\item \textsuperscript{141} Brudney, \textit{supra} note 118, at 611 & n.40.
\item \textsuperscript{142} \textit{See, e.g.}, Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).
\end{itemize}
this translates into a duty to the common stockholders to maximize the value of their shares.\textsuperscript{143}

Unlike 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 make the decisions about how to run the corporation.\textsuperscript{144} Shareholders have little say in controlling the corporation other than deciding who to elect as directors.\textsuperscript{145} 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 are rationally ignorant of such matters—and are limited in their ability to terminate and replace agents who shirk.\textsuperscript{146} Thus, in many ways, the need for prophylactic prohibitions on self-dealing is even greater in the corporate context than in common-law agency.\textsuperscript{147} And 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.\textsuperscript{148}

Because market forces and board elections are not sufficient to align the interests of managers and directors with the 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.

\textsuperscript{143} 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., Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law, 89 GEO. L.J. 439 (2001); Brudney, supra note 118, at 611.

\textsuperscript{144} See, e.g., Delaware General Corporate Law (DGCL) § 141.


\textsuperscript{147} Brudney, supra note 118, at 612.

\textsuperscript{148} Id.
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 where 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. “Mere errors of judgment are not sufficient grounds for equity interference, for the powers of those entrusted with corporate management are largely discretionary.” And courts are reluctant to infer bad faith based on the outcome of board decisions, focusing instead on the process by which the board reached its decision. As long as the directors were disinterested and reasonably informed, “the board’s decision will be upheld unless it cannot be attributed to any rational business purpose.”

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 simply void. But as people began to

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149 See Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (defining 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, 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.”).


151 Paramount Commc’ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 45 n.17 (Del. 1994); see ALLEN & KRAAKMAN, supra note 149, at 252. The one major exception to this formulation of the business judgment rule is in transactions involving a change in corporate control where directors have an entrenchment interest. See, e.g., Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).


153 Marsh, Are Directors Trustees?, 22 BUS. LAWYER 35 (1966). But see Norvell Brevenridge, The Corporate Director’s Fiduciary Duty of Loyalty: Understanding the Self-Interested Director Transaction, 41 DePaul L. Rev. 655 (1992) (arguing that 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 comprised of a majority of disinterested directors (with interested directors not counting towards a quorum). ALLEN & KRAAKMAN, supra note 149, at 292; see also ROBERT CHARLES CLARK, CORPORATE LAW 160-66 (1986) (discussing change away from per se rule).
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—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 doctrine, a self-dealing transaction between a corporation and its directors is not void solely because of the conflict of interest. Directors may offer two defenses to a claim that they breached their duty of loyalty: They can claim that the transaction was entirely fair, or they can show that the transaction was approved by a disinterested decision maker through one of several process “safe harbors.” If the directors cannot show that the transaction was approved through a neutral process, the court engages 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, corporate law creates a powerful incentive for conflicted directors to seek the approval of a disinterested decision maker, 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. Courts will review both the substantive terms of the transaction (i.e., the price) and the fairness of the bargain to the interests of the company. As the Delaware Supreme Court put it in Weinberger v. UOP:

The concept of fairness has two aspects: fair dealing and fair price. The former embraces questions of when the

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154 See CLARK, supra note 153, at 164-65.
155 See, e.g., DGCL § 144(a).
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.\footnote{457 A.2d 701, 711 (Del. 1983) (citations omitted).}

And a director must disclose not only his interest in the transaction, but all material information relevant to the transaction;\footnote{See Rosenblatt v. Getty Oil Co. 493 A.2d 929 (Del. 1985); Lynch v. Vickers Energy Corp., 383 A.2d 278 (Del. 1978).} failure to disclose a conflict is per se unfair.\footnote{State ex rel Hayes Oyster Co. v. Keypoint Oyster Co., 391 P.2d 979 (Wash. 1964).}

If the disclosure is adequate and the dealings are fair, courts focus on the intrinsic fairness of the transaction. There are two ways a court can go about this: 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.\footnote{CLARK, supra note 153, at 147-48.} In the first of these methods, the court tries to determine whether the substantive terms of the transaction are the same as those that would be reached if it had been conducted at arm’s length. The directors must show that the outcome would have been the same had a rational, well-informed, disinterested board considered the transaction.\footnote{Summa Corp. v. TWA, 540 A.2d 403 (Del. 1988); see also CLARK, supra note 153, at 148; Beveridge, supra note 153, at 672.}

In the second method, the court relies on an objective factor—market price—to determine whether the transaction was fair.\footnote{CLARK, supra note 153, at 148.} 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.\footnote{Id.}

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.\footnote{See supra notes 149-152 and accompanying text.} 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. The duty of loyalty requires that the board try to achieve the most favorable price that the market will bear, but showing what that price is after the fact, and without the opportunity to bargain for it, is very difficult. The parties will tend to supply valuations that support their sides and the “battle of the experts” may lead to widely divergent estimates, introducing uncertainty into the assessment. 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.

2. Process Safe Harbors

To take some pressure off the court’s role 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. 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 deferential standard of the business judgment rule. Because the decision maker who 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. Thus the standard presumptions of the business judgment rule—that courts should

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167 See ALLEN & KRAAKMAN, supra note 149, at 312.
168 Allen, Jacobs & Strine, supra note 152, at 1302-03.
170 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.”); cf. Brudney, supra note 118, at 633-34.
171 E.g., DGCL § 144(a)(1)-(2); NYBCL § 713; Cal. Corp. Code § 310.
173 See Cooke v. Oolie, No. 11134, 2000 Del. Ch. LEXIS 89 (May 24, 2000) (“The disinterested director’s ratification cleanses the taint of interest because the disinterested directors have no incentive to act disloyally and should only be 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”).
not second guess the substantive business decisions of disinterested directors—apply.

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 fulfill.\textsuperscript{174} Courts examine the adequacy of the disclosure to ensure that the decision makers had access to all material information relevant to the transaction.\textsuperscript{175} Courts 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.\textsuperscript{176} When reviewing shareholder ratification, courts ask whether the shareholders were fully informed, disinterested, and uncoerced.\textsuperscript{177} If these processes are found to be fair and adequate, the deferential standard of the business judgment rule applies and the burden of proof shifts to the party challenging the transaction.\textsuperscript{178} The only substantive inquiry a court will make is whether the outcome of the transaction was so irrational as to constitute corporate “waste.”\textsuperscript{179}

There is, of course, a danger that these safe-harbor processes could be captured by conflicted insiders. But if there is reason to suspect that the disinterested parties approving the transaction are not truly independent, courts use a more scrutinizing 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.\textsuperscript{180} 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

\begin{notes}
\item[175] See Rosenblatt v. Getty Oil Co., 493 A.2d 929 (Del. 1985); Lynch v. Vickers Energy Corp, 383 A.2d 278 (Del. 1978); see also ALLEN & KRAAKMAN, supra note 149, at 297.
\item[176] ALLEN & KRAAKMAN, supra note 149, at 313.
\item[177] See Lewis v. Vogelstein, 699 A.2d 327 (Del. Ch. 1997); In In re Wheelabrator Technologies, Inc. 663 A.2d 1194 (Del. Ch. 1995).
\item[178] See supra note 172.
\item[179] See Lewis v. Vogelstein, 699 A.2d 327 (Del. Ch. 1997) (“Roughly, 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.”).
\item[180] See Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997); ALLEN & KRAAKMAN, supra note 149, at 309.
\end{notes}
of review to the business judgment rule. The court will still review the transaction for entire fairness, but the challenging party bears the burden of showing that it is unfair.

But even in transactions where capture is particularly likely, corporate law encourages companies to adopt a neutral decision-making 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 to negotiate opposite the conflicted controlling shareholders in attempts simulate arm’s-length transactions. These special committees must be charged by the board that their role is to obtain the best available deal for the entire corporation (not just one that would fall within the range of “fair” deals), be composed of disinterested directors, and be provided with the resources necessary to accomplish their task. Special committees usually retain outside investment banks and lawyers for advice on the transaction. In reviewing the transaction, the court will examine whether the special committee operated effectively and independently and whether the corporation followed the committee’s recommendations. The directors must show “that the controlling shareholder did not dictate the terms of the transaction and that the committee exercised real bargaining power ‘at arm’s-length.’” If so, the burden to show unfairness will shift to the plaintiff. While courts ultimately retain the authority to review the transaction for fairness, if the special-committee procedures are adequate, courts give substantial weight to the recommendations of the committee. And when approval by special committee is combined with the additional structural protection of a fully informed ratification by a majority of the minority shareholders, some courts are willing to give business-judgment-rule deference to the result.

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181 See Kahn v. Lynch Communication Systems, 638 A.2d 1110 (Del. 1994); Cookies Food Prods. v. Lakes Warehouse, 430 N.W. 447 (Iowa 1988)


185 ALLEN & KRAAKMAN, supra note 149, at 314; see Kahn v. Tremont Corp., 694 A.2d 422, 429 (Del. 1997).

186 Kahn v. Tremont Corp., 694 A.2d 422, 429 (Del. 1997).


188 See ALLEN & KRAAKMAN, supra note 149, at 314.

189 In re CNX Gas Corp. Shareholders Litig., 4 A.3d 397, 412-13 (Del. Ch. 2010); In re Cox Commc’ns, Inc. Shareholders Litig., 879 A.2d 604 (Del. Ch. 2005); see also Allen, Jacob & Strine, supra note 152, at 1308 (arguing that ratification by a majority of the minority should shift standard of review to business judgment rule).
Through the use of process safe harbors, courts are able to get around their institutional incompetence in making business judgments. Instead, judicial review focuses on ensuring that the self-dealing transaction was approved by a disinterested decision maker in a fair process. These disinterested decision makers are better suited institutionally than courts to make business judgments. Courts retain some power to review the substance of the transactions for egregious unfairness, but their review focuses primarily on the independence of the decision makers and the adequacy of the procedures to make sure they are fully informed and competent.

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. If directors engage in a self-dealing transaction without using a process safe harbor it triggers exacting scrutiny by the courts. But by obtaining approval from disinterested directors or shareholder ratification, directors can avoid the substantial likelihood that their transactions will be invalidated after 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 ARE 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 and imposing their will. Both offer opportunities for agents to advance their own interests instead of, or at the expense of, the principals’ interests. Neither shareholders nor citizens can directly control

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190 This 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 (e.g., 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 require to make a sound business judgment, and 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 any agency costs caused by the conflict). CLARK, supra note 153, at 181-82. However, fully informed and uncoerced ratification by shareholders lends great legitimacy to the corporate action. See Allen, Jacobs & Strine, supra note 152, at 1308. With knowing approval by the principal, it is difficult to identify the abuse of the agent.
the behavior of their agents and 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 citizens comprising a majority in their districts.\textsuperscript{191} The board of directors makes decisions for the corporation and the board is not bound to follow instructions from a majority of the shareholders.\textsuperscript{192}

In many ways, the agency problem is even more severe in political representation because the principals lack the options of easy exit or diversification.\textsuperscript{193} 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 the least it requires emigration, at the most, rebellion—and diversification is not 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 ensure that the agents act in the best 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. This Part argues that political representatives stand 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, and thus violate their constitutional obligations, when they self-deal by manipulating laws regulating the political process to entrench themselves. Finally, it argues that courts should enforce the fiduciary duties of representatives by holding self-dealing laws unconstitutional.

\textbf{A. Political Representatives Stand in a Fiduciary Capacity to the People}

Both constitutional history and political theory support the notion that political representatives are fiduciaries and, accordingly, owe a duty of loyalty to the people they represent.


\textsuperscript{192} See supra notes 144-145; see also Allen & Kraakman, supra note 149, 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.”).

\textsuperscript{193} See Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States 76, 106-14, 121(1970).
1. Constitutional History

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. 194 “Political trusteeship” played a prominent role in the trial of Charles I in 1649. 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. 195 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. 196 The idea that Parliament received its power from, and acted as trustee on behalf of, the people was widespread by the mid-seventeenth century. 197 Oliver Cromwell repeatedly referred to public office, both that of Parliament and own his station of Lord Protector, as a trusteeship. 198

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. 199 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 society.” 200 The legislative power was “only a fiduciary power to act for certain ends,” 201 and the government was

195 Gough, supra note 194, at 167-69.
196 Id. at 168-70; see also John Milton, The Tenure of Kings and Magistrates (1649) (“[T]he power of kings and magistrates is nothing else, but what only is derivative, transferred and committed to them in trust from the people to the common good of them all.”).
197 Gough, supra note 194, at 176-80.
198 Id. at 179-80.
200 Locke, supra note 199, § 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 the express or tacit trust that it shall be employed for their good and the preservation of their property.”).
201 Id. § 149. Locke argued that legislative acts in breach of its fiduciary duties 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 imposed in them; for all power given with trust for attaining an end, being limited by that end, whenever that end is manifestly
obliged to act only on behalf of the community and not in its own
interests.\footnote{Locke’s approach was widely accepted in England by the eighteenth century when Henry St. John Bolingbroke declared that a patriot king “will make one, and but one distinction between his rights and the rights of the people: he will look on his to be a trust and theirs a property.”\footnote{Whig pamphleteers argued that Commons “ought to be what they reckon themselves, \textit{Trustees} and \textit{Guardians} of the Liberties of England.”}}\footnote{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.\footnote{As John Reid has argued, the theory of governmental “constraint through delegated trust” played a prominent role in shaping the constitutional debate surrounding the American Revolution.\footnote{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 service of the people; and whenever such power shall be perverted to their hurt and detriment, the trust is broken, and becomes null and void.’”\footnote{And Robert Natelson has observed that both sides had adopted public trust views of government and “agreed that public officials were bound by fiduciary-style obligations.”}}}}

In the years following the Revolution the newly independent Americans frequently used the language of agency and trusteeship in reference to their

\footnote{\textit{Id.}; see also \textit{id.} §§ 221-22.\footnote{\textit{J.W. Gough, Introduction, supra} note 199, at xxiv; see also \textit{Locke, supra} note 199, § 142 (‘[L]aws ought to be designed for no other end ultimately than the good of the people.’); Natelson, \textit{Public Trust, supra} note 29, at 1117 (“According to Locke, public officials should not engage in self-dealing.”).\footnote{\textit{Gough, supra} note 194, at 183-84 (quoting Bolingbroke).}}\footnote{\textit{Id.} at 184 (quoting pamphlets).\footnote{\textit{See L. Hartz, The Liberal Tradition in America} (1955); Natelson, \textit{Public Trust, supra} note 29, at 1115 & n.157; cf. Donald Lutz, \textit{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 Revolution, but his rate of citation fell off after independence).}}\footnote{\textit{John Phillip Reid, Constitutional History of the American Revolution} 52 (abridged ed. 1995).\footnote{\textit{Id.} (quoting London press criticizing parliamentary legislation for American colonies).}}\footnote{\textit{Natelson, Public Trust, supra} note 29, at 1121-22. 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. \textit{Id.} at 1128-34.}}
William Paca 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. Gordon Wood has argued that this understanding of the representative as a “mere agent” reflected a new concept of representation, quite different from the “virtual” representation that was prevalent in England and the colonies before the Revolution. Under this newer theory of “actual” representation, representatives derived their authority solely from the power delegated to them by their election, not by any identity of interests with the people as a whole that supported virtual representatives.

Although the Federalists retreated from some of the more radical implications of actual representation (like instructing legislatures) in favor of a revived form of virtual representation in their arguments for ratification, they held on to the ideas of delegation and agency from the post-Revolutionary period. They too saw representatives as limited agents of the people holding delegated power for a limited time. In The Federalist No. 46, for example, Madison said: “The federal and state governments are in fact but different agents and trustees of the people.”

Robert Natelson has argued 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. 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 borne by private-law fiduciaries. This fiduciary theory of government

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210 Id. at 39 (quoting William Paca). 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.
211 Id. at 40; see also 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, S.C. pamphlet).
212 See id. at 2-12; HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967).
213 See WOOD, supra note 209, at 45-46, 52-53.
214 Id. at 53.
215 THE FEDERALIST NO. 46 (James Madison); see also id. Nos. 14, 49, 55, 57, 63.
216 Natelson, Public Trust supra note 29, at 1083-86.
217 Id. at 1087, 1178; Natelson, Judicial Review, supra note 30, at 245-47.
was nearly universally accepted by proponents and opponents of the Constitution alike. Natelson argues that 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. And 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.

2. Political Theory

Modern political theorists have echoed their historical counterparts in arguing that agency concepts and fiduciary duties play an important role in a representative form of government. According to Hanna Pitkin, “representing means acting in the interests of the represented, in a manner responsive to them.” While it is important for a representative to be able to act independently and exercise discretion, he must always act in the interests of the represented, and, if a conflict arises between his actions and the wishes of the represented, he must be able to explain why his actions (and not their wishes) are in accord with their true interests. Pitkin’s definition of representation leaves no room for the representative to act in his own interests. She argues that “the representative’s duty, his role as a representative, is generally not to get reelected, but to do what is best for those he represents,” and she explains that representation is “a fiduciary relationship, involving trust and obligation on both sides.”

More recent legal scholarship follows in the same vein. Evan Criddle, for example, has argued that “[a]ll agents and instrumentalities of the state are . . . subject to fiduciary duties in discharging their responsibilities.”

Recognizing that political representatives bear a duty of loyalty is consistent with the two main theoretical justifications for fiduciary duties: contract and delegated power. American constitutional democracy is based on a contractual theory of government, and the terms of that contract

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218 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).
219 Natelson, Public Trust, supra note 29, at 1124-25; see also Natelson, Agency Law, supra note 30, at 271-74.
220 Natelson, Public Trust, supra note 29, at 1128, 1146-1150.
221 Pitkin, supra note 212, at 209.
222 Id. at 209-10.
223 Id. at 164.
224 Id. at 128.
225 Criddle, Fiduciary Administration, supra note 31, at 473; see also Ponet & Leib, supra note 31; Fox-Decent, supra note 31.
involve the delegation of power from the people to the government. Indeed, Geoffrey Miller has argued 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.\textsuperscript{226}

On the contract theory, the U.S. Constitution (or any constitution for that matter\textsuperscript{227}) 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.\textsuperscript{228} We can discern those duties by asking what the parties would have agreed to in the absence of transaction costs, and the natural answer is that the people would agree to be bound by the rules of the legislature only if the legislature 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 implicit terms in the contract created by the Constitution.

On the theory that inherent in the delegation of power is 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 delegated to the government by the people.\textsuperscript{229} The people elect representatives to be their agents and act on their behalf governing the country. Through elections, the principals delegate power to their agents to legally bind them. Because their power is delegated from the people, representatives owe a duty of loyalty to the people.\textsuperscript{230} Indeed, several state constitutions in existence 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.\textsuperscript{231}

\textsuperscript{226} Miller, supra note 30, at 3.
\textsuperscript{227} See, e.g., Md. Const. § I (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 206, at 100 (“Some state constitutions said they were contracts, even codifying the contractarian doctrine that government is founded in compact.”).
\textsuperscript{228} See supra notes 130-132 and accompanying text.
\textsuperscript{229} See U.S. Const. pmbl. (“We the People...do ordain and establish....”);
\textsuperscript{230} See supra notes 137-140 and accompanying text. As John Austin observed of the British Parliament in 1885, “speaking 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 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.” Gough, supra note 194, at 187 (citing Austin).
\textsuperscript{231} E.g., Pa Const. art. IV (1776) (“[A]ll power [is] . . . derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and
B. Breach of the Politician’s Duty of Loyalty

If political representatives are properly understood to bear fiduciary duties, the next question is: What would breach of those duties look like? In most fiduciary relationships the duty of loyalty is breached through a conflict of interest alone. The eighteenth-century fiduciary law relied on by the Framers contained the same prophylactic prohibition on self-dealing.\textsuperscript{232} If the agent engages in a self-dealing transaction, even in the absence of any substantive harm to the principal, his fiduciary duty is breached.\textsuperscript{233} Political representatives, then, would breach of their duty of loyalty by engaging in self-dealing behavior.

1. The Conflict of Interest in Incumbent Regulation of the Political Process

Whenever representatives use their power to pass laws in their own interests, rather than the interest of the people, they violate the exclusive-benefit principle that characterizes the duty of loyalty. 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.\textsuperscript{234}

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

\textsuperscript{233} See supra notes 117-123 and accompanying text.
\textsuperscript{234} U.S. \textit{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 \textit{Akil Amar, The Bill of Rights as a Constitution}, 100 \textit{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.
Redistricting is the prime example: 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 effectively insulate incumbents from challenge, the temptation to manipulate the districting process must be tremendous. But incumbents’ ability to manipulate laws regulating the political process for entrenchment purposes is not limited to gerrymandering. Other, less direct mechanisms like ballot-access restrictions, voter qualifications, and campaign-finance regulations may also serve to entrench incumbents.235

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 responsiveness236—a showing of substantive harm is not necessary to establish a breach of the duty of loyalty. Under the standard fiduciary framework, that duty is breached by the conflict of interest alone.237 Therefore, any time representatives pass laws regulating the political process, they are effectively self-dealing. They are legislating on 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.

It is not my goal here to attempt to catalog all of the potential conflicts of interest that might constitute breach of political representatives’ fiduciary duties of loyalty. But 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.238 Legislators face similar competitive pressures when they enact substantive laws that may increase their chances of reelection—whether good economic 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. Harder questions might arise when representatives have personal stakes in the legislation—like awarding government contracts to companies in which they or their close

235 See supra note 32 and accompanying text.
236 See supra notes 52-54 and accompanying text.
237 See supra notes 121-123 and accompanying text.
relatives own stock—that might outweigh the competitive pressures that they face. But exploring the boundaries of representatives’ fiduciary duties when they have financial conflicts of interests is beyond the scope of this Article.

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. That conception of harm leads to an endless search for a baseline appropriate level of party strength or baseline undiluted vote. Nor is the harm simply a lack of competition. That too runs into the baseline problem: What is the appropriate level of competition for a given district or for the electoral system as a whole? The harm is in 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—the agents’ failure to act in sole interest of the principals. The disloyalty of the agents, and the distortion of electoral outcomes that it causes, undermines the legitimating function that elections serve.

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 political process, the representatives would not be in breach of the duty of loyalty. Obtaining the informed consent of the people

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240 See Schuck, supra note 57, at 1237; Lowenstein & Steinberg, supra note 57, at 60.

241 Charles, supra note 13, at 120 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 668-69.

242 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.

243 See Charles, supra note 13, at 106-07.
presents similar problems to obtaining consent of shareholders in the corporate context. Because the principals are diffuse, they face substantial transaction costs, both in becoming informed on the nature of the conflict and 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 not be adequate in the political arena. Surely it would be futile to consider an incumbent’s electoral victory to be consent to his self-dealing behavior of drawing his district to assure victory. Yet some valid mechanisms may exist to cleanse the taint of representatives passing laws regulating the political process. These mechanisms are the subject of Part IV.

One must be careful in drawing analogies from private law. One 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 fairly uniform—to maximize shareholder value. In 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 (e.g., security, law and order), but on most issues the peoples’ 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? Is it the people in an individual representative’s district? Is it only a majority of the people in the 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, to the majority, or even to the corporation as a whole, but because of the conflict of interest, we distrust the directors to make that decision and the duty of loyalty is breached. Only by using special procedures to cleanse the taint of self-dealing or by showing entire fairness can the transaction go forward. Likewise, even if we cannot specify the interests of the electorate (or even

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244 This, of course, depends on the definition of the principal. If the principal consists of only the voters in the district, the futility is obvious. A statewide referendum, on the other hand, would have a much greater legitimating effect. See infra Part IV.B.3.
245 See Brudney, supra note 118, at 612. Individual shareholders with different risk preferences may disagree about the timeframe over which the corporation should aim to maximize value. Some shareholders may prefer short-term gains to the long-term health of the corporation, but these deviations in interests are minor compared to the political context.
246 For example, it may be in the interests of a majority (especially a temporary majority) of the voters in a district to effect a partisan gerrymander and thereby secure their power in the future.
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 either civic-republican or pluralist, public-choice models of representation. Even if opinions differ as to whether representatives should be acting in the public interest or in the interests of their constituents, people are likely to agree that representatives should not be acting primarily in their own interests.

2. Judicial Disapproval of Incumbent Self-Dealing

In several situations, courts have recognized that incumbent self-dealing works a constitutional harm. In the campaign finance arena, in particular, the Supreme Court has been skeptical of attempts by legislators to regulate campaign spending because of the danger that those measures are aimed at incumbent entrenchment.

Justice Scalia addressed this concern in his partial dissent in *McConnell v. FEC* from the Court’s decision to uphold provisions of the Bipartisan Campaign Finance Reform Act (BCRA), arguing that restrictions on “soft money” contributions to political parties and candidates illegitimately favored incumbents over challengers.\(^{247}\) He wrote that “[t]he first instinct of power is the retention of power,”\(^{248}\) and he would have held that the contribution limits were unconstitutional restrictions on political speech. Justice Kennedy, too, suggested that BCRA might be little more than “an incumbency protection plan.”\(^{249}\) The Court subsequently followed this approach in *Randall v. Sorrell*, 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 electoral accountability.”\(^{250}\)

In *Davis v. FEC*, the Court struck down BCRA’s so-called “Millionaires Amendment,” which raised the cap on allowable contributions to candidates if they face self-funded opponents who spend more than a certain threshold their own money.\(^{251}\) In rejecting the argument that Congress had a

\(^{247}\) 540 U.S. 93 (2003).

\(^{248}\) Id. at 249-50; see also Issacharoff & Karlan, supra note 38, at 576.

\(^{249}\) 540 U.S. at 306 (Kennedy, J., concurring in part and dissenting in part); see also Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm’n, 518 U.S. 604, 644 n.9 (1996) (Thomas, J., concurring in judgment and dissenting in part) (“There is good reason to think that campaign reform is an especially inappropriate area for judicial deference to legislative 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.”).


legitimate interest in leveling the playing field for candidates of different personal wealth, the Court explained:

Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. 1, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters’ choices.\(^\text{252}\)

The Court echoed these concerns in striking down limitations on independent electioneering expenditures by corporations in *Citizens United v. FEC*.\(^\text{253}\)

In the redistricting context, although the Court has struggled in articulating the precise nature of the harm—or figuring out what to do about it—it has consistently recognized that political gerrymandering works a constitutional harm. *Bandemer*, for example, recognized that if incumbents drew districts to consistently degrade the power of the opposing party they would be unconstitutionally discriminating against challengers.\(^\text{254}\) Even the plurality in *Vieth*, which would have held gerrymandering claims nonjusticiable, tacitly recognized that severe partisan gerrymanders violate the Constitution,\(^\text{255}\) and a majority of the justices (in separate opinions) recognized the constitutional harm.

Shortly after *Vieth*, the Supreme Court in *Cox v. Larios* summarily affirmed a three-judge court’s decision holding Georgia’s redistricting plan unconstitutional because it violated the equipopulation principle.\(^\text{256}\) Under prior law, deviations of less than 10% from the perfect one-person, one-vote standard were tolerated in state legislative districts,\(^\text{257}\) but in *Larios*, the court held that purely partisan purposes of incumbents shaping districts to

\(^{252}\) *Id.* at 742.

\(^{253}\) 130 S. Ct. 876, 904-05 (2011); cf. *id.* at 968-969 (Steven, 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 Congress such deference in the redistricting process. *See id.* at 969 (citing his dissents in *LULAC* and *Vieth*).

\(^{254}\) 478 U.S. 109, 132, 139 (1986).


\(^{256}\) 542 U.S. 947 (2004).

\(^{257}\) *See White v. Regester*, 412 U.S. 755 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1972); *see also* Pildes, Foreword, *supra* note 58 at 76.
favor their parties and protect their own seats cannot provide even the minimal justification needed for small deviations.\textsuperscript{258}

And in \textit{LULAC v. Perry}, although the Court did not sustain the partisan gerrymandering claim, it did recognize the harm of incumbent self-dealing in the racial gerrymandering context.\textsuperscript{259} The Court found that a transparent attempt to prevent an emergent Latino majority from voting incumbent Republican Congressman Henry Bonilla out of office by carving portions of a heavily Latino county out of a district and lassoing in predominantly Anglo, Republican voters from neighboring districts was an illegal racial gerrymander, even though the districting plan created a new Latino voting district in another part of the state.\textsuperscript{260} The Court explained that, while incumbency protection has sometimes been acknowledged as a legitimate factor in districting decisions, incumbency protection can only be justified if it is used in the interests of the constituents, not the incumbent.\textsuperscript{261}

If the justification for incumbency protection is to keep the constituency intact so the officeholder is accountable for promises made or broken, then the protection seems to accord with concern for the voters. If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. By purposely redrawing lines around those who opposed Bonilla, the state legislature took the latter course.\textsuperscript{262}

\textsuperscript{258} Larios v. Cox, 300 F. Supp. 2d 1320, 1357 (N.D. Ga. 2004). This was qualified to some degree by Kennedy’s plurality opinion in \textit{LULAC v. Perry}, 548 U.S. 399 (2006). Interestingly, this rationale was rejected in \textit{Gaffney}.

\textsuperscript{259} 548 U.S. 399, 440-41 (2006) (majority). One of the more forceful criticisms of the Court’s reluctance to engage with partisan gerrymandering claims is that it puts pressure on the protections against racial gerrymandering by forcing plaintiffs to assert what are essential partisan claims in racial terms. See Issacharoff, \textit{Cartels}, supra note 18, at 630-31.

\textsuperscript{260} 548 U.S. at 423-25, 428-29.

\textsuperscript{261} \textit{Id.} at 440-41.

\textsuperscript{262} \textit{Id.} at 441. In discussing incumbency protection in districting, the Court put an important limitation on a throwaway line in Justice Brennan’s opinion in \textit{Karcher v. Daggett}, 462 U.S. 725 (1983), which has been much abused. Brennan noted that “avoiding contests between incumbent Representatives” was a “legitimate objective[] that on a proper showing could justify minor population deviations.” \textit{Id.} at 740. This concern for pairing incumbents matches the Court’s concern in \textit{LULAC} for keeping constituencies intact so that they can voice approval or disapproval of their incumbent’s performance. But this limited concern has been frequently misinterpreted to imply that incumbency protection is a traditional and legitimate districting criterion. Indeed, incumbency protection has been used as a defense against claims of racial gerrymandering to show that racial concerns did not predominate. See Easley v. Cromartie, 532 U.S. 234, 248 (2001). Hopefully \textit{LULAC} has put to rest the idea that incumbency protection is somehow a legitimate districting goal.
While I would dispute the notion that we could trust legislators to make districting decisions to increase their accountability for “promises made or broken,” the Court seems to recognize, at least in the race context, that incumbent protection for the benefit of incumbents is illegitimate.

Finally, state courts have also recognized the constitutional harm caused by incumbent self-dealing. In Gould v. Grubb, for example, the California Supreme Court struck down a law that required incumbents to be listed first on the ballot, which political scientists have shown increases the chances of being selected.

C. Remedy for Politicians’ Breach of Their Duty of Loyalty

If we recognize that political representatives are fiduciaries who have a duty of loyalty and that breach of that duty works a constitutional harm, the question becomes one of remedy. Suits in contract or tort against individual legislators are not available to enforce their fiduciary duties. 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 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 laws aimed at entrenching incumbents unconstitutional.

Robert 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. Indeed, in Federalist 78, Hamilton explained that it was the role of the judiciary to keep elected agents within the limits of their delegated authority. To do otherwise would be to subordinate “the intention of the people to the intention of their agents.”

If courts were to bear the role of supervising and enforcing fiduciary duties on representatives, the presence of a conflict of interest should trigger heightened scrutiny. If the legislature passed a normal substantive law, regular rational-basis scrutiny would apply. If the legislature passed a

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263 536 P.2d 1337, 1338 (Cal. 1975).
264 Pildes, Foreword, supra note 58, at 76 & n.200.
265 See U.S. CONST. art. I, § 6, cl. 1; GOUGH, supra note 194, at 188; Natelson, Judicial Review, supra note 30, at 269-70; Issacharoff & Ortiz, supra note 63, at 1646-47.
266 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.”).
267 THE FEDERALIST NO. 78 (Alexander Hamilton).
268 Id.
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 would serve 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 unfair or motivated by entrenchment, it would be invalidated 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. 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 political process in general or districting decisions in particular. But the Constitution is strikingly silent on many issues central to the structure of the democratic process; yet that has not stopped the Court from intervening in reapportionment or racial gerrymandering contexts. In much the same way that the Court has given force to structural values in the Constitution such as federalism and the separation of powers, the Court can recognize the structural commitment to fiduciary government as the basis for judicial review of incumbent self-dealing.

Moreover, there are several 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. The most obvious candidate is the Republican Form of Government Clause. Although the Supreme Court has long held claims under the Republican Form of Government Clause to be nonjusticiable political questions, those holdings reflect a skepticism about the institutional

274 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); see also Issacharoff, Cartels, supra note 18, at 613-14..
competence of courts rather than any explicit limitation on the content of the constitutional guarantee.\textsuperscript{275} Other candidates include the Elections Clause,\textsuperscript{276} the Equal Protection Clause,\textsuperscript{277} the First Amendment,\textsuperscript{278} and the Due Process Clauses. Indeed, the Due Process Clause could easily be read to impose a duty on legislators to avoid self-dealing—\textit{i.e.}, to refrain from being judges in their own causes\textsuperscript{279}—and, under the rationale of \textit{Carolene Products} footnote 4, to authorize the courts to strictly scrutinize legislation that blocks the channels of political change.\textsuperscript{280} Any of these clauses, if interpreted with the Constitution’s general purpose of creating a fiduciary government in mind, could serve as a basis for judicial review of legislative self-dealing the redistricting process.\textsuperscript{281}

Textualism, however, is not the main concern in relying on courts to enforce the fiduciary duties of legislators in redistricting decisions.\textsuperscript{282} Indeed, the courts appear willing to recognize that the incumbent self-dealing in gerrymandering violates the Constitution.\textsuperscript{283} The main concern is

\textsuperscript{275} See Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912); Luther v. Borden, 48 U.S. (How.) 1 (1849).

\textsuperscript{276} U.S. CONST. art. I, § 4 cl. 1 (granting states authority to regulate “times, places, and manners” 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 of Samuel Issacharoff, Burt Neuborne, and Richard H. Pildes as Amicus Curiae in Support of Appellants, in LULAC v. Perry, 548 U.S. 399 (2006) (arguing that political gerrymandering to create safe districts exceeds the Elections Clause’s grant of power to the states to design congressional districts and violates Article I § 2’s requirement that Members of the House be chosen by “the People,” not the state legislatures); Pildes, supra note 19, at 262-70.


\textsuperscript{278} See Vieth v. Jubilirer, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring); 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 \textit{Shaw v. Reno}, 509 U.S 630 (1993), line of cases, which says 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); 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).

\textsuperscript{279} E.g., Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009); \textsc{The Federalist} No. 10 (Madison).

\textsuperscript{280} See \textsc{generally John Hart Ely, Democracy and Distrust} (1980).

\textsuperscript{281} 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 supra note 30.

\textsuperscript{282} None of the Justices who proposed substantive standards for evaluating political gerrymanders in \textit{Bandemer}, \textit{Vieth}, or \textit{LULAC} even attempted to provide a textual foundation for their approaches. See Stephanopoulos, supra note 11, at 37 n.203.

\textsuperscript{283} See supra Part III.B.2.
the institutional competence of courts.\footnote{See Fuentes-Rohwer, supra note 15, at 1160, 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.”).} It is all well and good to say that legislators should not draw districts 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? This is where 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 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 this problem of institutional incompetence by creating incentives for agents to seek approval of their conflicted decisions from disinterested decision makers, allowing courts to focus their review on the adequacy of the process of approval instead of 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 where 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 conflicted transaction 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 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.\footnote{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., Judically Manageable Standards and Constitutional Meaning, 119 HARV. L. REV. 1274 (2006); Issacharoff, Cartels, supra note 18, at 641-48.}

This corporate-law framework could 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 examines the framework using the example of 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 congressional redistricting or redistricting in states that use partisan or bipartisan commissions where the line-drawing institutions, though formally separate from the agents, are captured by insiders.286

A. “Entire Fairness” Review of Redistricting

There can be little question that legislative redistricting is a self-dealing transaction and 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 like they did for self-dealing corporate transactions in the nineteenth century287: Districts drawn by legislatures are invalid. Samuel 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 conflicted legislators in the redistricting process.288 Issacharoff’s account, however, is incomplete because it does too little to provide a constitutional foundation for prophylaxis and it provides courts with little guidance in evaluating the institutions and processes that would replace legislatures as line-drawers.289 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. Courts could put the burden on the legislature to show that, despite the conflict of interests, the redistricting was entirely “fair.” This, 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

286 See supra notes 36-37, 58-68, and accompanying text.
287 See supra note 153.
288 Issacharoff, Cartels, supra note 18, at 643.
289 Critics, such as Nathaniel Persily, have argued that prophylactic rules, like the Miranda rule, have only been used to protect rights with “some clear textual basis that can shape the contours and content of the prophylactic rule,” and cannot be justified by the antitrust metaphor and procompetitive democratic theory propounded by Issacharoff. Persily, supra note 6, at 676-77.
exactly the problem that plagued the Supreme Court in *Vieth*—by what standard should the court evaluate the “fairness” of the districts that the legislature drew? There is no extrinsic, objective benchmark like market price with which to compare the outcome.\[290\] 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. We can say that a corporate transaction occurring at the price a well-functioning market would have set is “fair,” but we do not believe that courts are the 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\[291\] (a position to which I am somewhat sympathetic), determining that baseline would be extraordinarily difficult.\[292\] 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.\[293\] No comparable political “transaction” in a competitive political market exists.\[294\]

A return to fiduciary principles, however, can provide guidance to courts where 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.\[295\] Courts could apply something akin to the other type of entire fairness review—the hypothetical arm’s-length comparison.\[296\] Instead of comparing the outcome to some extrinsic baseline, the court would ask whether the districting plan drawn by the legislature is the same as one that would have been drawn by a

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*See supra* notes 18, 616-17

*See supra* notes 117-119 and accompanying text.

*See supra* notes 162-163 and accompanying text.
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 difficult to evaluate, certainly no one could reasonably claim that the standard methods of gerrymandering (e.g., packing, cracking, stacking, shacking,\textsuperscript{297} or the collusive agreements of the bipartisan gerrymander\textsuperscript{298}) 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. Legislators would be hard pressed to explain most of their districting decisions or the bizarre shapes of gerrymandered districts\textsuperscript{299} in plausible non-entrenchment 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 the legislature bears 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.\textsuperscript{300}

In practice, entire fairness review may end up looking a lot like strict scrutiny—strict in theory, but fatal in fact.\textsuperscript{301} 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, it applies an almost prophylactic prohibition against self-dealing, which is the hallmark of the duty of loyalty.\textsuperscript{302} Such searching

\begin{footnotes}
\item \textsuperscript{297} Issacharoff & Karlan, supra note 38, at 551-52.
\item \textsuperscript{298} See Issacharoff, Cartels, supra note 18.
\item \textsuperscript{299} The Court took a similar approach with respect to racial gerrymandering in the Shaw v. Reno line of cases. There, the Court viewed unexplained (or inexplicable) “highly irregular” and bizarrely shaped districts as evidence of an impermissible “effort to segregate the races for purposes of voting.” 509 U.S. 630, 646 (1997); see also Charles, supra note 13, at 672-74.
\item \textsuperscript{300} A legislature could conceivably make a showing that it ignored partisan and entrenchment effects in its districting decisions in favor of some objective criteria that may have actually worsened the electoral prospects of the party in power or incumbents in general. Needless to say, such a scenario does not resemble any redistricting practices by legislatures today.
\item \textsuperscript{302} See supra notes 121-123 and accompanying text.
\end{footnotes}
review would approach the per se rule advocated by Issacharoff\textsuperscript{303} and would serve to force redistricting decisions into a process 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.\textsuperscript{304}

\textbf{B. Process Safe Harbors for Redistricting}

As in corporate law, the harm in incumbent control of redistricting is the conflict of interest. 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, it could serve as a safe harbor, like approval by disinterested directors or shareholder ratification in corporate law. Courts would then apply a much more deferential standard of review—one analogous to the business judgment rule—to the outcome. This would have the effect of both mitigating the self-dealing nature of redistricting and keeping 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. The courts would ask whether the decision makers had conflicts of interest themselves.\textsuperscript{305} They would examine the independence of the process from the influence of conflicted legislators.\textsuperscript{306} And, they would determine whether the decision makers were provided with the relevant information\textsuperscript{307} and sufficient resources necessary to make a disinterested decision.\textsuperscript{308} 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

\textsuperscript{303} See supra note 288.
\textsuperscript{304} See Ferejohn & Friedman, supra note 285.
outcome of the safe-harbor process unless the challenger could show that it was egregiously unfair—\textsuperscript{309} the analog of corporate waste.\textsuperscript{310}

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.\textsuperscript{311} Others have suggested using automated computer programs to draw districts based on criteria that would not include political data.\textsuperscript{312} Another option would be to put a proposed redistricting plan before the voters in a statewide referendum.

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 form of districting process, nor to survey all of those that have been suggested, but rather 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 not for courts to dictate the normative goals of districting (e.g., 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.

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

\textsuperscript{309} Cf. Cooke, 2000 Del. Ch. LEXIS 89.
\textsuperscript{310} Cf. Lewis v. Vogelstein, 699 A.2d 327 (Del. Ch. 1997).
1. Independent Districting Commissions

Many states use commissions as part of their redistricting processes, but very few 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.\footnote{McDonald, Redistricting, supra note 36, at 236.} They were designed to avoid legislative gridlock by either centralizing redistricting responsibility in the commission or allowing the legislature to act first and then handing redistricting off to a commission if gridlock occurred.\footnote{Id.} 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.\footnote{Id.} As a result, members of these commissions typically are highly partisan and maintain close ties with the legislators.\footnote{Id. at 236-37.}

It is only recently that states have begun to experiment with truly independent districting commissions.\footnote{For the 2010 round of redistricting, six states—Alaska, Arizona, California, Idaho, Montana, and Washington—have adopted more or less independent citizen districting commissions. See Levitt, supra note 311, at 534-35.} These commissions have been established almost exclusively through the initiative process, thereby bypassing the legislature.\footnote{McDonald, Redistricting, supra note 36, at 237.}

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. For example, commissioners cannot have served in a 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.\footnote{AZ. CONST. Art. 4, pt. 2, §§ 3-4, 12.} Commissioners are then selected by the majority and minority leaders of each house of the state legislature from the pool of pre-vetted candidates, with the four selected commissioners choosing a fifth who will chair the commission.\footnote{Id. §§ 6-8.} The Arizona constitution also specifies substantive criteria for the commission to follow including equipopulation, compliance with the U.S. Constitution and VRA, 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 other goals.\footnote{Id. § 14.} 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.\textsuperscript{322} Commission meetings must be open to the public, and draft maps are subject to a public notice and comment requirement.\textsuperscript{323} The 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.\textsuperscript{324}

Likewise, in a pair of ballot initiatives in 2008 and 2010, California adopted an independent Citizens Redistricting Commission for drawing state and congressional districts. As in Arizona, there are strict eligibility criteria for commissioner, barring applicants who had, 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 more than $2000 to any elected candidate.\textsuperscript{325} And commissioners are prohibited from seeking elective office for ten years after serving, from holding any appointed public office for five years, or from working as a paid legislative staffer or lobbyist for five years.\textsuperscript{326} But California’s commissioner selection process provides more independence from the legislature than Arizona’s. Qualified applicants are screened for analytical skills, impartiality, and diversity by the independent State Auditor’s office, which selects 20 Democrats, 20 Republicans, and 20 people who are not members of either party as nominees. The majority and minority leaders in each house of the state legislature are allowed to strike two nominees from each pool.\textsuperscript{327} The first eight commissioners (three Democrats, three Republicans, and 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.\textsuperscript{328} District maps must be approved by a supermajority of each class of commissioner (three Democrats, three Republicans, and three neither)\textsuperscript{329} and are subject to a public referendum if challenged by a petition signed by

\textsuperscript{322} Id. § 15.
\textsuperscript{323} AZ. CONST. Art. 4, pt. 2, § 16.
\textsuperscript{324} Id. §§ 18-19, 23.
\textsuperscript{327} Cal. Gov’t Code § 8252(b)-(e).
\textsuperscript{328} Id. § 8252(f)-(g).
\textsuperscript{329} CAL. CONST., art XXI, § 2(c)(5).
5% of the number of voters in the last gubernatorial election.\textsuperscript{330} 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 must appoint special masters to draw the maps.\textsuperscript{331}

California also specifies substantive criteria for the commission to follow, including equipopulation, compliance with the VRA, contiguity, respect for political subdivisions, compactness, and respect for communities of interest.\textsuperscript{332} But unlike in Arizona, the commission is not required to attempt to create competitive districts. The California commission is, however, barred from considering incumbent or candidate residences or from drawing districts to favor or discriminate against any incumbent, candidate, or party.\textsuperscript{333} 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.\textsuperscript{334}

When reviewing a districting decision made by a commission, courts should focus primarily on the independence of the commissioners and the fairness of the process, not the ultimate outcome. This 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, adequately informed, and used fair procedures, courts apply the deferential business-judgment-rule standard of review to their substantive decisions.

In evaluating 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. The idea is not to exclude people with political opinions from commissions, but to ensure that people who are part of, or beholden to, the legislature or party machine are excluded. Courts should also evaluate the fairness 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 use, do

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\item\textsuperscript{330} Id. § 2(i).
\item\textsuperscript{331} Id. §§ 2(j), 3(b)(3).
\item\textsuperscript{332} Id. § 2(d).
\item\textsuperscript{333} Id. § 2(e).
\item\textsuperscript{334} Id. § 2(h); Cal Gov’t Code §§ 8253, 8253.6.
\end{itemize}
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little to cleanse the taint of self-dealing and should not be entitled to deference.

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 that the decision was made free from incumbent (or party) 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 is not 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 or parties. A captured commission would not be much better than leaving line drawing in the hands of the legislatures themselves. But capture by partisans is exactly what courts are looking for when they review the commission process for independence and fairness. If a party 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 political parties, 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.\footnote{One suggestion to guard against capture has been to use \textit{advisory} commissions to propose nonbinding districting plans which the legislature could then vote up or down without amendment. \textit{See} Christopher S. Elmendorf, \textit{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.}

California’s Citizens Redistricting Commission measures up fairly well on these criteria. The eligibility requirements, vetting, and randomized selection process for commissioners ensures that the commission is not beholden to the legislature or political parties. And the independent funding
and transparent procedures that invite public participation help ensure that the process is well-informed, fair, and adequate. If California’s procedures are followed, districting plans adopted by the commission should be entitled to deference by a reviewing court.336

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 a majority of the Arizona commissioners are appointed by the leaders of the state legislature. 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 mapping process, backed by transparency and public participation requirements, make it less likely that the commissioners would attempt to pull off such an incumbent-friendly gerrymander. But a reviewing court must assure itself that the commissioners are not beholden to the incumbent legislators (or parties) before it can safely defer to the commission’s districting plan.

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.337 But under a fiduciary model, the court should have first assured itself that the commission was truly independent and operated free from incumbent or party capture. While the appropriate degree of competitiveness is properly a decision for the commission that the

336 See Vladimir Kogan & Eric McGhee, Redistricting California: An Evaluation of the Citizens Commission Final Plans (forthcoming Cal. J. Pol. & Pol’y 2012), available at http://igs.berkeley.edu/politics/redistricting_california.pdf (finding that commission’s 2011 districts measured up well against districting criteria specified by California Constitution, were significantly more compact than previous districts, and are likely to produce modest increase in competition); cf. Vandermost v. Bowen, No. S198387, 2012 WL 246627 (Cal. Jan. 27, 2012) (holding that commission-draw map for state senate will serve as interim map in event that referendum challenging map qualifies for ballot); id. (Liu, J. concurring) (criticizing majority for retaining discretion to evaluate substantive merits of proposed interim maps).

337 Ariz. Minority Coalition for Fair Redistricting v. Ariz. Independent Redistricting Comm’n, 220 Ariz. 587, 596-98 (2009); see also id. at 601 (Hurwitz, J., concurring) (“[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.”).
court lacks institutional competence to make, 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.

2. Automated Computer Programs

Another potential safe-harbor process would be to use automated computer programs to draw districts. 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, but the random outcome would have difficulty passing muster under the VRA’s mandate to create majority-minority districts. Once we go beyond completely apolitical data, the questions of what criteria are used to design the program, the relative weight of those criteria, and what data can be used as inputs, involve the sorts of first-order decisions that we think incumbents are untrustworthy, and courts incapable, of making. Therefore, automated computer programs may work best when used in conjunction with another safe-harbor process like an independent commission.

Even when used alone, however, automated computer programs have several advantages over districting through the normal legislative process. Computer programs can increase the transparency of districting.

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338 See id. at 598, 600; see also id. at 601 (Hurwitz, J., concurring) (“[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.”).

339 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 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. Independent Redistricting Comm’n v. Brewer, No. CV-11-0313-SA (Ariz. Nov. 17, 2011); see Mary Jo Pitzl, Court orders reinstatement of redistricting official, ARIZONA REPUBLIC (Nov. 18, 2011).

340 See, e.g., Issacharoff, Cartels, supra note 18; Issacharoff, Judging Politics, supra note 312; Browdy, supra note 312. See Micah Altman & Michael McDonald, The Promise and Perils of Computers in Redistricting, 5 DUKE J. CON. L. & PUB. POL’Y 69, 80-88 (2010), on the feasibility and computational challenges of using fully automated programs to draw districts.

decisions.\textsuperscript{342} Because the criteria used in districting decisions must be coded explicitly into the program in advance, the process of redistricting becomes reviewable.\textsuperscript{343} The decisions and tradeoffs made in determining the criteria for districting, along with any incumbent self-dealing, can be exposed to meaningful public and judicial scrutiny.\textsuperscript{344} Automated computer programs can also be used to force decision makers to pre-commit to explicitly stated aims and objectives of redistricting.\textsuperscript{345} If line drawers had to reduce their redistricting objectives to a computer program before census data became available and then live with the districts drawn by the computer program, they would be forced to debate the merits of districting principles before they could know how the outcomes would affect them.\textsuperscript{346} Of course this assumes that the census data could not be accurately predicted in advance by political insiders, a strained assumption given what is at stake 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.\textsuperscript{347}

In short, automated computer programs offer promise for increasing transparency and forcing debates over districting criteria to happen 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 for determining program design criteria out of the hands of the legislature or courts, however, 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 a self-dealing transaction can be cleansed through ratification by a majority of the

\textsuperscript{342} Altman & McDonald, \textit{supra} note 340, at 72, 102-05.
\textsuperscript{343} Browdy, \textit{supra} note 340, at 1386.
\textsuperscript{344} \textit{Id.} at 1389.
\textsuperscript{346} Issacharoff, \textit{Judging Politics, supra} note 340, at 1699; \textit{cf.} Adam Cox, \textit{Designing Redistricting Institutions}, 5 ELEC. 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).
\textsuperscript{347} See Altman & McDonald, \textit{supra} note 340 at 98-101.
shareholders as long as the conflict of interest is fully disclosed and the shareholders are adequately informed before the vote.\textsuperscript{348} It appears that 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. On the other hand, 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 the proposed map. Framing effects may allow insiders to manipulate the outcome.\textsuperscript{349} 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 is not a vote for the status quo, it is 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.

On the other hand, certain features could make ratification by referendum work. 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. Meaningful 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

\textsuperscript{348} See, e.g., In re Wheelabrator Techs., Inc., 663 A.2d 1194 (Del. Ch. 1995).
redistricting and only those criteria approved by referendum could be used in the computer program. But careful scrutiny of the programming process would be necessary to ensure that the criteria approved by the public were implemented fairly and not manipulated for partisan ends.  

Lucas v. Forty-Fourth General Assembly 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 the state’s electorate.” At first blush, Lucas seems wrongly decided on a fiduciary theory. There was no entrenchment concern in Lucas. The apportionment scheme was approved by an overwhelming majority of voters, including a majority of voters in each county. Any taint of self-dealing was cleansed by the apportionment plan’s ratification through popular referendum. 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 “clear-cut choice” in favor of the apportionment plan. Structural defects in the decision-making process—for example, that the “ballots were long and cumbersome”—rendered the referendum insufficient to cleanse the taint. 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.

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

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350 See Altman & McDonald, supra note 340, at 88-91.
352 Id. at 736.
353 Id. at 717, 731.
354 Id. at 732.
355 Id. at 731.
356 Id. at 731-32 (“[T]he assumption of the court below that 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.
These process safe harbors may not be perfect, but they are certainly better than the way redistricting is currently done in most states. One would be hard pressed to design a system with greater risk of incumbent self-dealing than allowing legislators to draw their own districts.

CONCLUSION

This Article represents a first step towards 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 give real force to this important constitutional value, without the need to make the types of decisions where we question their legitimacy or competence.

In no area is the conflict 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 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.