LEADERS ARE NOT FIDUCIARIES

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Leaders have long been described as fiduciaries because they are entrusted with the power to make decisions that significantly affect the lives and welfare of others. While trustworthiness is an admirable and necessary quality in a leader, fiduciary doctrine describes neither the bounds of a leader's behavior nor the protections enjoyed by the governed. Fiduciary doctrine does not occupy the field of trusting relationships.

Leaders sell both the goals and priorities they will pursue in their positions and their own trustworthiness—that is, the combination of ability, integrity, and benevolence they bring to the task. In order to win and keep leadership positions, leaders must define success for constituents and convince them that they can be relied upon to deliver those results according to a given standard of decency. Fiduciary rhetoric obscures, rather than supports, the elements of trust that leaders must sell to their constituents. Those who are vulnerable to the decision-making of powerful others are harmed by their own belief in fiduciary rhetoric that does nothing to constrain the behavior of leaders who are driven by self-interest. Fiduciary rhetoric does not describe how leaders make decisions, and fiduciary doctrine cannot protect those who select and rely on leaders. By deceiving and misdirecting those it aims to protect, the fiduciary myth does real harm.

This Article makes three novel theoretical contributions to the literature. First, it argues that contrary to popular and scholarly opinion, conscientious leaders of large, diverse groups are not, and cannot be, fiduciaries of those they lead. Second, it models a more accurate understanding of how leaders are constrained by those affected by their decisions. Third, it presents an explanation of why the fiduciary myth, long viewed as harmless at worst, is actually harmful to those it is supposed to protect. It animates these arguments by focusing on the specific relationships between corporate and political leaders and their constituents.

INTRODUCTION

What have corporate directors and government officials done for *you* lately? Perennial dissatisfaction with corporate managers and the government is so ubiquitous that it has become cliché. Those who run large public corporations and our government have significant power to affect the quality of life we all enjoy. The concentration of substantial power over not only the national, but the global, economy and welfare is acceptable because it rests on an assumption that those in power work for us. They are "public servants." We "elect" them and can "fire" them. They hold power in trust for our collective benefit. They are our fiduciaries.

That paradigm is gravely mistaken. Leaders of large, diverse groups are not and cannot be fiduciaries of those they lead. Corporate directors and officers are not shareholders' agents, nor are they shareholders' representatives. They are not held to a standard of pursuing the interests of a single, identifiable beneficiary. Their jobs are not that simple. They also do not pursue a public

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good or even a testable corporate good. Likewise, government officials, despite their titles, do not meaningfully represent the interests of their constituents, and they are held to no such legal standard. Indeed, something akin to a business judgment rule allows leaders of all kinds great latitude to decide which goals to pursue and how to pursue them. Corporate managers and elected officials use that latitude to transparently pursue self-interest when making important decisions. They are not fiduciaries.

They are salespeople. They are each selling their own trustworthiness to make decisions that significantly affect the lives of others. The expressive function of fiduciary law has been to convince leaders and society that one who must be trustworthy must also be fiduciary. This Article reveals that equating trust with fiduciary doctrine misunderstands fiduciary law and undersells trust.

The reason fiduciary doctrine has been thrust upon relationships between powerful decision-makers and those who are subject to their decisions is that the decision-makers are given control over property that does not belong to them. They are expected to use that property in a way that benefits particular others.[1] Fiduciaries are not to indulge self-interest or the interests of others to the extent those interests conflict with those of the beneficiary. Because leaders' decisions can generate significant externalities, we hope that they will act with integrity, that they will endeavor to minimize the negative externalities they impose on society, and that they will not behave opportunistically to the detriment of those who are vulnerable to them. "Fiduciary" is the doctrine our law applies to situations where one person exercises power and influence over the assets or well-being of another. But it is an inapt description of leaders of large, diverse groups. Trust is key, but there is trust outside of fiduciary relationships, and fiduciary doctrine does not accurately describe the relationships between leaders of large, diverse groups and their constituents.

Not only is designating leaders "fiduciaries" limiting, it is also misleading. Assuming leaders are fiduciary leads us to dance around a fiction instead of honoring the parties' appropriate rights and expectations. There is no one beneficiary of a corporate manager or political representative's fiduciary duties, no one set of interests for those leaders to represent. There is not even a clear "abstract purpose" for them to pursue.[2] No one can define a social purpose for

1. Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 215 (2005) (stating that a beneficiary "delegates open-ended management power over property to a [fiduciary]"); Megan W. Shaner, *The (Un)Enforcement of Corporate Officers' Duties*, 48 U.C. DAVIS L. REV. 271, 296 (2014) ("[F]iduciary obligations serve as the princip[al] restraint on the broad management powers provided to the board of directors . . . ."); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 426 (1993) (explaining that where the contracting parties lack the foresight or expertise to specify the manner in which the objective of the relationship is to be achieved, fiduciary duties step in to fill the gap); Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 800 (1983) (noting the beneficiary in a fiduciary relationship is dependent on the fiduciary).

2. Nicholas R. Parrillo, *Fiduciary Government and Public Officers' Incentives*, *in* FIDUCIARY GOVERNMENT 156 (2018) (describing Miller and Gold's conception of a "governance type" fiduciary responsible for

government or a business strategy for a corporation that even half of their respective constituents would agree with. There is no fiduciary without a beneficiary, and a beneficiary must have an identifiable interest for the fiduciary to pursue. Any requirement or expectation that leaders behave selflessly is both unrealistic and disingenuous. The self-interest of our leaders is made plain and is largely visible. So rare is a departure from the pursuit of pure (if not directly monetary) self-interest that it is celebrated as an unusual display of bravery and integrity.[3]

This Article reveals that leaders of large, diverse groups of people cannot possibly make decisions in the interests of appropriate others. There is no one identifiable interest for those leaders to pursue. Even though they are not constrained to enact the will of any single constituency, they are also not free to make completely self-serving decisions at the expense of those who have empowered them. It is not fiduciary obligation that constrains them, nor is it a legally or ethically enforceable mandate that they be other-regarding. Rather, they must make decisions that they can "sell" to those who determine their ability to remain in power. Leaders market themselves and their leadership priorities, goals, and strategies to investors and voters who decide whether they want to invest in the strategy the leader represents. Winning leaders attract the most investors, voters, and buyers. Those who invest in corporate and political leaders are like options holders, to whom no fiduciary duties are owed. They make an investment in the hopes that the leader's promised approach will be successful; they invest in the strategy they think has the best chance of realizing their desired ends, but they do not expect that their precise interests will be faithfully represented by the leaders.

The very goal of remaining in power is a selfish one. Society only needs *someone* to do the work of corporate executives and government officials. We are under no illusion that the best among us are corporate executives or elected leaders. Rather, we must choose among those who most want to exercise power over the lives of others. In order to properly protect society from the externalities imposed by the decisions and whims of necessarily selfish leaders, the law must honestly confront the realities of their decision-making and provide remedies that reflect the system as it operates.

We cannot rely on empty fictions and norms to provide more than incidental protection. While perpetuating norms of holding leaders to fiduciary ideals may confer some benefits to the extent it creates a culture that encourages

"pursu[ing] multiple, non-prioritized purposes" (quoting Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 516–17 (2015))).

3. Senator John McCain, for example, was celebrated for his willingness to take political positions that went against his blatant self-interest, something some might argue should be the baseline duty for any politician serving the public. *Coalition for Integrity Honors U.S. Senator John McCain with 2017 Integrity Award, Parsons Corporation with Corporate Leadership Award*, BUS. WIRE (Nov. 27, 2017), https://www.businesswire.com/news/home/20171127005017/en/Coalition-Integrity-Honors-U.S.-Senator-John-McCain.

honorable behavior, it also imposes costs to the extent it causes citizens and constituents to misapprehend the nature and quality of the leadership to which they are subject. A false sense of security is dangerous, sure, but so is misunderstanding one's own power within the system. If shareholders and citizens believe they have the power to affect corporate and government policy and make the world operate more as they would like it to when they do not, then they are mistaken about what they are trusting elected leaders to do. That fundamental misunderstanding operates as fraud against those very constituents. The power to make decisions for constituents that affect their lives is taken under the false pretense that the decision-making power is to be exercised for their benefit.

None of this is to say that leaders necessarily act in bad faith. On the contrary, they often want what is best for their constituents—to achieve a balance of competing interests that yields the best possible pay off for all involved. That is often, if not always, how their success is defined. When one constituency's needs are particularly important, conscientious leaders may promote that group's interests above others. In many situations, it behooves leaders for personal and professional reasons to do what they think is best for the group as a whole.[4] While decisions made with those considerations in mind are certainly other-regarding, they are not enforceable by fiduciary doctrine, nor is that goal the fiduciary mandate.

I use two prominent examples to illustrate the distinction between well-meaning leadership and fiduciary doctrine: corporate executives and political leaders. The two kinds of leaders are different from each other in many ways and their objectives and constituencies are very different. The corporate goal of wealth maximization can be difficult to define with specificity, but it is far narrower than a mandate to pursue the public good. Shareholders pay far less attention to corporate elections and corporate policy than voters do to political elections, and their apathy is more rational. Shareholders are less exposed to the risk of failure of any one corporate executive than citizens in a democracy are to a failure of government and particularly vulnerable populations within the citizenry often do not vote.[5] The expressions and consequences of self-interest can be less dangerous in the corporate context than in the political arena because the stakes can be lower. (Though, collectively, corporate greed that creates systemic risk can have significant consequences for the global economy.)

But the similarities between the two that I focus on yield important insights about each domain of leadership and leadership of large, diverse groups more

4. This is the mandate Rob Atkinson would give all leaders, to make the decision they think is best for society. Rob Atkinson, *For-Profit Managers as Public Fiduciaries: A Neo-Classical Republican Perspective*, 19 FLA. ST. U. BUS. REV. 1, 2, 24 (2020).

5. H. P. P. Lötter, *Poverty as Threat to Democratic Values*, 22 PUB. AFFS. Q. 177, 177 (2008) (observing the various harms experienced by politically vulnerable, impoverished populations in democratic societies).

generally. Corporate executives and government leaders make important decisions that affect others profoundly. They do so with a constituency, jurisdiction, and beneficiary in mind and are theoretically supposed to pursue the best interests of that group. They are given power in the first place, in part, in reliance on a mandate that they exercise that power in an other-regarding manner that does not prioritize self-interest. They have discretion over the valuable assets of others and can cause significant harm to the lives of others if they do their jobs poorly or make the wrong decisions. The groups they lead are large, widely dispersed, and diverse in their interests and preferences. Society is most concerned with the decisions leaders make and how to constrain them to make decisions that honor the expectations of those who put them in power. I will reveal that the fiduciary paradigm is a poor fit in such circumstances and devise a more sensible, realistic model of the relationship between public leadership and public trust.

In this Article, I make three significant contributions to the literature. First, I debunk the conventional wisdom that leaders serve selflessly—that they are required to and do pursue the best interests of their constituents in their decision-making. Second, I model the correct understanding of the relationship between leaders and their constituents and the central role trust plays in how leaders achieve and maintain power. Third, I reveal that the myth of fiduciary–leaders is harmful to the very constituents it means to protect. Leadership of large, diverse groups is, by its very nature, incompatible with fiduciary principles. It cannot be executed in a way that singularly and zealously pursues a certain interest of a particular other because the interests and preferences of those who realize the effects of the leadership are too diverse and the self-interest of the leader is too strong. For as long as the fiduciary–leader myth has dominated, those who acknowledge its practical weakness have argued that its value in norm and culture creation overcomes any gap in its enforceability or descriptive power. I argue that equating a desire for integrity and equitable behavior with fiduciary standards materially misleads those who give leaders power. Constituents suffer from that misrepresentation when they use the wrong information to decide where to invest their money or how to vote. They might waste time informing themselves about issues that will not materially affect the choices they have to make because they misjudge the issues that will turn an election or how their preferred candidate will perform once elected. Constituents must understand the terms of their relationships with leaders in order to do what they can to maximize their chances of realizing their best interests or preferences. The harms caused by the fiduciary–leader myth are not felt every day. The rationally apathetic constituents of the leaders examined here, on average, rely on proxies and the advice of experts that get them fairly close to where they want to be. But when things go awry—when constituents are mistaken and misled—they may suffer irreparable harms that could have been avoided if only we would stop lying to ourselves about virtues our legal system does not demand or enforce.

In Part I, I sketch the fiduciary paradigm of corporate governance. The fiduciary model is comprised of points of agreement among fiduciary scholars and jurists. I argue that it does not accurately describe the governance of modern public corporations. Directors do not take marching orders from any corporate or shareholder constituency and are, at most, "representing" a corporate position they have invented themselves. To treat such leaders as though they are beholden to the interests of others is to misunderstand the work they are doing.

In Part II, I examine the representative paradigm of democratic government. To be sure, government officials are empowered to represent their jurisdictions, to speak on their behalf, to make decisions, and to cast votes for others. Nevertheless, political leaders are not bound to pursue or follow the interests of their constituents or even of a discernable public good. They are leaders, not followers, of voters' will. To the extent they take orders from or reveal a fealty to any entity, it is the political party to which they belong.[6] As such, political leaders are not responsive to the needs, preferences, or interests of their constituents, not even those constituents who vote. What's more, a political outcome is not even an accurate reflection of the voters' interests, preferences, or needs. There is no mechanism for holding a political leader to the interests of voters and no recourse against a political leader whose personal interest in power and future profit drives his or her decision-making. Political leaders are not fiduciaries. They are not even responsive representatives.

In Part III, I reveal how leaders market their trustworthiness to those they lead. I model the dynamic relationship between ability on the one hand and a "standard of decency" composed of integrity and benevolence, on the other. Leaders position themselves within that model, maximizing signs of achievement within the constraints placed on their behavior by law and the markets in which they operate.

In Part IV, I make the case that the fiduciary–leader myth harms those it claims to protect. The fiduciary–leader myth obscures leaders' trustworthiness by focusing constituents' attention on the wrong metrics. Fiduciary obligation mischaracterizes ability because it frames success in terms of pursuing interests that are impossible to reliably identify. Fiduciary rhetoric leads constituents to assume benevolence to the extent they assume the leader is acting in their best interests and to overlook integrity to the extent they are convinced that eschewing conflicted self-interest is the only important element of integrity. A strong belief in the fiduciary–leader myth is therefore doubly destructive; it can

6. CHRISTOPHER H. ACHEN & LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT 14 (2016).

leave constituents defrauded in terms of their expectations and with leaders who are not as trustworthy as they believe them to be.

I. FIDUCIARY PARADIGM OF BUSINESS GOVERNANCE

The genesis of the fiduciary paradigm of business governance was intuitive.[7] When the owners of a business decided to hire managers to operate the business for them, and ownership was then separated from control of the firm, the business owners demanded that the managers make business decisions consistent with the owners' interests. Fiduciary law is traditionally applied in situations in which one party exercises discretion over the assets of another.[8] The early separation of ownership from control constituted such a situation. Managers, as fiduciaries of business owners, were to exercise their judgment and discretion in pursuit of profit maximization for the business owners and were not to indulge conflicting self-interest. Owners would not have given up control over their business but for fiduciary assurances and the anticipated significant benefit from enlisting more qualified managers to make business decisions on their behalf. Skilled managers did not necessarily have the capital to start or buy the businesses they could manage. So the separation of ownership from control and the attendant fiduciary relationship was born.

Times have changed. While the fiduciary model still fits some businesses, it no longer describes the expectations and interactions among corporate leaders and shareholders in large public corporations. In an age of director primacy,[9] directors do not take their marching orders from shareholders. They are not charged with faithfully representing or pursuing the interests of a particular group of corporate stakeholders or even corporate shareholders. The law only requires that they follow the corporate interest of their own design. While profit maximization may seem to be a common, other-regarding goal, the degree to which different boards pursue that goal varies so widely by firm that it can hardly be considered an identifiable interest of another that directors faithfully pursue. Indeed, they appear to be doing what Rob Atkinson has suggested—using their own personal moral judgments to limit their profit-seeking as they see fit.[10] Beyond personal moral judgments and qualms, executive compensation and careerism have made the financial self-interest of officers and directors the acknowledged motivation for much of their decision-making. Well-diversified shareholders, the original beneficiaries of the fiduciary

7. Many observations and arguments in this Part build on my prior work in *Self-Interested Fiduciaries and Invulnerable Beneficiaries: When Fiduciary Duties Don't Fit*, *in* FIDUCIARY DUTIES IN BUSINESS, Cambridge University Press, (forthcoming 2020).

8. Stephen R. Galoob & Ethan J. Leib, *Fiduciary Loyalty, Inside and Out*, 92 S. CAL. L. REV. 69, 70 (2018); Frankel, *supra* note 1, at 808–09.

9. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 547 (2003).

10. Atkinson, *supra* note 4, at 26.

relationship in corporate law, are no longer vulnerable to the decisions of the managers of any one firm. Corporations themselves are not vulnerable without reference to the community of interests that make them up and none of those interests that compose the public corporation are as vulnerable as the beneficiaries of fiduciary duties must be.

The original justification for corporate fiduciary duties still fits for small firms where investors invest large sums of money for long periods of time in the hopes of outsized financial returns. So-called livelihood businesses also justify the use of fiduciary duties because the owners, who are often also the dominant managers, have their personal fortunes and livelihoods at stake.[11] Those populations of owners have risked significant capital and are vulnerable to the extent their returns depend on the judgment and discretion of others. But public corporations are different and have evolved to a point where their officers and directors cannot be said to govern as fiduciaries of the interests and well-being of an identifiable other or others.

A. Fiduciary Model

In order to show that the fiduciary model does not accurately describe the governance of large, public corporations, we must first define that model. Fixing a definition of the nature of fiduciary obligation and the scope of fiduciary duties is controversial. Scholars have debated when it is appropriate to find a fiduciary relationship, the extent to which those relationships are voluntary and contractual or structural, and what the duties of loyalty and care require. Corporate fiduciary duties are recognized as sui generis, differing structurally from one-on-one fiduciary relationships and necessarily requiring that corporate officers and directors be given significant latitude to use judgment to make business decisions that might not look wise in hindsight.[12] A strong business judgment rule and the lack of a personal relationship between the fiduciary and an identifiable beneficiary set the corporate fiduciary relationship apart.

The debate over the nature of corporate fiduciary duties has, like all other debates about legal theory, two main camps: the deontological and the utilitarian. In the fiduciary debate, the deontological position is known as "anti-contractarian" and "moralist," while the utilitarian position is known as "contractarian" or "amoralist."[13] The two sides differ on the scope and nature of the duty of loyalty—the duty that a fiduciary pursue the beneficiary's best interests within the scope of the engagement without indulging conflicted

11. *See* Christine Hurt, *Startup Partnerships*, 69 B.C. L. REV. (forthcoming 2020) (noting it is uncommon for small partnerships to prefer the elimination of fiduciary duties).

12. Shaner, *supra* note 1, at 294–95.

13. Kelli A. Alces, *The Fiduciary Gap*, 40 J. CORP. L. 351, 353–54 (2015); Galoob & Leib, *supra* note 8, at 72.

self-interest or prioritizing the interests of a third party. The duty of loyalty is the defining feature of fiduciary relationships, and it is unique to fiduciary doctrine.[14] Anti-contractarians believe that the duty of loyalty requires a devotion akin to that found in friendship.[15] They argue that the duty describes a feeling—a requisite cognition—on the part of the fiduciary, that the fiduciary *wants* what is best for the beneficiary and that the fiduciary pursues those ends as he would his own.[16] A loyal fiduciary, by these lights, must always consider a beneficiary's interests paramount and must not take any action that is inconsistent with those interests. They extend this reasoning to corporate fiduciary relationships.[17]

In contrast, the contractarian position holds that the corporate duty of loyalty requires only that the fiduciary not engage in conflicted transactions—that is, the fiduciary may not use his position to realize personal financial gain to the exclusion of and without permission from the corporation.[18] It is a simple command that does not inquire into the fiduciary's thought processes, preferences, personal loyalties, or zealousness. It only determines whether the fiduciary inappropriately realized financial gain and, in the absence of such a conflicted interest, it does not require more of the fiduciary.[19] Two ways of framing the minimalist corporate duty of loyalty according to the contractarian

14. Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665, 673 (2009); Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 901 (1993).

15. Leib, *supra* note 14, at 681–86; Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 511–14 (2009); Galoob & Leib, *supra* note 8, at 72–76; Lyman Johnson, *After* Enron*: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 43–47 (2003).

16. Gold, *supra* note 15, at 511–14; Galoob & Leib, *supra* note 8, at 72–76; Johnson, *supra* note 15, at 43–47.

17. Gold, *supra* note 15; Galoob & Leib, *supra* note 8, at 72–76; Johnson, *supra* note 15, at 43–47.

18. R. Franklin Balotti & Jesse A. Finkelstein, Delaware Law of Corporations and Business Organizations § 4.16 (2008); Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) ("Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests.").

> ("[T]he 'duty of loyalty . . . imposes an affirmative obligation to protect and advance the interests of the corporation and mandates that [a director] absolutely refrain from any conduct that would harm the corporation. . . . [A] director may not allow his self-interest to jeopardize his unyielding obligations to the corporation and its shareholders.'"

In re Walt Disney Co., No. Civ. A. 15452, 2004 WL 2050138, at *5 n.49 (Del. Ch. Sept. 10, 2004) (alteration in original) (emphasis omitted) (quoting Belcom, Inc. v. Robb, 1998 WL 229527 at *3 (Del. Ch. 1998))); Anadarko Petroleum Corp. v. Panhandle E. Corp., 545 A.2d 1171, 1174 (Del. 1988) ("It is a basic principle of Delaware General Corporation Law that directors are subject to the fundamental fiduciary duties of loyalty and disinterestedness. Specifically, directors cannot stand on both sides of the transaction nor derive any personal benefit through self-dealing."); *see generally* Ribstein, *supra* note 1.

19. Ribstein, *supra* note 1, at 225; Alces, *supra* note 13, at 393.

position are: (1) "[d]on't be conflicted without permission;"[20] and (2) corporate directors can do whatever they want as long as they act in good faith.[21]

Despite important differences, the contractarian and anti-contractarian positions have much in common. Both positions acknowledge that fiduciary relationships exist in situations in which one party is vulnerable to the judgment, discretion, and potential self-interest of another.[22] A fiduciary agrees to hold the interests of the beneficiary paramount over conflicted self-interest or the interests of a third party. Fiduciary duties reflect the reasonable expectations of both parties in entering into the relationship.[23] A fiduciary is to disregard conflicted self-interest and the conflicting interests of third parties in her pursuit of the best interests of a vulnerable beneficiary. This is the fiduciary model I will use to evaluate the extent to which the governance relationships of modern public corporations are fiduciary. I find they are not.

Before proceeding, it is important to understand the roles of officers and directors in corporate law and outline where fiduciary relationships are said to lie. Directors are responsible for the management of the firm. They supervise officers. Modern boards of directors of public corporations are said to be monitoring boards, primarily responsible for monitoring the real decision-makers—the officers.[24] Directors are responsible for making certain significant decisions for the corporation, but important day-to-day decision-making is the province of senior officers.[25] Because officers are employees of the firm and work under the supervision of directors, they are not held to owe fiduciary duties to shareholders. Their duties run to the corporation as employees of the firm and fiduciary responsibility for their decision-making rests with directors who have an obligation to monitor them.[26] There has not been serious litigation in Delaware against officers for breach of fiduciary duty,[27] and most fiduciary litigation that mentions officers addresses officers

20. Kelli A. Alces, *Debunking the Corporate Fiduciary Myth*, 35 J. CORP. L. 239, 269 (2009) (emphasis omitted).

21. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1015 (1997) ("Directors of Delaware corporations can do anything they want, as long as it is not illegal, and as long as they act in good faith.").

22. Frankel, *supra* note 1, at 809–10; Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 903–05 (1988); Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 556–58 (2001); D. Gordon Smith & Jordan C. Lee, *Fiduciary Discretion*, 75 OHIO ST. L.J. 609, 620–22 (2014).

23. Easterbrook & Fischel, *supra* note 1; Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 936–38 (2006).

24. Melvin A. Eisenberg, *The Board of Directors and Internal Control*, 19 CARDOZO L. REV. 237, 237 (1997); MELVIN A. EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS 139–41 (1976).

25. EISENBERG, *supra* note 24, at 140.

26. *See* Lyman P.Q. Johnson & Robert V. Ricca, *(Not) Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. 663, 669 (2007); Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1605–08 (2005); Shaner, *supra* note 1, at 304–06.

27. Directors would have to decide to sue them. Shareholders could try to compel the corporation to sue officers by making a demand, but such a demand is likely to be refused and would not be excused as futile because the majority of the board of directors (on a majority-independent board as required by NYSE

who are also on the board.[28] Despite the somewhat nebulous state of the understanding of fiduciary obligation for officers, as employees of the corporation, they are agents of the corporation, and so its fiduciaries. Thus, they are expected to make business decisions that are consistent with orders they receive from superiors or in the best interests of the corporation, just as an employee is supposed to execute her duties in the best interests of her employer. The self-interest of officers in making business decisions for the firm has not been examined in legal doctrine because of the intervening supervision of directors.[29] Key senior officers often sit on and dominate the board, and senior officers are responsible for educating directors about the decisions the directors must supervise, so the roles are not as practically distinct as they seem to be legally.

For the purposes of this Article, the important question is whether officers and directors of public corporations are using their power and discretion to make decisions for and manage the corporation in the best interests of a beneficiary of some fiduciary obligation, or if they are using that power and discretion to pursue their own ends. Because our inquiry is concerned with the discretion used to make decisions about the property of another, I will consider officers and directors together. Officers and directors exercise that discretion together, and structurally, their power to exercise discretion over property that does not belong to them is said to give rise to fiduciary obligation. Both are charged with acting for and on behalf of the corporation: officers as employee-agents and directors in a *sui generis* capacity that bears similarities to the work of a trustee.

B. Why the Fiduciary Model Does Not Fit

No one piece of the fiduciary model stands alone in defining fiduciary relationships and fiduciary obligations. The various pieces of the doctrine come together to describe a special type of interaction between the parties of a consensual relationship. As public corporations and investments in them have grown increasingly complex, various pieces of the fiduciary model have failed to describe the relationships between corporate managers and the firm. The

rules) would be sufficiently disinterested to respond to a demand. Practically, this means that officers are not sued for breach of fiduciary duty under Delaware corporate law. Shaner, *supra* note 1, at 312–14.

28. *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 275 (Del. Ch. 2003) (deciding a fiduciary suit brought against multiple defendants, including the CEO and president who were both directors); *In re* Rural/Metro Corp. S'holder Litig., 102 A.3d 205, 214 (Del. Ch. 2014) (noting that the president/CEO defendant in a fiduciary suit was also the director); Lewis v. Fuqua, 502 A.2d 962, 964 (Del. Ch. 1985) (deciding a derivative fiduciary suit brought against the board, including a CEO who was also the chairman of the board); Continuing Creditors' Comm. of Star Telecomms. Inc. v. Edgecomb, 385 F. Supp. 2d 449, 452, 460–62 (D. Del. 2004) (deciding a fiduciary suit against directors, one of whom was the CEO and another was the president).

29. Johnson & Ricca, *supra* note 26, at 665–67; Megan Wischmeier Shaner, *Officer Accountability*, 32 GA. ST. U. L. REV. 357, 367–71 (2016).

essential task of the supposedly fiduciary relationship is moderating the exercise of discretion over the assets of the firm, the assets that do not belong to the officers and directors. When decision-makers are entrusted with control over assets that do not belong to them, they are expected to exercise that power in the interests of others, not to opportunistically appropriate those assets for their own personal benefit or profit. It is the exercise of that power and authority that I will examine in this section. I will hold the reality of the corporate decision-making process up to the fiduciary model to see if the model accurately describes the relative positions of the corporate "fiduciaries" and their "beneficiaries."

Corporate fiduciaries are overwhelmingly motivated by self-interest in the exercise of their authority over corporate assets and business strategy. Self-interest is the only interest corporate managers can realistically identify to pursue. The interests of a corporate beneficiary or of shareholders are impossible to isolate or identify apart from how they affect the self-interest of corporate decision-makers. What's more, corporate beneficiaries—whether the firm itself or investors in the firm—are not meaningfully *vulnerable* to those making decisions for the firm. Fiduciary duties are not necessary to coax corporate constituents to risk their capital, and even if fiduciary duties were robust, they would not necessarily protect investors and other stakeholders from the kinds of harms about which they may be most concerned. Corporate fiduciary duties are narrow and rarely enforced because they simply do not fit the realities of the context in which they apply. They do not provide the appropriate restrictions or remedies for modern public corporate governance.

1. *Interests of Beneficiary*

While it is difficult to make a serious claim that directors work on behalf of or in pursuit of the specific interests of any one group, some scholars have argued that fiduciaries serving large, diverse populations pursue a purpose.[30] Corporate leaders are to eschew self-interest and the interests of third parties in pursuit of the interests of the corporation. The closest we can come to a clear definition of the interests of the corporation has been long-term wealth maximization. That stated goal of corporate decision-making does not guide corporate business decisions. There is too much variation in how long-term wealth maximization may be achieved and what limits are, or could be, placed on the pursuit of that interest to say that the goal guides directors' decisions. It is similarly difficult for shareholders to evaluate those decisions as the constituency that will benefit most directly. In short, even if we assume, *arguendo*, that corporate leaders owe fiduciary duties to pursue corporate wealth maximization, we have no idea what that really requires of them. Surely it does

30. Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 516–17 (2015).

not mean that they should take a scorched-earth approach in achieving every possible cent of profit at the expense of all other interests.[31] If it did, many corporate leaders who are deemed successful would be guilty of violating that duty in favor of their own personal interests or philosophies. The business judgment rule allows corporate officers and directors to run the business however they see fit; they must only take care not to pursue any personal interest that would harm the corporation. Self-interest that can be understood to coincide with wealth maximization, or even wealth development short of absolute maximization, is not only permitted but encouraged. Because corporate leaders can define what the goal of their work is and because they are given broad discretion in doing so, they can define that purpose in self-interested ways that are difficult, if not impossible, for the law to discipline.

A liability rule of limited scope makes sense because it is impossible to define the one true interest a corporate director is supposed to pursue in corporate decision-making. Business outcomes are simply too difficult to predict, and the interests of corporate constituents—even the interests of shareholders—can be too varied.[32] But investors and other corporate constituents—including employees, creditors, consumers, and the communities in which firms operate—all want to influence or direct managers' decision-making. Indeed, all constituents have mechanisms at their disposal to influence corporate decisions. Those constituencies exercise their rights to influence management in relation to each other, with their different interests achieving salience in different circumstances.

Most directly, the investors who are able to move the most money to influence the stock price of a firm have the power to guide corporate decision-making. The market appraisal of the value of a corporation's stock matters the most to directors who set compensation and to officers and directors who want to show others they are valuable leaders. Because shareholders' interests correspond with a higher stock price (that's how they realize a return on their investment), they will favor firms that do the most to encourage directors to manage to higher stock prices. In instances where investors have other values, those values can also be honored by management.[33]

31. Atkinson points out that even Milton Friedman himself did not go that far. Atkinson, *supra* note 4, at 20.

32. Shareholders, for instance, prefer varying degrees of risk tolerance by the companies in which they invest depending on their investment goals. Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 654–56 (2004) (discussing the disparities in risk tolerance between beneficiaries and fiduciaries in the context of trusts); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 665–67 (1995). Creditors, on the other hand, would prefer little to no risk tolerance by the borrowers they lend to. *See* Kelli A. Alces, *Strategic Governance*, 50 ARIZ. L. REV. 1053, 1054–59 (2008) (describing the power of creditors in the context of insolvent corporations).

33. *See Impact*, TOMS, https://www.toms.com/impact; *Environmental & Social Responsibility*, PATAGONIA, https://www.patagonia.com/environmentalism.html (last visited Oct. 10, 2020); *Buy a Pair, Give a Pair*, WARBY PARKER, https://www.warbyparker.com/buy-a-pair-give-a-pair (last visited Oct. 10,

Whatever approach management takes to maximizing its own sense of corporate well-being—measured by a combination of profit and other considerations—becomes the management scheme that is marketed to investors. The companies that are most attractive to investors thrive; those that cannot find a constituency of shareholders fail. The managers of the failing firms will be removed from their positions and may have trouble finding work at the same level elsewhere. Officers and directors strive to achieve their goals in order to stay in the game, to keep their jobs, to maximize their income, and to secure the next, greater, more challenging position.

Other constituents can exert influence in more subtle ways. Creditors can control the flow of capital that managers need to fund their initiatives and support their decisions.[34] A strong labor force allows the company to operate smoothly and efficiently and to avoid liability-inducing errors. Companies with a unionized labor force operate at the mercy of collective bargaining agreements and are vulnerable to work stoppages. If managers can only get the employees they pay for, firms will have incentives to pay more and to treat employees better. Consumers are powerless in many ways,[35] but can be quite powerful if a company makes a big enough mistake. A failure to appeal to consumers can cause a business to fail for want of purchasers of its product. Angering consumers can result in boycotts, public relations problems, and a decline in the product market that a corporation relies upon to survive. If corporate managers fail to appeal to consumers, they are just as likely, if not more likely, to lose their positions as if they make too many concessions to consumers that might keep the stock price from rising as high as investors might like.

The corporate officers who make up the Business Roundtable have tried to thread this public relations needle. Sensing that corporate executives are being painted as the national bad guys in an increasingly populist political environment,[36] the Business Roundtable released a statement claiming to abandon shareholder profit maximization as their sole management focus and instead to consider the interests of all stakeholders, including customers,

2020); *Threads for Threads*, FIGS, https://www.wearfigs.com/pages/threads-for-threads (last visited Oct. 10, 2020).

34. Michelle M. Harner, *Corporate Control and the Need for Meaningful Board Accountability*, 94 MINN. L. REV. 541, 543–44 (2010).

35. Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1.373, 1.428–34 (2004) (discussing several common contract terms to which consumers are vulnerable); Erin Ann O'Hara, *Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection*, 153 U. PA. L. REV. 1883, 1910–15 (2005) (setting out a variety of situations where consumers are highly vulnerable in market transactions).

36. Holly Otterbein, *How Bernie Sanders Would Give Power to Workers in Their Companies*, POLITICO (Oct. 14, 2019), https://www.politico.com/news/2019/10/14/bernie-sanders-2020-election-workers-046660; John Harwood, *Bernie Sanders on Socialism, Taxes and Why He Thinks Fossil Fuel Executives Are 'Criminals'*, CNBC (Oct. 29, 2019), https://www.cnbc.com/2019/10/28/bernie-sanders-lets-not-make-people-overly-nervous-about-socialism.html; Peter J. Henning, *Elizabeth Warren Wants to Make It Easier to Prosecute Executives*, N.Y. TIMES (April 22, 2019), https://www.nytimes.com/2019/04/22/business/dealbook/elizabeth-warren-finance-executives.html.

employees, suppliers, and the communities in which the businesses operate when devising corporate strategy.[37] Looking at the list of signatory companies will cause a reader to be skeptical of the socially responsible aspirations of the statement. Many have cut employee hours,[38] reduced the services they provide consumers at a given price,[39] and advocated against environmental regulation in the last year.[40] In practice, their focus seems to be on the bottom line, as an obligation to shareholders would presume. What is interesting about the statement is that it makes a show of putting shareholder wealth maximization aside in favor of other interests that compete with the shareholder goal. That seems to be at odds with any understanding of owing a fiduciary duty to shareholders or to a purpose of maximizing corporate wealth.

A fiduciary must know who her beneficiary is, whose interests she must pursue, what interest to hold paramount above self-interest, and any competing interest. If corporate CEOs are at liberty to define the corporate purpose and the goals they will pursue, it is hard to say they are exercising their judgment and authority in the interests of another. Even if the declaration of independence contained in the statement were genuine and approved by directors, we would be left to wonder which beneficiary corporate directors were serving. The most realistic interpretation of the statement is that it is a publicity stunt to buy goodwill with consumers and employees and to avoid the imposition of onerous regulation after the next election. Even so, it bears noticing that powerful CEOs thought the statement would be helpful to the corporate interest, and that they believe (and perhaps that shareholders also believe) that they have the power to define the corporate purpose and the beneficiary groups or purposes they serve.[41] The discretion to define a beneficiary is a choice the fiduciary model does not allow a fiduciary.

In conclusion, very little about the way corporate officers and directors make decisions about which corporate constituents' interests to prefer when

37. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy that Serves All Americans*,' BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

38. *See* Noam Scheiber, *Marriott Workers Struggle to Pay Bills, and Credit Union Fees*, N.Y. TIMES (Oct. 11, 2018), https://www.nytimes.com/2018/10/11/business/marriott-credit-union-employee-strike.html. Marriott employees participated in a widespread labor strike concerning wages, steady working hours, and work conditions. *Id.*

39. *See* Laura Koss-Feder, *How Hoteliers Incentivize Guests to Skip Housekeeping*, HOTEL NEWS NOW (Oct. 4, 2019), http://www.hotelnewsnow.com/Articles/298441/How-hoteliers-incentivize-guests-to-skip-housekeeping. Marriott, among other hotel chains, incentivizes guests to forego housekeeping services with reward points. *Id.*

40. *See* Hiroko Tabuchi, *General Motors Sides with Trump in Emissions Fight, Splitting the Industry*, N.Y. TIMES (Oct. 28, 2019), https://www.nytimes.com/2019/10/28/climate/general-motors-california-emissions-trump.html. General Motors, Fiat Chrysler, and Toyota have each supported the Trump administration in combatting California's fuel economy standards for vehicles. *Id.*

41. Rob Atkinson would say that "[t]he point here is not that the entrepreneurs are virtuous, but rather that, even at their most hyperbolic and hypocritical, they are paying homage to what we ourselves recognize as a virtuous motive: doing good, as they say, while doing well." Atkinson, *supra* note 4, at 42.

those interests conflict or about what corporate purpose they are supposed to serve suggests fiduciary ideals bound them. There is not one defined, immutable beneficiary of corporate fiduciary duties, so we should not say that corporate officers and directors are fiduciaries of shareholders or of firms in exercising their power to make decisions for the firm. Nevertheless, scholars continue to search fiduciary theory for hints of how fiduciary liability may guide corporate directors to make the "correct" decisions.[42] Plaintiffs' attorneys continue to bring fiduciary litigation against officers and directors when corporations experience crises. Courts continue to entertain such lawsuits through rounds of appeals and amended complaints.[43] When the complaints are ultimately dismissed, the Delaware Supreme Court may invest heavily in a long, explanatory opinion, cast in terms of fiduciary obligation, punctuated with strong fiduciary rhetoric. The loyalty of corporate managers to an interest or a cause is interrogated and theorized, and ultimately defined narrowly.[44] Courts will not extend corporate fiduciary duties beyond a narrow prohibition of self-dealing, but the rhetoric, the hand-wringing, and the litigation all serve to give the false impression that fiduciary duties are powerful, and that they provide not only the dominant norm in corporate governance but also the primary source of discipline for corporate officers and directors.[45]

Two other considerations undermine even a limited understanding of corporate fiduciary obligation. We will turn to those now.

2. *Self-Interested Fiduciaries*

Corporate officers and directors are primarily motivated by self-interest in their management of large corporations. Officers' compensation packages are finely tuned to guide their decision-making; the effects any particular decision could have on compensation are designed to dominate the process.[46] Incentive

42. *See* Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 637–39 (2002) (discussing the expansion of corporate fiduciary duties to include employee interests); Robert Ashford, *The Socio-Economic Foundation of Corporate Law and Corporate Social Responsibility*, 76 TUL. L. REV. 1187, 1191–92 (2002) (discussing some theoretical components of fiduciary law to be used to pursue social welfare); Edward J. Janger & Adam J. Levitin, *Badges of Opportunism: Principles for Policing Restructuring Support Agreements*, 13 BROOK. J. CORP. FIN. & COM. L. 169, 180–81 (2018) (discussing the potentially conflicting concerns corporate fiduciaries have between the firm and creditors when a firm enters the "zone of insolvency"); Frederick Tung, *The New Death of Contract: Creeping Corporate Fiduciary Duties for Creditors*, 57 EMORY L.J. 809, 823–25 (2008) (discussing scholarship arguing that the increased weight of creditor interests as a firm approaches insolvency may justify expanding creditor fiduciary obligations).

43. *See, e.g.*, *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 277–78 (Del. Ch. 2003).

44. Alces, *supra* note 13, at 373–75.

45. Rock, *supra* note 21, at 1014–16 (discussing the highly narrative aspects of Delaware fiduciary law and the difficulty of extracting clear rules from largely rhetorical judicial opinions).

46. Alan R. Palmiter, *Reshaping the Corporate Fiduciary Model: A Director's Duty of Independence*, 67 TEX. L. REV. 1351, 1368–69 (1989). Compensation packages "can create incentives for management to behave consistently with owners' wealth maximization interests." *Id.*

compensation is not as significant of a driver for outside directors' decision-making because they are paid a fixed salary.[47] But outside directors can be motivated by a number of personal interests such as career reputation and advancement, personal and professional connections with officers, and outside business interests that may be affected in some way by the decisions they make for the corporation on whose board they are serving. Of these interests, only conflicting, outside business interests could run afoul of the duty of loyalty.[48]

In a particularly narrow formulation, the duty of loyalty might only require that a director not personally transact business with the corporation, and if a corporation does want to buy something for a director, that it do so at a fair price. The price of such an interested transaction would have to be approved by a majority of disinterested directors or shareholders or proven to a court to be fair.[49] If this were all the corporate duty of loyalty required of fiduciaries, then I could not argue that corporate directors are not fiduciaries. Indeed, they are subject to this limitation on interested transactions and cannot profit at the corporation's expense, at least not without fully disclosing their gain to their fellow directors, the firm's shareholders, or both. If corporate fiduciary duties were this narrow, the duty of loyalty would not protect the corporation or shareholders very much from opportunistic decision making by directors, nor would it necessarily have comforted early shareholders enough to entice them to risk their capital. Such a narrow formulation is certainly not what scholars and jurists have in mind when they debate the meaning of the duty of loyalty or the extent to which it can constrain managerial decision-making. Indeed, such a command to disclose all of the circumstances of a self-interested transaction does not require a broad equitable doctrine like fiduciary law at all. Rather, a simple and easily enforced contractual provision could describe the proper procedure for transactions between the firm and its directors.

Such a procedural rule may be more effective than a broad liability rule.[50] Prescribed procedures for decision-making can prevent conflicts of interest by creating obstacles to potentially conflicted decisions. Procedural rules might guard against fiduciary breaches, but fiduciary doctrine is designed as a flexible liability rule. That we have designed some contractual procedures that advance fiduciary ideals does not change the equitable nature of fiduciary liability. If a simple procedural rule has swallowed all corporate fiduciary liability, then it never did what initial investors must have hoped.

47. *See* Diane Lerner, *Board of Directors Compensation: Past, Present and Future*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Mar. 14, 2017), https://corpgov.law.harvard.edu/2017/03/14/board-of-directors-compensation-past-present-and-future.

48. Claire Hill & Richard Painter, *Compromised Fiduciaries: Conflicts of Interest in Government and Business*, 95 MINN. L. REV. 1637, 1650–53 (2011).

49. DEL. CODE ANN. tit. 8, § 144(a).

50. Samuel Issacharoff, *Legal Responses to Conflicts of Interest*, *in* CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 189, 190–91 (2005).

There are good reasons to limit the duty of loyalty for directors. All fiduciaries have personal conflicts of some kind. They are all active in the world beyond each fiduciary relationship and will have personal interests that may motivate or guide their decision-making in the fiduciary context. Conflicts are unavoidable agency costs. The law could not possibly identify or police all conflicts, so it must focus on direct financial conflicts of interest. For our purposes, then, the focus must be on how corporate decisions are made and whether corporate decision-makers are able to put aside personal interest, including and especially personal financial interest, in order to make decisions that are in the corporation's best interest (whatever that means).

Senior officers are the primary decision-makers in corporate governance. But Delaware corporate law says that the "business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors,"[51] so legal responsibility for corporate decision-making lies with directors. Placing legal liability away from the true center of decision-making has long prevented corporate law from adequately responding to governance problems.[52] Directors, on average, spend only about twenty hours per month on their duties.[53] Inside directors, those who are also senior officers, have an outsized influence on decision-making because they are able to inform other directors about their own work, even as they are supposed to be monitored by those very directors. Because the senior officers are on the ground every day, they have a significant informational advantage over outside directors and so have more control over the direction of the corporation than outside directors. The incentives and motivations of senior officers are therefore important to understanding how corporate leaders make the decisions that affect their "beneficiaries," however defined.[54]

It is common to align fiduciaries' financial interests with those of their beneficiary or with the ends the beneficiary has retained the fiduciary to pursue.[55] That alignment of financial incentives has not always been an approved tool in fiduciary relationships and used to be banned outright.[56] When government officials began to be paid for services in England and America in the early eighteenth century, they were often paid directly by the citizen requesting the service.[57] The payments were thought to be anathema to considering the officials the fiduciary of the requesting citizen because "the

51. Tit. 8, § 141(a).

52. *See* Johnson & Millon, *supra* note 26, at 1605–10; Shaner, *supra* note 1, at 305–08.

53. Jeanne Sahadi, *Here's How to Get on a Board of Directors*, CNN BUS. (Mar. 12, 2019, 3:44 PM), https://www.cnn.com/2019/03/11/success/getting-on-a-board-of-directors/index.html.

54. Alces, *supra* note 32, at 1063–66; *see* Johnson & Millon, *supra* note 26, at 1647.

55. LC Cap. Master Fund, Ltd. v. James, 990 A.2d 435, 452–53 (Del. Ch. 2010) (holding that directors' owning of company shares is not a conflict as such aligns the interests of the directors with the shareholder beneficiaries to whom they are beholden).

56. Parrillo, *supra* note 2, at 146–47.

57. *Id.*

facilitative payment's purpose was so obviously to harness the officer's self-interest, rather than to appeal to the 'other-regarding orientation that the fiduciary theory presupposes.'"[58] The same could be said of the work corporate executives do now. To the extent executive compensation is designed to harness the executives' self-interest, corporate governance allows those executives to make decisions driven by personal financial interest. Those same executives have the power to decide what the corporate interest is, and so whether their personal financial incentives conflict with it. It is very possible for executive compensation to conflict with an identifiable corporate interest or the interests of shareholders.

Modern option compensation was born in large part because officers were more invested in individual corporations than shareholders, so their incentives were not well-aligned.[59] Officers had their livelihoods and professional reputations at stake in the well-being of the firm, and well-diversified shareholders would have preferred that they take more risk in managing the corporation than officers were comfortable taking.[60] In order to align officers' risk preferences with those of well-diversified shareholders, firms started to pay executives with stock options that would allow them to realize the upside of corporate stock price increases without exposing them to the financial loss associated with stock price decline.[61] Pinpointing the appropriate level of corporate risk-taking is a significant challenge for corporate management. Increasingly, boards of directors are using incentive compensation to at least influence, if not dominate, the process executives use to define the corporate risk preference.[62] The aggressiveness of corporate investment, whether a corporation invests in projects with long-term payoffs or those that may result in more immediate returns, and the amounts and kinds of debt a corporation takes on are all crucial business decisions that directly bear on officers'—and so a board's—definition of corporate interest.[63] When those decisions are driven by personal financial interest—that is, when executive compensation packages strongly influence them—it is difficult to properly characterize those corporate

58. *Id.* at 151 (citing Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1856 (2016)).

59. Meredith R. Conway, *Money for Nothing and the Stocks for Free: Taxing Executive Compensation*, 17 CORNELL J.L. & PUB. POL'Y 383, 407 (2008).

60. Kelli A. Alces & Brian D. Galle, *The False Promise of Risk-Reducing Incentive Pay: Evidence from Executive Pensions and Deferred Compensation*, 38 J. CORP. L. 53, 57–58 (2012).

61. *Id.* at 58–59.

62. Frederick Tung, *Pay for Banker Performance: Structuring Executive Compensation for Risk Regulation*, 105 NW. U. L. REV. 1205, 1207–08 (2011); *see* Frederick Tung & Xue Wang, *Bank CEOs, Inside Debt Compensation, and the Global Financial Crisis*, 11 (Boston U. Sch. of L. Working Paper No. 11-49, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1570161.

63. Scholars have argued that the focus on shareholder wealth maximization leads to "short-termism" in directors, resulting in them taking excessive risks to maximize wealth within a short time frame, rather than focusing on the long-term well-being of the firm. Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579, 593–96 (2018); Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 268–69 (2012).

leaders as fiduciaries because they are not eschewing self-interest in favor of a beneficiary's interest. Defining the beneficiary's interest in terms of the fiduciary's financial self-interest is the antithesis of fiduciary obligation.

Even though it seems the board of directors is setting compensation and designing it to push officers toward the decisions, or risk profile, the directors deem to be in the corporate best interest, they are not doing anything so precise. Rather, they are deciding in advance what kinds of personal financial interests they hope will guide senior officers when those officers encounter unknown and perhaps unpredictable situations. Because corporate decision-making is complex and involves consideration of various elements that can shift and change unpredictably over time, the best directors can do with executive compensation is set rough boundaries for officers' risk preferences. Rather than holding officers responsible for understanding the corporate interest or a general shareholder interest in profit maximization and trusting them to pursue that, directors are calling on officers' self-interest and expecting and encouraging that self-interest to drive corporate decision-making.

The law does not respond to the dominant self-interest of officers. As long as directors delegate decision-making to officers in good faith and not in their own personal self-interest, they do not run afoul of any understanding of their corporate fiduciary duties. Some would argue that legally, directors are the true fiduciaries of the firm under corporate governance law and that officers are only responsible for doing whatever it is directors have told them to do. I have already explained that the realities of corporate decision-making belie that model. Further, to the extent directors are allowing corporate decision-making to be ruled by officers' personal financial interests, even if they have defined some of the operation of those interests, they are managing in a way that is only guaranteed to serve those officers' financial interests. Whomever we may deem to be the proper beneficiaries of directors' fiduciary duties, certainly no one thinks officers are those beneficiaries.

Corporate law does not require complete selflessness. Rather, fiduciaries may not be conflicted without permission. As is the case in all fiduciary relationships, if the fiduciary has the beneficiary's well-informed permission to indulge in a conflict of interest, then the law will not intervene.[64] In corporate law, this corollary to an absolute duty of selflessness is well-documented and thought to benefit corporations by allowing them to realize the benefit of their executives' connections.[65] Executive compensation is transparent and consented to by the board. The weak "say on pay" mechanism, whereby shareholders may pass on executive compensation at regular intervals, gives shareholders access to detailed information about officers' incentives and

64. *See, e.g.*, DEL. CODE ANN. tit. 8, § 144(a).

65. Johnson, *supra* note 15, at 33–35 (discussing varying theories of loyalty in corporate case law).

allows them to express disapproval if they would like.[66] The transparency of executive compensation and the fact that it is calibrated to the defined interests of the corporation should ensure that officers are making business decisions that are consistent with corporate interests and goals, or at least the goals designed by officers and directors and acquiesced to by shareholders. Only a *conflicted* interest constitutes a breach and much of the time officers' interests may not conflict with those of a reasonably defined corporate beneficiary.

The self-interest pursued by executives to maximize their compensation is self-interest designed by others, but it is self-interest just the same. Ethan Leib and Stephen Galoob have written about a "cognitive dimension to fiduciary loyalty."[67] Their cognitive loyalty requires a robust commitment to a beneficiary.[68] They argue that "[a] strategically contingent commitment is not genuine loyalty."[69] An executive driven by compensation and the directors who follow his judgment and guidance cannot have more than a strategically contingent commitment to a given course of corporate action. Risk preferences, business strategies, and the mechanisms used to pursue them all depend on how the various options will affect executives personally. It is not realistic to expect an executive to switch to a strategy that does not maximize his own payoff should corporate interest diverge from the executive's compensation interest. Further, with the compensation package properly in place, the law would not require it.

Sophisticated, complex compensation packages are, at best, precommitment strategies to certain visions of corporate interest. They do not expect or even require that directors or executives reevaluate the corporate interest as it may change over time. That is perhaps one reason why incentive compensation has seemed to fail at various times by giving executives strong incentives to pursue strategies that harm corporations in unanticipated market conditions.[70] Once again, as we try to direct leaders to pursue certain ends, we find that they are actually pursuing personal profit and personal achievement. Those affected by corporate activity can only hope that leaders' accomplishments inure to the benefit of corporate constituents.

66. Shareholders typically rubber stamp the compensation packages approved by management in say-on-pay votes. Jill Fisch et al., *Is Say on Pay All About Pay? The Impact of Firm Performance*, 8 HARV. BUS. L. REV. 101, 102 (2018) ("[S]hareholders at the overwhelming majority of issuers vote to approve executive compensation, and the average percentage of votes in favor exceeds 90%.").

67. Galoob & Leib, *supra* note 8, at 86.

68. *Id.* at 90.

69. *Id.* at 91.

70. Wulf A. Kaal, *Contingent Capital in Executive Compensation*, 69 WASH. & LEE L. REV. 1821, 1824 n.6 (2012) (discussing how packages that benefit executives while insulating them from risk of loss could promote excessive risk-taking); Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U. L. REV. 673, 711–12 (2005).

3. *Invulnerable Beneficiaries*

The consequences of decisions made for large public corporations have significant impacts throughout the economy. Those who deal with the corporation directly—including shareholders, creditors, consumers, and employees—have taken on some level of personal risk associated with corporate outcomes. Large public corporations can contribute to systemic risk that can affect the economy as a whole. The externalities of corporate decision-making are significant. In some ways, our entire society is potentially vulnerable to the decisions of corporate officers and directors. But no single interest group or corporate constituent has the vulnerability of a beneficiary in a fiduciary relationship.

The single constituency most likely to be considered the vulnerable beneficiary of corporate fiduciary duties is the class of common shareholders. Common shareholders are the residual claimants of the firm, so they only stand to gain if the firm has positive equity, and the degree to which they profit is directly related to the profitability of the firm. Because the residual claimants are paid last,[71] their rising tide will lift all ships, and so their interest is considered to be most closely identified with the corporate interest in wealth maximization. Shareholders do not have a fixed claim—meaning they are not entitled to any value from the corporation—so they risk their entire investment without any downside protection.[72] While the original corporate business owners were vulnerable to threats—that hired corporate managers could steal from them by stealing from the firm, or that managers would shirk and fail to maximize corporate profits to the extent reasonably possible—modern shareholders in public corporations are not so vulnerable.

Most individual "beneficial" shareholders[73] are well-diversified, so not exposed to firm-specific risk.[74] They often rationally invest in managed or indexed funds and do not know which firms' stock they own. They do not pay attention to or care about the decisions of any one firm, at least to the extent the firm does not pose a systemic threat. Institutional investors represent the interests of the large majority of those individual investors. They may invest more in participating in the governance of particular portfolio firms but are still sufficiently well-diversified to avoid firm-specific risk. Institutional investors are also sophisticated about corporate governance, have access to corporate decision-makers, and can threaten to move significant amounts of money by investing in or withdrawing from particular corporate investments. The power

71. Spencer J. Hazan, Note, *Considering Stakeholders in M&A*, 16 N.Y.U. J.L. & BUS. 749, 759 (2020).

72. *See id.*

73. A "beneficial owner" of a security is defined as a person who directly or indirectly controls the power to vote or direct the vote of such a security, can exercise the power to dispose or direct the disposition of such a security, or both. *See* 17 C.F.R. § 240.13d-3 (a)(1)–(2).

74. *See* Alces & Galle, *supra* note 60, at 57.

their significant investments give them allows them to influence corporate decision-making when they deem necessary. They are the shareholders who have the power to affect stock price, so they have the power to affect executive compensation. They are also well-positioned to exercise voice through corporate litigation and lobbying. They are not the relatively vulnerable, unsophisticated beneficiaries fiduciary doctrine envisions.

Hedge funds and private equity funds constitute another important group of shareholders, as do activist investors who take large stakes in public companies. Such investors are at least as sophisticated as corporate managers, if not more so, and are able to directly influence corporate policy. They are even able to influence corporate managers to take actions that may be contrary to the interests of other corporate constituents, even other shareholders.[75] Far from vulnerable, hedge funds can dominate decision-making in troubled firms.[76]

One argument made in favor of continuing to regard corporate governance relationships as fiduciary relies on the vulnerability of shareholders. Some scholars argue that shareholders would refuse to invest without a promise of fiduciary obligation.[77] With regard to investment in public corporations, evidence to the contrary abounds. Derivatives investors, bondholders, and institutional creditors all invest in public corporations without benefitting from fiduciary duties owed by executives. Even common shareholders invest with the knowledge that they will realistically not be able to hold senior officers liable for breaches of fiduciary duty.[78] To the extent investors think they are relying on a representation of strong corporate fiduciary duties, they are being defrauded, because corporate fiduciary duties are so weakly enforced. We should not overlook the many investors who are willing to part with significant capital without relying on the fiduciary myth. Any notion that fiduciary duties are necessary to coax investment in public corporations is wrong.

To summarize, corporate leaders are not properly considered fiduciaries under the fiduciary model because they cannot identify an interest of a beneficiary to pursue; any beneficiary "purpose" is designed entirely with regard to their self-interest, and those subject to their decision-making are not truly vulnerable to the leaders' exercise of judgment. The reality of the governance of large public corporations fails to fit the fiduciary model at every step. Corporate leaders are not unique in this way. Indeed, the leaders of large,

75. *See* Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1029–34 (2007); *see also* Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 820–22 (2006).

76. *See* Martijn Cremers et al., *Activist Hedge Funds and the Corporation*, 94 WASH. U. L. REV. 261, 270–72 (2016); *see also id.* at 298–300 (discussing some short-term goals of hedge fund activists and how this risk exposure does not align with other stakeholders' interest in the long-term health of the corporation).

77. *See* Hurt, *supra* note 11; D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1432–38 (2002).

78. *See* Shaner, *supra* note 1, at 311–19; Johnson & Millon, *supra* note 26, at 1609–10.

diverse groups are not—and cannot be—fiduciaries. The next Part shows that government leaders, another group of very prominent leaders of large, diverse populations, also fail to meet the fiduciary standard.

II. REPRESENTATIVE PARADIGM OF DEMOCRATIC GOVERNMENT

Democratic governments are also premised on a theory that governmental leaders represent their constituents, the citizens within their jurisdictions.[79] Some among us must have the power and authority to speak for the rest because nations must have the ability to act as entities.[80] Because the legitimacy and authority of a democratically-elected government purport to arise from the approval of its citizens, by tally of their votes, the government is considered by many to be beholden to those citizens.[81] Government officials are charged with making decisions they believe to be in the public interest.[82] Some scholars of fiduciary law have gone so far as to describe government itself, as well as its agents and officials, as fiduciary.[83] I submit that fiduciary principles are as misplaced in our understanding of democratically elected government as they are in corporate governance for similar reasons. The mismatch may be even more pronounced in government. Surely there are ways in which political leaders must be trustworthy, but fiduciary doctrine does not capture all elements of trust; it continues to be unable to accurately describe the relationship between elected leaders and the large, diverse populations they govern.

A. What is Representative Government?

Definitions and uses of the term *representative* are varied, and scholarly debates have circled around them for hundreds of years.[84] The "representative" government in Hobbes's view was a monarchy that represented its population by virtue of its authority to act on the nation's behalf and speak for the nation in negotiations with other states.[85] Hobbes's monarch was anointed by God, not subject to regular elections, and so not expected to respond to the will of his subjects.[86] Angry mobs might forcibly remove a monarch from his position,

79. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 2 (1967).
80. *Id.*
81. *See* ACHEN & BARTELS, *supra* note 6, at 1.
82. Paul B. Miller, *Fiduciary Representation*, *in* FIDUCIARY GOVERNMENT 21, 46–48 (2018).
83. *Id.* at 26–27.
84. PITKIN, *supra* note 79, at 4.
85. *See id.* at 4, 38–39.
86. *See id.* at 30–31.

and one kingdom could be conquered by another, but there was no democratic accountability to speak of and no expectation of it.[87]

Representative democracy was born of a desire that government understand and respond to the will of its people, that it pursue a public good that would benefit the majority of its citizens, and that government officials were to eschew self-interest in that pursuit.[88] Representative democracies provoke questions about the extent to which elected officials are beholden to the preferences and specific interests of their constituents.[89] Must a representative obey her constituents in order to serve them faithfully?[90] Must her actions reflect their revealed preferences?[91] Must they represent only the majority who voted for them or all citizens within their jurisdiction, or must they only serve their personal understanding of the public good?[92]

Achen and Bartels critically examine the "folk theory" of representative democracy, which holds that the preferences of the majority of voters become government policy—that citizens "live under an ethically defensible form of government that has their interests at heart."[93] They conclude that this folk theory is naïve.[94] Voters are not well-informed about their preferences and are even less well-informed about their interests.[95] A voter's interests include all things necessary to improve the voter's personal quality of life: (1) sufficient resources for physical and emotional support; (2) employment prospects and income potential; and (3) provisions for personal well-being, such as access to health care, food, transportation, and connection to a community. A voter's political *preferences*, on the other hand, would include policies and leaders that comport with her personal ideology, even if that ideology supports policies that would undermine one or more of the voter's interests.[96] A voter may vote in favor of a policy that comports with her personal political ideology (against government entitlement programs, say) even if that policy directly undermines her personal financial interest (as a beneficiary of those very entitlement

87. *See id.* at 19–20, 38–39.

88. *Id.* at 3.

89. *See id.* at 4. *Compare id.* at 168–71 (reviewing the philosophy of Edmund Burke, who wrote that leaders should be reasonable aristocrats who decide what is in the best interests of the governed population), *with id.* at 190–92 (reviewing the liberalism of the American Founding Fathers who favored a government that represented all individuals). The opinions of Burke and Liberals meet where they both conclude that leaders must transcend the petty opinions, interests, and grievances of their constituents and arrive at a clear understanding of a "common good" to pursue. *See id.* at 193.

90. *See id.* at 4.

91. *See id.*

92. *See id.*

93. ACHEN & BARTELS, *supra* note 6, at 1.

94. *See id.* at 1–2.

95. *See id.* at 9.

96. *See* Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1417 (2013).

programs).[97] Political loyalties acquired in childhood and the current state of the economy do more to influence voting outcomes than views on the various policies at issue in a particular election.[98] Voters are able to communicate neither their preferences nor their interests very capably through voting. Further, they will vehemently disagree about what policies best serve the public good. It is impossible for a leader to please everyone and equally impossible to dutifully serve the interests and preferences of an entire constituency.

Even if voters were better able to communicate their interests or preferences through voting, voting would still be a blunt instrument for achieving complex policy ends.[99] A voter is given a choice between only two viable candidates (in a two-party system), and those two choices do not necessarily allow the voter to choose someone who holds their policy preferences on a number of issues.[100] A single voter cannot hope to control whether other checks provided by the system of government will work effectively because she is often not eligible to vote in enough elections to influence the political makeup of the various elected positions.

The power that voters can exercise is limited further by their own cognitive constraints. Their ideological beliefs turn out to be a "mechanical reflection of what their favorite group and party leaders have instructed them to think."[101] Voters are organized into ideological "teams" from childhood and are unlikely to part with those allegiances when voting over the course of a lifetime.[102] Voters may be slightly better at communicating preferences than they are at signaling their interests, but as stated above, those preferences may not align with their interests. Further, there is significant political science showing that political leaders tell voters what their policy preferences and priorities are, not the other way around.[103] There simply is not a reliable device the average individual voter can rely on to communicate her preferences to her political leaders. Even if she could, those preferences are not to be trusted to accurately reflect her interests, according to a significant body of political science research.[104]

This is not to say that voter preferences cannot influence politicians at all. Rather, voter preferences are the product of a dialogue among politicians, constituents, organized interest groups, and news media interpretations of that

97. Ronald Brownstein, *Federal Anti-Poverty Programs Primarily Help the GOP's Base*, THE ATLANTIC (Feb. 16, 2017), https://www.theatlantic.com/politics/archive/2017/02/gop-base-poverty-snap-social-security/516861 (citing a study showing voter base that substantially supports GOP candidates also substantially benefits from aid programs those candidates seek to cut).

98. *See* ACHEN & BARTELS, *supra* note 6, at 1.

99. *See id.* at 49–50.

100. *See id.* at 48–49.

101. *Id.* at 12.

102. *See id.* at 1.

103. *See infra* Part II.B.

104. *See* ACHEN & BARTELS, *supra* note 6, at 41–45.

dialogue.[105] It is commonly understood that "all governments use propaganda to manipulate their subjects; that, conversely, even totalitarian dictators have (and must have) popular support."[106] Some voter preferences do reach politicians and affect policy, especially if a constituency that is unusually likely to vote has a unified, identifiable position on a particular issue. "Purity tests" in primary elections serve as an example. A Democrat would have a hard time winning a primary if she did not support abortion rights, for example, and a Republican would have difficulty winning a primary if she did not take the opposite view. But not all voters hold firm, immutable stances on even very prominent issues and their dedication to particular positions can vary.[107] Party platforms can shift over time, and voters will often move with them.[108] It stands to reason that if partisan affiliation is the greatest predictor of how a voter will vote,[109] then particular policy preferences are far more likely to be addressed in a primary contest than in a general election. When the only alternative is from the opposite party, there is no alternative at all.[110] The threat of losing a primary contest is taken seriously by elected officials.[111] Because of partisan gerrymandering, general elections can be contentious at the national or state level, but local-level general elections are usually not suspenseful.[112] There are but limited opportunities for voters' policy preferences to seriously affect the outcome of an election.

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105. *See id.* at 44–45.

106. *See* PITKIN, *supra* note 79, at 4.

107. Achen and Bartels find:

> A substantial number of women gravitated to the party sharing their view about abortion, reflecting the deep significance of the issue for women. Men, on the other hand, more often changed their view about abortion to comport with their partisanship—in effect, letting their party tell them what to think about one of the most contentious moral issues in contemporary American politics.

ACHEN & BARTELS, *supra* note 6, at 17.

108. *See id.* at ch. 9.

109. *See id.* at 4 ("We will argue that voters, even the most informed voters, typically make choices not on the basis of policy preferences or ideology, but on the basis of who they are—their social identities.").

110. "The resulting proliferation of direct primaries ultimately made both major parties' presidential nominations 'more democratic' in crude populist terms while diluting the influence of political professionals, whose firsthand knowledge of the competing candidates' strengths and weaknesses had helped to weed out amateurs and demagogues." *Id.* at 15.

111. Stephanie Akin, *The Next Joe Crowley? Not Us, These High-Profile Democrats Say*, ROLL CALL (July 24, 2019), https://www.rollcall.com/news/campaigns/democratic-incumbents-put-on-guard-as-progressives-launch-primary-challenges (explaining that following the success of Alexandria Ocasio-Cortez against New York incumbent representative Joseph Crowley, incumbent politicians who face primary challengers respond with fundraising and frequent appearances to keep their seats).

112. *See* John N. Friedman & Richard T. Holden, *The Rising Incumbent Reelection Rate: What's Gerrymandering Got to Do With It?*, 71 J. POL. 593 (2009) (explaining that House of Representatives' incumbent success rates were around 95% at the time, with redistricting being a disruptive factor over prior years); *2018 Election Analysis: Incumbent Win Rates by State*, BALLOTPEDIA (Dec. 21, 2018), https://ballotpedia.org/2018_election_analysis:_Incumbent_win_rates_by_state. The 2018 incumbent success rate was approximately 92%. *Id.*

Without question, our elected leaders represent us in the Hobbesian sense. Duly elected or appointed government officials have the power to speak for us and to make decisions that bind us or govern us as a community or nation. They can represent us to other states and to other countries in foreign affairs. They are empowered to enact, execute, and enforce our laws. All of these actions constitute a kind of representation. For better or worse, they speak on our behalf.

Yet they do not do so subject to our control. They are not our agents; they are not our fiduciaries. They are responsible for making decisions according to their own judgment and what they believe will allow them to stay in power.[113] Voter preferences are only a small part of the constellation of influences that work on political decision-makers. Self-interest in remaining in power dominates even the leader's personal interest about what constitutes the best interests of the public—or an ideological desire to make the world work a certain way.[114] The scope of this Article's analysis is limited to examining the constraints placed on leaders as they make decisions on behalf of their constituents and how those decisions affect their constituents. Examining how those decisions must be made and the motivations at work confirm what Achen and Bartels and many other political scientists have found: that political leaders work for themselves but must do so in a manner that responds to the "market" forces that determine their success. Like corporate executives, they make decisions that affect others—not necessarily in the best interests of those others, but also not in a way designed to harm others or steal benefits to the exclusions of those who have empowered them. "Fiduciary" is not the appropriate paradigm for the relationship between elected leaders and their constituents. But there are important market constraints on their decision-making that society at large, and voters in particular, would do well to understand so that the law may respond to the realities of our elected, "representative" government and provide the necessary protections for the governed.

B. Representative of What?

As with corporate executives, and any leaders of large, diverse, widely dispersed groups, elected government officials face a body of constituents with diverse, often directly conflicting interests. There is no question of a

113. Of course, it is better in a republic. Atkinson, *supra* note 4. But if we are evaluating the representative paradigm of democratic government, it fails by any measure to describe what happens in democracies and also fails to explain the limited power or influence the governed may have over a republican government.

114. Rebekah Herrick et al., *Unfastening the Electoral Connection: The Behavior of U.S. Representatives When Reelection is No Longer a Factor*, 56 J. POL. 214, 225 (1994) (describing how politicians facing reelection tend to engage in frequent—and sometimes meaningless—activities to ensure their own reelection).

government leader being allowed to place the interests of a single beneficiary (or a singular collective interest) above the interests of any other. The folk theory of democracy supposes that elected leaders represent the majority that voted for them[115] or pursue their good-faith appraisal of what is in the "public good."[116] A notion of the public good is an even less meaningful goal than "corporate wealth maximization." The country appears to be about evenly split about what is in the public interest on most issues.[117] Not only is there a split of opinion about what is best for the public, but as the electorate becomes more and more polarized, the stakes of the disagreement grow and one side believes the policies of the other to be malicious, evil, and destined to cause significant, irreparable harm.[118] So for a leader to make the decisions preferred by the majority or plurality who elected her is to directly contravene not only the interests of those who voted for the other candidate but also to destroy the world in the estimation of the losing voters. Even the pacified voters cannot be said to be getting what is in their best interest because, as mentioned above, voters are terrible at learning, identifying, and voting consistently with their best interests. They are rationally apathetic about most matters and almost always vote according to a combination of long-standing partisan affiliation and the current state of the economy.[119]

Because political leaders cannot be expected to represent the interests of their constituents, they try to shape those interests to match their own. Elected officials and party leaders often inform voter opinions, preferences, and priorities.[120] While a voter or a group of voters may have strong preferences on some issues, they are likely to follow their preferred political leaders on

115. ACHEN & BARTELS, *supra* note 6, at 1.

116. Miller, *supra* note 82, at 47.

117. Recent surveys show close margins in the public on a variety of key issues. Kristen Bialik, *State of the Union 2019: How Americans See Major National Issues*, PEW RSCH. CTR. (Feb. 4, 2019), https://www.pewresearch.org/fact-tank/2019/02/04/state-of-the-union-2019-how-americans-see-major-national-issues (describing that positions on either side of the border wall, immigration, the Mueller investigation, and tariffs and trade command between 40% and 60% support among the general public); Kristen Bialik, *State of the Union 2018: Americans' Views on Key Issues Facing the Nation*, PEW RSCH. CTR. (Jan. 29, 2018), https://www.pewresearch.org/fact-tank/2018/01/29/state-of-the-union-2018-americans-views-on-key-issues-facing-the-nation (observing that views on the economy, foreign policy, trade, and government regulation of businesses command between 40% and 60% support on either side of the issues among the public).

118. Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013, 1019–25 (2011).

119. ACHEN & BARTELS, *supra* note 6, at 276–84.

120. Kevin. M. Murphy & Andrei Schleifer, *Persuasion in Politics*, 94 AM. ECON. REV. 435, 437–38 (2004) (describing how religious–conservative political base supporters supported war, counter to what one might expect, when a political leader supported it); William Minozzi et al., *Field Experiment Evidence of Substantive, Attributional, and Behavioral Persuasion by Members of Congress in Online Town Halls*, 112 PROC. NAT'L ACAD. SCIS. U.S. AM. 3,937, 3,941 (2015) (citing a study finding that political leaders were able to persuade constituents on issues in personalized settings); Tetsuya Matsubayashi, *Do Politicians Shape Public Opinion?*, 43 BRIT. J. POL. SCI. 451, 473 (2013). Using long term data from U.S. Representative interactions, a study found "that Democratic representatives shift the opinions of their constituents in the pro-Democratic and liberal direction, while Republican representatives shift opinions in the pro-Republican and conservative direction." *Id.*

unrelated issues, deciding to defer to the leaders' judgments once loyalty is won.[121] Voters are most easily swayed on issues about which they are not well-informed and do not feel passionately if they are influenced by politicians who otherwise share their ideology.[122] That dynamic gives political leaders strong incentives to convince their constituents to care deeply about particular issues. Political focus on the abortion issue won evangelical Christians over to the Republican side and gave Republicans a powerful coalition on a host of issues, both related to evangelical ideology and not.[123] Far from passively taking cues from constituents about what issues to prioritize and what policies to pursue, political leaders drive the bus, influencing and even dictating voters' priorities and preferences.

1. *Partisan Loyalty*

To the extent politicians appear to be loyal to anyone or anything, they are loyal to their political parties. Party loyalty determines a candidate's ability to receive financial and advertising support from the national party.[124] Abandoning the party line can result in censure from other party members who may be popular with voters and have the ability to influence their choices in primaries. As party platforms shift over time and leadership changes, members must keep an eye on whom the party leaders are, whom the base seems to support in primaries, and how to remain loyal to party politics.[125] Falling out of a party in a two-party system is dangerous for candidates who are not entrenched incumbents with loyal followings. Toeing the party line is the default position and marked deviations from that expectation may result in a politician's changing parties or being heralded as a maverick.[126] Loyalty to party

121. Murphy & Schleifer, *supra* note 120, at 437.

122. *Id.*

123. Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates After* Roe v. Wade*, 1973–1980*, 87 CHI-KENT L. REV. 571, 584–89 (2012); Clyde Haberman, *Religion and Right-Wing Politics: How Evangelicals Reshaped Elections*, N.Y. TIMES (Oct. 28, 2018), https://www.nytimes.com/2018/10/28/us/religion-politics-evangelicals.html.

124. ACHEN & BARTELS, *supra* note 6, at 242 n.12 (citing Phillip E. Converse, *Religion and Politics: The 1960 Election*, ELECTIONS AND THE POLITICAL ORDER 119 (1966) (discussing a study focusing on white protestant voters responding to Kennedy's Catholic affiliation during his election)).

125. *See id.* at 233–36.

126. Alan Fram, *Party-Swapping Congressman Gets Trump Praise, Democratic Ire*, ASSOCIATED PRESS (Dec. 17, 2019), https://apnews.com/5c16676ad01586277e10deb7be1418c3 (stating that Democratic U.S. Representative, Jeff Van Drew, switched to the Republican Party after his decision to vote against the Articles of Impeachment against Trump); Nolan D. McCaskill, *Gabbard Lays Low After Voting 'Present' on Impeachment*, POLITICO (Dec. 20, 2019), https://www.politico.com/news/2019/12/20/tulsi-gabbard-lays-low-after-present-impeachment-vote-088266 (explaining that Democratic U.S. Representative, Tulsi Gabbard, was the focus of substantial criticism from the Democratic Party after breaking party lines and voting "present" on the impeachment vote against Trump); Ronald Brownstein, *John McCain's 2000 Campaign and the Republican Road Not Taken*, THE ATLANTIC (Aug. 27, 2018), https://www.theatlantic.com/politics/archive/2018/08/

could be seen as a sort of loyalty to one's voters because of voter adherence to partisan preferences and ideological allegiances. But partisan loyalty is the guiding force in political leaders' decision-making, not a reference to the preferences or interests of individual constituents or even constituents as a whole. While party preferences may align with what a particular elected official's independent judgment would be, it would be hard to tell in most cases because politicians, particularly less experienced ones, align themselves with a party or ideological position and consult the group before announcing policy positions individually.[127]

Of course, politicians are responsive to some voter preferences; otherwise, they would not be able to craft an effective marketing strategy for their candidacy. There must be something about one candidate that appeals to voters more than the other options. Demagogues appeal strongly to group identities of their supporters, "arousing racial, religious, and class prejudices."[128] Such group identities, even devoid of particular prejudice, often define voter behavior for generations. Group identity and the partisanship that it suggests endures for generations within a family, and as families grow and change, the identity of interest between the voter and the political party she supports can weaken.[129] A voter will continue to support the political party with which she has always identified, even when its policies no longer suit her interests or even necessarily conform to her beliefs.[130] Responsiveness to voter preferences, or even voter behavior, then, is not a sign of representing voter interests. Instead, politicians adopt or create a brand, signaling to voters what their group identities are, and voters choose the politicians or the political party, the brand, that corresponds with how they see themselves, with their group identity.[131] Thus, the chief determinants of the voting behaviors of most rank-and-file voters are predictable and predictably unrelated to their personal interests or even policy preferences. Voter behavior is an unreliable predictor of voter interests or even beliefs or preferences.[132] It follows, then, that politicians have little or no incentive to discover or determine voter interests, let alone expend

john-mccains-2000-campaign-and-the-republican-road-not-taken/568597 (describing how U.S. Senator John McCain was often praised and adopted the "maverick" nickname for instances of bipartisan cooperation and his willingness to break party lines on certain issues).

127. James M. Snyder, Jr. & Tim Groseclose, *Estimating Party Influence in Congressional Roll-Call Voting*, 44 AM. J. POL. SCI. 193, 194 (2000) (conducting a study focusing on roll-call votes sought to separate party influence from personal preferences found that party affiliation tended to produce a strong influence on voting behavior); Timothy P. Nokken, *Dynamics of Congressional Loyalty: Party Defection and Roll-Call Behavior 1947–97*, 25 LEG. STUD. Q. 417 (2000) (conducting a study which found that politicians' voting behaviors shifted significantly at the time they switched parties to line up with the policy preferences of that party).

128. REINHARD HENRY LUTHIN, AMERICAN DEMAGOGUES: TWENTIETH CENTURY 3 (1954).

129. ACHEN & BARTELS, *supra* note 6, at 233–34.

130. *Id.*

131. *Id.* at 48–51.

132. *See id.* at 233–34; Alan S. Gerber et al., *Party Affiliation, Partisanship, and Political Beliefs: A Field Experiment*, 104 AM. POL. SCI. REV. 720 (2010).

resources pursuing them. They will do better to signal their allegiance to a party or broad ideology as that is the more reliable predictor of voting behavior. It is more important that a political leader telegraph her own values than that she necessarily reflect the values of her constituents.

2. *Interest Groups*

Well-organized and well-funded interest groups can strongly influence policy outcomes. Some voter interests are represented and advocated by those interest groups, but their interests are not perfectly aligned. Of course, interest groups have one goal at the center of their agendas and so do not concern themselves with the various interests voters may have that conflict with the central goal of the interest group.[133] Some interest groups that purport to represent voters, such as unions and the NRA, have amassed significant power in their ability to fund primary opponents and influence the voting behavior of their large memberships. Corporations are able to combine to lobby for their policy preferences even though they do not influence the voting behavior of their shareholders or executives. Because of the money they can spend on political campaigns and advertising, interest groups can be overwhelmingly powerful voices in policy debates. It is hard to believe that American gun regulation would be what it is today without the strong interference of the NRA. Indeed, political campaigns often make a point of not taking money from interest groups and advertising their imperviousness to lobbyists for those special interests.[134] Demonstrating independence from interest groups is a way for a politician to signal that she is more interested in and motivated by the concerns and preferences of the ordinary voter who does not benefit from a well-financed organization.

Surely independence from corporate interests may make that point. There are not many voters who support, or even care very much about, the details of pharmaceutical or oil and gas regulation. But those industries have powerful lobbies that strongly influence political decision-making that touches their interests.[135] Voters may realize that the cumulative effects of industry influence are contrary to their best interests—the environment suffers, drug prices

133. Seidenfeld, *supra* note 96, at 1420; *see also id.* at 1408 ("Given their outlook, not surprisingly, public choice theorists expressed doubt that interest group representation could be harnessed to force agencies to regulate in the public interest.").

134. Elaine Godfrey, *Why so Many Democratic Candidates Are Dissing Corporate PACs*, THE ATLANTIC (last updated Aug. 23, 2018), https://www.theatlantic.com/politics/archive/2018/08/why-so-many-democratic-candidates-are-ditching-corporate-pacs/568267.

135. Aris Folley, *Top Oil Firms Have Spent $1B on Branding, Lobbying Since Paris Agreement: Study*, THE HILL (Mar. 27, 2019), https://thehill.com/policy/energy-environment/436117-top-oil-firms-spend-millions-on-lobbying-to-block-climate-change; Susan Scutti, *Big Pharma Spends Record Millions on Lobbying Amid Pressure to Lower Drug Prices*, CNN (Jan. 24, 2019), https://www.cnn.com/2019/01/23/health/pharma-lobbying-costs-bn/index.html.

increase to unaffordable levels, and smoking and sugar consumption increase to the detriment of public health. Nevertheless, in an environment of constant political fundraising, special interest money is influential. Politicians justify their susceptibility to special interest preferences by reasoning that accepting the donations is the only way to stay in power to pursue other policy preferences that are important to them (and their voters).[136] So, they will do a favor for the pharmaceutical industry if it allows them to stay in power to make sure that foreign policy doesn't go off the rails due to the irresponsibility of the other party.

On the other hand, signaling independence from labor unions, Planned Parenthood, the NRA, and religious organizations may not as clearly send a message of caring deeply about the interests of actual voters. Voters are trained by those interests to support them doggedly. Liberals strongly associate themselves with support for Planned Parenthood and consider that support an important signal of their commitment to liberal politics more generally. Interest groups that relate to voter positions on divisive social issues are essential to political branding for both parties and become important social signals in the groups that define voter identity and behavior.[137]

The tremendous power of well-organized and well-financed interest groups is their ability to focus voters' and elected officials' attention on their issues. A voter who cares deeply about Planned Parenthood can follow Planned Parenthood's guidance about candidates when voting. That might lead to reliable allegiance to the Democratic party and a preference for more liberal candidates in primaries. Likewise, certain voters, or even groups of voters such as military veterans and police unions, may strongly support the NRA and care deeply about legislators' and executives' NRA scores, which might lead the voters to reliably vote with Republicans and for more conservative candidates. Indeed, focusing voter attention so strongly on a few divisive issues allows political leaders to appease interest groups on those issues and find cover for a variety of other policy positions—or even sins—hiding behind their fealty to gun rights or abortion rights. Social psychology research shows that voters are more likely to favor political candidates who are more ideologically extreme than they are.[138] So liberal voters will favor candidates to the left of them, and

136. *See* Shane Goldmacher, *Biden Campaign Drops Opposition to Super PAC Support*, N.Y. TIMES (Oct. 24, 2019), https://www.nytimes.com/2019/10/24/us/politics/joe-biden-super-pac.html (describing how the Biden campaign justifies change in stance on accepting Super PAC contributions, pointing to need to fend off Republican attacks and the overarching Democratic need to defeat Trump in an election); Josh Kraushaar, *How Super PACs Will Strengthen Democracy in 2016*, THE ATLANTIC (May 3, 2015), https://www.theatlantic.com/politics/archive/2015/05/how-super-pacs-will-strengthen-democracy-in-2016/448800 (suggesting that corporate interest contributions through Super PACs enable more candidates to run for office).

137. ACHEN & BARTELS, *supra* note 6, at 319–23.

138. *See* George Rabinowitz & Stuart Elaine Macdonald, *A Directional Theory of Issue Voting*, 83 AM. POL. SCI. REV. 93 (1989).

conservative voters will favor candidates to their right.[139] Candidates can claim those advantages by carefully and vocally following the platforms of well-organized, well-financed interest groups that successfully focus voter attention on certain policy goals without concerning themselves with voters' other preferences. To the extent voters' interests influence government decision-making, concern for those interests can be consolidated to a few highly publicized, highly divisive issues. Everyone picks a side and cannot imagine voting for a candidate who does not share their views on those few issues. The lines are indelibly drawn, at least until the economy suffers.[140]

Voters might care deeply about certain signature issues and may be somewhat well-informed about them. But almost no voters are deeply informed about any issue and their voting behavior often does not conform to their interests on those and other issues. Voters are bad representatives of themselves, so it is not surprising that politicians would find it difficult to represent voters. Most voting behavior is determined by social identity with ideological and cultural group associations, most of which are fixed in childhood or early adulthood. As the population becomes more and more polarized and politically divided, those group associations become more entrenched. Political leaders, then, do well to brand themselves as strongly associated with those cultural groups and positions. Signaling is more important to staying in power than being sensitive to whatever preferences voters may have about how the world works, and it is certainly more important than whatever the best interests of voters may actually be. Because maintaining political power—both personally and for their party—is the raison d'être for holding elected office, putting on the show that makes staying in power more likely is a far more effective strategy than "representing," reflecting on, and pursuing the interests of constituents—even those who voted for the official in the first place.

C. Self-Interest

That politicians are motivated by selfish interest is hardly a new insight. As with any leadership position, some selfishness makes the leader more effective. If a leader cannot preserve her status or keep her party in power, she cannot pursue the goals her constituents may want her to pursue. An interest in self-preservation, particularly through a loyalty to party, may be what some voters have in mind and may constitute an intended, albeit imperfect, operation of the system. Even more pernicious selfishness—such as compromising key values under pressure from special interests or in order to secure certain

139. *Id.*

140. Voters will vote out the incumbent party if the economy declines immediately before an election. ACHEN & BARTELS, *supra* note 6, at 146–47.

campaign funds—is expected, though not admired, and is considered an unfortunate byproduct of how our system operates.

Some politicians pursue personal power and recognition so zealously that it is impossible to tell what they honestly believe and to whom they are loyal. Galoob and Leib describe "strategically contingent commitment[s]" as those dependent on what the commitment can do for the committed.[141] That is, one who engages in strategically contingent commitments will "abandon [a cause] without compunction in order to pursue a future, aggrandizing option,"[142] no matter the strength of the original commitment. A strategically contingent commitment is not "genuine loyalty."[143] Politics is, at times, defined by such "strategically contingent commitment[s]," and not always for bad reasons. Negotiation and compromise (giving up on one goal in order to achieve another) are accepted means of pursuing political ends. Ideological purity can lead to legislative deadlock and may not result in achieving the stated goals of an elected term. Of course, holding some principles dear—especially on behalf of constituents—is noble and often held up as an ideal. Often, we may marvel at the hypocrisy of the opportunists among us, but we are not surprised by their behavior, and more importantly, we do nothing to stop them. Both sides of any political debate—and often, each candidate in an election—can point to instances of the other side's engaging in strategically contingent commitments and leaving some supposed interests of constituents betrayed.

Personal political ambition is an inescapable aspect of a system in which candidates choose to run in elections and individual candidates, rather than ruling parties, are elected.[144] If individuals, rather than political parties, are deciding who the candidates are, then individual ambition defines when one is "ready" and "fit" to run.[145] Each candidate has decided that more than any other Democrat or Republican, he or she is uniquely, individually qualified and should be the one chosen for a particular position. Occasionally, someone runs for office intending to serve only one term, to work to achieve one particular goal or set of goals, and to return to their lives outside politics.[146] More often

141. *See* Galoob & Leib, *supra* note 8, at 91.

142. *Id.*

143. *Id.* (referring to "Littlefinger" in George R.R. Martin's *A Song of Ice and Fire*).

144. JEFFREY A. BECKER, AMBITION IN AMERICA: POLITICAL POWER AND THE COLLAPSE OF CITIZENSHIP 123–27 (2014).

145. Such observations about the 2020 Democratic primary and the current occupant of the White House have given rise to complaints in the opinion pages of national newspapers. *See, e.g.*, David Leonhardt, *The Presidential Nominating Process Is Absurd*, N.Y. TIMES (Dec. 29, 2019), https://www.nytimes.com/2019/12/29/opinion/2020-presidential-primary.html?smid=nytcore-ios-share; Jonathan Rauch, *How American Politics Went Insane*, THE ATLANTIC (2016), https://www.theatlantic.com/magazine/archive/2016/07/how-american-politics-went-insane/485570; John F. Harris, *Why 2020 Democrats Pretend to Be Radical*, POLITICO (June 26, 2019), https://www.politico.com/magazine/story/2019/06/26/2020-democratic-presidential-candidates-227211.

146. Russell Berman, *The Class of 2010 Heads Home*, THE ATLANTIC (Feb. 22, 2016), https://www.theatlantic.com/politics/archive/2016/02/house-republican-tea-party-class-2010-leaves-

though, politicians plan to have long careers that increase in power and stature over time. There are significant benefits associated with seniority in the legislative branches for the individual officeholder, and by extension, her constituents.[147] The more power a politician achieves, the more lucrative her lobbying and speaking fees when she returns to civilian life. There is far more at stake in staying in office and pursuing a political career than in faithfully representing the interests of a distinct constituency of voters. Politicians have strong incentives to maximize their personal power and influence separate and apart from appeasing voters or pursuing certain policy outcomes. It would be irrational for a politician to be so tied to a policy position that she stakes her career on it. It is in the political leader's best interest to be able to change with the times, to follow the political winds, and to ride the right coattails to advance.

But can voters see through that and simply vote such an opportunist out of office? Not only can they not, but they do not particularly want to. Politicians do not often lose elections because voters have been convinced that the politician has done a bad job or been selfish or made a bad decision that is inconsistent with voter preferences. Rather, unsuccessful incumbents may have upset an interest group that can fund a primary opponent, even if their decision was supported by the majority of voters in their jurisdiction. For example, gun control regulation polls well but does not go anywhere, presumably because of the power the NRA wields over the funding of primary elections.[148] If a leader falls out of favor because of a gaff or personal scandal, they could lose their position even if they did a good job of representing their constituents' interests.[149] On the other hand, blatant opportunists may be popular for reasons having to do with personal charisma, strongly held views on a couple of issues, or popularity and power within political circles, even if they have not served voters well and are only pursuing personal power and personal interest.[150] Voters are simply not well-placed to police opportunism and self-interested behavior by political leaders, and even if individual voters or interest groups

congress/463227 (observing that several Tea Party GOP congressmen who were not career politicians prior to election chose to leave public office voluntarily).

147. Kathy Gill, *The Effects of the Seniority System on How Congress Works*, THOUGHTCO (May 30, 2019), https://www.thoughtco.com/what-is-the-seniority-system-3368073 (explaining that members of Congress amass more committee power over time as they gain seniority, gaining substantial influence over the primary sources of legislation).

148. Maggie Haberman et al., *N.R.A. Gets Results on Gun Laws in One Phone Call with Trump*, N.Y. TIMES (Aug. 20, 2019), https://www.nytimes.com/2019/08/20/us/politics/trump-gun-control-nra.html; Rachel Treisman, *Poll: Number of Americans Who Favor Stricter Gun Laws Continues to Grow*, NPR (Oct. 20, 2019), https://www.npr.org/2019/10/20/771278167/poll-number-of-americans-who-favor-stricter-gun-laws-continues-to-grow.

149. *See* Brandon Rottinghaus, *Surviving Scandal: The Institutional and Political Dynamics of National and State Executive Scandals*, 47 PS: POL. SCI. & POLS. 131, 131 (2014) (explaining that the effectiveness of politicians in office does not significantly impact their ability to survive political scandals).

150. *Id.* (noting that the ability to survive a scandal tends to be connected to the politicians' support within their own party).

could keep track of such violations of trust, voting in a two-party system is a crude instrument for the job.

Some fiduciary scholars define fiduciary doctrine as an equitable one resting on the ability to ask a judge after a decision has been made whether it was made in accord with the duty of loyalty, the duty to pursue the beneficiary's best interests to the exclusion of conflicted self-interest, and the interests of a third party.[151] There is no mechanism for such an appraisal in our government. While some may argue that impeachment is such a mechanism, it is viewed as an extreme punishment, practically a death-penalty, and is used rarely and in only the most egregious cases. Even when impeachment is invoked, it is a political process that is subject to all of the complexities that make enforcement of meaningful fiduciary obligation in government almost impossible. Because it is not at all clear that blatantly self-interested behavior violates the public's expectation or trust, let alone that it angers voters, we are powerless to hold politicians to such an aspirational standard.

III. LEADERS SELL A PRODUCT: THEIR OWN BRAND OF TRUSTWORTHINESS

As members of a society that realizes the benefits of and bears the costs imposed by corporate and political leaders, we are most interested in how those leaders make the decisions that affect us and what their priorities are. We want to understand their *values*. While the two spheres of influence differ, they share the widely held assumption that the leaders in each sphere exercise their authority to make important decisions in the interest of others. As I have explored how their decision-making is exercised and what influences it throughout this Article, one theme has emerged: the only interest these leaders are particularly well-qualified and well-incentivized to pursue is their own. Connecting that self-interest to particular goals is the most effective way we have yet devised to direct or influence the decision-making of the leaders of large, diverse groups.

Indeed, political leaders and corporate executives make decisions for citizens and shareholders, respectively, by pursuing self-interest within market constraints. Political leaders operate within a market for votes and political power and influence that is populated by interest groups, political parties, and the political realities of their position and jurisdiction. Corporate executives must be able to sell themselves and their leadership values to institutional investors, consumers, other executives (to be selected for boards and positions as senior officers in the first place), and market analysts. Checks and balances in government and corporate governance limit the power of any one

151. *See* Charles M. Elson & Robert B. Thompson, Van Gorkom*'s Legacy: The Limits of Judicially Enforced Constraints and the Promise of Proprietary Incentives*, 96 NW. U. L. REV. 579, 581–82 (2002); *see also* Miller, *supra* note 82, at 41–42.

decision-maker and constrain their behavior with the countervailing power of others and enforceable obligations owed to a variety of third parties. Just because they are not adequately constrained by fiduciary duties does not mean these leaders are free to steal or behave opportunistically. The law, through various regulations and the enforcement of contracts, provides a framework that ensures that as leaders pursue the best decisions for themselves, they are also doing the job they were hired to do.

The product corporate and political leaders are designing and selling is the kind of leader they will be. In order to remain in power and to be entrusted with a leadership position, they must show they are trustworthy—that they can be relied upon to lead competently and with integrity and benevolence toward interested parties. Leaders show the market what their values and priorities are, and the various markets decide which leadership packages are most appealing. In the investment markets, investors pick various "horses"—in the form of companies and investment vehicles—and hope their package of horses outperforms others. Corporate executives have to look like fast horses. Political leaders have to look like they will be most able to make the world look as their supporters think it should, as, perhaps, they themselves think it should. They are locked in a competition with the other political party or opposite ideology, pursuing the power to drive law and policy to the exclusion of the opposing viewpoint.

In order to win a leadership position, a corporate executive or elected official must inspire the confidence of those she will lead. The central premise of fiduciary theory applies—before delegating significant power and control over one's affairs or welfare to another, we must be convinced of their trustworthiness. Trustworthiness is demonstrated by convincing the trustor that the trustee is competent and can be relied upon to act with integrity and benevolence toward the trustor.[152] That trustworthiness is not defined by notions of fiduciary obligation; it does not require that the leader agree to act solely in the best interests of some identifiable other or that the leader eschew thought of self. Rather, it only requires that the trustee be dependably competent and benevolent in her actions, that she act with integrity. A leader can be self-interested without inflicting harm, as long as her self-interest is not malicious or harmful to the societal interests she controls or can strongly influence.

Fiduciary doctrine puts too fine a point on what it is leaders must do to earn our trust or even exercise power effectively and for the societal good. Its relentless focus on selflessness misplaces our society's focus and deceives constituents about how leaders do their work. If what proponents of fiduciary rhetoric mean by "fiduciary" is actually "trustworthy," developing a more

152. *See* Roger C. Mayer et al., *An Integrative Model of Organizational Trust*, 20 ACAD. MGMT. REV. 709, 718–19 (1995); *see also* KATHERINE HAWLEY, TRUST: A VERY SHORT INTRODUCTION 11 (2012).

accurate understanding of that expectation and how it can be enforced will provide more and better protection of the interests of those subject to leaders' decisions. This Part considers the elements of trustworthiness and how even selfish leaders can signal that they are trustworthy. Trustworthiness is composed of ability (competence), benevolence (goodwill toward others), and integrity (adhering to codes of acceptable conduct). I consider benevolence and integrity together as a "standard of decency." But first, let's turn to ability.

A. Ability

Leaders lead. Neither corporate executives nor elected officials mark their success by conforming to the visions or desires of any group that supports them. They decide what the best course of action is because their constituents have delegated that authority to them, lacking the time or expertise or inclination to do it themselves.[153] If leaders were to constantly look to their constituents for advice or guidance, they would be abdicating their authority to those they are supposed to lead; the benefits the constituents realize from delegating decision-making would be lost; and the quality of decisions made would be worse.[154] By definition, leaders do not obey. They demonstrate great ability by devising better courses of action or having better ideas or solutions to problems than others. They must eclipse not only the decision-making ability and creativity of their constituents, but also that of their nearest competitors. A leader, then, must often tell constituents what is in their best interests, what the best course of action is, and what policies they should support. Not only do they often have more expertise, but leaders have vastly more information than constituents can or do. We often look to leaders, of all kinds, who have earned our trust to tell us what to think about important issues. Leaders want to position themselves to be those trusted beacons who can guide public opinion and constituent support to their preferred policies and courses of action.

Individual leaders will define their goals, and so the markers of their success, for themselves. They then sell that vision of success, how they define their mission, to those who will put them in power. These visions of success compete on a market for power and control.

Most corporate executives demonstrate their competence by improving the firm's profitability and market share. They define their mission as pursuit of profit and market their ability to achieve that goal better than others. Successful executives operate companies that lead others in the industry—they are innovative, can anticipate what consumers will want, and convince consumers of the superiority of their products. The success of such firms is reflected in their stock prices. Investors can see that the firms are valuable and are willing

153. *See* Bainbridge, *supra* note 9, at 559–60.

154. *Id.* at 568–74.

to pay more for their stock. Executives are compensated accordingly and climb through the ranks of the market for corporate-governance talent. A smaller group of corporate executives choose instead to market their ability to lead a flourishing corporation that is considerate of interests beyond profit maximization. They are concerned about their firms' relationships with the surrounding community, environment, consumers, and employees. They may sacrifice immediate profit in order to serve those interests in the hopes of achieving a broader appeal among consumers and investors, thereby increasing their share in the market for corporate control.[155]

The most widely recognized signal of a public corporation's governance team's competence is stock price. Executives try to maximize stock price within a variety of other constraints. They do that by navigating the constraints placed on pursuit of profit and working to move and manipulate those boundaries. An executive who puts the right combination of contracts in place to provide for the company's needs at the lowest possible price to leave the most possible profit for shareholders (or herself) will be considered successful. There is a dialogue between corporate executives and relevant interests. Trends in the product market arise from both consumer demands (healthier, less processed food) and corporate innovation (who knew we wanted kale chips?). Shareholders do, monolithically, want share prices to increase, but how and why they do increase is a matter of fierce debate. The investment market can signal to executives what limits it wants them to observe in pursuing profit maximization. For instance, shareholders would also prefer that corporations increase profits without using forced or underpaid labor or poisoning groundwater. Executives can show how and when they will respond to consumer preferences that might initially seem opposed to profit maximization in order to secure long-term business or effectively compete in an industry. On a parallel track, executives cause their firms to pay lobbyists, and lobby lawmakers themselves, to advance the corporation's interest in (de)regulation, giving voice to the corporate goal of lowering the costs of doing business and limiting constraints on a firm's ability to maximize its profitability. Executives demonstrate their ability by deftly managing various interests, observing and manipulating constraints, and propelling their firms into market dominance. The job requires creativity, vision, social skills, and savvy.

Most successful political leaders stay in power and amass more power over time. They are electable and attain seniority, control, or both, over larger groups of people over the course of their careers. They succeed in implementing policies that conform to their ideology. They make the world look the way they think it should, the way they've convinced their supporters it should. A

155. Officers and directors of benefit corporations that are organized to seek profit but with an eye to public benefit still maximize profit within the constraints they define by their concern for society. Those leaders are marketing the balance they have struck to a particular group of like-minded investors.

competent politician grows more powerful over time, either by achieving seniority in a legislative chamber or being appointed or elected to positions that carry more power over more people (or more important decisions). A truly successful political leader will be able to point to a list of partisan accomplishments and the size of her realm of influence to demonstrate that she has been entrusted with the power to affect the lives and fortunes of a significant and growing jurisdiction. Conforming the policies in her sphere of influence to partisan goals is one marker of success, but, importantly, a political leader is only successful if she, particularly, individually, is the one to exercise that power.

Political leaders must also limit the constraints placed on their ability to achieve their policy goals. The greatest limitation political leaders face is the power and influence of the opposing political party. Winning elections is important, of course, but so is navigating the partisan political landscape once elected. Our government, at all levels, is usually divided to some extent. Various parts of the government have power to limit, direct, or influence others. While trying to maximize their personal power and influence, as well as the power and influence of their political parties, political leaders must appeal to voters, abide by the wishes of important and well-funded interest groups, respond to the desires of powerful lobbies, raise money, and work within the system to achieve policy goals. A political leader must balance a variety of interests within well-defined constraints to achieve personal and political success.

Just as corporate executives try to manipulate the contours of their permissible activity, political leaders try to mold their confines to the extent they can. When balancing various interests, they hide from competing constituencies the influence of the others. They convince voters to follow them, so they are not bound to follow voters. They help moneyed interests quietly, while trumpeting policy goals and achievements with broader popular appeal. They carefully skirt ethics codes and requirements, finding loopholes and soft spots as they enjoy the power they have been given.[156] Each branch of government tries to slowly, subtly, defensibly (or not) expand its power and influence over others.[157] Keen politicians do not necessarily follow others or their constituents, but they can sense the direction of the prevailing winds and anticipate changes

156. *See* Sung Hui Kim, *The Supreme Court's Fiduciary Duty to Forgo Gifts*, *in* FIDUCIARY GOVERNMENT 205, 207–17 (2018).

157. *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1055–69 (2013) (discussing the history and expansion of executive control over administrative agencies); Robert D. Sloane, *The Scope of Executive Power in the Twenty-First Century: An Introduction*, 88 B.U. L. REV. 341, 345 (2008) (discussing unitary executive theory and the growth of executive power in the context of foreign affairs and terrorism); Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate,* 47 U.C. DAVIS L. REV. 261, 261–62 (2013) (reviewing the increased use of filibuster and reconciliation procedural mechanisms to amplify the power of the Senate within the lawmaking process).

in sentiment and position themselves at the forefront of burgeoning movements to establish themselves on the frontier before others arrive.[158]

Successful leaders of corporations and government, our leaders of large, diverse flocks with diverse interests and preferences, market themselves as pursuing a focused, well-defined vision and sell the benefits of that vision, their motivating philosophy, to those who might empower them. Then, they creatively navigate the constraints placed on their power by the legal infrastructure and a variety of interests to maximize their ability to pursue their stated goals in the manner they advertised while enhancing their personal power and influence. In order for a leader to convince the market of investors, voters, and interest groups that she is the best person to wield power, she must demonstrate the ability to succeed on all relevant metrics and to exceed expectations. Leaders demonstrate their ability by deftly managing various interests, observing and manipulating constraints, and propelling their visions into market dominance.

B. Standard of Decency: Integrity and Benevolence

Even a competent leader will not win the confidence and affection of those she leads if she is not perceived as being honorable and benevolent. This is particularly true in regimes in which the leader is elected by a democratic process, but has proven to be true even in dictatorships and monarchies.[159] A leader is more effective when she has the support of those she leads, and she earns that support by seeming like someone who will use her power for good, not evil, one who will use it to help others rather than to enrich herself. A benevolent leader wants the best for those who trust her; she wants to use her power to help many and harm few.[160] Integrity reflects a leader's adherence to a code of conduct or faithfulness to the law.[161] Integrity also includes honesty in fact and a determination to stand by and act in accordance with stated principles even when doing so is difficult. The two characteristics combine to form what I will refer to as the "standard of decency" a leader observes. Each leader defines her standard of decency for herself and markets it as part of the trustworthiness she wants to sell. I do not mean to *accuse* leaders of this marketing, nor do I use the term cynically. Publicly announcing and adhering to a standard of decency elevates the entire culture of leadership and encourages all leaders to *be*, not simply seem, more trustworthy.

158. James A. Stimson et al., *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 543 (1995) (explaining that a study of the responsiveness of the different branches to shifts in public opinions finds that House Representatives exhibit a "rational anticipation" of those shifts, saving themselves from electoral consequences).

159. *See* PITKIN, *supra* note 79, at 4.

160. *See* Fahri Karakas & Emine Sarigollu, *Benevolent Leadership: Conceptualization and Construct Development*, 108 J. BUS. ETHICS 537, 537 (2012).

161. *Id.* at 544.

The fiduciary narrative has become an important part of signaling benevolence and integrity, but the connection is misleading. Consider, for example, fiduciary rhetoric in corporate law. The fiduciary narrative serves the function of signaling to executives that integrity and benevolence are important. It may also allow executives to signal to the investing public that they exercise their power with integrity and in a selfless manner that is considerate of the good of corporate constituents.[162] Honestly disclosing information about the company's activities and some of the executives' personal interests to investors is part of governing a corporation with integrity, and that standard is supported by the expectations of fiduciary doctrine. Further, an executive acting with integrity avoids personal financial conflicts of interest that are not blessed by the board. This is the primary command of corporate fiduciary obligation. But fiduciary doctrine only describes part of the standard of behavior that integrity demands. A board member also acts with integrity when she refuses to go along with the group in overlooking a potential problem, or when she pushes others to investigate a decision past their immediate willingness to do so.[163] Such diligence is important but not mandated by fiduciary doctrine or the relatively weak corporate standard of care.

Benevolence in a leader of a large group contemplates a broader consideration of various interests than fiduciary doctrine requires or allows. A fiduciary has only one beneficiary and cannot simultaneously serve competing interests loyally. Yet, in modern parlance, a leader who pursues the interests of one constituency to the exclusion of others is not benevolent.[164] To the contrary, a zealous pursuit of profit maximization, to the exclusion of other concerns and interests, is perceived by many as being malicious.[165] Populist and progressive political movements consider profit maximization to be a heartless corporate goal that damages the environment, communities, the working class, and even the economy.[166] Corporate leaders are showing that they are sensitive to public opinion to the extent they claim to honor interests other than pure profit maximization. If claiming that corporate executives are greedy and use

162. *See* Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1661–63 (2001).

163. *See* Kimberly D. Krawiec et al., *The Danger of Difference: Tensions in Directors' Views of Corporate Board Diversity*, 2013 U. ILL. L. REV. 919, 930–40 (2013) (discussing the pressure on board members to avoid disagreement and reach concurrence on important issues).

164. *See* BUS. ROUNDTABLE, *supra* note 37; Elizabeth Warren, *Companies Shouldn't be Accountable Only to Shareholders*, WALL STREET JOURNAL (Aug. 14, 2018), https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687.

165. *See* Warren, *supra* note 164 (arguing that the focus on profit maximization negatively impacts workers and the economy); *Corporate Accountability and Democracy*, BERNIE, https://berniesanders.com/issues/corporate-accountability-and-democracy (last visited Feb. 7, 2020).

166. *See* Michael Burke, *Ocasio-Cortez: 'Capitalism is Irredeemable'*, THE HILL (Mar. 10, 2019), https://thehill.com/homenews/house/433394-ocasio-cortez-capitalism-is-irredeemable (relating how progressive leader Representative Ocasio-Cortez criticizes profit maximization for its impacts on the environment and people in general).

their power for evil is a successful strategy for those seeking political leadership positions, then corporate executives will change the narrative about what they are doing at the helms of corporations in the interest of appearing to be benevolent. The fiduciary mandate is thus contrary to notions of benevolence.

Big-tent benevolence does not undermine the reality that executives signal competence by enhancing the profitability and thereby the stock price of the firm. The signaling of benevolence has two purposes. The first is to give the impression that a corporate executive is using her powers for good. The second is to get ahead of those who may want to constrain the decisions the executive can make for the corporation in pursuit of profit. The savvy executive signals that she is not exclusively pursuing profit so that she may be freer to pursue profit. The goal of profit maximization is indeed advanced by the rhetoric of benevolence if the rhetoric succeeds in slowing the progress of regulation that might rein in corporate activity or impose restrictions on executives' abilities to maximize corporate wealth. The government will not perceive a need to regulate corporate employment practices, or to increase environmental regulations, if it appears that corporations are setting appropriate limits for themselves.

Political leaders, once elected, are largely responsible for regulating themselves and designing and implementing their own ethical compliance rules.[167] Each branch of government holds some checks on the power of others, and Congress is charged with overseeing the executive branch,[168] but the ethical rules to which public officials are held originate within, and can be largely enforced by, the branch in which they serve.[169] The strongest external pressure for integrity and adherence to standards of decency comes from pressure from the fourth branch—the press—and resulting public opinion.

Political leaders demonstrate integrity not just by toeing the line on official ethical standards but by avoiding the appearance of impropriety in their personal and professional lives. Transparency about finances, influences, supporters, and political positions is highly valued. Most of all, adhering to principled positions in difficult situations, at the risk of bucking one's own political party or supporters, indicates integrity on the part of a political leader.

167. *See* Kathryn Watson, *How Does a Congressional Ethics Investigation Work?*, CBS NEWS (Dec. 7, 2017), https://www.cbsnews.com/news/how-does-a-congressional-ethics-investigation-work (explaining that Congress is a self-regulating body and its members rarely face removal or other forms of discipline); Michael Sozan & William Roberts, *10 Far-Reaching Congressional Ethics Reforms to Strengthen U.S. Democracy*, CTR. FOR AM. PROGRESS (Apr. 25, 2019), https://www.americanprogress.org/issues/democracy/reports/2019/04/25/469030/10-far-reaching-congressional-ethics-reforms-strengthen-u-s-democracy (advocating for ethical compliance reform, authors point out several instances of misconduct that went without discipline or substantial review).

168. *See* Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1062–63 (2008).

169. *See, e.g.*, Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1, 6–7 (1996) (analyzing the problem of the traditional leniency of congressional ethics committees in disciplining members of Congress).

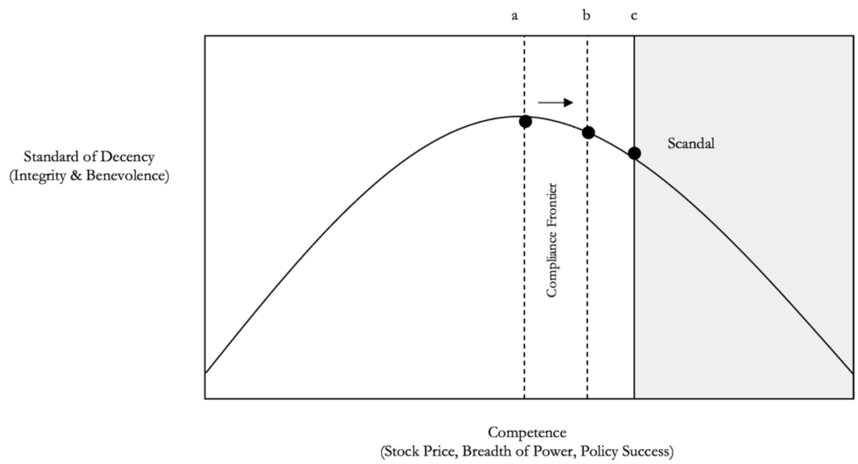
Purity of purpose, however defined (and that purpose is not always characterized by universal benevolence), is part of the message political leaders market when they sell their integrity to those who may elect them.

Political leaders demonstrate benevolence, in large part, by selling their ability to relate to a large portion of the electorate. They strive to seem "on the side" of as many potential voters as they credibly can. That often involves some showing of "folksiness" or relatability in addition to proposing policies that have the potential to grow the pie so that all may enjoy more wealth. A benevolent politician is not condescending, elitist, or dismissive of the struggles of any part of the electorate. Of course, given the realities of politics and politicians, almost all of these demonstrations of benevolence are staged, at best. A more empirically demonstrable form of benevolence politicians are turning to now is a promise to be independent from campaign donations from special interests.[170] By eschewing campaign donations from the wealthy and elite or special corporate interests, a politician can appear more dedicated, and beholden to, the unmoneyed electorate.

C. *Modeling the Relationship Between Ability, Integrity, and Benevolence*

Leaders demonstrate they are trustworthy by showing constituents, and the public more generally, that they are competent and benevolent and that they act with integrity. Their ability to reach markers of success to demonstrate their ability is limited by the need to demonstrate integrity and benevolence. A leader behaves with integrity when she is honest about her motives and open in her disclosures about her activities, complies with the law, and avoids financial conflicts of interest. Benevolence means showing concern for and goodwill toward relevant interests. A benevolent leader responds with kindness to the concerns of her constituents and shows respect for the wide range of interests preferred by her constituency, functionally defined as the intended audience of her demonstrations of benevolence. Unfortunately, leaders may narrowly define that audience. The relationship among the three elements of trust is diagrammed in the graph below.

170. Bernie Sanders and Elizabeth Warren have used this tactic to particular effect. *See* Lissandra Villa, *Sanders Campaign Announces $34.5M in Fourth Quarter Donations, Touts 5 Million Individual Contributions*, TIME (Jan. 2, 2020), https://time.com/5757711/bernie-sanders-34-million-q4-fundraising (holding out grassroot contributions as evidence of popular support); Charlotte Alter, *Warren's New Campaign Finance Plan is Putting Rivals like Biden and Buttigieg on the Spot*, TIME (Oct. 15, 2019), https://time.com/5700819/warren-campaign-finance-plan-2020-election (recounting Warren's announcement of her plan to reject big donors and corporate funding in her 2020 campaign).



Ability, on the one hand, and integrity and benevolence, on the other, are positively correlated for a time. Integrity and benevolence are on the same axis because, together, they signal that the leader is morally and ethically upstanding—that she conforms to a standard of decency. Competence is on a separate axis because it is measured by tangible results. A competent corporate executive returns superior profits measured by high stock prices. A competent political leader expands her sphere of influence and returns policy successes to those who put her in power. The two axes are positively correlated to the extent a leader's perceived competence consists of the ability to maximize markers of success within relevant legal and ethical constraints. But a leader may find that she can attain higher markers of success (higher stock price, more power and influence, more policy wins) if she violates the law or hides her activities or conflicted interests from the public. Regulators and those who enforce the law are constantly trying to stem the tide of incentives for leaders to push and exceed boundaries. The current total constraint imposed by law and a public sense of decency is denoted at point *a*. Acting within that constraint, complying with the law and legal norms, is described by Alan Palmiter as observing a "duty of obedience."[171] Leaders are engaged in a battle to push the boundary of accepted behavior to capture more success, so as to leave less money on the table as a result of compliance with legal and ethical standards. They are trying to move the boundary of legal and ethical constraints to point *b*. They want to be less constrained by law and legal norms. But there is a point past which leadership and the law cannot go. There is a minimum standard of decency, of integrity and benevolence, that regulators and leaders must observe. Past that point—point *c* on the graph—non-compliant behavior, once discovered, will result in scandal and upheaval, regardless of the victories or profits won.

171. Alan R. Palmiter, *Duty of Obedience: The Forgotten Duty*, 55 N.Y.L.S. L. REV. 457 (2010). Where Palmiter explores how to enforce compliance with a duty of obedience, I use the compliance with laws and norms he describes to note the trustworthiness of a leader who observes that standard.

When someone asks to be chosen for a leadership position, to the exclusion of others, she is asking investors or voters or other powerful constituents to endorse her position on the trustworthiness curve. She is selling her vision of what success will mean, her ability to reach it, and what constraints she believes must be placed on her behavior and what limits she will accept. Most leaders market themselves as operating at and striving for point *a*. They claim high marks on all three indicators, doing everything they can to succeed on the task they have been given (as they understand it) while maintaining the requisite standard of decency. Others are willing to sacrifice some of their competence score to score higher on benevolence as a way to demonstrate their integrity.[172] Still others openly pursue high competence scores while actively working to limit the constraints placed on their ability to do so.[173] They look for loopholes, lobby against regulation, fight to hide their activities from the public, and claim it is all necessary to deliver on their promises to those who elected them. Because the standard of decency is a sum of integrity and benevolence, it represents a sliding scale. A leader can choose ways in which she might want to demonstrate more of one and then be bound by less of the other to reach the same point on the trustworthiness curve.

Regardless of how they are marketing themselves to their share of the market, leaders would generally like to move toward point *b* if they can. The space between points *a* and *b* is the "compliance frontier." Of course, the ways and degrees to which leaders and candidates traverse the frontier vary by individual or by relevant group (a particular company's management team or a political party, for example). Even if leaders think some constraints are beneficial, either because they have a competitive advantage in abiding by those limitations or because those limits comport with their worldview, they will want to dodge, or work to minimize, others. Point *b* allows greater achievement on the metrics that allow leaders to stay in power and maximize their personal return from their position. A leader at point *a* who is competing with others who are moving toward or have arrived at point *b* will likely lose in the market for control and power. Her inability to achieve point *b* will be viewed as a failure of innovation, creativity, or industry.[174]

172. *See Three Guides for Going B—And Why It Matters*, PATAGONIA, https://www.patagonia.com/blog/2018/08/three-guides-for-going-b-and-why-it-matters (last visited Oct. 2, 2020); *Our Values*, BEN & JERRY'S, https://www.benjerry.com/values (last visited Feb. 7, 2020); *Fair Trade*, EILEEN FISHER, https://www.eileenfisher.com/fair-trade/fair-trade-overview (last visited Feb. 7, 2020).

173. *See* Aris Folley, *Top Oil Firms Have Spent $1B on Branding, Lobbying Since Paris Agreement: Study*, THE HILL (Mar. 27, 2019), https://thehill.com/policy/energy-environment/436117-top-oil-firms-spend-millions-on-lobbying-to-block-climate-change; Scutti, *supra* note 135.

174. For this reason, corporate boards include members who provide the corporation with the political or business connections necessary to move constraints on a company's profit-seeking or competitive advantage to point *b*. *See* STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, OUTSOURCING THE BOARD: HOW BOARD SERVICE PROVIDERS CAN IMPROVE CORPORATE GOVERNANCE 37–40 (2018) (discussing the benefits a corporation can reap from well-connected board members).

All leaders want to move to point *b*, even those who heavily market their commitment to regulations or causes that would seem to limit their ability to pursue profit or increased power. Recall that competence is defined as achieving the goals contained in the leader's job description, however defined. For example, a leader who markets herself as committed to socially conscious leadership of a corporation has been selected for that role by investors who want her to pursue that vision. She cannot be successful in that mission if the law requires her to place profit seeking above other behaviors, nor can she succeed in keeping the company afloat by outperforming others in the industry if their leaders are not constrained in their ability to exploit the environment or workers. A socially-conscious executive wants to limit the degree to which the law prohibits her from making calculated tradeoffs between immediate profit and other interests. She works not only to limit constraints on her decision-making, but also to enhance constraints on the strategies chosen by her rivals. The difference between a ruthless profit maximizer and a socially responsible executive is not in their relative desires to bend regulation to their purposes, but in how they have defined their goals. The socially-conscious executive may present one version of corporate strategy to investors and another to other parties in interest. Through the process of moving to *b*, of changing the law and legal norms, leaders seek more *autonomy* to achieve their goals.

To maintain power, leaders must enhance the market share of subscribers to their goals and philosophies. They must sell their case for earning trust and power in a market in which those with differing worldviews and competing visions for success will compete for votes or investments. They do so by adopting a position on the trustworthiness curve, defining its terms for their constituents, and working to adjust the terms of their position to allow them to pursue as many of their stated goals as possible while subject to the fewest external constraints.

The work the law can do to protect constituents is to create rules that allow constituents to see where on the curve a leader or candidate is and why, particularly as the leader or candidate moves within the compliance frontier. The law must reveal the interests that leaders or candidates are pursuing, what their influences are, and what their priorities seem to be. How the law can do that work is a subject for future research. But focusing on transparency within the compliance frontier will provide more protections to leaders' constituents than fiduciary doctrine can or does.

IV. THE FIDUCIARY MYTH IS HARMFUL

Even as scholars may acknowledge that the fiduciary mandate is empty and difficult to enforce, they maintain that it serves an important expressive function.[175] What's the harm, they say, in perpetuating a norm that encourages leaders to be trustworthy and other-regarding? Of course they have conflicts, but if they believe they are charged with acting in the best interests of others, or in service of a good faith understanding of a public good, then the fiduciary myth has done its job. On the contrary, the fiduciary myth is harmful to those it purports to serve. To the extent they believe it, it deceives them, and to the extent they realize its emptiness, they may not look for or monitor other components of trustworthiness.

An investor or voter who would not trust leaders who were not fiduciaries has been deceived, and maybe defrauded, out of money or political power. If we believe that investors would not part with their money if corporate leaders were not fiduciaries, then they have been defrauded because corporate leaders are not actually fiduciaries in a meaningful or enforceable way. They are certainly not fiduciaries in the aspirational way investors imagine, or even to the greatest aspirations of the rhetoric used by judges deciding corporate law cases.[176] If voters only vote for a politician because they believe the politician must pursue the voters' best interests or policy preferences, then they have been defrauded of their vote. The voters' mistaken belief in fiduciary protection has prevented them from learning what they must about a candidate to give their interests and preferences a fighting chance.

But there is compelling evidence that shareholders and voters do not rely on the fiduciary myth in making their choices. Numerous investors in the capital markets are not owed fiduciary duties by those whose actions control or influence the fates of their investments. Bondholders and derivatives traders invest substantial amounts of money and are not the beneficiaries of fiduciary duties. For all of the voters whose candidate is selected, almost as many lose and do not expect the official elected will serve their interests. Indeed, most of the voters on the losing side are certain the leader will pursue the exact opposites of their interests and preferences. There must be harm beyond the possibility of fraud, and there is: the fiduciary myth distracts the vulnerable from properly investigating the trustworthiness of their leaders. A belief that the law requires leaders to behave as fiduciaries, or that there is a remedy for faithless behavior that someone else can or will enforce, skews the views of those who are led. It misleads them about the responsibility they have for vetting the leaders they can empower.

One may be trustworthy without being a fiduciary, and many fiduciaries might be trustworthy in only limited ways. Fiduciary doctrine is but a single, specific tool with the limited goal of preventing observable conflicts of interest.[177] It cannot address the many conflicts of interest that we cannot see

175. *E.g.*, Rock, *supra* note 21, at 1014–16.

176. Alces, *supra* note 13, at 367–75.

177. *See* Paul B. Miller, *Justifying Fiduciary Remedies*, 63 U. TORONTO L.J. 570, 604–06 (2013); Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 553–54 (2016).

or prove, but whose existence we take for granted.[178] The mechanisms for enforcing fiduciary obligations against corporate and political leaders are limited, expensive, and uncertain. Yet we demand that those leaders be trustworthy, and we entrust them with power that can significantly affect our well-being. That we entrust them with power is not enough to make them fiduciaries. "Fiduciary" describes certain trusting relationships that operate in specific ways. Many trusting relationships are not fiduciary in nature.[179] The relationships between leaders of large, diverse groups and those they lead simply are not, and cannot be, fiduciary.[180] But they do rely on specific kinds of trust in order for vulnerable constituents to submit to the power of the leader.

The distinction I reveal here is not merely semantic. It goes to the substance of the trust we require of leaders. Fiduciary rhetoric encourages constituents to assume benevolence and overlook integrity. Constituents who believe the leader is a fiduciary will assume a leader is benevolent if they are told that the leader is required to pursue *their* best interests, to the exclusion of all conflicting interests. With a diverse group of constituents and multiple competing interests, even within similarly situated groups, a leader simply cannot pursue all, or even some of, the best interests of any individual or group that she leads. The promise of benevolence that fiduciary rhetoric puts forth is simply misleading and prevents constituents from fully evaluating aspects of benevolence in which they might have more of an interest if they accurately understood the nature of the relationship with the leader.

When a constituent believes a leader is a fiduciary, she assumes the leader may not use the position for financial gain and that the leader may not indulge in conflicted personal interests. Were these limitations enforced, we might believe that they provided a sufficient guarantee of integrity. If a leader really did eschew self-interest or financial gain and did not give in to interests that conflict with those of a defined beneficiary group, the leader may be considered to act with sufficient integrity in a variety of settings. Fiduciary doctrine requires honest disclosure and even obedience in some instances. It is obvious why it is tempting to categorize corporate and political leaders as fiduciary. But because of the complexities of leading large, diverse groups, fiduciary doctrine is a poor fit and misses some important indicia of integrity that our society finds important. For example, political leaders are deemed to act with integrity when they take difficult stands on principle, often to the disappointment of various supporters. Fiduciary doctrine does not require, or even consider, such

178. *See* Hill & Painter, *supra* note 48, at 1644–50.

179. One example is sellers who give advice, called seller-advisors in prior work. Justin Sevier & Kelli Alces Williams, *Consumers, Seller-Advisors, and the Psychology of Trust*, 59 B.C. L. REV. 931, 946–50 (2018). Many personal relationships are also very trusting but not treated as fiduciary in the eyes of the law.

180. *See supra* Parts I & II.

independent moral judgments.[181] A corporate executive may act with integrity when she forgoes a profitable contract that exacts dangerous externalities the corporation will not internalize, but fiduciary doctrine does not speak to such a show of integrity. The integrity fiduciary doctrine can define is narrower than the integrity we seek in our leaders.

Fiduciary doctrine is simply too small to capture many ways in which our leaders earn our trust, and a belief in the myth that leaders are fiduciaries prevents us from discovering ways they betray that trust. To believe that a leader is a fiduciary is to misunderstand the nature of the relationship and the nature of their task. A leader of a large, diverse group of people and interests simply cannot be a fiduciary and should not be. Rather than focus on the single-mindedness of purpose that the fiduciary doctrine requires, a leader must understand a complex landscape of interests, influence, merit, and power. She must navigate that landscape creatively, doing the job defined for her and the job she defined for herself in marketing her vision and goals to those who bought what she was selling. Success in that endeavor is not pursuing the best interests of another to the exclusion of all else. Rather, a successful leader pursues her own self-interest as defined by the leader, her constituents, and the system in which they operate together.

CONCLUSION

This Article makes three novel theoretical contributions to the literature. First, it argues that contrary to popular and scholarly opinion, leaders of large, diverse groups are not, and cannot be, fiduciaries of those they lead. It is impossible for such leaders to focus on one beneficiary with clear interests to pursue. The best leaders can do is commit themselves to a purpose of their own design that they can define and redefine as their own personal interests change over time. Leaders are most focused on their own interests in making leadership decisions. Finally, and most obviously, their role as leaders means that they are more often in the position of telling their constituents what is in their best interests, or what they should want or believe, than they are in receiving that information from those they lead. Leaders have the strongest incentives to reach conclusions about what goals to pursue according to their own personal interests rather than with regard to the particular interests of constituents.

Second, the Article models a more accurate understanding of how leaders are constrained by those affected by their decisions. Leaders package their values and priorities as a product that they sell to those who can put them in power. The market to which leaders must sell themselves is far broader than

181. However, a definition of fiduciary obligation, devised by my colleague Rob Atkinson, does. Atkinson argues that managers of business enterprises, as fiduciaries of the public good, must do "what is best, by [their] own best lights, for society as a whole." Atkinson, *supra* note 4, at 2.

any common understanding of a beneficiary class. The product a leader sells is a combination of ability, integrity, and benevolence that convinces constituents of the leader's trustworthiness. The market will select and empower the leaders perceived to be most trustworthy given the priorities of the relevant portion of the market. A leader's trustworthiness is measured by a dynamic relationship between achievement and the standard of decency that limits it.

Third, the Article presents an explanation of why the fiduciary myth, long viewed as harmless at worst, is actually harmful to those it is supposed to protect. Those who believe in and rely on the fiduciary myth are defrauded when they give up their money or political power in reliance on a constraint that does not exist. Even those who do not rely on the fiduciary myth in deciding to invest in or select a given leader are harmed to the extent the fiduciary myth causes them to assume benevolence or integrity without demanding evidence of either.

Our legal system and our society more generally have too long been mistaken about the nature of leadership and the relationship between leaders and those whose lives they affect. This Article is an important first step in correcting that mistake. With a more realistic understanding of how leaders make decisions and the role trust plays in their rise to power, the law will be able to respond appropriately to the risks of harm they present.